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# RETALIATORY EVICTION AS ABUSE OF RIGHTS: A CIVILIAN APPROACH TO LANDLORD-TENANT DISPUTES

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## *I. Introduction*

Soon after Charlie Barnes moved into her New Orleans apartment, she began experiencing problems with the premises, including flooding, rodent infestation, inadequate electrical outlets, and defective doors, floors, and ceilings. After the lessor's agent, Real Estate Services, Inc. (RESI), failed to make the necessary repairs, Barnes consulted an attorney. The attorney sent a certified letter to RESI on September 23, 1983, specifying the defects and warning that Barnes would exercise her right under Louisiana Civil Code article 2694 to repair and deduct the cost from her rent, unless RESI made all repairs. One week later, RESI served Barnes with a notice to vacate, and subsequently filed a rule for possession.

In the city court, Barnes argued that the eviction was in retaliation for her attorney's letter, and that such a retaliatory eviction was an abuse of the landlord's right to evict. RESI's supervisor stated that the eviction was necessary in order for the landlord to repair the serious defects in the premises. As proof of the severity of these defects, RESI offered testimony that the electrical system was falling off the exterior of the building and introduced correspondence from the city threatening condemnation of the property. The trial judge ordered Barnes to vacate the premises. He rejected her defense of retaliatory eviction because the landlord had legitimate reasons for eviction.<sup>1</sup>

On appeal to the fourth circuit, Barnes again urged the defense of retaliatory eviction. After discussing the elements of the abuse of rights

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1. Real Estate Services, Inc. v. Barnes, No. 222-691 (1st City Ct. N.O. November 3, 1983), *aff'd*, 451 So. 2d 1229 (La. App. 4th Cir. 1984).

theory,<sup>2</sup> the court held that Barnes' defense was unfounded. The court found that the serious defects in the apartment were valid grounds for the eviction, and that the simultaneous eviction of a neighboring tenant evidenced a lack of retaliatory motive. Due to potential safety concerns, Barnes was not permitted to remain in the apartment while the repairs were effectuated.<sup>3</sup>

Although Charlie Barnes' retaliatory eviction defense was not successful, her case is important for two reasons. First, it demonstrates the willingness of Louisiana courts to hear the defense of retaliatory eviction under the abuse of rights doctrine, even in a summary proceeding.<sup>4</sup> Second, the case illustrates the context in which a defense of retaliatory eviction is desirable.

The Louisiana Civil Code governs the lease relationship by apportioning rights and obligations between the landlord and the tenant.<sup>5</sup> A notice to vacate may be considered retaliatory if it is in response to the tenant's efforts to enforce one of his rights or if it is in response to the tenant's efforts to force the landlord to meet his obligations. For example, Charlie Barnes was attempting to enforce her right to repair and deduct.<sup>6</sup> Other rights of the tenant which are enforceable against the landlord include the right to demand that the landlord make certain repairs,<sup>7</sup> the right to sublease,<sup>8</sup> and the right to peaceable possession free from disturbances by third parties claiming a right to the premises.<sup>9</sup>

An important set of tenants' rights also exists outside the Civil Code. Each major city in Louisiana has either a set of Housing Standards or a Minimum Housing Standards Code.<sup>10</sup> These codes were enacted to prevent the use of "residential buildings and dwelling units characterized by physical conditions which render them unfit and unsafe for human habitation."<sup>11</sup> The strong public policy underlying these housing codes is "to protect the health, safety and welfare of the general public and

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2. Real Estate Services, Inc. v. Barnes, 451 So. 2d 1229 (La. App. 4th Cir. 1984).

3. *Id.*

4. For a discussion of current eviction practice in Louisiana, see *infra* text accompanying notes 31-55.

5. La. Civ. Code arts. 2676-2744.

6. La. Civ. Code art. 2694.

7. La. Civ. Code arts. 2692, 2693 and 2717; see also, Armstrong and LaMaster, *The Implied Warranty of Habitability*; Louisiana Institution, *Common Law Innovation*, 46 La. L. Rev. 195 (1985).

8. La. Civ. Code art. 2725.

9. La. Civ. Code art. 2704.

10. E.g., New Orleans, La., *Minimum Housing Standards Code* ch. 30 (1956); Shreveport, La., *Code of Ordinances* ch. 19 (1971); Baton Rouge, La., *Code of Ordinances* Title 8A (1983) (adopting *Standard Housing Code*, 1976 edition, as revised in 1977 and 1978, by reference).

11. New Orleans, La., *Minimum Housing Standards Code* ch. 30, art. I, § 1 (1956).

the owners and occupants of dwellings and dwelling units used or intended to be used for purposes of human habitation.”<sup>12</sup> In order to implement this policy, very specific standards are applicable to all aspects

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12. New Orleans, La., Minimum Housing Standards Code ch. 30, art. I, § 2 (1956). The strength of this public policy is evidenced by the extensive statements of “policy” and “legislative findings of fact” included in the ordinances. For example, New Orleans, La., Minimum Housing Standards Code ch. 30, art. I, § 2 (1956) states:

It is found and declared that there exist in the City and Parish of New Orleans certain substandard and unsanitary residential buildings and dwelling units characterized by physical conditions which render them unfit and unsafe for human habitation. These conditions are of such nature as to be detrimental to the health, safety and welfare of the occupants thereof as well as the public at large.

It is further found and declared that there exist in the City and Parish of New Orleans residential buildings and dwellings units which were originally constructed according to standards now recognized to be obsolete and deficient in terms of current modern housing standards governing construction, use, occupancy, light, ventilation and sanitary facilities. The continued existence of these obsolete and deficient residential buildings and dwelling units is detrimental to the health, safety and welfare of the occupants thereof as well as the public at large.

It is further found that the existence of such substandard, unsanitary, obsolete and deficient buildings used for dwelling purposes, threatens the physical, social and economic stability of the surrounding residential buildings and neighborhood facilities, occasions disproportionate expenditure of public funds for remedial action and jeopardizes the well-being of the entire community.

Therefore, it is in the public interest of the citizens of New Orleans to protect and promote decent, safe and sanitary residential buildings and dwelling units by the adoption and enforcement of the minimum housing standards of this chapter.

The adoption and enforcement of this Minimum Housing Standards Code is hereby declared to be a necessary municipal governmental function in the interest of the health, safety and welfare of the people of the City of New Orleans.

Shreveport's Code similarly provides:

There exists in the City of Shreveport, Louisiana, structures used for human habitation and nonresidential purposes that are substandard in structure and maintenance. Furthermore, inadequate provisions for light and air, insufficient protection against fire, lack of proper heating, unsanitary conditions, and overcrowding constitute a menace to the health, safety, morals, welfare, and reasonable comfort of our citizens. The existence of such conditions will create slum and blighted areas requiring large scale clearance if not remedied. Furthermore, in the absence of corrective measures, such areas will experience a deterioration of social values, a curtailment of investment and tax revenue, and an impairment of economic values. The establishment and maintenance of minimum structural and environmental standards are essential to the prevention of blight and decay and the safeguarding of public health, safety, morals, and welfare. Therefore, the City of Shreveport, acting through the city council as its governing body, has adopted, by way of ordinance at its regular meeting convened, this code which is authorized by Louisiana Revised Statutes, Title 33, Sections 4751 and 4752.

Shreveport, La., Code of Ordinances ch. 19, art. I, § 1 (1971).

of housing including plumbing,<sup>13</sup> sanitation,<sup>14</sup> water supply,<sup>15</sup> heating,<sup>16</sup> interior<sup>17</sup> and exterior walls,<sup>18</sup> light and ventilation,<sup>19</sup> porches,<sup>20</sup> railings,<sup>21</sup> doors, windows, and screens.<sup>22</sup>

The effectiveness of a housing code's administrative remedies, which may include fines<sup>23</sup> or even demolition of the building when standards are not met,<sup>24</sup> may depend upon the willingness and ability of tenants to report violations. For example, the Shreveport Housing and Property Standards Code authorizes the administrator to inspect a building only after receiving a complaint by an occupant of a building or a petition signed by at least five citizens, each of whom reside within six hundred feet of the premises complained of, alleging that the premises are in violation of the code.<sup>25</sup>

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13. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art III, § 34 and art. VI, § 55 (1956); Standard Housing Code § 302.2 (1982).

14. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. VI, § 52 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, §§ 71, 76 (1971); Standard Housing Code § 307 (1982).

15. E.g., Shreveport, La., Code of Ordinances ch. 19, art. IV, § 71.3 (1971); Standard Housing Code § 302.3 (1982).

16. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, §§ 34, 38, 42, and art. VI, § 57 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, § 71.5 (1971).

17. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, § 30, and ch. 29, art. XI, §§ 91-100 (1952) (special provisions for lead based substances); Shreveport, La., Code of Ordinances ch. 19, art. IV, § 74.16 (1971); Standard Housing Code § 305.16 (1982).

18. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, § 25 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, § 74.2 (1971); Standard Housing Code § 305.2 (1982).

19. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, §§ 39-41 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, § 72 (1971); Standard Housing Code § 303 (1982).

20. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, § 27, and art. VI, § 62 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, § 74.5 (1971); Standard Housing Code § 305.5 (1982).

21. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, § 27 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, §§ 74.6, 74.18 (1971); Standard Housing Code §§ 305.6, 305.18 (1982).

22. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. III, § 26, and art. VI, § 56 (1956); Shreveport, La., Code of Ordinances ch. 19, art. IV, §§ 74.7, 74.13 (1971).

23. E.g., Shreveport, La., Code of Ordinances ch. 19, art. II, §§ 18.1-18.2 (1971) (fine not to exceed \$500.00).

24. E.g., Shreveport, La., Code of Ordinances ch. 19, art. I, § 3(a) and art. III, § 44 (1971).

25. Shreveport, La., Code of Ordinances ch. 19, art. II, § 11.1 (1971); see also, New Orleans, La., Minimum Housing Standards Code ch. 30, art. I, § 10 (1956).

A tenant's complaint to the housing authorities may result in a fine or other penalty being imposed upon the landlord.<sup>26</sup> Such an event may incite the landlord to retaliate against the tenant.<sup>27</sup> Under current Louisiana eviction practice, a retaliation could take the form of a refusal to renew a lease or the termination of a periodic lease.<sup>28</sup>

A retaliatory eviction punishes a tenant for exercising his legitimate rights. Additionally, such an eviction will have a chilling effect upon other similarly situated tenants. This chilling effect frustrates the public policies underlying the Civil Code and the local housing codes.<sup>29</sup> This article will review current eviction practices in Louisiana, examine retaliatory eviction legislation in other states, demonstrate that the adoption of similar legislation by Louisiana would be consistent with the civilian doctrine of abuse of rights, and recommend the adoption of specific legislation.<sup>30</sup> Such a recommendation is particularly timely since the Louisiana State Law Institute is currently preparing to recommend revision of the Civil Code articles on lease.

## II. Eviction Procedure

A review of current eviction practice in Louisiana will demonstrate how the landlord can use this procedure to effect a retaliatory purpose and how the tenant may raise the defense of retaliatory eviction in an action for possession. Louisiana Code of Civil Procedure article 4701 allows a landlord to commence eviction proceedings when a tenant's right to possession has ceased because of expiration of the lease term, nonpayment of rent, or failure to perform other lease obligations.<sup>31</sup> A landlord may use this procedure to retaliate against the tenant by terminating the lease upon the expiration of the periodic or stipulated lease term.

A lease term may be set by contract between the parties or determined by supplemental provisions of law.<sup>32</sup> In the case of a lease with

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26. E.g., New Orleans, La., Minimum Housing Standards Code ch. 30, art. I, § 12, and art. VII, §§ 63-71 (1956); Shreveport, La., Code of Ordinances ch. 19, art. II, §§ 12, 16, 18.1-18.2 (1971).

27. See *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016, 89 S. Ct. 618 (1969).

28. See *infra* discussion accompanying notes 31-55.

29. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016, 89 S. Ct. 618 (1969).

30. Retaliatory eviction legislation has been before the Louisiana legislature on at least one prior occasion. La. H.B. 709, 1st Reg. Sess. (1975) was defeated. See Note, *Lessor's Obligation to Maintain a Habitable Dwelling: Enforcement By Lessee and Retaliatory Action By Lessor*, 36 La. L. Rev. 813 (1976).

31. La. Code Civ. P. art. 4701.

32. La. Civ. Code arts. 2684, 2685, and 2687.

a definite contractual term, Civil Code article 2727 provides that the lease concludes automatically at the expiration of the agreed term<sup>33</sup> without the need for either party to provide notice of termination.<sup>34</sup> The conclusion of the lease term, however, does not end the tenant's right to possession of the premises. Either party can terminate this right to possess. The tenant may end his possession by abandonment of the premises at the end of the term. The landlord, with or without retaliatory motive, may end the possession by providing a notice of refusal to renew or to allow reconduction.<sup>35</sup>

If the tenant does not quit the premises at the end of the term and remains in possession for one week without objection from the landlord, a periodic lease is established by tacit reconduction.<sup>36</sup> A reconduction of the lease occurs by operation of law, as it is presumed that the continued possession by the tenant and the willing sufferance of this possession by the landlord constitute a tacit agreement to extend the lease on the same conditions.<sup>37</sup> Reconduction extends an urban lease on a periodic, month-to-month basis.<sup>38</sup> A lease of residential property without a stipulated term is also a periodic month-to-month lease.<sup>39</sup> Either party may terminate a periodic lease by notice ten days before the expiration of the period.<sup>40</sup>

A landlord with a retaliatory purpose can thus "evict" his tenant by refusing to renew a lease or by terminating a periodic lease. When the landlord has terminated the tenant's right to possession by delivery of a notice to vacate, or the tenant has expressly waived his right to notice,<sup>41</sup> and the tenant has not vacated the premises, the landlord may commence eviction proceedings.<sup>42</sup>

The landlord must resort to judicial process because eviction through self-help may constitute the tort of trespass<sup>43</sup> or conversion.<sup>44</sup> The land-

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33. La. Civ. Code art. 2727.

34. 2 M. Planiol, *Civil Law Treatise* pt. 2, No. 1730 (La. St. L. Inst. trans. 11th ed. 1959).

35. La. Civ. Code art. 2691; La. Code Civ. P. art. 4701; 2 M. Planiol, *supra* note 34, at No. 1732.

36. La. Civ. Code art. 2689; the rule for predial leases is different, see La. Civ. Code art. 2688.

37. S. Litvinoff, *Sale and Lease in the Louisiana Jurisprudence*, at 561 (1983); 2 M. Planiol, *supra* note 34, at No. 1732.

38. La. Civ. Code art. 2689; the rule for predial leases is provided by La. Civ. Code art. 2688.

39. La. Civ. Code arts. 2685, 2687.

40. La. Civ. Code art. 2686; a different rule governs predial leases, see S. Litvinoff, *supra* note 37, at 561.

41. Waiver is allowed by La. Code Civ. P. art. 4701 and La. Civ. Code art. 2713.

42. La. Civ. Code art. 2713; La. Code Civ. P. art. 4701.

43. See, e.g., *Patin v. Stockstill*, 315 So. 2d 868 (La. App. 1st Cir. 1975).

44. See, e.g., *Porter v. Johnson*, 369 So. 2d 1141 (La. App. 1st Cir. 1979), cert. denied, 371 So. 2d 615 (La. 1979).

lord may have the tenant cited by a court of competent jurisdiction to show cause why he should not be ordered to deliver possession to the landlord.<sup>45</sup> Trial of the rule to show cause is a summary proceeding,<sup>46</sup> intended to be conducted rapidly, without observance of all of the formalities required in ordinary proceedings.<sup>47</sup> A jury trial is not available,<sup>48</sup> and neither party may obtain damages.<sup>49</sup> To prevail the landlord need only prove the existence of a lease, and that the tenant is in breach thereof or that a notice has been given to end the tenant's right of possession.<sup>50</sup>

The tenant may raise a limited number of defenses.<sup>51</sup> For example, if the reason for eviction is the tenant's failure to pay rent, he may offer as a defense his withholding of rent to make necessary repairs.<sup>52</sup> A tenant may also challenge the propriety of the eviction. This should allow him to raise a defense of retaliatory eviction because the essence of that defense is that the landlord is using the process of the court for an improper purpose.<sup>53</sup>

If the tenant is found to have lost his right of possession, the court will render a judgment of eviction ordering the tenant to vacate the premises.<sup>54</sup> The tenant may suspend execution of the judgment by alleging an error of law or fact in the trial of the rule and by complying with the strict procedures for appeal.<sup>55</sup>

The current procedure for eviction is an efficient process. Nevertheless, the procedure can only be considered fair if the tenant is entitled to raise an affirmative defense of retaliatory eviction. A review of retaliatory eviction legislation from other states will demonstrate the parameters of the remedy.

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45. La. Code Civ. P. art. 4731.

46. *Id.*; La. Code Civ. P. art. 2592(3).

47. La. Code Civ. P. art. 2591.

48. La. Code Civ. P. art. 1732.

49. *Himbola Manor Apartments v. Watson*, 315 So. 2d 790 (La. App. 3d Cir. 1975).

50. *Williams v. Reynolds*, 448 So. 2d 845 (La. App. 2d Cir. 1984).

51. La. Code Civ. P. art. 4732 provides that the court can hear "any defense." However, the tenant may not inject defenses such as the invalidity of the landlord's title. See *Williams v. Reynolds*, 448 So. 2d 845 (La. App. 2d Cir. 1984), and *Vicknair v. Watson-Pitchford, Inc.*, 348 So. 2d 695 (La. App. 1st Cir. 1977).

52. See, e.g., *Laurel Lee Shopping Center v. Parker*, 457 So. 2d 822 (La. App. 1st Cir. 1984); *Evans v. Does*, 283 So. 2d 804 (La. App. 2d Cir. 1973); *Leggio v. Manion*, 172 So. 2d 748 (La. App. 4th Cir. 1965); repair and deduct is allowed under La. Civ. Code art. 2694.

53. La. Code Civ. P. art. 4732 allows the court to hear "any defense." While the tenant is somewhat limited in the number of defenses he can raise, see *supra* note 51, public policy in favor of decent housing should allow the raising of a retaliatory eviction defense.

54. La. Code Civ. P. art. 4732.

55. La. Code Civ. P. art. 4735.



### III. *The Experience of Other States*

At common law a landlord had the right to decline to renew a lease or to evict a month-to-month tenant for any reason or for no reason at all.<sup>56</sup> The first limitations on this principle occurred in the District of Columbia. They were jurisprudential rather than statutory in origin.

Yvonne C. Edwards was a month-to-month tenant who found the condition of her rental housing intolerable.<sup>57</sup> She reported violations of statutes governing sanitary conditions to the appropriate authorities. When her landlord brought an action to evict her, she asserted that the notice to quit the premises was in retaliation for the lawful exercise of her rights.

The tenant relied principally on the First Amendment to the United States Constitution, maintaining that eviction abridged her right to petition the government for redress of grievances. However, the trial judge found that the tenant had failed to allege the requisite state action. The mere existence of statutory eviction procedures did not implicate the government in the landlord's action.

The trial judge relied instead on the decision of the United States Supreme Court in the case of *In re Quarles*.<sup>58</sup> There the Court had recognized a constitutional right to report violations of the law and to freedom from reprisal on account of the report. The citizen who reports such violations is protected from retaliation by either public or private parties. A court may not lend its authority to an eviction instituted in retaliation for a citizen's constitutionally protected acts.

On appeal, Judge Skelly Wright upheld the result reached by the trial court but declined to base the defense of retaliatory eviction in constitutional law.<sup>59</sup> Instead, he held that statutory construction and public policy preclude the judiciary from assisting the landlord. Observing that effective implementation and enforcement of housing codes depends upon private initiative in reporting violations, Judge Wright found an implicit legislative purpose to promote such complaints. This purpose would be frustrated if a landlord could evict a tenant because the tenant reported violations.

This decision left many questions unanswered. Was the landlord only precluded from evicting the tenant or also from other forms of reprisal? Are activities of the tenant other than reports to public au-

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56. 2 R. Powell, *The Law of Real Property* ¶ 225 [2][b] (1985).

57. *Habib v. Edwards*, Civ. Div. No. LT75895 (D.C. Ct. Gen. Sess. 1965). This memorandum opinion is reprinted fully in A. J. Casner & W. Barton Leach, *Cases and Text on Property* at 523 (3d ed. 1984).

58. *In re Quarles*, 158 U.S. 532, 15 S. Ct. 959 (1895).

59. *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016, 89 S. Ct. 618 (1969).

thorities protected from retaliation? Must the tenant prove that the landlord's acts are retaliatory or will the requisite intent be presumed? If retaliatory intent is presumed, how long does the presumption endure? Is retaliatory eviction merely a defense to the landlord's suit for possession of the premises or an independent basis for an action to recover actual or exemplary damages? Does the defense apply to all rental housing or only to landlords who lease several residential premises?

Twenty-seven states have addressed these issues and now prohibit retaliatory eviction by statute.<sup>60</sup> These statutes implement the policy first articulated by Judge Wright of protecting "tenants who seek to exercise their rights to decent, safe, and sanitary housing."<sup>61</sup> Many have adopted or been influenced by the Uniform Residential Landlord and Tenant Act.<sup>62</sup>

A majority of statutes define acts of retaliation to include increasing the tenant's rent or decreasing services in addition to bringing or threatening to bring an action for possession of the premises.<sup>63</sup> A few states merely prohibit the landlord from evicting the tenant in reprisal.<sup>64</sup> The legislation of some states is more expansive in its protection of the tenant, prohibiting any type of retaliatory act.<sup>65</sup>

60. Alaska Stat. § 34.03.310 (1962); Ariz. Rev. Stat. Ann. § 33-1381 (1974); Cal. Civ. Code § 1942.5 (West 1985); Conn. Gen. Stat. Ann. § 47a-20 (1978); Fla. Stat. Ann. § 83.64 (West Supp. 1985); Hawaii Rev. Stat. § 521-74 (Supp. 1984); Iowa Code Ann. § 562A.36 (West Supp. 1985); Kan. Stat. Ann. § 58-2572 (1983); Md. Real Prop. Code Ann. § 8-208.1 (1981); Mass. Gen. Laws Ann. ch. 186, § 18 (West 1981); Minn. Stat. Ann. § 566.03 (West Supp. 1986); Mo. Rev. Stat. § 441.620 (1986); Mont. Code Ann. § 70-24-431 (1985); Neb. Rev. Stat. § 76-1439 (1981); Nev. Rev. Stat. § 118A.510 (1985); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985); N.M. Stat. Ann. § 47-8-39 (Supp. 1982); N.Y. Real Prop. Law § 223-b (Consol. 1979); N.C. Gen. Stat. § 42-37.1 (1984); Ohio Rev. Code Ann. § 5321.02 (Page 1981); Or. Rev. Stat. § 91.865 (1984); R.I. Gen. Laws § 34-20-10 (1984); Tenn. Code Ann. § 66-28-514 (1982); Tex. Prop. Code Ann. § 92.057 (Vernon 1984); Va. Code § 55-248-39 (1986); Wash. Rev. Code Ann. § 59.18.240 (Supp. 1986); Wis. Stat. Ann. § 704.45 (West Supp. 1985).

61. See, e.g., N.C. Gen. Stat. § 42-37.1 (1984).

62. Approved by the National Conference of Commissioners on Uniform State Laws in 1972, the Uniform Act has been adopted by Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Tennessee and Virginia.

63. Alaska Stat. § 34.03.310 (1962); Ariz. Rev. Stat. Ann. § 33-1381 (1974); Conn. Gen. Stat. Ann. § 47a-20 (1978); Fla. Stat. Ann. § 83.64 (West Supp. 1985); Hawaii Rev. Stat. § 521-74 (Supp. 1984); Iowa Code Ann. § 562A.36 (West Supp. 1985); Md. Real Prop. Code Ann. § 8-208.1 (1981); Mass. Gen. Laws Ann. ch. 186, § 18 (West 1981); Mo. Rev. Stat. § 441.620 (1986); Nev. Rev. Stat. § 118A.510 (1985); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985); N.Y. Real Prop. Law § 223-b (Consol. 1979); Ohio Rev. Code Ann. § 5321.02 (Page 1981); Wis. Stat. Ann. § 704.45 (West Supp. 1985); URLTA (1972).

64. Cal. Civ. Code § 1942.5 (West 1985); Minn. Stat. Ann. § 566.03 (West 1986); N.Y. Real Prop. Law § 223-b (Consol. 1979); N.C. Gen. Stat. § 42-37.1 (1984); R.I. Gen. Laws § 34-20-10 (1984); Tex. Prop. Code Ann. § 92.057 (Vernon 1984).

65. New Jersey prohibits any substantial alteration of the terms of the tenancy. N.J.

The legislation of these states generally protects the tenant's right to report violations of building and housing codes to the appropriate authorities.<sup>66</sup> They also protect the tenant who complains to the landlord about the condition of the premises.<sup>67</sup> Complaints to authorities and the landlord often must satisfy a requirement of good faith.<sup>68</sup> Many statutes also prohibit retaliation against a tenant who organizes or participates in a tenant's union.<sup>69</sup>

The catalogue of acts against which the landlord may not take reprisals is extended in some jurisdictions. In California, for example, the landlord may not retaliate after an inspection or issuance of a citation by housing code enforcement authorities or after issuance of a judgment on a question of tenantability which is adverse to the landlord.<sup>70</sup> Another group of states protect generally any good faith attempt by the tenant to remedy by any lawful means a violation of the lease, landlord and tenant law or the housing code.<sup>71</sup>

The most controversial aspect of the attempt to curtail reprisals against tenants is the proof of a landlord's retaliatory intent. Unless the landlord actually threatens the tenant, the evidence of intent usually amounts to no more than the juxtaposition of a complaint of some kind by the tenant followed by a notice of eviction or increase in rent. The coincidence of these events may excite suspicion yet fail to prove the landlord's retaliatory intent by a preponderance of the evidence. The Uniform Act<sup>72</sup> and many state legislatures<sup>73</sup> have for this reason

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Stat. Ann. § 2A:42-10.10 (West Supp. 1985). Washington's legislation affirms that the list of prohibited retaliatory acts is merely illustrative. Wash. Rev. Code Ann. § 59.18.240 (Supp. 1986).

66. See, e.g., Alaska Stat. § 34.03.310 (1962); Ariz. Rev. Stat. Ann. § 33-1381 (1974); Cal. Civ. Code § 1942.5 (West 1985); Conn. Gen. Stat. Ann. § 47a-20 (1978); Hawaii Rev. Stat. § 521-74 (Supp. 1984).

67. See, e.g., Iowa Civ. Code § 562A.36 (West Supp. 1985); Md. Real Prop. Code Ann. § 8-208.1 (1981); Mo. Rev. Stat. § 441.620 (1986).

68. See, e.g., Cal. Civ. Code § 1942.5 (West 1985); Conn. Gen. Stat. Ann. § 47a-20 (1978); Hawaii Rev. Stat. § 521-4 (Supp. 1984).

69. See, e.g., Nev. Rev. Stat. § 118A.510 (1985); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985); N.Y. Real Prop. Law § 223-b (Consol. 1979). Pennsylvania's statutory protection against retaliatory eviction pertains only to a tenant who participates in a tenant's union. Pa. Stat. Ann. tit. 68, § 250.205 (Purdon Supp. 1986).

70. Cal. Civ. Code § 1942.5(a) (3) & (4) (West 1985).

71. Conn. Gen. Stat. Ann. § 47a-20 (1978); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985); N.Y. Real Prop. Law § 223-b (Consol. 1979).

72. URLTA § 5.101(b) (1972).

73. Ariz. Rev. Stat. Ann. § 33-1381 (1974); Cal. Civ. Code § 1942.5 (West 1985); Iowa Code Ann. § 562A.36 (West Supp. 1985); Mass. Gen. Laws Ann. ch. 186, § 18 (West 1981); Mo. Rev. Stat. § 441.620 (1986); Mont. Code Ann. § 70-24-431 (1985); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985); N.Y. Real Prop. Law § 223-b (Consol. 1979); Wash. Rev. Code Ann. § 59.18.240 (Supp. 1986).

established a presumption that a notice of eviction, refusal to renew a lease or an increase in rent which follows soon after an act by the tenant to secure his rights is retaliatory. In Massachusetts the effect of this presumption is to require the landlord to prove by clear and convincing evidence that any notice of termination or increase in rent is not a reprisal.<sup>74</sup> In other states the trier of fact is merely required to find that the landlord's act was retaliatory unless evidence is introduced to rebut the presumption.<sup>75</sup> The landlord may introduce evidence of any non-retaliatory motive for his actions.<sup>76</sup>

This controversial presumption is not accepted in all states. Several states which adopted the Uniform Act deleted its reference to the presumption.<sup>77</sup> The effect of this deletion is unclear. The trier of fact may infer a connection between the tenant's complaint and the landlord's act even in the absence of a presumption. The tenant's burden in these states is less than in those which require affirmative proof of retaliatory intent. Five states impose the burden of proving retaliatory intent on the tenant.<sup>78</sup> Moreover, some jurisdictions which employ a presumption of retaliatory intent provide that the burden of proving retaliation is the tenant's if the notice of intent to increase the rent, to evict or to otherwise alter the terms of the lease is delivered before the tenant complains about the premises.<sup>79</sup>

The structure of the retaliatory eviction legislation creates the impression that there is a presumption that the landlord's acts are in reprisal for the tenant's exercise of his rights even if the presumption is not expressly established. Legislation in Alaska, which is typical of a number of states, provides that the landlord may not retaliate by increasing the rent or bringing an action for possession after the tenant has acted in specified ways to protect her rights, but that the landlord may bring an action for possession on account of any one of seven specific, legitimate reasons.<sup>80</sup> It is submitted that a presumption of retaliatory

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74. Mass. Gen. Laws Ann. ch. 186, § 18 (West 1981).

75. Ariz. Rev. Stat. Ann. § 33-1381 (1974); URLTA (1972).

76. N.Y. Real Prop. Law § 223-b(5) (Consol. 1979); *Silberg v. Lipscomb*, 117 N.J. Super. 491, 285 A.2d 86 (1971).

77. Kan. Stat. Ann. § 58-2572 (1983); Neb. Rev. Stat. § 76-1439 (1981); N.M. Stat. Ann. § 47-8-39 (Supp. 1982); Or. Rev. Stat. § 91.865 (1984); Tenn. Code Ann. § 66-28-514 (1982).

78. Fla. Stat. Ann. § 83.64 (West Supp. 1985); Minn. Stat. Ann. § 566.03 (West Supp. 1985); N.C. Gen. Stat. § 42-37.1 (1984); R.I. Gen. Laws § 34-20-10 (1984); Va. Code § 55-248-39 (1986). All of these statutes require affirmatively that the tenant prove retaliatory intent by a preponderance of the evidence.

79. Iowa Code Ann. § 562A.36 (West Supp. 1985); URLTA (1972). In Washington, a tenant's complaint to housing authorities within ninety days of notice of a proposed rent increase is presumed to be in bad faith. Wash. Rev. Code Ann. § 59.18.240 (Supp. 1986).

80. Alaska Stat. § 34.03.310 (1962) (see *infra* note 83).

motive follows implicitly from evidence of the tenant's complaint to housing authorities if the statute lists legitimate, non-retaliatory grounds for eviction. Superior legislative drafting would make this presumption explicit and remove uncertainty concerning appropriate jury instructions.

All legislation under consideration permits the landlord to evict the tenant or increase rent in some circumstances notwithstanding the tenant's prior complaint to housing authorities. In some cases the landlord is merely required to provide a credible explanation of any non-retaliatory motive.<sup>81</sup> Other acts contain a brief list of permissible purposes for landlord action, most of which relate to the particular tenant. For example, Tennessee permits the landlord to bring an action for possession despite the tenant's prior complaint if (a) the violation of the housing code was caused by the tenant's lack of ordinary care, (b) the tenant was in default in rent, or (c) compliance with the housing code would require demolition or substantial alterations which would effectively deprive the tenant of the use of the premises.<sup>82</sup> The statutes of other jurisdictions list numerous commercially justifiable grounds for bringing an action for possession.<sup>83</sup>

Legislation such as that of Tennessee, which sharply limits permissible grounds for eviction, exceeds the proper vocation of a retaliatory eviction statute by precluding the landlord from terminating the lease on other, justifiable grounds. Any legislative specification of permissible

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81. N.Y. Real Prop. Law § 223-b (Consol. 1979).

82. Tenn. Code Ann. § 66-28-514 (1982).

83. Alaska Stat. § 34.03.310 (c) (1962):

(c) Notwithstanding (a) and (b) of this section, a landlord may bring an action for possession if

(1) the tenant is in default in rent;

(2) compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit;

(3) the tenant is committing waste, or a nuisance, or is using the dwelling unit for an illegal purpose or for other than living or dwelling purposes in violation of the rental agreement;

(4) the landlord seeks in good faith to recover possession of the dwelling unit for personal purposes;

(5) the landlord seeks in good faith to recover possession of the dwelling unit for the purpose of substantially altering, remodeling, or demolishing the premises;

(6) the landlord seeks in good faith to recover possession of the dwelling unit for the purpose of immediately terminating for at least six months use of the dwelling unit as a dwelling unit; or

(7) the landlord has in good faith contracted to sell the property, and the contract of sale contains a representation by the purchaser corresponding to (4), (5) or (6) of this subsection.

Nevada permits an increase in rent which applies uniformly to all tenants. Nev. Rev. Stat. § 118A.510 (1985).

grounds for termination of the lease or increase in rent should focus on the purpose of retaliatory eviction legislation. That purpose is to encourage tenants to protect their right to a habitable dwelling, not to give the tenant a right to remain in the premises indefinitely without increased rent. If the goals of the legislature are to obtain rent stabilization and create rights in tenants to renew leases indefinitely, these purposes should be pursued directly and explicitly through other legislation. Moreover, all justifiable commercial reasons for refusing to renew a lease or increasing rent cannot possibly be listed in a statute. It is therefore not necessary for legislation to state that the landlord may increase the rent if his costs rise. It is enough to specify that the landlord may rebut the presumption of retaliatory motive by proving by a preponderance of the evidence that the decision to bring an action for possession, to increase rent or to decrease services was independent of any consideration of the activities of the tenant protected by statute.

The doctrine of retaliatory eviction originated as a defense to the landlord's suit for possession.<sup>84</sup> Legislation has broadened the scope of the doctrine, permitting an aggrieved tenant to recover possession,<sup>85</sup> actual damages,<sup>86</sup> and attorney's fees.<sup>87</sup> Some statutes permit the recovery of exemplary damages<sup>88</sup> which may be a multiple of the monthly rent.<sup>89</sup>

In the Louisiana experience an award of exemplary damages is exceptional.<sup>90</sup> On the other hand, the small amount of actual damages involved in a suit for possession discourages litigation to vindicate the tenant's rights. If the policy of our state is the protection of tenants who in good faith invoke their legal right to a habitable dwelling, then

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84. *Edwards v. Habib* 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016, 89 S. Ct. 618 (1969).

85. Alaska Stat. § 34.03.310 (1962); Ariz. Rev. Stat. Ann. § 33-1381 (1974); Nev. Rev. Stat. § 118A.510 (1985); URLTA (1972).

86. Cal. Civ. Code § 1942.5 (West 1985); Nev. Rev. Stat. § 118A.510 (1985); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985); N.Y. Real Prop. Law § 223-b (Consol. 1979); Ohio Rev. Code Ann. § 5321.02 (Page 1981).

87. Cal. Civ. Code § 1942.5 (West 1985); Hawaii Rev. Stat. § 521-74 (Supp. 1984); Ohio Rev. Code Ann. § 5321.02 (Page 1981); Tex. Prop. Code Ann. § 92.057 (Vernon 1984); Wash. Rev. Code Ann. § 59.18.240 (Supp. 1986).

88. California permits recovery of not more than \$1000.00 nor less than \$100.00 for each retaliatory act where the landlord has been found guilty of fraud, oppression or malice. Cal. Civ. Code § 1942.5 (West 1985).

89. Kansas Stat. Ann. § 58-2563 (1983) (the tenant may recover an amount not more than one and one-half months' rent or actual damages, whichever is greater); Neb. Rev. Stat. § 76-1430 (1981) (the tenant may recover an amount equal to three months periodic rent as liquidated damages); Or. Rev. Stat. § 91.815 (1984) (damages in an amount not more than two month's periodic rent or twice the actual damages sustained by the tenant, whichever is greater); Tex. Prop. Code Ann. § 92.057 (Vernon 1984) (one month rent plus \$100.00).

90. La. Civ. Code art. 2315.1.

the legislature should provide incentives to the legal profession and the litigant. The provisions of the Civil Code Ancillaries pertaining to lessees' security deposits which permit the recovery of actual damages or two hundred dollars, whichever is greater,<sup>91</sup> and costs and attorney's fees,<sup>92</sup> provide an appropriate analogy for remedies in this area. If, as the authors of this article believe, the public policy protecting a tenant's right to report violations of the housing code is more significant than that protecting the recovery of a security deposit, then the encouragement to vindicate those rights should be correspondingly greater, perhaps amounting to liquidated damages of twice the monthly rent, with costs and attorney's fees in the court's discretion.

On the other hand, some lessors should be excluded from the scope of any retaliatory eviction statute. Where the owner of rental housing is one of the occupants of the dwelling, for instance, he has an interest in domestic tranquility which balances a tenant's right to report violations of the housing code with impunity. Legislation of other states recognizes this interest, and excludes owner-occupied dwellings of less than four units.<sup>93</sup>

#### IV. Abuse of Rights

The prohibition against retaliatory eviction in common law states arose as a result of public policy. The courts considered the tenant's right to report violations of the housing code and defects in the premises more worthy of protection than the landlord's right to resume possession of the dwelling.<sup>94</sup> Retaliatory eviction legislation marked a significant departure from the traditional common law rights of the lessor. Similar public policy considerations could also serve as a foundation for Louisiana retaliatory eviction legislation. However, in contrast to the common law, such legislation will harmonize with the Louisiana civilian tradition. The ancient<sup>95</sup> and widely accepted<sup>96</sup> civilian

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91. La. R.S. 9:3252 (1983).

92. La. R.S. 9:3253 (1983).

93. N.Y. Real Prop. Law § 223-b (Consol. 1979). New Jersey excludes owner-occupied dwellings with not more than two rental units. N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1985).

94. See, e.g., *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016, 89 S. Ct. 618 (1969).

95. The earliest statement of the doctrine has been accredited to Gaius: "male enim nostro iure uti non debemus" (we should not exercise our rights wrongfully); Bolgár, *Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 La. L. Rev. 1015, 1017 n. 9 (1975).

96. The countries which recognize the doctrine include Argentina, the Canadian province of Quebec, France, Germany, Italy, Japan, Mexico, Netherlands, U.S.S.R., Spain and Switzerland. See Bolgár, *supra* note 95; Catala & Weir, *Delict and Torts: A Study*

doctrine of abuse of rights can serve as the basis for retaliatory eviction legislation.<sup>97</sup>

Stated in general terms, the doctrine of abuse of rights provides that "fault" in the delictual sense<sup>98</sup> may be imposed upon a party who has exercised a right in a manner that has caused injury to another.<sup>99</sup> Planiol criticized the doctrine as being misnamed, stating that if a right is abused, its exercise is illicit, and therefore no right has been exercised.<sup>100</sup> This frequently discussed criticism<sup>101</sup> has not impeded application of the doctrine. "Abuse of rights" has become an accepted term of art which provides sufficient reference to the legal theory.<sup>102</sup> Planiol's criticism does, however, demonstrate that the doctrine of abuse of rights can only be applied to an act which the actor can claim is the exercise of a right.<sup>103</sup>

In the landlord and tenant context, the landlord generally has a right to evict his tenants. He may exercise that right by declining to renew a lease or by terminating a periodic lease upon proper notice. In a case involving a lease for a specific term or a periodic lease by tacit reconduction, analysis of the right to evict reveals two sources of regulation, which may be characterized as internal and external. The internal source is derived from the lease contract between the landlord and

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in Parallel (Part II), 38 Tul. L. Rev. 221 (1964); Brunner, Abuse of Rights in Dutch Law, 37 La. L. Rev. 728 (1977); Mayrand, Abuse of Rights in France and Quebec, 34 La. L. Rev. 993 (1974); Sono & Fujioka, The Rule of the Abuse of Right Doctrine in Japan, 35 La. L. Rev. 1037 (1975); F. Stone, Tort Doctrine § 260, in 12 Louisiana Civil Law Treatise (1977).

97. The common law generally does not recognize the doctrine of abuse of rights. *Chapman v. Hanig*, 3 Weekly L.R. 19 (C.A.) (1963), discussed in *Catala & Weir*, supra note 96, at 257. See also, *Cueto-Rua*, Abuse of Rights, 35 La. L. Rev. 965, 967-971 (1975) (discussing rejection of doctrine of abuse of rights in common law jurisdictions).

Louisiana could alternatively base retaliatory eviction legislation upon existing codal provisions such as La. Civ. Code art. 1983 which requires that contracts be performed in good faith.

98. *Lambert v. Maryland Casualty Co.*, 403 So. 2d 739, 755 (La. App. 4th Cir. 1981), aff'd, 418 So. 2d 553 (La. 1982); *Hero Lands Co. v. Texaco, Inc.*, 310 So. 2d 93, 97 (La. 1975); Comment, Abuse of Rights in Louisiana, 7 Tul. L. Rev. 426, 434 (1933).

99. *Lambert v. Maryland Casualty Co.*, 403 So. 2d 739, 755 (La. App. 4th Cir. 1981), aff'd, 418 So. 2d 553 (La. 1982); Note, Lessor's Obligation to Maintain a Habitable Dwelling: Enforcement by Lessee and Retaliatory Action by Lessor, 36 La. L. Rev. 813 (1976); *Cueto-Rua*, supra note 97.

100. 2 M. Planiol, *Civil Law Treatise* pt. 1, No. 871 (La. St. L. Inst. trans. 11th ed. 1959).

101. *Cueto-Rua*, supra note 97, at 974; Comment, "At will" Franchise Terminations and the Abuse of Rights Doctrine—The Maturation of Louisiana Law, 42 La. L. Rev. 210, 232 (1981); Comment, supra note 98, at 433; *Mayrand*, supra note 96, at 993.

102. *Cueto-Rua*, supra note 97, at 974-975.

103. 2 M. Planiol, supra note 100; *Brunner*, supra note 96, at 730.



tenant.<sup>104</sup> The right to evict would be abused from this standpoint by an eviction for reasons not contemplated by the landlord and tenant. The external source of regulation is that imposed by society under statute.<sup>105</sup> Regulation of this kind considers the tenant's right to decent housing and to redress grievances, as well as the landlord's legitimate interest in determining the destiny of the property. The Civil Code articles on lease articulate these policies.<sup>106</sup> From an external standpoint, eviction is an abuse of right if it occurs for purposes not consistent with the appropriate balance between these policies.

Retaliatory eviction can be seen as an abuse of right from either the internal or external perspective. Nevertheless, in the lease context, the analysis can be merged. The contract between the landlord and tenant cannot anticipate and provide for a retaliatory eviction by the landlord, as such a provision would be *contra bonos mores*. Rights of the landlord and tenant under their contract are limited in that the parties can only contract for eviction on legitimate grounds: their subjective expectations under the contract regarding eviction cannot deviate from objective societal expectations. As a result, whether there has been an abuse of right from either an internal or external perspective can be determined under an identical analysis.

Analyzing a claim of abuse of rights requires a careful balancing of competing policies.<sup>107</sup> A broad definition of retaliatory or abusive eviction may overly restrict the landlord's individual rights. For example, the landlord must retain his rights to end a periodic lease for valid purposes such as his need to reconstruct the building,<sup>108</sup> or the tenant's failure to pay rent.<sup>109</sup> The tenant may not become so secure in his possession of the premises that the landlord loses effective ownership. Conversely, some limits are needed on the landlord's ability to evict a

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104. This internal source of regulation was referred to as a "threshold question" in Comment, *supra* note 101 at 230:

An important threshold question must be answered in the negative before the abuse of rights doctrine should be involved: was the condition performed in the manner probably intended by the parties? If so, the non-terminating party has no grounds for complaint, because he has obtained the very thing for which he bargained.

While this threshold inquiry is appropriate in cases involving franchise terminations, its separation into a separate inquiry is not needed in a case of retaliatory eviction. See *infra* text accompanying notes 106-07.

105. See *supra* text accompanying notes 31-55 (discussing current Louisiana landlord's statutory right to evict).

106. La. Civ. Code arts. 2692, 2695, 2710, 2711, 2712, 2729.

107. Catala & Weir, *supra* note 96, at 227.

108. The need to reconstruct the premises was a valid reason for eviction in *Real Estate Services, Inc. v. Barnes*, 451 So. 2d 1229 (La. App. 4th Cir. 1984).

109. La. Civ. Code art. 2712.

tenant who has acted in a socially desirable way by reporting a housing code violation.

Professor Cueto-Rua's discussion of the French framework of the doctrine of abuse of rights demonstrates that a flexible theory is needed in order to walk this fine line between individual freedom and societal goals of a collective nature.<sup>110</sup> This analysis of French Law, as subsequently embraced by the Louisiana Supreme Court,<sup>111</sup> provides that an abuse of rights will be found in four instances:

(1) The exercise of a right with the intent to cause harm is an abuse of that right.<sup>112</sup> This is the aspect of the abuse of rights doctrine which the trial court and the fourth circuit seemed willing to apply to Charlie Barnes' case, *Real Estate Services, Inc. v. Barnes*.<sup>113</sup> In rejecting the retaliatory eviction defense, the appellate court stated, "we cannot say the landlord filed the rule for possession solely to harass defendant."<sup>114</sup> A court relying exclusively on this aspect of the abuse of rights theory will focus upon the landlord's motive. As a result, the court may overemphasize the individual rights of the landlord and tenant, and not give full consideration to the important societal interests to be protected by a ban on retaliatory eviction.

(2) A right is abused if it is exercised with no serious or legitimate interest.<sup>115</sup>

(3) Enforcement of a right has been denied, as an abuse of right, when the exercise of the right is against moral rules, good faith and elementary fairness.<sup>116</sup>

(4) The final criteria was propounded by the French scholar, Louis Josserand. An exercise of a right in a manner contrary to the purposes for which the right was granted would be an abuse of that right.<sup>117</sup>

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110. Cueto-Rua, *supra* note 97, at 984-1004.

111. *Illinois Central Gulf R.R. Co. v. International Harvester Co.*, 368 So. 2d 1009, 1014 (La. 1979); Comment, *supra* note 101, at 237; see also, *Real Estate Services, Inc. v. Barnes*, 451 So. 2d 1229 (La. App. 4th Cir. 1984), and *Housing Authority of City of Abbeville v. Hebert*, 387 So. 2d 693 (La. App. 3d Cir. 1980), cert. denied, 394 So. 2d 275 (La. 1980).

112. Cueto-Rua, *supra* note 97, at 991.

113. 451 So. 2d 1229 (La. App. 4th Cir. 1984).

114. *Id.* at 1231.

115. Cueto-Rua, *supra* note 97 at 995; *Morse v. Jay Ray McDermott & Co.*, 344 So. 2d 1353, 1369 (La. 1977) (on rehearing) ("The exercise of a right without a legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance."); *Lambert v. Maryland Casualty Co.*, 403 So. 2d 739 (La. App. 4th Cir. 1981) (no abuse of rights because the defendant corporation acted to protect its "legitimate and serious interests"), *aff'd*, 418 So. 2d 553 (La. 1982).

116. Cueto-Rua, *supra* note 97, at 996.

117. *Id.* at 1001; *Bolgár*, *supra* note 95, at 1018; *Mayrand*, *supra* note 96, at 1000.

Under this theory, rights are relative to one another.<sup>118</sup> If a person has exercised a right within the ambit of its purpose, he will be protected even though he may cause inconvenience to the rights of others.<sup>119</sup> But if the person exercises a right in an abnormal manner, not within its purpose, he will be at "fault" and subject to civil liability for resulting damages.<sup>120</sup> To determine what constitutes fault, societal interests must be weighed in the balancing of relative rights.<sup>121</sup>

Josserand's criteria provides the best foundation for enactment of retaliatory eviction legislation in Louisiana. If a landlord exercises his right to evict a tenant in a manner consistent with expectations of the parties, or of society—i.e., for a legitimate purpose—he will be protected even if he causes inconvenience to the evicted tenant. The landlord misuses his right, however, if he evicts the tenant in retaliation for the tenant exercising his legitimate rights, such as reporting housing code violations. The landlord's right to evict is relatively less important than the tenant's right to report housing code violations free of fear of retaliation because of the societal interest in safe housing,<sup>122</sup> which can only be furthered through a guarantee of impunity. Abuse of the right to evict has occurred from both the internal and external perspective because neither the parties nor society can countenance an eviction for a retaliatory purpose.<sup>123</sup> A legislative ban on retaliatory eviction is clearly compatible with the civilian doctrine of abuse of rights.<sup>124</sup>

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118. Cueto-Rua, *supra* note 97, at 1001; Bolgár, *supra* note 95, at 1018.

119. F. Stone, *supra* note 96, at § 261; Comment, *supra* note 98, at 434.

120. Mayrand, *supra* note 96, at 1000; Comment, *supra* note 98, at 434; a frequently cited example from French law involves a dispute between neighboring landowners. Mr. Clément-Bayard owned a field on which he kept a hangar for his zeppelins. The owner of the field adjacent to the hangar erected a wooden structure topped with metal spikes for the sole purpose of impeding the zeppelin operations. This was held to be an abuse of rights. *Affaire Clément-Bayard*, August 3, 1915, *Cour de cassation Requetes*, S. 1920.1.300, D.P. 1917.1.79, discussed in Bolgár, *supra* note 95, at 1021.

121. Bolgár, *supra* note 95, at 1018; Comment, *supra* note 98, at 434.

122. See, e.g., *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert denied, 393 U.S. 1016, 89 S. Ct. 618 (1969).

123. See *supra* text accompanying notes 106-07.

124. French law has apparently codified a ban on retaliatory eviction as a type of abuse of rights:

A law of September 1, 1948, restricts the landowner's right to recover possession of the demised premises at the end of the tenancy. The tenant acquires a legal right to remain in occupation of the premises unless the landlord finds himself in a situation that justifies his recovery of possession. Even when recovery of possession is justified, the judge will not allow the landlord to exercise this right if it is invoked with the intention of doing harm to the tenant and not in order to satisfy a legitimate interest.

Catala & Weir, *supra* note 96, at 226. The Louisiana courts have recognized the applicability of the doctrine of abuse of rights to landlord-tenant relations; *Illinois Central Gulf R.R.*

### V. Proposed Legislation

The authors propose amendment of Civil Code article 2713 to prohibit termination of a lease in retaliation for a tenant's good faith exercise of her rights. This proposed legislation is consistent with the law of other civilian jurisdictions which prohibits the abuse of rights<sup>125</sup> and with modern legislation which applies the doctrine specifically to lessor-lessee relations.<sup>126</sup> This proposal also develops the notion, currently contained in the Louisiana Civil Code, that contracts are to be performed in good faith.<sup>127</sup> The proposed legislation creates an explicit presumption that a lessor's acts are retaliatory in certain cases. We have not, however, attempted to list permissible grounds for terminating or altering the terms of a lease. Any termination of the lease by the lessor which is not retaliatory, or in violation of the lease or applicable law, would be permissible.

Inasmuch as the proposed legislation furthers the public policy of promoting decent housing, we urge the adoption of mandatory liquidated damages in the amount of not less than two months stipulated rent where the lessee has already been dispossessed and an award of the reasonable expenses of the lessee's legal action in any case in which the tenant prevails. This provision would provide for an award of attorney's fees even if the tenant's cause were undertaken by a free provider of legal services. The proposed legislation also precludes the lessor from demanding increased rent or diminishing services supplied by the lessor in retaliation for the tenant's acts. This provision is necessary to prevent a lessor from indirectly terminating the lease by increasing the lessee's costs.

We propose that the following language be added to Louisiana Civil Code article 2713:<sup>128</sup>

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Co. v. International Harvester, 368 So. 2d 1009 (La. 1979); Real Estate Services, Inc. v. Barnes, 451 So. 2d 1229 (La. App. 4th Cir. 1984). No Louisiana tenant has yet presented a successful case based on this doctrine.

125. Spanish Civ. Code art. 7.2 provides:

The law does not protect the abuse of right or the antisocial exercise of the same. Every act or omission which by the intention of its author, its object or by the circumstances in which it takes place exceeds the normal limits of the exercise of a right, with harm to a third party, shall give rise to corresponding indemnification and to the adoption of judicial or administrative measures to enjoin the continuance of the abuse.

126. Spanish Law of Urban Leases art. 9 ("Judges shall reject claims which imply manifest abuse or abnormal exercise of a right.")

127. La. Civ. Code art. 1983.

128. La. Civ. Code art. 2713 currently provides:

When the lessor has given notice to the lessee, in the manner directed by law, to quit the property, and the lessee persists in remaining on it, or if the

The lessor abuses the right to terminate a lease by reconduction or other periodic lease, to decline to renew a lease, to demand greater rent, or to diminish services provided by the lessor if the exercise of the right is in retaliation for an act by the lessee to enforce one of the rights of the lessee under the lease or applicable law. In any proceeding by or against the lessee, evidence of the exercise by the lessee of a right of the lessee under the lease within one year of the alleged act of retaliation creates a rebuttable presumption that the act by the lessor was in retaliation.

The lessee may raise the retaliatory character of the lessor's acts as a defense in any proceeding of eviction brought by the lessor. A lessee who prevails may recover reasonable legal expenses. A wrongfully dispossessed lessee may recover actual damages not less than twice the monthly rental in an ordinary proceeding.

The provisions of this article relating to retaliatory conduct do not apply to an owner occupied dwelling which contains no more than four rental units.

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lessee has waived his right to such notice by written waiver contained in the lease and has lost his right of occupancy for any reason, the lessor may have him summoned before a judge or a justice of the peace, and condemned to depart; and if three days after notice of the judgment he has not obeyed, the judge or justice of the peace may order that he shall be expelled and that the property shall be cleared by the sheriff or constable, at his expense.

The mode of proceeding in such cases is provided for by special laws.