

5-15-2015

## Eliminating Landlord Retaliation in England and Wales—Lessons from the United States

Melissa T. Lonegrass

*Louisiana State University Law Center*, [missy.lonegrass@law.lsu.edu](mailto:missy.lonegrass@law.lsu.edu)

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the Land Use Law Commons

---

### Repository Citation

Melissa T. Lonegrass, *Eliminating Landlord Retaliation in England and Wales—Lessons from the United States*, 75 La. L. Rev. (2015)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol75/iss4/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Eliminating Landlord Retaliation in England and Wales—Lessons from the United States

*Melissa T. Lonegrass\**

I.	Introduction.....	1072
II.	Anti-Retaliation Legislation in England and Wales .....	1076
	A. Legal Background.....	1076
	B. The Impetus for Reform.....	1078
	C. Proposed Legislation in England—The Tenancies (Reform) Bill of 2014–15 .....	1083
III.	Reaction and Debate .....	1085
	A. Wavering Support for Reform .....	1085
	B. Opponents Speak Out .....	1086
	C. Covert Legislative Response—The Deregulation Bill.....	1089
	D. A Proposal in Wales—The Renting Homes (Wales) Bill.....	1090
	E. Examination of Foreign Experience .....	1091
IV.	American Prohibitions on Landlord Retaliation .....	1092
	A. Early Prohibitions on Retaliation.....	1093
	B. Uniform Law and the Restatement .....	1095
	C. Proliferation—States and Municipalities.....	1097
	1. Affirmative and Defensive Claims .....	1097
	2. Coverage of Tenant Activities and Landlord Behaviors .....	1098
	3. Proof of Retaliatory Motive .....	1100
	4. Remedies.....	1102

---

Copyright 2015, by MELISSA T. LONEGRASS.

\* Harriet S. Daggett-Frances Leggio Landry Professor of Law & Bernard Keith Vetter Professor of Civil Law Studies, Louisiana State University, Paul M. Hebert Law Center. I would like to thank the LSU Law Center for its generous research support. I would also like to thank the participants of the 2014 Annual Meeting of the Central States Law Schools Association, at which a draft of this paper was presented, for their thoughtful commentary. Special thanks are due to Christopher K. Odinet for his helpful suggestions. Finally, I am most grateful to my student assistants, Samuel Crichton (class of 2014), Rodger “Rory” Green (class of 2015), Alex Robertson (class of 2016), and Aaron Scamp (class of 2015) for their research and editing assistance.

5. Exceptions.....	1102
D. The Revised Uniform Law.....	1103
V. The Efficacy of U.S. Retaliation Laws .....	1106
A. Empirical Data on Evictions in the United States.....	1106
1. The Scarcity of Empirical Data.....	1106
2. What the Data Show .....	1108
B. The Institutional Context of Anti-Retaliation Laws ....	1109
1. Legal Representation .....	1110
2. Housing Courts .....	1112
3. Reporting of Evictions .....	1114
4. Financial and Informational Concerns.....	1115
VI. Lessons for the United Kingdom .....	1117
A. Doctrine.....	1118
B. Context.....	1120
VII. Conclusion .....	1122

## I. INTRODUCTION

Alice is a residential tenant living in a low-income neighborhood in Milwaukee, Wisconsin.<sup>1</sup> Like most low-income tenants, Alice did not sign a written lease, and she rents month-to-month. Although Alice's apartment is in relatively good repair, the heater does not work, and several of the windows are broken. The unit is drafty, and her infant son is often sick. After making several unsuccessful complaints to her landlord, Alice contacted the city agency responsible for code enforcement to report her apartment's condition. Within days of making her complaint, Alice's landlord served her with a five-day notice of eviction designed to send a message to her and the other tenants that complaining to the local authorities has consequences.

Nearly 4,000 miles away in Crosby, Liverpool, Debbie faces a similar fate.<sup>2</sup> Debbie lives alone in a rented flat and suffers from

---

1. This hypothetical is adapted from a case study reported in the empirical and observational work of Matthew A. Desmond in *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIOLOGY 88 (2012).

2. This hypothetical is adapted from a report of the Citizens Advice Bureau on retaliatory eviction in the United Kingdom. DEBBIE CREW, THE TENANT'S DILEMMA, WARNING: YOUR HOME IS AT RISK IF YOU DARE COMPLAIN, CITIZENS

Crohn's disease. The windows in her flat do not close, and the house is often damp. The sole heater—a small electric fireplace—does not heat the dwelling sufficiently and is very expensive to run. After Debbie's landlord refused to pay for a new heating unit, she sought help from a local charity, which was in turn able to secure a grant for central gas heating to be installed on the property. However, the landlord declined the grant when contractors advised that he would need to pay £800 to have the meter relocated to comply with local housing regulations. The charity advised Debbie that although she had the right to take action to require her landlord to comply with the law, she risked provoking retaliation by her landlord in the form of an eviction. Debbie decided to do nothing rather than jeopardize her housing.

Although Alice and Debbie face similar challenges, Alice's circumstances may be somewhat less grim. Wisconsin law expressly forbids "retaliatory eviction" in response to a tenant's complaint to a local housing code enforcement agency or to the landlord about the condition of the premises.<sup>3</sup> In fact, municipal law not only prohibits this conduct, but it also *presumes* that any attempt by a landlord to terminate a tenancy within 12 months after a complaint to the housing authority is retaliatory.<sup>4</sup> Under state and local law, Alice has a valid defense to her landlord's suit for eviction. Provided she pays her rent on time, Alice can be assured that her tenure is secure for at least the next year. Currently in England, however, no such prohibition on landlord retaliation is recognized. Landlords are entitled to evict tenants renting under periodic tenancies for any reason simply by serving proper notice.<sup>5</sup>

---

ADVICE BUREAU 3 (2007), available at [http://https://www.citizensadvice.org.uk/tenants\\_dilema\\_-\\_document.pdf](http://https://www.citizensadvice.org.uk/tenants_dilema_-_document.pdf), archived at <https://perma.cc/A72G-SM7M>.

3. WIS. STAT. ANN. § 704.45 (Westlaw 2015); WIS. ADMIN. CODE ATCP § 134.09(5) (Westlaw 2015); MILWAUKEE, WIS., CODE OF ORDINANCES § 200-21-8 (2009).

4. MILWAUKEE, WIS., CODE OF ORDINANCES § 200-21-8 (2009) ("It shall be presumed that any attempt to terminate the tenancy, or to increase charges, or to reduce services or to refuse to renew a rental agreement, or to otherwise harass or retaliate against such occupant or to reduce the level of services being rendered to such occupant during the period from the first complaint to the commissioner to 12 months after complete reimbursement to the city for the costs incurred by it in acting under this section is done in retaliation and is void and subject to a forfeiture of not less than \$100 nor more than \$2,000 for each such attempt.").

5. Housing Act, 1988, c. 2, § 21(1)(b) (Eng.). See also *infra* Part II.A. Unlike a tenancy for a fixed term, a periodic tenancy continues indefinitely, usually on a month-to-month basis.

Thus, Debbie risks losing her home if she makes a complaint to the local authority, no matter how legitimate it may be.

Retaliatory eviction has been the subject of much recent public debate in the United Kingdom.<sup>6</sup> Tenant advocates in England and Wales claim that landlord retaliation is widespread—even rampant—with over 300,000 tenants experiencing some form of landlord retaliation each year.<sup>7</sup> Fear of landlord retribution, it is argued, stymies complaints about housing conditions and in turn leads to hazards and blight.<sup>8</sup> Over half of the private tenant population in England alone endures damp conditions, mold, leaking windows and roofs, electrical hazards, animal infestations, and gas leaks, and as many as one in eight dare not speak up for fear of a landlord's revenge.<sup>9</sup>

In July 2014, public concern about landlord retaliation came to a head when landmark legislation aimed at preventing retaliatory eviction was introduced in England's House of Commons.<sup>10</sup> In substance, the proposed law is simple—it would prevent a landlord from serving an otherwise valid notice to vacate on a tenant who made legitimate complaints about the property's condition.<sup>11</sup> However, despite initial support from the Government, the bill floundered under the pressure of landlord advocates who maintain that this legislation is both unnecessary and rife with the potential for tenant abuse.<sup>12</sup> Although tenant advocates narrowly succeeded in resuscitating the nearly failed bill by appending an amendment to a widely supported deregulation bill,<sup>13</sup> the anti-retaliation law

---

6. This paper focuses on landlord retaliation in England and Wales. Although neither Scotland nor Northern Ireland is addressed herein, the moniker "United Kingdom" is used throughout as a convenient shorthand reference.

7. HANNAH GOUSY, SHELTER, SAFE AND DECENT HOMES: SOLUTIONS FOR A BETTER PRIVATE RENTED SECTOR 7 (2014), available at [http://England.shelter.org.uk/data/assets/pdf/file/0003/1039530/FINAL\\_SAFE\\_AND\\_DECENT\\_HOMES\\_REPORT\\_USE\\_FOR\\_LAUNCH.pdf](http://England.shelter.org.uk/data/assets/pdf/file/0003/1039530/FINAL_SAFE_AND_DECENT_HOMES_REPORT_USE_FOR_LAUNCH.pdf), archived at <http://perma.cc/BYX6-QD SG>. Shelter estimates that each year 3% of tenants are served with notice, or threatened with eviction because they complain to their local council or their landlord about a problem in their home. *Id.* See also *infra* Parts II.B, III.B (discussing Shelter's estimates of landlord retaliation and debates regarding their accuracy).

8. GOUSY, *supra* note 7, at 7. See also *infra* Part II.B.

9. GOUSY, *supra* note 7, at 25. See also *infra* Part II.B.

10. *Tenancies (Reform) Bill 2014–15*, PARLIAMENT.UK, <http://services.parliament.uk/bills/2014-15/tenanciesreform.html>, archived at <http://perma.cc/6PXX-9X24> (last visited Feb. 5, 2015).

11. *Tenancies (Reform) Bill, 2014-15*, H.C. Bill [19] cl. 1 (Eng.), available at [www.publications.parliament.uk/pa/bills/cbill/2014-2015/0019/15019.pdf](http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0019/15019.pdf), archived at <http://perma.cc/6NPC-UVB7>.

12. See *infra* Parts III.B, III.C.

13. *Deregulation Bill 2013-14 & 2014-15*, H.L. Bill [95] (Eng.), available at <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0095/15095.pdf>,

still has staunch opponents, not only in England but also in Wales, where lawmakers have recently introduced anti-retaliation legislation in the National Assembly as part of a much-anticipated comprehensive housing bill.<sup>14</sup>

In their efforts to keep anti-retaliation initiatives in the United Kingdom afloat, tenant advocates point to common law jurisdictions around the world whose landlord-tenant law prohibits retaliatory conduct.<sup>15</sup> New South Wales, Australia, New Zealand, and even the United States provide for these protections—why then should not the United Kingdom?<sup>16</sup> Thus far, comparisons to foreign law have been limited and cursory, pointing only to the presence or absence of anti-retaliation regimes in the law.<sup>17</sup> More comprehensive examination of retaliatory eviction regimes abroad—both in their letter and their application—is lacking. This Article seeks to contribute to the legal-political debate surrounding landlord retaliation in England and Wales by providing a detailed, contextual analysis of retaliatory eviction laws in the United States and their success at home.

Parts II and III of this Article review the ongoing efforts aimed toward prohibiting retaliatory eviction in England and Wales, highlighting the arguments that have led to a stalemate in the progress of law reform in those countries. Part IV then describes in detail the legal regimes that govern landlord retaliation in the United States. As Part IV demonstrates, U.S. anti-retaliation regimes are generally robust, with consensus emerging around strong tenant protections. Part V goes on to examine statistical and anecdotal evidence of tenant evictions that points away from the success of U.S. retaliatory eviction laws. Although this evidence seems to weigh against legal reform in the United Kingdom, Part VI argues that this is not the case. Instead, Part VI provides context for comparisons between the United States and the United Kingdom and concludes that existing legal and non-legal institutions in the United Kingdom will support anti-retaliation regimes in ways not currently possible in this country.

---

archived at <http://perma.cc/G8L9-WFXK>.

14. Renting Homes (Wales) Bill § 213 (2015), *available at* [http://www.assembly.wales/laid%20documents/pri-ld10098%20-%20renting%20homes%20\(wales\)%20bill/pri-ld10098-e.pdf](http://www.assembly.wales/laid%20documents/pri-ld10098%20-%20renting%20homes%20(wales)%20bill/pri-ld10098-e.pdf), archived at <http://perma.cc/W4W8-YJU2>.

15. *See infra* Parts II–III.

16. *Id.*

17. *Id.*

## II. ANTI-RETALIATION LEGISLATION IN ENGLAND AND WALES

A. *Legal Background*

“Revenge” evictions have historically been regarded as entirely lawful in much of the United Kingdom, at least in the private sector. The overwhelming majority of private tenants in England and Wales rent under contracts known as “assured shorthold tenancies,” which provide tenants with very little security of tenure.<sup>18</sup> Although the landlord cannot regain possession of the property within the first six months of the lease unless the tenant breaches the agreement, after the six-month period has passed, the landlord may regain possession at any time upon giving two months’ notice of termination.<sup>19</sup> The landlord of an assured shorthold tenancy need not establish any fault on the part of the tenant as a prerequisite to regaining possession. Instead, the landlord is entitled to evict for any reason, provided that the statutory requirements for notice are met.<sup>20</sup> Because eviction is an absolute right for landlords of assured shorthold tenancies, no inquiry is required (or even permitted) into a landlord’s motives for choosing to terminate a lease. Courts are not afforded any discretion in granting possession when notice is properly made.<sup>21</sup>

The assured shorthold tenancy was introduced to English law in 1988 as part of a package of deregulatory reforms designed to increase the size of the private rental sector.<sup>22</sup> At that time, the private rental sector had fallen into serious decline, with less than 10% of households in England rented from private landlords.<sup>23</sup> In reaction, conservative policy-makers took aim at long-standing security of tenure and rent control requirements that were perceived to discourage private investment in the rental housing

---

18. See Melissa T. Lonegrass, *A Second Chance for Innovation—Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 U. ARK. LITTLE ROCK L. REV. 905, 921 (2013).

19. Housing Act, 1988, c. 2, § 21(1)(b) (Eng.). See also ANDREW ARDEN & ANDREW DYMOND, *MANUAL OF HOUSING LAW* 113–14 (9th ed. 2012). If the tenancy is fixed, then notice may be given two months prior to the end of the fixed term. If notice is not provided, then at the end of the fixed term the lease becomes periodic. See Housing Act, 1988, c. 2, § 21(2) (Eng.). Periodic assured shorthold tenancies may be terminated by giving notice at least two months prior to the date of desired termination, which must be the last day of a period. See *id.* § 21(4)(a) (Eng.).

20. ARDEN & DYMOND, *supra* note 19, at 113–14.

21. *Id.*

22. JAMES DRISCOLL, *HOUSING: THE NEW LAW: A PRACTICAL GUIDE TO THE HOUSING ACT 2004*, at 1–2 (2007).

23. *Id.*

market.<sup>24</sup> Recent evidence showing that the private market has risen consistently since the early 1990s demonstrates that efforts at deregulation have proven largely successful.<sup>25</sup> Thus, the freedom provided to landlords by the assured shorthold tenancy is viewed as an essential component to the security of the housing market.

However, laws permitting landlords to evict tenants with impunity are difficult to square with other basic obligations owed by residential landlords. The provision of a safe dwelling maintained in good repair is a basic requirement of all landlords, even under assured shortholds. The obligation to provide decent housing arises from two separate statutory regimes in England and Wales. First, Section 11 of the 1985 Landlord and Tenant Act places a statutory duty on most landlords to carry out repairs to the structure and exterior of the dwelling; to basins, sinks, baths, and other sanitary installations in the dwelling; and to heating and hot water installations.<sup>26</sup> Additionally, the 2004 Housing Act ushered in a new Housing Health and Safety Rating System, which requires landlords to take measures to ensure the safety of their tenants from specific “hazards,” defined generally as any risk to health or safety to an occupier of a dwelling.<sup>27</sup> Tenants concerned about the condition of their homes can request an inspection by a local housing authority environmental health officer, who can then order that the landlord make required repairs to bring the dwelling into compliance with the law.<sup>28</sup>

In particular, the 2004 introduction of the Health and Safety Rating System was designed to address a growing problem of decent housing supply in England. Today, 33% of the private rented stock in that country is classified as “non-decent,” meaning

---

24. DAVID HUGHES AND STUART LOWE, *THE PRIVATE RENTED SECTOR IN A NEW CENTURY* 5 (2002).

25. DEP’T FOR CMTY. & LOCAL GOV’T, *ENGLISH HOUSING SURVEY HEADLINE REPORT 2012–13*, at 8 (2013) [hereinafter *ENGLISH HOUSING SURVEY 2012–13*], available at <https://www.gov.uk/government/statistics/english-housing-survey-2012-to-2013-headline-report>, archived at <https://perma.cc/76JN-TNUD>. The report shows that the proportion of households living in the private rented sector in 2013–2014 was 18%. *Id.*

26. Landlord & Tenant Act, 1985, c. 70, § 11–14 (Eng.). Leases of longer than seven years are exempted from these requirements. *Id.*

27. Housing Act, 2004, c. 34, § 2(1) (Eng.). The stated purpose of the new legislation is to ensure that “[a]ny residential premises should provide a safe and healthy environment for any potential occupier or visitor.” THE OFFICE OF THE DEPUTY PRIME MINISTER, *HOUSING HEALTH AND SAFETY RATING SYSTEM: OPERATING GUIDE 8* (2006), available at <http://www.nchh.org/Portals/0/Contents/HH%20Standards.UKHHRsoperatingguidance.pdf>, archived at <http://perma.cc/5TYU-PPGJ>.

28. Housing Act, 2004, c. 34, §§ 5–7 (Eng.).

that it fails to meet minimum statutory requirements for housing conditions, that it is in a state of disrepair, or that it lacks reasonably modern facilities.<sup>29</sup> Although its proponents view the Housing Health and Safety Rating System as an important step toward improving the quality of housing stock, skeptics remain concerned that it does not go far enough to incentivize landlords to maintain their properties in good condition.<sup>30</sup> Furthermore, tenant advocates assert that the ongoing legality of retaliatory eviction stifles tenant complaints regarding the condition of rented dwellings, leading to further erosion in the quality of housing.<sup>31</sup>

### *B. The Impetus for Reform*

Indeed, the prevalence of retaliatory eviction has received a great deal of public attention in the last decade. Although there are no official government statistics maintained on evictions,<sup>32</sup> research conducted in part by Shelter UK, a housing charity with a strong presence in England and in Wales,<sup>33</sup> concluded that during 2013–2014 roughly 324,000 private tenants in England were evicted, served with notice, or threatened with eviction after asking for repairs to be carried out or complaining to a local authority's environmental health department about conditions in their homes.<sup>34</sup> In addition, 1 in 12 of the tenants in Shelter's survey reported that they were too scared of losing their home to report a problem or to request improved conditions.<sup>35</sup> Shelter's research directly links tenants' fear of retaliation to the declining condition of housing in

---

29. ENGLISH HOUSING SURVEY 2012–13, *supra* note 25.

30. See THE LAW COMM'N, RENTING HOMES: THE FINAL REPORT §§ 1.61, 8.1–8.17 (2008), available at [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol1.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol1.pdf), archived at <https://perma.cc/76JN-TNUD>.

31. See CREW, *supra* note 2; Jan Luba, *Repairs, Where Have All the Claims Gone?*, 14 LANDLORD & TENANT REV. 2010 1, 3–6 (2010); HANNAH GOUSY, SHELTER, CAN'T COMPLAIN: WHY POOR CONDITIONS PREVAIL IN PRIVATE RENTED SECTOR HOMES 13 (2014), available at [http://www.landlordlawblog.co.uk/wp-content/uploads/2014/02/6430\\_04\\_9\\_Million\\_Renters\\_Policy\\_Report\\_Proof\\_6\\_opt.pdf](http://www.landlordlawblog.co.uk/wp-content/uploads/2014/02/6430_04_9_Million_Renters_Policy_Report_Proof_6_opt.pdf), archived at <https://perma.cc/T4YQ-5YYH>.

32. *Private Rented Housing: Evictions: Written Question-212213*, PARLIAMENT.UK, <http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2014-10-28/212213>, archived at <http://perma.cc/9DRM-SWR7> (last updated Mar. 15, 2015).

33. See SHELTER, <http://www.shelter.org.uk/>, archived at <http://perma.cc/DSY2-M9GK> (last visited Mar. 10, 2015).

34. See GOUSY, *supra* note 7, at 25.

35. *Id.*

the private rented sector.<sup>36</sup> According to the organization, 61% of English tenants surveyed experienced at least one of the following problems in the prior 12 months: mold or damp conditions, leaking roofs or windows, electrical hazards, animal infestations, or gas leaks.<sup>37</sup> In addition, 10% of tenants reported that their health had been affected during the last year because their landlord had failed to address needed repairs or poor conditions on the property, and 9% reported that their children's health had been affected.<sup>38</sup>

Shelter has also studied the occurrence of retaliatory eviction in Wales, though less systematically. Shelter Cymru, the organization's Welsh division, conducted a survey in 2013 of 29 Environmental Health and Tenancy Support Officers, who work closely with tenants and landlords to resolve disputes, especially involving disrepair.<sup>39</sup> Of survey respondents, 100% opined that tenants had been dissuaded from using help offered by environmental health and tenancy support officers because of fears of jeopardizing their tenancy.<sup>40</sup> Over half (55%) stated that there is "definitely" a need for more security for tenants wishing to exercise their statutory rights to repairs.<sup>41</sup> Additionally, over one-third (41%) indicated

---

36. SHELTER, SHELTER'S RESPONSE TO THE REVIEW OF PROPERTY CONDITIONS IN THE PRIVATE RENTED SECTOR 3 (2014), available at [http://england.shelter.org.uk/professional\\_resources/policy\\_and\\_research/policy\\_library/policy\\_library\\_folder/response\\_review\\_of\\_property\\_conditions\\_in\\_the\\_private\\_rented\\_sector](http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/response_review_of_property_conditions_in_the_private_rented_sector), archived at <http://perma.cc/8NEE-LMGW>.

37. *Id.*

38. *Id.* These findings have been widely publicized in both online and print media. See, e.g., *True Scale of 'Revenge Evictions' Exposed by Shelter Investigation*, SHELTER MEDIA CTR., [http://media.shelter.org.uk/home/press\\_releases/true\\_scale\\_of\\_revenge\\_evictions\\_exposed\\_by\\_shelter\\_investigation](http://media.shelter.org.uk/home/press_releases/true_scale_of_revenge_evictions_exposed_by_shelter_investigation), archived at <http://perma.cc/XJ2G-ZB5N> (last visited Mar. 10, 2015); Seb Klier, *Revenge Evictions are a Threat Hanging Over UK Renters that Needs to End*, CITYMETRIC (Oct. 23, 2014), <http://www.citymetric.com/horizons/revenge-evictions-are-threat-hanging-over-uk-renters-needs-end-411>, archived at <http://perma.cc/S35V-7EBV>; Tracy McVeigh, *Outlaw Revenge Evictions by Landlords, Says Housing Charity*, THE GUARDIAN (Oct. 25, 2014), <http://www.theguardian.com/society/2014/oct/25/shelter-ban-revenge-evictions-rogue-landlords-tenants>, archived at <http://perma.cc/5DHK-F6HF>; Tweet by Residential Landlord Ass'n News, TWITTER (Oct. 15, 2014, 7:51 AM), [https://twitter.com/RLA\\_News/status/522399487005052930](https://twitter.com/RLA_News/status/522399487005052930), archived at <https://perma.cc/EFV5-NDY6> (directing followers to Residential Landlord Ass'n webpage and discussion of Shelter's 2012–13 English Housing Survey).

39. SHELTER CYMRU, MAKING RIGHTS REAL: PREVENTING RETALIATORY EVICTIONS IN WALES 21 (2013), available at <http://www.sheltercymru.org.uk/wp-content/uploads/2013/07/Making-rights-real.pdf>, archived at <http://perma.cc/FF2W-MJTG>.

40. *Id.* at 21–22.

41. *Id.* at 22.

that they would support a campaign to protect tenants from retaliatory eviction.<sup>42</sup>

Shelter is not the only organization to report on the prevalence of landlord retaliation in the United Kingdom.<sup>43</sup> The Citizens Advice Bureau, a public assistance charity with offices throughout the United Kingdom,<sup>44</sup> produced a report in 2007 urging that restrictions should be placed on private landlords' rights to evict tenants who complain about disrepair or health and safety violations.<sup>45</sup> Citizens Advice cited government statistics included in the 2000 Survey of English Housing showing that although 21% of private tenants in England were dissatisfied with the way their landlords carried out repairs and maintenance on their property, only one quarter of those said that they had "tried to enforce their right."<sup>46</sup> When asked to provide reasons, those who had not taken action reported that they did not want to "cause trouble with their landlord" (21%), that they "felt their tenancy would be ended" (5%), or that they "didn't think it was worth the effort" (one third).<sup>47</sup> Citizens Advice also relied on anecdotal evidence supplied by the organization's employees, noting that "[Citizens Advice Bureau employees] from around the country regularly report" cases of retaliatory conduct by landlords.<sup>48</sup> The report further revealed that "[i]n some cases landlords have even used their power to evict as a bargaining tool to try to get the tenant to pay for

---

42. *Id.* at 24.

43. Other tenants' rights organizations have done similar research. For example, the Tenants' Voice, an online "tenants community," found in a survey of over 2,000 tenants from their Facebook community that 32% of tenants who had been evicted or threatened with eviction were put in that position after complaining to their landlord about the condition of their property. Additionally, the survey found that 71% of tenants had paid for repairs themselves rather than asking their landlord to make them, and 61% were wary of complaining to their landlords about poor conditions. Of note, 86% of respondents had never heard of the term "retaliatory eviction," suggesting that the practice is underreported. See *A Third of Tenants Have Been Evicted or Threatened with Eviction After Complaining to Their Landlords*, THE TENANTS' VOICE (Oct. 14, 2003), [www.thetenantsvoice.co.uk/your\\_home/a-third-of-tenants-have-been-evicted-or-threatened-with-eviction-after-complaining-to-their-landlords/](http://www.thetenantsvoice.co.uk/your_home/a-third-of-tenants-have-been-evicted-or-threatened-with-eviction-after-complaining-to-their-landlords/), archived at <http://perma.cc/V5XA-2HUG>. Additionally, in a 2012 report on the private rented sector in Wales, the organization Consumer Focus Wales identified isolated occurrences of retaliation and fear of retaliation reported by private tenants. CONSUMER FOCUS WALES, *THEIR HOUSE, YOUR HOME: THE PRIVATE RENTED SECTOR IN WALES* 39–40 (2012).

44. See *Citizens Advice*, CITIZENS ADVICE BUREAU, [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk), archived at <http://perma.cc/LBX8-7L5A> (last visited Mar. 10, 2015).

45. CREW, *supra* note 2, at 4.

46. *Id.* at 4–5.

47. *Id.*

48. *Id.* at 6.

the work needed.”<sup>49</sup> Perhaps the most compelling data produced in the report was a survey of local authority officers tasked with addressing tenant complaints regarding violations of environmental health standards. In a survey of these officers, 48% reported that tenants were “often” or “always” deterred from accepting help because they were afraid of jeopardizing their tenancy.<sup>50</sup>

Both Shelter and Citizens Advice have called for an end to retaliatory eviction through legislative reforms.<sup>51</sup> In turn, legal officials in both England and Wales have also begun to investigate the problem of landlord retaliation. However, until very recently, most governmental inquiries have not resulted in recommendations for the type of legislation proposed by Shelter, Citizens Advice, and other tenant support organizations.

For example, in 2008, the Labour Government commissioned a review of the private rental sector by the Centre for Housing Policy at the University of York.<sup>52</sup> The authors of the resultant report critiqued the findings of Shelter and Citizens Advice, noting that both organizations maintain policies of advising tenants that exercising their rights might result in the landlord issuing a termination notice.<sup>53</sup> Thus, the authors concluded, it is “unsurprising” that local authority officers found that tenants showed reluctance to pursue complaints against their landlords.<sup>54</sup> The authors went on to question the accuracy of conclusions drawn from the “opinions” of local authority officers, noting that the task of calculating the incidence of retaliatory eviction is “complex”:

It cannot be denied that there will be landlords who evict tenants who complain about property condition; at the same time, it has to be admitted that there are tenants who will claim unfair eviction in the hope that this will improve their chance of getting a social housing tenancy.<sup>55</sup>

---

49. *Id.* at 7.

50. *Id.* at 8. Fifty-four percent of officers reported that this “sometimes” occurs, while no respondents stated that this “never” occurs. *Id.*

51. *Id.* at 13 (“Specifically, where a tenant has recently taken steps to enforce their statutory rights on disrepair or health and safety issues, landlords should not be able to use Section 21 to evict a tenant inappropriately.”). *See generally* GOUSY, *supra* note 7.

52. *See generally* JULIE RUGG & DAVID RHODES, CTR. FOR HOUS. POLICY, THE UNIV. OF YORK, THE PRIVATE RENTED SECTOR: IN ITS CONTRIBUTION AND POTENTIAL (2008), available at [www.york.ac.uk/media/chp/documents/2008/prs\\_reviewweb.pdf](http://www.york.ac.uk/media/chp/documents/2008/prs_reviewweb.pdf), archived at <http://perma.cc/EYV3-9FTU>.

53. *Id.* at 80.

54. *Id.*

55. *Id.*

The authors ultimately concluded that retaliatory eviction would be best addressed not by limiting the landlord's right to evict but by "ensuring that landlords who would take this action are removed from the sector."<sup>56</sup>

Also in 2008, the Law Commission considered the possibility of prohibiting retaliatory eviction, noting that the issue had "attracted a considerable amount of public attention over the last year."<sup>57</sup> In its report, the Law Commission concluded that proposals to limit a landlord's right to evict following a tenant making a complaint about housing conditions suffered from "significant difficulties," most notably the challenge of proving the landlord's retaliatory motive.<sup>58</sup> The Law Commission report also concluded that because most tenants do not seriously consider pursuing legal proceedings, prohibitions on retaliatory eviction "may be of symbolic importance but be of little practical effect."<sup>59</sup> The same report expressed concern that anti-retaliation laws could cause "considerable disturbance to the private rented sector by introducing a measure whose impact would be unpredictable and uncertain."<sup>60</sup>

More recently, in 2013, the Communities and Local Government Select Committee of Parliament initiated an inquiry into the private rented sector that included consideration of retaliatory eviction.<sup>61</sup> Even after receiving evidence from multiple tenant advocacy organizations, the Committee stated it was "not convinced" that a legislative approach to retaliatory eviction would be an effective solution to the problem. In the opinion of the Committee, "[c]hanging the law to limit the issuing of [eviction] notices might be counter-productive and stunt the market."<sup>62</sup> The Committee surmised instead that moving toward a "culture" where longer tenancies are the norm would give tenants greater security and more confidence to ask for improvements.<sup>63</sup> The Committee also suggested that proactive enforcement of environmental regulations by local authorities

---

56. *Id.* at 113.

57. THE LAW COMM'N, HOUSING: ENCOURAGING RESPONSIBLE LETTING FINAL REPORT ¶ 6.98 (2008), *available at* [http://lawcommission.justice.gov.uk/docs/lc312\\_Housing\\_Encouraging\\_Responsible\\_Letting.pdf](http://lawcommission.justice.gov.uk/docs/lc312_Housing_Encouraging_Responsible_Letting.pdf), archived at <http://perma.cc/2KVJ-KYG9>.

58. *Id.* at ¶ 6.99.

59. *Id.*

60. *Id.*

61. *See* BRITISH PARLIAMENT, [www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/role](http://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/role), archived at <http://perma.cc/S9B6-QXUK> (last visited Mar. 10, 2015).

62. CMTYS. & LOCAL GOV'T COMM., THE PRIVATE RENTED SECTOR, 2013-14, H.C. 50, ¶ 105 (U.K.), *available at* [www.publications.parliament.uk/pa/cm201314/cmselect/cmcomloc/50/50.pdf](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcomloc/50/50.pdf), archived at <http://perma.cc/YN57-2XV3>.

63. *Id.*

would also obviate the need for tenants to take the responsibility of reporting.<sup>64</sup>

Finally, in February 2014, the Government launched its own inquiry into housing conditions in the private rented sector. The main impetus for this project was “to consider what more can be done and how to best tackle bad landlords without negatively impacting on the good ones.”<sup>65</sup> On the topic of retaliatory eviction, the Government called for input on whether restrictions on landlords’ rights to evict without cause should be introduced in cases where the property is in need of major improvements or repairs, what the appropriate “trigger point” for introducing such restrictions should be, and how to prevent spurious or vexatious complaints.<sup>66</sup> Responses to the review were accepted up to March 28, 2014, and the Government intends to publish its final report sometime in 2015.<sup>67</sup>

*C. Proposed Legislation in England—The Tenancies (Reform) Bill of 2014–15*

Despite the uncertainty of Parliamentary and Governmental support for legislative prohibitions on retaliatory eviction, in July 2014, Member of Parliament Sarah Teather introduced the Tenancies (Reform) Bill of 2014–15, aimed primarily at tackling landlord retaliation.<sup>68</sup>

---

64. *Id.*

65. DEP’T FOR CMTY. & LOCAL GOV’T, REVIEW OF PROPERTY CONDITIONS IN THE PRIVATE SECTOR, 2014, at 5 (U.K.), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/283979/Review\\_of\\_Property\\_Conditions\\_in\\_the\\_Private\\_Rented\\_Sector\\_\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283979/Review_of_Property_Conditions_in_the_Private_Rented_Sector__2_.pdf), archived at <https://perma.cc/3QQV-J6UJ>.

66. *Id.* at 10.

67. *Id.* at 5; *Private Rented Housing: Written Question-218368*, PARLIAMENT.UK, [www.parliament.uk/written-questions-answers-statements/written-question/commons/2014-12-11/218368](http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2014-12-11/218368), archived at <http://perma.cc/5X73-6DQE> (last visited Mar. 10, 2015). See also WENDY WILSON, SOCIAL POLICY SECTION, RETALIATORY EVICTION IN THE PRIVATE RENTED SECTOR, 2015, at 9 (U.K.) [hereinafter RETALIATORY EVICTION IN THE PRIVATE SECTOR], available at [www.parliament.uk/Templates/BriefingPapers/Pages/BPPdfDownload.aspx?bp-id=SN\\_07015](http://www.parliament.uk/Templates/BriefingPapers/Pages/BPPdfDownload.aspx?bp-id=SN_07015), archived at <https://perma.cc/VYY9-URXP> (containing information on the Tenancies (Reform) Bill “provided to Members of Parliament in support of their parliamentary duties”).

68. *Tenancies (Reform) Bill 2014–15*, *supra* note 10. The stated policy rationale of the bill is “to prevent tenants from feeling unable to complain about poor property conditions because they fear eviction.” See Explanatory Notes to the Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 1 (Eng.), available at <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0019/en/15019en.pdf>, archived at <http://perma.cc/V5DG-SFT4>. In addition to addressing the issue of retaliatory eviction, the Bill seeks to make changes to the eviction notice

The primary thrust of the bill was to prevent a landlord from serving an otherwise valid notice of eviction in response to tenant complaints about the condition of the dwelling. The bill sought to prevent unlawful eviction in assured shorthold tenancies by rendering “invalid” a notice of eviction made within six months after a local housing authority served a “relevant notice” of needed improvements or repairs on the landlord.<sup>69</sup> Notably, the bill contained a number of exceptions under which the prohibitions on evictions would not apply. For example, the law would not apply where the complained-of condition was caused by the tenant’s failure “to use the dwelling-house in a tenant-like manner,” or by the tenant’s breach of an express term in the tenancy agreement.<sup>70</sup> Additionally, the law would not apply if a court determined that the tenant’s complaint regarding the condition of the housing was “totally without merit.”<sup>71</sup> A landlord would also be permitted to evict following a tenant’s complaint so long as he placed the dwelling house “genuinely on the market for sale.”<sup>72</sup> Finally, the proposed law would not apply where the dwelling was subject to a mortgage granted before the beginning of the tenancy, and the mortgagee required possession of the dwelling for the purpose of disposing of it with vacant possession.<sup>73</sup> No exception was made for complaints made by tenants who are in arrears in the payment of rent.<sup>74</sup>

---

procedure “to make the eviction process more straightforward for both landlords and tenants.” *Id.*

69. Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 1(2) (Eng.), available at <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0019/15019.pdf>, archived at <http://perma.cc/8VPL-ZLK9>. The term “relevant notice” includes notices made in connection with hazard notices and improvement notices made in connection with category 1 and category 2 hazards, as well as notices for emergency remedial action. *Id.* § 1(9).

70. *Id.* § 2(1).

71. *Id.* § 2(2).

72. *Id.* § 2(3). The bill makes clear that a dwelling-house is not “genuinely on the market for sale” if the landlord intends to sell his interest in the dwelling-house to a person associated with the landlord or a business partner. *Id.* § 2(4)–(6).

73. *Id.* § 2(8)–(9).

74. For a comparison of this point to American law, see *infra* Part VI.A.

## III. REACTION AND DEBATE

A. *Wavering Support for Reform*

Once introduced, the Tenancies (Reform) Bill attracted broad support from local government and tenant representative bodies.<sup>75</sup> Additionally, the Government came out in support of the bill, stating that the bill would “root out a minority of spiteful landlords and ensure that hardworking tenants are not afraid to ask for better standards in their homes.”<sup>76</sup>

The Government’s support of the bill was gratifying for tenant advocates, given its past stance that legislation prohibiting retaliatory eviction might prove deleterious for the housing market.<sup>77</sup> However, the Government’s support did not provide enough momentum for the bill to advance as its proponents had hoped. At its Second Reading, which took place on November 28, 2014, the bill did not gain enough votes to move forward.<sup>78</sup> Commentators initially declared that the bill would have “no chance of proceeding” after its failure in November.

In light of the conflicting views on the extent of retaliatory eviction and the appropriate means to address it, the All Party Parliamentary Group (APPG) for the Private Rented Sector<sup>79</sup> conducted a short inquiry into retaliatory eviction in late 2014.<sup>80</sup> Written submissions were invited up to November 5, 2014, and the APPG’s report, *Tackling Retaliatory Eviction*, was quickly published on December 15. The APPG stated that the volume of conflicting statistics submitted in connection with the inquiry was “bewildering” and concluded that obtaining objective data on the

75. See RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 15.

76. Stephen Williams Vows to Outlaw Revenge Evictions, GOV.UK (Sept. 11, 2014), <http://www.gov.uk/government/news/stephen-williams-vows-to-outlaw-revenge-evictions>, archived at <http://perma.cc/C7PB-VCPV>.

77. See Isabel Hardman, *Tory Backbenchers Talk Out ‘Revenge Evictions’ Bill*, THE SPECTATOR (Nov. 28, 2014, 5:51 PM), <http://blogs.spectator.co.uk/coffeehouse/2014/11/tory-backbenchers-talk-out-revenge-evictions-bill/>, archived at <http://perma.cc/UF88-4CN2>.

78. *Tenancies (Reform) Bill 2014–15*, *supra* note 10.

79. All Party Parliamentary Groups are informal groups of Members of both Houses with a common interest in particular issues. APPG reports are therefore not official publications of either the House of Commons or the House of Lords, or of any of its committees. See ALL PARTY PARLIAMENTARY GROUP FOR THE PRIVATE RENTED SECTOR, TACKLING RETALIATORY EVICTIONS—REPORT AND ORAL EVIDENCE (2014), available at <http://www.rla.org.uk/documents/download.shtml?pid=2735>, archived at <http://perma.cc/S65R-WWNM>.

80. RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 7–8 (citing ALL PARTY PARLIAMENTARY GROUP FOR THE PRIVATE RENTED SECTOR, *supra* note 79).

issue proved to be “impossible.”<sup>81</sup> In light of this conclusion, the APPG cautioned against legislating in the absence of more robust evidence of retaliatory eviction and called upon the Government to collect this data in the English Housing Survey.<sup>82</sup> The group also requested the Council of Mortgage Lenders to provide data regarding the potential impact of the bill on the buy-to-let market.<sup>83</sup>

The APPG additionally recommended other measures that might obviate the need for legislation expressly prohibiting retaliatory eviction.<sup>84</sup> The group recommended that a review of the ability of Environmental Health Officers to carry out their enforcement responsibilities may be warranted.<sup>85</sup> The APPG also recommended a new statutory requirement that tenants be given details about their rights and responsibilities, especially regarding evictions, prior to moving into a property.<sup>86</sup> However, no endorsement for the proposed bill or any version of it was provided.

### *B. Opponents Speak Out*

After its introduction, the Tenancies (Reform) Bill was the recipient of staunch criticism—not only of the proposed law, but of the evidence proffered by tenant advocates that landlord retaliation is a serious problem deserving of legislative attention. The bill’s primary opponent was the Residential Landlords Association (RLA), which suggested that the problem of retaliatory eviction is much more limited than has been suggested by organizations like Shelter and Citizens Advice. The RLA also stubbornly maintained that existing law contains sufficient protections for the small number of tenants who experience retaliation at the hands of a “rogue” landlord. The RLA campaigned heavily against the Tenancies (Reform) Bill on both of these grounds during the weeks leading up to its Second Reading in November 2014.<sup>87</sup>

---

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See *Retaliatory Eviction—Make Sure Your Voice is Heard*, RESIDENTIAL LANDLORDS ASS’N (Nov. 12, 2014), <http://news.rla.org.uk/retaliatory-eviction-make-sure-your-voice-is-heard/>, archived at <http://perma.cc/MYN8-9E5V>; *Parliament Week—Campaign with the RLA on Retaliatory Eviction!*, RESIDENTIAL LANDLORDS ASS’N (Nov. 14, 2014), <http://news.rla.org.uk/parliament-week-campaign-with-the-rla-on-retaliatory-eviction>, archived at <http://perma.cc/UVR6-9LFC>; *Retaliatory Eviction Bill Published—Time for Landlords to Act*, RESIDENTIAL LANDLORDS ASS’N (Nov. 25, 2014), <http://news.rla.org.uk/retaliatory-eviction-bill-published-time-for-landlords-to-act/>, archived at <http://perma.cc/8EJD-HUVW>.

First, the RLA disputed Shelter's estimates of the extent and prevalence of retaliatory conduct, emphasizing that the Government collects no official statistics on eviction—retaliatory or otherwise—and that the data proffered by tenant advocates is largely anecdotal.<sup>88</sup> According to the RLA, “the case [against retaliatory eviction] is being based on anecdotal evidence from Environmental Health Officers . . . on behalf of local authorities and deductions from other statistical evidence, with all the attendant dangers which go with such an approach.”<sup>89</sup>

The RLA has produced its own evidence that it says counters claims that retaliatory eviction is prevalent in the United Kingdom.<sup>90</sup> In a survey of more than 1760 landlords, 56% reported evicting tenants.<sup>91</sup> Of those, almost 90% cited rent arrears as the reason for the eviction.<sup>92</sup> Other commonly cited reasons for eviction were anti-social behavior, damage to property, and drug-related activity.<sup>93</sup> The RLA argues that its survey “demonstrates that the vast majority of landlords only seek to evict when they really need to.”<sup>94</sup> The RLA also cites findings from the 2012–2013 English Housing Survey suggesting that 84% of private sector tenants were “satisfied” with their accommodations.<sup>95</sup>

Additionally, the RLA argues that retaliatory eviction is already illegal and that there is therefore no need to legislate further in this area.<sup>96</sup> The RLA relies in part on the 2008 Unfair Trading Regulations, promulgated under the Consumer Protection Act, which prohibit conduct that “intimidates or exploits”

---

88. See RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 4–5 (citing *Retaliatory Eviction—Case Against Regulatory Intervention*, RESIDENTIAL LANDLORDS ASS'N (June 21, 2013), <http://news.rla.org.uk/retaliatory-evictions-case-against-regulatory-intervention/>, archived at <http://perma.cc/FL7B-MPZC> (“We strongly refute the suggestion that retaliatory eviction is a wide spread practice and there is no evidence (properly so called) in support of the campaigners’ claims.”)).

89. *Id.*

90. *Landlords Do Not Evict Tenants Without Reason Shows New Research*, RESIDENTIAL LANDLORDS ASS'N (Aug. 15, 2014), <http://news.rla.org.uk/landlords-do-not-evict-tenants-without-reason-shows-new-research/>, archived at <http://perma.cc/4CW3-TN28>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See ENGLISH HOUSING SURVEY 2012–13, *supra* note 25.

96. See RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 15; RESIDENTIAL LANDLORDS ASS'N, RETALIATORY EVICTIONS ALREADY ILLEGAL IN PRIVATE RENTED HOUSING 2–3 (2014), *available at* <http://www.rla.org.uk/documents/download.shtml?pid=2348>, archived at <http://perma.cc/4YRU-WT3M>.

consumers.<sup>97</sup> The RLA notes that the Official Guidance to the Unfair Trading Regulations makes clear that the Regulations apply to landlord–tenant relations. According to the Guidance document: “[t]hreatening the tenant with eviction to dissuade them from exercising rights they have under the tenancy agreement or in law, for example where they wish to make a complaint to a local authority about the condition of the property, or seek damages for disrepair” gives rise to breach of the Unfair Trading Regulations.<sup>98</sup> The RLA acknowledges that tenants cannot bring private actions to enforce the Unfair Trading Regulations but advocates that existing law be expanded to allow tenants to do so.<sup>99</sup>

The RLA further claims that landlord retribution is prohibited by existing criminal law. To be sure, the Protection from Eviction Act 1977, the Criminal Law Act 1977, and the Protection from Harassment Act 1997 all make harassment and illegal eviction criminal offences.<sup>100</sup> The RLA explains further that under the common law defense of illegality, a court cannot assist a landlord in evicting a tenant in retaliation for a complaint about the property because the landlord would be committing a criminal offense by pursuing such a claim.<sup>101</sup> The RLA does not, however, acknowledge that the 1997 Harassment Act requires a “course of conduct” in order for landlord behavior to rise to the level of a criminal offense, making it unlikely that the service of a notice of eviction in reaction to a tenant complaint would qualify as such.<sup>102</sup> The RLA also does not acknowledge that under existing criminal law, the tenant would be required to affirmatively prove the retaliatory conduct of the landlord, whereas proof of retaliatory motive is not required under the proposed legislation.<sup>103</sup>

Finally, the RLA cautions that the proposed legislation will have unintended consequences for landlords and the private rented marketplace generally. The RLA argues strongly that any limitation on the landlord’s unfettered right to terminate an assured shorthold tenancy will erode market confidence “at a time when

---

97. RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 15 (citing *Retaliatory Evictions Already Illegal in Private Rented Housing*, RESIDENTIAL LANDLORDS ASS’N (Nov. 10 2014), <http://www.rla.org.uk/documents/download.shtml?pid=2348>, archived at <http://perma.cc/4YRU-WT3M>).

98. *Id.*

99. *Id.* at 3.

100. *Id.* at 2–3.

101. *Id.* at 3.

102. RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 15.

103. The RLA also fails to address the fact that criminal cases under these statutes are fairly rare, as neither police nor prosecutors are sufficiently incentivized or resourced to carry out prosecutions against landlords. *See* Lonegrass, *supra* note 18, at 955.

the private rented sector is the only area of growth in rented homes.”<sup>104</sup> Legislation invalidating eviction notices following requests for repairs will, they say, encourage tenants to request repairs or governed inspections in response to any action by landlords to tackle rent arrears or other breaches of the tenancy.<sup>105</sup> Thus, the legislation will merely embolden tenants to file false claims in an effort to avoid otherwise lawful evictions. The Association of Residential Letting Agents, also staunchly opposed to the bill, concurs: “It is probable that retaliatory eviction is likely to cost landlords more money than merely remedying any problem.”<sup>106</sup>

### *C. Covert Legislative Response—The Deregulation Bill*

Although outward support for anti-retaliation law has waned, tenant advocates have identified another potential route to success. In February, an amendment was proposed with little fanfare to a general deregulation bill. The amendment is substantially similar to the stalled Tenancies (Act).<sup>107</sup> As both houses of Parliament have agreed on the text of the Deregulation Bill 2013–14 to 2014–15, the prohibition of retaliation in England is all but certain.

As under the prior bill, under the pending law a notice of eviction may not be served on a tenant within six months after the service of a “relevant notice” of needed repairs or improvements on the landlord by the local housing authority.<sup>108</sup> The prohibition on eviction following a relevant notice does *not* apply, however, where the relevant notice has been revoked as a result of having

---

104. RETALIATORY EVICTION IN THE PRIVATE SECTOR, *supra* note 67, at 16 (citing *Retaliatory Evictions—Case Against Regulatory Intervention*, RESIDENTIAL LANDLORDS ASS’N (June 21, 2013), <http://news.rla.org.uk/retaliatory-evictions-case-against-regulatory-intervention/>, archived at <http://perma.cc/9GU7-U99A>).

105. *Id.*

106. ASS’N OF RESIDENTIAL LETTING AGENTS, RESPONSE TO THE PRIVATE RENTED SECTOR ALL-PARTY PARLIAMENTARY GROUP’S INQUIRY ON THE TENANCIES (REFORM) BILL 2 (2014), *available at* <http://www.arla.co.uk/media/611318/tenancies-reform-bill-prs-appg-inquiry-response-arla.pdf>, archived at <http://perma.cc/NUF5-ZK2K>.

107. *See* Deregulation Bill, 2013-14 & 2014-15, H.L. Bill [95] § 33 (Eng.); *see also* DEP’T FOR CMTYS. & LOCAL GOV’T, POLICY STATEMENT ON AMENDMENT TO DEREGULATION BILL (2015), *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401602/Policy\\_statement\\_on\\_amendment\\_to\\_Deregulation\\_Bill.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401602/Policy_statement_on_amendment_to_Deregulation_Bill.pdf), archived at <http://perma.cc/CF4G-5YY2>.

108. Deregulation Bill, 2013-14 & 2014-15, H.L. Bill [95] § 33 (Eng.).

been served in error, quashed, reversed, or suspended as provided by other substantive law.<sup>109</sup>

Also as under the prior bill, the pending law contains a number of additional exceptions. The law does not apply when the complained-of condition was caused by the tenant's failure "to use the dwelling-house in a tenant-like manner," or by the tenant's breach of an express term in the tenancy agreement.<sup>110</sup> Additionally, a landlord may evict following a tenant's complaint so long as he placed the dwelling house "genuinely on the market for sale."<sup>111</sup> Finally, the proposed law would not apply where the dwelling was subject to a mortgage granted before the beginning of the tenancy and the mortgagee required possession of the dwelling for the purpose of disposing of it with vacant possession.<sup>112</sup>

Notably, the pending law did not incorporate the exception from prior law for cases in which a court determines that the tenant's complaint regarding the condition of the dwelling was "totally without merit."<sup>113</sup> Also absent from the pending law is any exception for complaints made by tenants who are in arrears in the payment of rent.

#### *D. A Proposal in Wales—The Renting Homes (Wales) Bill*

Tenant advocates have also gained a foothold in the General Assembly of Wales. A long-awaited comprehensive housing law bill introduced there in February 2015 and set to be reviewed in Committee during the summer contains a simple, but potentially formidable, retaliatory eviction provision.<sup>114</sup>

Unlike the complex and detailed anti-retaliation regime introduced in England, the Welsh legislation aims only to provide courts with discretion to refuse to award possession to a landlord who has acted in a retaliatory manner.<sup>115</sup> According to the proposed

---

109. *Id.*

110. *Id.* § 34(1).

111. *Id.* § 34(2). The bill makes clear that a dwelling-house is not "genuinely on the market for sale" if the landlord intends to sell his interest in the dwelling-house to a person associated with the landlord or a business partner. *Id.* § 34(3).

112. *Id.* § 2(8)–(9).

113. *Id.* § 2(2).

114. See Renting Homes (Wales) Bill § 213 (2015), available at [http://www.assembly.wales/laid%20documents/pri-ld10098%20-%20renting%20homes%20\(wales\)%20bill/pri-ld10098-e.pdf](http://www.assembly.wales/laid%20documents/pri-ld10098%20-%20renting%20homes%20(wales)%20bill/pri-ld10098-e.pdf), archived at <http://perma.cc/V84K-557G>; *Landmark Bill to Make it Easier and Simpler to Rent a Home in Wales*, LLYWODREATH CYMRU WELSH GOVERNMENT (Feb. 9, 2015), <http://gov.wales/newsroom/housing-and-regeneration/2015/renting-homes-landmark-bill/?lang=en>, archived at <http://perma.cc/QK7E-UYLG>.

115. Renting Homes (Wales) Bill § 213(2) (2015).

statute, a possession claim is retaliatory if the tenant has relied on or invoked the landlord's obligations to maintain the premises in a habitable condition and to make required repairs and the court is "satisfied that the landlord has made the possession claim to avoid complying with these obligations."<sup>116</sup> As of this writing, the bill has been assigned to the Communities, Equality, and Local Government Committee, which has issued a call for evidence on the bill's impact.<sup>117</sup> Once this inquiry closes, the bill will be discussed in Committee for several months before it will be debated by the Assembly.<sup>118</sup> Although the success of the bill is far from certain, the legislation is promising, particularly in light of the imminent adoption of anti-retaliation law in England.

### *E. Examination of Foreign Experience*

The political discussions surrounding retaliatory eviction, its incidence, and the most appropriate means of controlling its occurrence have been largely devoid of comparisons to foreign common law jurisdictions, where robust anti-retaliation regimes are the norm. However, before the debate entered the legislative arena, pro-tenant organizations such as Shelter and Citizens Advice looked to foreign law for inspiration as to how to effectively combat landlord retribution.

In its 2007 report on retaliatory conduct, Citizens Advice observed that in most European jurisdictions, retaliatory eviction is not an issue, as private tenants enjoy strong security of tenure regimes that permit landlords to evict only in narrowly prescribed circumstances, such as rent arrears, damage to property, or, in some countries, if the landlord needs the property for use as his own dwelling.<sup>119</sup> Thus, the best inspiration for a robust anti-retaliation regime is drawn not from European jurisdictions, but from non-European common law jurisdictions where tenants have less security of tenure, such as Australia, New Zealand, and the

---

116. *Id.* § 213(3). See also RENTING HOMES (WALES) BILL EXPLANATORY MEMORANDUM 33–34 (Feb. 2015), available at [http://www.assembly.wales/laid%20documents/pri-ld10098-em%20-%20renting%20homes%20\(wales\)%20bill%20-%20explanatory%20memorandum/pri-ld10098-em-e.pdf](http://www.assembly.wales/laid%20documents/pri-ld10098-em%20-%20renting%20homes%20(wales)%20bill%20-%20explanatory%20memorandum/pri-ld10098-em-e.pdf), archived at <http://perma.cc/3BXX-J2DA>.

117. *Consultation*, NAT'L ASSEMBLY FOR WALES, <http://senedd.assembly.wales/mgConsultationDisplay.aspx?ID=168>, archived at <http://perma.cc/9EQH-NDFJ> (last visited Mar. 27, 2015).

118. *Renting Homes (Wales) Bill*, NAT'L ASSEMBLY FOR WALES, <http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=12055>, archived at <http://perma.cc/H7ZE-9KGZ> (last visited Mar. 27, 2015).

119. CREW, *supra* note 2, at 12 & app. 2.

United States.<sup>120</sup> In all of these countries, landlords can generally terminate tenancies without cause, but are prohibited—either by legislation or case law—from evicting tenants who have taken some action to enforce their rights.<sup>121</sup> Shelter has also conducted extensive research into the anti-retaliation regimes of common law jurisdictions with low security of tenure, including New South Wales, Queensland, South Australia, Victoria, Western Australia, Tasmania, New Zealand, and the United States.<sup>122</sup>

Although Shelter and Citizens Advice urge that a legislative solution to landlord retaliation in the United Kingdom ought to follow the experience of foreign jurisdictions, thus far foreign law has been studied only in its letter, and only facially so. No detailed analysis has been undertaken of the great variation—and attendant strengths and weaknesses—among state and local laws prohibiting landlord retaliation. Moreover, these laws have been studied in their appearance only and not in their application. A comprehensive review of how well anti-retaliation laws interact with existing legal and non-legal institutions for tenant relief must be undertaken and should serve as a lens through which to consider how similar anti-retaliation regimes would function in the United Kingdom. The remainder of this Article seeks to fill this gap and contribute to the ongoing legislative debate by providing a detailed review of U.S. retaliatory eviction laws and their implementation.

#### IV. AMERICAN PROHIBITIONS ON LANDLORD RETALIATION

The vast majority of jurisdictions in the United States prohibit landlords from taking revenge against tenants who exercise their rights under housing codes or other laws governing tenant rights.<sup>123</sup> Forty states and the District of Columbia have statutes that provide varying degrees of protection from retaliatory conduct.<sup>124</sup> Another four states have recognized the doctrine jurisprudentially.<sup>125</sup> Many individual municipalities have also enacted anti-retaliation

---

120. *Id.* at 12 app. 1.

121. *Id.*

122. SHELTER CYMRU, MAKING RIGHTS REAL: PREVENTING RETALIATORY EVICTIONS IN WALES 15–20 & app. (2013), available at <http://www.sheltercymru.org.uk/wp-content/uploads/2013/07/Making-rights-real.pdf>, archived at <http://perma.cc/FF2W-MJTG>.

123. See generally Memorandum from Shelly Kurtz & Alice Noble-Allgire to Members of the URLTA Drafting Comm. (Oct. 2, 2012) [hereinafter Noble-Allgire Memorandum], available at [http://www.uniformlaws.org/shared/docs/Residential%20Landlord%20and%20Tenant/2012oct2\\_URLTA\\_Memo\\_Retaliation%20Eviction.pdf](http://www.uniformlaws.org/shared/docs/Residential%20Landlord%20and%20Tenant/2012oct2_URLTA_Memo_Retaliation%20Eviction.pdf), archived at <http://perma.cc/4J5A-62EQ>.

124. *Id.*

125. *Id.*

ordinances that offer additional protection to local tenants.<sup>126</sup> However, the proliferation of anti-retaliation laws is a relatively new phenomenon in American landlord–tenant law. Before exploring their variety, some examination of their introduction is warranted.

#### *A. Early Prohibitions on Retaliation*

As is the case today in the United Kingdom, the American common law was entirely unconcerned with an evicting landlord’s motive or purpose in terminating the tenancy.<sup>127</sup> Landlords enjoyed the right to terminate a periodic tenancy or refuse to renew a fixed term lease for any reason, simply through timely service upon the tenant of a notice to quit.<sup>128</sup> Indeed, it was well established that the landlord could evict “for any legal reason or no reason at all.”<sup>129</sup> During the second half of the last century, however, American courts and legislatures began limiting landlords’ freedom to terminate a lease, particularly when eviction served as retribution against a tenant for complaining about the condition of a residential dwelling.<sup>130</sup>

State laws prohibiting retaliatory conduct by landlords were first fashioned by the judiciary during the landlord–tenant “revolution” of the 1960s and 1970s.<sup>131</sup> During that time, housing policy shifted dramatically, resulting in new laws that sought to ensure safe and habitable housing conditions for residential tenants.<sup>132</sup> A consequence of this trend was the development by courts of rules prohibiting landlords from retaliating against tenants for exercising their newly secured rights.<sup>133</sup> The doctrine of retaliatory eviction was first developed as a defense to the landlord’s action for unlawful detainer, on the reasoning that housing and sanitary codes and the emerging implied warranty of habitability would be rendered ineffective if tenants feared retribution by landlords against whom complaints were levied.<sup>134</sup>

---

126. See, e.g., CHICAGO, ILL., MUN. CODE § 5-12-150; see also Lauren A. Lindsey, Comment, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant’s Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 110 (2010) (listing examples).

127. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 540 (1982).

128. *Id.* at 539–40.

129. ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* 718 (1980).

130. Glendon, *supra* note 127, at 540.

131. 5 THOMPSON ON REAL PROPERTY § 43.06(a) (2d ed. 2007).

132. Glendon, *supra* note 127, at 521.

133. *Id.*

134. *Id.* at 540.

In the seminal case of *Edwards v. Habib*, the D.C. Circuit became the first court to articulate the need for such a doctrine.<sup>135</sup> As famously articulated by the opinion's author, Judge Skelly Wright:

There can be no doubt that the slum dweller, even though this home be marred by housing 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 . . . but also would stand as a warning to others that they dare not be so bold.<sup>136</sup>

Thus, in *Edwards*, the court held that a landlord could not refuse to renew a lease in retaliation for a tenant's complaint to a housing code authority.<sup>137</sup> Instead, the tenant was entitled to remain in the premises for as long as the landlord's motive for refusing to renew remained retaliatory.<sup>138</sup> Following the decision in *Edwards*, numerous other courts employed similar reasoning to recognize the anti-retaliation defense.<sup>139</sup>

State legislatures followed the lead of the courts by enacting retaliatory eviction regimes designed to protect and promote tenants' rights to decent housing.<sup>140</sup> These enactments, and the judicial decisions applying them, further strengthened tenant protections. First, many state statutes expanded protection beyond the prevention of eviction.<sup>141</sup> Whereas in periodic leases, retaliation tended to take the form of termination of the tenancy, other forms of retaliation prevailed in fixed term agreements.<sup>142</sup> A landlord seeking retribution for tenant complaints might instead increase the rent or suspend

---

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

136. *Id.* at 701. See also 5 THOMPSON ON REAL PROPERTY § 43.06(a) (2d ed. 2007) ("Landlord-tenant reforms are of little utility if a landlord can evict or otherwise punish tenants for asserting their rights.").

137. *Edwards*, 397 F.2d at 701.

138. *Id.*

139. See, e.g., *Alteri v. Layton*, 408 A.2d 18, 20 (Conn. Super. Ct. 1979); *Wilkins v. Tebbetts*, 216 So. 2d 477, 478-79 (Fla. Dist. Ct. App. 1968); *Windward Partners v. Delos Santos*, 577 P.2d 326, 331-32 (Haw. 1978); *Wright v. Brady*, 889 P.2d 105, 107-08 (Idaho Ct. App. 1995); *Clore v. Fredman*, 319 N.E.2d 18, 22 (Ill. 1974); *Bldg. Monitoring Sys., Inc. v. Paxton*, 905 P.2d 1215, 1216-17 (Utah 1995); *Dickhut v. Norton*, 173 N.W.2d 297, 301 (Wis. 1970).

140. See Glendon, *supra* note 127, at 542 ("Legislation, rather than judicial decisions, predominates in this area.").

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

142. Brian T. McManus, Comment, *Retaliatory Evictions in Washington and Seattle: In Search of Public Policy*, 57 WASH. L. REV. 293, 296 (1982).

utility services.<sup>143</sup> State legislatures responded by addressing the gamut of potentially retaliatory conduct by landlords. Additionally, many states sought to prevent landlords from retaliating against tenants for reasons other than merely complaining about housing conditions. For example, landlords were prohibited from evicting in response to tenants' complaints about a landlord's criminal conduct or opposition to a landlord's development plans for the property.<sup>144</sup> Over time, some jurisdictions further extended anti-retaliation laws to also protect tenants' First Amendment rights to free speech and assembly.<sup>145</sup>

### *B. Uniform Law and the Restatement*

Today, most retaliatory eviction laws in the United States are based, at least loosely, on the Uniform Residential Landlord and Tenant Act (URLTA), which was published in 1972. The URLTA protects three types of tenant behavior: (1) reporting housing code violations affecting the tenant's health or safety; (2) complaining to the landlord about the condition or maintenance of the premises; and (3) joining or forming a tenant's union or other tenant's rights advocacy group.<sup>146</sup> Tenants who engage in protected behavior are afforded a defense in eviction proceedings and may also affirmatively claim damages and attorney's fees in response to a landlord's retaliatory conduct.<sup>147</sup> Notably, "retaliatory conduct" by landlords may include not only eviction or the threat of eviction but also the increasing of rent or the decreasing of services to the tenant.<sup>148</sup>

Significantly, proscriptions on retaliatory eviction are designed solely to avoid wrongful termination of a lease, and not merely capricious termination.<sup>149</sup> In the absence of a forbidden motive,

---

143. *Id.*

144. Rabin, *supra* note 141, at 534.

145. *See, e.g.*, *E. & E. Newman, Inc. v. Hallock*, 281 A.2d 544 (N.J. Super. Ct. App. Div. 1971); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969); *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.9 (1977) (discussing views on constitutional violations stemming from retaliation eviction).

146. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(a)(1)–(3) (1972).

147. *Id.* § 5.101(b).

148. *Id.* § 5.101(a).

149. 5 THOMPSON ON REAL PROPERTY § 43.06(a) (2d ed. 2007) ("The purpose of retaliatory conduct statutes is to prohibit retaliatory actions by landlords. Accordingly, the statutes do not prohibit particular conduct of the landlord in all instances, but only if the conduct has a retaliatory motive behind it.").

landlords remain free to evict a tenant or refuse to renew a lease for any reason. Thus, the key component of any retaliatory eviction claim is proof of the landlord's retaliatory motive. Significantly, the URLTA provides that if the alleged retaliation occurs within one year of the tenant's protected behavior, a presumption exists in the tenant's favor that the landlord's conduct was in fact retaliatory.<sup>150</sup> However, this presumption does not arise if the tenant made the complaint after a notice of a proposed rent increase or diminution of services.<sup>151</sup>

Finally, the URLTA provides that landlords may regain possession of the property even after a tenant has taken protected action under certain circumstances, described as "safe harbors" for the landlord. Thus, the landlord's conduct will not be deemed retaliatory if the tenant caused the damage or code violation of which he complains, if the tenant is in default in rent, or if compliance with the applicable housing code would require some alteration, remodeling, or demolition of the dwelling which would effectively deprive the tenant of his use of the dwelling.<sup>152</sup>

The *Restatement (Second) of Property* also recognizes the defense of retaliatory eviction, albeit one more limited than that of the URLTA. The relevant provision deems "retaliatory" a landlord's termination of a tenancy by notice or failure to renew a tenancy for a specified term, provided that five criteria are met.<sup>153</sup> These are: (1) there is a protective housing statute in place; (2) the landlord is in the business of renting residential property; (3) the tenant is not materially in default in the performance of his obligations under the lease at the time the landlord acts; (4) the landlord is primarily motivated in acting because the tenant has complained about a violation by the landlord of a protective housing statute; and (5) the tenant's complaint was made in good faith and with reasonable cause.<sup>154</sup> The *Restatement's* iteration of the anti-retaliation doctrine is far more restrictive than that of the URLTA, in no small part because it applies only to landlords "in the business" of renting and requires affirmative proof of the landlord's retaliatory

---

150. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(b) (1972). The act goes on to say that the term "[p]resumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." *Id.*

151. *Id.* § 5.101(b).

152. *Id.* § 5.101(c).

153. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 (1977).

154. *Id.*

motive.<sup>155</sup> Although the *Restatement* approach is not mainstream, some state courts have favored its less expansive reach.<sup>156</sup>

### *C. Proliferation—States and Municipalities*

Wide variation exists among state anti-retaliation laws, with some states and municipalities offering far less protection to tenants than others. The largest disparities exist with respect to five components of retaliatory eviction doctrine: (1) its utility as an affirmative claim for relief in addition to a defense in a suit for eviction; (2) the range of behaviors that are both protected from retaliation and that may be deemed retaliatory; (3) the existence and strength of a presumption of retaliatory motive on the part of the landlord; (4) the scope of relief available to a tenant who successfully proves retaliation; and (5) exceptions.

#### *1. Affirmative and Defensive Claims*

In many jurisdictions where anti-retaliation laws exist, tenants may bring an affirmative claim for damages or injunctive relief when a landlord has acted in a retaliatory fashion.<sup>157</sup> In a minority of states, however, a tenant may rely on anti-retaliation law only as a defense to a landlord's action for eviction.<sup>158</sup> The latter approach severely limits the protective effect of an anti-retaliation regime in that it deprives the tenant of any modicum of control over his own claim. If a landlord takes steps short of eviction, such as an increase in rent, a decrease in services, or even a threat of eviction, the tenant has neither access to relief nor leverage in his negotiations with the landlord. Rather, the tenant is forced to wait until the landlord initiates a legal proceeding before he can complain.<sup>159</sup>

---

155. *Id.* According to the *Restatement* comments, the determination of whether a landlord is “in the business” of renting depends upon “whether the landlord’s rental activities are only an aspect of providing himself with housing, or primarily involve providing others with housing,” concluding that “in the latter case, the landlord is in the business of renting property.” *Id.* cmt. d. Thus, for example, the owner of a large multi-unit apartment building is “in the business” of renting, even if he occupies one of the units in the building. *Id.*

156. *See, e.g.,* Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215 (Utah 1995).

157. *Id.*

158. *Id.*

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

## 2. Coverage of Tenant Activities and Landlord Behaviors

Another area of wide variation among jurisdictions is the scope of anti-retaliation doctrine, both with respect to the tenant activities that are protected and the types of landlord behaviors that are deemed to be retaliatory.<sup>160</sup> Tenant advocates argue that in order to best protect and promote policies implicit within laws requiring safe and habitable housing for tenants, “courts should protect *all* acts that are within the tenants’ rights and intended to promote the habitability of rentals.”<sup>161</sup> Similarly, supporters of tenant rights argue that anti-retaliation regimes must cover the full gamut of landlord retaliation in order to be fully effective.<sup>162</sup> And yet, state laws vary significantly in terms of their scope.

With respect to tenant activities, a majority of states have adopted the approach of the URLTA, which is to protect tenants who have either (1) reported housing code violations affecting health or safety; (2) complained to the landlord about the condition of the premises; or (3) joined or formed a tenants’ union or other tenants’ rights advocacy group.<sup>163</sup> However, some legislatures have specifically declined to cover the tenant’s affiliation with a union or other advocacy organization.<sup>164</sup> Also, some jurisdictions restrict protection to the tenant by requiring that the tenant’s complaints to the landlord or to a governmental agency be made in “good faith”<sup>165</sup> or that the landlord have notice or knowledge of the protected activity of the tenant.<sup>166</sup> In contrast, many states have added additional types of activities for which a tenant is protected,

---

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.”)

160. See Richard E. Blumberg & Brian Quinn Robins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 16 (1976).

161. Brian D. Casserly, Note, *Insuring the Effectiveness of Indiana’s Landlord-Tenant Laws: The Necessity of Recognizing the Doctrine of Retaliatory Eviction in Indiana*, 46 IND. L. REV. 1317, 1342–43 (2013) (emphasis added).

162. *Id.* at 1343. Even at its broadest, the doctrine has limits. At its core, retaliatory eviction is much more limited than “good cause” eviction regimes and therefore may prohibit only vindictive or presumptively vindictive, and not merely capricious, eviction. See Paul Sullivan, Note, *Security of Tenure for the Residential Tenant: An Analysis and Recommendations*, 21 VT. L. REV. 1015, 1049 (1997) (citing Blumberg & Robins, *supra* note 160, at 44).

163. See Noble-Allgire Memorandum, *supra* note 123, at 4.

164. *Id.* at 4–5.

165. “Good faith” is required by 17 states. Some states have gone further by allowing a landlord to recover damages from a tenant for claims made in bad faith. *Id.* at 4.

166. A knowledge requirement has been adopted by nine states. *Id.*

including the exercise of a right under the lease, a failure to agree to a new rule or regulation after the tenancy begins, or the exercise of a statutory right to terminate a lease.<sup>167</sup>

Notably, although many states' statutory protections are broad in coverage, judicial interpretation of these statutes can significantly limit their scope. Take, for example, the approach of a Connecticut court in interpreting a statute forbidding a landlord to evict within six months after the tenant "has in good faith requested the landlord to make repairs."<sup>168</sup> The court limited the term "repairs" to major repairs aimed at preventing urban decay and blight, holding that "repairs required to conform a dwelling unit to basic structural, mechanical[,] and housing code regulations are the type of repairs which were contemplated by the legislature and which raise the presumption of a retaliatory defense."<sup>169</sup> Thus, the court declined to recognize a request to unclog bathroom plumbing as a request for "repair" under the retaliatory eviction regime.<sup>170</sup> The court cited a floodgate argument as its primary reason for interpreting the statute so narrowly.<sup>171</sup>

State law also varies with respect to the range of landlord conduct that is regulated by anti-retaliation regimes. The URLTA prohibits retaliation in the form of eviction, increases in rent, or decreases in services provided to the tenant.<sup>172</sup> Although most states' retaliatory conduct laws adhere to this narrow range of activities, some states have expanded the list, either by adding other types of specific conduct or by adopting a generalized standard that would encompass a broader range of actions.<sup>173</sup> Some terms enumerated by these more protective statutes include refusing to renew a lease, termination of a periodic tenancy, increased obligations under the lease, depriving the tenant of use of the premises, materially

---

167. *Id.* at 5. Some states even protect activities that are not necessarily related to the lease, including the pursuit of *any* legal action against the landlord, testifying against the landlord in court, or exercising rights and remedies under *any* state law. *See id.* at 6.

168. *See Alteri v. Layton*, 408 A.2d 18, 19 n.1 (Conn. Super. Ct. 1979) (citing CONN. GEN. STAT. ANN. § 47a-20 (Westlaw 2015)).

169. *Id.* at 22.

170. *Id.*

171. *Id.* ("To allow the presumption to be raised by a request that a bathtub drain be unclogged would open the floodgates for a multitude of requests for repairs. In Hartford alone there exist in excess of 12,000 substandard dwelling units requiring repairs of both a major and minor nature. There is scarcely a dwelling unit in this jurisdiction beyond the pale of requiring repair. The necessity for repairs is applicable to nearly all existing dwelling units.")

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

173. Noble-Allgire Memorandum, *supra* note 123, at 3.

interfering in bad faith with the tenant's rights under the lease, or substantial alteration of the terms of the tenancy.<sup>174</sup>

### 3. Proof of Retaliatory Motive

A third area of variation in retaliatory eviction law concerns the tenant's proof of the landlord's retaliatory motive. It is well accepted that a landlord's motive is exceptionally difficult to prove, and many courts and commentators have posited that requiring a tenant to affirmatively prove a landlord's retaliatory motive renders retaliatory eviction laws nearly useless.<sup>175</sup> A majority of states address the difficulty of proof through presumptions of retaliatory intent that favor tenants.<sup>176</sup> According to this approach, when a landlord attempts to evict a tenant or performs other prohibited acts within a certain time period following protected tenant activity, a presumption of retaliation arises and the burden rests on the landlord to present a valid (non-retaliatory) reason for his actions.<sup>177</sup> Unfortunately, however, not all jurisdictions recognize a presumption of retaliation in favor of the tenant.<sup>178</sup> Indeed, other states have gone so far as to adopt a presumption *against* the tenant and in favor of the landlord.<sup>179</sup>

Even in states where the presumption is recognized, it is not without exceptions. For example, several states have adopted the approach of the URLTA, under which the presumption of retaliatory motive does not apply when a notice of a rent increase or diminution in services predated the tenant's complaint.<sup>180</sup> These exceptions are reasonably premised on the likelihood that a complaint following an unfavorable (though lawful) change in the lease terms may itself be unfairly motivated.<sup>181</sup>

---

174. *Id.* at 3–4.

175. *See, e.g.*, CHESTER W. HARTMAN, HOUSING AND SOCIAL POLICY 77 (1975) (“Motivation . . . is difficult to prove, and . . . at the end of the statutory period—usually three to six months—the tenant is again exposed to retaliatory eviction, which vitiates most of the value of the protections.”); Casserly, *supra* note 161, at 1343 (citing *Gokey v. Bessette*, 580 A.2d 488, 491 (Vt. 1990) (“A subjective test would effectively establish such a high burden of proof for tenants that the benefit the Legislature intended to confer would be an illusion.”)).

176. Noble-Allgire Memorandum, *supra* note 123, at 6. *See also* Blumberg & Robins, *supra* note 160, at 16.

177. Noble-Allgire Memorandum, *supra* note 123, at 6.

178. Eleven states have omitted this presumption. *Id.*

179. *See, e.g.*, COLO. REV. STAT. § 38-12-509(3) (Westlaw 2015).

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

181. Reasonable though these exceptions may be, they have been adopted in only six states. *See* Noble-Allgire Memorandum, *supra* note 123, at 7.

The pro-tenant position favored by many states has itself been criticized on the basis of the time limitations that are placed on presumptions of retaliation. States adopting the approach of the uniform law limit the presumption to one year after the tenant's protected conduct.<sup>182</sup> Thus, any eviction or other regulated behavior by the landlord during the year following a tenant's protected conduct will be presumed retaliatory, and the burden rests on the landlord to establish a non-retaliatory motive. However, most states have enacted much shorter periods, some as short as 90 days.<sup>183</sup> Once the period runs out, the tenant is again left with the nearly insurmountable task of proving the landlord's improper motive.<sup>184</sup>

The strength of the presumption is also relevant. In some jurisdictions, the landlord can rebut the presumption of retaliation by proving that the eviction was initiated for "good cause."<sup>185</sup> In contrast, other jurisdictions provide much stronger protections by requiring the landlord to prove by clear and convincing evidence that the motive for eviction was not retaliatory.<sup>186</sup> Finally, in other states, landlords can rely only on a predefined list of defenses to the tenant's claim that retaliation has occurred.<sup>187</sup>

Finally, there is some variation in approaches to the problem of a landlord's "mixed motives"—eviction for motives that are both retaliatory and legitimate.<sup>188</sup> The few jurisdictions to address this issue do so with one of three approaches. Some jurisdictions use a "sole motivation" test that requires the tenant to prove that the retaliatory purpose was the sole reason for the eviction.<sup>189</sup> This test essentially insulates landlords with multiple motives from liability provided that at least one of the motives for the landlord's conduct was legitimate.<sup>190</sup> Other states apply an "independent motivation" test, which is far more favorable to tenants.<sup>191</sup> Here, once the tenant

---

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

183. Noble-Allgire Memorandum, *supra* note 123, at 7. One state, New Jersey, omits any time period from its presumption. N.J. STAT. ANN. § 2A:42-10.12 (Westlaw 2015).

184. Even the longest presumptions of retaliation may have the effect of merely postponing retaliatory conduct on the part of landlords. *See* Blumberg & Robins, *supra* note 160, at 16. And yet, the provision of *time*—to plan for the future, garner resources, and secure alternative housing—is often benefit enough to a tenant faced with the possibility of immediate eviction.

185. *See, e.g.*, FLA. STAT. ANN. § 83.64 (Westlaw 2015).

186. *See, e.g.*, MASS. GEN. LAWS ch. 186, § 18 (Westlaw 2015).

187. *See infra* Part IV.C.5 (addressing exceptions to anti-retaliation laws).

188. Noble-Allgire Memorandum, *supra* note 123, at 10.

189. Iowa and Connecticut rely on this approach. *Id.*

190. *Id.*

191. *Id.*

has produced sufficient proof to raise a presumption of retaliation, the landlord must rebut the presumption by showing that “the decision to evict was reached independent of any consideration of the activities of the tenants protected by the statute.”<sup>192</sup> An intermediate approach is the “primary motive test,” which considers whether a retaliatory motive was the primary or predominant reason for the eviction.<sup>193</sup>

#### 4. Remedies

Next, anti-retaliation regimes vary in the forms of relief offered to tenants who successfully prove that their landlords have engaged in prohibited retaliatory conduct. The URLTA again is the touchstone for most states. The uniform law allows the tenant to recover “an amount not more than [three] months’ periodic rent or [threefold] the actual damages sustained by him, whichever is greater, and reasonable attorney’s fees.”<sup>194</sup> A small number of states provide lesser relief, allowing recovery of actual damages and attorney’s fees but not the treble damages allowed under the uniform act.<sup>195</sup> In contrast, two states impose penalties on landlords in addition to actual damages suffered.<sup>196</sup> Understandably, tenant advocates promote anti-retaliation regimes that afford tenants a complete range of coverage, including actual, consequential, and punitive damages; attorney’s fees and court costs; and injunctive relief.<sup>197</sup>

#### 5. Exceptions

Finally, a number of states recognize exceptions to retaliatory conduct prohibitions, under which a landlord may evict a tenant notwithstanding a presumed or established retaliatory motive. Most

---

192. *Silberg v. Lipscomb*, 285 A.2d 86, 88 (N.J. Dist. Ct. 1971).

193. Michigan and Virginia have adopted this approach. See Noble-Allgire Memorandum, *supra* note 123, at 10. This is also the approach endorsed by the Restatement. See RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 14.8 (1977).

194. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.17 (1972).

195. Noble-Allgire Memorandum, *supra* note 123, at 13.

196. CAL. CIV. CODE § 1942.5(f) (Westlaw 2015); TEX. PROP. CODE § 92.333 (2014). New Hampshire’s law varies slightly in that it imposes a penalty of up to three months’ rent in lieu of actual damages and without the necessity of proof of damages. *Sherryland, Inc. v. Snuffer*, 837 A.2d 316, 320 (N.H. 2003).

197. *Cassery*, *supra* note 161, at 1342–43. Notably, a small minority of states have adopted rules that allow landlords to recover damages from tenants who make claims in bad faith. Noble-Allgire Memorandum, *supra* note 123, at 14.

states base their lists of exceptions on the URLTA.<sup>198</sup> Under the uniform law, a tenant may be evicted regardless of the landlord's motive if the condition complained of was caused by the tenant, a member of the tenant's family, or a person on the premises with the tenant's consent; if the tenant is in default in rent; or if compliance with applicable codes would require alterations that would effectively deprive the tenant of the use of the leased premises.<sup>199</sup> Of the states to adopt the URLTA's exceptions, many of them have expanded upon this list with additional exceptions.<sup>200</sup> These may include a tenant's breach of an obligation in the lease other than the obligation to pay rent or the landlord's desire to use the dwelling as his own residence.<sup>201</sup>

#### *D. The Revised Uniform Law*

In 2012, the Uniform Law Commission undertook a large-scale revision of the URLTA that, as of this writing, is still underway.<sup>202</sup> The most current draft of the revised uniform law reflects fairly significant changes to the URLTA's retaliatory eviction provisions.<sup>203</sup> First, the scope of tenant behavior protected by the act has been expanded to incorporate the variety of approaches taken by many states since the URLTA was first promulgated.<sup>204</sup> Under the revised URLTA, a tenant would be covered not only for complaints to a government agency or the landlord and for affiliation with a tenants' rights organization or union, but also if he exercised any legal right under the lease or any provision of law or pursued any legal action or administrative remedy against the landlord in court or an administrative proceeding.<sup>205</sup> The range of landlord conduct that may be deemed retaliatory has also been broadened. Where the

---

198. See 5 THOMPSON ON REAL PROPERTY § 43.06(a) (2d ed. 2007).

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

200. Noble-Allgire Memorandum, *supra* note 123, at 7.

201. *Id.* at 7–10. See also RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 cmt. f (1977). States vary as to whether they state exceptions as exceptions to the doctrine entirely or exceptions to the presumption of retaliation. See Noble-Allgire Memorandum, *supra* note 123, at 7.

202. See Memorandum from Sheldon F. Kurtz, Chair of the Study Comm., to the Uniform Law Comm'n Scope and Program Comm. (May 18, 2011), available at [http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta\\_studycmtereport\\_051811.pdf](http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta_studycmtereport_051811.pdf), archived at <http://perma.cc/3LAV-WA2C>.

203. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 901 (Revised Nov. 2014), available at <http://www.uniformlaws.org/Committee.aspx?title=Residential%20Landlord%22and%20Tenant%20Act>, archived at <http://perma.cc/D48Q-SCQ6>.

204. *Id.* § 901(a).

205. See *id.*

original act recognized as retaliatory a suit for possession, a decrease in services, or an increase in rent, the revised act also recognizes refusing to renew a tenancy containing an option to renew, terminating a periodic tenancy, and any conduct prohibited by criminal law.<sup>206</sup> Taken together, these reforms reflect a policy of protecting tenants in the exercise of any legal right, and in ensuring that the law contains no loopholes that would allow a landlord to unlawfully evict, whether literally or constructively.

Notably, the Uniform Law Commission drafting committee has taken a balanced approach to reform, expanding not only tenant rights but also landlord protections. Again in an apparent attempt to incorporate the variety of state approaches to landlord retaliation, the Uniform Law Commission has expanded the list of safe harbors for landlords. The existing uniform law permits landlords to regain possession even after a tenant has taken protected action if the tenant caused the damage or code violation at issue, if the tenant was in rent arrears, or if compliance with the applicable code would require some alteration, remodeling, or demolition of the building that would effectively deprive the tenant of its use.<sup>207</sup> The revised law would permit the landlord to evict in all of these cases as well as under additional circumstances. First, the landlord is not liable for retaliation if the tenant's conduct was "in an unreasonable manner or at an unreasonable time, or was repeated in a manner having the effect of harassing the landlord."<sup>208</sup> Second, retaliatory eviction would not apply when the tenant, a member of his family, or his guest engaged in conduct that presented a threat to the health or safety of another tenant on the premises<sup>209</sup> or in criminal activity.<sup>210</sup> Finally, the landlord could recover possession if he sought to do so based on a notice to terminate the lease and the notice was given to the tenant before the tenant engaged in the protected behavior.<sup>211</sup> These reforms have been introduced with an eye toward preventing tenants from abusing anti-retaliation regimes to the detriment of landlord rights.

Other significant reforms in the revised uniform law involve the presumption of retaliation. First, the Uniform Law Commission responded to the problem of a landlord's "mixed motives" by

---

206. *See id.* § 901(b).

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

208. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 901(c)(2) (Revised Nov. 2014), available at <http://www.uniformlaws.org/Committee.aspx?title=Residential%20Landlord%20and%20Tenant%20Act>, archived at <http://perma.cc/D48Q-SCQ6>.

209. *See id.* § 901(c)(4).

210. *See id.* § 901(c)(5).

211. *See id.* § 901(c)(6).

requiring the landlord's "dominant" purpose in taking action against a tenant to be retaliatory.<sup>212</sup> Here again, the Uniform Law Commission exhibits a moderate approach to revision by choosing the intermediate approach to mixed motives among the several fashioned by the states.<sup>213</sup> The revised act also decreases the time period during which a landlord's motive is presumed to be retaliatory from one year following a tenant's protected conduct to six months following such action.<sup>214</sup>

The revision of the URLTA's retaliatory eviction provisions has not been without some controversy. The National Apartment Association (NAA), for example, has stated that it has "serious concerns" about the proposed revision.<sup>215</sup> The NAA's most significant concern appears to be the potential for tenants to abuse the law by complaining of minor defects in the premises.<sup>216</sup> According to the NAA, "[r]etaliatory laws are often abused and extend the evictions process in some cities to six to 10 months as the parties dispute the retaliation claim in court."<sup>217</sup> To that end, the NAA has recommended that the model act protect only tenants who act in "good faith" and allow landlords to recover a civil penalty of one month's rent plus \$500, court costs, and reasonable attorneys' fees from a tenant who acts in "bad faith," such as by complaining of a defect or housing code violation that does not in fact exist.<sup>218</sup> Tenant advocates have responded to the NAA's complaints by pointing out that the organization has offered no

---

212. *See id.* § 902(a).

213. *See infra* Part IV.C.3.

214. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 903(a) (Revised Nov. 2014), available at <http://www.uniformlaws.org/Committee.aspx?title=Residential%20Landlord%20and%20Tenant%20Act>, archived at <http://perma.cc/D48Q-SCQ6>.

215. Letter from Douglas S. Culkin, President & CEO, Nat'l Apartment Ass'n, to Hon. Joan Zeldon, Chair of the Drafting Comm. to Revise the Unif. Residential Landlord and Tenant Act (July 9, 2014) (containing National Apartment Association July 2014 Comments to Uniform Residential Landlord and Tenant Act), available at [http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/5\\_2014jul9\\_RURLTA\\_NAA%20comments\\_Culkin.pdf](http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/5_2014jul9_RURLTA_NAA%20comments_Culkin.pdf), archived at <http://perma.cc/FY8U-3GXH>.

216. Letter from Greg Brown, Senior Vice President of Government Affairs, Nat'l Apartment Ass'n, to Hon. Joan Zeldon, Chair of the Drafting Comm. to Revise the Unif. Residential Landlord and Tenant Act (July 3, 2013) (containing apartment industry comments to ULC update of Uniform Residential Landlord and Tenant Act), available at [http://www.uniformlaws.org/shared/docs/Residential%20landlord%20and%20tenant/2013jul3\\_RURLTA\\_NAA\\_Letter\\_Brown.pdf](http://www.uniformlaws.org/shared/docs/Residential%20landlord%20and%20tenant/2013jul3_RURLTA_NAA_Letter_Brown.pdf), archived at <http://perma.cc/46ZZ-PMSE>.

217. *Id.*

218. Letter from Douglas S. Culkin to Hon. Joan Zeldon, *supra* note 215, at 2-3.

data to substantiate its claim that residential tenants currently abuse retaliatory eviction laws.<sup>219</sup> And, to date, the Uniform Law Commission has not introduced specific penalties for tenants who act in bad faith.

## V. THE EFFICACY OF U.S. RETALIATION LAWS

Through state-by-state experimentation, anti-retaliation regimes in the United States have flourished. Although a great deal of variation exists, most state laws provide robust protections for tenants who seek to hold landlords responsible for their contractual and legal obligations. A clear consensus has emerged among legislators, courts, and academics in favor of strong protections for tenants, with attendant safeguards for landlords in place. An assessment of American laws “on the books” thus speaks highly in favor of the adoption of anti-retaliation regimes abroad in England and Wales.

However, despite the adoption of strong protections by more than 40 states, many tenants continue to live in fear that their landlords will increase rent, cut services, or even evict those who raise legitimate complaints and demand that landlords provide safe and habitable dwellings. Indeed, jurisprudential, empirical, and anecdotal evidence suggests that prohibitions on retaliatory conduct may not provide tenants with meaningful protection against landlord retribution. In order to determine whether anti-retaliation legislation would be more successful in the United Kingdom than it has been in the United States, it is necessary to explore the reasons why landlord retaliation remains a concern in this country.

### *A. Empirical Data on Evictions in the United States*

#### *1. The Scarcity of Empirical Data*

American landlord-tenant scholars have long debated the utility of pro-tenant reforms such as the implied warranty of habitability and prohibitions on retaliatory conduct. However, the functional

---

219. Letter from Lawrence McDonough to Hon. Joan Zeldon, Chair of the Drafting Comm. to Revise the Uniform Residential Landlord and Tenant Act (Nov. 3, 2014) (containing comments on issues to be discussed by Drafting Committee at November 2014 meeting), *available at* [http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/2014nov3\\_RUTLTA\\_Comments\\_McDonough.pdf](http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/2014nov3_RUTLTA_Comments_McDonough.pdf), archived at <http://perma.cc/Z8U6-LCLA>. McDonough also notes that “[t]o the extent that tenants or landlords engage in frivolous litigation, most states have laws and rules that authorize the imposition of sanctions. Also, the Act already includes a requirement that both parties act in good faith in Section 105.” *Id.*

assessment of landlord–tenant law is extremely difficult, as little-to-no hard evidence exists regarding the use of these doctrines in housing disputes. Statistical evidence on eviction proceedings is extremely scarce.<sup>220</sup> Data is not collected in a systematic way at the national, state, or even local level.<sup>221</sup> The data that has been collected has largely been in the form of small, short-term studies limited both in time and in locale—often to a single housing court in a large municipal area.<sup>222</sup> In addition, a significant volume of the available “evidence” on eviction appears in the form of media—even social media—reports rather than academic analysis.<sup>223</sup>

Moreover, the few published empirical studies documenting court proceedings between landlords and tenants do not contain sufficient detail to determine the frequency with which tenants rely upon retaliatory eviction laws or the success rates of those claims.<sup>224</sup> Additionally, reported decisions in which tenants prevail on retaliatory eviction claims are few and far between,<sup>225</sup> and no

---

220. See Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL’Y DEBATE 461, 461 (2003) (“Each year, an untold number of Americans are evicted or otherwise forced to leave their homes involuntarily. The number is likely in the many millions, but we have no way of gauging even a modestly precise figure for renters, because such data are simply not collected on a national basis or in any systematic way in most localities where evictions take place.” (internal citations omitted)); Desmond, *supra* note 1, at 90 (“Eviction is perhaps the most understudied process affecting the lives of the urban poor.”).

221. See Hartman & Robinson, *supra* note 220, at 461.

222. See, e.g., BOS. BAR ASS’N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION: A REPORT ON THE BBA CIVIL RIGHT TO COUNSEL HOUSING PILOTS (2012) (Lawrence, MA and Lynn, MA); LAWYERS’ COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT (2003).

223. See, e.g., Leslie Wolf Branscomb & Tanya Sierra, *Landlord of Opportunity: National City Mayor’s Units Have Made Him Millions While Tenants Fight Vermin, Disrepair*, SAN DIEGO UNION-TRIB., Dec. 15, 2005, at A1; Jake Thomas, *The Reality of Retaliatory Eviction, Part I*, SMILE POLITELY (June 10, 2008, 11:00 AM), [http://www.smilepolitely.com/culture/The\\_Reality\\_of\\_Retaliatory\\_Eviction\\_Part\\_1/](http://www.smilepolitely.com/culture/The_Reality_of_Retaliatory_Eviction_Part_1/), archived at <http://perma.cc/P2PG-2AXZ> [hereinafter Thomas, *Part I*] (“In downstate Illinois, a law aimed at protecting tenants from landlords who might retaliate against them for calling in a building inspector is almost never used.”); Jake Thomas, *The Reality of Retaliatory Eviction, Part II*, SMILE POLITELY (June 18, 2008, 10:59 AM), [http://www.smilepolitely.com/culture/The\\_Reality\\_of\\_Retaliatory\\_Eviction\\_Part\\_2/](http://www.smilepolitely.com/culture/The_Reality_of_Retaliatory_Eviction_Part_2/), archived at <http://perma.cc/P84Q-MBZH> [hereinafter Thomas, *Part II*].

224. Of the numerous eviction and housing court studies reviewed by the author of this Article and cited herein, most did not contain any discussion of retaliatory eviction or any statistics regarding the use of anti-retaliation laws.

225. A Westlaw search for the term “retaliatory eviction” reveals approximately 1,000 cases reported in the 47 years since the landmark decision of *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), slightly more than 20 per year

reliable record exists of the number of claims raised at the trial level. Also, because many evictions occur informally, either through landlord self-help or agreements entered into between landlords and tenants, it is difficult to know with certainty whether retaliatory eviction laws are, in practice, useful to residential tenants.<sup>226</sup>

## 2. *What the Data Show*

Although compelling arguments may be made that anti-retaliation laws ought to be stronger, at least in some jurisdictions,<sup>227</sup> the available data concerning eviction proceedings suggests that reform of anti-retaliation laws will have little practical effect on tenants. This is because both statistical and anecdotal reports suggest that tenants lose nearly all eviction cases, whether or not landlord retaliation is involved.<sup>228</sup> In fact, reports that tenants “always” lose eviction cases, or lose in 95% to 99% of cases, are not unusual.

More to the point, both statistical data and anecdotal evidence suggest that the availability of a legal defense to eviction—such as landlord retaliation—does not significantly affect eviction outcomes.<sup>229</sup> Indeed, even in jurisdictions where anti-retaliation regimes strongly favor tenants, tenants very rarely invoke these laws,

---

nationwide. The number of cases in which a tenant’s retaliatory eviction claim was actually considered by the court is far smaller, as are those involving successful claims.

226. Desmond *supra* note 1, at 95 (providing an anecdotal account of a landlord who paid tenants \$200 each to leave instead of taking them to eviction court, and who estimated that he initiated 10 such informal evictions for every formal eviction proceeding that he filed).

227. See *supra* Part IV.C (discussing state-by-state and local variation on anti-retaliation regimes). Some commentators have argued for doctrinal reforms to strengthen anti-retaliation law. See, e.g., Lindsey, *supra* note 126.

228. See, e.g., Branscomb & Sierra, *supra* note 223, at A1 (95% of pro se tenants lose their cases); LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 17 (observing that Chicago tenants “always lost on the merits”); CAL. APARTMENT LAW INFO. FOUND., UNLAWFUL DETAINER STUDY 1991, at 26, 38 (finding that landlords prevail in over 99% of cases).

229. See LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 16–18 (concluding that “[i]n all cases in which a defense was raised, the tenant lost”); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 558 (1992) (“The[] formal availability [of defenses], however, appears to have little effect on case outcomes.”); see also Lynn E. Cunningham, *Legal Needs for Low-Income Population in Washington, DC*, 5 UNIV. D.C. L. REV. 21, 37 (2000) (noting that although the District of Columbia has some of the strongest tenant protections of any jurisdiction in the country, tenants are still disadvantaged).

whether formally or informally.<sup>230</sup> Thus, the strength or weaknesses of the retaliatory eviction laws in a particular jurisdiction may be largely, if not entirely, irrelevant in most evictions that occur there.

Additionally, despite the existence of laws specifically prohibiting retaliation, at least some landlords continue to evict in retaliation for protected tenant behavior.<sup>231</sup> While it might be expected that some small percentage of unscrupulous landlords will continue to act in flagrant violation of the law, surveys of tenant concerns indicate that the practice may not be limited to a small subset of cases. Multiple sources report that tenants continue to express concerns that if they take *any* legal action against their landlords, they will be faced with eviction, rent increases, or other forms of harassment.<sup>232</sup>

### *B. The Institutional Context of Anti-Retaliation Laws*

As the above data suggests, evaluating the success of anti-retaliation regimes is complex. Tenants lose eviction cases so quickly and at such high rates not because of the strength or weakness of retaliatory eviction laws or other tenant defenses, but because of broader and more pervasive institutional and structural barriers to tenant success in housing courts. These contextual influences must be factored in to any comparative assessment predicting the success of retaliatory eviction abroad. An evaluation of the full range of legal, financial, and social forces affecting residential tenants in the United States is far beyond the purview of this project. However, four contextual variables account for much of the reason why tenants rarely avail themselves of defenses to eviction with any success.

---

230. See Thomas, *Part I*, *supra* note 223 (“In downstate Illinois, a law aimed at protecting tenants from landlords who might retaliate against them for calling in a building inspector is almost never used.”). In fact, some evidence suggests that tenants rarely invoke defenses of *any kind* in eviction suits. LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 16 (noting that defenses were raised in only 30% of cases).

231. See Desmond, *supra* note 1, at 115–16 (describing an action of eviction in retaliation for the tenant’s call to the Department of Neighborhood Services to report code violations in Milwaukee, where retaliatory eviction is forbidden by law).

232. See, e.g., Bezdek, *supra* note 229, at 563 & n.106; Lindsey, *supra* note 126, at 106–07 (relying on news reports of retaliatory eviction to argue that retaliatory conduct by landlords is a significant problem “[d]espite the lack of definite statistics” on its frequency).

### 1. Legal Representation

First, tenants in the United States very rarely have legal representation at summary eviction proceedings. In fact, some studies show that tenants appear pro se in as many as 95% to 99% of cases.<sup>233</sup> While the data varies from report to report, studies consistently report that landlords have representation in a majority of cases, while tenants do not.<sup>234</sup> The disparity of representation in landlord-tenant disputes has become accepted as fact. One expert recently reported that “[i]n landlord-tenant matters . . . it is typical for ninety percent of tenants to appear pro se while ninety percent of landlords appear with counsel.”<sup>235</sup> Some evidence suggests that the disparity in representation is far less pronounced in cases involving “mom and pop” landlords<sup>236</sup> as opposed to professionals.<sup>237</sup> Even still, in cases where neither side is represented by counsel, landlords tend to receive assistance from agents and other “repeat players” in housing court, whereas tenants are more frequently represented by novices—family members and friends.<sup>238</sup> Thus, whereas landlords generally receive at least some modicum of professional help in court, tenants rarely do.

---

233. LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 13 (tenants were represented in 5.3% of cases); Cunningham, *supra* note 229 (less than 1% of cases involved an attorney representing a client).

234. See, e.g., Desmond, *supra* note 1, at 123 (citing SEEDCO POLICY CTR., HOUSING HELP PROGRAM, SOUTH BRONX, NYC (2009)) (estimating that tenants were unrepresented in over 70% of cases); REBECCA HALL, BERKELEY CMTY. LAW CTR., EVICTION PREVENTION AS HOMELESSNESS PREVENTION 9–11 (1991) (landlords were represented in over 80% of eviction cases, whereas tenants were represented in only 20% of evictions); LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 13–14 (53% of landlords represented, compared to 5.3% of tenants); COMM. TO IMPROVE THE AVAILABILITY OF LEGAL SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1989), in 19 HOFSTRA L. REV. 775, 773 (1989) (landlords were represented in 80% to 90% of cases while tenants were represented in no more than 10% to 15%); CITYWIDE TASK FORCE ON HOUS. COURT, 5 MINUTE JUSTICE: “AIN’T NOTHING GOING ON BUT THE RENT!”, A REPORT OF THE MONITORING SUBCOMMITTEE OF THE CITYWIDE TASKFORCE ON HOUSING COURT §§ 4.2–3 (1986) (21% of tenants were represented compared to 78% of landlords); CMTY. TRAINING & RES CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTIONS, AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL (1993) (tenants represented in 12% of cases compared to 98% of landlords).

235. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 750 (2015).

236. Bezdek, *supra* note 229, at 556–57.

237. See CITIZENS ADVICE BUREAU, EVICTIONS RISE IN THE BRONX BUT DECLINE IN OTHER BOROUGH BETWEEN 1997 AND 1999, at 7 (2001).

238. Bezdek, *supra* note 229, at 562.

With respect to eviction outcomes, representation appears to matter. A recent review of the available literature suggests that tenants prevail twice to ten times as often when assisted by an attorney.<sup>239</sup> One study of evictions in California found that represented tenants won twice as frequently as landlords, whereas landlords won five times more often than unrepresented tenants.<sup>240</sup> Another study of a New York housing court found that evictions occurred in over half of the cases in which tenants were unrepresented, but only one third of the cases in which tenants were assisted by counsel.<sup>241</sup>

Several explanations may be offered as to why tenants win more frequently with legal counsel. Litigants who proceed pro se are forced to navigate complex schemes of substantive and procedural rules.<sup>242</sup> The preparation of pleadings, the conduction of discovery, and even proper court decorum are entirely foreign to untrained litigants and can present substantial roadblocks to success.<sup>243</sup> In

239. Steinberg, *supra* note 235, at 757.

240. HALL, *supra* note 234, at 11.

241. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 427 (2001) (judgments issued in 32% of cases where tenants were represented, compared to 52% of cases where tenants were not represented).

The data is not entirely consistent on this point. Some studies have not concluded that representation improves tenant outcomes. For example, a 2004 Chicago study found that although represented tenants were more successful in obtaining continuances, their cases resulted in judgments for eviction just as frequently as those involving unrepresented tenants. LAWYERS' COMM. FOR BETTER HOUS., *supra* note 222, at 17–18. However, it must be remembered that it is difficult to assess the effect of attorney representation on tenant outcomes, as most cases in which the tenant is represented are resolved pursuant to agreed orders, the terms of which cannot be adequately monitored to produce reliable data. *See id.* at 10; Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 794–95 (1994). Gerchick also notes another reason why represented tenants tend to win more often: “tenant attorneys may not take cases that they do not believe that they can win, except in the unusual case in which the tenant will be able to pay the attorney’s legal fees out of his own pocket rather than relying upon the court to award fees.” Gerchick, *supra*, at 795.

Finally, a growing body of new research is forming outcomes measures for “limited” or “unbundled” legal services, or the provision of basic legal information or services from an attorney at the outset of litigation rather than full service representation. *See, e.g.*, Steinberg, *supra* note 235 (finding that tenant outcomes were not improved by unbundled representation); BOS. BAR ASS'N TASK FORCE, *supra* note 222, at 32 (concluding that full representation of tenants by counsel is essential for the protection of their rights); *see also* Steinberg, *supra* note 235, at 745 (collecting other research in this area).

242. Steinberg, *supra* note 235, at 755.

243. *Id.*

eviction cases, lawyers can determine what is actually owed by way of rent, negotiate with landlords for more time to pay, and, when necessary, assist the tenant in articulating legitimate defenses to the landlord's eviction claim.<sup>244</sup> In particular, a lawyer's ability to provide a tenant with knowledge regarding viable defenses and the confidence to assert those defenses is crucial to the success of anti-retaliation regimes. As plainly articulated by one commentator, "[t]he ability to utilize a rebuttable presumption [of retaliation] is unhelpful where the tenant is unable to state any valid defense because of a lack of legal training."<sup>245</sup>

## 2. Housing Courts

Housing courts themselves face many challenges that tend to impede tenant outcomes. First is the "astounding brevity of eviction proceedings" in many housing courts around the country.<sup>246</sup> Eviction cases are often decided in a "matter of minutes" and hearings leave little time for a tenant to assert defenses to the landlord's complaint.<sup>247</sup> A 2003 study of Chicago evictions found that the average hearing lasted a mere 1 minute and 44 seconds: "barely enough time for the parties to reach the bench, identify themselves, and state the nature of the dispute."<sup>248</sup> A study of Baltimore evictions of the same year found that the average case received "less than 30 seconds of judicial review."<sup>249</sup> Notably, the length of hearings appears to vary significantly with legal representation. One study found that the average length of a hearing increased when the tenant was represented but decreased below the average when the landlord alone had the benefit of counsel.<sup>250</sup>

The short time devoted to eviction proceedings is a consequence of a larger systemic problem within housing courts—a general lack of resources. Most housing courts are severely

---

244. Seron et al., *supra* note 241, at 431.

245. Lindsey, *supra* note 126, at 119.

246. *Id.* at 117.

247. David B. Bryson, *The Role of Courts and a Right to Housing*, in RACHAL G. BRAT, ET AL., *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 198 (2006).

248. LAWYERS' COMM. FOR BETTER HOUS., *supra* note 222, at 11–12.

249. *A System in Collapse: Baltimore City Suffers from an Overwhelmingly High Caseload of Tenant Evictions. Hurt in the Process are Tenants, Landlords, the City of Baltimore, and its Neighborhoods*, ABELL REP. (The Abell Found., Balt., Md.), Mar. 2003, at 1, 2. The number of cases in Baltimore Rent Court in 2003 was 1,050 per day. *Id.*

250. LAWYERS' COMM. FOR BETTER HOUS., *supra* note 222, at 11 (noting that if only the landlord was represented and the tenant was not, the case lasted an average of 1 minute and 38 seconds).

underfunded and understaffed. In Baltimore, for example, where over 150,000 eviction suits are filed annually, the state district court assigns only one judge per day to rent court.<sup>251</sup> Baltimore researchers thus surmise that “[t]here are arguably fewer judicial resources and less due process devoted to these cases than any other matters in the court system.”<sup>252</sup> The haste of eviction proceedings undoubtedly results in high numbers of procedural defects.<sup>253</sup> When so little time and attention are paid to tenant claims that even basic due process is lacking, the availability of tenant defenses like retaliatory eviction cannot be expected to have any meaningful effect on outcomes.

Because most suits for eviction are filed in response to a tenant’s failure to pay rent, the likelihood that procedural defects affect tenant outcomes is arguably low.<sup>254</sup> However, even if the lack of time and attention devoted to proceedings by eviction courts does not always affect outcomes, it comes at an expressive cost. Indifference sends a message to tenants that contesting the claim is futile. To tenants, judges seem impatient and biased toward landlords.<sup>255</sup> The appearance of landlord preference has meaningful philosophical effects, to be sure. As one group of researchers cautioned, “[a]n illegitimate process that comes with the imprimatur of the state may ultimately inflict more dignitary harm than landlord self-help.”<sup>256</sup> More practically speaking, a tenant is not likely to raise a defense to eviction if she feels that doing so would be fruitless.

Lamentably, the problem of bias is not merely a problem of perception. Many housing court judges exhibit a clear bias toward landlords. For example, in one study only 60% of cases were dismissed when the landlord failed to appear despite clear legal rules requiring dismissal for want of prosecution in such cases.<sup>257</sup> In that same study, landlords were often not required to specifically establish the elements of a prima facie case; instead, judges seemed to presume that they had been met.<sup>258</sup> Researchers also observed that “important court procedures” were frequently omitted in eviction proceedings: the parties were sworn to tell the

---

251. *A System in Collapse*, *supra* note 249, at 1, 2.

252. *Id.*

253. LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 20.

254. *Id.*

255. *Id.* at 5.

256. *Id.* at 19.

257. *Id.* at 5.

258. *Id.* at 4.

truth only 8% of the time, and judges examined the eviction notice presented to the tenant in only 65% of cases.<sup>259</sup>

Some evidence suggests that this type of judicial bias exists in other jurisdictions as well. The bad behavior of one Indiana judge was recently highlighted when the state supreme court overruled an eviction order on due process grounds in *Morton v. Ivacic*. In that case, the small claims court refused to allow the tenant to present testimonial or documentary evidence in his favor, remarking: “Ultimately, [the landlord’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.”<sup>260</sup> Though the state supreme court’s rebuke of the trial court judge may be gratifying for tenant advocates, it does little for the untold numbers of tenants who face similar treatment and lack the knowledge and resources to lodge an appeal.

Finally, judicial behavior can have profound effects on the tenant’s ability to articulate a defense to eviction. One study determined that tenants raised defenses in only 9% of cases when they were not prompted by a judge to do so, compared to 55% of the time when the judge asked the tenant for a defense.<sup>261</sup> Disappointingly, that same study observed that judges asked tenants if they had a defense in only 27% of cases, although they were “solicitous in helping landlords establish their prima facie cases.”<sup>262</sup> This data, if generalizable to the experience of tenants in other housing courts, has profound implications for the success of anti-retaliation regimes.

### 3. Reporting of Evictions

Market forces may also undermine the success of anti-retaliation regimes. In recent years, numerous reporting services have surfaced that offer to provide background information about potential tenants to prospective landlords. Understandably, most landlords do not wish to rent to a tenant with a record of a past eviction.<sup>263</sup> In many cases, even a dismissed eviction is a black mark that will impede a tenant’s ability to rent in the future.<sup>264</sup> Thus, tenants with histories of eviction have difficulty finding

---

259. *Id.* at 14–15.

260. *Morton v. Ivacic*, 898 N.E.2d 1196, 1199–1200 (Ind. 2008).

261. LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 222, at 15–16.

262. *Id.*

263. Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344 (2006).

264. Desmond, *supra* note 1, at 118.

desirable housing.<sup>265</sup> Recently evicted tenants also have problems qualifying for affordable housing programs.<sup>266</sup> It is not surprising that a tenant would therefore endure poor living conditions without complaint in order to avoid the possibility of an eviction filing, even one that is not legally justified and might ultimately be dismissed.

Additionally, prohibitions on retaliatory conduct do nothing to protect tenants who have asserted their rights against *past* landlords from being blacklisted from future rentals.<sup>267</sup> This difficulty is exacerbated by the fact that credit bureaus and renter screening companies routinely review court records to identify filings. By law, the tenant has the right to have the court record show that the judgment has been satisfied.<sup>268</sup> In practice, however, this almost never occurs.<sup>269</sup> As a result, the tenant is left with the burden of attempting to explain an incomplete court record to subsequent landlords and lenders.<sup>270</sup>

#### *4. Financial and Informational Concerns*

Finally, financial and informational obstacles significantly affect the success of anti-retaliation regimes. For many tenants, the inability to pay rent is the largest impediment to a valid defense. Anti-retaliation regimes generally do not protect tenants who are in arrears with respect to rent payments.<sup>271</sup> Since most eviction actions involve the tenant's failure to pay rent, it is hardly surprising that defenses to eviction, including retaliatory eviction, are rarely successfully invoked.<sup>272</sup>

Even where tenants can afford to pay rent on time, the high cost of legal counsel and court proceedings may deter many tenants from bringing affirmative retaliatory eviction claims or from appearing to defend an eviction suit in housing court. Although some jurisdictions have successfully implemented low-cost procedures for adjudicating landlord-tenant claims, court costs in many jurisdictions are unreasonably high for most

---

265. *Id.* at 119.

266. *Id.*

267. Vicki Richman, *Landlords Blacklist Activist Tenants*, SHELTERFORCE ONLINE (July/Aug. 2002), <http://www.shelterforce.com/online/issues/124/blacklist.html>, archived at <http://perma.cc/VZZ5-XKYK>.

268. *A System in Collapse*, *supra* note 249, at 1, 5.

269. *Id.* at 5.

270. *Id.*

271. *See infra* Part V.B.4.

272. *See* LAWYERS' COMM. FOR BETTER HOUS., *supra* note 222, at 6; *see also* Lindsey, *supra* note 126, at 133.

tenants.<sup>273</sup> The cost of an attorney is also prohibitive for most tenants. Legal advocates for the poor have long argued for a legal right to counsel in housing courts, similar to the right that exists in criminal cases, on grounds that it would ensure due process of law and procedural safeguards in an area of vital interest for tenants and their families.<sup>274</sup> Unfortunately, those pleas have failed to produce any constitutionally or statutorily guaranteed rights to counsel in housing cases. Thus, tenants who cannot afford counsel on their own must rely on either federally funded legal aid or local pro bono services providers. However, federally funded legal aid serves only the very poor, and even then it is severely underfunded and understaffed.<sup>275</sup> According to the most recent data, there is only one Legal Aid lawyer for every 6,415 eligible individuals.<sup>276</sup>

Further impeding tenants' success in housing court is the fact that housing law in the United States is notoriously complex.<sup>277</sup> Private landlord-tenant regimes vary not only by state but also by municipality. The law applicable to a tenant's case may be in the form of state statutes, local administrative rules, and the corresponding case law. Those tenants who are most likely to have meritorious retaliatory eviction claims are likely to be unsophisticated, even illiterate.<sup>278</sup> It is unsurprising then that researchers studying eviction routinely observe that tenants are poorly informed about their rights as tenants, the mechanics of eviction, and the means of defending an eviction proceeding.<sup>279</sup>

---

273. For example, the filing fee in a summary eviction in Baltimore, Maryland was \$9 in 2003 and \$23 in the District of Columbia in 2003. *A System in Collapse*, *supra* note 249, at 1, 6.

274. See Steinberg, *supra* note 235, at 761 (discussing resurgence of the advocacy for a right to counsel in civil cases).

275. *Id.* at 770-71.

276. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: OVERVIEW 1 (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf), archived at <http://perma.cc/SL7R-B7YQ>.

277. Seron et al., *supra* note 241.

278. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 416 (2011).

279. Desmond, *supra* note 1, at 94; LAWYERS' COMM. FOR BETTER HOUS., *supra* note 222, at 22 ("There is a small but significant number of tenants who . . . probably could have asserted effective habitability defenses had they known how to do so correctly before the eviction process was initiated . . . . [T]enants seemed to believe that the only way to make the landlord provide habitable housing was to completely withhold rent and that if they could only 'tell their side of the story' in eviction court, things would work out. Yet by the time tenants have failed to give notice . . . and appeared in court, it is too late.").

Although some community centers and legal services organizations provide basic information to tenants about eviction proceedings, the availability and quality of assistance varies widely by locale.<sup>280</sup> Some communities have highly visible and reputable services that assist tenants in their dealings with landlords.<sup>281</sup> However, in other communities, these services are either less reliable or non-existent.<sup>282</sup> And, in all cases, only those organizations made up of legal professionals can offer meaningful legal advice to the public, as non-lawyers are generally prohibited by law from providing legal services.<sup>283</sup> Without even a basic understanding of their legal rights or the mechanisms for enforcing them, tenants have little chance of successfully invoking anti-retaliation laws, even when a landlord's conduct is egregious.

## VI. LESSONS FOR THE UNITED KINGDOM

The foregoing assessment demonstrates that although anti-retaliation regimes in the United States are generally robust, offering stringent protections for tenants against retributive landlords, they are largely underutilized by tenants who lack the institutional resources to marshal effective defenses against eviction in housing court. Thus, the success of these regimes in the United States is mixed. Doctrinally and philosophically, anti-retaliation regimes are uncontroversial, even favored. Practically, however, they have had limited effects on the lives of tenants. It follows then that the lessons to be drawn for law reform in the United Kingdom are of two types: doctrinal and contextual. With respect to doctrine, a review of American law reveals the prohibitions introduced in the English and Welsh proposals are modest, even conservative, in comparison. And, with respect to context, a review of the legal and non-legal institutions for tenant support in the United Kingdom

---

280. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. REV. 949, 967 (2009).

281. See, e.g., *Going to Daley Center Eviction Court*, ILL. LEGAL AID, [http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp\\_content&contentID=5552](http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=5552), archived at <http://perma.cc/SAU9-B63P> (last updated Apr. 2009) (legal aid video describing actions in a summary eviction suit, appropriate court decorum, how to locate the courtroom, where to sit or stand, and when to present the appropriate evidence); *Landlord Tenant Resource Center*, D.C. BAR, <http://www.dcbbar.org/for-the-public/help-for-individuals/landlord-tenant.cfm>, archived at <http://perma.cc/QD9Z-K7WG> (last visited Feb. 27, 2015) (providing free legal information to unrepresented landlords and tenants who have housing disputes in the District of Columbia).

282. Sandefur, *supra* note 280, at 967.

283. *Id.* at 967.

suggests that anti-retaliation law will thrive in a manner not currently possible in the United States.

*A. Doctrine*

In comparison to American law, the proposed approach to landlord retaliation in the English House of Commons is relatively modest. First, whereas most American jurisdictions permit tenants to bring an affirmative claim for damages or injunctive relief against landlords who act in a retaliatory fashion, both the English and Welsh legislation provide only a defense to an action for possession.<sup>284</sup> Indeed, the proposed laws provide no remedies at all to the tenant other than the invalidity of a notice to quit.<sup>285</sup> Although tenants in the United States may enjoy attorney fees and damages, often expressed as a multiplier of monthly rent, victorious tenants in England and Wales would be awarded no more than ongoing possession of the property in question.

Additionally, the scope of the proposed legislation is exceptionally narrow compared to the variation in the United States. Regimes in the United States tend to prohibit retaliation in many forms, including not only eviction, but also increases in rent and decreases in services.<sup>286</sup> State consensus, expressed most recently through the revised URLTA, would also penalize landlords for refusing to renew a fixed term tenancy or terminating a periodic tenancy with a retaliatory motive.<sup>287</sup> In contrast, proposed law in the United Kingdom seeks to combat a narrow subset of landlord behavior—termination of a periodic tenancy through notice.<sup>288</sup> Other landlord behaviors simply are not addressed. The range of tenant behavior that would be protected under the proposed law in England and Wales is also far more limited than that of most regimes in the United States. The proposed law speaks only to a tenant making complaints regarding the condition of the premises and not to other types of conduct such as the pursuit of other legal claims against the landlord unrelated to the tenancy.<sup>289</sup>

---

284. See Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 1 (Eng.); Deregulation Bill, 2013-14 & 2014-15, H.L. Bill [95] § 33 (U.K.); Housing (Wales) Act, 2014 (Eng.).

285. *Id.*

286. See *supra* Part IV.C.2.

287. See *id.*

288. See Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 1 (Eng.); Deregulation Bill, 2013-14 & 2014-15, H.L. Bill [95] § 33 (U.K.); Housing (Wales) Act, 2014 (Eng.).

289. See *generally* Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 1 (Eng.).

One noteworthy feature of the English House of Commons proposal is that it does not require any proof by the tenant that the landlord had a retaliatory motive in serving the tenant with notice to vacate.<sup>290</sup> The mere service of a notice to vacate within six months after a tenant has made a valid complaint to the landlord or a local housing authority regarding the condition of the premises is deemed “invalid.”<sup>291</sup> This formulation wisely avoids the requirement of affirmative proof of the landlord’s retaliatory motive. In the United States, it is agreed nearly universally that a presumption of retaliatory motive is essential to the success of a retaliatory eviction regime.<sup>292</sup> Without the presumption, it would be almost impossible for a tenant to prove the subjective mindset of the landlord in his or her decision to evict.<sup>293</sup> The requirement of affirmative proof would thus undermine the regime entirely.

Indeed, the English and Welsh proposals are more narrow and landlord-friendly than American law in almost every respect except one: the exceptions to its application. To be sure, the proposed law in England would not apply where the complained-of condition was caused by the tenant’s own fault.<sup>294</sup> Further, English law would not apply to those cases in which the landlord sought to place the dwelling on the market for sale.<sup>295</sup> However, no express exception is named in either the English or Welsh provisions for cases in which the tenant is in arrears in the payment of rent.<sup>296</sup> This exception is nearly universal in the United States, and understandably so. American landlords would stridently protest any law foreclosing their inability to terminate a lease on the ground of nonpayment. The introduction of a similar exception to the proposals in England and Wales may provide the necessary assurance to landlords that their basic right to the payment of rent will not be affected by this protective measure. In addition, in some American jurisdictions, tenants are not afforded the benefit of a presumption of retaliation when a tenant complains of housing conditions only after receiving a notice of rent increase or diminution in services.<sup>297</sup> These

290. *See generally id.*; Deregulation Bill, 2013-14 & 2014-15, H.L. Bill [95] § 33 (Eng.).

291. *See id.*

292. *See supra* Part IV.C.3.

293. *See supra* Part IV.C.3.

294. *Compare* Parts II.C, and III.C, with Part IV.C.5.

295. Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 2(3) (Eng.). An exception is also made for lawful mortgage foreclosure. *See infra* Parts II.C, III.C.

296. *See generally* Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 1 (Eng.); Deregulation Bill, 2013-14 & 2014-15, H.L. Bill [95] § 33 (Eng.); Housing (Wales) Act, 2014 (Eng.).

297. *See supra* Part IV.C.3.

exceptions are designed to combat the possibility that a tenant's complaint is itself retaliatory in nature.<sup>298</sup> The introduction of a similar limitation in the proposed legislation may alleviate some of the concerns of the RLA, which has expressed a rational fear that tenants will abuse the system.

### *B. Context*

On its face, the anti-retaliation legislation currently pending in the United Kingdom appears promising. In comparison to the complexity and variation of American law, its formulation is simple and its ambitions are few. However, questions remain regarding whether the law, if enacted, would be effective. In the United States, where landlord protections are often far more robust than those proposed in the United Kingdom, landlord retaliation remains a substantial threat. Would retaliatory eviction laws similarly founder abroad?

In the United Kingdom, a robust system of both legal and non-legal institutions provide tenants with access both to information about the law and to legal services. Perhaps most obviously significant is that legal aid is available to much of the population through a so-called "Judicare system."<sup>299</sup> Persons eligible for aid receive government vouchers that permit litigants to procure legal assistance from the private bar.<sup>300</sup> Importantly, for most of the system's history, the range of persons eligible for aid has not been limited to the very poor but has included a majority of the population, even the middle class.<sup>301</sup> In contrast, legal aid in the United States is far less accessible. No right to counsel is recognized in civil cases such as landlord-tenant disputes, and therefore tenants in need of legal support must rely on pro bono organizations for aid.<sup>302</sup> And, although the availability of legal aid

---

298. See *supra* Part IV.C.3.

299. Sandefur, *supra* note 280, at 955. See also Alan Paterson, *Legal Aid at a Crossroads*, 10 CIV. JUST. Q. 124, 126-29 (1991) (describing the primary features of the system).

300. Sandefur, *supra* note 280, at 963.

301. *Id.* at 955. However, the availability of legal aid does not necessarily translate to its use. A recent survey found that people took only 10% of "difficult to solve" legal problems involving money or housing to lawyers, courts, or tribunals. *Id.* (citing PASCOE PLEASENCE, CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE (LEGAL SERVS. COMM'N 2004)).

302. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981) (declining to extend constitutional right to counsel to civil cases). The United States Congress has established a Legal Services Corporation, but this organization is limited both in its reach and resources. See Lua Kamal Yille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United*

and legal services is uniform across the United Kingdom, assistance in the United States varies significantly by geography.<sup>303</sup>

In addition, unlike the United States, the United Kingdom has numerous non-legal institutions to which tenants may turn for assistance in their interactions with landlords.<sup>304</sup> Some of these are government-sponsored, such as regulatory agencies and government ombudsmen.<sup>305</sup> The Housing Ombudsman, for example, can deal with some, though not all, disputes between tenants and private landlords.<sup>306</sup> Moreover, residents of the United Kingdom enjoy access to a set of reputable advice providers, including the Citizens Advice Bureau, Shelter, the Law Centres Network,<sup>307</sup> and AdviceNow.<sup>308</sup> Shelter, for example, provides a wealth of information on tenancy agreements, the rights and obligations of landlords and tenants, and basic advice regarding landlord-tenant disputes directly on their website.<sup>309</sup> In addition, Shelter claims that its advisors are available 365 days a year to provide advice to tenants in person, over the telephone, or online.<sup>310</sup> Similarly,

*States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 872–78 (2004); see also Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1228 (2014) (noting that in 2009, there was only one legal aid lawyer per 6,425 low income individuals in the United States).

303. Rhode, *supra* note 302, at 1230 (“[G]eography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need, but rather by where they happen to live.” (quoting REBECCA SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT v (2011))).

304. See generally Rhode, *supra* note 302 (critiquing legal and non-legal institutions for legal aid in the United States); Sandefur, *supra* note 280 (providing a comparison of legal and non-legal paths to legal assistance in the United States and the United Kingdom).

305. Sandefur, *supra* note 280, at 964.

306. See *Citizens Advice—How to Use an Ombudsman in England*, CITIZENS ADVICE BUREAU, [http://www.adviceguide.org.uk/nm/index/your\\_rights/how\\_to\\_use\\_an\\_ombudsman.htm](http://www.adviceguide.org.uk/nm/index/your_rights/how_to_use_an_ombudsman.htm), archived at <http://perma.cc/NEV8-CWQZ> (last visited Feb. 4, 2015); *Welcome, Can We Help?*, HOUS. OMBUDSMAN SERV., <http://www.housing-ombudsman.org.uk>, archived at <http://perma.cc/G38X-ZEAE> (last visited Feb. 4, 2015).

307. LAW CTNS. NETWORK, <http://www.lawcentres.org.uk>, archived at <http://perma.cc/C23X-FH2S> (last visited Mar. 10, 2015).

308. ADVICENOW, <http://www.advicenow.org.uk>, archived at <http://perma.cc/P3ZC-7CPB> (last visited Mar. 10, 2015).

309. *Private Renting – Shelter England*, SHELTER ENGLAND, [http://england.shelter.org.uk/get\\_advice/private\\_renting](http://england.shelter.org.uk/get_advice/private_renting), archived at <http://perma.cc/FGL3-CMY9> (last visited Mar. 10, 2015).

310. *What We Do*, SHELTER ENGLAND, [http://england.shelter.org.uk/what\\_we\\_do](http://england.shelter.org.uk/what_we_do), archived at <http://perma.cc/WXB3-3MT2> (last visited Mar. 10, 2015).

Citizens Advice Bureau assists tenants with housing disputes either in person at over 3,000 local venues or remotely, by telephone or over the Internet.<sup>311</sup> These organizations are highly visible to the public, in part because official government websites concerning housing and legal aid both inform readers about the existence of these organizations and provide direct links to their websites.<sup>312</sup> The availability of these services and their prominence both on the Internet generally and on easy-to-navigate government websites stands in stark contrast to the United States.

Finally, the key strength of advice organizations in the United Kingdom is that they have the power to dispense legal advice, much as a legal professional would do, but at little to no cost to the tenant.<sup>313</sup> In the United States, on the other hand, stringent prohibitions on the unauthorized practice of law prevent non-lawyers from dispensing legal advice.<sup>314</sup> Thus, the average tenant in the United Kingdom is equipped in ways that American tenants are not—with funding, information, and support.<sup>315</sup>

## VII. CONCLUSION

In the United States, the law has long disfavored retaliation by landlords against residential tenants who assert their rights to safe and habitable housing.<sup>316</sup> Most states prohibit landlords from taking revenge against tenants either through targeted legislation or case law.<sup>317</sup> The primary purpose of these statutes and rulings is to provide tenants with the freedom and confidence to insist that

---

311. See *Key Facts about the Citizens Advice Service*, CITIZENS ADVICE BUREAU, [http://www.citizensadvice.org.uk/index/aboutus/factsheets/cab\\_key\\_facts.htm](http://www.citizensadvice.org.uk/index/aboutus/factsheets/cab_key_facts.htm), archived at <http://perma.cc/T6W5-RHSD> (last visited Feb. 27, 2014).

312. See, e.g., *Legal Aid*, GOV.UK, <https://www.gov.uk/legal-aid/eligibility>, archived at <https://perma.cc/87KW-M69C> (last visited Feb. 27, 2015) (noting, under a heading clearly marked “Alternatives to Legal Aid,” that those who cannot secure legal aid may be able to get free advice from the Law Centres Network, Citizens Advice, and AdviceNow).

313. Sandefur, *supra* note 280, at 964.

314. See Rhode, *supra* note 302, at 1232–38 (discussing United States restrictions on the unauthorized practice of law); see also Richard Moorhead, et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *LAW & SOC’Y REV.* 765, 785–86 (2003) (concluding in a study of low-income clients in the United Kingdom, in matters such as housing non-lawyers generally outperformed lawyers in terms of both outcomes and clients satisfaction).

315. Sandefur, *supra* note 280, at 966. Sandefur describes the contrast between the United States and the United Kingdom as “stark.” *Id.*

316. See 5 THOMPSON ON REAL PROPERTY § 43.06(a) (2d ed. 2007).

317. *Id.* § 43.06(a).

landlords provide housing of the quality that is required by law.<sup>318</sup> On paper, the protections guaranteed to tenants by most retaliatory eviction regimes are quite robust.<sup>319</sup> In many states, a tenant who complains of indecent housing—whether to a landlord, to government authorities, or by way of community action—is protected against eviction, increases in rent, and other unfavorable lease modifications.

Regrettably, however, the practical success of most retaliatory eviction regimes in the United States is highly questionable. Reported cases in which tenants prevail on retaliatory eviction claims are scarce, as are statistical data on the successful use of the defense in housing and small claims courts. Additionally, although little statistical evidence exists on the incidence of retaliatory action by landlords, the available evidence suggests that retaliatory eviction laws do little to improve the position of residential tenants in eviction suits. Despite the existence of anti-retaliation laws “on the books,” many tenants in the United States continue to endure substandard living conditions without complaint out of fear of retaliation.

However, the failure of United States anti-retaliation regimes should not discourage legal reformers in the United Kingdom. The approaches to retaliatory eviction laws in the United States are many and varied, as individual states experiment with the appropriate balance between landlord freedom and tenant protection. Although political and academic debates exist at the margins, widespread agreement exists on the necessity of these regimes. Moreover, although tenants continue to face landlord retribution, structural and contextual barriers to tenant success are likely to blame, rather than doctrinal shortcomings. In the United States, the primary impediment to tenant success in evictions is a lack of institutional support. Without adequate representation or even access to information, American tenants are constrained from asserting viable defenses to eviction suits. In the United Kingdom, where legal and non-legal institutions of tenant-aid abound, prohibitions on landlord revenge are much more likely to survive, and thrive.

---

318. See Lindsey, *supra* note 126, at 110–11. Lindsey notes that anti-retaliation laws promote multiple state policies, including: “(1) improving public health, housing, and living conditions; (2) promoting social stability; and (3) reducing the cost of eviction to governments.” *Id.* at 110–13.

319. See Lawrence R. McDonough, *Still Crazy After All These Years: Landlords and Tenants and the Law of Torts*, 33 WM. MITCHELL L. REV. 427, 429 (2006) (citing Minnesota’s anti-retaliation laws to support the proposition that “the law clearly favors tenants”).

