INSURING THE EFFECTIVENESS OF INDIANA'S LANDLORD-TENANT LAWS: THE NECESSITY OF RECOGNIZING THE DOCTRINE OF RETALIATORY EVICTION IN INDIANA

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INTRODUCTION

The economic downturn resulting from the housing market collapse continues to have profound impacts on the rental market for residential homes.[1] As a result of the instability in housing, renters who may traditionally have looked to purchase a home have postponed or changed such plans and remained in the rental market.[2] At the same time, previous homeowners who have lost their homes due to the economic turmoil are turning to that same market to meet their housing needs.[3] These factors have resulted in increased demand on the rental housing market, which in turn has increased the cost of renting.[4] Increased demand, and thus cost for a product that is a necessity—particularly where that product is immobile—limits prospective tenants in their choices and, thus, their bargaining power in the landlord-tenant relationship.[5] This tightened market is expected to continue throughout the recovery from the recession.[6]

In light of these market shifts, resulting in an increase in the number of tenants and a decrease in their strength in the landlord-tenant relationship, Indiana's legal treatment of the relationship should be reviewed for inadequacies. For example, recently in northern Indiana, an older woman whose sole income is social security was told by her landlord that her lease would not be renewed, and she must vacate her residence.[7] Although the woman had been a tenant of the

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1. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 22 (2011), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf.

2. *Id.*

3. *Id.*

4. *Id.* at 22-23.

5. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 170-71 (2005) (describing how the necessity of housing may diminish bargaining power, and that alternatives available to bargainers play a role in bargaining power).

6. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 1.

7. Worthington v. Golden Oaks Apartments, No. 3:11-cv-223 RM, 2011 WL 4729879, at *1 (N.D. Ind. Oct. 4, 2011).

landlord's for nearly twenty years, she had recently called code enforcement officials due to an issue with the heating of her rented home.[8] The cooler temperature aggravated her disability, making living in her residence difficult.[9] She sued, alleging, among other claims, the threat of eviction was in retaliation for her having contacted a code enforcement agency; effectively discrimination based on her disability under the Fair Housing Act.[10] This particular woman may have had a claim because of her disability, but should the ability to secure relief in this situation turn on whether the tenant fits into a class protected by the Fair Housing Act? Without protection from such retaliatory evictions, would any tenant be inclined to report a housing code violation or bring her or his concern to the landlord's attention?

This fact pattern is indicative of a retaliatory eviction: "[a]n eviction . . . commenced in response to a tenant's complaints or involvement in activities with which the landlord does not agree."[11] Although never held to be a right of action or a defense to an eviction proceeding in Indiana, retaliatory eviction for a tenant's action that was intended to better his or her living condition has been recognized in other jurisdictions as a defense to that eviction since 1968.[12] In *Edwards v. Habib*,[13] the D.C. Circuit Court held that proof of such a retaliatory motive is a defense to an eviction action.[14] Judge Skelly Wright upheld the necessity of inquiring into the landlord's motive in an eviction, stating that failure to do so would "frustrate the effectiveness of the housing code as a means of upgrading the quality of housing."[15]

The latter part of the 1960s began what has been deemed a "revolution" in residential landlord-tenant law due to the vast expansion of tenants' rights during that period.[16] The landlord, up to that point, historically had dominated the American landlord-tenant relationship.[17] This era marked a turning point, away from the traditional view of "caveat lessee,"[18] away from widespread complete freedom to set rental prices,[19] and even as far as a complete reversal of policy as to require good cause for eviction in one jurisdiction.[20] Scholars in landlord-

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8. *Id.*

9. *Id.*

10. *Id.*

11. BLACK'S LAW DICTIONARY 595 (8th ed. 2004).

12. *See* Edwards v. Habib, 397 F.2d 687, 690 (D.C. Cir. 1968) (This is the seminal retaliatory eviction case.).

13. *Id.* at 688.

14. *Id.* at 690.

15. *Id.* at 701.

16. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520-21 (1984).

17. *See* 2-16B POWELL ON REAL PROP. § 16B.05 (2013) (noting that, historically, a landlord could terminate or refuse to renew a lease "for any reason or no reason").

18. Rabin, *supra* note 16, at 521.

19. *Id.* at 527-28.

20. *See* N.J. STAT. ANN. § 2A:18-61.1 (West 2013) (anti-eviction act passed in 1974 requiring

tenant law had expected tenants' rights to continue to develop, but this has not necessarily occurred.[21]

Indiana, for example, was in large part a non-participant in this historical movement.[22] Regarding retaliatory eviction, the Indiana Supreme Court has indeed endorsed the underlying policy of the prohibition[23] but has thus far failed to pursue the initiative further. While comparing retaliatory evictions to retaliatory employment discharges in *Frampton v. Central Indiana Gas Co.*,[24] the court stated,

> Retaliatory discharge and retaliatory eviction are clearly analogous. Housing codes are promulgated to improve the quality of housing. The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy.[25]

Although no Indiana court went on to develop a retaliatory eviction prohibition after *Frampton*'s express endorsement, the legislature passed laws in 2002 that would support such a doctrine, if not require it.[26]

As of 2012, forty jurisdictions statutorily provided some degree of retaliatory eviction protection for tenants.[27] In addition, four states' courts have allowed

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and defining good cause for eviction).

21. Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 833-35 (2008) (discussing, specifically, the expectations and shortcomings in the movement to establish security of tenure for tenants by way of good cause eviction requirements).

22. *See* discussion *infra* Part II. The nonparticipation is evidenced by the lack of case law and statutes from the 1960s and 1970s vastly expanding tenants' rights and protections.

23. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

24. *Id.* at 426.

25. *Id.* at 428 (comparing the public policy of prohibiting retaliatory discharge to that of retaliatory eviction in allowing an action based on a claim that employee's discharge was in retaliation for his filing of a worker's compensation claim); *see also* 11-79 POWELL ON REAL PROP. § 79.04 (2013) ("The objective of building codes is to protect the public health and public safety.").

26. *See* discussion *infra* Part III.

27. *See* ALA. CODE § 35-9A-501(a) (2013); ALASKA STAT. § 34.03.310 (2012); ARIZ. REV. STAT. ANN. § 33-1381 (2012); CAL. CIV. CODE § 1942.5 (West 2013); CONN. GEN. STAT. § 47a-20 (2013); DEL. CODE ANN. tit. 25, § 5516 (2013); D.C. CODE § 42-3505.02 (2013); FLA. STAT. 83.64 (2012); HAW. REV. STAT. § 521-74 (2012); 765 ILL. COMP. STAT. 720/1 (2012); IOWA CODE § 562A.36 (2012); KAN. STAT. ANN. § 58-2572 (2012); KY. REV. STAT. ANN. § 383.705 (West 2012); ME. REV. STAT. tit. 14, § 6001(3) (2012); MD. CODE ANN., REAL PROP. § 8-208.1 (2012); MASS. GEN. LAWS ch. 239, § 2A (2012); MICH. COMP LAWS § 600.5720 (2013); MINN. STAT. § 504B.441 (2012); MISS. CODE ANN. § 89-8-9 (2012); MONT. CODE ANN. § 70-24-431 (2011); NEB. REV. STAT. § 76-1439 (2012); NEV. REV. STAT. § 118A.510 (2011); N.H. REV. STAT. ANN. § 540:13-a (2012); N.J. STAT. ANN. § 2A:42-10.12 (West 2013); N.M. STAT. ANN. § 47-8-39(A) (2013); N.Y. REAL PROP. LAW § 223-b (McKinney 2012); N.C. GEN. STAT. § 42-37.1 (2012); OHIO REV. CODE ANN. § 5321.02 (West 2012); OR. REV. STAT. § 90.385 (2011); 35 PA. CONS. STAT. ANN. § 1700-1

retaliatory eviction protections for tenants absent such statutes.[28] Conversely, only two states have explicitly rejected retaliatory motive as a defense to an eviction, both based on procedural grounds.[29]

This Note will explore the means by which a tenant may achieve protection from retaliatory eviction through Indiana's courts. Specifically, this Note will review the impact of Indiana's 2002 laws creating statutory obligations on the part of both tenants and landlords and on an Indiana retaliatory eviction doctrine.[30] Part I provides an overview of the development of tenant rights, with a focus on retaliatory eviction protections, discussing, in detail, the variety of applications and remedies in various court-initiated prohibitions on retaliatory eviction. Part II discusses the development of the landlord-tenant relationship in Indiana. Part III explores the intersection of the 2002 Indiana laws creating statutory obligations for both parties in the landlord-tenant relationship and the rationale behind retaliatory eviction prohibitions. Finally, Part IV addresses the considerations required before implementing a retaliatory eviction prohibition, including the implications and impacts such a policy may have.

I. THE EVOLUTION OF THE RETALIATORY EVICTION DOCTRINE

A. The Early History of American Landlord-Tenant Law

The relationship between residential landlords and tenants has been governed by a constantly shifting balancing act between property and contract law

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(West 2012); R.I. GEN. LAWS § 34-18-46 (2011); S.C. CODE ANN. § 27-40-910 (2012); S.D. CODIFIED LAWS § 43-32-27 (2013); TENN. CODE ANN. § 66-28-514 (2012); TEX. PROP. CODE ANN. § 92.331 (West 2012) (amended 2013); VT. STAT. ANN. tit. 9, § 4465 (2012); VA. CODE ANN. § 55-248.39 (2013); WASH. REV. CODE § 59.18.240 (2012); W. VA. CODE § 37-15-7 (2012); WIS. STAT. § 704.45 (2013).

28. *See* W.W.G. Corp. v. Hughes, 960 P.2d 720, 721 (Colo. App. 1998) (confirming the trial court's authority to consider retaliatory eviction because it is an equitable defense, and equitable defenses are permitted in actions for possession of property under Colorado law); Wright v. Brady, 889 P.2d 105, 107, 109 (Idaho Ct. App. 1995) (holding that retaliatory eviction is a defense to an eviction under Idaho law); Capone v. Kenny, 646 So. 2d 510, 512-13 (La. Ct. App. 1994) (finding that the trial court erred by not considering tenant's defensive claim to an eviction proceeding alleging the eviction was an abuse by the landlord of the landlord's rights under Louisiana law, but affirming in favor of the landlord because the tenant did not show an egregious abuse); Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1219 (Utah 1995) (holding that retaliatory eviction is a defense in an eviction proceeding in order to promote Utah's legislative intent inherent in the promulgation of laws creating habitability protections for tenants).

29. *See* Leve v. Delph, 710 S.W.2d 389, 391-92 (Mo. Ct. App. 1986) (holding that a Missouri law prohibited counterclaims in unlawful detainer actions); Nelson v. Johnson, 778 N.W.2d 773, 782 (N.D. 2010) (holding that North Dakota law prohibited counterclaims in eviction actions, "except as setoff to a demand . . . for damages").

30. IND. CODE §§ 32-31-7- to -8 (2013).

paradigms.[31] "Landlord-tenant law has always been a hybrid area in which many strains, property and contract in particular, have mingled and vied for dominance."[32] As American common law developed in the late nineteenth and early twentieth centuries, the movement placed greater importance on the real property transfer aspects of the lease agreement, which favored the landlord.[33] For example, the "American Rule" developed, which obligated the landlord only to give the tenant legal possession of the dwelling.[34] If the previous tenant held over, it was the new tenant's responsibility to file a court action for possession or damages.[35]

This early American property law-based approach to the landlord-tenant relationship also resulted in the doctrine of caveat lessee; the risk of defects in the residence fell squarely on the tenant, and the landlord had no duty to repair, regardless of whether the defect occurred before or after the creation of the landlord-tenant relationship.[36] The trend favoring the property law aspects of the lease agreement likewise caused the tenants' covenants within the lease to be largely independent of the landlords' covenants; the tenant was usually required to pay rent regardless of whether the landlord met his or her obligations under the agreement.[37] Another common law canon that emerged was that a landlord could evict a tenant at the end of the lease agreement "for any reason or no reason at all."[38] Additionally, landlords were under no obligation to renew a lease so long as they provided any required notice to the tenants prior to the termination.[39]

This is not to say tenants did not have any rights or protections in the relationship during this period: perhaps the oldest existing tenant protection is that of an implied covenant of quiet enjoyment, which was recognized as early as the middle ages in England.[40] This implied covenant provides that the lessee is entitled to enjoy and obtain the beneficial use of the leased premises free from interference by the landlord.[41] Also, the concept of constructive eviction—a landlord's wrongful elimination of the habitability of the premise, forcing a tenant to abandon the property —has also long been recognized under American common law.[42]

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31. *See generally* Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L. J. 356 (2004) (providing an overview of the shifting views governing residential leases, beginning in the middle ages).

32. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 575 (1982).

33. *See* Geurts, *supra* note 31.

34. *See* 2-16B POWELL, *supra* note 17, § 16B.02.

35. *See id*.

36. Rabin, *supra* note 16, at 521.

37. *See* Geurts, *supra* note 31.

38. *See* Roisman, *supra* note 21, at 831 (internal quotation marks omitted).

39. *Id.*

40. *See* Geurts, *supra* note 31.

41. *See* RICHARD A. LORD, 15 WILLISTON ON CONTRACTS § 48:10 (4th ed. 2011).

42. *See* Dyett v. Pendleton, 8 Cow. 727, 727 (N.Y. 1826) (holding that where prostitution

B. The Later-Twentieth Century Advancement of a Consumer-Based Approach to the Landlord-Tenant Relationship

With the latter part of the twentieth century came the American "transformation" of the legal relationship between landlord and tenant.[43] During this time period, the laws governing residential leases "escaped from the realm of private ordering, in which the stronger party typically has the advantage,"[44] and instead became "subject to regulation in the public interest."[45] A new dichotomy emerged, distinguishing commercial leases from residential leases, with consumer law having a more pronounced influence on residential leases.[46] Courts increasingly viewed the residential lease as a bundle of goods and services rather than a conveyance of property:

> Some courts have realized that certain of the old rules of property law 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.[47]

This shift in the legal perception of the residential landlord-tenant relationship came about at a time when there were "substantial improvement[s] in the quantity, quality, and affordability of housing."[48] The implication is that it was not necessarily widespread deplorable housing conditions that caused the change, but rather a multitude of social factors impacting the legal system.[49] The civil rights movement was in full force in the 1960s.[50] President Johnson declared a

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constantly disturbed prostitution tenant within a building, and the landlord acquiesced to conduct, the landlord could not bring suit for breach of lease because the landlord's inaction constructively evicted the tenant).

43. *See generally* Glendon, *supra* note 32 (discussing the later twentieth century changes in the law governing residential leases as a culmination of trends in private law in general).

44. *Id.* at 575.

45. *Id.* (internal quotation marks omitted).

46. *Id.* at 504.

47. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75 (D.C. Cir. 1970).

48. Rabin, *supra* note 16, at 545 (Rabin's conclusions are supported by statistical data showing improving measures of housing inadequacy over the period.).

49. *Id.* at 545-54 (suggesting the civil rights movement played the largest role in spawning the changes to landlord-tenant law, accompanied by the anti-Vietnam war sentiment, institutional changes within state legislatures, the creation of the Office of Economic Opportunity creating funding for legal aid, various developments in legal theory, and rising prosperity leading to a "war against poverty").

50. *Id.* at 547 (noting Martin Luther King Jr. gave his famous "I Have a Dream" speech in January of 1963, President Johnson declared "war on poverty" and signed the Civil Rights Act in 1964, and there was widespread rioting throughout the nation during the latter part of the decade).

"War on the Sources of Poverty,"[51] leading to the 1964 Economic Opportunity Act that established the Office of Economic Opportunity.[52] This office funded legal services programs that represented the tenants in many of the landmark tenant rights cases of the period.[53] The impact of the ideology that stemmed from the social culture of this time period was so great that one author recognized that "the moral principle of redistribution of wealth from a landlord to a tenant" Was the driving force behind the change, "not contract law."[54]

In the courts, the prominence of the contract had long been on the rise, revitalizing the idea of *pacta sunt servanda*, while the *laissez faire* model of economics had peaked.[55] Viewing residential leases through consumer and contract law lenses brought into consideration the bargaining power of the parties, a consideration that the historical, property law-based approach lacked.[56] The down-trodden position of many indigent tenants, and the renters' general lack of bargaining power in the landlord-tenant relationship, were ideas not lost in the courts.[57] The social environment of the time also had an impact directly on legal decision makers: "[j]udges and legislators believed that landlords could afford to give up some of their profits for the benefit of slum dwellers because the landlord's economic position, like that of everyone else, was improving."[58]

Congress's most prominent action affecting the rights of landlords and tenants during this period was the passage of the Fair Housing Act ("FHA") as part of the Civil Rights Act of 1968.[59] The FHA, in part, prohibited landlords nationwide from discriminating with respect to who they would rent to, in the terms of their rental agreements, or in the services they would provide.[60] The protected classes originally were race, color, national origin, and religion.[61]

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51. Lyndon B. Johnson, President of the United States, Special Message to the Congress Proposing a Nationwide War on the Sources of Poverty (Mar. 16, 1964), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=26109&st=&st1=#axzz1emVgAJbJ.

52. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 2, 78 Stat. 508 (1964) (codified as amended at 42 U.S.C. § 2701 (repealed 1981)).

53. Rabin, *supra* note 16, at 550-51.

54. Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 881-82 (1975) (describing "[w]aivability and [r]emedies" as the driving forces behind the recent revisions included in a draft of the Restatement of the Law, Second, Property).

55. Glendon, *supra* note 32, at 509 n.43 (*Pacta sunt servanda* is the Latin term for "bargains [must] be kept.").

56. Richard Rivera, *The Evolution of Landlord and Tenant Law: An Overview of Past and Present*, NEW YORK PRACTICE SKILLS COURSE HANDBOOK SERIES, Oct. 1997, at 24 (discussing how the emerging view of landlords as sellers to consumer tenants brought about a consideration of the bargaining position of the parties).

57. *See* Geurts, *supra* note 31.

58. Rabin, *supra* note 16, at 554.

59. 42 U.S.C. §§ 3601-19 (2006).

60. *Id.* § 3604 (a) -(b).

61. Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-19 (2006)).

Sex,[62] handicap, and familial status[63] were later added. Although a major step forward, the FHA specifically provided for exceptions in its discrimination prohibitions for single family homes rented by the owners[64] when the dwelling contains no more than four units, and the owner intends to occupy one of the units.[65]

1. The Development of the Implied Warranty of Habitability.—One of the revolutionary doctrines emerging from courts during the 1960s and 70s was that of the implied warranty of habitability within rental agreements.[66] This doctrine provided that inherent in a residential lease was a warranty by the landlord that the premise was suitable for living, and the premise would remain in proper condition for the lease term.[67] The seminal case holding such a warranty existed was *Javins v. First National Realty Corp.*,[68] where Judge Skelly Wright quoted the United States Supreme Court in expressing the need to reconsider residential tenant law:

> "[T]he body of private property law . . . , more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." 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.[69]

In *Javins*, the landlord, First National Realty Corporation, commenced an eviction against its tenants for failure to pay rent.[70] The tenants admitted to their default on the rent payment but claimed the landlord's numerous violations of local housing ordinances were a defense to the action or, alternatively, that the violations should allow for a set-off of the damages in an amount equal to their delinquency.[71] The court held that obligations of the landlord under the housing codes necessarily imply a warranty to tenants that those obligations are met, and

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62. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 527, 88 Stat. 633 (1974) (codified as amended at 42 U.S.C. § 3604 (2006)).

63. Fair Housing Amendments Act of 1988, Pub L. No. 100-430, § 6, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. § 3604 (2006)).

64. 42 U.S.C. § 3603(b)(1) (2006) (The FHA prohibition of discrimination in the rental of housing is not applicable if the renting homeowner does not own or have an interest in more than three such homes, nor is it applicable when no rental services of any kind are used in the rental process.).

65. *Id.* § 3603(b)(2) *But see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding 42 U.S.C. § 1982 protects against racial discrimination in all housing transactions).

66. Rivera, *supra* note 56, at 24 ("[C]ourts finally came to recognize an implied warranty of habitability in residential apartment leases, a revolutionary departure from the past.").

67. BLACK'S LAW DICTIONARY, *supra* note 11, at 1619.

68. 428 F.2d 1071 (D.C. Cir. 1970).

69. *Id.* at 1074 (second alteration in original) (footnote omitted) (quoting Jones v. United States, 362 U.S. 257, 266 (1960)).

70. *Id.* at 1073.

71. *Id.*

"must be read into" the lease agreement.[72] The court also gave a policy justification for overturning the historical caveat lessee approach: the common law was built on historical agrarian tenants' expectations; the current residential lease is perceived more akin to a consumer transaction, whereas it had historically been viewed more similar to a property conveyance.[73]

The implied warranty of habitability began to replace the doctrine of constructive eviction because courts were able to find a breach of the implied warranty of habitability without the necessity that the tenants have been forced to vacate the premises due to the uninhabitable conditions, as a constructive eviction requires.[74] The resemblance between this implied warranty and the implied warranty of fitness recognized in contracts for the sale of goods under the Uniform Commercial Code section 2-315 hints at the emergence of consumer law as the dominant force in the landlord-tenant relationship, and this resemblance was indeed a consideration in *Javins*.[75]

Following the D.C. Circuit's example, many state supreme courts have since recognized an implied warranty of habitability within residential leases.[76] Courts generally have held that tenants cannot waive this protection.[77] Legislatures also have codified warranties of habitability, often following section 2.104 of the Uniform Residential Landlord and Tenant Act.[78]

2. The Development of the Retaliatory Eviction Prohibition.—A second radical departure from the common law came in the form of limitations on the landlord's unchecked power to evict.[79] Also a product of the D.C. Circuit Court, *Edwards v. Habib*[80] held that the promulgation of the District of Columbia's housing codes necessarily intended a prohibition of retaliatory evictions where the motive derived from the tenant reporting a code violation.[81] The court also indicated that there are strong public policy concerns that support prohibiting retaliatory eviction,[82] and that there may be violations of constitutional rights in

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72. *Id.* at 1081-82.

73. *Id.* at 1074-77.

74. *See* RICHARD A. LORD, 15 WILLISTON ON CONTRACTS § 48:11 (4th ed. 2011) (discussing the general replacement in the courts of the doctrine of constructive eviction with that of the implied warranty of habitability since the latter did not require the tenant to abandon the premises).

75. *Javins*, 428 F.2d at 1075.

76. 2-16B POWELL, *supra* note 17, § 16B.04 n.37 (providing a list of state supreme court decisions holding an implied warranty of habitability exists in residential leases).

77. *See id.*, pt. [1][d].

78. *Id.* at n.45 (providing a list of states statutes that are modeled on the Uniform Residential Landlord and Tenant Act § 2.104).

79. Rabin, *supra* note 16, at 534 (noting the common law view that a landlord could evict "for any reason or no reason").

80. 397 F.2d 687 (D.C. Cir. 1968).

81. *See id.* at 690-91.

82. *Id.* at 699 ("As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted." (footnote omitted)).

such instances.[83]

In *Edwards*, a month-to-month tenant complained about her rented housing conditions to the Department of Licenses and Inspections, which found more than forty violations of local housing codes.[84] The landlord promptly served the tenant with an eviction notice after the landlord had been informed of the violations.[85] In finding a statutorily implied prohibition of evictions in retaliation for reporting violations of housing rights,[86] Judge Wright provided robust policy support for his holding:

> 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." In trying to effect the will of Congress and as a court of equity we have the responsibility to consider the social context in which our decisions will have operational effect. . . . There can be no doubt that the slum dweller, even though this home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence.[87]

a. Varying bases for court-created retaliatory eviction prohibitions.—Within ten years of *Edwards*, more than half the states developed anti-retaliatory eviction doctrines through their courts or legislatures.[88] Other courts have found prohibitions through different means. A New Jersey court held that to allow an eviction in retaliation for the tenant who organized a tenant meeting would be a violation of the tenant's First Amendment rights, as applied to the states via the Fourteenth Amendment.[89] At least one court of this revolutionary period even found the court's action itself, in granting possession and evicting a tenant, could constitute the required state action under a constitutional violation claim.[90] Alternatively, a Massachusetts court found a violation of the tenant's First Amendment rights, as applied through the Fourteenth Amendment, under 42

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83. *Id.* at 690-99 (discussing, in depth, the possibility that a retaliatory eviction may violate the First Amendment and the non-enumerated right to inform the government of violations of law).

84. *Id.* at 688.

85. *Id.* at 689.

86. *Id.* at 702.

87. *Id.* at 701 (internal citation omitted).

88. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.9 (1977).

89. *See* E. & E. Newman, Inc. v. Hallock, 281 A.2d 544, 546 (N.J. Super. Ct. App. Div. 1971); *see also*, RESTATEMENT (SECOND) OF PROP., *supra* note 88 (discussing how findings of constitutional violations vary between jurisdiction, as the courts interpret whether "state action" is involved under the local law rather than a uniform approach).

90. *See* Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969), *superseded by statute*, N.Y. REAL PROP. LAW § 223-b (McKinney 2013), *as recognized in* German v. Fed. Home Loan Mortg. Corp., 899 F. Supp. 1155, 1165 (S.D.N.Y. 1995) (noting that the statute codified a defendant's right to assert a "'retaliatory eviction' defense").

U.S.C. § 1983,[91] where the landlord had acquired the leased property from the state and the eviction was in retaliation for the tenant's "associational activities" and petitions to the government.[92]

b. Scope of protected tenant activities.—Likewise, court-created anti-retaliatory eviction doctrines extended protected tenant activities to varying degrees. *Edwards* proscribed protection from retaliation for reporting housing code violations in the District of Columbia.[93] Some courts extended the protection to all judicial or legislatively sanctioned activity related to securing safe housing for tenants, such as rent withholding.[94] The constitutional rights of freedom of association, at least when it is associated with housing as when organizing a tenant group,[95] and voting[96] have also been found to be protected acts. However, it has also been held that the retaliatory eviction doctrine does not protect constitutional rights unrelated to tenancy.[97] Other protected actions include complaining to law enforcement about a landlord's illegal acts,[98] and expressing opposition to the landlord's development plans.[99]

c. Scope of prohibited landlord retaliatory actions.—Another dimension of any retaliatory eviction prohibition is the scope of the retaliatory activity against which the tenant is protected.[100] For example, a New Jersey court found that

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91. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

92. *See* McQueen v. Druker, 438 F.2d 781, 782, 784-85 (1st Cir. 1971). Claims under a conspiracy approach, by way of 42 U.S.C. § 1985(3) (2006), whereby two or more people who conspire to deny another of his rights are liable to that person, have also been attempted, but no court has found for a tenant under such a claim. *See, e.g.*, Fallis v. Dunbar, 386 F. Supp. 1117, 1119, 1121 (N.D. Ohio 1974).

93. *See* Edwards v. Habib, 397 F.2d 687, 701-02 (D.C. Cir. 1968).

94. *See* Robinson v. Diamond Hous. Corp., 463 F.2d 853, 870-71 (D.C. Cir. 1972) (holding rent withholding is an activity protected by the retaliatory eviction doctrine); *see also* Schweiger v. Super. Ct., 476 P.2d 97, 102-03 (Cal. 1970) (protecting a tenant who exercised his jurisdictional right to repair premises and deduct the cost of such from the rent).

95. *See McQueen*, 438 F.2d at 785.

96. *See* United States v. Beaty, 288 F.2d 653, 658 (6th Cir. 1961).

97. *See* Imperial Colliery Co. v. Fout, 373 S.E.2d 489, 494 (W. Va. 1988) (refusing to extend retaliatory eviction defense to situation where tenant is claiming eviction is based on his participation in a labor strike).

98. *See* Barela v. Super. Ct., 636 P.2d 582, 586-88 (Cal. 1981) (Where a tenant had reported a landlord's molestation of the tenant's child, the tenant was protected from retaliatory eviction for that report.).

99. *See* Windward Partners v. Delos Santos, 577 P.2d 326, 328-29, 334 (Haw. 1978).

100. *See* 2-16B POWELL, *supra* note 17 (describing the realm of prohibited landlord conduct broadly, based on post-*Edwards* case law and statutes, "whenever the landlord takes action detrimental to the tenant after the tenant exercises a protected right").

increasing a tenant's rent in response to organizing a tenant meeting and then evicting the tenant for failing to pay the increased rent could be unlawful retaliatory eviction.[101] Similarly, a California court found raising rent in retaliation could create an independent right of action for the tenant, based on retaliatory eviction, rather than the tenant having to wait to use the doctrine in its traditional defensive role in an eviction proceeding.[102] A landlord's threat of eviction and refusal to renew a lease, even when the right to do so was expressed within the lease, was also found to violate the retaliatory eviction doctrine when doing so was in retaliation for a tenant's protected actions.[103]

d. Methods by which retaliatory eviction prohibitions are enforced.—When a tenant raises retaliatory eviction as a defense to an eviction action, the tenant must show proof he or she participated in a protected act, and the landlord took a retaliatory action.[104] Jurisdictions vary, but many courts have established a presumption that the landlord's act was retaliatory once the tenant is able to prove a minimal level of supporting evidence, thus shifting the burden to the landlord to show there was not a retaliatory motive in their eviction.[105] Some jurisdictions require the retaliatory motive be shown to be the sole motive behind the landlord's act, placing a substantial burden on the tenant.[106] On the opposite end of the spectrum of tenant burden, once the tenant raises the presumption in New Jersey, a landlord may overcome it only by demonstrating that his or her action was not based in any way upon the protected acts of the tenant.[107] However, the more common approach is a middle ground, whereby courts require the retaliatory motive be proven as a primary motive in the landlord's act,[108] or that any non-retaliatory reason given by the landlord be non-significant.[109]

The remedy for retaliatory eviction also varies from jurisdiction to jurisdiction, but all states that recognize the doctrine treat it as a defense to an eviction action, as *Edwards* held.[110] Jurisdictions have also recognized injunctive

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101. E. & E. Newman, Inc. v. Hallock, 281 A.2d 544, 545-56 (N.J. Super. Ct. App. Div. 1971) (per curiam).

102. *See* Aweeka v. Bonds, 97 Cal. Rptr. 650, 652 (Cal. Ct. App. 1971).

103. *See* McQueen v. Druker, 438 F.2d 781, 782-85 (1st Cir. 1971).

104. *See* 2-16B POWELL, *supra* note 17.

105. *See id.* (stating that in some jurisdictions statutes created a presumption of retaliatory motive if the action is created within a proscribed time of the tenant's protected act, and in other jurisdictions courts have held that such presumption exists without it being expressed in a statute); *see, e.g.*, ARIZ. REV. STAT. ANN. § 33-1381(B) (2013), KY. REV. STAT. ANN. § 383.705(2) (West 2013).

106. *See* 2-16B POWELL, *supra* note 17 (describing this as the "sole motive test"); *see also* Dickhut v. Norton, 173 N.W.2d 297, 302 (Wis. 1970).

107. Silberg v. Lipscomb, 285 A.2d 86, 88 (Distr. Ct. of Union Cnty., N.J. 1971).

108. *See* 2-16B POWELL, *supra* note 17 (describing the test applied in *McQueen*, 438 F.2d at 781).

109. *See id.* (describing the approach applied in *Parkin v. Fitzgerald*, 240 N.W.2d 828, 832-33 (Minn. 1976)).

110. *Id.*

relief to bar a landlord from increasing the rent, [111] or even from filing the eviction suit.[112] In addition, many jurisdictions statutorily provide for punitive damages where an eviction is deemed retaliatory.[113]

e. Legislatively prohibited retaliatory eviction.—Although this Note is focused on judicial action in relation to retaliatory eviction, it should be noted that many states now enforce the prohibition through legislation.[114] The legislative action often came after the judicial creation of the retaliatory eviction doctrine, endorsing the courts' rulings, with examples of such jurisdictions being California[115] and New York.[116] In at least one jurisdiction where the retaliatory eviction prohibition was codified, the supreme court of the state found that the protections enumerated in that statute did not prohibit the courts from finding additional protected activity.[117] Section 5.101 of the Uniform Residential Landlord and Tenant Act provides a model retaliatory eviction law that states have used as a basis for their laws.[118]

II. LANDLORD-TENANT LAW IN INDIANA

Indiana was, for the most part, a non-participant in the changes taking place in landlord-tenant law during the 1960s and 1970s.[119] Protections existed by way of Indiana's common law prior to that period's national revolution,[120] but case

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111. *See, e.g.*, E. & E. Newman, Inc. v. Hallock, 281 A.2d 544, 546 (N.J. Super. Ct. App. Div. 1971).

112. *See, e.g.*, *id. But see* Hosey v. Club Van Cortlandt, 299 F. Supp. 501, 506-08 (S.D.N.Y. 1969) (holding injunctive relief was improper because the tenant could use retaliatory eviction as a defense to any possessory action brought against him), *superseded by statute*, N.Y. REAL PROP. LAW § 223-b (McKinney 2013), *as recognized in* German v. Fed. Home Loan Mortg. Corp., 899 F. Supp. 1155 (S.D.N.Y. 1995).

113. *See, e.g.*, CAL. CIV. CODE § 1942.5(f)(2) (West 2013) (requires punitive damages to be awarded between $100 and $2000 for a retaliatory eviction); DEL. CODE ANN. tit. 25, § 5516(e) (2013) (providing for three months' rent or three times actual damages, whichever is greater, for a retaliatory eviction); MASS. GEN. LAWS ch. 186, § 18 (2013) (providing for punitive damages in the amount of the greater of: a minimum of one month's rent, a maximum of three months' rent, or actual damages).

114. *See supra* note 27 and accompanying text.

115. CAL. CIVIL CODE § 1942.5 was enacted in 1979, well after *Schweiger v. Superior Court*, 476 P.2d 97 (Cal. 1970).

116. N.Y. REAL PROP. LAW § 223-b was enacted in 1979, well after *Hosey*, 299 F. Supp. at 501.

117. *See* S.P. Growers Ass'n v. Rodriguez, 552 P.2d 721, 728-29 (Cal. 1976).

118. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (1972).

119. This assertion is based on the relative lack of statutory protections passed and lack of case law produced in Indiana during the period, in comparison to the movement sweeping other jurisdictions across the nation. *See* discussion *infra* Part I.B.2. (describing the vast tenant protections created under various jurisdiction's retaliatory eviction doctrines).

120. *See, e.g.*, Talbott v. English, 59 N.E. 857, 860 (Ind. 1901) (recognizing the doctrine of

law recognizing the developing view of the residential lease as a consumer transaction was slow to come in the Hoosier state. Eventually it was the legislature that would create substantive tenant protections.[121] However, at least one Indiana court appeared as if it was willing to recognize the reformed view of residential leases in *Breezewood Management Co. v. Maltbie*,[122] which was decided in 1980.

In *Breezewood*, Indiana University student-tenants found numerous issues with an apartment they had leased from Breezewood after they had taken possession, including rotting floorboards, loose and broken windows, cockroaches, plumbing leaks, and a lack of hot water and heating.[123] During the term of the lease, one of the tenants moved out and refused to pay further rent.[124] At first the landlord agreed to allow the remaining tenant to stay and pay only his half of the rent, but later the landlord sued both of the tenants for the entire balance owed under the lease.[125] The tenants counterclaimed for breach of an implied warranty of habitability.[126] For the first time in Indiana, the court of appeals held that the local housing codes necessarily implied that there existed an implied warranty of habitability in the lease agreement.[127]

Unfortunately, rather than building from *Breezewood* as a starting point for increased tenants' rights, the courts have instead regressed. In *Johnson v. Scandia Associates, Inc.*,[128] the Indiana Supreme Court held that the warranty would only be implied if there were housing codes or some other facts existing in the lease agreement, apparently other than the simple fact the agreement was for residential housing, that could establish that both of the parties intended to have a warranty of habitability—i.e., the warranty must be implied-in-fact and will not be implied by law.[129] The court also found, when the warranty is implied-in-fact, the landlord will not be liable for any consequential damages resulting from a breach, such as injury caused by a defect in the premises.[130]

Further, no retaliatory eviction doctrine has ever emerged from Indiana's courts, and this author was able to discover only one Indiana locale with a statutory prohibition.[131] Month-to-month tenants are particularly susceptible to

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constructive eviction); Avery v. Dougherty, 2 N.E. 123, 125 (Ind. 1885) (recognizing the tenant's right to quiet enjoyment).

121. *See* IND. CODE §§ 32-31-8-5 to -6 (2013) (enacted in 2002).

122. 411 N.E.2d 670 (Ind. Ct. App. 1980).

123. *Id.* at 671.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 675 (stating the tenants "had a reasonable expectation their basic housing needs would be met").

128. 717 N.E.2d 24 (Ind. 1999).

129. *Id.* at 31-32.

130. *Id.* at 32.

131. *See* BLOOMINGTON (IND.) MUNICIPAL CODE § 16.12.090 (2011) (prohibiting actual eviction, or the threat of eviction, in retaliation for a tenant's request for an inspection, as provided

eviction, as they have no express contractual protections to deter an arbitrary eviction at the end of each monthly term.[132] The court system may be in part to blame for relying on informal small claims courts to provide a speedy remedy to landlords, possibly to the detriment of the tenant's due process rights.[133] In perhaps the most recent and blatant example of such a violation of a tenant's due process rights, the state supreme court noted in *Morton v. Ivacic*:

> The transcript appears to indicate that the hearing proceeded from the onset under the expectation that Ivacic was entitled to an order of immediate possession. First, the court informed Morton that he and Ivacic would have to agree on a move-out date before Morton was afforded an opportunity to present a defense. The court's statements—"Ultimately, he's going to get possession of the property . . . . [S]ir, where there's smoke there's fire . . . I mean he isn't making this up. He's a substantial citizen. Evidently, you owe him something"—suggest inattention to Morton's defenses.
>
> Morton attempted to provide the court with testimony and a notarized affidavit or other documentation, and he was denied. This was inconsistent with due process.[134]

The court went on to note that Indiana has long allowed a tenant in an ejection action to present "[a]ll legal and equitable defenses,"[135] and the failure to allow those defenses, as in this case, violated the tenant's due process rights.[136] If this was a common occurrence in eviction proceedings, it is easily understood why Indiana has been slow to develop more substantive tenants' rights.[137]

Indiana law does provide a remedy for a wrongfully evicted tenant by way

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in the municipal code).

132. *See* IND. CODE § 32-31-1-4 (2013). *See also,* Adams v. Holcomb, 77 N.E.2d 891, 893 (Ind. 1948) ("Ejectment is a proper remedy to be used by a landlord to recover possession of the leased premises from his tenant after the expiration of the term . . . ."); Barber v. Echo Lake Mobile Home Com., 759 N.E.2d 253, 255 (Ind. Ct. App. 2001) (holding a month-to-month tenancy is properly terminated without cause so long as one month notice is provided to tenant).

133. *See* Morton v. Ivacic, 898 N.E.2d 1196, 1199-1200 (Ind. 2008) (holding a tenant defendant in a possessory action had been denied due process when he was not allowed to provide any defense at the possessory hearing, and that the small claims court's attitude toward the proceeding from the outset was that the landlord would prevail).

134. *Id.* at 1200 (alterations in original).

135. *Id.* (alteration in original) (citing Olds v. Hitzemann, 42 N.E.2d 35, 38 (Ind. 1942)).

136. *Id.*

137. *See* LAWYERS' COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 15-16 (2003) *available at* http://www.lcbh.org/images/2008/10/chicago-eviction-court-study.pdf (discussing how tenants in Chicago's similar summary eviction proceedings often are denied an opportunity to provide a defense, but many pro se tenants also lack the knowhow to present a proper defense).

of a wrongful eviction action,[138] but this approach is sub-par in its remedy. A wrongful eviction claim allows a court to consider not only whether there was a breach of the lease agreement by the landlord to allow compensatory damages, but also whether any malicious motive supporting punitive damages existed.[139] However, the tenant will have a wrongful eviction claim only once the landlord removes the tenant from the property, as wrongful eviction is not a defense to prevent the physical eviction.[140] This approach completely ignores the tenant's interest in remaining in the home.[141]

Although the courts in Indiana have not developed comprehensive tenant protections required by modern landlord-tenant relationships, the legislature took a major step forward in 2002.[142] The legislation, referred to throughout this Note as the Residential Landlord-Tenant Statutes ("RLTS"),[143] was intended to improve the condition of the state's rental housing.[144] The legislature appears to have primarily intended RLTS to correct the holding in *Johnson*, codifying a warranty of habitability in every lease agreement for a living unit within Indiana[145] rented after June 30, 2002.[146]

The RLTS also defines the warranty of habitability, requiring the landlord to (1) deliver the property "in a safe, clean, and habitable condition,"[147] (2) "[c]omply with all health and housing codes applicable to the rental premises,"[148] (3) "[m]ake all reasonable efforts to keep common areas . . . in a clean and proper condition,"[149] and (4) "[p]rovide and maintain" the electrical, plumbing, sanitary, heating, air conditioning, elevators, and any supplied appliance "in good and safe working condition."[150] These requirements cannot be waived in a rental agreement.[151] Further, the RLTS expressly creates a cause of action for a tenant who has brought any of the enumerated issues in the statute to the landlord's

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138. *See* Nate v. Galloway, 408 N.E.2d 1317, 1322 (Ind. Ct. App. 1980) ("[W]hen a wrongful eviction has occurred, the tenant may clearly sue for damages based on an improper termination of the lease and his los[s] therein.").

139. *See* Moyer v. Gordon, 14 N.E. 476, 476-77 (Ind. 1887).

140. *See Galloway*, 408 N.E.2d at 1321-22; Trout v. Brown, 123 N.E.2d 647, 649-50 (Ind. App. 1955) (finding loss of possession is a prerequisite to a wrongful eviction claim).

141. *See* Roisman, *supra* note 21, at 820-30 (discussing the importance of "security of tenure").

142. Indiana's legislature passed a series of laws pertaining to the landlord-tenant relationship in 2002, codified at Title 32, Article 31 of the Indiana Code.

143. IND. CODE § 32-31-2.9-2 (2013).

144. Robert G. Solloway & Tanya D. Marsh, *Filling in the Gaps: The Continuing Evolution of Property Law in Indiana*, 36 IND. L. REV. 1217, 1243-44 (2003).

145. IND. CODE § 32-31-8-5 (2013).

146. *Id.* § 32-31-8-1.

147. *Id.* § 32-31-8-5(1).

148. *Id.* § 32-31-8-5(2).

149. *Id.* § 32-31-8-5(3).

150. *Id.* § 32-31-8-5(4).

151. *Id.* § 32-31-8-4.

attention and the landlord thereafter failed to take corrective action.[152] Tenants can recover by way of actual and consequential damages, attorney's fees, injunctive relief, and "any other remedy appropriate under the circumstances."[153]

Other provisions within the RLTS protect the tenant's right to a return of any security deposit paid, or an itemization of how the deposit was spent, within a set time period of the tenant's vacating the property and providing a forwarding address.[154] Also, the landlord is prohibited from interfering with the tenant's possession through "self-help eviction," meaning landlords may not force a tenant to vacate by changing the locks, removing doors, interrupting utility services, or the like.[155]

Although the RLTS primarily targets the obligations of Indiana landlords, the statute also provides for certain obligations on the part of Indiana tenants: (1) to comply with all health and housing code requirements primarily applicable to the tenant;[156] (2) to keep the occupied and used areas clean;[157] (3) to use the provided systems in a reasonable manner;[158] and (4) to refrain from waste of the rented property.[159]

III. THE IMPACT OF INDIANA'S 2002 RESIDENTIAL LANDLORD-TENANT STATUTE ON A RETALIATORY EVICTION PROHIBITION IN INDIANA

The public policy in support of prohibiting retaliatory evictions is as relevant today as it was when the doctrine came into existence forty-five years ago. Any discouragement of tenants from reporting issues in their housing naturally will frustrate the purpose of housing and health codes,[160] which are intended to promote the public's health and safety.[161] Although Indiana has, in the past, abided by the doctrine that a landlord may evict their tenant for any reason at the end of the lease term,[162] Indiana law has recognized the importance of providing exceptions to established common law doctrines necessary to promote important public policies.[163] Further, allowing a claim for damages only after the unjust

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152. *Id.* § 32-31-8-6(a)-(b).

153. *Id.* § 32-31-8-6(d).

154. *See id.* §§ 32-31-3-12 to -17.

155. *See id.* § 32-31-5-6.

156. *Id.* § 32-31-7-5(1).

157. *Id.* § 32-31-7-5(2).

158. *Id.* § 32-31-7-5(3).

159. *Id.* § 32-31-7-5(4).

160. *See* Edwards v. Habib, 397 F.2d 687, 700-01 (D.C. Cir. 1968).

161. *See* 11-79 POWELL, *supra* note 25.

162. *See* Halliday v. Auburn Mobile Homes, 511 N.E.2d 1086, 1088 (Ind. Ct. App. 1987) (finding the previous version of what is now Indiana Code section 32-31-1-4, which provides what notice is required before a tenant may be evicted, allows the landlord-tenant agreement to "be terminated at the option of a party (with or without cause)").

163. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427-29 (Ind. 1973) (creating an exception to the state's employment-at-will doctrine for retaliatory discharge, finding such

removal of a tenant from the property provides no hope of retaining possession and will discourage reporting of housing issues due to the substantial importance generally placed on security of tenure.[164]

This Note posits that the RLTS provides support for Indiana to have a retaliatory eviction prohibition in three distinct ways. First, the statutes provide statewide legal standards for landlord conduct and leased properties systems' maintenance.[165] Further, the RLTS expressly requires tenants to inform landlords of the landlords' violations of the applicable codes in order to have a remedy for the landlords' failures to abide by the law.[166] The most respectful interpretation of the statute, in order to allow the legislation to be effective, is to prohibit retaliation against tenants for reporting landlord violations under the law.[167]

Second, the enactment of the RLTS demonstrates it is the public policy of the State of Indiana to promote safe housing for tenants statewide, wholly apart from the existence of local housing codes.[168] This is important because the courts look to the legislature to provide the public policy of the state that their decisions should perpetuate,[169] and the RLTS directs the state courts on the current public policies surrounding the landlord-tenant relationship. The policy of promoting safe rental housing depends upon the protection of tenant's actions taken to ensure safe housing. As was the District of Columbia's housing code in *Edwards*,[170] Indiana's statutory foundation provides the necessary baseline of housing standards that can be effectuated only by preventing landlords from retaliating for efforts to enforce those standards.[171]

Finally, if the statutory language is not strong enough for courts to find that it expresses a public policy, as previously described, the RLTS can fill a

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discharges to be against public policy).

164. *See* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV 483, 532 (1985) ("A tenant who fears loss of an interest as vital as his home may forego associations or actions that are a normal part of self-determination and self-expression.").

165. IND. CODE § 32-31-8-5 (2013) (The statute lists systems a landlord must provide and maintain: electrical, plumbing, sanitary, heating, and air conditioning systems. It also requires the landlord to deliver the rental unit in a clean and safe manner and abide by any applicable health and housing codes.).

166. *Id.* § 32-31-8-6(b)(1).

167. *See* State *ex rel.* Hatcher v. Lake Super. Ct., 500 N.E.2d 737, 740 (Ind. 1986) (requiring a statute be interpreted so as to not make it easily circumvented and thus a nullity).

168. *See* IND. CODE § 32-31-8-5 (2013) (The statute requires landlords not only abide by applicable housing codes, but that the premises be delivered in a safe and clean condition with basic systems compatible congruent with modern habitability. This demonstrates a legislative determination that tenants statewide be provided safe and effective housing.).

169. *See* Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979) ("Normally, of course, the determination of what constitutes public policy . . . is a function of the legislature.").

170. Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968).

171. *Id.* at 699-701 (holding public policy required a retaliatory eviction prohibition for the District's housing codes to be effective).

necessary gap in the creation of such a public policy. A comparison of retaliatory eviction with Indiana case law regarding retaliatory discharge demonstrates how this model of policy creation has worked in the past in Indiana's courts.[172] As the policies supporting both doctrines are parallel,[173] considering this third route to creation of a retaliatory eviction doctrine should not be overlooked.

A. Retaliatory Eviction Prohibition as a Matter of Statutory Interpretation of Indiana's Residential Landlord-Tenant Statutes

Indiana's landlord-tenant relationship statute is ambiguous in at least one aspect—it requires a tenant to provide notice to the landlord of the landlord's violations of the law in order to invoke the court's aid,[174] but it does not expressly provide that doing so will permit the tenant protection under the law. However, canons of statutory interpretation show such protection is part of the legislation: the legislature will not enact an easily circumvented statute,[175] and the legislature intends its statutes to be effective.[176]

In *State ex. rel. Hatcher v. Lake Superior Court, Room Three*,[177] the Gary City Judge and Court challenged the Mayor of Gary's process of reviewing and revising the judicial branch's budget before its submission to the city council.[178] The suit was brought under Indiana Code section 36-4-4-5(a), which requires the county superior court, sitting *en banc*, to determine the disputes concerning the separation of powers between city branches of government.[179] The defendant attempted to circumvent the statute by use of Indiana's change of venue statute, which provides that a court shall grant a change of venue request when the movant meets certain requirements.[180] The court denied the change of venue request, and the defendant petitioned for a writ of mandamus to require the judge to grant the venue change.[181] The court held that such a reading of the Indiana

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172. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (creating a policy-based exception to the common law employment at will doctrine); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1059 (Ind. Ct. App. 1980) (limiting the policy exception to the common law employment at will doctrine to only those discharges made in retaliation for the employee's exercise of a statutory right).

173. *See Frampton*, 297 N.E.2d at 428 (comparing the policy supporting retaliatory discharge with that of prohibiting retaliatory eviction).

174. IND. CODE § 32-31-8-6(b)(1) (2013).

175. State *ex. rel.* Hatcher v. Lake Super. Ct., 500 N.E.2d 737, 740 (Ind. 1986) (holding parties cannot, through a change of venue motion, avoid a statutory venue provision, as such an easy avoidance of the statutory requirement impedes the very purpose of the statute).

176. Lickliter v. Rust Feed & Seed & Lumber, Inc., 421 N.E.2d 10, 11 (Ind. Ct. App. 1981) ("We shall not presume that the legislature intended to enact an ineffective statute.").

177. 500 N.E.2d 737 (Ind. 1986).

178. *Id.* at 738.

179. *Id.* at 738-40.

180. *Id.* at 739.

181. *Id.* at 738.

Code would be inconsistent with legislative intent since the interpretation would allow for a change of venue in this instance, thus making the code's venue provision easily avoided and meaningless.[182]

The understanding expressed by the Indiana Supreme Court in *Hatcher* is analogous to this Note's proposed interpretation of Indiana's landlord-tenant laws. A law should be construed so that its provisions are not useless.[183] As previously mentioned, Indiana Code section 32-31-8-6 requires a tenant to first give notice to the landlord of the landlord's violation of a code provision, permitting a reasonable time to correct the issue, before the tenant may file a civil suit.[184] The rudimentary logic supporting the idea that leaving a tenant unprotected in the tenants' act of reporting code violations to landlords would frustrate the purpose of how Indiana's landlord-tenant law has been understood since the inception of the retaliatory eviction doctrine.[185]

Currently, an Indiana tenant may have to weigh his or her interests in correcting existing habitability issues with interests of remaining in the home. A law, such as Indiana Code section 32-31-8-6, which requires the reporting of a violation to the landlord before a tenant's right to a civil action arises, must necessarily intend to protect the tenant from a retaliatory action by the landlord for that reporting.[186] Further, a reasonable interpretation of the law must also protect tenant actions intended to gain information on possible issues, such as requesting an inspection by a housing authority.[187] If tenants are not able to report suspected housing code violations, both recording and confirming the issue, the RLTS will be ineffective in its purpose and have its intended impact circumvented.[188] The tenant's knowledge of a lack of legal protection from a retaliatory eviction, even without the express threat of eviction from a landlord, will chill the tenant's likelihood to report a code violation.[189]

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182. *Id.* at 739-40.

183. *Id.* at 739.

184. IND. CODE § 32-31-8-6(b) (2013).

185. *See* Edwards v. Habib, 397 F.2d 687, 700-01 (D.C. Cir. 1968) ("To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code . . . .").

186. *Id.* at 700-01 (finding tenants whom are unprotected in reporting housing code violations will be deterred from reporting); *see also* 99 AM. JUR. TRIALS § 289 (2006) ("[C]ourts have observed that low-income tenants are often forced to accept substandard housing because of unequal bargaining power, and allowing retaliatory eviction by a landlord would only serve to perpetuate this condition." (footnote omitted)).

187. The tenant may not know what the exact violations are in every instance, even though there are manifestations that some deficiency exists. However, tenants should be free to pursue information that would lead to identification and correction of these issues.

188. *See, e.g.*, *Edwards*, 397 F.2d at 700; Schweiger v. Super. Ct., 476 P.2d 97, 102 (Cal. 1970); Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1217 (Utah 1995) (noting that protecting tenants in reporting code violations to government officials is vital to effectuate rental housing standards).

189. *See Edwards*, 397 F.2d at 701 ("[A]n eviction under the circumstances . . . would not only punish appellant for making a complaint which she had a constitutional right to make, . . . but also

This statutory interpretation approach to the creation of an Indiana retaliatory eviction prohibition is similar to one of the two approaches found in *Edwards v. Habib*,[190] but the Indiana law lends more support to this statutory interpretation method than existed in *Edwards*. Indiana's RLTS expressly requires the tenant inform the landlord of any housing condition that would violate the law before the tenant would have an ability to bring a claim in court,[191] unlike the D.C. housing code in *Edwards*. This is clear evidence that the legislature intended that informing the landlord of the issue was to be the primary route to correct housing violations, with action through the state's courts being secondary. This approach has at least one possible benefit: reduction in courts' dockets, if issues are in-fact resolved without court involvement.

However, by the RLTS specifically requiring the tenant to bring the issue to the landlord's attention first, before a right to civil action will arise,[192] the tenant is left in an exceptionably vulnerable position.[193] Unless the RLTS is interpreted to prohibit retaliatory eviction, Indiana's "with or without cause"[194] approach leaves tenants not under contract at the landlords' mercy as to whether or not the tenant will be allowed to remain. This notification-first scheme is more susceptible to retaliatory actions due to both (1) the tenant having to hold himself or herself out as the one who has raised the code issue, and (2) the lack of immediate third party oversight of the landlord's subsequent actions.

The Utah Supreme Court implemented a similar approach in determining that a statute nearly identical to Indiana's RLTS effectively required a retaliatory eviction prohibition.[195] In *Building Monitoring Systems, Inc. v. Paxton*,[196] the court considered a state law that imposed certain duties on landlords and required tenants to provide landlords with notice of violations of that law twice before

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would stand as a warning to others that they dare not be so bold . . . .").

190. *Id.* at 701 (holding a prohibition of retaliatory eviction was intended by the legislature's creation of the housing code, as well as a necessary public policy for the code to be effective).

191. IND. CODE § 32-31-8-6(b)(1) (2013).

192. *Id.*

193. Under Indiana's scheme, tenants are expressly required to hold themselves out as the one who has an issue with the living conditions before having a right of action. *See id.* (requiring "[t]he tenant" specifically to be the one to provide notification of the noncompliance to the landlord). This eradicates any possibility that the tenant may raise their concern anonymously by way of having a third party, such as a government agency, bringing the issue to the landlord's attention on behalf of the tenant.

194. *See* Halliday v. Auburn Mobile Homes, 511 N.E.2d 1086, 1088 (Ind. Ct. App. 1987) (finding the previous version of what is now Indiana Code section 32-31-1-4, which provides what notice is required before a tenant may be evicted, allows the landlord-tenant agreement to "be terminated at the option of a party (with or without cause)").

195. *See* Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1218 (Utah 1995). The court noted that the provision requiring the tenant to provide the landlord notice of a violation exposes the scheme to an inherent threat of retaliatory eviction.

196. *Id.* at 1215.

tenants could file a civil action for the violations.[197] The court noted, "It is obvious that if the owner were allowed to evict the renter upon receiving . . . notice to correct or remedy a condition, the renter could not remain in possession long enough to exercise the rights afforded him or her [under that law]."[198] In holding that the Utah law necessitated a retaliatory eviction prohibition, the court stated that "[t]he scheme of the Act would be frustrated and defeated by the short circuiting of the renter's rights."[199]

An interpretive presumption that may seem to hinder the statutory interpretation that would create a retaliatory eviction prohibition is that a statute is not intended to interfere with a private right:[200] possession of the rental property by the landlord in this instance. This contention may be overcome with the understanding that Indiana has long recognized limitations on landlord self-help evictions serve legitimate public interests.[201]

B. Indiana's Residential Landlord-Tenant Statutes Express a Public Policy in Support of Increasing Tenant Protections and Promoting Safe Rental Housing

Indiana courts have reserved public policy determinations for Indiana's General Assembly, subject only to constitutional limitations.[202] Enactments of tenant protections, such as housing codes, have been found to entail a legislative policy of promoting the habitability and safety of the housing rental stock.[203] Thus, with the enactment of the RLTS, the Indiana legislature has declared that Indiana has a public policy of ensuring safe living conditions for all of the state's residential renters.[204] This express policy declaration approach does more than the previously discussed statutory interpretation route by mandating that courts extend the scope of tenant activities protected from retaliatory eviction in order

197. *Id.* at 1217.

198. *Id.* at 1218.

199. *Id.*

200. Lee v. Burns, 182 N.E. 277, 278 (Ind. App. 1932) ("[I]t will be presumed that a statute is not intended to interfere with or prejudice a private right or title.").

201. *See* Judy v. Citizen, 101 Ind. 18, 21 (1885) (interpreting a statute allowing recovery of damages for forcible entry by another, even if that other person has actual right of possession, as requiring a landowner to take action through a court when their tenant forcibly resists the landlord's possession); Ransburg v. Richards, 770 N.E.2d 393, 405 (Ind. Ct. App. 2002) (holding an exculpatory clause relieving a landlord from liability for the landlord's own negligence as void against public policy).

202. Murray v. Conseco, Inc., 795 N.E.2d 454, 457 (Ind. 2003).

203. *See* Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968). More recently, the Utah Supreme Court took a comparable route to establishing that state's retaliatory eviction doctrine, using a statute very similar to Indiana's RLTS. *See* Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1218-19 (Utah 1995).

204. IND. CODE § 32-31-8-5 (2013).

to effectuate that policy.[205]

While the previously described statutory interpretation approach to developing a retaliatory eviction prohibition in Indiana directly implies that the tenants only are protected from retaliation for reporting a violation, this policy approach can have an effect on every tenant act within the tenant's rights to safe and habitable living conditions.[206] Thus, under the wider umbrella of a public policy of protecting tenant interests and promoting safe and habitable rental housing, Indiana courts are able to protect more tenant activities.

The Indiana RLTS appears to have been a legislative rejection of the 1999 *Scandia* holding that would have limited the application of Indiana's warranty of habitability protections.[207] The RLTS expressly extends the implied warranty of habitability to all residential leases.[208] The RLTS also rejects the *Johnson* holding that a breach of the implied warranty does not provide for consequential damages—such as those for personal injury.[209] Thus, the statute demonstrates a shift to a consumerist approach to the landlord-tenant relationship by creating protections for lesser-positioned tenants that would not otherwise be able to be bargained for in lease agreements[210]—i.e., the formation of tenant groups[211] and public opposition to landlord development plans.[212]

This approach is identical to the alternate approach used in the D.C. Circuit's *Edwards v. Habib* holding.[213] Indiana's RLTS is parallel to the District of

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205. Indiana law should protect any tenant activity within the rights of a tenant and connected to an attempt to further the goal of safe and adequate housing. This is in contrast to the statutory interpretation of Indiana Code section 32-31-8-6 posited by this Note, which may limit the protected activity to reasonable attempts to discover non-compliance with the law and inform the landlord thereof. *See* discussion *supra* Part III.A.

206. A policy of promoting the welfare of tenants, based on a consumerist view of the landlord-tenant relationship, would require courts protect all acts whereby a tenant is exercising a right with the intention to ensure habitability and appropriate living conditions.

207. Johnson v. Scandia Assocs., 717 N.E.2d 24, 32 (Ind. 1999) (holding the availability of breach of implied warranty of habitability claims to be limited to instances where extrinsic evidence supported the parties intent for the warranty to exist, and limiting the warranty's scope to exclude consequential damages). Indiana's RLTS rejects both of these holdings by providing all residential leases in Indiana contain with a statutorily imposed warranty of habitability and allowing for consequential damages for breaches of that warranty. *See* IND. CODE § 32-31-8-6(d)(1)(A) (2013).

208. IND. CODE § 32-31-8-1 (2013) (applying the statute to all residential leases executed after June 30, 2002).

209. *Id.* § 32-31-8-6(d)(1)(a).

210. *See* Glendon, *supra* note 32, at 575 (providing a detailed discussion of how increased regulation of the landlord-tenant relationship is parallel to developments of consumer protections in the law).

211. *See* McQueen v. Druker, 438 F.2d 781, 785 (1st Cir. 1971).

212. *See* Windward Partners v. Delos Santos, 577 P.2d 326, 334 (Haw. 1978).

213. Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968) (holding a prohibition of retaliatory eviction was necessary on the basis of public policy in order to avoid frustration of the legislature's intent in creation of the District's housing code, as well as a necessary statutory

Columbia's housing code, as portrayed in *Habib*; the RLTS demonstrates a legislative intent to better ensure adequate living conditions for the city's residents by creating protections they would otherwise be unable to bargain for in the relationship.[214] As in the original retaliatory eviction case, protections created by the RLTS "depend in part on private initiative in the reporting of violations."[215] In order to preserve that initiative, public policy requires the prohibition of acts that retaliate against good faith efforts to pursue those protections.[216]

C. Indiana's Residential Landlord-Tenant Statutes Provide a Previously Missing Component for Establishing a Public Policy Against Retaliatory Eviction

Although Indiana's RLTS expresses a clear intent that the State will have a public policy of promoting safe rental housing by holding the landlord liable for deficiencies, the statutes may also perpetuate a public policy approach to retaliatory eviction prohibition in a second way.

In examining a policy approach to retaliatory eviction, Indiana's case law with respect to retaliatory discharge of an employee is relevant. In *Frampton v. Central Indiana Gas Co.*,[217] the Indiana Supreme Court held that discharging an employee in retaliation for filing a worker's compensation claim is a wrongful act entitling that employee to damages.[218] In doing so, the court compared the doctrine it created to that of retaliatory eviction, an early sign of support for a prohibition of such wrongful evictions: "The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a [worker's compensation] claim, ultimately undermines a critically important public policy."[219] This was a momentous decision in that it recognized a policy justification for creating an exception to the long followed employment-at-will doctrine of the state.[220]

Later, in *Campbell v. Eli Lilly & Co.*,[221] the Indiana Court of Appeals considered a claim of retaliatory discharge.[222] The employee, Campbell, claimed he had been discharged in retaliation for complaining to his employer about its

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interpretation for the housing code to be effective).

214. *See id.* at 700 (emphasizing the intent to promote the living conditions of the "city's slum dwellers[,]" but presumably to promote safe living conditions for all of the city's inhabitants as the housing code would apply to all equally).

215. *Id.*

216. *See id.* at 701 (holding public policy, as well as statutory interpretation of the housing code, requires a prohibition of retaliatory eviction for efforts to enforce the housing code).

217. 297 N.E.2d 425 (Ind. 1973).

218. *Id.* at 428.

219. *Id.*

220. *Id.*

221. 413 N.E.2d 1054 (Ind. Ct. App. 1980).

222. *Id.* at 1059-60.

other employees and products.[223] In holding that Campbell's conduct did not qualify as a sufficient basis for such a claim, the court stated, "[I]n order to fall within a recognized exception to the employment at will rule, a plaintiff must demonstrate that he was discharged in retaliation for either having exercised a statutorily conferred personal right or having fulfilled a statutorily imposed duty."[224]

In comparison, a retaliatory eviction prohibition would be an exception to Indiana common law regarding the landlord-tenant relationship, which provides no real limit on a landlord's ability to evict a month-to-month tenant.[225] Indiana Code section 32-31-8-6(b)(2) provides an implied statutory right to report violations of the RLTS to landlords by requiring that the tenant report violations to the landlord before the tenant may obtain a remedy under the statute in court, as well as implicating a right to obtain information relating to possible violations.[226]

Thus, Indiana's RLTS fulfills the role of conferring a statutory right to tenants to report violations, and a reciprocal duty on landlords to hear and address those concerns, which public policy must protect, based on the holding in *Frampton*.[227] *Frampton*'s policy is simply that the courts will protect statutorily conferred rights, even when doing so will be in contradiction to common law.[228] Although similar to the statutory interpretation method suggested,[229] and functionally the same, this approach aligns the doctrines of retaliatory employment discharge prohibition and retaliatory eviction prohibition. Both methods of developing a retaliatory eviction prohibition would inherently protect only acts that are an effort to obtain information regarding possible violations and acts informing landlords of those issues. Although narrower in scope of protected tenant activities than the previously suggested expressed policy interpretation of Indiana's RLTS,[230] Indiana case law, via *Frampton*, provides strong support for this method.[231]

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223. *Id.* at 1059.

224. *Id.* at 1061.

225. *See* Adams v. Holcomb, 77 N.E.2d 891, 893 (Ind. 1948) ("Ejectment is a proper remedy to be used by a landlord to recover possession of the leased premises from his tenant after the expiration of the term . . . .").

226. IND. CODE § 32-31-8-6(b) (2013). *See* discussion *supra* Part III.A.

227. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (finding public policy must protect statutorily conferred rights).

228. *See id.* ("[U]nder ordinary circumstances, an employee at will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule must be recognized.").

229. *See* discussion *supra* Part III.A.

230. *See* discussion *supra* Part III.B.

231. *See Frampton*, 297 N.E.2d at 428.

IV. IMPLEMENTING A RETALIATORY EVICTION PROHIBITION IN INDIANA

A court implementing a policy against retaliatory eviction must take into account several components that, as a whole, will determine the efficiency of the policy. The court will need to consider the scope of the protected activity, the scope of the prohibited activity, and upon whom the burden of proof will ultimately fall. All of these topics have been discussed to some degree in regard to the historical development of retaliatory eviction,[232] but this section will explore them in regard to implementing an Indiana proscription.

First to be addressed, as a foundational issue in the creation of a retaliatory eviction doctrine, is whether the doctrine is limited to a defense to eviction or if the prohibition entails an affirmative right of action in and of itself. The simple answer to this matter was best stated by a California appellate court:

> We can discern no rational basis for allowing such a substantive defense while denying an affirmative cause of action. It would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only, after he is confronted with an unlawful detainer action and a possible lien on his personal property.[233]

A. Scope of Protected Tenant Activities

The scope of the protected tenant activity is dependent upon what the court finds as its basis for the creation of the policy: a statutory interpretation necessity, a legislatively expressed policy, or a necessary policy to effectuate the law.[234] Both the statutory interpretation (discussed in Part III.A.) and the statutory-right protection policy (discussed in Part III.C) methods may limit a court to the protection of only the tenant's act of raising and reporting the housing issue to the landlord and any prerequisite information gathering acts in (such as having a government official inspect the rental unit).[235] This is a narrow latitude of protection, but it would be a starting point for Indiana case law to further develop tenant protections, such as whether courts should prohibit a landlord's retaliation for a tenant's participation in an association focused on assisting other tenants' resolution of habitability issues. Retaliation for such acts would seem impermissible,[236] but a narrow approach initially would leave the issue unsettled as an activity not necessarily within the scope of the RLTS.

Conversely, if courts interpreted the RLTS as expressing a legislative policy shifting to a consumer-like protection of tenants and promoting safe and habitable rental housing, then courts should protect all acts that are within the tenants'

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232. *See* discussion *supra* Part I.B.2.

233. Aweeka v. Bonds, 97 Cal. Rptr. 650, 652 (Cal. Ct. App. 1971).

234. *See* discussion *supra* Part III.

235. *See* discussions *supra* Part III.A, Part III.C.

236. *See, e.g.*, McQueen v. Druker, 438 F.2d 781, 785 (1st Cir. 1971) (holding retaliation for forming a tenant association was prohibited under the retaliatory eviction doctrine).

rights and intended to promote the habitability of rentals.[237] This approach is more progressive in developing tenant rights, and is in line with the current state of landlord-tenant law in the majority of jurisdictions.[238]

B. Scope of Prohibited Landlord Actions

The methodology used by the courts in creating Indiana's retaliatory eviction doctrine does not require burdensome constraints on the landlord. The prohibited acts would necessarily be the same, regardless of whether a court were to find the doctrine necessary as a matter of statutory interpretation to ensure effective laws, as a tool of a broader public policy, or as a requirement to protect statutory rights of tenants.

Most obviously, law must prohibit the landlord from successfully evicting a tenant through the court system in retaliation for a protected activity. Also, retaliatory actions with the effect of evicting a tenant should be prohibited in order for the doctrine to be effective and avoid circumvention, such as rent increases in response to an unwanted tenant action.[239] Further, landlords must be prohibited from threatening or refusing to extend an existing lease on retaliatory grounds, as allowing a landlord to do so may have the same effect as an eviction (instilling a fear of retribution in tenants) in certain situations.[240] This quartette of prohibitions (eviction, constructive eviction, threat of eviction, and refusal to renew) limits the circumvention of the retaliatory eviction doctrine and, thus, would serve to best effectuate its purpose.

C. Burden of Proof and Damages

Putting the burden on a tenant to prove their landlord's motive may threaten to render a retaliatory eviction doctrine useless.[241] As discussed earlier, other jurisdictions have hedged this risk by only requiring that the tenant minimally prove the landlord's motive before the burden shifts to the landlord to show the

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237. *See, e.g.*, Robinson v. Diamond Hous. Corp., 463 F.2d 853, 863, 871 (D.C. Cir. 1972) (holding that the retaliatory eviction doctrine protects tenants from being punished for rent withholding). *See also* Schweiger v. Super. Ct., 476 P.2d 97, 102-03 (Cal. 1970) (protecting a tenant who exercised his jurisdictional right to repair premises and deduct the costs from the rent).

238. *See generally*, 2-16B POWELL, *supra* note 17 (discussing a wide range of tenant acts protected by various jurisdictions' retaliatory eviction prohibitions).

239. *See* Aweeka v. Bonds, 97 Cal. Rptr. 650, 652 (Cal. Ct. App. 1971) (holding that a rent increase retaliation for a habitability complaint is a prohibited action under the state's retaliatory eviction law).

240. *See McQueen*, 438 F.2d at 785-86 (barring a landlord from refusing to renew a lease for a retaliatory purpose where that landlord is deemed a state actor).

241. A retaliatory eviction scheme that places a large burden on the tenant to show a subjective retaliatory motivation in the landlord's action, such that the tenant will seldom be able to meet the burden, renders the protection effectively unusable. *See* Gokey v. Bessette, 580 A.2d 488, 491 (Vt. 1990) ("A subjective test effectively would establish such a high burden of proof for tenants that the benefit the Legislature intended to confer would be an illusion.").

motivation was not retaliatory.[242] The previously discussed "middle ground" approach offers effective protection to the tenant, while preventing tenant abuse of the retaliatory eviction doctrine.[243]

This method would require a tenant to show the primary motivation of the landlord's retaliatory action to be in response to an unwanted, but protected, act of the tenant.[244] As is common in other jurisdictions, this motivation should also be presumed if the landlord's action occurs within a set time period—i.e., three months—of the landlord's awareness of their tenant's issue with the habitability of the premises.[245] Once the motivation either is demonstrated by the tenant or presumed, the landlord may rebut only by showing a non-retaliatory reason for the action.[246]

The final issue to be considered is a determination of appropriate damages when a retaliatory eviction is found to have occurred. This can be easily addressed by the language of the RLTS, which specifies "[a]ctual damages and consequential damages,"[247] "[a]ttorney's fees and court costs,"[248] "[i]njunctive relief,"[249] and "[a]ny other remedy appropriate under the circumstances."[250] Thus, whether retaliatory eviction is asserted affirmatively or defensively, the statute allows courts to enjoin the landlord from evicting a tenant and provides for punitive damages as a remedy appropriate under the circumstances, in addition to attorney's fees, and actual or consequential damages incurred by the tenant.[251]

CONCLUSION

Studies or reports detailing the frequency of retaliatory evictions, even in

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242. *See* discussion *supra* Part I.B.2.d.

243. *Id.*

244. *See* 2-16B POWELL, *supra* note 17 (describing the test applied in *McQueen*, 438 F.2d at 785).

245. *See id.* (stating that, in some jurisdictions, statutes create a presumption of retaliatory motive if the action is created within a proscribed time of the tenant's protected act and that, in other jurisdictions, courts have held that such a presumption exists without it being expressed in a statute). *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1381(B) (2013); KY. REV. STAT. ANN. § 383.705(2) (West 2013).

246. *See* 2-16B POWELL, *supra* note 17 (discussing the common scheme for retaliatory eviction doctrines whereby a rebuttable presumption is raised after a condition creating a presumption of motivation is shown, or the tenant proves the landlord's motivation itself to some degree).

247. IND. CODE § 32-31-8-6(d)(1)(A) (2013).

248. *Id.* § 32-31-8-6(d)(1)(B).

249. *Id.* § 32-31-8-6(d)(2).

250. *Id.* § 32-31-8-6(d)(3).

251. The language of Indiana Code section 32-31-8-6(d) provides for a wide range of damages to enforce the laws provisions. A similar statute was interpreted in *601 West 160 Realty Co. v. Henry*, 705 N.Y.S.2d 212, 216-17 (N.Y. Civ. Ct. 2000), which held that such language in a New York statute establishing retaliatory eviction as a defense allowed for $3000 in punitive damages.

jurisdictions where a prohibition against this type of eviction is recognized, are practically non-existent. This lack of information may be attributed to two issues: (1) tenants appearing *pro se* often lack the legal knowledge to implicate the defense without the assistance of the court or counsel;[252] and (2) the lack of detailed inquiry in small claims proceedings.[253] Regardless, a retaliatory eviction prohibition does not have to have an expansive impact to serve an important purpose: the intent is only to prohibit those less frequent eviction proceedings where the state's valid goals and the public's safety interests are in conflict with the goals and interests of a malicious landlord.

Although the prohibition of retaliatory evictions undoubtedly limits the common law "with or without cause" approach to eviction, the Indiana General Assembly has indicated that the time has come to recognize limitations on the landlord's previously unchecked power in the landlord-tenant relationship. This is not an arbitrary check on the landlord's power, but one to effectuate the policies of the State and promote public health and safety.

The legislature has made clear its intent that landlords be held liable for failures to provide safe housing and basic habitability amenities. The RLTS specifically requires tenants to inform landlords of the landlord's failures to abide by the law in order for the tenants to have a remedy themselves. Whether Indiana's RLTS is interpreted as providing the courts with a shift in policy to a consumerist approach to the landlord-tenant relationship, or requiring a retaliatory eviction doctrine as a matter of interpretation or policy, the end result must be to prohibit malicious landlord retaliation intended to suppress tenants' rights and the tenants' ability to improve their living conditions.

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252. *See* LAWYERS' COMM. FOR BETTER HOUS., *supra* note 137, at 23-24 (describing the impact of the tenant's lack of education on the eviction process resulting in inability to present defenses).

253. *See id.* at 4, 16 (describing how judges typically only ask tenants whether their rent is paid, and only inquire as to defenses 27% of the time).