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PROTECTION FOR CITIZEN COMPLAINTS TO PUBLIC AUTHORITIES—PROHIBITION OF RETALIATORY EVICTIONS:

THE CASE OF EDWARDS v. HABIB

Edwards v. Habib is a recent decision from the United States Court of Appeals, District of Columbia Circuit which allows tenants in month-to-month tenancies a defense against summary dispossession actions.¹ Where the tenant had complained to local authorities that his dwelling did not meet the minimal housing standards in that jurisdiction, a landlord had been able to punish the complaining tenant through eviction.² The tenant in the District of Columbia after *Edwards* is now permitted to assert as a defense to eviction the illegal retaliatory purpose of the landlord.³ The decision is an

¹ *Edwards v. Habib*, 397 F.2d 687, 690, 702, 703 (D.C. Cir. 1968), cert. denied, 89 S. Ct. 618 (1969). For additional comment on the *Edwards* case see, Comment, *Landlord and Tenant—Retaliatory Evictions*, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 193 (1967); Note, *Retaliatory Eviction—Is California Lagging Behind?* 18 HAST. L. J. 710 (1967); Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia*, 36 GEO. WASH. L. REV. 190 (1967); Comment, *Landlord-Tenant—Eviction in Retaliation for Reporting Housing Code Violations Prohibited*, 44 NOTRE DAME LAWYER 286 (1968); Note, *Landlord and Tenant—Eviction—Public Policy and Congressional Purpose to Ensure Decent Housing Conditions Require Construction of Summary Eviction Statute to Prohibit Eviction in Retaliation for Tenant's Reports of Housing Code Violations to Authorities*, 82 HARV. L. REV. 932 (1969).

Judge J. Skelly Wright, who wrote the opinion for the court in the Court of Appeals, has also written an interesting subsequent article in which he mentioned the *Edwards* opinion and concludes that: "The fact that this is a landmark case shows that the courts have preyed on the poor. Until now the courts in every jurisdiction have not merely refused to intercede to halt retaliatory evictions, but have actually placed their imprimaturs on such evictions by enforcing them." Wright, *The Courts Have Failed the Poor*, N.Y. Times, March 9, 1969, § 6 (Magazine) at 26, 108, 110 [hereinafter cited as Wright].

² Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541, 542 (1966). The common law rule that a landlord may demand possession after reasonable notice continues to be followed. 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 145-67 (1947). The demand for possession both in the District of Columbia and in other jurisdictions is frequently used as a retaliation against a tenant who has complained of code violations on the rented premises. See e.g., Gibbons, *Landlord-Tenant Problems in LEGAL REPRESENTATION OF THE POOR—A GUIDE FOR NEW JERSEY'S LEGAL SERVICES PROJECT ATTORNEYS* 275, 295, 296 (E. Jarmel ed. 1968) [hereinafter cited as LEGAL REPRESENTATION OF THE POOR].

³ 397 F.2d at 690.

important judicial attempt to bring landlord-tenant law into conformity with the reality of a continuing domestic housing shortage and the necessity to enforce municipal housing codes.⁴

Edwards v. Habib was decided in a jurisdiction in which housing problems are among the most serious in the nation.⁵ Yet the inadequacy of housing for the poor in the District of Columbia is only a small part of the continuing national crisis in urban housing. Despite the fact that these housing problems have been widely reported in recent years, efforts to meet them have been inadequate.⁶ Statistics continue to demonstrate a quantitative need for additional units and for renovation of existing units.⁷ Statistics cannot, however, begin to indicate the effects that housing conditions have on the lives of individuals who are forced to live in overcrowded and substandard housing units.⁸

Since there has not been an adequate program to build new housing units for the poor, the present inadequate supply must be rehabilitated.⁹ The basic instrument in this rehabilitation has been

⁴ See Comment, *Tenants' Remedies in the District of Columbia: New Hope for Reform*, 18 CATHOLIC U.L. REV. 80 (1968); and Comment, *Landlord and Tenant—Retaliatory Evictions*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193 (1967).

⁵ *Hearings on S. 2331, 3549, and 3558 Before the Subcommitt. on Business and Commerce of the Senate Comm. on the District of Columbia*, 89th Cong., 2d Sess. 1, 2, 3 (1966) [hereinafter cited as 1966 *Hearings*]; Schoshinski, *supra* note 2, at 519; NATIONAL CAPITAL PLANNING COMMISSION, PROBLEMS OF HOUSING PEOPLE IN WASHINGTON, D.C. (1966) (excerpts reprinted in 1966 *Hearings* 406-13); 397 F.2d at 701. It was estimated that 37.3 percent of the District of Columbia's total household population were deprived of sound uncrowded housing at rentals reasonable in comparison with income. 1966 *Hearings* 192.

⁶ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257 (March 1, 1968) [hereinafter cited as REPORT ON CIVIL DISORDERS]: "[S]ince 1960...[t]here has been virtually no decline in the number of occupied dilapidated units in metropolitan areas, and surveys in New York City and Watts actually show an increase in the number of such units. These statistics have led the Department of Housing and Urban Development to conclude that while the trend in the country as a whole is toward less substandard housing, 'There are individual neighborhoods and areas within many cities where the housing situation continues to deteriorate.'"

⁷ *Id.*

⁸ Sax and Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967); M. HARRINGTON, *THE OTHER AMERICA* (1962); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) and *Frank v. State of Maryland*, 359 U.S. 360, 371 (1959), cited in *Edwards v. Habib*, 397 F.2d 687, 701 n.47; President Johnson's message to Congress on the District of Columbia, February 15, 1965, reprinted in 1966 *Hearings* 17-18.

⁹ Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255 (1966) [hereinafter cited as Gribetz and Grad]; LEGAL REPRESENTATION OF THE POOR at 278.

the housing code which sets minimum dwelling standards.¹⁰ Since codes are less expensive and politically more feasible than large-scale building programs, more cities and municipalities continue to adopt them.¹¹

Unfortunately, where codes have been adopted, they have not been uniformly and effectively enforced.¹² Code enforcement has been retarded by the fact that often more than one agency is involved, and the overlapping agency jurisdiction has resulted in inefficiency.¹³ In most cases the staff size assigned to inspection has been inadequate, and the budgetary limitations have precluded hiring of well-trained personnel.¹⁴

¹⁰ "The fundamental instrument in this effort is the housing code with its specific standards of maintenance. Such regulation is necessary because the common law imposed almost no sanction on the landlord for failure to repair and maintain the property." *LEGAL REPRESENTATION OF THE POOR* at 277.

¹¹ Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1116 (1956). The Housing Act of 1954 appears to have been the major impetus in encouraging cities to adopt housing codes. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). Since 1954 more than 650 cities have adopted housing codes. *Id.* It has been estimated by the Department of Housing and Urban Development that as of June 30, 1965, there were over 1,000 housing codes in effect. (An unofficial survey quoted by the Neighborhood Legal Services Project of the United Planning Organization in the District of Columbia in 1966 *Hearings* 38 n.3). Currently, the Department of Housing and Urban Development has the power to encourage the adoption and effective enforcement of such codes. Grants of federal funds have been authorized, "to cities, other municipalities, and counties for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the area." Housing and Urban Development Act of 1965 § 311(a), 42 U.S.C. § 1468 (1964 ed., Supp. I). For a relatively early discussion of the purpose and importance of codes see HOUSING AND HOME FINANCE AGENCY, OFFICE OF THE ADMINISTRATOR, DIVISION OF HOUSING RESEARCH, *LOCAL DEVELOPMENT AND ENFORCEMENT OF HOUSING CODES* (1953).

¹² Note, *Enforcement of Municipal Housing Codes*, *supra* note 11, at 801. "The enforcement of housing codes—of minimal standards of health and safety, fire protection, sanitation, light and ventilation, cleanliness, maintenance, and occupancy—through inspection, posting of violations, administrative devices, and, ultimately, legal remedies and sanctions, has failed in recent years to halt or reverse urban blight." Gribetz and Grad, *supra* note 9, at 1255-56.

¹³ *LEGAL REPRESENTATION OF THE POOR* at 292-93; Note, *Enforcement of Municipal Housing Codes*, *supra* note 11, at 804.

¹⁴ Inspection teams are usually understaffed and discover only a small percentage of existing violations. Note, *Municipal Housing Codes*, *supra* note 11, at 1123; see also, Note, *Enforcement of Municipal Housing Codes*, *supra* note 11, at 804; Note, *Leases and the Illegal Contract*

With limited personnel, the most effective mode of code enforcement—through area-wide searches—becomes less feasible.¹⁵ Area-wide searches which are mounted are cursory and infrequent. For this reason many municipalities rely almost exclusively on

Theory—Judicial Reinforcement of the Housing Code, 56 GEO. L.J. 920, 929 (1968). There have been various other serious difficulties with code enforcement and there is no intent here to suggest that an increasing volume of citizen complaints, which *Edwards* protects, would provide the only needed element for success in code enforcement.

Even when inspections have disclosed law violations, there have been problems in treatment of the law violating landlord. Mere discovery of the violation has not meant that the premises will be repaired to minimum code requirements. REPORT ON CIVIL DISORDERS at 472; Gribetz and Grad, *supra* note 9, at 1277-79. There has been an inability or an unwillingness to distinguish between an offender with a few violations and a so-called "hard core" offender or "slum lord." Gribetz and Grad, *supra* note 9, at 1276-80.

Judges appear reluctant to treat the latter as criminals and the assessment of fines has been far below that provided for in the criminal laws. *Id.* 1276-77. Small fines are not a significant enough inducement for owners to make major repairs. LEGAL REPRESENTATION OF THE POOR 294-95; Note, *Municipal Housing Codes*, *supra* note 11, at 1123. The lack of success of code enforcement is attributable in "great measure" to the failure of sanctions to induce compliance. Gribetz and Grad, *supra* note 9, at 1256. Delays and adjournment of prosecutions against the landlords are common. *Id.* at 1277-79. The average wait for cases examined by the building department in New York was five months while grace periods and extensions in the District of Columbia sometimes delay repairs as long as a year and a half. Although there is a possibility of a sentence of 10 days in jail and a fine of \$300 in the District of Columbia, apparently there are no cases where the landlord has spent even one day in jail. Wright, *supra* note 1, at 108.

An additional problem is the collusion or atmosphere of friendly sympathy which frequently exists between the landlord and the housing inspector. 1966 *Hearings* 107. This has been an especially grave problem in the District of Columbia, but it appears to exist in a number of other jurisdictions as well. 1966 *Hearings* 19.

The potentially far-reaching case of *People v. Walker*, 50 Misc. 2d 751, 271 N.Y.S.2d 447 (Sup. Ct. 1966) illustrates the problem of corruption within the Department of Inspections in New York City. In that case it was held that after a landlord had exposed corruption within the Department an inspection with possible retaliatory motive was an unconstitutional violation of the equal protection clause. Where there was official retaliation through selective enforcement of the housing codes, there was a denial of equal protection.

¹⁵ See Comment, *Camara and See: Accommodation Between the Right of Privacy and the Public Need*, 47 NEB. L. REV. 613, 624 (1968). In the *Camara* decision the majority opinion noted: "There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. . . ." *Camara v. Municipal Court*, 387 U.S. 523, 535, 536 (1967). A study in New York City in 1953 illustrated

citizen complaints.¹⁶ Ideally, if tenants were aware of the existence of codes and had confidence in their enforcement, tenant complaints would be an important source of information.¹⁷ Even if thorough and frequent area-wide searches were possible, tenant complaints would still be an important supplementary source of information.¹⁸ An effective complaint procedure would permit tenants to involve themselves in altering illegal housing conditions.¹⁹

When a landlord can evict a tenant because he has complained to the authorities about illegal conditions, tenants will be deterred from making complaints.²⁰ In an urban area with a housing short-

the potential thoroughness of the area-wide search as opposed to the citizen-complaint process: "[I]n 1953 in New York City, an inspection team went through a 15-square block area as to which 567 violations had been reported by the complaint procedure. The survey revealed a total of 12,445 violations." *LEGAL REPRESENTATION OF THE POOR* at 293. While there appears to be various problems with area-wide code enforcement, the *Camara* and *See* cases appear not to be unduly restrictive of this technique. See Comment, *Camara and See: Accommodation Between the Right of Privacy and the Public Need*, *supra* at 622.

¹⁶ *LEGAL REPRESENTATION OF THE POOR* at 295.

¹⁷ *Id.*

¹⁸ *Id.*; See also Gribetz and Grad, *supra* note 9, at 1258; Note, *Enforcement of Municipal Housing Codes*, *supra* note 11, at 843-60; Sax and Hiestand, *Slumlordism as a Tort*, *supra* note 8, at 843-860, 65 MICH. L. REV. 869. "Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations." 397 F.2d at 700.

The discussion here is limited to private landlord-tenant relations with regard to code enforcement not only because this was the factual situation presented in the Edwards case but also because the great majority of low income families are tenants. *LEGAL REPRESENTATION OF THE POOR* at 275.

¹⁹ For a good example of an attempt in the District of Columbia to involve tenants in making complaints see *THE UNITED PLANNING ORGANIZATION, THE STAND UP AND FIGHT BOOK*.

²⁰ See excerpt from President Johnson's Message to Congress on the District of Columbia, 2 *LAW IN ACTION* 1, 6 (March, 1968).

The discussion herein is limited to a discussion of landlord retaliation for a tenant's report of substandard housing conditions. Eviction may currently be used in retaliation for any other acts of the tenant, and it appears to be a significant factor in discouraging the maintenance of suits against the landlord. See Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920 (1968).

An interesting example of the power which landlords wield in the District was presented by the eviction of Mrs. Elicia Powell after her house in the slum area was toured by Senator Tydings. Various violations of the housing code were noted during the tour of Mrs. Powell's house and the violations were mentioned in an article which appeared in the Washington Post on June 16, 1966. Although Mrs.

age, the threat of eviction is an overwhelming weapon which the landlord can wield²¹ because: (1) the vacancy rate in most cities is very low thus making it difficult to find a new residence;²² (2) even if a new residence is found, it may well be as undesirable or even less desirable than the old residence;²³ (3) public housing is usually not a reasonable alternative because it is in short supply and not immediately available to evicted tenants;²⁴ (4) the availability of other housing may be further reduced because the tenant may be marked as a trouble-maker and landlords may therefore exclude him;²⁵ (5) the expense of moving for low income tenants is often a formidable one;²⁶ and (6) the usual suddenness of the eviction is coupled with the loss of familiar surroundings and a feeling of both helplessness and injustice.²⁷

Powell's name was not mentioned in the article, the block on which she lived was identified and the amount she paid for rent was disclosed. On June 27th Mrs. Powell was served with a 30-day notice to vacate her house. 1966 *Hearings* 146.

Apparently Senator Tydings, through scheduling an appearance and questioning the landlord before the Subcommittee on Business and Commerce, was able to convince the landlord that Mrs. Powell should remain in the tenancy. 1966 *Hearings* 214.

²¹ See, e.g., The statement of Harris Weinstein, Chairman, Housing Committee, Washington Planning and Housing Association in 1966 *Hearings*: "Housing regulations, housing codes, statutes, and laws of any manner are of no avail if the party to be benefited by the law is too intimidated to invoke his rights. Many tenants of low income in this city are afraid to complain against their landlord no matter how egregious may be the landlord's disregard of law. This fear is real; it is abiding; it is frequently a complete inhibition upon the tenant who would prefer to abate the squalor in which he lives.

A vast number of tenants in this city believe that if they complain against their landlord, the landlord will immediately retaliate through an eviction or exorbitant rent increase.

[T]his fear is not mere superstition. It is based on experience and represents a fear of what would, in fact, happen to many tenants if they complained." *Id.* at 64.

²² Mr. Habib testified that the vacancy rate in Washington, D.C. was 1.7% and was the lowest in the United States. 1966 *Hearings* 167. It is not a meaningful remedy to tell a tenant to move elsewhere in a city with an acute housing shortage. Brief of Washington, D.C. Neighborhood Legal Services representing appellant in *Brown v. Southall Realty Company*, 237 A.2d 834 (1968) at 20.

²³ See note 6 *supra*.

²⁴ Gribetz and Grad, *supra* note 9, at 1255.

²⁵ Comment, *Public Landlords and Private Tenants: The Eviction of 'Undesirables' from Public Housing Projects*, 77 YALE L.J. 988, 990 (1968).

²⁶ *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968).

²⁷ Comment, *Public Landlords and Private Tenants*, *supra* note 25, at 990.

An exemplary eviction of a complaining tenant will frequently silence other tenants who fear to lose what housing accommodations they have.²⁸ Until *Edwards v. Habib* such an eviction was a swift and certain means of retribution against any tenant in a month-to-month tenancy.²⁹ For those tenants there was no defense to an eviction action.

LOWER COURT PROCEEDINGS IN *EDWARDS v. HABIB*

In 1965, Mrs. Yvonne Edwards, a month-to-month tenant in the District of Columbia, made complaints concerning code violations to the Department of Licenses and Inspections of the District of Columbia.³⁰ The Housing Division had the premises inspected, discovered more than forty violations of the housing code, and ordered the landlord to make the necessary repairs.³¹ After Mr. Habib, the landlord, was notified of the repairs and improvements which had to be made, he sought to have Mrs. Edwards evicted.³²

Pursuant to the District of Columbia Code section 45-902, Mr. Habib gave Mrs. Edwards thirty days notice to quit the premises.³³ In *Habib v. Edwards*, Mr. Habib obtained a default judgment for

²⁸ See Judge Wright's opinion, 397 F.2d at 701: "Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make... but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid." See also LEGAL REPRESENTATION OF THE POOR at 295-96: "Such an eviction has the effect of serving as an example to other tenants by demonstrating to them the severe personal consequences of making complaints to the housing inspectors. By intimidating the other tenants in the building and the neighborhood this tends to dry up a source of complaints upon which the inspectors rely in carrying out their job."

²⁹ Schoshinski, *supra* note 2, at 545.

³⁰ See Note, *Retaliatory Eviction—Is California Lagging Behind?*, 18 HASTINGS L. J. 700 (1967); *Edwards v. Habib*, 227 A.2d 388, 389 (1967).

³¹ 397 F.2d at 688.

³² *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965); N.Y.U. SCHOOL OF LAW PROJECT ON SOCIAL WELFARE LAW, HOUSING FOR THE POOR: RIGHTS AND REMEDIES, No. 1 at 42 (1967) [hereinafter cited as HOUSING FOR THE POOR]. Mr. Habib was the executive vice president of the Washington Homeowners and Property Owners Association. He owned approximately three hundred units worth over one million dollars in the District of Columbia alone. 1966 *Hearings* 164-96.

³³ D.C. Code § 45-902 (1967), Notices to quit—Month to Month: "A tenancy from month to month, or from quarter to quarter, may be terminated by a thirty days' notice in writing from the landlord to the tenant to quit, or by such a notice from the tenant to the landlord of his intention to quit, said notice to expire, in either case, on the day of the month from which such tenancy commenced to run."

possession.³⁴ The motion to set aside the default judgment was granted by Judge Greene in a significant memorandum opinion.³⁵ However, at the subsequent trial, the judge ruled that retaliatory

³⁴ *Habib v. Edwards*, Civil Action No. LT 75895—'65 (D.C. Gen. Sess. Landlord-Tenant Branch, Oct. 11, 1965). The default judgment was obtained in the Landlord-Tenant Branch of the General Sessions Court under D.C. CODE ANN. § 45-910. HOUSING FOR THE POOR 42. D.C. CODE ANN. § 910 (1967), Ejectment or summary proceedings: "[W]henever a lease for any definite term shall expire, or any tenancy shall be terminated by notice as aforesaid, and the tenant shall fail or refuse to surrender possession of the leased premises, the landlord may bring an action of ejectment to recover possession in the United States District Court for the District of Columbia; or the landlord may bring an action to recover possession before the District of Columbia Court of General Sessions, as provided in sections 11-701 to 11-749."

³⁵ *Habib v. Edwards*, Civil Action No. LT 75895—'65 (D.C. Gen. Sess. Landlord-Tenant Branch, Oct. 27, 1965), reprinted in HOUSING FOR THE POOR at 43 and 1966 *Hearings* 172.

The motion was granted by Judge Harold Greene who held, in a memorandum opinion, that the default judgment should be set aside because excusable neglect had been shown.

In the most significant portion of the opinion, Judge Greene noted that Section 910 (*supra* note 34) was subject to and limited by the Constitution. He cited *Rudder v. United States*, 226 F.2d 51 (1955) in which possession under Section 910 was denied on constitutional grounds, and he concluded that "the principle of constitutional supremacy in possession suits recognized by that decision obviously applies to everyone." HOUSING FOR THE POOR at 45-46.

Judge Greene resisted the argument made by counsel for Mrs. Edwards that her right to free speech and to petition the government for redress of grievances were denied by the landlord (in his serving of the notice to quit) and the government (in its permitting the landlord to terminate the tenancy by such notice and in judicially enforcing the notice). *Id.* at 46-48. He wrote that, while the first amendment applied to the states by virtue of the fourteenth amendment, neither the first nor the fourteenth amendment is applicable to "purely private acts of private parties." *Id.* at 46.

Yet Judge Greene found that Mrs. Edwards had been denied another constitutional right: "If the testimony of the defendant is true, she is being evicted because she gave information to her government concerning a violation of these laws and regulations... defendant has a constitutional right to provide such information to the government. Moreover, that right—unlike the right encompassed within the First and Fourteenth Amendments—is protected not only against interference by the government but also against interference by private persons." *Id.* at 48.

Judge Greene relied upon *In re Quarles*, 158 U.S. 532 (1895) in holding that Mrs. Edwards had been denied the right to inform authorities of violations of the law—a right which was not grounded in a particular amendment but which arose out of the creation and establishment by the Constitution of a supreme national government.

eviction was not a defense and ordered a directed verdict for the landlord.³⁶

While an appeal was pending before the District of Columbia Municipal Court of Appeals, the tenant sought a stay of execution from the United States Court of Appeals for the District of Columbia. That court allowed the stay in a brief *per curiam* decision, but the concurring opinion of Judge Wright and the dissenting opinion of Judge Danaher indicated the court's strong division on the issues presented in the case.³⁷

On appeal the trial court's directed verdict for the landlord was upheld,³⁸ and the case was appealed to the United States Court of Appeals.

THE COURT OF APPEALS OPINION IN *EDWARDS v. HABIB*

(a) DISPOSITION ON THE GROUNDS OF STATUTORY INTERPRETATION AND PUBLIC POLICY

The majority opinion in the United States Court of Appeals written by Judge Wright with Judge McGowan concurring, held that a tenant had a defense to an action of eviction if the tenant could prove that the landlord was evicting because the tenant had reported housing code violations.³⁹ The case was remanded for a new trial in which Mrs. Edwards could attempt to prove Mr. Habib's retaliatory intent.⁴⁰

Judge Wright's majority opinion and Judge McGowan's concurring opinion were based on an interpretation of the District of Columbia summary eviction code sections and the District's housing code.⁴¹ A landlord could not, the majority opinion held, use summary eviction procedures to punish and deter the reporting of housing code violations.⁴² Such an eviction could not be permitted as a matter of statutory construction and for reasons of public policy.⁴³

The majority proceeded on the assumption that permitting retaliatory evictions would deter citizen complaints of housing code violations and that such citizen complaints were an important

³⁶ See, *Edwards v. Habib*, 227 A.2d 388, 389 (1967); *HOUSING FOR THE POOR* at 42.

³⁷ *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965).

³⁸ *Edwards v. Habib*, 227 A.2d 388 (1967).

³⁹ 397 F.2d at 690.

⁴⁰ *Id.* at 702-03.

⁴¹ *Id.* at 690, 699, 701.

⁴² *Id.* at 699.

⁴³ *Id.* at 699.

part of the effective implementation and enforcement of the codes.⁴⁴ If that were true, then the use of the summary eviction statutes for an "illegal purpose" (to render ineffective the housing code and punish those who reported law violations) could not be countenanced by the court nor could it have been intended by Congress. This, the court noted, was especially true since the eviction statute was merely "procedural."⁴⁵ On the other hand, the housing code embodied a "strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary places to live."⁴⁶ With this purpose statutorily expressed in the housing codes,⁴⁷ the court concluded that Congress

⁴⁴ *Id.* at 700.

⁴⁵ *Id.* at 699.

⁴⁶ *Id.* at 700.

⁴⁷ Congress authorized the Commissioners of the District of Columbia to enact building regulations: "The Commissioners of the District of Columbia are authorized and directed to make and enforce such building regulations for the said District as they may deem advisable."

"Such rules and regulations made as above provided shall have the same force and effect within the District of Columbia as if enacted by Congress." 1 D.C. CODE § 228 (1967).

For an early Congressional expression of concern in the eradication of slums and the protection of low income families, see Act of Sept. 1, 1937, c. 896 § 1, 50 Stat. 888: "It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit...to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income...that are injurious to the health, safety, and morals of the citizens of the Nation."

The purpose of the District of Columbia housing regulations was expressed in § 2101: "The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted, and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline.

The Commissioners further find and declare that such unfortunate conditions are due, among other circumstances, to certain conditions affecting such residential buildings and such areas, among them the following: dilapidation, inadequate maintenance, overcrowding, inadequate toilet facilities, inadequate heating, inadequate bathing or washing facilities, insufficient protection against fire hazards, inadequate lighting and ventilation, and other insanitary or unsafe conditions.

The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants. Congress has made statements of policy which are similar.

affirmatively sought to avoid the use of the summary eviction statute to deter individuals from reporting housing code violations.⁴⁸

The majority opinion concludes that a violation of the policy embodied in the housing codes is illegal.⁴⁹ Hence, while the summary eviction statute can be used for any reason or no reason at all, the court circumvents this statute's language by holding that it may not be used to accomplish an *illegal* purpose. Yet such an eviction does *not* violate the terms of the housing code—although the majority states that a “[p]resumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself. . . .”⁵⁰ Even the citizen complaint, which the court is seeking to preserve, is not formally provided for in the housing code.⁵¹

The *Edwards* opinion defines illegality in terms of public policy. The difficulty is that there is a competing “fundamental” public policy, as Judge Danaher notes, which militates for the landlord's right to control his property.⁵² While it is true that the public policy of the housing code is statutorily expressed, the expression is so generalized that it does not directly resolve the statutory conflict in the *Edwards* case.⁵³

It is hereby declared to be a matter of legislative determination that owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.” D.C. CODE ANN. § 5-701 (1961).

⁴⁸ 397 F.2d at 701.

⁴⁹ *Id.* at 699-702.

⁵⁰ *Id.* at 701-02.

⁵¹ *Id.* at 700. The court nevertheless noted that the Department of Licenses and Inspections had established its own procedure for handling citizen complaints and that for fiscal 1966 nearly a third of the cases handled by the Department arose from private complaints. *Id.*

⁵² Judge Danaher's argument in the dissent was less concerned with the precise rights which the landlord possessed than with the absence of authority in the courts to change landlord-tenant relationships. *Id.* at 703-704. His dissent nevertheless touched on the “fundamental” rule of law which allows evictions, and argued, in effect, that the court's denial of property control to the landlord was a taking of property without due process. *Id.* at 703.

⁵³ The code does not speak directly to the issue of retaliatory evictions, and, as Judge Danaher noted in the dissent, legislation has been proposed to remedy the problem of retaliation. *Id.* at 704. The court

The court might have been more convincing if it had simply admitted that there were competing rights involved in *Edwards*.⁵⁴ The court admitted that there might be countervailing considerations when it discussed the constitutional issues involved in the decision.⁵⁵ Yet the court's resolution of the issue of statutory interpretation was accomplished with no real discussion of the landlord's right to his property and the policy, to the extent there is any, behind the common law rule permitting the landlord possession for any reason after notice has been given. This common law rule was changed in *Edwards*, but to say that the code's general expression of purpose effected this change or that a prohibition on retaliatory eviction should be read into the code is difficult to accept.

Of course the adoption of the housing codes had impact upon the landlord-state relationship and upon the landlord-tenant relationship. But the doctrine which *Edwards* announces is that the codes altered the periodic tenancy so that the tenant may remain in his tenancy even after notice if the landlord's motive in the eviction violates the policy behind the housing codes.⁵⁶ In the

recognized that neither the summary eviction statutes nor the housing code contemplated the specific problem of retaliatory evictions. *Id.* at 702 n.50. See generally 82 HARV. L. REV. 932 (1969), *supra* note 1, at 933-35.

⁵⁴ Instead of labeling the summary eviction statute as merely "procedural" and contending that there was therefore no statutory conflict between that statute and the housing code, the court might have noted that the summary eviction statute expresses the older common law policy favoring the landlord and discussed the extent to which that had been altered by the adoption of the housing codes.

⁵⁵ Yet the court did not define what the landlord's rights and interests were. 397 F.2d at 695.

⁵⁶ *Id.* at 701-702. It is clear that other jurisdictions will need considerable persuasion before they abandon their time-honored summary eviction statutes in the face of clear-cut retaliatory evictions.

After the *Edwards* decision, the defense of retaliatory eviction was held not to be available to tenants in Connecticut in *LaChance v. Hoyt*, CV 14-685-35851, a decision by the Circuit Court of the Fourteenth Circuit on September 6, 1968. In that case the tenant had informed the Bureau of Housing Code Enforcement of Hartford about violations in his apartment. After an examination of the premises some of the complaints were substantiated and a letter was sent to the landlord listing things to be done. On the day the landlord received the letter from the Bureau she called her attorney to institute eviction proceedings.

In the eviction proceedings the tenant was represented by counsel from the Hartford Legal Aid Society. The Attorney General of Connecticut filed a Motion to Intervene as Party Defendant to protect three different interests: (1) to assure that proper use is made of state courts; (2) to prevent threatened emasculation of certain statutes (including building and sanitary ordinances); (3) to protect citizens of the state against a deprivation of first and fourth amend-

absence of a specific housing code provision or a demonstration of legislative intent which called for or permitted this alteration of the periodic tenancy, the court's holding based upon statutory interpretation and public policy becomes less plausible.

The court argues that Congress "by directing the enactment of the housing code, impliedly directed the court to prefer the interests of the tenant who seeks to avail himself of the code's protection."⁵⁷ Leaving aside the question of whether this was actually congressional intent, this statement surely cannot stand without some explanation of what rights the landlord has which are now in a less preferred position.⁵⁸ Apparently this "pervasive policy" of the housing codes may now be used by the tenant to overcome certain contractual rights of the landlord as well as statutes which clearly militate in his favor. There must be a stopping place for such a policy, and it is this which the court should have taken greater pains to explain.

ment rights and against the affects of summary eviction process unreasonably used.

The issue was the same as in the *Habib* case: "The question to be answered now is whether or not a defense of 'retaliatory action' can be considered in summary process matters and whether or not the eviction proceedings in this matter was a retaliatory action." (advance sheet opinion at 5).

The court held in favor of the landlord on the sole ground that retaliatory eviction was not a legislatively permitted defense: "It is inconceivable to expect that a Judge would usurp the functions of the legislature; any change in the rights of landlord and tenants should be undertaken by the legislature; not the courts. The law-makers deliberate as a group and enact legislation accordingly. The statute on summary process actions has to be followed closely; the special defense of 'retaliatory action' has no place or standing under the statute." (advance sheet 7).

⁵⁷ 397 F.2d at 696.

⁵⁸ Of course Congress had an intent to better the housing conditions in the District of Columbia, but whether this can be equated with an intent consistently to prefer tenant to landlord interests is questionable. There are a number of compelling reasons why housing codes should be enacted including the economic interest of the landlord in maintaining the economic value of his investment. As the Supreme Court has observed in commenting upon the rationale behind codes and code enforcement: "Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures." *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967).

The *Edwards* case adopts a deceptively simple rationale based on statutory construction and public policy grounds which are strongly, though indirectly, challenged in the dissent. It would appear that the attempt in *Edwards* to avoid the constitutional grounds for decision has not, in the absence of further legislation by the District of Columbia, been wholly convincing.

(b) THE CONSTITUTIONAL DISCUSSION

Because the holding in *Edwards* was founded upon statutory construction, the consideration of constitutional issues was not "constitutionally compelled."⁵⁹ Nevertheless, Judge Wright's opinion begins with an extensive discussion of the constitutional issues in which he appears to conclude that Mrs. Edwards did have constitutional rights which were violated by a retaliatory eviction.⁶⁰ It is because of this constitutional discussion that Judge McGowan

⁵⁹ The court stated that it did not need to consider the constitutional challenge to the statutes because of its construction of the statute based upon Congressional intent. The court's reason for considering the constitutional claims at all was "because the constitutional considerations inform the statutory construction on which our decision rests, we do discuss them briefly." 397 F.2d at 690. The constitutional discussion comprises the major portion of Judge Wright's opinion.

The court felt that the "lurking constitutional issues are relevant to our construction of the statutes in two ways." *Id.* at 690, n.6. The first reason why the Constitution was relevant was that its consideration should be avoided: "where two interpretations are plausible, we should opt for the one that avoids the constitutional questions." *Id.* This was a reason why the Constitution was relevant to statutory construction in general but was not a reason why the constitutional issues need have been discussed in this case.

Nevertheless, the court's second reason appeared to militate for the constitutional discussion: "[I]n discerning the intent of Congress we must assume that it too sought to avoid constitutional doubt and to protect the constitutional interests which are at stake." *Id.* Judge Wright's assumption that Congress sought to protect the constitutional interests at stake proceeds implicitly on a more basic assumption that Congress was aware of what those constitutional interests were. Of course it may always be said that Congress in enacting legislation seeks to avoid constitutional clash, but that is not quite the same purpose as seeking to affirm a given constitutional protection via the legislation, nor can it be deduced that Congress is thereby seeking to affirm constitutional protections however defined. Judge Wright's conclusion that Congress sought to protect the constitutional interests which the petitioner asserts is surely to attribute too much to Congressional intent.

⁶⁰ *Id.* at 696 and 698. Note especially Judge Wright's introduction to the third portion of the opinion in which he appears to assume that Mrs. Edward had a "constitutional defense" but that "judicial recognition" of it was not compelled. *Id.* at 699.

chose to concur with Judge Wright's opinion rather than join in its "constitutional speculations."⁶¹

The two constitutional questions which Judge Wright's opinion considers are: (1) whether there is a constitutional right to report violations of law and petition the government for redress of grievances under the first and fourteenth amendments; and (2) whether there is a constitutional right to inform the government of law violations which inheres in the very nature of the Constitution and the federal government and which is protected against both private and governmental interference.⁶²

Petitioning the government through reporting of housing code violations is at the core of protected first amendment speech.⁶³ Eviction for exercise of this right is a form of punishment.⁶⁴ Yet before an evicted tenant can prevail on first amendment grounds, he must demonstrate "state action" under the fourteenth amendment.⁶⁵

Judge Wright noted that in *Tarver v. G. & C. Construction Corporation*, "state action" was found where the court system was utilized in the eviction procedure.⁶⁶ While Judge Wright did not explicitly reject this reading of the "state action" requirement, he noted that Judge Greene's lower court opinion in the *Edwards*

⁶¹ *Id.* at 703.

⁶² *Id.* at 690 and 696.

⁶³ *Id.* at 690.

⁶⁴ *Id.*

⁶⁵ *Id.* at 691.

⁶⁶ In *Tarver* the United States District Court for the Southern District of New York was confronted with a factual situation almost identical to that in *Edwards*. Mrs. Tarver protested to the Health Department about a code violation in her apartment. The Health Department apparently notified the landlord, G. & C. Construction Corp. Mrs. Tarver, the same day that she had made the complaint, received a hand-delivered letter notifying her that her rent was to be increased from \$35 per week to \$150 per week commencing the following week.

The tenants then sought a preliminary injunction to enjoin their landlord from evicting them or from taking other retaliatory measures. In granting the injunction the United States District Court for the Southern District of New York almost cursorily noted that there was the necessary "state action" to bring alleged deprivations of constitutional rights within the fourteenth amendment. The court stated:

"Defendants' contention that, even assuming a violation of Constitutional rights, plaintiffs have failed to show that defendants are acting under color of State law is untenable. Patently eviction requires the action of state courts and State judicial officers, acting in their official capacities, and the action of the State within the meaning of the Fourteenth Amendment." *LEGAL REPRESENTATION OF THE POOR* at 403.

case had declined to rely upon such an all encompassing reading of state action "for fear that if every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated."⁶⁷

Judge Wright took the position that between the *Tarver* interpretation of *Shelley* and Judge Greene's opinion, there was a middle position in which "state action" would not encompass all private rights.⁶⁸

Judge Wright relied heavily upon commentators who argue that there may be "state action" when the state does not act affirmatively to assure equal protection.⁶⁹ The state would thereby be acting unconstitutionally through inaction except in those instances where the Constitution demanded inaction. Applying this view to the *Edwards* case, Mrs. Edwards' eviction could not be allowed because the government failed to protect her against private retaliation for the exercise of her first amendment rights and because the courts would in fact be assisting the retaliation by permitting the eviction.⁷⁰

A strong objection to this argument of inaction as "state action" is that it has been urged only in regard to racial discrimination under the fourteenth amendment and not the first amendment as urged in *Edwards*.⁷¹ To meet this objection Judge Wright cited *New York Times Co. v. Sullivan*, where the Court held that first amendment rights were incorporated into the fourteenth amendment's due process clause. Although the Court in the *Times* case considered the question of "state action" only briefly, it concluded that there had been the requisite "state action" in the application of the state's common law even though the common law had only formed the doctrine upon which a private lawsuit was to be litigated.⁷²

Judge Wright cited *Marsh v. Alabama* "which like the instant case, involved state aided privately initiated abridgement of first amendment freedoms."⁷³ In *Marsh* Justice Black had weighed the competing constitutional rights of owners of property against those of people who sought to exercise freedoms of press and of religion.⁷⁴

⁶⁷ 397 F.2d at 691.

⁶⁸ *Id.* at 692.

⁶⁹ *Id.* at 692-93.

⁷⁰ *Id.* at 693.

⁷¹ *Id.*

⁷² *Id.* at 694 n.21.

⁷³ *Id.* at 695.

⁷⁴ *Id.* at 695-96.

In both the *Times* and the *Marsh* cases the state had simply provided courts and laws to settle essentially private disputes. In the *Times* case the state had not initiated the action, and in the *Marsh* case there would have been no prosecution if there had not been a private complaint. Both cases, in Judge Wright's opinion, stood for the proposition that where the state has provided both courts and laws and the resolution of the suit violates first amendment rights, as in *Edwards*, the competing rights must be balanced.⁷⁵ In the *Edwards* context Judge Wright asserted that such a balancing was not necessary because Congress had impliedly directed the courts to prefer the tenant over the landlord through the adoption of the housing codes.⁷⁶

Judge Wright's opinion also considered whether there is a right to petition the government and to report violations of law which is protected against both private and governmental interference.⁷⁷ The argument was strongly made in Judge Greene's lower court opinion where he relied upon *In re Quarles* to uphold Mrs. Edwards' constitutional right to inform the authorities of a law violation without fear of private reprisal.⁷⁸ Judge Wright also relied upon *In re Quarles* and he quoted its holding that:

The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action.⁷⁹

Yet the *Quarles* argument was not conclusive because at issue there was the applicability and constitutionality of the Civil Rights Act.⁸⁰ The Court in *Quarles* had not been directly faced with the issue of the constitutionality of such interferences in the absence of legislation against them or the legal consequences if such interferences were unconstitutional. Nevertheless, *Quarles* cannot be distinguished merely because the Civil Rights Act had provided statutory protection for certain rights among which was the right to report violations of the statute.⁸¹ The enforcement

⁷⁵ *Id.* at 696.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ HOUSING FOR THE POOR at 51. Judge Greene wrote: "In short, the defendant in this case has a constitutional right to inform the proper governmental authorities of violations of the law, as well as the correlative right not to be injured or punished by anyone for having availed herself of her basic right to provide such information." *Id.* at 51.

⁷⁹ *In re Quarles* and Butler, 158 U.S. 532, 536-37 (1895).

⁸⁰ 397 F.2d at 698.

⁸¹ *Id.*

section of the Civil Rights Act did not add new federal rights but merely provided sanctions for the violation of existing federal constitutional and statutory rights.⁸² The court in *Quarles* noted the right to inform the government was a fundamental constitutional right not dependent upon any specific statutory guarantee.⁸³ In *Edwards* the rights which Mrs. Edwards was asserting were not protected by a specific statutory guarantee, but they were protected by the Constitution under the *Quarles* case.⁸⁴

The constitutional discussion in *Edwards* is an important statement of tenants' rights. Judge Wright's conclusions leave little doubt that in his opinion Mrs. Edwards could have prevailed upon her constitutional defenses to the eviction.⁸⁵ The potential availability of these constitutional protections to a complaining tenant may encourage tenants to utilize code complaint procedures.

LEGISLATIVE RESPONSES TO RETALIATORY EVICTION

The decision in *Edwards v. Habib* may prove to be an inadequate deterrent to retaliatory eviction.⁸⁶ The case would be extremely valuable if it could be used to convince landlords that they have no recourse against code complaints but to repair their units. Yet landlords of deteriorating or deteriorated units are reluctant to undertake a full-scale renovation with code standards as their goal. There would be, landlords argue, little profit motive in such a renovation and it may even result in operating units at a loss.⁸⁷ For these reasons, landlords of these dilapidated units will do

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See note 60, *supra*.

⁸⁶ See LEGAL REPRESENTATION OF THE POOR at 276: "The fundamental factor in the condition of housing rented to the poor is that, with the exception of public housing, the buildings are old and their structure and equipment need continual repair. The circumstances of a housing shortage, however, considerably reduces the landlord's incentive to invest in repairs. The intensive use due to overcrowding causes a higher level of physical depreciation of the property. Landlords tend to give up attempting to repair the building and rely instead on selling the property for its land value in some future slum clearance project. The housing shortage also permits the landlord to maintain and increase rents despite the deterioration of the premises."

⁸⁷ See COUNCIL OF ECONOMIC ADVISORS ANN. REP. 116 (1966), in which the problems of America's central cities were described as follows: "The cities became caught in a vicious spiral of spreading slums, rising crime, and worsening congestion. Once a neighborhood began to deteriorate, it did not pay any individual landlord to attempt to stem the decline; private return on new investments fell, since little extra rent could be charged for better apartments in slum areas."

everything possible to avoid paying for massive renovation and continuing repairs.⁸⁸ If a tenant complains and continues to complain to officials about housing conditions, it would be economically advantageous for the landlord to remove the tenant from the building or to raise his rent significantly. The tenant must therefore convince the landlord that it is not in his economic interest to evict.

It is to meet these cases that legislation could best assist the tenant. A legislative standard fixing a period of time during which the landlord could not retaliate would, assuming strict enforcement, practically eliminate retaliatory eviction as a rational economic weapon.⁸⁹ Of course some landlords would probably still seek to punish their tenants for complaints, but this punishment would be expensive in terms of legal costs and probably unsuccessful in actual litigation.⁹⁰

Yet if retaliatory eviction were eliminated as a rational economic weapon, and if codes were properly enforced, many landlords would find it undesirable if not impossible to seek to maintain their investments. The cost of repairing the living units to code standards would, of course, vary depending upon the existing state of the structure. It is clear, however, that many such structures could probably not continue to be long-term profitable investments if code standards were fully enforced.⁹¹ In addition, the high initial cost of making the needed repairs might dissuade a landlord from making the investment at all. In short, some units would be

⁸⁸ Mr. Habib, for example, had already been cited for over 1,000 code violations in 1966 at the time he testified before the Subcommittee on Business and Commerce. 1966 *Hearings* at 189.

⁸⁹ Some of the possible standards are discussed *infra*.

⁹⁰ A legislative set of standards which could act as a clear warning and an active judiciary which would respond to violations of the legislative standards would appear to be more preferable than a single commitment by either the legislature or the judiciary which it may not have the resources to implement.

Both legislative and judicial remedies would increase the probable cost to a landlord who undertook retaliatory eviction. Legislatively imposed fines and criminal penalties along with litigation in the civil courts might convince landlords that the legal costs alone would be too much to bear. In this regard it might be well to remember that Mr. Habib's legal costs could only have been borne by an individual with means somewhat beyond those of the typical landlord. As Mr. Habib himself observed: "Anyone can appeal who is a tenant if he has a lawyer, and there are plenty of lawyers who will represent landlords at no charge." 1966 *Hearings* at 182. Mr. Habib disclosed that in 1966 before either of the last two appeals of the case, his lawyers had spent over 1,000 hours of legal time on the case. *Id.*

⁹¹ DEP'T. OF HOUSING AND URBAN DEV. & DEP'T. OF JUSTICE & OFFICE OF ECONOMIC OPPORTUNITY, TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING 26-29 (1967) [hereinafter cited as TENANTS' RIGHTS].

abandoned by the landlords or turned to another use and the question then would become what happens to the tenants of those buildings? What role should the state then assume with regard to them?⁹²

This question has to some degree been answered by certain present statutes which allow for the buildings to be put in receivership.⁹³ The state would move into the place of the landlord and operate the units. Yet if the governmental unit does not make the conscious decision to move into this area with an awareness of the possibly significant costs involved, the enforcement of standards will be relaxed as the city pushes the administration of apartments from private to public hands. It is better to have a negligent private landlord than to close the building and further contract the housing supply.⁹⁴

The question in the last analysis is a political one. If codes were adopted because they were politically more expedient than funding housing programs, will codes be enforced if the cost to the public is high? If the electorate regards urban renewal as too expensive, isn't it even less palatable to expend large amounts of public funds, even comparable amounts of public funds, on buildings which are older, unattractive, and in continual need of repair? If the units are not economically profitable for the private investor, their maintenance may be politically impossible for the would-be public landlord.

In short, to the extent that codes were a device to avoid making the difficult political argument for the public funding in part or in whole of housing units, the codes have failed. To enforce the codes will require a strenuous political effort to gather the funds for more inspectors, better-trained inspectors, and, if necessary, public administration of profitless rental units. Whether it will be best to provide the needed funds for the code inspection system or to seek to construct new units is a question which now must be faced by communities concerned with their housing problems and the inability of their codes to reduce or ameliorate the hardcore housing problems. It is to be hoped that the federal government which has an undeniable interest in the housing problems will take an active role in inducing each community to make the necessary decision to fund a program of rehabilitation or construction.⁹⁵

⁹² *Id.*

⁹³ See, e.g., N. Y. MULTIPLE DWELLING LAW § 309 (McKinney 1945), and Laws of Illinois 1965, page 2612, § 1 ILLINOIS REV. STAT., c. 24, Section 11-31-2).

⁹⁴ TENANTS' RIGHTS at 27.

⁹⁵ *Id.* at 30-40.

For the present, the *Edwards* case is an important forward step in making codes effective through protecting the rights of citizens to make code complaints.⁹⁶ But, the *Edwards* case is but a small step in making codes effective.

The decision has not lessened the need for legislation. *Edwards* gave the tenant the right to assert a defense, but unless the defense can be a certain means of deterring eviction, landlords will continue to use this method of ridding their units of complaining tenants and thereby discouraging future complaints. Legislation could establish a presumption that the eviction was retaliatory if it occurred within a specified period of time following the tenant's complaint.

Before examining current congressional proposals, it may be well to examine the legislative efforts of those states which have attempted to cope with the problem. New York State's Spiegel Law enacted in 1962 allows public welfare officials to withhold rent where tenants who receive welfare live in housing conditions which are dangerous or detrimental to health.⁹⁷ The 1965 amendment to the law was intended in part to stop retaliatory evictions and provide for a stay of eviction until code violations are remedied.⁹⁸ Yet the Spiegel Law only applies to welfare recipients, and, even though limited, has received criticism because it denies rent revenue to the small landlord at the very time he most needs it to correct code violations.⁹⁹

Massachusetts and Connecticut have enacted similar statutes which allow the courts to stay eviction for a period up to nine months.¹⁰⁰ In Massachusetts the tenant must not be a wrongdoer, he must have searched diligently for similar housing in the same city, and he must comply with terms which the court imposes.¹⁰¹ The major difficulty with the Massachusetts statute along with a similar statute in Philadelphia is that once the violations of the codes are remedied retaliatory eviction may occur.¹⁰²

⁹⁶ 3 LAW IN ACTION 1 (June 1968).

⁹⁷ N.Y. Sess. Laws 1962, c. 997. Note, *Retaliatory Eviction—Is California Lagging Behind?*, 18 HASTINGS L.J. 700, 704 (1967).

⁹⁸ N.Y. Sess. Laws 1962, c. 997, effective July 1, 1962, as amended by N.Y. Sess. Laws 1965, c. 701, effective July 2, 1965.

⁹⁹ Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 584-85 (1966).

¹⁰⁰ MASS. GEN. LAWS ANN. c. 239 §§ 9-13 (1959); CONN. GEN. STAT. REV. §§ 52-546 (Supp. 1964).

¹⁰¹ MASS. GEN. LAWS ANN. c. 239 §§ 9-13 (1959).

¹⁰² TENANTS' RIGHTS at 15.

In Illinois, in New Jersey, and in Maryland, specific statutes have been aimed at retaliatory eviction.¹⁰³ Both the New Jersey and Maryland statutes are too recent to assess in terms of their effect, but the Illinois statute which is similar has not been effective because it is difficult to prove that the reason for the eviction was retaliation.¹⁰⁴

Most legislative efforts have failed to prohibit eviction through rent increases even though this is clearly as effective a device as direct eviction action.¹⁰⁵ An amendment to the Baltimore statute which would have made rent increases unlawful where the court had determined that there was a defense to eviction based upon unlawful conditions was proposed and then defeated.¹⁰⁶

Two current congressional attempts to cope with the problem of retaliatory eviction are H.R. 257 and S. 3199.¹⁰⁷ Both bills appear to be more comprehensive than any similar existing legislation. Title II of H.R. 257 deals with both retaliatory evictions and rent increases. When a tenant files a complaint with the District of Columbia Department of Licenses and Inspections, or when the Department serves a notice of deficiencies to the landlord, or when the tenant complains to the landlord, the landlord is then prevented from evicting the tenant for a period of nine months.¹⁰⁸ The nine month provision is thus incorporated into the statute even though it is uncertain why protection could not be extended beyond that time period if the tenant had good reasons to believe that retaliation was the purpose of eviction. While the District of Columbia Court of Appeals previously indicated its belief that the courts should not examine the landlord-tenant relationship to determine such retaliatory motives,¹⁰⁹ Judge Wright's opinion clearly has given the courts that new role.¹¹⁰ A danger to the new judicial attitude as represented by *Edwards v. Habib* is that a legislatively imposed time limit will be read as setting a *maximum* period of time during which the tenant may be protected from retaliatory intent. To

¹⁰³ 18 HASTINGS L.J. 700, 704; CLEARING HOUSE REVIEW 14, March, 1968; 3 LAW IN ACTION 12 (June 1968).

¹⁰⁴ 18 HASTINGS L. J. at 704.

¹⁰⁵ *Id.*

¹⁰⁶ 3 LAW IN ACTION 12 (June 1968).

¹⁰⁷ H. R. Doc. No. 257, 90th Cong., 1st Sess. was introduced by Representative Bennett on January 10, 1967 and was referred to the Committee on the District of Columbia; S. Doc. No. 3199, 90th Cong., 2d Sess. was introduced by Senator Bible and was referred to the Committee on the District of Columbia.

¹⁰⁸ However, the Bill sets out nine rather broad exceptions to this rule.

¹⁰⁹ *Edwards v. Habib*, 227 A.2d 388, 390 (1967).

¹¹⁰ 397 F.2d at 702, 703.

avoid any such construction, legislation should be explicit in either permitting the courts to extend the time period, permitting the courts to regard the time period as a *minimum* time during which the tenant is protected, or simply doing away with the arbitrary time period altogether. The latter suggestion would be the least desirable since a legislatively imposed time period during which the landlord could not evict concurrent with judicial efforts to prohibit retaliatory eviction is at least a potentially more certain and more explicit protection for the tenant than judicial protection alone.

The purpose of S. 3199 as expressed in the bill is: "To prohibit landlords from retaliating against tenants for good-faith complaints of housing violations in the District of Columbia."¹¹¹ The bill establishes under section 1236B(c) a presumption that where there has been a complaint to the District of Columbia and there is a subsequent attempt at eviction or an attempt to increase rent, such attempts will be presumed to be in retaliation for the complaint and will be prohibited.

The presumption may be a more valuable protection for the tenant than the formula laid down in H.R. 257 which prohibits an action of eviction after a complaint except that the landlord may recover possession if any one of nine exceptions is met. The first exception is sufficient to indicate that in practice the nine month prohibition on eviction actions could be easily skirted.¹¹²

THE RESPONSE OF THE COURTS TO RETALIATORY EVICTIONS

Even in the absence of additional legislation, important steps could be taken in the District of Columbia to insure that the *Edwards* defense to retaliatory eviction could be strengthened and other legal defenses to retaliatory eviction developed.¹¹³

¹¹¹ S. 3199, 90th Cong., 2d Sess. (1968).

¹¹² The first exception would allow the landlord to recover possession of the premises if the tenant was violating a pre-existing obligation of his tenancy. It is not difficult to foresee that in the presently existing landlord's market, the landlord may be able to force a tenant into a lease which places impossible burdens upon the tenant which would be unenforced unless the tenant sought to complain. In addition the tenants' duty to pay rent on a given date might be considered such a pre-existing duty despite the fact that indigent tenants frequently pay rents shortly after the due dates. Comment, *Landlord-Tenant—Eviction in Retaliation for Reporting Housing Code Violations Prohibited*, 44 NOTRE DAME LAWYER 286, 292 (1968).

¹¹³ A very simple change in housing codes would make the complainants anonymous. At the present time landlords can usually find out whether

a housing violation was discovered through a complaint or through a search, and they can often discover the identity of the complaining tenant. There is no sound reason why a landlord should be informed of a complaint before it has been verified by housing inspectors. After it has been verified, there is no reason to notify the landlord whether the violation was first detected through inspection or by a tenant complaint and then inspection. Of course where the complaint was issued about conditions in a living unit and not the common area, a landlord would know who the complainant was. On the other hand a complaint from one unit might mean that other units in the same building were in comparable condition and there would be no need for the inspectors to limit themselves to inspecting just one unit. Inspecting an entire building on the strength of one complaint would be entirely reasonable in a jurisdiction which depended primarily upon complaints for information of code violations. Naturally the inspection of the entire building would insure a greater anonymity for the complainant and encourage tenants to notify without fear of retaliatory gestures. *LEGAL REPRESENTATION OF THE POOR* at 296, 297.

While anonymity would encourage the flow of information to the inspection agencies, as a practical matter a landlord can often discover from other tenants or his supervisor in the building who the complainant was. If tenants were organized in a tenant union, however, complaints could be issued through the union itself and individuals would thereby be shielded. The union would of course have other benefits for the tenant—among them the enforcement of code provisions through the use of private economic sanctions. Limited experience with these unions indicates some success in enforcement of housing codes through utilization of existing legal sanctions and private economic pressures. Retaliation through massive eviction of unionized tenants would be difficult even where housing is in extremely short supply because the tenants would be able to delay eviction while they asserted retaliation as a defense to the eviction proceedings. Such a delay would enable tenants to locate other housing in the event their defense was unsuccessful. The landlord could look forward to extended and expensive legal proceedings along with a possible frustration of his ultimate purpose. Even if he were successful his eviction would result in vacancies and loss of rental values for an indeterminate period.

All of these legal devices for the tenant are limited by the sheer unavailability of legal help for the poor. To be sure, this need has been partially met, but the current strains on legal services in poverty areas are enormous and many cases simply cannot be handled by the relatively small numbers of lawyers currently devoting themselves to this work. While retaliatory eviction cases may now receive some priority, their defense may well be at the expense of other potential indigent litigants who will not receive a share of the limited legal services currently available. In determining which cases can be handled distinctions will probably have to be drawn between clear-cut cases such as *Mrs. Edwards*, where an eviction or rent increase follows closely on the heels of a complaint, and cases where the retaliatory measures are taken some time after the complaint and inspection and are more difficult to prove. *See generally* *PROCEEDINGS OF THE HARVARD CONFERENCE ON LAW AND POVERTY*, March 17, 18 and 19, 1967.

After *Edwards* the tenant will still have difficulty in proving in court that a retaliatory eviction has taken place. Judge Wright's opinion tacitly admits that a landlord, in the absence of legislation, may be able to retaliate by giving a purely economic reason or through giving no reason at all.¹¹⁴ Indeed the economic reason may have credence if the landlord asserts that he has been forced to bring his units up to code standards and that his operating costs have dramatically increased.

An important consideration in the wake of *Edwards* will be the burden of proof necessary to establish the new defense of retaliation. There will be difficulty in seeking to prove the illegal purpose of retaliation. The question will be one of permissible or impermissible purpose, and this will be a question of fact for the court or the jury.¹¹⁵ The court or jury will have to demand that the tenant made a good faith complaint to the housing inspectors. Following this complaint, there would have to be alleged the initiation of eviction procedures or a demand for an increase in rent. Whether these were retaliatory gestures would depend in part upon how closely they followed upon the tenant's complaint. In order to prevent recurring suits and at the same time allow the landlord a later opportunity to repossess his tenancy, the courts may be forced to establish a presumption that once an eviction has been judged retaliatory, subsequent evictions during a specified period of time would also be presumed retaliatory.¹¹⁶

The precise standards of proof were not discussed by Judge Wright in his opinion but it was stated that the questions presented by the *Edwards* case were not "significantly different from problems with which the courts must deal in a host of other contexts, such as when they must decide whether the employer who discharges a worker has committed an unfair labor practice because he has done so on account of the employee's union activities."¹¹⁷ As Judge Greene had written in his lower court memorandum opinion, the distinction between action which is permitted when done for a lawful purpose but proscribed when done for an illegal purpose can be made and is made daily by court and administrative agencies without interfering in legitimate economic interests.¹¹⁸

¹¹⁴ 397 F.2d at 702.

¹¹⁵ *Id.*

¹¹⁶ See generally Judge Greene's opinion in *HOUSING FOR THE POOR* at 45-46.

¹¹⁷ 397 F.2d at 702-03.

¹¹⁸ *HOUSING FOR THE POOR* at 46.

In addition to asserting retaliation as a defense to an eviction action, a tenant could also seek to enjoin an eviction because of its retaliatory purpose.¹¹⁹ After a tenant has filed a housing complaint and has reason to believe the landlord will seek to evict him, the tenant may seek an injunction which could be phrased in terms of the landlord's retaliatory motive.¹²⁰ Such an injunction could be sought for an indefinite time period since a landlord might be tempted to evict immediately after the injunction has expired.¹²¹ It is doubtful, however, whether eviction can be long delayed through an injunction. Courts may be reluctant to interfere in a month-to-month tenancy, and, in effect, transform it into a contract where a tenant has rights to retain possession of the tenancy for an indefinite period. An injunction could probably best be sought after the landlord has disclosed retaliatory purpose through a notice of intent to evict or through a major (and unjustified) increase in rent. In light of the *Edwards* decision courts may be more willing to grant an injunction where: (1) the landlord is apparently operating premises illegally in violation of the housing code; and (2) where the landlord displays a retaliatory purpose which the *Edwards* case has declared illegal.

Yet the reluctance of courts to utilize the injunction to assist the tenant where the tenant has no real contractual right is clearly illustrated by the *Edwards* case. At the same time that Mrs. Edwards was seeking in the Landlord-Tenant Branch to establish retaliatory eviction as a defense, she filed Civil Action 2570-65 in the District Court on October 14, 1965.¹²² In that action Mrs. Edwards sought: (1) an interlocutory injunction; (2) a permanent injunction; (3) a temporary restraining order; (4) \$5,000 compensatory damages; and (5) \$20,000 punitive damages. Mrs. Edwards argued that it was against public policy and the intent of the regulations to permit defendant to evict because of complaints to the Housing Division.¹²³ The injunction was denied because there was an adequate remedy at law (damages which Mrs. Edwards alleged) and because the test for preliminary injunction as established by the Circuit Court in *Embassy Dairy v. Camalier* had not been met.¹²⁴ Whether Mrs. Edwards' quest for an injunction would have met with judicial approval after the defense of retaliatory eviction had been recognized in the jurisdiction either by case law or by statute is a moot question.

¹¹⁹ Schoshinski at 545.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Edwards v. Habib*, 366 F.2d 628, 631 (1965).

¹²³ *Id.*

¹²⁴ *Id.*

CONCLUSION

The decision in *Edwards v. Habib* is but a partial answer to the critical need for providing housing for the poor. To the degree that citizen complaints will be encouraged and codes better enforced, some improvement in housing conditions may be expected. Even if heretofore unsuccessful code enforcement can be somewhat improved, the tenant still faces a persistent housing shortage, a possibility of future retaliatory action, and a continued weak bargaining position with his landlord.

Judge Wright has written, subsequent to his decision in *Edwards*, that:

Though our most pressing social, moral and political imperative is to liberate the urban poor from their degradation, the courts continue to apply ancient legal doctrines which merely compound the plight of the poverty-stricken. These doctrines may once have served a purpose, but their time has passed. They must be modified or abandoned.¹²⁵

What is important in *Edwards* is not only its departure from common law landlord-tenant law by its upholding of the defense of retaliation, but its generalized conclusion that the law and public policy as discerned and applied by the Court of Appeals of the District of Columbia favors the interests of the tenant rather than the landlord. Courts in other jurisdictions may have more difficulty coming to this conclusion both because of their own statutes and their reluctance to change from the older doctrines. Yet while other jurisdictions do not have the same statutory history and structure as the District of Columbia, the constitutional issues which Judge Wright discussed in the course of his opinion seem to support a more universally expanded view of tenants' rights. While urging these constitutional rights will not bring immediate change in housing conditions, increased judicial recognition and acceptance of these rights would prove to be an important step in "modifying" or "abandoning" a system of landlord-oriented law which stands in the way of improving the conditions of the low-income tenant.

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¹²⁵ Wright, N.Y. Times, March 9, 1969 (Magazine) at 116. In this regard it may be well to note that tenants in federally assisted housing projects may no longer be summarily evicted without prior notification of the reasons for their eviction and without opportunity to reply to those reasons. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969).