

Case Sequence:

Landlord – Tenant Cases District of Columbia

For your information, there was reorganization of the District of Columbia court system between the time of the Edwards case and the Golphin case. After the reorganization, the District of Columbia Court of Appeals replaced the D.C. Circuit as the highest appellate court in the jurisdiction.

[Brown v. Southall Realty Company](#), 237 A.2d 834 (D.C. 1968).

[Watson v. Kotler](#), 264 A.2d 141 (D.C. 1970).

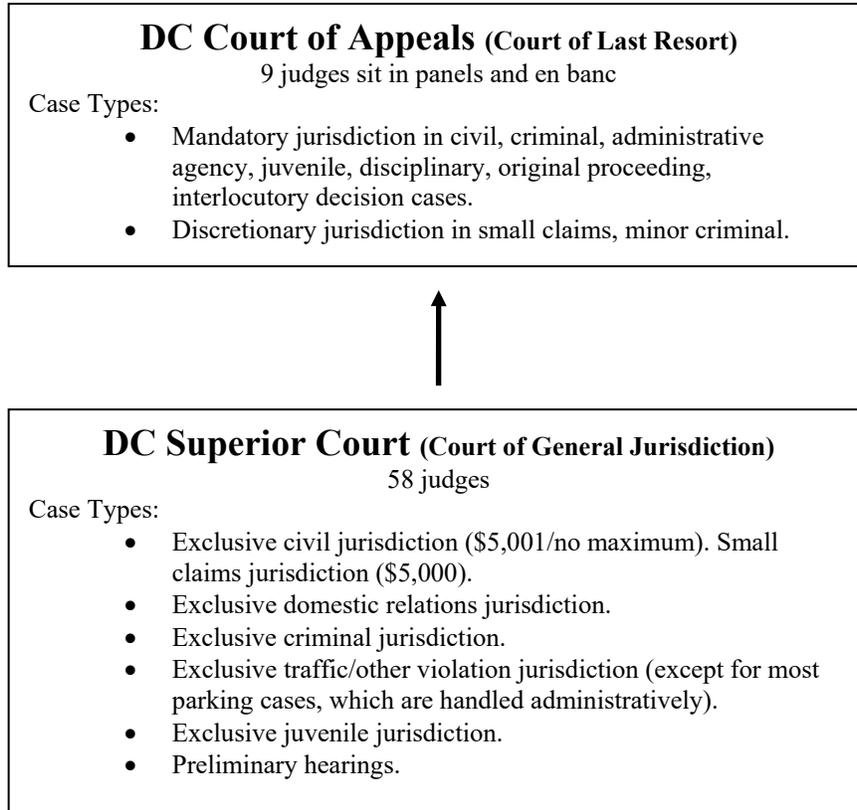
[Javins v. First National Realty Corp](#), 428 F.2d 1071 (D.C. Cir. 1970).

[Edwards v. Habib](#), 397 F.2d 687 (D.C. Cir. 1968).

[Golphin v. Park Monroe Associates](#), 353 A.2d 314 (D.C. 1976).

[District of Columbia Court Chart](#)

District of Columbia Court Chart



Brown v. Southall Realty Co.

District of Columbia Court of Appeals

December 11, 1967, Argued ; February 7, 1968, Decided

No. 4199

Reporter

237 A.2d 834 *; 1968 D.C. App. LEXIS 128 **

Judges: Hood, Chief Judge, Myers, Associate Judge, and Quinn (Associate Judge, Retired).

Opinion by: QUINN

Opinion

[*835] This appeal arises out of an action for possession brought by appellee-landlord, against appellant-tenant, Mrs. Brown, for nonpayment of rent. The parties stipulated, at the time of trial, that the rent was in the arrears in the amount of \$230.00. Mrs. Brown contended, however, that no rent was due under the lease because it was an illegal contract. The court held to the contrary and awarded appellee possession for nonpayment of rent.

Although counsel for appellant stated at oral argument before this court that Mrs. Brown had moved from the premises and did not wish to be returned to possession, she asserts that this court should hear this appeal because the judgment of the court below would render certain facts res judicata [*2] in any subsequent suit for rent. ¹ In *Bess v. David*, supra, a suit by a landlord against a tenant for recovery of rent owed, defendant contended that he did not owe rent because he was not a tenant during the time alleged. The defendant was, however, denied that defense, this court stating on appeal that ". . . we think *any* question of appellant's tenancy is foreclosed by the judgment in the previous *possessory* action." 140 A.2d at 317.

[*836] Thus, because the validity of the lease and the determination that rent is owing will be irrevocably established in this case if the judgment of the trial court is allowed to stand, ² we feel that this appeal is timely made.

[**3] Although appellant notes a number of errors, we consider the allegation that the trial court erred in failing to declare the lease agreement void as an illegal contract both

meritorious and completely dispositive, and for this reason we reverse.

The evidence developed, at the trial, revealed that prior to the signing of the lease agreement, appellee was on notice that certain Housing Code violations existed on the premises in question. An inspector for the District of Columbia

Housing Division of the Department of Licenses and Inspections testified that the violations, an obstructed commode, a broken railing and insufficient ceiling height in the basement, existed at least some months prior to the lease agreement and had not been abated at the time of trial. He also stated that the basement violations prohibited the use of the entire basement as a dwelling place. Counsel for appellant at the trial below elicited an admission from the appellee that "he told the defendant after the lease had been signed that the back room of the basement was habitable despite the Housing Code Violations." In addition, a Mr. Sinkler Penn, the owner of the premises in question, was called as an adverse [**4] witness by the defense. He testified that "he had submitted a sworn statement to the Housing Division on December 8, 1964 to the effect that the basement was unoccupied at that time and would continue to be kept vacant until the violations were corrected."

This evidence having been established and uncontroverted, appellant contends that the lease should have been declared unenforceable because it was entered into in contravention to the District of Columbia Housing Regulations, and knowingly so.

Section 2304 of the District of Columbia Housing Regulations reads as follows:

No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin.

Section 2501 of these same Regulations, states:

786, 787 (1899): "A judgment taken by default in summary proceedings by a landlord for non-payment of rent is conclusive between the parties as to the existence and *validity* of the lease, the occupation by the tenant, and that *rent is due*, and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings."

¹ *Edwards v. Habib*, D.C.App., 227 A.2d 388 (1967); *Bess v. David*, D.C.Mun.App., 140 A.2d 316 (1958); *David v. Nemerofsky*, D.C.Mun.App., 41 A.2d 838 (1945).

² Note in *Bess v. David*, supra, this court cited with approval the following language from *McCotter v. Flinn*, 30 Misc. 119, 61 N.Y.S.

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Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises [**5] or neighborhood healthy and safe.

It appears that the violations known by appellee to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the "habitation" unsafe and unsanitary. Neither had the premises been maintained or repaired to the degree contemplated by the regulations, i.e., "designed to make a premises . . . healthy and safe." The lease contract was, therefore, entered into in violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained.

In the case of *Hartman v. Lubar*, 77 U.S.App.D.C. 95, 96, 133 F.2d 44, 45 (1942), cert. denied, 319 U.S. 767, 87 L. Ed. 1716, 63 S. Ct. 1329 (1943), the court stated that, [**837] "[the] general rule is that an illegal contract, made in violation of the statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer."³ The court in *Lloyd v. Johnson*, 45 App.D.C. 322, 327 (1916), indicated:

To this general rule, however, the courts have found exceptions. For the exception, resort must be had to the intent of the legislature, as well as the subject matter of the legislation. [**6] The test for the application of the exception is pointed out in *Pangborn v. Westlake*, 36 Iowa 546, 549, and approved in *Miller v. Ammon*, 145 U.S. 421, 426, 36 L. Ed. 759, 762, 12 Sup.Ct.Rep. 884, as follows: "We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the court will so hold and construe the statute accordingly."

Applying this general rule to the Housing Regulations, it may be stated initially that they do provide for penalties for violations.⁴ [**8] A reading of Sections 2304 and 2501

infers that the Commissioners [**7] of the District of Columbia, in promulgating these Housing Regulations, were endeavoring to regulate the rental of housing in the District and to insure for the prospective tenants that these rental units would be "habitable" and maintained as such.⁵ The public policy considerations are adequately stated in Section 2101 of the District of Columbia Housing Regulations, entitled "Purpose of Regulations." To uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold prior to the agreement (i.e., obstructed commode, broken railing, and insufficient ceiling height in the basement), would be to flout the evident purposes for which Sections 2304 and 2501 were enacted. The more reasonable view is, therefore, that where such conditions exist on a leasehold prior to an agreement to lease, the letting of such premises constitutes a violation of Sections 2304 and 2501 of the Housing Regulations, and that these Sections do indeed "imply a prohibition" so as "to render the prohibited act void." Neither does there exist any reason to treat a lease agreement differently from any other contract in this regard.⁶

Thus, for this reason and those stated above, we reverse.

Reversed.

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³ See also *Kirschner v. Klavik*, D.C.Mun.App., 186 A.2d 227 (1962), and *Rubin v. Douglas*, D.C.Mun.App., 59 A.2d 690 (1948).

⁴ See *Washington, D.C., Housing Regulations*, § 2104 (1955).

⁵ Note the use of the word "shall" in both §§ 2304 and 2501 of the Housing Regulations. The word "shall" ordinarily connotes language of command. *Anderson v. Yungkau*, 329 U.S. 482, 485, 91 L. Ed.

436, 67 S. Ct. 428 (1947); *Ballou v. Kemp*, 68 App. D.C. 7, 92 F.2d 556 (1937).

⁶ See *Jess Fisher & Co. v. Hicks*, D.C.Mun.App., 86 A.2d 177 (1952), where a lease agreement was held ineffective because it violated the District of Columbia Rent Control Act. Cf. *Amos v. Cummings*, D.C.Mun.App., 67 A.2d 687 (1949).

Watson v. Kotler

District of Columbia Court of Appeals

March 10, 1970, Argued ; April 13, 1970, Decided

No. 5117

Reporter

264 A.2d 141 *; 1970 D.C. App. LEXIS 262 **

Judges: Kelly, Fickling and Kern, Associate Judges.

Opinion by: KERN

Opinion

[*142] On June 23, 1967, an inspector from the Housing Division of the Department of Licenses and Inspections discovered numerous Housing Code violations in an apartment building owned by appellee at 3223 Hiatt Place, N.W. Appellee was notified and given time in which to make repairs, as required by § 1301.4 of the Housing Regulations.¹ The housing inspector, on reinspection of the premises in September 1967, found that the violations had been abated. During the period between the two inspections, appellee had leased Apartment 2 in his building to appellant under a written lease, which waived appellee's obligation to give notice to quit.²

[**2] In June 1969 appellee brought action against appellant for recovery of possession of Apartment 2 because she was in arrears with her rent payments.³ Appellant asserted the defense of invalidity of the lease because there had been Housing Code violations in her apartment at the time she executed the lease in 1967. *See* Brown v. Southall Realty Co., D.C.App., 237 A.2d 834 (1968). The trial court granted judgment in favor of appellee.

In Brown v. Southall, the landlord had made no attempt until the time of trial to abate the violations existing on the premises he was renting. Further, it appeared that the landlord had violated the terms of his sworn statement to the

Housing Division to the effect that he would *not* rent such premises until violations on them were corrected. We held (237 A.2d at 837) that "[to] uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold [**3] prior to the agreement . . . would be to flout the evident purposes [of the Housing Code]."

The record shows in the instant case that appellee complied with the June 1967 order of the Housing Division to repair violations existing on his premises.⁴ Appellant did not complain in July 1967, when she executed the lease, that appellee was delaying his repairs nor does she now assert that he acted unreasonably. The housing inspector in September 1967 found that appellee had made the repairs. Only after appellant had fallen behind in her rent payments did she contend that the lease she had been living under for two years was illegal and void.

[**4] Section 1301.4 of the Housing Regulations allows a landlord a reasonable time after he has received notification of Code violations on premises he leases to repair them in "a workmanlike manner." D.C. Housing Regulations § 2515. We must assume that the seriousness of the menace to the public which such violations pose and the time required for repair are considered by the representatives of the Housing Division before they grant a landlord "reasonable time" to make repairs.⁵ For us to invalidate [*143] the lease between appellant and appellee under the circumstances of this case "would be to flout the evident purposes" of the Housing Code which was our primary consideration in declaring the lease void in Brown v. Southall. The purpose of the Housing Code is not solely to penalize landlords but to stimulate them into keeping their premises safe and habitable for tenants. To deprive the

¹ Notice of a Housing Code violation shall "[allow] a reasonable time for the performance of any act such notice requires. . . ."

² *See* D.C. Code 1967, §§ 45-902, 908.

³ The parties stipulated that \$115 rent was owed at the time appellee filed suit.

⁴ There was testimony that *new* housing violations were found on the premises after the execution of the lease but such violations do not result in voiding the lease. *Saunders v. First Nat'l Realty Corp.*, D.C.App., 245 A.2d 836 (1968). There was further testimony that

appellee's housing business license was renewed each year during the period in question by the Department of Licenses and Inspections. D.C. Code 1967, § 47-2328; Housing Regulations § 3102.1.

⁵ Appellant asserts in her brief that "the premises were vacant when the extension was granted." However, there is no basis in the record on appeal for this statement. We note that in Brown v. Southall, *supra*, the Housing Division took steps to assure itself that the premises would remain vacant until repairs were accomplished; thus, we cannot assume that the Housing Division's action here of not banning the leasing of the premises was due to inadvertence, even if appellant's assertion was true.

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landlord of rental income from premises he seeks to maintain is certainly to discourage him from meeting the demand for decent, low-cost housing in the District of Columbia. *See* *Edwards v. Habib*, 130 U.S.App.D.C. 126, 140, 397 F.2d 687, 701 (1968), cert. denied, 393 U.S. 1016, 21 L. Ed. [**5] 2d 560, 89 S. Ct. 618 (1969). We do not believe that the public interest is served by voiding a lease which a tenant enters into while the landlord is correcting deficiencies on the leased premises and under which she thereafter lives for two years.

Affirmed.

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Javins v. First Nat'l Realty Corp.

United States Court of Appeals for the District of Columbia Circuit

January 16, 1970, Argued ; May 7, 1970, Decided

Nos. 22405, 22406, 22409

Reporter

428 F.2d 1071 *; 1970 U.S. App. LEXIS 9377 **; 138 U.S. App. D.C. 369

Ethel JAVINS, Appellant, v. FIRST NATIONAL REALTY CORPORATION, Appellee. Rudolph SAUNDERS, Appellant, v. FIRST NATIONAL REALTY CORPORATION, Appellee. Stanley GROSS, Appellant, v. FIRST NATIONAL REALTY CORPORATION, Appellee

Judges: [**1] Wright, McGowan and Robb, Circuit Judges.

Opinion by: WRIGHT

Opinion

[*1072] J. SKELLY WRIGHT, Circuit Judge:

These cases present the question whether housing code¹ violations which arise during the term of a lease have any effect upon the tenant's obligation to pay rent. The Landlord and Tenant Branch of the District of Columbia Court of General Sessions ruled proof of such violations inadmissible when proffered as a defense to an eviction action for nonpayment of rent. The District of Columbia Court of Appeals upheld this ruling. *Saunders v. First National Realty Corp.*, 245 A.2d 836 (1968).

Because of the importance of the question presented, we granted appellants' petitions for leave to appeal. We now reverse and hold that a warranty of habitability, measured

by the standards set out in the Housing Regulations for the District of Columbia, [**2] is implied by [*1073] operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.

I

The facts revealed by the record are simple. By separate written leases,² [**4] each of the appellants rented an apartment in a three-building apartment complex in Northwest Washington known as Clifton Terrace. The

landlord, First National Realty Corporation, filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions on April 8, 1966, seeking possession on the ground that each of the appellants had defaulted in the payment of rent due for the month of April. The tenants, appellants here, admitted that they had not paid the landlord any rent for April. However, they alleged numerous violations of the Housing Regulations as "an equitable defense or [a] claim by way of recoupment or set-off in an amount equal to the rent claim," as provided in the rules of the Court of General Sessions.³ [**5] They offered to prove

"that there are approximately 1500 violations of the Housing Regulations of the District of Columbia in the building at Clifton Terrace, [**3] where Defendant resides some affecting the premises of this Defendant directly, others indirectly, and all tending to establish a

judgment for rent. The exclusion of prosecution of any claims in this branch shall be without prejudice to the prosecution of any claims in other branches of the court."

Appellants have sought only to defeat the landlord's action; they have not as yet claimed any money damages for the landlord's alleged breach of contract. Under Rule 4(c) *supra*, they may not counterclaim for money damages if the landlord seeks only possession and no money judgment, as it has done here. For the considerations to be applied in determining whether this rule conforms "as nearly as may be practicable" to the Federal Rules of Civil Procedure as required by 13 D.C.Code § 101 (1967), *see McKelton v. Bruno*, 138 U.S.App.D.C. 366, 428 F.2d 718 (decided February 17, 1970).

¹ Housing Regulations of the District of Columbia (1956).

² A clause in the lease provided that the tenant waived the statutory 30-day notice to quit. 45 D.C.Code § 908 (1967) expressly permits waiver of this notice. Appellants' answer put in issue the validity of the waivers. In view of our disposition, we have no occasion to pass upon this aspect of the case.

³ Rule 4(c) of the Landlord and Tenant Branch of the Court of General Sessions provides:

"In suits in this branch for recovery of possession of property in which the basis of recovery of possession is nonpayment of rent, tenants may set up an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim. No counterclaim may be filed unless plaintiff asks for money

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course of conduct of violation of the Housing Regulations to the damage of Defendants * * *."

Settled Statement of Proceedings and Evidence, p. 2 (1966). Appellants conceded at trial, however, that this offer of proof reached only violations which had arisen since the term of the lease had commenced. The Court of General Sessions refused appellants' offer of proof ⁴ and entered judgment for the landlord. The District of Columbia Court of Appeals affirmed, rejecting the argument made by appellants that the landlord was under a contractual duty to maintain the premises in compliance with the Housing Regulations. *Saunders v. First National Realty Corp.*, *supra*, 245 A.2d at 838. ⁵

[*1074] II

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts [**6] have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law * * *, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." ⁶ Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life -- particularly old common law doctrines which the courts themselves created and developed. ⁷ [**7] As we have said before, "The continued vitality of the common law * * * depends upon its ability to reflect contemporary community values and ethics." ⁸

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these

cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services ⁹ -- a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper [**8] maintenance.

Professor Powell summarizes the present state of the law:

"* * * The complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses inserted in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient. In practice, the law today concerning estates for years consists chiefly of rules determining the construction and effect of lease covenants. * * *" ¹⁰

Ironically, however, the rules governing the construction and interpretation of "predominantly contractual" obligations in leases have too often remained rooted in old property law.

[**9] Some courts have realized that certain of the old rules of property law [*1075] governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases. ¹¹ Proceeding piecemeal has, however,

⁴ According to established procedure, this case was submitted to both the District of Columbia Court of Appeals and this court on the basis of a sparse "Settled Statement of Proceedings and Evidence," as approved by both parties and the trial judge. Unfortunately, the court's ruling on the offer of proof was made from the bench, and the basis of the ruling is not reflected in the "Settled Statement." We have recently noted the inadequacy of such records for review by an appellate court. *Lee v. Habib*, 137 U.S.App.D.C. 403, 424 F.2d 891 (1970).

⁵ In the District of Columbia Court of Appeals, appellee urged that these cases were moot on the basis of events occurring since the landlord initiated this litigation. The D.C. Court of Appeals held that the cases were not moot. *Saunders v. First National Realty Co.*, 245 A.2d 836, 837 (1968). Appellee has not argued mootness here, and in any event we follow the ruling of the D.C. Court of Appeals on this point.

⁶ *Jones v. United States*, 362 U.S. 257, 266, 80 S. Ct. 725, 733, 4 L. Ed. 2d 697 (1960).

⁷ See *Spencer v. General Hospital of the District of Columbia*, 138 U.S.App.D.C. 48, 53, 425 F.2d 479, 484 (1969) (*en banc*); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). Cf. 11 S. Williston, *Contracts* § 1393A at 461 (3d ed. W. Jaeger 1968) ("Most of the leading jurisdictions have not hesitated to undo a judicially committed blunder * * * by employing the same means -- judicial decisions") and cases cited therein at n. 20.

⁸ *Whetzel v. Jess Fisher Management Co.*, 108 U.S.App.D.C. 385, 388, 282 F.2d 943, 946 (1960).

⁹ See, e.g., National Commission on Urban Problems, *Building the American City* 9 (1968). The extensive standards set out in the Housing Regulations provide a good guide to community expectations.

¹⁰ 2 R. Powell, *Real Property* para. 221 [1] at 179 (1967).

¹¹ *E.g.*, *Medico-Dental Building Co. v. Horton & Converse*, 21 Cal.2d

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led to confusion where "decisions are frequently conflicting, not because of a healthy disagreement on social policy, but because of the lingering impact of rules whose policies are long since dead."¹²

[**10] In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.¹³

[**11] III

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.¹⁴ [**12] In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability.¹⁵ Thus without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are at least of reasonably average quality. Moreover, if the supplier has been notified that goods are required for a specific purpose, he will be held to warrant that any goods

sold are fit for that purpose. These implied warranties have become widely accepted and well established features of the common law, supported by the overwhelming body of case law.¹⁶ Today most states as well as the District of Columbia¹⁷ have codified and enacted these warranties into statute, as to the sale of goods, in the Uniform Commercial Code.

Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of goods and services must rely upon the skill and honesty of the supplier to at least the same extent as a purchaser of goods. Courts have not hesitated to find implied warranties of fitness and merchantability [*1076] in such situations.¹⁸ [**13] In most areas product liability law has moved far beyond "mere" implied warranties running between two parties in privity with each other.¹⁹

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate.²⁰ Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product.²¹ For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness.²² [**15] In other

411, 418, 132 P.2d 457, 462 (1942). *See also* 1 American Law of Property § 3.11 at 202-205 (A. Casner ed. 1952); Note, The California Lease -- Contract or Conveyance?, 4 Stan.L.Rev. 244 (1952); Friedman, The Nature of a Lease in New York, 33 Cornell L.Q. 165 (1947).

¹² Kessler, The Protection of the Consumer Under Modern Sales Law, 74 Yale L.J. 262, 263 (1964).

¹³ This approach does not deny the possible importance of the fact that land is involved in a transaction. The interpretation and construction of contracts between private parties has always required courts to be sensitive and responsive to myriad different factors. We believe contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations.

We also intend no alteration of statutory or case law definitions of the term "real property" for purposes of statutes or decisions on recordation, descent, conveyancing, creditors' rights, etc. We contemplate only that contract law is to determine the rights and obligations of the parties to the lease agreement, as between themselves. The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law. *See* 2 M. Planiol, *Treatise on the Civil Law* § 1663 *et seq.* (1959); 11 La.Stat. Ann., Civil Code, Art. 2669 (1952).

¹⁴ *See generally* 8 S. Williston, *Contracts* §§ 983-989 (3d ed. W. Jaeger 1964); W. Prosser, *Torts* § 95 (3d ed. 1964).

¹⁵ *See* Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L.Rev. 493 (1962); Uniform Commercial Code §§ 2-314, 2-

315 (1968).

¹⁶ *Ibid.*

¹⁷ 28 D.C.Code Subtitle I (1967).

¹⁸ Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Colum.L.Rev. 653 (1957). *See* Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); 2 F. Harper & F. James, *Torts* § 28.19 at 1577 n. 5 and n. 6 (1956).

¹⁹ *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963). *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960); Jaeger, *Product Liability: The Constructive Warranty*, 39 Notre Dame Lawyer 501 (1964).

²⁰ *See* Fegeas v. Sherrill, 218 Md. 472, 147 A.2d 223 (1958); 7 S. Williston, *Contracts* § 926 at 800-801, § 926A (3d ed. W. Jaeger 1963).

²¹ *See generally* Bearman, *Caveat Emptor in Sale of Realty -- Recent Assaults Upon the Rule*, 14 Vand.L.Rev. 541 (1961); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 Minn.L.Rev. 108 (1953).

²² *See* Waggoner v. Midwestern Development, Inc., S.D., 83 S.D. 57, 154 N.W.2d 803 (1967); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1969); Schipper v. Levitt & Sons, Inc., *supra* Note 7; Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Loraso v. Custom

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cases courts have held builders of new homes liable for breach of an implied warranty that all local building regulations had been complied with.²³ And following the developments in other areas, [**14] very recent decisions²⁴ and commentary²⁵ suggest the possible extension of liability to parties other than the immediate seller for improper construction of residential real estate.

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal²⁶; rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract.²⁷ However, the Supreme Courts of at least two states, in recent and well reasoned opinions, have held landlords to implied warranties [**16] of quality in housing leases. *Lemle v. Breeden*, S. Ct.Hawaii, 51 Haw. 426, 462 P.2d 470 (1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969). *See also Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961). In our judgment, the old no-repair rule cannot [**1077] coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned²⁸ [**17] in favor of an implied warranty of habitability.²⁹ In the District of Columbia, the

Built Homes, Inc., La.App., 144 So.2d 459 (1962). Other cases still continue the older limitation on the vendor's liability to homes sold before construction is complete. *See, e.g., Hoyer v. Century Builders*, 52 Wash.2d 830, 329 P.2d 474 (1958).

²³ *See Schiro v. W. E. Gould & Co.*, 18 Ill.2d 538, 165 N.E.2d 286 (1960); Annot., 110 A.L.R. 1048 (1937).

²⁴ *Connor v. Great Western Savings and Loan Ass'n*, 69 Cal.2d 850, 73 Cal.Rptr. 369, 447 P.2d 609 (1968) (in bank) (Traynor, Ch. J.). Chief Justice Traynor's excellent opinion utilizes tort doctrines to extend liability beyond the immediate seller.

²⁵ Comment, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U.Chi.L.Rev. 739 (1968).

²⁶ *E.g., Kearse v. Spaulding*, 406 Pa. 140, 176 A.2d 450 (1962); *Susskind v. 1136 Tenants Corp.*, 43 Misc.2d 588, 251 N.Y.S.2d 321 (1964); *Rubinger v. Del Monte*, N.Y.S. Ct., App.T., 217 N.Y.S.2d 792 (1961).

²⁷ The cases which recite this old rule are legion. A representative sampling is cited in 32 Am.Jur. Landlord and Tenant § 655 n. 14 (1941).

²⁸ As far as tort liability is concerned, we have previously held that the old common law rule has been changed by passage of the housing code and that the landlord has a duty to maintain reasonably safe premises. *See Note 52 infra*.

²⁹ Although the present cases involve written leases, we think there is no particular significance in this fact. The landlord's warranty is

standards of this warranty are set out in the Housing Regulations.

IV

A. In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages.³⁰ Such a rule was perhaps well suited to an agrarian economy; the land was more important³¹ [**19] than whatever small [**18] living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself.³² These historical facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.³³

implied in oral and written leases for all types of tenancies.

³⁰ The rule was "settled" by 1485. 3 W. Holdsworth, *A History of English Law* 122-123 (6th ed. 1934). The common law rule discussed in text originated in the even older rule prohibiting the tenant from committing waste. The writ of waste expanded as the tenant's right to possession grew stronger. Eventually, in order to protect the landowner's reversionary interest, the tenant became obligated to make repairs and liable to eviction and damages if he failed to do so. *Ibid*.

³¹ The land was so central to the original common law conception of a leasehold that rent was viewed as "issuing" from the land: "The governing idea is that the land is bound to pay the rent * *. We may almost go to the length of saying that the land pays it through [the tenant's] hand." 2 F. Pollock & F. Maitland, *The History of English Law* 131 (2d ed. 1923).

³² Many later judicial opinions have added another justification of the old common law rule. They have invoked the timeworn cry of *caveat emptor* and argued that a lessee has the opportunity to inspect the premises. On the basis of his inspection, the tenant must then take the premises "as is," according to this reasoning. As an historical matter, the opportunity to inspect was not thought important when the rule was first devised. *See Note 30 supra*. To the extent the no-repair rule rests on *caveat emptor*, *see page 1079, infra*.

³³ Even the old common law courts responded with a different rule for a landlord-tenant relationship which did not conform to the model of the usual agrarian lease. Much more substantial obligations were placed upon the keepers of inns (the only multiple dwelling houses

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[**20] Court decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate in some cases. For example, the common law, since it assumed that the land was the most important part of the leasehold, required a tenant to pay rent even if any building on the land [*1078] was destroyed.³⁴ Faced with such a rule and the ludicrous results it produced, in 1863 the New York Court of Appeals declined to hold that an upper story tenant was obliged to continue paying rent after his apartment building burned down.³⁵ The court simply pointed out that the urban tenant had no interest in the land, only in the attached building.

Another line of cases created an exception to the no-repair rule for short term leases of furnished dwellings.³⁶ The Massachusetts Supreme Judicial Court, a court not known for its willingness to depart from the common law, supported this exception, pointing out:

"* * * [A] different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. * * * It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. * * *"³⁷

[**22] These as well as other similar cases³⁸ demonstrate that some courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those

known to the common law). Their guests were interested solely in shelter and could not be expected to make their own repairs. "The modern apartment dweller more closely resembles the guest in an inn than he resembles an agrarian tenant, but the law has not generally recognized the similarity." J. Levi, P. Hablutzel, L. Rosenberg & J. White, Model Residential Landlord-Tenant Code 6-7 (Tent. Draft 1969).

³⁴ *Paradine v. Jane*, Aley 26, 82 Eng.Rep. 897 (K.B. 1947); 1 American Law of Property, *supra* Note 11, § 3.103.

³⁵ *Graves v. Berdan*, 26 N.Y. 498 (1863).

³⁶ 1 American Law of Property, *supra* Note 11, § 3.45 at 267-268, and cases cited therein.

³⁷ *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892).

³⁸ The cases developing the doctrines of "quiet enjoyment" and

assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair.

[**23] It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban³⁹ tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee.⁴⁰ Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in [*1079] making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the [***24] property.

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above.⁴¹ In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or

"constructive eviction" are the most important. See 2 R. Powell, *supra* Note 10, para. 225 [3]. See also *Gladden v. Walker & Dunlop*, 83 U.S.App.D.C. 223, 168 F.2d 321 (1948) (landlord has duty to maintain portions of apartment "under his control" including plumbing, heating and electrical systems); *J. D. Young Corp. v. McClintic*, Tex.Civ.App., 26 S.W.2d 460 (1930) (implied covenant of fitness in lease of building under construction); *Steeffel x. Rothschild*, 179 N.Y. 273, 72 N.E. 112 (1904) (duty to disclose latent defects).

³⁹ In 1968 more than two thirds of America's people lived in the 228 largest metropolitan areas. Only 5.2% lived on farms. The World Almanac 1970 at 251 (L. Long ed.). More than 98% of all housing starts in 1968 were non-farm. *Id.* at 313.

⁴⁰ See *J. Levi et al.*, *supra* Note 33, at 6.

⁴¹ See Part III, *supra*.

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structural defects, the tenant's position [**25] corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 375, 161 A.2d 69, 78 (1960).⁴²

Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately [**26] expect that the apartment will be fit for habitation for the time period for which it is rented. We point out that in the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases.⁴³ Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.

Even beyond the rationale of traditional products liability law, the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the [**27] tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented.⁴⁴ Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination⁴⁵ [**28] and standardized form leases,⁴⁶ mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage⁴⁷ of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the

findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely [*1080] to the unlucky ones who must suffer the daily indignity of living in a slum.⁴⁸

Thus we are led by our inspection of the relevant legal principles and precedents to the conclusion that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds. Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts⁴⁹ for urban dwellings.

[**29] B. We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. The housing code -- formally designated the Housing Regulations of the District of Columbia -- was established and authorized by the Commissioners of the District of Columbia on August 11, 1955.⁵⁰ Since that time, the code has been updated by numerous orders of the Commissioners. The 75 pages of the Regulations provide a comprehensive regulatory scheme setting forth in some detail: (a) the standards which housing in the District of Columbia must meet;⁵¹ (b) which party, the lessor or the lessee, must meet each standard; and (c) a system of inspections, notifications and criminal penalties. The Regulations themselves are silent on the question of private remedies.

[**30] Two previous decisions of this court, however, have held that the Housing Regulations create legal rights and duties enforceable in tort by private parties. In *Whetzel v.*

(1966).

⁴⁶ R. Powell, *supra* Note 10, para. 221 [1] at 183 n. 13.

⁴⁷ See generally President's Committee, *supra* Note 44.

⁴⁸ A. Schorr, *Slums and Insecurity* (1963); J. Levi, *et al.*, *supra* Note 33, at 7-8.

⁴⁹ We need not consider the provisions of the written lease governing repairs since this implied warranty of the landlord could not be excluded. See *Henningsen v. Bloomfield Motors, Inc.*, *supra* Note 19; *Kay v. Cain*, 81 U.S.App.D.C. 24, 25, 154 F.2d 305, 306 (1946). See also Note 58, *infra*.

⁵⁰ 2 D.C.Register 47 (1955).

⁵¹ These include standards for nursing homes and other similar institutions. The full scheme of the Regulations is set out in *Whetzel v. Fisher Management Co.*, *supra* Note 8.

⁴² Nor should the average tenant be thought capable of "inspecting" plaster, floorboards, roofing, kitchen appliances, etc. To the extent, however, that some defects are obvious, the law must take note of the present housing shortage. Tenants may have no real alternative but to accept such housing with the expectation that the landlord will make necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected.

⁴³ In *Brown v. Southall Realty Co.*, 237 A.2d 834 (1968), the District of Columbia Court of Appeals held that unsafe and unsanitary conditions existing at the beginning of the tenancy and known to the landlord rendered any lease of those premises illegal and void.

⁴⁴ See *Edwards v. Habib*, 130 U.S.App.D.C. 126, 140, 397 F.2d 687, 701 (1968); 2 R. Powell, *supra* Note 10, para. 221 [1] at 183; President's Committee on Urban Housing, *A Decent Home* 96 (1968).

⁴⁵ President's Committee, *supra* Note 44, at 96; National Commission, *supra* Note 9, at 18-19; G. Sternlieb, *The Tenement Landlord* 71

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Jess Fisher Management Co., 108 U.S.App.D.C. 385, 282 F.2d 943 (1960), we followed the leading case of *Altz v. Louis Lieberson*, 233 N.Y. 16, 134 N.E. 703 (1922), in holding (1) that the housing code altered the common law rule and imposed a duty to repair upon the landlord, and (2) that a right of action accrued to a tenant injured by the landlord's breach of this duty. As Judge Cardozo wrote in *Lieberson*:

"* * * We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect. * * *"

134 N.E. at 704. Recently, in *Kanelos v. Kettler*, 132 U.S.App.D.C. 133, 135, 406 F.2d 951, 953 (1968), [*31] we reaffirmed our position in *Whetzel*, holding that "the Housing Regulations did impose maintenance obligations upon appellee [landlord] which he was not free to ignore."⁵²

The District of Columbia Court of Appeals gave further effect to the Housing Regulations in *Brown v. Southall Realty Co.*, 237 A.2d 834 (1968). There the landlord knew at the time the lease was signed that housing code violations existed which rendered the apartment "unsafe and unsanitary." Viewing the lease as a contract, the District of Columbia Court of Appeals held that the premises were let in violation of Sections [*1081] 2304⁵³ and 2501⁵⁴ of the Regulations and that the lease, therefore, was void as an illegal contract. In the light of *Brown*, it is clear not only that [*32] the housing code creates privately enforceable duties as held in *Whetzel*, but that the basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term. The *Brown* court relied particularly upon Section 2501 of the

Regulations which provides:

"Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

By its terms, this section applies to maintenance and repair during [*33] the lease term. Under the *Brown* holding, serious failure to comply with this section before the lease term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after it has been signed. To the contrary, by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.

This principle of implied warranty is well established. Courts often imply relevant law into contracts to provide a remedy for any damage caused by one party's illegal conduct.⁵⁵ In a case closely analogous to the present ones, the Illinois Supreme Court held that a builder who constructed a house in violation of the Chicago building code had breached his contract with the buyer:

"* * * The law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it. * * *"

"The rationale for this rule is that the parties to the contract would have expressed that which the law implies 'had they not supposed that it was unnecessary to speak of it because the law provided for it.' * * * [*34] Consequently, the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties."⁵⁶

⁵² *Kanelos* and *Whetzel* have effectively overruled, on the basis of the enactment of the housing code, *Bowles v. Mahoney*, 91 U.S.App.D.C. 155, 202 F.2d 320 (1952) (two to one decision, Judge Bazelon dissenting).

⁵³ "No person shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin."

⁵⁴ *See infra*.

⁵⁵ *See cases cited in Annot.*, 110 A.L.R. 1048 (1937).

⁵⁶ *Schiro v. W. E. Gould & Co.*, *supra* Note 23, 18 Ill.2d at 544, 165 N.E.2d at 290. As a general proposition, it is undoubtedly true that parties to a contract intend that applicable law will be complied with by both sides. We recognize, however, that reading statutory provisions into private contracts may have little factual support in the intentions of the particular parties now before us. But, for reasons of public policy, warranties are often implied into contracts by operation of law in order to meet generally prevailing standards of honesty and fair dealing. When the public policy has been enacted into law like the housing code, that policy will usually have deep roots in the expectations and intentions of most people. *See Costigan, Implied-in-Fact Contracts and Mutual Assent*, 33 Harv.L.Rev. 376, 383-385 (1920).

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[**35] We follow the Illinois court in holding that the housing code must be read into housing contracts -- a holding also required by the purposes and the structure of the code itself.⁵⁷ The duties imposed by the Housing Regulations may [*1082] not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor.⁵⁸ [**37] Criminal penalties are provided if these duties are ignored. This regulatory structure was established by the Commissioners because, in their judgment, the grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective.⁵⁹ Innumerable studies have documented the desperate condition of rental housing in the District of Columbia and in the nation. In view of these circumstances, we think the conclusion reached by the Supreme Court of Wisconsin as to the effect of a housing code on the old common law rule cannot be avoided:

"* * * The legislature has made a policy judgment -- that it is socially (and politically) desirable to impose these duties on a property owner -- which has rendered the old common law rule obsolete. To follow the old rule of [**36] no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. * * *"⁶⁰

We therefore hold that the Housing Regulations imply a

warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.

V

In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles,⁶¹ however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged [**38] as breach of the landlord's warranty.⁶²

At [**39] trial, the finder of fact must make two findings: (1) whether the alleged violations⁶³ existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of [*1083] the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail.⁶⁴

[**40] The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid

⁵⁷ "The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live." *Edwards v. Habib*, *supra* Note 44, 130 U.S.App.D.C. at 139, 397 F.2d at 700.

⁵⁸ Any private agreement to shift the duties would be illegal and unenforceable. The precedents dealing with industrial safety statutes are directly in point:

"* * * The only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. * * *"

Narramore v. Cleveland, C., C. & St. L.Ry. Co., 6 Cir., 96 F. 298, 302 (1899). *See* W. Prosser, Torts § 67 at 468-469 (3d ed. 1964) and cases cited therein.

⁵⁹ *See* Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum.L.Rev. 1254 (1966); Note, Enforcement of Municipal Housing Codes, 78 Harv.L.Rev. 801 (1965).

⁶⁰ *Pines v. Persson*, 14 Wis.2d 590, 596, 111 N.W.2d 409, 412-413 (1961). *Accord*, *Buckner v. Azulai*, 251 Cal.App.2d Supp. 1013, 59 Cal.Rptr. 806 (1967).

⁶¹ In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability.

⁶² To be relevant, of course, the violations must affect the tenant's apartment or common areas which the tenant uses. Moreover, the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action. However, violations resulting from inadequate repairs or materials which disintegrate under normal use would not be assignable to the tenant. Also we agree with the District of Columbia Court of Appeals that the tenant's private rights do not depend on official inspection or official finding of violation by the city government. *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 494 (1969).

⁶³ The jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent.

⁶⁴ As soon as the landlord made the necessary repairs rent would again become due. Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground.

back rent is indeed owed to the landlord.⁶⁵ In these circumstances, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due.⁶⁶ If the tenant refuses to pay the partial amount, a judgment for possession may then be entered.

[**41] The judgment of the District of Columbia Court of Appeals is reversed and the cases are remanded for further proceedings consistent with this opinion.⁶⁷

[**42] So ordered.

Circuit Judge ROBB concurs in the result and in Parts IV-B and V of the opinion.

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⁶⁵ In *George Y. Worthington & Son Management Corp. v. Levy*, 204 A.2d 334, 336 (1964), the District of Columbia Court of Appeals approved a similar procedure:

"In actions for possession of real property by reason of default in rent, where no money judgment for the back rent is sought, it is nevertheless proper practice for the trial court to specifically find the amount of rent in arrears. * * *"

⁶⁶ Compare *Molyneaux v. Town House, Inc.*, D.C.C.A., 195 A.2d 744 (1963). A jury finding that the landlord had failed to live up to all of his obligations would operate as a conclusive finding that the tenant was entitled to equitable relief under *Molyneaux*.

⁶⁷ Appellants in the present cases offered to pay rent into the registry of the court during the present action. We think this is an excellent protective procedure. If the tenant defends against an action for possession on the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent

payments into the registry of the court as they become due; such a procedure would be appropriate only while the tenant remains in possession. The escrowed money will, however, represent rent for the period between the time the landlord files suit and the time the case comes to trial. In the normal course of litigation, the only factual question at trial would be the condition of the apartment during the time the landlord alleged rent was due and not paid.

As a general rule, the escrowed money should be apportioned between the landlord and the tenant after trial on the basis of the finding of rent actually due for the period at issue in the suit. To insure fair apportionment, however, we think either party should be permitted to amend its complaint or answer at any time before trial, to allege a change in the condition of the apartment. In this event, the finder of fact should make a separate finding as to the condition of the apartment at the time at which the amendment was filed. This new finding will have no effect upon the original action; it will only affect the distribution of the escrowed rent paid after the filing of the amendment.

Edwards v. Habib

United States Court of Appeals for the District of Columbia Circuit

January 22, 1968, Argued ; May 17, 1968, Decided

No. 20883

Reporter

397 F.2d 687 *; 1968 U.S. App. LEXIS 6913 **; 130 U.S. App. D.C. 126

Judges: Danaher, Wright and McGowan, Circuit Judges. McGowan, Circuit Judge (concurring except as to Parts I and II). Danaher, Circuit Judge (dissenting).

Opinion by: WRIGHT

Opinion

[*688] J. SKELLY WRIGHT, Circuit Judge:

In March 1965 the appellant, Mrs. Yvonne Edwards, rented housing property from the appellee, Nathan Habib, on a month-to-month basis. Shortly thereafter she complained to the Department of Licenses and Inspections of sanitary code violations which her landlord had failed to remedy. In the course of the ensuing inspection, more than 40 such violations were discovered which the Department ordered the landlord to correct. [*689] Habib then gave Mrs. Edwards a 30-day statutory notice¹ to vacate and obtained a default judgment for possession of the premises.² [**3] Mrs. Edwards promptly moved to reopen this judgment, alleging excusable neglect for the default and also alleging as a defense that the notice to quit was given in

¹ 45 D.C.CODE § 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."

² 45 D.C.CODE § 910 (1967), Ejectment or summary proceedings:

"Whenever 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."

See also 16 D.C.CODE § 1501 (1967).

retaliation for her complaints to the housing authorities. Judge Greene, sitting on motions in the Court of General Sessions, set aside the default judgment [**2] and, in a very thoughtful opinion, concluded that a retaliatory motive, if proved, would constitute a defense to the action for possession.³ At the trial itself, however, a different judge apparently deemed evidence of retaliatory motive irrelevant and directed a verdict for the landlord.

Mrs. Edwards then appealed to this court for a stay pending her appeal to the District of Columbia Court of Appeals, and on December 3, 1965, we granted the stay, provided only that Mrs. Edwards continue to pay her rent. *Edwards v. Habib*, 125 U.S.App.D.C. 49, 366 F.2d 628 (1965). She then appealed to the DCCA, which affirmed the judgment of the trial court. 227 A.2d 388 (1967). In reaching its decision the DCCA relied on a series of its earlier decisions holding that [**4] a private landlord was not required, under the District of Columbia Code, to give a reason for evicting a month-to-month tenant and was free to do so for any reason or for no reason at all.⁴ The court acknowledged that the landlord's right to terminate a tenancy is not absolute, but felt that any limitation on his prerogative had to be based on specific statutes or very special circumstances.⁵ Here,

³ Rule 55(e) (2) of the Court of General Sessions provides that a motion to vacate a judgment of default shall be accompanied by a verified answer "setting up a defense sufficient if proved to bar the claim in whole or in part." Though the rule does not apply in landlord and tenant actions, Judge Greene felt that it constituted "a reliable guide to the exercise of the Court's determination on a default." Consequently he did not simply reopen the judgment upon a showing of excusable neglect, but went on to consider whether the defendant had set up a "defense sufficient, if proved, to bar the claim."

⁴ *Fowel v. Continental Life Ins. Co.*, D.C.Mun.App., 55 A.2d 205 (1947); *Warthen v. Lamas*, D.C.Mun.App., 43 A.2d 759 (1945). In *Fowel* the court held that evidence as to the landlord's reasons for seeking possession was inadmissible.

⁵ The DCCA acknowledged three distinct lines of cases "wherein a landlord's right to terminate a tenancy has been limited." 227 A.2d at 390. First, where a governmental body is the landlord, it is subject to the requirements of due process and cannot act arbitrarily towards its tenants. *Rudder v. United States*, 96 U.S.App.D.C. 329, 331, 226 F.2d 51, 53 (1955); *Housing Authority of City of Los Angeles v. Cordova*,

the [*690] court concluded, the tenant's right to report violations of law and to petition for redress of grievances was not protected by specific legislation and that any change in the relative rights of tenants and landlords should be undertaken by the legislature, not the courts. We granted appellant leave to appeal that decision to this court. We hold that the promulgation of the housing code by the District of Columbia Commissioners at the direction of Congress impliedly effected just such a change in the relative rights of landlords and tenants and that proof of a retaliatory motive does constitute a defense to an action of eviction. Accordingly, we reverse the decision of the DCCA with directions that it remand to the Court of General Sessions for a new trial where Mrs. [**5] Edwards will be permitted to try to prove to a jury that her landlord who seeks to evict her harbors a retaliatory intent.

[**6] I

Appellant has launched a constitutional challenge to the judicial implementation of 45 D.C. CODE §§ 902 and 910 in aid of a landlord who is evicting because his tenant has reported housing code violations on the premises. We do not, however, reach the question whether it is unconstitutional for the court to apply the statute in such circumstances because we think Congress never intended that it be so applied. Nevertheless, because constitutional considerations inform the statutory construction on which

130 Cal.App.2d Supp. 883, 885, 279 P.2d 215, 216 (1955), *cert. denied*, 350 U.S. 969, 76 S. Ct. 440, 100 L. Ed. 841 (1956). *See also* Thorpe v. Housing Authority, 386 U.S. 670, 87 S. Ct. 1244, 18 L. Ed. 2d 394 (1967). Second, where there is emergency rent control legislation restricting the contractual rights of landlords. Block v. Hirsh, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1921). And third, where eviction was in retaliation for the tenant's registering to vote or actually voting. United States v. Bruce, 5 Cir., 353 F.2d 474 (1965); United States v. Beaty, 6 Cir., 288 F.2d 653 (1961). The DCCA distinguished the voting cases as involving "specific *** legislation" enacted to protect the right intimidated by eviction. The court also acknowledged, without evaluative comment, that some courts have allowed a tenant to show as a defense that his eviction was sought solely because of his race. Abstract Investment Co. v. Hutchinson, 204 Cal.App.2d 242, 22 Cal.Rptr. 309 (1962). Racially restrictive covenants are unenforceable in the District in part because their enforcement might be contrary to "the public policy of the United States." Hurd v. Hodge, 334 U.S. 24, 34, 68 S. Ct. 847, 853, 92 L. Ed. 1187 (1948).

⁶The lurking constitutional issues are relevant to our construction of the statutes in two ways. First, where two interpretations are plausible, we should opt for the one that avoids the constitutional questions. District of Columbia v. Davis, 125 U.S.App.D.C. 311, 371 F.2d 964, *cert. denied*, 386 U.S. 1034, 87 S. Ct. 1487, 18 L. Ed. 2d 598 (1967). And second, in 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. *See* Kent v. Dulles, 357 U.S.

our decision rests, we do discuss them briefly.⁶

[**7] Appellant argues first that to evict her because she has reported violations of the law to the housing authorities would abridge her First Amendment rights to report violations of law and to petition the government for redress of grievances. But while it is clear beyond peradventure that the making of such complaints is at the core of protected First Amendment speech,⁷ and that punishment, in the form of eviction, if imposed by the state would unconstitutionally abridge First Amendment rights, it is equally clear that these rights are rights against government, not private parties. Consequently, before appellant can prevail on this theory she must show [*691] that the government is in some relevant sense responsible for inhibiting her right to petition for redress of grievances; she must show, in other words, the requisite "state action."⁸ Appellant seeks to overcome this obstacle by arguing that the use of courts to effect her eviction sufficiently implicates the state as to bring into play constitutional constraints. She relies on an unreported decision of the United States District Court for the Southern District of New York, where the court invoked just such a theory [**8] to support the issuance of a preliminary injunction restraining an alleged retaliatory rent increase. *Tarver v. G. & C. Construction Corp.*, S.D.N.Y., November 9, 1964.

[**9] There can now be no doubt that the application by

116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958); *Yates v. United States*, 354 U.S. 298, 319, 77 S. Ct. 1064, 1077, 1 L. Ed. 2d 1356 (1957): "We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone * * *."

⁷The First Amendment gives express recognition to the right of the people "to petition the Government for a redress of grievances." U.S.Const., Amend. I. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1960), a republication in expanded form of his work FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP.CT.REV. 245; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP.CT.REV. 191.

⁸The concept of "state action" generally comes into play where there is an alleged denial of the Fourteenth Amendment's equal protection guarantee. State action is also required under the Fifteenth Amendment. The doctrine was born in the Civil Rights Cases, 109 U.S. 3, 11, 3 S. Ct. 18, 27 L. Ed. 835 (1883), and it has been suggested that it has long since died, at least where racial discrimination is involved. *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV.L.REV. 69, 84-91 (1967). The "state action" concept is also relevant where First Amendment freedoms are at stake. *See, e.g.*, *Marsh v. State of Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). This may be so even where the court is simply enforcing a privately negotiated contract. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). But the nature and extent of the judicial involvement required to bring into play these constitutional constraints is unclear. The central case is, of course, *Shelley v. Kraemer*, where the Court ruled that judicial enforcement of private agreements containing restrictive covenants against selling to Negroes violated the Fourteenth Amendment's command that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws." But the contours of *Shelley* remain undefined and it is uncertain just how far its reasoning extends.⁹ [*11] Judge Greene declined [*10] to rest his opinion on *Shelley* for fear that if, for constitutional purposes, 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. He accepted the reasoning of Mr. Justice Black, who joined in the *Shelley* opinion but has since maintained that its doctrine applies only where, as in *Shelley* itself, the court is called upon to upset a transaction between a willing buyer and a willing seller.¹⁰ Others, [*692] however, have urged different interpretations of *Shelley*, ones which would extend its principle beyond its facts but would still leave certain private rights, even when judicially enforced, immune from the Constitution's restraints on government.

Some commentators have suggested that private action is subject to constitutional scrutiny [*12] only when the state has encouraged or sanctioned it.¹¹ [*14] Others have gone further and suggested that at least where racial discrimination is involved the state denies the equal protection of the law when it does not act affirmatively to assure equal protection by legislating against privately initiated, as well as governmental, discrimination.¹² But

⁹ *Shelley* has been called "constitutional law's *Finnegan's Wake*." Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV.L.REV. 143, 148 (1964). And many commentators have sought the skeleton key that adequately explains it. *See, e.g.*, Henklin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U.P.A.L.REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM.L.REV. 1083, 1108-1120 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U.P.A.L.REV. 1 (1959). It has also been severely criticized. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV.L.REV. 1, 29 (1959).

¹⁰ *Bell v. State of Maryland*, 378 U.S. 226, 331, 84 S. Ct. 1814, 12 L. Ed. 2d 822 (1964) (dissenting opinion of Mr. Justice Black). *But see* dissenting opinion of Mr. Justice Douglas in *Black v. Cutter Laboratories*, 351 U.S. 292, 300, 76 S. Ct. 824, 100 L. Ed. 1188 (1956), in which Mr. Justice Black joined. Professor Pollak, who thinks *Shelley* was rightly decided, would apparently limit it in much the same way. "The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained. The principle underlying the distinction is this: the fourteenth amendment permits each his personal prejudices and guarantees him free speech and press and worship, together with a degree of free economic enterprise, as instruments with which to persuade others to adopt his prejudices; but access to state aid to induce others to conform is barred." Pollak, *supra* Note 9, at 13.

¹¹ As the Court felt it did in *Reitman v. Mulkey*, 387 U.S. 369, 377, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); *Lombard v. State of Louisiana*, 373 U.S. 267, 273, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963); *Barrows v. Jackson*, 346 U.S. 249, 254, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). This is the traditional view sanctioned in the Civil Rights Cases, *supra* Note 8. *But see* *United States v. Guest*, 383 U.S. 745, 755-756, 86 S.

Ct. 1170, 16 L. Ed. 2d 239 (1966); *Bullock v. United States*, 6 Cir., 265 F.2d 683, *cert. denied*, 360 U.S. 909, 932, 79 S. Ct. 1294, 3 L. Ed. 2d 1260 (1959); *Kasper v. Brittain*, 6 Cir., 245 F.2d 92, *cert. denied*, 355 U.S. 834, 78 S. Ct. 54, 2 L. Ed. 2d 46 (1957); *Brewer v. Hoxie School District No. 46*, 8 Cir., 238 F.2d 91 (1956). And the state is responsible for the acts of its officials even where the acts are unauthorized or forbidden by law. *United States v. Raines*, 362 U.S. 17, 25, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (raising a Fifteenth Amendment state action question); *Screws v. United States*, 325 U.S. 91, 108, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945). It may also be responsible where it permits private bodies to perform an essentially governmental function, *Evans v. Newton*, 382 U.S. 296, 299, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966); *Terry v. Adams*, 345 U.S. 461, 469, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) (Fifteenth Amendment); *Smith v. Allwright*, 321 U.S. 649, 662-663, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (Fifteenth Amendment), or where it owns and leases property to a private body, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), or where a common carrier's operations are authorized by the state, *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 161-162, 35 S. Ct. 69, 59 L. Ed. 169 (1914), or where because of private discrimination those discriminated against are denied equal access to governmental benefits. *Simkins v. Moses H. Cone Memorial Hospital*, 4 Cir., 323 F.2d 959 (1963), *cert. denied*, 376 U.S. 938, 84 S. Ct. 793, 11 L. Ed. 2d 659 (1964); *Derrington v. Plummer*, 5 Cir., 240 F.2d 922, 925-926 (1956), *cert. denied*, 353 U.S. 924, 77 S. Ct. 680, 1 L. Ed. 2d 719 (1957). The 1964 Civil Rights Act, along with the Supreme Court's interpretation of it in *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964), have mooted, at least for the time being, the question what, if any, state action is required to bring the Fourteenth Amendment to bear against privately owned public accommodations.

¹² *See, e.g.*, Black, *supra* Note 8, at 73-74; Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection*

these commentators are careful to point out that *Shelley* should not be read to hold that a state cannot enforce any discrimination which it could not itself make.¹³ There is, on this view, unconstitutional action by inaction except [*693] in those situations where the Constitution itself demands inaction; that is, in those situations where the state could not legislate equality because to do so would impinge on the individual discriminator's countervailing rights of liberty, property and privacy.¹⁴ The state, through its police or courts, could aid an individual in his quest to keep Negroes from a dinner party in his home even though it could not keep Negroes from a courthouse cafeteria¹⁵ or even from a privately owned hotel solely on account of their race. Consequently this theory might dull, but it would not obliterate, [**13] the distinction between private and state action.

Were this analysis of state action by inaction under the equal protection clause [**15] unqualifiedly applied where the question was governmental action under the First Amendment, there is no doubt that Mrs. Edwards' eviction could not be sustained. Not only would the government have failed to protect her against private reprisals for the exercise of her First Amendment rights (and clearly it could constitutionally protect her if it chose to do so),¹⁶ [**16] but it would, through its court, actually be aiding the individual who seeks to intimidate the exercise of those rights.¹⁷ It may

Guarantee, 66 COLUM.L.REV. 855 (1966); Henkin, *supra* Note 9, at 481-485. The literature on "state action" generally is voluminous. See sources cited in footnotes 6 and 34 of Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.REV. 219, 222 and 231. And more recently, Black, *supra* Note 8; Horowitz and Karst, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP.CT.REV. 39.

¹³ The state court, for instance, could constitutionally probate a will leaving the deceased's property to the Catholic Church, even though the state could not constitutionally make a comparable disposition of its own funds.

¹⁴ See Black, *supra* Note 8, at 100-103; Henkin, *supra* Note 9, at 487-496.

¹⁵ *Derrington v. Plummer*, *supra* Note 11.

¹⁶ Even in its heyday, the state action doctrine did not preclude federal legislation protecting from private interference the exercise of the right to report violations of law. In *re Quarles and Butler*, 158 U.S. 532, 536, 15 S. Ct. 959, 39 L. Ed. 1080 (1895). Unquestionably such legislation governing merely the District of Columbia would be valid.

¹⁷ Given the current state of the law in the District, it is questionable that a landlord could ever evict a resisting tenant without the aid of the courts. See *Fisher v. Parkwood, Inc.*, D.C.App., 213 A.2d 757, 759 (1965). And in view of our stay, judicial action to effect an eviction in this case would be indispensable. To some commentators the question of "state action" turns on whether judicial action was essential to the

be, however, that what is state action under the Fourteenth Amendment is not always state action under the First. To begin with, the Reconstruction amendments were enacted with a particular purpose in mind: to eradicate forever the vestiges of slavery and the black codes.¹⁸ [**17] In addition, the language of the First Amendment, "Congress shall make no law * * *," is not as amenable as the Fourteenth Amendment is to the construction that there is state action by inaction or by judicial action which merely gives legal effect to privately made decisions. Indeed those who have expounded this theory of state action have been careful to limit their case to the area of racial discrimination.¹⁹

But this does not end the matter. In *New York Times Co. v. Sullivan*, *supra*, the state of Alabama neither forced nor even encouraged Police Commissioner Sullivan to sue the *New York Times*. It simply provided courts in which such a suit could be brought, and its common law provided the doctrine upon which the dispute would be settled. There was no suggestion in the Supreme Court's opinion that the doctrine was not fairly and honestly applied by the state court. Yet the Court, hardly pausing even to [*694] consider the question of state action,²⁰ [**18] held that a libel judgment against the *Times*, on the facts of that case, unconstitutionally abridged the *Times*' First Amendment rights as incorporated in the Fourteenth

deprivation of the alleged right. See, e.g., Note, *Landlord and Tenant -- Retaliatory Evictions*, 3 HARV.CIV.R.-CIV.LIB.L.REV. 193, 197-198 (1967). Pollak's view is somewhat similar, see Note 10 *supra*.

¹⁸ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72, 21 L. Ed. 394 (1872); *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 9, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); see also J., TEN-BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM.L.REV. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV.L.REV. 1 (1955).

¹⁹ Black, *supra* Note 8, at 70; Henkin, *supra* Note 9, at 473 n. 2.

²⁰ "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court -- that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. * * *" 376 U.S. at 265, 84 S. Ct. at 718.

Amendment's due process clause. The fact that Congress and the state legislature had "made no law" was apparently irrelevant to this determination.²¹

A state court judgment, then, even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws. Of course, the federal court review in *Times* was technically under the due process clause of the Fourteenth Amendment as it incorporates the First, while here the challenge is made under the First Amendment itself. But there is no reason to think that review under the First Amendment is more limited.²² In any case, review under the Fifth Amendment's due process clause would not be. [**19] *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). And it may be that the more flexible concept of due process is preferable where the question is one involving First Amendment rights and the government, though perhaps sufficiently implicated in the abridgement to bring into play constitutional constraints, is not directly responsible [*695] for it. It may be instructive to borrow again from other state action theorists whose analyses, though concerned primarily with racial discrimination, are somewhat less rigid and therefore may transfer more

comfortably from the area of racial discrimination under the Fourteenth Amendment into the context of First Amendment rights.

[**20] It has been suggested that there is state action, not only when an individual asserts a claim of right against a state, but also when he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable under the circumstances, *i.e.*, according to its law.²³ [**21] Once this "state action" is established, the question then becomes simply "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action."²⁴

The question in the instant case would then be whether a court can consistently with the Constitution prefer the interests of an absentee landlord²⁵ [**23] in evicting a tenant solely because she has reported violations of the housing code to those of a tenant in improving her housing by resort to her rights to petition the government and to report violations of laws designed for her protection. On this theory, if it would be unreasonable to prefer the landlord's interest, it would also be unconstitutional.²⁶ Mr. Justice

²¹ It was enough that a common law rule was applied to mediate conflicting claims of right between private parties. Though highly relevant to the Court's decision on the merits, the fact that the plaintiff was a state official was not a factor in the Court's determination that there was reviewable state action. For an excellent discussion of the state action implications of *New York Times*, see Van Alstyne, *supra* Note 12, at 227-230.

²² It is of course true that the First Amendment explicitly proscribes only congressional action. But at least as incorporated into the Fourteenth, it invalidates any "state action" which abridges the freedoms it protects. Action by a state legislature is not required. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). There is no more reason to require congressional action where the challenge is made under the First Amendment itself. As Mr. Justice Black put it: "The First and Fourteenth Amendments, I think, take away from *government*, state and *federal*, all power to restrict freedom of speech, press, and assembly * * *." *Cox v. State of Louisiana*, 379 U.S. 536, 578, 85 S. Ct. 453, 468, 13 L. Ed. 2d 471 (1965) (concurring and dissenting opinion). (Emphasis added.) Compare *Hurd v. Hodge*, *supra* Note 5, 334 U.S. at 35, 68 S. Ct. at 853: "It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws." Of course there are acts of Congress, 45 D.C.CODE §§ 902 and 910, 16 D.C.CODE § 1501, at play in the instant case. But to say that these statutes, as applied here, might be unconstitutional would be an accurate but artificial way of putting the issue. In general, the statutes simply provide the landlord with a

judicial mechanism for achieving what he could traditionally accomplish by self-help. They say nothing about what if any defenses are available to the tenant. Consequently a more informative way of framing the question would be: Is it unconstitutional for the court not to permit a defense under them that eviction is sought in retaliation for the exercise of First Amendment rights? Indeed, rights of federal citizenship? See text *infra*, Part II.

²³ Van Alstyne, *supra* Note 12, at 241-245; Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF.L.REV. 1 (1964); Williams, *The Twilight of State Action*, 41 TEXAS L.REV. 347 (1963); Van Alstyne and Karst, *State Action*, 14 STAN.L.REV. 3 (1961); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO.CAL.L.REV. 208 (1957).

²⁴ Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, *supra* Note 23, at 209.

²⁵ The fact that Mrs. Edwards is not in any sense a boarder in Mr. Habib's home would, on this theory, be relevant in assessing his interest in associating with whom he pleases. Compare Appendix I to Mr. Justice Douglas' concurring opinion in *Bell v. State of Maryland*, *supra* Note 10, 378 U.S. at 261-271, 84 S. Ct. 1814, 12 L. Ed. 2d 822.

²⁶ If Congress had made an unambiguous judgment that in the context of the instant case the landlord's interests were to be preferred to the tenant's, this court would owe that judgment great deference, more than the Supreme Court would owe comparable judgments of state legislatures. If, however, the statute was unclear, we would owe no deference to the DCCA's interpretation of it, while the Supreme Court would defer to a comparable construction by a state court of a state

Black, who is not prone to weigh interests where First Amendment rights are involved,²⁷ seems to have taken just this approach in writing for the Court in *Marsh v. State of Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), which, like the instant case, involved state-aided privately-initiated abridgement of First Amendment freedoms.²⁸ [*24] [*696] The question before the Court in *Marsh* was "whether a State, consistently with the First [*22] and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management." 326 U.S. at 502, 66 S. Ct. at 277. In answering it, Mr. Justice Black felt compelled to "balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion" and in doing so remained mindful "of the fact that the latter occupy a preferred position." 326 U.S. at 509, 66 S. Ct. at 280. He concluded that the state acted unconstitutionally in preferring the property rights of the town's owners to those of the defendant and the town's residents²⁹ through the application of its criminal trespass statute to Mrs. Marsh. "Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." *Ibid.*

Again it should be remembered that in *Times* the state did not initiate the action, nor did it encourage the private parties involved to do so. And in *Marsh* there could have been no prosecution without a private complaint. In both cases the

statute.

²⁷ See, e.g., his dissenting opinions in *Konigsberg v. State Bar*, 366 U.S. 36, 56, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961); *Braden v. United States*, 365 U.S. 431, 438, 81 S. Ct. 584, 5 L. Ed. 2d 653 (1961); *Barenblatt v. United States*, 360 U.S. 109, 134, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959); *Dennis v. United States*, 341 U.S. 494, 579, 71 S. Ct. 857, 95 L. Ed. 1137 (1951). See also Black, *The Bill of Rights*, 35 N.Y.U.L.REV. 865 (1960).

²⁸ Mr. Justice Black will also apparently resort to a balancing approach where he perceives "speech plus" as he did in *Cox v. State of Louisiana*, *supra* Note 22, 379 U.S. at 578, 85 S. Ct. at 468 "This Court does, and I agree that it should, 'weigh the circumstances' in order to protect, not to destroy, freedom of speech, press, and religion." If there is ever such a thing as "speech pure" (see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP.CT.REV. 1, 23-25), we have it in the instant case. For Mrs. Edwards' speech itself does not interfere in any way with the legitimate property interests of her landlord or anyone else. The question on this theory would simply be whether it is unreasonable for the government not to limit property rights by forbidding retaliatory evictions in order to protect the tenant's right to report housing code violations.

²⁹ Just as the interests of the company town's residents were considered by the Court in *Marsh*, so here the interests of other tenants who would

state simply provided courts and laws to settle essentially private disputes.³⁰ Where its settlement impinged on First Amendment freedoms, a balancing process was utilized on review to determine whether it did so unconstitutionally.³¹ But we need not undertake such a weighing of interests here or even decide if such a process is appropriate, for we find, as indicated in Part III, that Congress, by directing the enactment of the housing code, impliedly directed the court to prefer the interests of the tenant who [*25] seeks to avail himself of the code's protection.

[*26] II

Appellant argues that, even if *Shelley* and the concept of "state action" are interpreted narrowly, and if the judicial implementation of the D.C. Code to effect a retaliatory eviction does not violate her First Amendment rights, her eviction would be unconstitutional nonetheless because the right to petition the government and to report violations of law is constitutionally protected against private as well as governmental interference. There is strong support for this position. In *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1867), decided before the Fourteenth Amendment was enacted, the Court struck down Nevada's one-dollar tax on anyone leaving the state in part because the Court felt that such a tax might infringe the individual's right to travel to Washington to participate in, and seek redress from, the government. And in *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 23 L. Ed. 588 (1876),

be deterred from seeking to improve their housing by reporting code violations to the authorities would have to be considered in deciding whether Mrs. Edwards' eviction would be reasonable.

³⁰ See also *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941), where the Supreme Court struck down an Illinois statute which gave employers the right to secure an injunction against picketing of their shops when there was no existing dispute between the employer and his employees. Nothing in the statute required or encouraged the employer to utilize the injunctive mechanism at his disposal. If he wished to permit such picketing he was free to do so. Consequently any decision to impair the alleged First and Fourteenth Amendment rights of the pickets was solely that of a private party, not that of the state. *Swing* was cited and relied upon in *Shelley v. Kraemer*, 334 U.S. 1, 17, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). The case is discussed in *Van Alstyne*, *supra* Note 12, at 226-227. See also Mr. Justice Harlan's concurring and dissenting opinion in *Peterson v. City of Greenville*, 373 U.S. 244, at 249, 83 S. Ct. 1119, 10 L. Ed. 2d 323 (1963).

³¹ The balance where First and Fourteenth Amendment rights are involved may be different. The individual's interest in being free to choose his associates on the basis of what they do or say may be entitled to more weight than such choices made on the basis of what they are, *i.e.*, on the basis of race.

in dictum³² [**29] and in *In re Quarles and Butler*, 158 U.S. 532, 15 S. Ct. 959, 39 L. Ed. 1080 (1895), as holding, the Court was even more explicit in recognizing the right to petition the government for redress [**27] of grievances and the right to inform the government of violations of law as rights of federal citizenship arising from our constitutional system as a whole, not just from the First Amendment or from any other particular constitutional clause or provision. In *Quarles* the Supreme Court affirmed the conviction under the Civil Rights Act of a private citizen for conspiring to "injure, oppress, threaten, or intimidate [another] in the free exercise * * * of [a] right * * * secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."³³ The defendant and his accomplices had threatened and beaten one Worley for informing federal officers that the defendant was violating the federal liquor law. The defendant argued that Worley had no right to inform that was protectable against private interference. But the Court rejected this argument, stating 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 [**28] by the Constitution itself of a national government, paramount and supreme within

its sphere of action. * * *

"* * * [As the Court said in *Ex parte Yarbrough*, 110 U.S. 651, 662, 4 S. Ct. 152, 28 L. Ed. 274 [**698] (1884)]: 'The power [to protect certain rights from private interference] arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. * * * It is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself * * * .

* * *

"The necessary conclusion is * * that this right is secured to the citizen by the Constitution of the United States * * * ." 158 U.S. at 536-537, 15 S. Ct. at 961.

This right, appellant argues, is accordingly protected against private as well as governmental interference.³⁴ It is on the basis of this theory that Judge Greene found that proof of a retaliatory purpose constituted a valid defense.

[**30] But though this argument from *Quarles* is persuasive, it is not conclusive, for at issue in *Quarles* was the applicability and constitutionality of the Civil Rights Act to punish private interferences with the right to report

³² *Cruikshank* involved a prosecution under § 6 of the Enforcement Act of May 31, 1870, 16 Stat. 141 (now, as amended, 18 U.S.C. § 241 (1964 ed.)), which made it a felony for two or more persons to "band or conspire together * * * with intent to * * * injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same * * * ." On a motion in arrest of judgment after a verdict of guilty, the Supreme Court found all counts of the indictment defective because they did not allege action by the state and thus the conspiracy was beyond the reach of federal law. But, the Court said, "If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose [that of consulting in respect to public affairs and to petition the government for redress of grievances], the case would have been within the statute, and within the scope of the sovereignty of the United States." For the right to assemble for these purposes "is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States." Because the right arose not simply from the Bill of Rights but from "the very idea of government, republican in form," they could be protected against private as well as official interference. 92 U.S. (2 Otto) at 552-553. See also *United States v. Classic*, 313 U.S. 299, 315, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); *Logan v. United States*, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892); *United States v. Waddell*, 112 U.S. 76, 5 S. Ct. 35, 28 L. Ed. 673 (1884); *Ex parte Yarbrough*, 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274 (1884). For a thoughtful analysis of congressional power under § 5 of the

Fourteenth Amendment, see *Cox Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV.L.REV. 91 (1966). On the development of federal power generally, see R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* (1947); H. CUMMINGS & C. McFARLAND, *FEDERAL JUSTICE* (1937); 2 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES*, Ch. XV, Sec. D (1967).

³³ Section 5508, Revised Statutes 1874-1878, now, as amended, 18 U.S.C. § 241.

³⁴ Federal law can protect such rights (at least the right to vote) from privately exercised economic intimidation as well as from more violent forms of coercion. The current civil rights statutes do just that. See *United States v. Beaty*, *supra* Note 5. Even "conduct that might be perfectly legal, if not colored by the bad intent of interfering with the right to [register and] vote" may become "illegal upon proof of such illegal intent." *United States v. Bruce*, *supra* Note 5, 353 F.2d at 476, where the intimidation took the form of a conspiracy by landlords to invoke the state trespass laws to keep one Brown, a Negro insurance collector, from reaching many of his policyholders who were tenants on their land. Brown had been active in urging his friends and neighbors to vote and the court felt that the allegations of the complaint, which had been dismissed below, made a showing from which it could be inferred that the landlords' ban of Brown was in reprisal for his participation in the voter registration drive. See also *United States by Katzenbach v. Original Knights of the Ku Klux Klan*, E.D.La., 250 F. Supp. 330 (1965), and cases discussed therein.

violations of law, not the questions, first, whether such interferences were themselves unconstitutional in the absence of remedial legislation, and second, if unconstitutional, what legal consequences attached to them. The DCCA rejected the argument for just this reason, saying that *Quarles* was a case where "Congress enacted special legislation to secure certain rights." 227 A.2d at 391. Presumably the legislation referred to is the Civil Rights Act, and the DCCA apparently felt that current civil rights statutes would not apply to this case. But the enforcement section of the Civil Rights Act provided remedies for the deprivation of rights secured by the Constitution or laws of the United States. It did not create new rights. And the Supreme Court held in *Quarles* that the right to report violations of law was a constitutional right protectable by federal legislation against private interference, not that it was itself a right created [**31] by the Civil Rights Act. It is this constitutional right that Mrs. Edwards is setting up as a defense to the landlord's action of eviction. It is not necessarily relevant, therefore, that because of the peculiar requirements of the civil rights statutes they may not provide her with additional affirmative civil³⁵ or criminal remedies³⁶ [**32] for violation of the same right.³⁷

[*699] III

But we need not decide whether judicial recognition of this constitutional defense is constitutionally compelled. We need not, in other words, decide whether 45 D.C. CODE § 910 could validly compel the court to assist the plaintiff in penalizing the defendant for exercising her constitutional right to inform the government of violations of the law; for we are confident that Congress did not intend it to entail

³⁵ 42 U.S.C. § 1983 (1964 ed.) establishes a right of action for the deprivation of any "rights, privileges, or immunities secured by the Constitution and laws" only against persons acting under color of law. And only under color of the law of a state or territory. *Gregoire v. Biddle*, 2 Cir., 177 F.2d 579, 581 (1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950). 42 U.S.C. § 1985(3) (1964 ed.), which establishes a right of action against interference or intimidation by private individuals, requires a conspiracy by two or more persons.

³⁶ 18 U.S.C. § 241 which provides criminal penalties for interference with rights or privileges secured by the Constitution or laws of the United States requires a conspiracy, while 18 U.S.C. § 242 (1964 ed.) penalizes only those acting under color of law. (Section 242 is not, however, limited to those acting under the law of a state or territory.)

³⁷ As with *Shelley*, there are, conceivably, problems in containing the *Quarles* doctrine. Could, for instance, a landlord invite all his tenants to dinner except those who had complained of housing code violations? Again the landlord's countervailing constitutional rights of privacy and association may be the cutting edge. Or perhaps such petty slights do not rise to the level of intimidation, coercion, interference or punishment. Finally, as Judge Greene pointed out, appellant is

such a result.

45 D.C. CODE § 910, in pertinent part, provides:

[**33]

"Whenever * * * any tenancy shall be terminated by notice as aforesaid [45 D.C. CODE § 902, *see Note 1 supra*], and the tenant shall fail or refuse to surrender possession of the leased premises, * * * 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."

And 16 D.C. CODE § 1501, in pertinent part, provides:

"When a person detains possession of real property * * * after his right to possession has ceased, the District of Columbia Court of General Sessions * * * may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for restitution of possession."

These provisions are simply procedural. They neither say nor imply anything about whether evidence of retaliation or other improper motive should be unavailable as a defense to a possessory action brought under them. It is true that in making his affirmative [**34] case for possession the landlord need only show that his tenant has been given the 30-day statutory notice, and he need not assign any reason for evicting a tenant who does not occupy the premises under a lease. But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities.³⁸ [**35] As a matter of statutory construction and for reasons of public policy,³⁹

simply setting up her constitutional right as a defense, and is not seeking affirmative relief based on it.

³⁸ In *L'Orange v. Medical Protective Co.*, 6 Cir., 394 F.2d 57 (1968), the Sixth Circuit held that a malpractice insurer could not cancel the policy of an Ohio dentist simply because the insured testified in a malpractice suit against a colleague insured by the same company. Presumably the policy could have been cancelled for any lawful reason or for no reason at all, but it could not be cancelled for the purpose of intimidating a witness in contravention of Ohio's public policy. *See also* *Petermann v. International Brotherhood of Teamsters, etc.*, Local 396, 174 Cal.App.2d 184, 344 P.2d 25 (1959), which held that a union could not fire one of its employees even though there was no fixed term of employment if the reason for the dismissal of the employee was his refusal to give false testimony before a legislative investigating committee. Such a dismissal, it was held, contravened California's policy against perjury.

³⁹ *Compare* *Hurd v. Hodge*, *supra* Note 5, 334 U.S. at 34-35, 68 S. Ct. at 852-853: "But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in

such an eviction cannot be permitted.

[*700] The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live.⁴¹ Effective implementation and enforcement of the codes obviously [*36] depend in part on private initiative in the reporting of violations. Though there is no official procedure for the filing of such complaints, the bureaucratic structure of the Department of Licenses and Inspections establishes such a procedure,⁴² [*38] and for fiscal year 1966 nearly a third of the cases handled by the Department arose from private complaints.⁴³ To permit

the exercise of its supervisory powers over the courts of the District of Columbia. The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents." (Footnotes omitted.)

⁴⁰ The District Commissioners have promulgated extensive housing regulations which require landlords to keep their premises in "clean, safe and sanitary condition." HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA, §§ 2101, 2304 (1956). The purpose of the Regulations is set forth 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 being the following: dilapidation, inadequate maintenance, overcrowding, inadequate toilet facilities, inadequate bathing or washing facilities, inadequate heating, 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."

41

"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).

retaliatory [*701] evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington.⁴⁴

As judges, "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." *Ho Ah Kow v. Nunan*, C.C.D.Cal., 5 SAWY. 552, 12 Fed.Cas. 252, 255 (No. 6546) (1879). In trying to effect the will of Congress [*39] and as a court of equity we have the responsibility to consider the social context in which our decisions will have operational effect. In light of the appalling condition and shortage of housing in Washington,⁴⁵ [*40] the expense of moving, the inequality of

See also 1 D.C.CODE § 226 (1967); 5 D.C.CODE § 701 (1967).

These functions were transferred without change to the District of Columbia Council pursuant to Reorganization Plan No. 3 of 1967, 32 FED.REG. 11669, 11672 (1967), U.S. CODE CONG. & ADMIN. NEWS 1967, p. 3537. *See also* 1 D.C.CODE §§ 224a, 226 (1967); 5 D.C.CODE § 616 (1967); 47 D.C.CODE § 2328 (1967); *Whetzel v. Jess Fisher Management Co.*, 108 U.S.App.D.C. 385, 282 F.2d 943 (1960). Congress' concern with housing conditions and housing code enforcement generally is evidenced in 42 U.S.C. §§ 1441 (1964 ed.), 1451(c), 1468 (Supp. II 1965-66). *See also* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO.L.J. 519, 525-526 (1966).

⁴² Reorganization Order No. 55, Part III, C., 6., 1 D.C.CODE, Appendix, at 137 (1967).

⁴³ Of 47,701 cases handled, almost 15,000 were initiated by private complaint. *See* HEARINGS BEFORE THE SUBCOMMITTEE ON BUSINESS AND COMMERCE OF THE SENATE COMMITTEE ON THE DISTRICT OF COLUMBIA ON S. 2331, S. 3549 AND S. 3558, 89th Cong., 2d Sess., at 52 (1966). And the need for increased private and group participation in code enforcement has been widely recognized. Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM.L.REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV.L.REV. 801, 843-860 (1965). *See also* Sax and Hiestand, *Slumlordism as a Tort*, 65 MICH.L.REV. 869 (1967).

⁴⁴ HEARINGS, *supra* Note 43, at 23, 90-114, 142-155, 192-196.

⁴⁵ *See Report of the National Capital Planning Commission, Problems of Housing People in Washington, D.C.*, reprinted in HEARINGS, *supra* Note 43, at 410:

"* * * Poor families are responding to Washington's housing shortage by doubling and overcrowding; by living in structurally substandard or other hazardous housing; by sharing or doing without hot water, heat, light, or kitchen or bathroom facilities; by farming out their children wherever they can; by denying their children exist to landlords and public officials; by paying rents which are high compared to incomes so they must sacrifice

bargaining power between tenant and landlord,⁴⁶ and the social and economic importance of assuring at least minimum standards in housing conditions,⁴⁷ we do not hesitate to declare that retaliatory eviction cannot be tolerated. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. 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, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment, 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.

[**41] The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be

other living necessities; and by living without dignity or privacy. Each one of these features has been measured separately or has been observed in Washington's poverty areas."

See also Schoshinski, *supra* Note 41, at 519 *ff.*

⁴⁶ See *Kay v. Cain*, 81 U.S.App.D.C. 24, 25, 154 F.2d 305, 306 (1946).

⁴⁷ "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." *Berman v. Parker*, 348 U.S. 26, 32-33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954). See also *Frank v. State of Maryland*, 359 U.S. 360, 371, 79 S. Ct. 804, 811, 3 L. Ed. 2d 877 (1959): "The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive break-down in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government."

According to the *Report of the Planning Commission*, *supra* Note 45, at pp. 5-6, "more than 100,000 children are growing up in Washington now under one or more housing conditions which create psychological, social, and medical impairments, and make satisfactory home life difficult or a practical impossibility." Reprinted in *HEARINGS*, *supra* Note 43, at 410.

⁴⁸ See, e.g., *John Hancock Mutual Life Ins. Co. v. N.L.R.B.*, 89 U.S.App.D.C. 261, 264, 191 F.2d 483, 486 (1951): "Under petitioner's view, the Act [Labor Management Relations Act, now 29 U.S.C. §§ 151 *et seq.* (1964 ed.)] would permit denial of employment to an applicant * * * on the ground that he had filed charges or given testimony before the Board. [This would] * * * thwart the

inferred as [*702] inherent in the legislation even if it is not expressed in the statute itself.⁴⁸ [**42] Such an inference was recently drawn by the Supreme Court from the federal labor statutes to strike down under the supremacy clause a Florida statute denying unemployment insurance to workers discharged in retaliation for filing complaints of federally defined unfair labor practices.⁴⁹ While we are not confronted with a possible conflict between federal policy and state law, we do have the task of reconciling and harmonizing two federal statutes so as to best effectuate the purposes of each.⁵⁰ [**43] The proper balance can only be struck by interpreting 45 D.C. CODE §§ 902 and 910 as inapplicable where the court's aid is invoked to effect an eviction in retaliation for reporting housing code violations.⁵¹

This is not, of course, to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity. If this illegal purpose is dissipated, the landlord can, in the absence of legislation⁵² [**45] or a binding contract, evict his tenants or raise their rents for

administration of the Act itself by ignoring the ever present threat of such intimidation. Such a reading of the Act would be a perversion of legislative intent."

⁴⁹ *Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967). See also *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964), and its companion case, *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234, 237-238, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964).

⁵⁰ See, e.g., *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S. Ct. 182, 84 L. Ed. 181 (1939); *Rawls v. United States*, 8 Cir., 331 F.2d 21, 28 (1964). When Congress enacted 45 D.C. CODE §§ 902 and 910, it did not have in mind their possible use in effectuating retaliatory evictions. Indeed, when they were enacted there was no housing code at all. And in all probability Congress did not attend to the problem of retaliatory evictions when it directed the enactment of the housing code. Our task is to determine what Congress would have done, in light of the purpose and language of the statute, had it confronted the question now before the court. And where there is a possible conflict, the more recent enactment, the housing code, should be given full effect while leaving an area of effective operation for the earlier statute. *International Union of Electrical, Radio, etc., Workers v. N.L.R.B.*, 110 U.S.App.D.C. 91, 95, 289 F.2d 757, 761 (1960). This task, we think, our resolution of the issue accomplishes.

⁵¹ In a recent important decision the DCCA has held that as a matter of public policy a landlord who has rented housing space knowing that it contained housing code violations could not collect back rent from his ex-tenant. *Brown v. Southall Realty Co.*, D.C.App., 237 A.2d 834 (1968).

⁵² There have been several bills introduced in Congress which deal expressly with the problem of retaliatory evictions. Hearings were held in the Senate, see Note 43 *supra*, on three bills but none was reported out of committee. H.R. 257, 90th Cong., 1st Sess. (1967), is

economic or other legitimate reasons, or even for no reason at all.⁵³ The question of permissible or impermissible purpose is one of fact for the court or jury, and while such a determination is not easy, it is not significantly different from problems with [*703] 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 [**44] an unfair labor practice because he has done so on account of the employee's union activities.⁵⁴ As Judge Greene said, "There is no reason why similar factual judgments cannot be made by courts and juries in the context of economic retaliation [against tenants by landlords] for providing information to the government."

Reversed and remanded.

Concur by: McGOWAN

Concur

McGOWAN, Circuit Judge (concurring except as to Parts I and II):

The considerations bearing upon statutory construction, so impressively marshalled by [**46] Judge Wright in Part III of his opinion, have made it unnecessary for me to pursue in any degree the constitutional speculations contained in Parts I and II; and it is for this reason that I do not join in them. The issue of statutory construction presented in this case has never seemed to me to be a difficult one, nor to require for its resolution the spur of avoidance of constitutional questions. A Congress which authorizes housing code promulgation and enforcement clearly cannot be taken to

now before the House Committee on the District of Columbia. Its companion bill, S. 1910, 90th Cong., 1st Sess. (1967), has been introduced in the Senate. The bill would forbid an eviction, except for specified reasons, during the nine months following the filing of a complaint. The proposed legislation is discussed in Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia*, 36 G.W.L.REV. 190, 196-203 (1967). See also the suggestion for judicial implementation in Note, *Landlord and Tenant -- Retaliatory Evictions*, *supra* Note 17, at 205-208.

⁵³ Of course, because of his prior taint the landlord may not be able to disprove an illicit motive unless he can show a legitimate affirmative reason for eviction.

⁵⁴ See, e.g., *John Hancock Mutual Life Ins. Co. v. N.L.R.B.*, *supra* Note 48. And under 42 U.S.C. § 1971(b) (1964 ed.), the court must decide whether economic pressures otherwise lawful are illegal because designed to intimidate the exercise of the right to vote in a federal election. See *United States v. Beaty*, *supra* Note 5; *United States v. Bruce*, *supra* Note 5. See also *United States v. Board of Education of Greene County, Miss.*, 5 Cir., 332 F.2d 40 (1964); *L'Orange v. Medical Protective Co.*, *supra* Note 38; *Petermann v.*

have excluded retaliatory eviction of the kind here alleged as a defense under a routine statutory eviction mechanism also provided by Congress.

Dissent by: DANAHER

Dissent

DANAHER, Circuit Judge (dissenting):

Basically at issue between my colleagues and me is a question as to the extent to which the power of the court may here be exercised where by their edict the landlord's right to his property is being denied. They concede as they must¹ "that in making his affirmative case for possession the landlord need only show that his tenant has been given the 30-day statutory notice, and he need not assign any

reason for evicting a tenant who does not occupy the premises under a lease."

[**47]

That fundamental rule of our law of property must give way, it now develops. My colleagues so rule despite the absence of a statutory prescription of discernible standards as to what may constitute "violations," or of provision for compensating² the landlord for the deprivation of his property. They say that the court will not "frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington." Since they recognize that there is an "appalling condition and shortage of housing in Washington,"³ [*704] they say the court must take

International Brotherhood of Teamsters, etc., Local 396, *supra* Note 38.

¹ See generally, 45 D.C.CODE §§ 902, 910 (1967) and 16 D.C.CODE § 1501 (1967).

² *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) held for the first time that the government here might condemn one's property and turn it over to another private "person" -- but not without due process, not without compensation.

³ It is common knowledge that following *Berman v. Parker*, *supra* note 2, the housing structures in one entire quadrant of the City of Washington were razed, driving thousands of tenants to seek whatever "appalling" accommodations they could find. In place of the destroyed housing, beautiful apartment buildings have been built, to be sure, with "co-ops" in some costing up to \$100,000 per apartment, with rentals in others priced far beyond the capacity to pay of thousands of those who had been displaced. And even the affluent tenants having chosen to do so, must be presumed, at least until now, to have taken the premises in the condition in which they found them, cockroaches and all.

account of the "social and economic importance of assuring at least minimum standards in housing conditions." So to meet such needs, the burden would now be met, not pursuant to a congressionally prescribed policy, with adequate provision for construction or acquisition costs, or for compensation to property owners, but by private landlords who [**48] will be saddled with what should have been a public charge.

[**49] Note how my colleagues achieve that result as they rule:

"But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted."

Just as do my colleagues, I deplore the effort of any landlord for a base reason to secure possession of his own property, but if his right so to recover in accordance with our law is to be denied, Congress should provide the basis. Appropriate standards as a pre-condition thus could be spelled out in legislation and just compensation thereupon be awarded if found to be due.⁴

[**50] I am not alone in my position, I dare say, as I read the Congressional Record for March 13, 1968, page H 1883. In President Johnson's message to the Congress he said:

"One of the most abhorrent injustices committed by some landlords in the District is to evict -- or threaten to evict -- tenants who report building code violations to the Department of Licenses and Inspections.

The Washington Post on April 1, 1968 editorialized upon the need for a renewal project after "the wholesale bulldozing of slums and massive uprooting of families with them which characterized the Southwest development."

⁴ As Chief Judge Hood observed, writing for a unanimous District of Columbia Court of Appeals: "If, as some believe, the law relating to landlords and tenants is outdated, it should be brought up-to-date by legislation and not by court edict." *Edwards v. Habib*, 227 A.2d 388, 392 (1967). In note 10, *id.*, he quoted from *Collins v. Hardyman*, 341 U.S. 651, 663, 71 S. Ct. 937, 942, 95 L. Ed. 1253 (1951), "It is not for this Court to compete with Congress or attempt to replace it as the Nation's law-making body."

⁵ Chief Judge Hood has traced out certain references to action already under way in Congress relating to the type of situation said to be present here. *Edwards v. Habib*, *supra* note 4, 227 A.2d at 390-91. And see the majority opinion, n. 51.

⁶ For background and as a matter of convenient reference, let it be noted that Edwards and Habib entered into a monthly tenancy agreement as of March 24, 1965. The tenant paid one month's rent in advance, and, of course, took the premises as she found them. The

"This is intimidation, pure and simple. It is an affront to the dignity of the tenant. It often makes the man who lives in a cold and leaking tenement afraid to report those conditions.

"Certainly the tenant deserves the protection of the law when he lodges a good faith complaint.

"*I recommend legislation to prevent retaliatory evictions by landlords in the District.*" (Emphasis added.)

He seems to think as do I that congressional action is required.⁵ It may be doubted that the President would so have recommended legislation except upon the advice of the legal authorities upon whom he relies. Certainly he is aware of the due process protective considerations which must be accorded to a landlord, even one who might be guilty of "an affront to the dignity" of a tenant. He must know that [**51] a community burden is not to be borne alone by landlords, charged with allegedly "retaliatory" ⁶ evictions because of complaints [**705] of "violations," undefined and vague and lacking in standards.

[**52] That my colleagues ultimately upon reflection began to doubt the sufficiency of their position seems clear enough, for they observe:

"This is not, of course, to say that *even if the tenant can prove a retaliatory purpose* she is entitled to remain in possession in perpetuity." (Emphasis added.)

"Of course" *not*, I say; *not at all* as the law has read, until now, I may add. My colleagues continue:

"If this illegal purpose is dissipated, the landlord can,

agreement provided that failure thereafter to pay the rental in advance would constitute a default and that the agreement was to operate as a notice to quit and that the statutory 30 days' notice to quit was expressly waived. Repeatedly thereafter the tenant was in default of payment of the rental. As of October 11, 1965, neither the appellant nor her counsel appeared in the Landlord-Tenant Branch of the Court of General Sessions. A later motion to reopen a default judgment was granted, a two-day trial followed, and a directed verdict for the landlord was entered.

This court was asked to stay the judgment after the District of Columbia Court of Appeals refused to do so. I then dissented from this court's order for reasons set forth in *Edwards v. Habib*, 125 U.S.App.D.C. 49, 51, 366 F.2d 628, 630 (1965), to which I now refer. In the meanwhile, time and again, further defaults occurred with resulting harassment and vexation to the landlord which this court as often overlooked. The landlord is still without possession of his property which should have been available to him for remodeling or sale, or even that the structure might be razed. Unless its condition could justify its condemnation by lawful authority, his should have been the option as to future use of the property.

It is difficult for me to understand how this court can sustain so studied a deprivation as has here occurred.

in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all."

And so, it may be seen according to the majority, we need never mind the Congress, the aid of which the *President* would invoke. We may disregard, even reject, our law of such long standing. We will simply leave it to a jury to say when a landlord may regain possession of his own property, although "the determination is not easy," my colleagues concede.⁷

[**53] I leave my colleagues where they have placed themselves.

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⁷And with the results in riot-torn Washington so painfully obvious the prospect now being opened up may seem horrendous indeed, whether the "violations" were committed by the tenants themselves or by

others whose conduct created conditions with which the landlord must cope. I cannot accept the premise that Congress even remotely entertained any such "intent" as my colleagues so confidently proclaim.

Golphin v. Park Monroe Associates

District of Columbia Court of Appeals

June 11, 1974, Argued ; February 24, 1976, Decided

No. 7797

Reporter

353 A.2d 314 *; 1976 D.C. App. LEXIS 475 **

Judges: Fickling, Gallagher and Nebeker, Associate Judges. Dissenting opinion by Associate Judge Nebeker.

Opinion by: GALLAGHER

Opinion

[*315] This is an appeal from the Landlord and Tenant Branch of the Superior Court of the District of Columbia. The appellee, Park Monroe Associates, filed suit against one of its tenants, Jesse Golphin, Jr., appellant, for possession of the apartment he occupied. The trial court granted possession to the landlord.

Appellant leased an apartment from Park Monroe Associates for a fixed term of one year. Ten days before the expiration of the term the tenant was served with a notice to vacate and quit the premises, which the tenant failed to do. A complaint was filed in the trial court with the ground for possession being asserted as the "[expiration] of 30 days notice to quit." During the trial, however, the court permitted the landlord to amend the complaint to assert, in effect, that possession was being sought [**2] due to the expiration of the term lease, though the notice was given

¹ Paragraph 35 of the lease provides:

HOLDING OVER TENANCY BY MONTH

35. Should Tenant continue in possession of the leased premises after the end of the term herein created with permission of Landlord, it is agreed that the tenancy thus created, shall be a monthly tenancy and may be terminated by either party upon giving to the other not less than thirty days' written notice to expire on the 30th day of the month. . . . Tenant hereby waives his right to any Notice to Quit.

² D.C. Code 1973, § 45-901.

³ Housing Regulations of the District of Columbia, 1955, § 2910. Retaliatory Acts.

No action or proceeding to recover possession of a habitations [*sic*] may be brought against a tenant, nor shall an owner otherwise cause a tenant to quit a habitation involuntarily, nor demand an increase in rent from the tenant, nor decrease the services to which the tenant has

shortly before the end of the term. We will view this case in the context of the permitted amendment.

At trial, the tenant offered to show that the landlord had demanded possession of the premises in retaliation against his organization of and membership in a tenant's association, as well as in retaliation against previous

complaints of housing code violations made to the landlord and governmental authorities. He proffered that he received a notice to quit the day after he became president of the tenant's association. More particularly, the tenant offered to show that if he had not become active in the tenant's association, in accordance with the established policy of the landlord he would have become a month-to-month tenant at the expiration of the one-year term; and that this established policy of the landlord was in consonance with the express [*316] terms of the lease. ¹ Lastly, the tenant proffered that six suits for possession were instituted by the landlord to oust other members of the tenant's association.

[**3] The trial court declined to admit the proffered testimony as being irrelevant because the statute ² provides that the landlord is entitled to possession immediately upon the expiration of the fixed term. Further, said the court, if there is any inconsistency between the statute and the housing regulations ³ [**4] the statute prevails. ⁴ Finding

been entitled, nor increase the obligations of a tenant, in retaliation against a tenant's:

- (a) Good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization.
- (b) good faith organization of or membership in a tenant organization.
- (c) good faith assertion of rights under these Regulations, including rights under Sections 2901 or 2902.

⁴ The court stated:

I would rest my decision on the provision of the statute [D.C. Code 1973, § 45-901]. If there be any inconsistency between statute 45-901 and the housing regulations [§ 2910], I think that the statute would prevail

and

The statute [§ 45-901] states that the landlord is entitled to

Golphin v. Park Monroe Associates

that the term of the lease had expired, the trial court concluded that the landlord was entitled to possession. We hold it was error to refuse to admit the testimony proffered to show a retaliatory eviction purpose by the landlord.

The question for us is whether on the facts of this case the defense of "retaliatory eviction" should have been permitted even though the tenant secured occupancy under a one-year lease, the term of which had expired.⁵ For the purpose of this review we must accept the excluded proffered testimony as establishing that this suit for possession was brought for retaliatory reasons.

[**5] The controlling decision concerning "retaliatory eviction" in this jurisdiction is *Edwards v. Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968), *cert. denied*, 393 U.S. 1016, 21 L. Ed. 2d 560, 89 S. Ct. 618 (1969). The *Edwards* doctrine, we might say parenthetically, is accepted in other jurisdictions,⁶ as well.

[**6] [*317] In *Edwards v. Habib, supra*, a landlord brought a possessory action against his month-to-month tenant after serving the tenant with the statutorily required 30 days' notice to quit.⁷ The tenant sought to invoke a

defense of "retaliatory eviction." *Edwards* held that "proof of a retaliatory motive . . . [constitutes] a defense to an action of eviction", and remanded the case to afford the tenant the opportunity to prove that the 30 days' notice to quit was in retaliation against her reporting housing code violations to the governmental authorities.

Briefly stated, the underlying rationale [**7] of that decision is that the Housing Regulations in this jurisdiction⁸ were promulgated at the explicit direction of Congress; their purpose is to secure safe and sanitary housing for the housing dwellers; effective implementation of these regulations depends in part on the private reporting of violations; though various statutes relating to landlord and tenant affairs provide that the landlord may evict for no reason at all upon proper notice, as a matter of statutory construction and for reasons of public policy this cannot be permitted if it is done in retaliation for the reporting of housing code violations to the authorities; and to permit such evictions would undercut the effectiveness of the housing code. *Edwards v. Habib, supra* at 138-141, 397 F.2d at 699-702. "A Congress which authorizes housing code promulgation and enforcement clearly cannot be taken to have excluded retaliatory eviction of the kind here alleged

possession immediately upon the expiration of the term. I would hold that the term had expired and that the plaintiff is entitled to possession.

⁵D.C. Code 1973, § 45-901 provides:

When real estate is leased for a certain term no notice to quit shall be necessary, but the landlord shall be entitled to the possession, without such notice, immediately upon the expiration of the term.

⁶*See, e.g., Schweiger v. Superior Court*, 3 Cal.3d 507, 476 P.2d 97, 90 Cal.Rptr. 729 (1970); *Engler v. Capital Management Corp.*, 112 N.J.Super. 445, 271 A.2d 615 (Ch. 1970); *Mobil Oil Corp. v. Rubenfeld*, 77 Misc.2d 962, 357 N.Y.S.2d 589 (App.T. 1974); *Toms Point Apartments v. Goudzward*, 72 Misc.2d 629, 339 N.Y.S.2d 281 (Dist.Ct. Nassau 1972); *Cornell v. Dimmick*, 73 Misc.2d 384, 342 N.Y.S.2d 275 (City Ct. Binghamton 1973); *Portnoy v. Hill*, 57 Misc.2d 1097, 294 N.Y.S.2d 278 (City Ct. Binghamton 1968); and *Dickhut v. Norton*, 45 Wis.2d 389, 173 N.W.2d 297 (1970). *See also McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971) (decided on constitutional grounds); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969) (decided on constitutional grounds); *Clore v. Fredman*, 59 Ill.2d 20, 319 N.E.2d 18 (1974) (decided on an Illinois retaliatory eviction statute); *E. & E. Newman, Inc. v. Hallock*, 116 N.J.Super. 220, 281 A.2d 544 (1971) (decided on constitutional grounds); *Church v. Allen Meadows Apartments*, 69 Misc.2d 254, 329 N.Y.S.2d 148 (Sup.Ct. Onondaga 1972) (decided on constitutional grounds); *Markese v. Cooper*, 70 Misc.2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972) (decided on public policy grounds). Some states have embodied the doctrine of *Edwards* in statutes. *See, e.g., CAL.CIV.CODE* § 1942.5 (West Supp. 1975); *CONN.GEN.STAT.ANN.* § 19-375a (Supp. 1975); *DEL. CODE*

ANN.tit. 25, § 5516 (1974); *ILL.REV.STAT.ch. 80, § 71* (1973); *ME.REV.STAT.ANN.tit. 14, § 6001* (Supp. 1974); *MASS.GEN.LAWS ANN.ch. 186, § 18* (1970); *MINN.STAT.ANN.* § 566.03 (Supp. 1975); *N.H.REV.STAT.ANN.* § 540.13-a, -13-b (1974); *N.J.STAT.ANN.* § 2A:42-10.10, -10.12 (Supp. 1975); *R.I.GEN.LAWS ANN.* § 34-20-10 (1970).

⁷D.C. Code 1973, § 45-902. 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.

⁸The Housing Regulations of the District of Columbia (1955) were established and authorized by the Board of Commissioners under the predecessor of D.C. Code 1973, § 1-228. In 1967, the functions of the Board of Commissioners were transferred to the District of Columbia Council. *See Edwards v. Habib*, 130 U.S.App.D.C. 126, 139 n.41, 397 F.2d 687, 700 n.41 (1968).

D.C. Code 1973, § 1-228 states:

Building Regulations.

The District of Columbia Council is authorized and directed to make and the Commissioner of the District of Columbia is authorized and directed to enforce such building regulations for the said District as the Council 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.

as a defense under a routine statutory eviction mechanism also provided by Congress." *Edwards v. Habib, supra* at 142, 397 F.2d at 703 (McGowan, J., concurring).

[**8] *Edwards* involved a month-to-month tenant whose term could be ended only after a 30 day notice. Here, we have a fixed term lease and by statute (D.C. Code 1973, § 45-901) it is provided that the landlord is entitled to possession upon the expiration of the term without a notice to quit. This statutory provision presents a refinement not before the court in *Edwards v. Habib, supra*, but on this record we think *Edwards* requires the same result. It is important to bear in mind that the tenant here proffered that if the landlord had not sought to evict him for retaliatory reasons he would have remained as a month-to-month tenant in accordance with established policy after the expiration of [*318] this fixed term lease. This proffer we must accept as factual in this discussion. So we must view it as established here that notwithstanding the fixed term in the lease, appellant would have remained as a tenant but for his activities in tenant affairs and in reporting alleged housing violations.⁹ This being so this case does not present just a construction of the bare statutory provisions in § 45-901 relating to fixed term tenants.

[**9] It seems to us that the crucial consideration is the essence of the law in this jurisdiction on retaliatory evictions.

At the bottom, *Edwards v. Habib* stands for the proposition that the states' *judicial processes* may not be used to accomplish an eviction for retaliatory purposes. In *Robinson v. Diamond Housing Corp.*, 150 U.S.App.D.C. 17, 463 F.2d 853 (1972), the same court stated:

If we resolve all reasonable doubts in favor of appellant . . . it becomes plain that a jury might find Diamond Housing to be using the eviction machinery to punish Mrs. Robinson for exercising her legal rights. *Edwards squarely holds that the state's judicial processes may not be so used*, and nothing which has transpired since *Edwards* was decided has caused us to change our view. Indeed, if anything, the creation by the District of Columbia City Council of new private remedies for code violations since *Edwards* reinforces our belief in the necessity for a broad retaliatory eviction defense.

⁹The retaliatory eviction provisions of the Housing Regulations (note 3 *supra*) apply to all actions or proceedings for possession. They are not confined to tenancies by the month, at will or at sufferance.

¹⁰ If the result were the contrary, an incidental effect would be to enable a landlord to make academic the defense of retaliatory eviction by the use of term leases incorporating a fixed term, rather than month-to-month, holdover provision.

¹¹ While the rationale of *Edwards* was not new in concept, there is no

[(150 U.S.App.D.C. at 25-26, 463 F.2d at 861-62).]

The actuality is that, even though the tenant here had a one-year lease, prior to the expiration of the lease the landlord [*10] abandoned his established policy of allowing the tenant to continue on into a monthly tenancy and sought to utilize the "judicial processes" to evict this tenant for retaliatory reasons. As we have seen, from *Edwards*, it is the law in this jurisdiction that the judicial processes may not be so used.¹⁰ *Compare Perry v. Sindermann*, 408 U.S. 593, 601-02, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). This being so, on the facts of this case we conclude that § 45-901, which provides that a landlord is entitled to possession without notice upon the expiration of a fixed term, is not dispositive here.

It appears to us that the dissent, at its roots, fails to apply here what it terms the "latter-day rule"¹¹ on retaliatory eviction (meaning *Edwards v. Habib, supra*). [*11] We, on the other hand, consider *Edwards* to be controlling. When it comes to "retaliatory evictions," *Edwards* does not establish a rule for short term tenants but not for long termers. It applies to all tenants, not just some.

The testimony going to the defense of retaliatory eviction should have been permitted in evidence.¹²

[**12] *Reversed and remanded for further proceedings.*

Dissent by: NEBEKER

Dissent

[*319] NEBEKER, Associate Judge, dissenting:

My dissent will be brief. My colleagues step over established legal principles of property law in their effort to extend the latter-day rule respecting ulterior motive for eviction. In taking this step, they sacrifice attributes of private ownership of property which are essential to our system. They do it at a time when there is mounting indication that the initial step in this direction exacerbates rather than alleviates substandard housing and the shortage of low and medium income rental housing. *See Edwards v. Habib*, 130 U.S.App.D.C. 126, 142-43, 397 F.2d 687, 703-

doubt but that, in applying the concept to the area of Landlord and Tenant law, the decision made new law, in this jurisdiction at least. As we indicated earlier, however, this new application is by no means now peculiar to this jurisdiction. *See note 6 supra*.

¹² *See Edwards v. Habib, supra* at 142, 397 F.2d at 703 (McGowan, J., concurring) where it is said that having authorized the housing code Congress cannot be taken to have excluded retaliatory eviction, as here alleged, under the routine statutory provisions relating to the right to regain possession.

04 (1968) (Danaher, J., dissenting).

In flagrant violation of the Statute of Frauds (D.C. Code 1973, § 28-3502) and D.C. Code 1973, §§ 45-807¹ and 45-901,² my colleagues change, or permit to be changed by extrinsic evidence, the basic nature of a fixed-term lease. They also create, without acknowledging it, a new and strange type of leasehold estate where one refuses to vacate at the expiration of the lease term. Perhaps it could be called a tenancy by trespass. Whatever it is, [**13] it is somehow unprecedently treated as superior to the "estate in possession" of the owner under D.C. Code 1973, § 45-807.

D.C. Code 1973, § 45-901 provides that the owner is entitled to immediate possession upon expiration of the fixed rental period. As of that moment the leasehold relationship between these parties expired.

Appellant could not become a tenant from month-to-month because paragraph 35 of the lease provides for this only if the tenant holds over with the landlord's permission, which was expressly withheld. No other form of tenancy survived. See *Bell v. Westbrook*, D.C.Mun.App., 50 A.2d [**14] 264 (1947), as to a failure of an estate at sufferance to survive. As in *Bell*, the owner here also brought an immediate action for possession. An estate at will (D.C. Code 1973, § 45-822) did not survive since "the joint will of lessor and lessee" is lacking.

In applying § 2901 of the Housing Regulations, my colleagues fail to take cognizance of the fact that it proscribes retaliatory acts against a "tenant". They also fail to recognize that Chapter 1, § 1101.1 of the Regulations states that "[words] shall have their usual meaning unless the context clearly indicates a different meaning", and that § 1102 defines a "tenant" as one "who holds or possesses a habitation . . . with the consent of [the] owner."

Let us consider today's holding in the context of a fixed-term lease of a habitation where the lessor plans to be away from his home but plans possibly to return upon expiration of the term. If he does so or leases to another and demands possession by refusing to consent to a month-to-month holdover, the tenant may forestall his eviction for the time it takes to get a jury trial on an assertion that refusal is a retaliatory act within a proscriptive regulation. The [**15] fundamental nature of an ordinary fixed-term lease has now been changed. It is now for a time certain plus at least litigation time.

¹D.C. Code 1973, § 45-807 provides:

An estate in possession exists when the owner has an immediate right to the possession of the land.

²D.C. Code 1973, § 45-901 provides:

When real estate is leased for a certain term no notice to quit

The appellant is in possession of appellee's property against its will and is nothing but a trespasser. The housing regulations do not and cannot benefit him.³ Our holding is an unprecedented step which, in my view, we cannot and should not take.

[*320] The majority observes that the appellee gave advance notice to vacate at the end of the term. Since post-term notice, absent acceptance of rent for post-term occupancy, does not create a holdover leasehold (*Williams v. John F. Donohoe & Sons, Inc.*, D.C.Mun.App., 68 A.2d 239 (1949)), it would seem that our holding must be confined to cases where notice is given during the existence of the tenancy. How else, except by this dubious reasoning, can housing regulations, applicable only to landlords and tenants, be held to apply? Moreover, it also [**16] is to be expected that fixed-term lease provisions may now be modified to eliminate a month-to-month holdover provision. In such cases, it would seem that a demand for possession upon expiration of the term could not be stalled by a proffer of retaliatory motive for refusal to renew. It is to be hoped that our holding will be confined to its precise facts.

Another basis for our extension of *Edwards v. Habib, supra*, is that it must apply to long-term as well as to short-term leases. I suggest, respectfully, that this argument reveals a misunderstanding of the issue. A month-to-month tenancy is hardly short term; it is indefinite. A one-year lease is not long term; it is a definite term. When it expires, it is ended.

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shall be necessary, but the landlord shall be entitled to the possession, without such notice, immediately upon the expiration of the term.

³The same may be said for section 214(a) of D.C. Act 1-35, July 25, 1975.