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Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts

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COMMENT

Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts

I. Introduction

Summary eviction courts were created to protect both the landlord's interest in freely controlling the use of her residential property and the tenant's interest in security of tenure.[1] Yet tenants, who often appear pro se in summary eviction proceedings, are rarely able to articulate the valid defense of retaliatory eviction.[2] Furthermore, studies show that tenants are likely to lose in eviction courts, regardless of whether they present a defense or not.[3] Given this situation, tenants who have undertaken a protected action—such as reporting violations of building codes—and who have a legitimate fear that their landlord may act in a retaliatory manner should be allowed to instigate preliminary injunction actions in summary eviction courts to enjoin landlords from evicting them. If a tenant facing probable retaliatory eviction could bring a preliminary injunction action against a landlord's illegal retaliation in summary eviction court, the tenant would have more control over his appearance in eviction court, thereby promoting the policies underlying retaliatory eviction laws.

This comment proposes and outlines a summary preliminary injunction procedure that would further protect tenants from retaliatory eviction in response to their good-faith efforts to improve their living conditions, while balancing landlords' rights to property and free operation of business. The adoption of the summary preliminary injunction procedure would allow tenants the right to bring an action in summary eviction courts—a course of action wholly new to the summary eviction process. Such a change would

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1. *See* discussion *infra* Part II.A.

2. *See* REBECCA HALL, BERKELEY CMTY. LAW CTR., EVICTION PREVENTION AS HOMELESSNESS PREVENTION 2, 9-11 (1991); LAWYERS' COMM. FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 13, 15-16 (2003) [hereinafter NO TIME FOR JUSTICE], *available at* http://www.lcbh.org/images/2008/10/chicago-eviction-court-study.pdf.

3. *See* NO TIME FOR JUSTICE, *supra* note 2, 16-18; *see also* 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-TRIBUNE, Dec. 15, 2005, at A1 (reporting that 95% of pro se tenants lose their cases, according to Steven Kellman, director of the Tenants' Legal Center of San Diego), *available at* 2005 WLNR 20378746.

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enhance tenants' ability to avail themselves of the protections provided by anti-retaliatory eviction laws. Yet the introduction of the summary preliminary injunction procedure also creates the need for specific safeguards to protect landlords from tenants abusing the summary preliminary injunction action.

Most landlords seek evictions in good faith. It has been recognized that "the great majority of [landlords] are merely attempting to earn a reasonable return on their investments by providing a vital service to our society."[4] The vast majority of eviction proceedings are filed for nonpayment of rent,[5] which is generally recognized as a valid cause for eviction.[6] The procedure proposed in this comment, therefore, should not have any detrimental effect on landlords' good-faith efforts to protect their legal interests within the summary eviction courts. Additionally, the proposed procedure is narrowly aimed to protect tenants who have already been subject to threats of retaliatory eviction, or who have good cause to suspect that their landlords may retaliate in response to protected actions taken in good faith. The procedure would allow tenants to bring preliminary injunction actions to prohibit the landlords' retaliatory evictions.

This comment begins in Part II by presenting the development and basic elements of the summary eviction procedure and by summarizing the fundamental steps of the typical summary eviction process. Parts III and IV discuss the inception and evolution of tenant protections guaranteed by retaliatory eviction law and analyze the policies behind the prohibition of retaliatory action by landlords. Part V demonstrates that tenants are often unable to benefit from the important protections offered by retaliatory eviction laws. Part VI details the proposed preliminary injunction procedure, and Part VII responds to potential arguments of opponents to the procedure. This comment concludes in Part VIII.

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4. Laura L. Westray, Note, *Are Landlords Being Taken by the Good Cause Eviction Requirement?*, 62 S. CAL. L. REV. 321, 321 (1988).

5. *See* NO TIME FOR JUSTICE, *supra* note 2, at 6; *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., Mar. 2003, at 1, 2 [hereinafter *A System in Collapse*], *available at* http://www.abell.org/pubsitems/arn303.pdf.

6. *See, e.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(c) (1972) (listing exceptions to the prohibition against landlord retaliatory evictions). Building or housing code violations "caused primarily by lack of reasonable care of the tenant" constitute another exception to the retaliatory eviction prohibition, as does any circumstance in which "compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit." *Id.*

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II. The Summary Eviction Process

A. Development of and Reasoning Behind the Summary Eviction Process

For much of common law history, landlords were allowed to personally evict their tenants in a process referred to as landlord "self-help."[7] Unfortunately, landlord self-help posed significant risks of violent landlord-tenant conflict and wrongful eviction of the tenant.[8] One alternative to landlord self-help was the legal remedy of ejectment; however, the ejectment process was "a relatively slow, fairly complex, and substantially expensive procedure" that proved impractical for timely effectuating the interest of the landlord in regaining control of her property.[9] Thus, both alternatives open to landlords for evicting tenants were unsavory.

Legislatures responded to this situation by creating the summary eviction process, which was intended "to avoid the negative effects of self-help, yet simultaneously ensure the health of the rental market by expeditiously removing tenants who do not meet market expectations."[10] The summary eviction process thus represents an efficient method of enforcing forcible entry and detainer (FED) statutes.[11] Generally, FED statutes made landlord self-help illegal and required evictions be conducted through the summary eviction process.[12] The summary eviction process was therefore intended to balance the interests of the tenant in not being abruptly, violently, or wrongfully evicted—as tended to occur in self-help evictions—with the interests of the landlord in a more efficient and less cumbersome procedure than ejectment.[13]

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7. *See* Lindsey v. Normet, 405 U.S. 56, 71 (1972); Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 150-52 (2000).

8. *See Lindsey*, 405 U.S. at 71; NO TIME FOR JUSTICE, *supra* note 2, at 6; 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, 776 (1994).

9. *See* Gerchick, *supra* note 8, at 776 (explaining that "ejectment statutes required the landlord to prove she held title to the disputed land," which involved the difficult burden of "show[ing] title superior not only to the tenant's, but also to everyone else's").

10. *See* NO TIME FOR JUSTICE, *supra* note 2, at 6.

11. *See* Spector, *supra* note 7, at 152-60.

12. Gerchick, *supra* note 8, at 776-77 (noting that "[t]he majority of states . . . forbid a landlord from using any form of self-help and require the landlord to resort to the judicial remedy in evicting a tenant").

13. *See id.*

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B. The Summary Eviction Process

Today, summary eviction procedures vary from state to state—and sometimes even within states, depending on local municipality rules.[14] Nevertheless, the core requirements and steps are substantially similar across jurisdictions.[15] There are two major phases of the summary eviction process. First, a court must "determin[e] which party is entitled to possession" of the property.[16] Second, a sheriff or marshal will conduct the actual eviction, if the court grants a writ of possession to the landlord.[17] Since a preliminary injunction against retaliatory eviction would necessarily occur before the second stage of the summary eviction process, this analysis will focus on the first phase of the summary eviction process.

Phase one of the summary eviction process generally entails several steps that lead to the adjudication of the right to possession. First, the landlord must notify the tenant that she is seeking possession of the rental unit and state the reasons for doing so.[18] If the tenant fails to adequately address the landlord's concerns within a certain time following receipt of notice, then "the landlord may file a summary eviction claim."[19] Much like any civil action, the landlord must serve the tenant with copies of the summons and complaint.[20] Typically, the tenant then has between two and five days to respond.[21] The tenant's failure to timely answer the complaint authorizes the landlord to request a writ of possession by default.[22] If the tenant responds in a timely fashion, on the other hand, the action will proceed to trial,[23] where the landlord must prevail in order to obtain a writ of possession.[24]

While the timeline of the summary eviction procedure varies among jurisdictions, it is important to note that the summary eviction process is deliberately streamlined.[25] In most jurisdictions, the time period that elapses

14. *See id.* at 791.

15. *See id.* at 791-92; *see also* Spector, *supra* note 7, at 137, 160-62 (observing that all states have some form of summary eviction proceedings in place, and that the U.S. Supreme Court has "effectively eliminated any incentive for change to the summary procedure for eviction" with its decision in *Lindsey v. Normet*, 405 U.S. 56 (1972)).

16. *See* Gerchick, *supra* note 8, at 792.

17. *Id.*

18. *Id.*

19. *See id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See id.*

25. *See id.* at 791; *see also* NO TIME FOR JUSTICE, *supra* note 2, at 6.

between the landlord's initial provision of notice to the tenant and the landlord's receipt of a writ of possession falls between a few days, if the tenant fails to appear, and a few weeks, if the tenant contests the eviction.[26]

III. Retaliatory Eviction Law

A. Retaliatory Eviction: Definition and Relevance

Generally, retaliatory eviction occurs when a landlord seeks to evict a tenant after the tenant has taken some legally protected action, in connection with the rental property, that the landlord perceives to be contrary to her interests.[27] Tenant actions most frequently retaliated against, and therefore most commonly protected from retaliatory action, include (1) reporting of any housing code violation that materially affects health and safety to a supervising governmental agency with the power to enforce the housing code against landlords;[28] (2) complaining to the landlord for the landlord's failure to maintain the premises;[29] and (3) forming or joining a tenant's union or other tenants' rights advocacy group.[30] These actions are specifically protected by statute and/or common law because of the policies underlying the adoption of retaliatory eviction laws.[31] Therefore, a tenant usually must prove that he undertook a protected action in order to successfully assert a claim or defense of retaliatory eviction.[32]

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26. The exact length of any actual summary eviction action may vary depending on the circumstances, but "[e]ven with delays, most evictions can be accomplished in two to three months." Kathleen Doler, *Evictions Are Hard: How to Do Them If Rent Romance Ends*, INVESTOR'S BUS. DAILY, Nov. 24, 2006, at A9; *see also* Spector, *supra* note 7, at 137 (noting that summary eviction cases are usually completed "within six to ten days after the action is commenced").

27. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 (1977).

28. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(a)(1) (1972). In *Markese v. Cooper*, 333 N.Y.S.2d 63 (Monroe County Ct. 1972), a county court in New York recognized that retaliatory eviction occurs when the landlord "evicts his tenant because of the tenant's reporting of housing code violations to the public authorities." *Id.* at 65.

29. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(a)(2). For a recent and humorous example of an alleged retaliatory eviction falling within this category, see Julie Harding, *Tenant's Anger at Eviction Note*, BRISTOL EVENING POST, Apr. 26, 2008, at 12 ("A blind man claims he is being evicted from his rented Bristol flat because he asked when the landlord would redecorate the property.").

30. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(a)(3). In *Hillview Associates v. Bloomquist*, 440 N.W.2d 867 (Iowa 1989), the Iowa Supreme Court held that the landlord of a mobile home park had retaliated against tenants for their active participation in a tenants' association. *See id.* at 871-72.

31. *See* discussion *infra* Part III.C.

32. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8(4); *see also*

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Courts may find wrongful retaliatory action taken by the landlord even when an actual eviction did not occur. If the landlord takes action she knows will have the effect of forcing the tenant to leave, that action can violate retaliatory eviction laws.[33] Thus, retaliatory action may be prohibited by statute where, for example, the landlord substantially alters the terms of the lease for the purpose of forcing the tenant to leave.[34] A California appellate court has recognized raising rent beyond the reasonable value of the rental unit or beyond what the landlord knows the tenant can afford as precisely this sort of an illegal retaliation.[35] Similarly, a landlord's refusal to renew a tenant's lease in response to a tenant's protected action has also been found to constitute unlawful retaliation.[36]

There have been few studies indicating the frequency with which retaliatory eviction occurs. Two primary causes contribute to the lack of statistics on retaliatory evictions. First, studies show that many tenants appear as pro se defendants in summary eviction courts.[37] Tenants in this situation are often unable to effectively present any defense, including a retaliatory eviction defense, even when such a defense might be warranted and successful.[38] Second, there is no way to account for the number of tenants who are the victims of retaliatory evictions but choose not to contest the evictions for personal or financial reasons or out of fear.[39] As a result of both of these circumstances, very few records exist from which to determine the frequency of retaliatory evictions.

Despite the lack of definite statistics on the frequency of retaliatory eviction today, news articles from the past few years demonstrate that retaliatory eviction is an issue that courts continue to encounter across the country.[40] For

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discussion *infra* Part VI.A.2.

33. *See, e.g.*, ALASKA STAT. § 34.03.310(a) (2000); Aweeka v. Bonds, 97 Cal. Rptr. 650, 651-52 (Cal. Ct. App. 1971) (finding that raising rent when the landlord was aware of the tenant's inability to pay constituted grounds for an independent retaliatory eviction action by the tenant).

34. *See, e.g.*, N.J. STAT. ANN. 2A:42-10.10(d) (West 2010).

35. *See Aweeka*, 97 Cal. Rptr. at 651-52.

36. *See, e.g.*, McQueen v. Druker, 317 F. Supp. 1122, 1125, 1132 (D. Mass. 1970), *aff'd*, 438 F.2d 781, 785 (1st Cir. 1971) (invalidating a lease provision purporting to grant the landlord the unconditional right to refuse renewal); *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8.

37. *See* NO TIME FOR JUSTICE, *supra* note 2, at 13; Gerchick, *supra* note 8, at 794-95; *see also* Branscomb & Sierra, *supra* note 3.

38. NO TIME FOR JUSTICE, *supra* note 2, at 15-16.

39. *See* Gerchick, *supra* note 8, at 794-95.

40. *See, e.g.*, Marian Gail Brown, *Landlord/Tenant Dispute Gets Personal*, CONN. POST, Apr. 13, 2008, *available at* 2008 WLNR 6926559; Cynthia Di Pasquale, *The Tenants' Voice in Annapolis, Times Nine*, DAILY REC. (Balt.), June 30, 2006, at 4, *available at* 2006 WLNR

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example, a landlord in Baltimore, Maryland, attempted to evict a tenant in retaliation for her refusal to sign a lease addendum that assigned to her responsibility for any mold found in the rental unit.[41] In Madison, Wisconsin, a landlord's retaliatory eviction of a woman who joined a neighborhood-watch program prompted the Madison City Council to pass anti-retaliatory eviction legislation in 2007.[42] Also in 2007, residents of one apartment complex in a Los Angeles suburb brought suit against their landlord, claiming that the apartment complex owner unreasonably raised rent in retaliation for their complaints to the city government about illegal eviction notices and the landlord's failure to provide tenants with statutorily required protections during renovation work that rendered units uninhabitable.[43] Thus, despite the proliferation of protections afforded tenants against retaliatory evictions over the past three decades,[44] retaliatory evictions continue to impact tenants today.

B. Development of Retaliatory Eviction Law

1. Common Law Retaliatory Eviction

Traditionally, the common law considered landlords privileged to possess their own lands essentially at will, and as a result, "the common law made no inquiry into [a landlord's] purpose or motives" with respect to actions affecting the landlord-tenant relationship.[45] Prior to the D.C. Circuit's groundbreaking decision regarding retaliatory eviction in *Edwards v. Habib*, the common law provided "that a private landlord was not required . . . to give a reason for evicting a month-to-month tenant and was free to do so for any reason or for no reason at all."[46]

24353811; Alex Dobuzinskis, *Complex's Landlord Faces Charges, Glendale Joins Residents in Criminal Complaint*, DAILY NEWS (L.A.), Oct. 5, 2007, at N3, *available at* 2007 WLNR 19725510; Mary Yeater Rathbun, *Council Hikes Renters' Rights; Bans Retaliation by Landlords*, CAP. TIMES (Madison, Wis.), Oct. 3, 2007, at A2, *available at* 2007 WLNR 19409458.

41. *See* Di Pasquale, *supra* note 40.

42. *See* Rathbun, *supra* note 40.

43. *See* Dobuzinskis, *supra* note 40.

44. *See* discussion *infra* Part III.B.

45. Annotation, *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law*, 23 A.L.R.5TH 140, § 2[a] (1994).

46. Edwards v. Habib, 397 F.2d 687, 689 (D.C. Cir. 1968) (citing, inter alia, Warthen v. Lamas, 43 A.2d 759 (D.C. 1945)); *accord* Markese v. Cooper, 333 N.Y.S.2d 63, 66 (Monroe County Ct. 1972). Under the laws of some jurisdictions with statutory prohibitions on retaliatory eviction, month-to-month tenants remain more vulnerable to eviction for wrongful purposes than fixed-term tenants. *See generally* Mark S. Dennison, *Tenant's Rights and Remedies Against Retaliatory Eviction by Landlord*, 45 AM. JUR. PROOF OF FACTS 3D 375, § 7 (1998) [hereinafter Dennison, *Tenant's Rights*] (discussing variations among jurisdictions in the

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Retaliatory eviction was first legitimized as an affirmative defense to an FED or eviction claim in 1968 in *Edwards v. Habib*.[47] In *Edwards*, tenant Yvonne Edwards complained to the D.C. Department of Licenses and Inspections about sanitary code violations on the residential property she rented from landlord Nathan Habib.[48] Upon discovering more than forty code violations during the resulting investigation, the department ordered Habib to correct the situation.[49] Habib then gave Edwards notice to vacate.[50] While the *Edwards* court recognized that the constitutional protections of free speech and equal protection could provide a basis for prohibiting retaliatory eviction,[51] it declined to decide the case on constitutional grounds and instead decided the issue based on the public policy expressed in legislative codes governing living conditions.[52]

The legislative policy relied on by the court in *Edwards* as the basis for its adoption of anti-retaliatory eviction measures was expressed in the legislative enactment of housing and sanitary codes.[53] The *Edwards* court noted that such

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applicability of retaliatory eviction statutes to fixed-term versus month-to-month leases). Whether the retaliatory eviction laws apply with equal force to both month-to-month tenants and tenants "holding over" from expired fixed-term leases is typically determined by the wording of the applicable anti-retaliatory eviction statute. *See id.*

47. *See* 397 F.2d 687.

48. *Id.* at 688.

49. *Id.*

50. *Id.* at 689.

51. *See id.* at 690-98. Generally, the tenant's argument for protection under the United States Constitution is that the state's inaction against a landlord who evicts a tenant who has not violated his lease, but who has made a good-faith complaint to authorities regarding living conditions in rented property, constitutes an abridgment of free speech or equal protection. *See id.*

52. *See id.* at 696, 699-701. Other courts have likewise recognized that retaliatory eviction cases often involve constitutional issues but have declined to decide cases on that basis. *E.g.*, Markese v. Cooper, 333 N.Y.S.2d 63, 71 (Monroe County Ct. 1972); Dickhut v. Norton, 173 N.W.2d 297, 299 (Wis. 1970). *But see* LaVoie v. Bigwood, 457 F.2d 7, 11-14 (1st Cir. 1972) (finding in favor of the tenant on a § 1983 claim brought on First and Fourteenth Amendment grounds); Walton v. Darby Town Houses, Inc., 395 F. Supp. 553, 557-60 (E.D. Pa. 1975) (same); *see also* David Thomas, Note, *Landlord-Tenant: The Status of Retaliatory Conduct in Oklahoma*, 33 OKLA. L. REV. 159, 167 (1980) (noting that some courts that have decided the issue of retaliatory eviction on constitutional grounds "have proscribed retaliatory conduct on the basis of the fourteenth amendment of the United States Constitution and the Civil Rights Act of 1871").

53. *See Edwards*, 397 F.2d at 700-01; *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8(1) (1977) (requiring "a protective housing statute embodying a public purpose to insure proper conditions of housing, especially multi-unit housing designed for rental to tenants of low or moderate income," as an essential element for establishing a claim of retaliatory eviction). For an in-depth discussion of the purposes and policies underlying retaliatory eviction laws, including the policy generally adopted by legislatures in housing,

codes "indicate a strong and pervasive [legislative] concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live."[54] Since the successful operation of such codes depends in part on the tenants' active reporting of violations, it would frustrate these codes' fundamental, remedial purpose to allow landlords to thwart the tenants' reporting of code violations by taking retaliatory action.[55] Courts therefore view the legislative intent expressed in such codes as a proper legal basis for judicial recognition of a defense of retaliatory eviction.[56]

In fact, some courts even go so far as extrapolate from the enactment of housing codes a legislative intent to "impose an implied warranty of habitability on the landlord."[57] The implied warranty of habitability basically means that the landlord guarantees, from the inception and for the duration of the lease, that there are and will be no latent defects in the property that materially affect health and safety.[58] Courts have determined that the implied warranty of habitability is the legal construct that authorizes the retaliatory eviction defense: without such defense, the underlying purpose of the implied warranty of habitability would be frustrated by evictions carried out in retaliation for a tenant's good-faith activism to improve his apartment's habitability.[59] In short, judicially established prohibitions on retaliatory eviction result from courts construing applicable housing codes as legislative expressions of public policy in favor of safe and healthy living conditions.

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sanitary, and building codes, see discussion *infra* Part III.C.

54. *Edwards*, 397 F.2d at 700; *accord Dickhut*, 173 N.W.2d at 299 ("There can be no doubt that the legislature and the common council of the city of Milwaukee have both recognized that blighted, substandard and insanitary housing conditions do exist and that they are detrimental to the public interest.")

55. *Edwards*, 397 F.2d at 700-01; *accord* Wright v. Brady, 889 P.2d 105, 107-09 (Idaho Ct. App. 1995) (recognizing the significance of the policies underlying local housing codes); Clore v. Fredman, 319 N.E.2d 18, 21 (Ill. 1974) ("The public policy of this State as evidenced by its statutory law forbids a landlord to terminate or refuse to renew a lease because a tenant complained to a governmental authority of a *bona fide* violation of any applicable building code, health ordinance or similar regulation."); *Markese*, 333 N.Y.S.2d at 67-69; *Dickhut*, 173 N.W.2d at 298-301.

56. *See Edwards*, 397 F.2d at 701. For a comprehensive jurisdictional analysis of judicial adoption of retaliatory eviction as an affirmative defense, see Mark S. Dennison, *Retaliatory Eviction Claims*, 99 AM. JUR. TRIALS 289, § 2 (2006) [hereinafter Dennison, *Eviction Claims*].

57. *See* Dennison, *Eviction Claims*, *supra* note 56, § 2; *see also* Mease v. Fox, 200 N.W.2d 791, 793-97 (Iowa 1972).

58. Dennison, *Eviction Claims*, *supra* note 56, § 2.

59. *See id.*

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2. Statutory Retaliatory Eviction

Statutory recognition of the retaliatory eviction defense followed judicial acceptance of the doctrine. In 1972, four years after the *Edwards* decision and on the heels of similar decisions from other courts across the nation,[60] the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Residential Landlord and Tenant Act (URLTA), which adopted in statutory form the defense of retaliatory eviction.[61] URLTA Article V, entitled "Retaliatory Conduct," has been expressly adopted by fifteen states.[62] In total, thirty-six jurisdictions have adopted statutory protections against retaliatory evictions.[63] Additionally, countless municipalities have enacted anti-retaliatory eviction ordinances.[64]

The two types of retaliatory eviction prohibitions, common law and statutory, have led to variations in the array of retaliatory eviction protections available to tenants in different jurisdictions. Among the jurisdictions affording any such protections to tenants, some have prohibitions based in both common and statutory law, while others have only one form of prohibition.[65]

C. General Policies Underlying Retaliatory Eviction Laws

There are three primary policies underlying the prohibition of retaliatory eviction: (1) improving public health, housing, and living conditions; (2) promoting social stability; and (3) reducing the cost of eviction to governments.

1. Improvement of Public Health, Housing, and Living Conditions

The improvement of public health, housing, and living conditions is the primary policy set forth by both courts and legislatures in adopting

60. *See, e.g.*, Schweiger v. Super. Ct. of Alameda County, 476 P.2d 97 (Cal. 1970); *Markese*, 333 N.Y.S.2d 63; *Dickhut*, 173 N.W.2d 297.

61. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (1972).

62. *See* Dennison, *Tenant's Rights*, *supra* note 46, § 3 n.37.

63. *See* Dennison, *Eviction Claims*, *supra* note 56, § 3 n.2.

64. *See, e.g.*, CHI., ILL., MUN. CODE § 5-12-150 (1990); *see also* Rathbun, *supra* note 40 (discussing the adoption of a retaliatory eviction ordinance by the city council of Madison, Wisconsin).

65. Still other jurisdictions have yet to embrace retaliatory eviction law in any form. For example, Oklahoma has declined to adopt any prohibitions regarding retaliatory eviction, either judicially or legislatively. *See* Oklahoma Residential Landlord and Tenant Act, 41 OKLA. STAT. §§ 101-136 (2001) (offering no protections against retaliatory evictions); Schuminsky v. Field, 1980 OK 22, ¶ 23, 606 P.2d 1133, 1137 (expressly declining to address the issue of retaliatory eviction because it had not been raised in the course of proceedings).

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prohibitions on retaliatory eviction. Courts recognize that timely reporting of code violations must be encouraged to promote the successful enforcement of housing, sanitary, and building codes.[66] A landlord's use of any retaliatory measure to silence bona fide complaints about living conditions directly conflicts with public policy favoring improvement of living conditions.[67] The court in *Edwards* noted that allowing the use of retaliatory measures to silence tenants' complaints would have the effect of "not only punish[ing] [the tenant] for making a complaint . . . but also would stand as a warning to others that they dare not be so bold"—an outcome which would be patently at odds with the applicable housing code legislation.[68]

2. Social Stability

The policy of social stability is primarily promoted in academic writings on eviction, which focus on the potential social harms caused by the "involuntary displacement" of tenants from their homes.[69] Evictions can cause significant disruption to an individual's "educational, religious, social, and employment connections," as well as unnecessary economic loss and, in some cases, actual homelessness.[70] Such harms may create substantial social costs: additional burdens on schools and social-welfare systems, increased vulnerability to psychological distress, loss of community cohesiveness.[71]

Research and observation bear out the link between involuntary displacement and these various harms. "Residential instability is a major cause of school instability, which has grave consequences not only for the transient students, but also for the 'stable students in a classroom . . . .'"[72] And studies have found that the emotional and psychological harm involved with the loss of a home can equal "the characteristics of grief and mourning for a lost person."[73] Involuntary relocation can also cause an individual or family

66. *See, e.g.*, Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968); Markese v. Cooper, 333 N.Y.S.2d 63, 67 (Monroe County Ct. 1972); Dickhut v. Norton, 173 N.W.2d 297, 301 (Wis. 1970); *see also* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101; RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 (1977).

67. *See Markese*, 333 N.Y.S.2d at 67.

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

69. *See, e.g.*, Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 821 (2008).

70. *Id.* at 821-23.

71. *See id.* at 828-29.

72. *Id.* at 821-22 (quoting Chester Hartman & Todd Michael Franke, *Student Mobility: How Some Children Get Left Behind*, 72 J. NEGRO EDUC. 1, 1 (2003)).

73. *Id.* at 824 (quoting Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, *in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 377 (James Q.

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to be unjustifiably removed from a valuable and close-knit community. One tenant facing eviction from a neighborhood of manufactured housing in which she had lived for decades stated, "[T]his place is a community. . . . My neighbors are like my family."[74] Finally, evictions may cause job disruption,[75] if eviction forces a tenant to move so far away from her current job that traveling to and from work becomes difficult or impossible.

3. Governmental Costs of Eviction

Successful illegal evictions may also place direct and indirect monetary burdens on governments, forcing taxpayers to foot the bill.[76] Municipalities often must pay for expensive clean-up efforts to remove residential street clutter left in the wake of wrongful evictions.[77] Perhaps more importantly, judicial enforcement of wrongful evictions makes inefficient use of governmental time and resources, crowding the dockets of summary eviction judges and consuming the availability of the sheriffs or marshals who must execute a landlord's writ of possession.[78]

Governments also suffer indirect costs of wrongful evictions: loss of tax revenue and the economic burden of homelessness. As previously noted, wrongful evictions can result in the unnecessary disruption of employment for the evicted tenant.[79] Such disruption obviously reduces or eliminates an individual tenant's income and thus constricts the government's income- or sales-tax revenue, placing strain on already-limited government resources. Furthermore, for low-income tenants "living in tight housing markets," eviction may cause homelessness.[80] Eviction proceedings, whether resulting in eviction or not, create a unique susceptibility to homelessness, if the unjustified eviction action subsequently appears on the tenant's rental and/or credit record, compromising the tenant's ability to find subsequent housing.[81]

Wilson ed., 1966)).

74. Brown, *supra* note 40.

75. *See* Roisman, *supra* note 69, at 821; *see also* NO TIME FOR JUSTICE, *supra* note 2, at 6.

76. *See* Di Pasquale, *supra* note 40 (noting the waste of taxpayer funds as a result of evictions in Baltimore, Maryland).

77. The City of Baltimore, for example, "spends $540,000 annually to clean up eviction chattel" left in the streets. Di Pasquale, *supra* note 40 (reporting that Baltimore "has three dedicated crews that clean up after roughly 32 evictions a day").

78. *See* Gerchick, *supra* note 8, at 792 (detailing the summary eviction procedure).

79. *See supra* text accompanying note 75.

80. Roisman, *supra* note 69, at 823 (citing Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 468 (2003)).

81. *See* Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239, 240-46 (1987) (describing how tenant screening services compile tenant profiles, including rental histories); *see also* NO TIME FOR JUSTICE,

Thus, at the same time that they cause decreases in government tax revenue, illegal evictions indirectly increase costs to government and social-welfare groups, by unjustifiably increasing the number of individuals requiring aid.[82]

The development and adoption of retaliatory eviction laws demonstrates judicial and legislative intent to advance the underlying policies of promoting public health, social stability, and economic efficiency. The importance of anti-retaliatory eviction measures is underscored by a contrast with landlord-tenant law in the United Kingdom. A recent article from the United Kingdom, where landlords can exploit a "loophole" in the law to retaliate against complaining renters, revealed that "[h]undreds of thousands of vulnerable tenants are living in sub-standard housing because they fear being evicted if they complain."[83] By contrast, many jurisdictions within the United States have enacted laws prohibiting retaliatory eviction to prevent precisely that situation.[84] However, the protections afforded tenants by retaliatory eviction laws are meaningless if tenants are unable to bring effective, timely defenses or causes of action for retaliatory eviction, as is often the case in today's summary eviction courts.[85]

IV. Legal Developments Recognizing and Preserving Tenants' Rights

Since the inception of retaliatory eviction laws, many courts and legislatures have amended the summary eviction process in favor of tenants when existing protections appeared insufficient. Courts and legislatures have established two principal avenues by which a tenant may invoke the protections of retaliatory eviction laws: an affirmative cause of action or a rebuttable presumption in the tenant's favor.

A. Allowing Tenants to Invoke Retaliatory Eviction Law Independently

First, courts and legislatures have expanded protections for tenants by broadening the ways in which a tenant may invoke retaliatory eviction laws. Although retaliatory eviction was originally cast as an affirmative defense in

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supra note 2, at 6; *A System in Collapse*, *supra* note 5, at 1, 5.

82. *See* Roisman, *supra* note 69, at 828-29. The short- and long-term economic consequences of homelessness on children must also be taken into account. For example, a parent's inability to provide housing puts children at greater risk of removal from the parent's custody and placement in foster care, which not only increases the need for immediate government expenditures (direct payments to foster families) but can also jeopardize the long-term educational, psychological, social—and therefore *economic*—well-being of the children torn from their families under such circumstances. *See id.* at 823, 828.

83. *Eviction Fears Prevent Tenants Complaining*, W. MAIL (UK), June 13, 2007, at 15.

84. *See* Dennison, *Eviction Claims*, *supra* note 56, § 3 n.2.

85. *See* NO TIME FOR JUSTICE, *supra* note 2, at 15-16.

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Edwards and successor cases,[86] courts in other jurisdictions quickly broadened a tenant's options to include the ability to raise the issue of retaliatory eviction. Some courts have recognized that retaliatory eviction should be available to tenant-defendants as a counterclaim in summary eviction proceedings.[87] Other courts have gone further. In *Aweeka v. Bonds*, for example, a California appellate court recognized retaliatory eviction as an independent, affirmative cause of action for damages outside the context of summary eviction courts.[88] The *Aweeka* court stated,

> We can discern no rational basis for allowing . . . a substantive defense [of retaliatory eviction] while denying an affirmative cause of action. It would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only, after he is confronted with an unlawful detainer action and a possible lien on his personal property.[89]

Likewise, the court in *Morford v. Lensey Corp.* determined that damages could be awarded as a remedy for a tenant who successfully proved a claim of retaliatory eviction after the tenant was forced to vacate the premises.[90]

Still other courts have allowed tenants to bring preliminary injunction actions in traditional civil courts. For example, in *McQueen v. Druker*, the First Circuit upheld a decision enjoining a landlord from evicting a tenant in a retaliatory manner after the landlord had served a notice of intent not to renew the lease.[91] Such broadening of the methods through which tenants may invoke the protections of retaliatory eviction law demonstrates some courts' recognition of the continuing need to evaluate and amend retaliatory eviction law to optimally enforce its foundational policies.

B. Allowing a Rebuttable Presumption in Favor of a Tenant When Proving a Landlord's Retaliatory Motive

A second way courts have expanded the protection of retaliatory eviction law is by recognizing the inherent difficulty that a tenant faces in proving the landlord's retaliatory motive.[92] To alleviate this burden—a burden that one

86. *See* discussion *supra* Part III.B.1.
87. *See, e.g.*, Jablonski v. Clemons, 803 N.E.2d 730, 734 (Mass. App. Ct. 2004).
88. 97 Cal. Rptr. 650, 652 (Ct. App. 1971).
89. *Id.*
90. Morford v. Lensey Corp., 442 N.E.2d 933, 937-38 (Ill. App. Ct. 1982).
91. *See* 438 F.2d 781, 782, 785 (1st Cir. 1971)
92. *See, e.g.*, Gokey v. Bessette, 580 A.2d 488, 491 (Vt. 1990).

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court noted would be effectively insurmountable[93]—courts and legislatures alike have crafted law allowing for a rebuttable presumption of retaliatory eviction if the tenant can prove certain facts.[94] For example, the tenant could raise the presumption by showing evidence of a protected action taken shortly before the alleged act of retaliation.[95]

After the tenant has presented the evidence necessary to create the presumption, "[i]f the landlord does not meet the burden of producing evidence of a nonretaliatory reason for termination, the statutory presumption would compel a finding of retaliatory [action]."[96] Allowing a tenant to raise a rebuttable presumption of retaliatory eviction recognizes the tenant's need for more lenient burdens of proof, especially where a landlord's subjective intent or motive would be nearly impossible for a tenant to prove by direct evidence.[97]

The judicial expansion of the methods and circumstances in which the tenant may invoke the protections of retaliatory eviction law, combined with judicial and legislative authority allowing a rebuttable presumption in favor of the tenant, indicates an emerging pattern of rebalancing the scales of justice. This rebalancing furthers the foundational policies of retaliatory eviction laws and helps tenants to effectively enforce the protections such laws afford. The

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93. *See id.* (explaining that forcing the tenant to prove the landlord's subjective intent "would effectively establish such a high burden of proof for tenants that the benefit the Legislature intended to confer would be an illusion").

94. *See, e.g.*, CONN. GEN. STAT. ANN. § 47a-20 (West 2006), *as construed in* Murphy v. Baez, 515 A.2d 383, 385 (Conn. Super. Ct. 1986) (citing Alteri v. Layton, 408 A.2d 18 Conn. Super. Ct. 1979)); N.J. STAT. ANN. § 2A:42-10.10, 10.12 (West 2010); Hillview Assocs. v. Bloomquist, 440 N.W.2d 867, 871 (Iowa 1989) (citing IOWA CODE §§ 562A.36, 562B.32).

95. *See, e.g.*, *Hillview*, 440 N.W.2d at 871 ("In an action by or against the tenant, evidence of a complaint within six months prior to the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation.").

96. *Id.* at 871. An argument may be made by landlord-defendants that under the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the combination of the tenant's prima facie case, along with the landlord's inability to produce evidence of a nonretaliatory justification, without more, should no longer compel an affirmative finding of retaliatory eviction. *See id.* at 513-15. Instead, it should present a factual question for the trier of fact to determine whether the tenant has sufficiently proven that the motive for the eviction or threat of eviction was in fact retaliatory. *See id.* This approach would not allow a plaintiff-tenant to succeed by merely disproving the landlord-defendant's proposed nonretaliatory justification. *See id.* This issue is addressed in greater detail in the discussion of the proposed operation of the rebuttable presumption in summary preliminary injunction cases. *See* discussion *infra* Part VI.A.4. The proposed method incorporates the *McDonnell Douglas* methodology used by the U.S. Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), a case that incorporates the *St. Mary's* holding. *See id.* at 142-43 (citing, inter alia, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

97. *See* discussion *infra* Part VI.A.4.

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reforms proposed in this comment align with this emerging pattern of reforms, addressing the difficulty that many tenants may have in enforcing these legal protections. It is important to note, however, that the progressive reforms noted in this Part have been enacted or upheld in only a minority of states.[98] Tenants in many states still lack the protection of *any* form of retaliatory eviction prohibitions, despite the progressive developments of legal protections in other states.[99]

V. Still Falling Short: Why Further Legal Developments in the Summary Eviction Process Are Necessary to Preserve the Protections Offered by Anti-Retaliatory Eviction Laws

Although some jurisdictions have appropriately adjusted the law of retaliatory eviction to allow further protections for tenants seeking in good faith to improve their living conditions,[100] most of these adjustments have had little, if any, effect on the summary eviction process.[101] In fact, studies show that the balance of power between landlords and tenants within the summary eviction courts is skewed in favor of landlords.[102]

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98. The states embracing such reforms include California, Connecticut, District of Columbia, Illinois, Iowa, Massachusetts, New Jersey, and Vermont. *See* CAL. CIV. CODE § 1942.5(f) (West 2010) (allowing tenant to bring a civil retaliatory eviction action for damages against the landlord), CONN. GEN. STAT. ANN. § 47a-20 (legislatively providing for a rebuttable presumption in favor of a tenant claiming retaliatory eviction); D.C. CODE § 42-3505.02(b) (2006) (same); N.J. STAT. ANN. § 2A:42-10.12 (same); Aweeka v. Bonds, 97 Cal. Rptr. 650, 651-52 (Ct. App. 1971) (upholding retaliatory eviction as an independent cause of action); Morford v. Lensey Corp., 442 N.E.2d 933, 937-38 (Ill. App. Ct. 1982) (recognizing retaliatory eviction as an independent cause of action); *Hillview*, 440 N.W.2d at 871 (citing IOWA CODE §§ 562A.36, 562B.32) (allowing a tenant to raise a rebuttable presumption in a retaliatory eviction claim); Jablonski v. Clemons, 803 N.E.2d 730, 734 (Mass. App. Ct. 2004) (citing MASS. GEN. LAWS ch. 186, § 18) (affirming the lower court's judgment in favor of tenant-defendants on their counterclaim for retaliatory eviction and allowing use of rebuttable presumption to prove retaliation); *Gokey*, 580 A.2d at 491 (citing, inter alia, VT. STAT. ANN. tit. 9, § 4465) (rejecting an argument that a tenant must prove a landlord's subjective retaliatory intent).

99. *See supra* note 65.

100. *See* discussion *supra* Part IV.

101. Recall that when seeking a preliminary injunction against a retaliatory eviction action or pursuing a remedy for damages sustained as a result of a retaliatory eviction, tenants must bring their actions in traditional civil courts. *See* discussion *supra* Part IV.A.

102. *See, e.g.*, HALL, *supra* note 2 (reporting results from a twelve-month study of evictions in Berkeley, California); NO TIME FOR JUSTICE, *supra* note 2 (noting the brevity of summary eviction proceedings and the disadvantages to tenants); *A System in Collapse*, *supra* note 5 (describing the heavy case loads resulting from tenant evictions).

Studies into the operation of summary eviction courts have revealed alarming disparities between landlords and tenants. To start, studies have found that a tenant-defendant's likelihood of winning at trial in summary eviction court is extremely low.[103] A study on Chicago eviction courts found that "unless the case was disposed of on procedural grounds, [it] ended in the tenant's removal from the unit," and that "tenants always lost on the merits."[104] An older study conducted in California "found that tenants prevail in less than one percent of eviction cases."[105] In 2005, attorney Steven Kellman, director of the Tenant's Legal Center of San Diego, told the *San Diego Union-Tribune* that "[a]bout 95 percent of [tenants contesting their evictions] will lose their cases, regardless of how good a case they have."[106]

Several studies have also noted the infrequency with which tenants have legal representation at summary eviction proceedings.[107] Studies show that tenants are represented in roughly 20% of cases at best,[108] and only 5% of cases at worst.[109] The same studies consistently show that landlords have representation in the majority of cases.[110] Tenants' lack of representation directly affects their ability to bring a case and articulate a valid defense.[111] If they raise any defense at all, tenant-defendants often attempt to defend themselves on grounds that are not "legally germane" to the issues in their cases—an unsurprising phenomenon, given such defendants' lack of legal knowledge.[112] Moreover, whether a tenant even asserts a defense can depend on whether the presiding judge prompts the tenant to do so. One study determined that judges asked tenants if they had a defense in only 27% of cases.[113] Yet in those cases, the tenant asserted a defense 55% of the time, compared to only 9% of the time when the judge did not ask the tenant for a defense.[114]

One potential reason for the consistent rejection of tenants' arguments and the failure of judges to request defenses from pro se tenants is the astounding brevity of summary eviction hearings. In Chicago, the average summary

103. *See* NO TIME FOR JUSTICE, *supra* note 2, at 16-18; *see also* Branscomb & Sierra, *supra* note 3; Gerchick, *supra* note 8, at 793-94.
104. NO TIME FOR JUSTICE, *supra* note 2, at 16, 17.
105. Gerchick, *supra* note 8, at 793-94.
106. Branscomb & Sierra, *supra* note 3.
107. *See, e.g.*, HALL, *supra* note 2, at 2, 9-11; NO TIME FOR JUSTICE, *supra* note 2, at 13.
108. *See* HALL, *supra* note 2, at 2.
109. NO TIME FOR JUSTICE, *supra* note 2, at 13.
110. *See* HALL, *supra* note 2, at 2, 9-11; NO TIME FOR JUSTICE, *supra* note 2, at 13-14.
111. *See* HALL, *supra* note 2, at 12.
112. NO TIME FOR JUSTICE, *supra* note 2, at 15-16.
113. *Id.* at 16.
114. *Id.*

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eviction hearing lasted 1 minute, 44 seconds.[115] Similarly, a study in Baltimore found that its summary eviction courts were so inundated with eviction cases that "[o]n a day with a full docket, . . . the average case receives less than 30 seconds of judicial review."[116] Under such limited time constraints, it is not surprising that tenants are unable to present an effective defense. Moreover, the fact that such a brief amount of time is dedicated to a proceeding effectively denying a tenant his home may raise legitimate due process concerns for the tenant.

Thus, the confluence of tenants' lack of representation or legal training and the time constraints imposed by court systems overburdened with summary eviction proceedings leaves many tenants unable to effectively present any defense, much less a complicated retaliatory eviction defense. Nevertheless, the increased number of tenants who were able to state a defense when prompted demonstrates that if pro se tenants are given even minimal legal assistance, they may be better able to effectively state a defense of retaliatory eviction in traditional summary eviction proceedings.[117] In the context of the preliminary injunction hearing proposed below,[118] the pro se tenant would likely need—and ought to be afforded—this same kind of prompting to state his affirmative claim for relief.[119] This prompting could have a significant impact on the tenant's ability to articulate a valid argument for enjoining the landlord's retaliatory action.

Another factor that may affect the balance of power in summary eviction courts is the efficiency of the process. While the efficiency of the summary eviction process aids the interest of the landlord in regaining control of her property and represents a fundamental aspect of the summary eviction courts,[120] the brevity of the process may be prejudicial to a pro se tenant who

115. *Id.* at 4, 7, 11-12.

116. *A System in Collapse*, *supra* note 5, at 2.

117. *See* NO TIME FOR JUSTICE, *supra* note 2, at 16; *see also supra* text accompanying notes 113-14.

118. *See* discussion *infra* Part VI.

119. The reasons judges should prompt pro se tenant-plaintiffs on the various elements of their claims in summary preliminary injunction procedures involve considerations of both practicality and fairness. From a practical standpoint, judges would have to prompt a tenant-plaintiff to present evidence; otherwise, the landlord-defendant would have nothing to contest, and the judge would have no factual basis for a ruling. But even more importantly, as a matter of fairness, it should be noted that summary eviction judges often help pro se landlords establish their prima facie cases for eviction through a series of questions or other prompts. *See* NO TIME FOR JUSTICE, *supra* note 2, at 16 (noting that judges in summary eviction courts "are solicitous in helping landlords establish their prima facie cases"). Simple fairness dictates that judges should provide similar assistance to tenant-plaintiffs, a practice which would likely dramatically increase tenants' ability to successfully present their cases.

120. *See* discussion *supra* Part II.A.

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is inexperienced with the eviction process and who may have a difficult time juggling work and/or childcare obligations on short notice.[121] The summary eviction process should not be made less efficient, however, because such a change would effectively nullify one of the foundational reasons for the process itself.

Instead, to mitigate this sort of built-in prejudice to tenants, a better approach would be to allow tenants to bring affirmative preliminary injunction actions. The tenant, as plaintiff, may have more control over the timing and scheduling of the case and therefore may be able to plan more effectively for work absences and childcare. Furthermore, the judge would begin the trial by prompting the plaintiff to state her prima facie case, which would include evidence of the landlord's retaliatory motive.[122] This simple change would, among other things, provide the tenant sufficient time to present her case. The judge, facing the tenant as plaintiff, would be unable to overlook the tenant's claim, because the prima facie case itself would depend on the tenant's evidence. Accordingly, providing tenants the remedy of summary preliminary injunction proceedings could eliminate procedural prejudice in summary eviction courts without compromising efficiency.

The summary preliminary injunction procedure may further aid tenants in taking advantage of developments in retaliatory eviction law.[123] Although only a few studies regarding the status of summary eviction courts have been conducted, existing reports agree that tenants are highly unlikely to be represented in summary eviction proceedings and that the hearings are surprisingly short when tenants do appear.[124] Under these circumstances, developments in favor of tenants under retaliatory eviction law have little meaning. For example, the ability to utilize a rebuttable presumption is unhelpful where the tenant is unable to state any valid defense because of lack of legal training.[125]

In today's summary eviction courts, tenants are unable to bring claims against landlords.[126] This means that tenants seeking preliminary injunctions or bringing other affirmative claims based on retaliatory eviction cannot take

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121. *See* JULIA ARNO ET AL., THE STATUS OF LEGAL ASSISTANCE FOR EVICTION ACTIONS IN CALIFORNIA: A REPORT TO THE STATE BAR OF CALIFORNIA BOARD OF GOVERNORS 10 (2005), http:// www.calbar.ca.gov/LinkClick.aspx?fileticket=ktzdJ8BE8Uo%3D&tabid=2326; *see also* NO TIME FOR JUSTICE, *supra* note 2, at 13 (finding that tenants failed to attend their summary eviction proceedings 44% of the time).

122. *See* discussion *infra* Part VI.A.2.

123. *See* discussion *supra* Part IV.

124. *See* HALL, *supra* note 2, at 2, 9-12; NO TIME FOR JUSTICE, *supra* note 2, at 13-14; *see also supra* text accompanying notes 108-09, 115-16.

125. *See* discussion *infra* Part VI.B.2.

126. *See* discussion *supra* Part IV.A.

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advantage of the efficiency of the summary eviction courts, while landlords have full access to the efficiency of summary eviction courts for their FED actions.[127] Furthermore, if tenants could only bring independent claims for damages in summary eviction courts after an eviction had occurred, this would frustrate the intended efficiency of the courts by introducing a claim for damages after the eviction had been adjudicated and finalized. Once a wrongful eviction has occurred, the efficiency of the summary eviction courts is no longer needed and the resulting claims for damages are best left for adjudication within the traditional civil court system.

Preliminary injunction actions, however, could be tailored to the summary eviction process because of their necessary and intentional efficiency. Courts in a small minority of jurisdictions use injunctions to protect against retaliatory eviction within the traditional court or administrative system.[128] But a preliminary injunction action available within the summary eviction courts could provide an easier, faster, and more accessible procedure than that offered by traditional courts, precisely because summary eviction courts have been specially created to be more efficient and accessible by the often pro se parties involved in FED disputes. Allowing tenants who legitimately fear retaliation from their landlords to file a preliminary injunction against retaliatory eviction in summary eviction courts would be an effective way to ensure that tenants facing a real threat of retaliatory eviction could preempt a landlord's retaliatory action against them. With a preliminary injunction action, tenants could receive an efficient adjudication of their claims, and potentially an injunction against the landlord's illegal retaliation, before the landlord had the chance to draw them into court as defendants in a summary eviction proceeding,[129] where studies show that their chances of succeeding with a defense of retaliation are minimal.[130]

The efficiency of action provided to landlords in summary eviction courts should be extended to tenants who need protection after making a good-faith attempt to improve their living conditions. The Supreme Court of California recently resolved an issue involving landlord-tenant disputes by noting, among other things, the importance of affording litigants in landlord-tenant disputes

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127. *See* discussion *supra* Part II.

128. *See, e.g.*, MD. CODE ANN., REAL PROP. § 8-206(e) (West 2002 & Supp. 2010); N.Y. REAL PROP. LAW § 223-b(3) (McKinney 2006); Smith v. D.C. Rental Accommodations Comm'n, 411 A.2d 612, 616 & n.7 (D.C. 1980) (citing, inter alia, D.C. CODE § 45-1654) (construing statute to allow the governing administrative body to enjoin retaliatory conduct by landlords).

129. The policy underlying this is clearly articulated in *Aweeka v. Bonds*, 97 Cal. Rpt. 650, 651-52 (Ct. App. 1971). *See supra* text accompanying note 89.

130. *See supra* text accompanying notes 103-06.

"the utmost freedom of access to the courts" to bring their causes of action.[131] It is important that both tenants and landlords be given a full opportunity to have their issues adjudicated. If potential victims of retaliatory evictions were afforded the opportunity to bring efficient, protective preliminary injunction actions in summary eviction courts, many of the problems facing tenants in summary eviction proceedings would be resolved, and a better balance of power between landlords and tenants could be achieved.

VI. A New Procedure: Adapting Preliminary Injunction Actions to Summary Eviction Courts

The summary preliminary injunction procedure melds together two procedures already in use to protect tenants against retaliatory eviction. First is the procedure under which tenants are allowed to bring an independent action for damages or injunctive relief.[132] Second is the summary eviction process, which allows for efficient adjudication of a landlord's FED claim.[133] Thus, while the procedures involved in the summary preliminary injunction would be familiar in many jurisdictions, the court involved would be different. It is this transfer of the adjudication to the more efficient summary eviction courts that could make a key difference in tenants' ability to successfully invoke the retaliatory eviction laws of their jurisdictions.[134] The transfer would, in turn, further the public policies underlying the adoption of the prohibitions on retaliatory eviction.[135] For example, if unscrupulous landlords are more often forced to improve their property to comply with the applicable housing code, then the overall safety of rental housing will improve.

When considering the introduction of the summary preliminary injunction, jurisdictions should ensure that the procedure is accessible to the pro se tenant. This would include ensuring that the procedure is both inexpensive and easily understandable. Keeping court costs low and providing simple tenant education on the availability, significance, and steps of the new procedure are among the efforts that jurisdictions should make to increase tenant access.

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131. Action Apartment Ass'n v. City of Santa Monica, 163 P.3d 89, 96-97 (Cal. 2007) (upholding the litigation privilege of landlords, which was infringed by an ordinance prohibiting them from maliciously taking action to terminate a tenancy). The same public policy that supports a landlord's access to the courts for efficient adjudication of claims should also support the tenant's right to access to the courts for an efficient adjudication of his claim.

132. *See* discussion *supra* Part IV.A; *see also supra* note 128 and accompanying text.

133. *See* discussion *supra* Part II.

134. *See* discussion *supra* Part IV.

135. *See* discussion *supra* Part III.C.

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A. The Proposed Process: The Preliminary Injunction Against a Landlord's Retaliatory Action

This section details the summary preliminary injunction procedure, discussing the timeline, the elements of proof for both the tenant and landlord, the operation of the rebuttable presumption in favor of the tenant, and the duration of the injunction. Because courts across jurisdictions may differ in opinion as to the appropriate duration of the injunction, the two most prominent viewpoints are contrasted below. This comment favors the majority position, which requires a landlord to prove that her retaliatory intent has dissipated prior to bringing a second ejectment action, over the minority position, which limits the injunction's duration to the time necessary for the landlord to make necessary improvements to bring the rental property up to code.[136] Legislatures introducing the summary preliminary injunction procedure should utilize their discretion in determining such details.

1. Timeline

Essentially, the timeline for a tenant's preliminary injunction would be the same as that provided to a landlord for eviction of the tenant.[137] The tenant would file the claim for a preliminary injunction with the summary eviction court in the same way that the landlord makes a claim for eviction against the tenant. Within a matter of days, the landlord would receive notice of the claim and a summons to appear at the hearing. At the hearing, the validity of the tenant's claim would be adjudicated, and if the judge or jury found that the landlord was likely to take illegal retaliatory action, the court could issue an injunction prohibiting the landlord from removing the tenant from the rental unit for a specified period of time.

2. Tenant's Burden of Proof to Make a Prima Facie Case

In order to reduce the risk of an influx of invalid claims and a corresponding increase in the possibility of improper injunctions against the landlord's legitimate right to evict, the tenant seeking an injunction in summary eviction court should bear a significant burden of proof to establish a prima facie case. The tenant should be required to prove at least four elements by clear and convincing evidence: a housing code violation or its equivalent, protected action by the tenant, the absence of reasonable cause, and the likelihood of retaliatory action.[138]

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136. *See* discussion *infra* Part VI.A.5.

137. *See* discussion *supra* Part II.B.

138. The four elements are generally adapted from the definition of "retaliatory conduct" in section 14.8 of the Restatement (Second) of Prop.: Landlord & Tenant. "Clear and

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First, the tenant must prove that the rental unit was in fact in a condition that violated applicable housing codes, or at least created a reasonable cause for a good-faith complaint by the tenant.[139] Evidence of a tenant's reasonable cause for making the complaint would include "whether the tenant made the complaint following investigation of the leased property."[140] Evidence of a tenant's good faith in reporting the violation would include the tenant's "reasonable efforts to bring the alleged violations to the landlord's attention."[141] If the tenant is found to have taken protected action with reasonable cause and in good faith, the issue of whether the code was actually violated may be irrelevant.[142] This good-faith requirement serves dual purposes. On one hand, it protects landlords from tenants who seek to abuse the retaliatory eviction protections by making false reports of code violations in order to lay the foundation for a retaliatory eviction claim or defense. On the other hand, it still protects those tenants who in good faith report what they believe to be code violations, thereby furthering the recognized public policy of promoting safe housing through enforcement of the housing codes.

Second, the tenant must prove that he in fact carried out a protected action under the applicable retaliatory eviction law.[143] For example, clear and convincing proof of the tenant's complaint to local housing authorities might include a copy of the complaint that had been stamped and dated by the relevant housing agency. Additionally, the tenant would need to prove that he took the protected action within a relatively short period of time immediately preceding the alleged retaliatory threat or the preliminary injunction action itself.[144]

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convincing" is the evidentiary standard of proof applicable to the defense of retaliatory eviction. *See* Dickhut v. Norton, 173 N.W.2d 297, 302 (Wis. 1970).

139. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8(4)-(5) & cmt. g (1977).

140. *Id.* § 14.8 cmt. g.

141. *Id.*

142. *See id.*

143. *See id.* § 14.8(4).

144. *See id.* § 14.8 stat. n.3. Statutory schemes that allow the tenant to use a rebuttable presumption to establish the landlord's retaliatory intent typically specify a short time period preceding the landlord's retaliatory action; the tenant raises the presumption by proving that he took protected action during that time period. *See id*. A comparison of statutory time periods reveals that the most commonly chosen time period is six months, and the time periods generally range in length from ninety days to one year. *See id*. Legislatures could reference these time periods already in use with regard to rebuttable presumptions when establishing a time period prior to the tenant's summary preliminary injunction action during which the tenant's protected action may be used to raise a presumption of the landlord's retaliatory intent. Jurisdictions have the discretion to determine the statutory time period; this comparison is provided as guidance.

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Third, the tenant must prove that no other reasonable cause existed for eviction.[145] Evidence tending to show the absence of a nonretaliatory motive might include records or testimony demonstrating that (a) the tenant is up-to-date on rent payments or (b) the tenant had not recently "been convicted of creating a nuisance, or of reckless or willful criminal damage [to the rental unit] by an occupant."[146] This requirement could be utilized by the court to efficiently determine whether the landlord had a legitimate reason to evict. If evidence of the tenant's complete compliance with all terms of the lease were undisputed by the landlord, the court could take the landlord's inability to show a legitimate reason to evict as evidence that the landlord was motivated by an impermissible consideration, such as retaliation.[147]

Fourth, the tenant must prove that the landlord is likely to take imminent retaliatory action against him.[148] This element is crucial to the protection of the landlord's interest in the context of a preliminary injunction action. As the First Circuit commented, "[W]e doubt whether any 'case or controversy' is involved when a tenant requests a declaration of procedural rights as to an imagined future eviction which has never been threatened."[149] Sufficient proof of this element may include clear and convincing evidence that the landlord served the tenant with notice of intent to evict, threatened eviction, or had committed prior retaliatory offenses.[150]

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145. *See id.* § 14.8(3) & cmt. e.

146. *See* Clore v. Fredman, 319 N.E.2d 18, 21 (Ill. 1974) (recognizing that the combination of such evidence constituted "prima facie evidence" of a landlord's retaliatory motives under the applicable ordinace); *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 cmt. e.

147. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), the United States Supreme Court used such reasoning in the context of an employment discrimination case. There, the Court determined that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not [that] the employer . . . based his decision on an impermissible consideration."

It should be noted that ordinarily a tenant may, pursuant to an applicable law, legally withhold rent payments after months of inaction by a landlord when repeated requests for remedy of code violations have been made. *See, e.g.*, Gokey v. Bessette, 580 A.2d 488, 491 (Vt. 1990) (citing VT. STAT. ANN. tit. 9, § 4458(a)(1); Hilder v. St. Peter, 478 A.2d 202, 209-10 (Vt. 1984)). Proof of such circumstances entitles the tenant to be excused from the failure to pay rent, meaning that the landlord cannot use untimeliness of rent payment as a legitimate motive for eviction. *See id.* Of course, the tenant would have to prove the fact of such withholding and the reasonable cause for it by clear and convincing evidence. *See* Dickhut v. Norton, 173 N.W.2d 297, 302 (Wis. 1970); *see also supra* note 138. By making such a showing, the tenant could satisfy this element of the prima facie case.

148. *See* McQueen v. Druker, 438 F.2d 781, 785-86 (1st Cir. 1971).

149. *Id.* (citing, inter alia, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)).

150. While these criteria serve as good indications of the likelihood of retaliatory action, they do not represent an exhaustive list. The courts would benefit from applying a totality-of-

These four elements of proof, when taken together, would establish the tenant's prima facie case, thus raising a rebuttable presumption that the landlord harbored an impermissible retaliatory motive.[151] The landlord's failure to overcome the presumption could lead to an injunction against retaliatory action.[152] Once the tenant made his prima facie case, the landlord would then have various options for rebutting this presumption.

3. Landlord's Responses to the Tenant's Prima Facie Case

The presumption of retaliatory motives, when successfully raised by a tenant who establishes a prima facie case for a preliminary injunction, would impose "a burden upon the landlord to produce evidence of legitimate nonretaliatory reasons to overcome the presumption."[153] There are two ways that the landlord could rebut the presumption of the likelihood of a retaliatory action.

First, the landlord may respond with evidence negating any of the elements of the tenant's prima facie case, thereby undermining the presumption created by the tenant.[154] For example, if the tenant provided documents demonstrating his complaint to authorities, the landlord's evidence that such documents were forged or fell outside the statutory period of relevancy for protected actions would be useful in undermining the tenant's prima facie case.

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the-circumstances test similar to that applied in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), and its progeny to determine whether there was a "case or controversy" significant enough for a federal court to issue a declaratory judgment in an intellectual property case. "Basically," the *MedImmune* Court wrote, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127 (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)); *see also* Surefoot LC v. Sure Foot Corp., 531 F.3d 1236, 1244 (10th Cir. 2008) (applying the *MedImmune* test to determine the existence of a case or controversy in a trademark infringement case); SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1380-81 (Fed. Cir. 2007) (same, in a patent infringement case). *See generally* John M. Bunting, Note, Surefoot LC v. Sure Foot Corp.*: A New Standard for Tenth Circuit Declaratory Judgment Jurisdiction in Intellectual Property Disputes, or How* Cardtoons *Got the Boot*, 62 OKLA. L. REV. 357 (2010). Just as these cases test whether a sufficiently substantial likelihood of adverse legal action exists for the purpose of exercising declaratory judgment jurisdiction, summary eviction courts should similarly test whether a plaintiff-tenant's evidence of the likelihood of a landlord's retaliatory action is sufficient to warrant a restrictive injunction on that landlord.

151. *See* discussion *supra* Part IV.B; *see also infra* Part VI.A.4.

152. *See* Hillview Assocs. v. Bloomquist, 440 N.W.2d 867, 871 (Iowa 1989).

153. *Id.*

154. *See* Morford v. Lensey Corp., 442 N.E.2d 933, 937-38 (Ill. App. 1982).

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Second, the landlord may submit for the court's consideration any evidence of her good-faith, nonretaliatory motives for eviction.[155] The landlord may rebut evidence of the likelihood of her retaliatory action by demonstrating that she made the determination to evict for a reason other than retaliation, and that the eviction action would have occurred regardless of whether the tenants had engaged in a protected action.[156] The Restatement (Second) of Property: Landlord and Tenant recognizes many factors that "tend to establish that the landlord's primary motivation was not retaliatory."[157] Relevant factors include the landlord's (1) "reasonable exercise of business judgment" in making the decision to seek eviction; (2) intention to transfer the property "free of all tenants"; (3) good-faith desire to use the property for a different purpose; (4) desire to remove all tenants because the property is unsafe and the landlord lacks the financial resources to make necessary repairs; and (5) longstanding history demonstrating a lack of retaliatory conduct in response to tenants' protected actions, despite the landlord's knowledge of such actions.[158] If the landlord negated an element of the tenant's prima facie case or provided evidence of a nonretaliatory motive, a question of fact would be presented for determination by the factfinder.[159]

4. Effect of the Rebuttable Presumption

This comment suggests that jurisdictions utilize a rebuttable presumption in favor of the tenant-plaintiff in the summary preliminary injunction procedure in order to most efficiently determine the validity of a retaliatory eviction claim. While not all jurisdictions embrace the rebuttable presumption in favor of the tenant in retaliatory eviction cases, it has been introduced in some jurisdictions to aid the tenant in proving that the landlord's motivation was retaliatory.[160] Without the aid of a rebuttable presumption, tenants would have difficulty proving the necessary element of the landlord's retaliatory intent.[161] The rebuttable presumption should be allowed in the summary preliminary injunction procedure for the same reason.

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155. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8(4) & cmt. f (1977).

156. Jablonski v. Clemons, 803 N.E.2d 730, 734 (Mass. App. Ct. 2004) (citing MASS. GEN. LAWS ANN. ch. 186, § 18).

157. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 cmt. f.

158. *See id.* (listing additional factors).

159. *See Morford*, 442 N.E.2d at 937-38; Hillview Assocs. v. Bloomquist, 440 N.W.2d 867, 871 (Iowa 1989); *cf.* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000) (addressing shifting burdens of proof in the context of employment discrimination).

160. *See, e.g.*, sources cited *supra* note 94.

161. *See* Gokey v. Bessette, 580 A.2d 488, 491 (Vt. 1990) (rejecting use of a subjective test for determining a landlord's motivation); *see also supra* note 93.

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The United States Supreme Court analyzed the use of a rebuttable presumption in cases involving employment discrimination in its unanimous decision, *Reeves v. Sanderson Plumbing Products*.[162] In *Reeves*, the Court delineated the proper method of utilizing a rebuttable presumption and its effect on the burdens of persuasion and production.[163] The circumstances and elements of proof involved in both employment discrimination claims and retaliatory eviction claims are similar enough to justify the use of a rebuttable presumption in favor of the plaintiff in the retaliatory eviction context.[164]

First, both types of claims require proof of a defendant's illegal *motivation*. Plaintiffs in employment discrimination cases must prove that their age, gender, race, or other legally protected trait motivated their employer to discriminate against them, while plaintiffs in retaliatory eviction cases must prove that their complaints motivated their landlord to retaliate against them.[165] In the context of the summary preliminary injunction, the elements of the tenant's prima facie case are intended, when taken together, to show a likelihood that the landlord will act with an impermissible retaliatory motive.[166]

Second, in claims of both employment discrimination and retaliatory eviction, the required proof of the defendant's illegal motivation usually cannot be shown by direct evidence of subjective motivation.[167] Unless the plaintiff has direct proof of the defendant's motivation to act illegally, in the form of a statement or otherwise, the required element of illegal motivation must be proven by circumstantial evidence.[168] Thus, the rebuttable presumption is useful because it allows the plaintiff to prove a set of circumstances that creates an inference of the defendant's illegal motivation; if the defendant cannot or does not provide a nonretaliatory alternative

162. *See* 530 U.S. at 143-48 (applying the rebuttable presumption in a case brought under the Age Discrimination in Employment Act (ADEA)).

163. *See id.* at 142-43.

164. In *Dickhut v. Norton*, 173 N.W.2d 297 (Wis. 1970), the Supreme Court of Wisconsin recognized a similar comparison between employment discrimination and retaliatory eviction cases, noting that both require a factual finding of the defendant's motivation, which is difficult to prove. *See id.* at 302 (quoting Edwards v. Habib, 397 F.2d 687, 702-03 (D.C. Cir. 1968)).

165. *Compare Reeves*, 530 U.S at 141 (requiring that the alleged discriminatory act be based on a prohibited characteristic), *with* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8(4) (1977) (requiring proof of a landlord's retaliatory motivation).

166. *See* discussion *supra* Part VI.A.2; *see also supra* note 150 and accompanying text.

167. *See Reeves*, 530 U.S. at 141; Gokey v. Bessette, 580 A.2d 488, 491 (Vt. 1990); *see also supra* note 93.

168. *See Reeves*, 530 U.S. at 141; *Gokey*, 580 A.2d at 491.

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explanation for the circumstances, the tenant's evidence stands as proof of the illegal motivation.[169]

This shift of the evidentiary burden to the defendant is considered fair in such cases because the defendant "is in the best position to put forth the actual reason for its decision."[170] The use of the rebuttable presumption in the summary preliminary injunction procedure would therefore force the landlord, who is likely to have the best evidence of her own motivation, to timely introduce such evidence. The similarities between the proof required in employment discrimination and retaliatory eviction claims demonstrate that the same rebuttable presumption that the Supreme Court applies in the employment discrimination context can and should apply in the context of an action for summary preliminary injunction against retaliatory eviction.

Within the summary preliminary injunction procedure, the rebuttable presumption of retaliation would shift the burden of production from the plaintiff-tenant to the defendant-landlord.[171] There are four steps involved in the burden-shifting process. The plaintiff-tenant must first establish a prima facie case.[172] Then, the burden shifts to the defendant-landlord to produce evidence demonstrating that she acted for a legitimate and legal reason.[173] If the defendant does not "produc[e] evidence of a nonretaliatory reason for termination, the . . . presumption would compel a finding of retaliatory lease termination."[174] But if the defendant successfully produces evidence of her legitimate motivation, the presumption disappears and no longer compels a

169. *See* Hillview Assocs. v. Bloomquist, 440 N.W.2d 867, 871 (Iowa 1989).

170. *Reeves*, 530 U.S. at 134 (discussing the rebuttable presumption in the context of employment discrimination).

171. This comment suggests the use of the *McDonnell Douglas* framework for burden shifting under a rebuttable presumption. This framework was established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), a Title VII case, and has since been applied by the U.S. Supreme Court in other types of cases. *See, e.g.*, *Reeves*, 530 U.S. at 142-48 (applying the *McDonnell Douglas* framework in an ADEA case). Courts have also applied this framework to the establishment of a retaliatory eviction defense. *See, e.g.*, *Hillview*, 440 N.W.2d at 870-71. Moreover, while the Supreme Court has refined the framework in subsequent employment law cases, the changes rest specifically on interpretations of statutory employment law. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). *See generally* Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395 (2005). Retaliatory eviction law arises from a separate statutory and/or common law foundation, and therefore the traditional *McDonnell Douglas* framework remains a sound model for proof of causation in a retaliatory eviction case.

172. *See Reeves*, 530 U.S. at 142.

173. *See id.*

174. *Hillview*, 440 N.W.2d at 871.

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finding for the plaintiff.[175] In the latter case, the plaintiff has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not [her] true reasons, but were a pretext," used to cover an illegal motive such as discrimination or retaliation.[176]

When determining whether the defendant's proffered motivation is pretextual, the factfinder "may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom.'"[177] At a minimum, the plaintiff must present sufficient evidence for a reasonable factfinder to determine that the defendant's reason is pretextual in order to prevail.[178] It is also important to note that while the rebuttable presumption shifts the ultimate burden of *production* between the parties, the burden of *persuasion* "remains at all times with the plaintiff."[179] This means that in the context of the summary preliminary injunction procedure, the tenant would at all times bear the burden of convincing the factfinder that the landlord intends and is likely to evict him based on retaliatory motives.

The burden-shifting process in the proposed summary preliminary injunction procedure can thus be summarized as follows: First, the tenant would be required to present evidence proving each of the four elements required to establish his prima facie case.[180] Then, the landlord would rebut the presumption by introducing evidence negating the tenant's prima facie case, or with evidence of her legitimate, nonretaliatory reason for evicting.[181] If the landlord did not introduce evidence sufficient to rebut the presumption, the presumption could provide a basis for judgment in favor of the plaintiff.[182] If the landlord introduced sufficient rebuttal evidence, the presumption would disappear and the tenant would then have the opportunity to introduce evidence disproving the landlord's rebuttal evidence.[183] Finally, the jury or summary eviction judge may consider all the evidence submitted by both

175. *See Reeves*, 530 U.S. at 142-43; *see also* W.E. Shipley, Annotation, *Effect of Presumption as Evidence or upon Burden of Proof, Where Controverting Evidence Is Introduced*, 5 A.L.R.3D 19, § 4[a] (1966) (providing an detailed explanation of how the introduction of controverting evidence eliminates a presumption).

176. *Reeves*, 530 U.S. at 143 (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

177. *Id.* (quoting *Burdine*, 450 U.S. at 255 n.10).

178. *See id.* at 148 (holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").

179. *Id.* at 143 (quoting *Burdine*, 450 U.S. at 253).

180. *See* discussion *supra* Part VI.A.2.

181. *See* discussion *supra* Part VI.A.3.

182. *See* Hillview Assocs. v. Bloomquist, 440 N.W.2d 867, 871 (Iowa 1989).

183. *See Reeves*, 530 U.S. at 142-43.

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parties to determine whether the landlord harbored a retaliatory motive to evict.[184]

5. Duration of Injunction

If the tenant prevailed in his claim of retaliatory eviction, the summary eviction court would issue an injunction prohibiting the landlord from taking any retaliatory action. One issue that arises in this circumstance is the duration of the injunction. The landlord has an interest in not being saddled indefinitely with a problematic tenant, while the tenant has a corresponding interest in security of tenure.[185]

Whether in summary eviction proceedings or in traditional civil actions for damages or injunctive relief, when courts find that a landlord acted on a retaliatory motive, they generally split into two distinct positions with regard to how much time must pass before, and what factors should be used to determine when, the landlord can bring a subsequent FED action. In one camp are the courts that have adopted the position that the landlord's retaliatory motive must dissipate—or at least cease to predominate the landlord's decision to evict—before she can legally evict the tenant.[186] This position requires the landlord, after she has been found to have harbored a retaliatory motive, to "prove that [her] actions are primarily motivated by a permissible, non-retaliatory purpose."[187] Courts taking this position require a factual finding of the landlord's subjective motivation; consequently, a case-by-case adjudication is necessary to determine whether the landlord may lawfully evict.[188] The Wisconsin Supreme Court recognized that "[t]he question of permissible or impermissible purpose is one of fact for the court or jury," even when the landlord's motivation and intent are being adjudicated a second time.[189] The Restatement recognizes that the finding of the same landlord's retaliatory motive at an earlier time is relevant, "but not conclusive," evidence in determining motive in the second eviction action.[190] Other relevant factors in a subsequent adjudication of a retaliatory eviction claim include "the length of

184. For an example of how burden shifting operates in the context of a tenant's *defense* of retaliatory eviction, see *Hillview*, 440 N.W.2d at 871-73.

185. *See* Markese v. Cooper, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972); Roisman, *supra* note 69, at 820-29; *see also* discussion *supra* Parts II.A, III.C.2.

186. *See, e.g.*, *Hillview*, 440 N.W.2d at 871 (citing Edwards v. Habib, 397 F.2d 687, 702 (D.C. Cir. 1968)); Dickhut v. Norton, 173 N.W.2d 297, 302 (Wis. 1970) (quoting same). The Restatement takes this approach as well. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 cmts. f, i (1977).

187. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 rep. n.7.

188. *See Hillview*, 440 N.W.2d at 871 (quoting *Edwards*, 397 F.2d at 702).

189. *See Dickhut*, 173 N.W.2d at 302 (quoting *Edwards*, 397 F.2d at 702).

190. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 cmt. i.

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time that has elapsed since the previous determination and whether the tenant has repeated the acts which previously caused the landlord to retaliate."[191]

Proponents of the above position may argue that the policies underlying the retaliatory eviction doctrine are fulfilled by a subjective, case-by-case adjudication of the landlord's intent. Only with such a subjective adjudication can a tenant truly be protected from a wrongful eviction in response to his good-faith, reasonable complaint about living conditions. Allowing landlords the freedom to bring a second action to evict, without another full adjudication of their motives, would make hollow the tenant's initial victory of having proven the landlord's retaliatory motive. Tenants would not only still face the possibility of retaliatory eviction but would also be unable to protect themselves from it.

A second group of courts have taken the alternative position that an objective test is needed, arguing that a landlord may bring a subsequent FED action once she has brought the rental unit into compliance with applicable codes.[192] Tempering this position is the caveat that after the repairs are made, the landlord should allow the tenant a reasonable amount of time to find substitute housing prior to seeking eviction.[193] Nonetheless, this position allows the landlord to evict the tenant after the necessary repairs are made regardless of whether the landlord's "original retaliatory motive remains unchanged."[194] The Utah Supreme Court clarified the policy underlying this rule, stating that

> because the [subsequent eviction] action may still be tainted with an unlawful motive, the burden is on the landlord to show that he has given the tenant a reasonable opportunity to procure other housing. Thus, the landlord is not deprived of his right to evict a complaining tenant, but the exercise of that right is deferred until he has remedied the housing or health code violation and the tenant has had a reasonable opportunity to find other housing.[195]

This rule regarding the duration of the injunction primarily expresses the public policy that a landlord should not be forced to accomodate "a perpetual tenant" as a result of a previous judicial finding of the landlord's retaliatory

191. *Id.*

192. *See, e.g.*, Markese v. Cooper, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972).

193. *See id.* (noting that "court[s] should be generous in allowing the tenant sufficient time, without the pressure normally exerted in a holdover eviction proceeding, to find other suitable housing"); *see also* Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1219 (Utah 1995).

194. *See Markese*, 333 N.Y.S.2d at 75.

195. *Paxton*, 905 P.2d at 1219.

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motive.[196] Furthermore, if the landlord is enjoined from evicting a tenant until the necessary repairs are complete, the landlord is given even greater incentive to make the necessary repairs, which furthers the public policy of maintaining the safety of housing.

Nevertheless, practical problems arise with this objective standard. First, there is no consideration of what would happen if the tenant failed to find substitute housing.[197] Particularly in areas plagued by shortages in affordable housing, a serious threat of homelessness could arise for the evicted tenant.[198] Second, the fundamental public policy of improving the safety of rental housing may also be undercut. Proponents of the minority position may argue that because retaliatory-minded landlords cannot evict until the necessary repairs are made, those landlords have an incentive to efficiently repair their property.

Yet, while the injunction may motivate some landlords to efficiently repair their property, it may allow other landlords to remain inattentive to code violations, effectively leaving the tenant imprisoned in substandard living conditions. Additionally, tenants in these situations may be unable to register a complaint with the housing authorities out of fear of further retaliatory threats or actions. These policy concerns demonstrate that the kind of case-by-case adjudication of the landlord's subjective intent advocated by the first cohort of courts best promotes the policies underlying the adoption of retaliatory eviction prohibitions.[199] Thus, for the landlord to evict after the

196. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8 rep. n.7.

197. *See id.*

198. *See id.*; *see also* discussion *supra* Part III.C.3.

199. Critics of the position that the landlord should be required to demonstrate the absence or dissipation of any retaliatory motive prior to a subsequent FED action may claim that placing such a burden on the landlord will result in inefficiency contrary to the purpose of FED statutes and summary eviction courts. This argument suffers from two major flaws: First, there would be a negligible impact on the number of cases filed, because FED statutes require that the landlord file a summary eviction action and appear in court before a writ of possession may be issued. *See* discussion *supra* Part II.B. Second, the summary eviction courts were not created to minimize the number of eviction cases heard, but rather to increase it by offering an efficient alternative to landlord self-help. *See* discussion *supra* Part II.A. The addition of one element of proof to the landlord's burden in the rare preliminary injunction case is unlikely to negatively impact the efficiency of these courts.

Additionally, summary eviction courts were created not only to provide an efficient method of adjudicating FED claims, but also to serve as a mandatory judicial alternative to landlord self-help. *See* Gerchick, *supra* note 8, at 776-77; Spector, *supra* note 7, at 152-60; *see also supra* text accompanying notes 10-12. One priority of the summary eviction process is that all evictions be adjudicated in a court of law, and requiring the landlord to demonstrate that her retaliatory motive has dissipated simply furthers the purpose of ensuring that all eviction claims are given a full adjudication in court.

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imposition of a preliminary injunction, she should be required to demonstrate that her retaliatory motive has dissipated.

B. Practicalities: Costs to and Education of Tenants

Some courts have recognized that low-income tenants living in tight urban housing markets are the renters who most need retaliatory eviction protections.[200] Such "low-income tenants are often forced to accept substandard housing because of unequal bargaining power" with landlords.[201] Tenants with greater financial resources, or who live in markets where affordable rental housing is readily available, are less likely to face the literal threat of homelessness or the instability of shelter dependence. Low-income urban tenants therefore have the greatest interest in maintaining tenure in their rental units, even under substandard housing conditions and/or strained relationships with their landlords. These are the tenants in the position to receive the greatest benefit from a summary preliminary injunction.

Low-income tenants may be unable to take full advantage of the summary preliminary injunction procedure, either because of the cost of filing fees or because they are unaware of the legal protections provided by anti-retaliatory eviction laws and summary preliminary injunction proceedings. To ensure that the protections provided by the addition of a summary preliminary injunction proceeding are realistically available to low-income tenants, filing fees and court costs need to be kept to a minimum, and the law should require efforts to notify and educate tenants about the available protections.

1. Ensuring That the Summary Preliminary Injunction Procedure Is Not Cost Prohibitive

In order to ensure the ability of low-income tenants to bring a summary preliminary injunction proceeding against their landlords, the filing fees and court costs should be minimized. The efficiency of summary eviction courts makes it feasible to keep the costs of the proceedings low. Some jurisdictions have already demonstrated the ability to contain the costs of summary eviction procedures.[202] For example, the filing fee for summary eviction in Baltimore, Maryland, in 2003 was only nine dollars, and the total fee for the summary procedure was thirty-nine dollars.[203] The filing fees for summary eviction in

200. *See, e.g.*, P.H. Inv. v. Oliver, 818 P.2d 1018, 1022 (Utah 1991); *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.8(1) (recognizing the special need for protection of low- and moderate-income tenants in multi-unit housing); Roisman, *supra* note 69, at 823.

201. Dennison, *Eviction Claims*, *supra* note 56, § 2.

202. *See A System in Collapse*, *supra* note 5, at 6.

203. *Id.*

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the District of Columbia at that time were more than double Baltimore's but remained relatively low at twenty-three dollars.[204] Because the summary preliminary injunction procedure should take approximately the same amount of time as the summary eviction procedure,[205] costs should be comparable between the two actions.

Another method that could be successful in keeping the summary preliminary injunction affordable for tenants is requiring the landlord to pay court costs and attorneys' fees when the tenant prevails in showing a high likelihood of retaliatory eviction. For example, the Chicago Residential Landlord and Tenant Ordinance provides that if the tenant prevails on a retaliatory eviction claim, the tenant may recover reasonable attorneys' fees and the greater of either two months' rent or twice the damages sustained by the tenant.[206] URLTA, enacted in many states,[207] is even more generous. It allows for recovery of reasonable attorneys' fees plus monetary damages not to exceed the greater of three months' rent or three times the actual damages sustained by the tenant.[208] Low income tenants could use such monetary damages to cover the costs of the summary preliminary injunction.

Admittedly, the amounts awarded a tenant-plaintiff for damages in connection with the summary preliminary injunction procedure would be low, because the tenant would not have suffered the negative effects of the eviction action. Even though the monetary damages suffered by the tenant would be minimal, the policy of providing tenants liberal monetary damages expressed in these statutes applies similarly to the summary preliminary injunction process. Forcing a losing landlord to pay a prevailing tenant's court costs and attorneys' fees in the summary preliminary injunction suit is fair and furthers the purpose of the injunction in two primary ways. First, the minimal fees associated with the procedure[209] are likely to be an insignificant burden on the landlord as compared to the tenant, who is likely to have a restricted income. Second, though the court costs are minimal, the possibility of having to pay the fees may deter some landlords from making illegal threats of retaliatory eviction as a method of tenant intimidation and control when a tenant could use those threats as evidence in a summary preliminary injunction action. With this method in place, court fees associated with the summary preliminary

204. *Id.*

205. *See* discussion *supra* Part VI.A.1.

206. CHI., ILL., MUN. CODE § 5-12-150 (1990).

207. *See* Dennison, *Eviction Claims*, *supra* note 56, § 3 n.2; Dennison, *Tenant's Rights*, *supra* note 46, § 3 n.37.

208. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.107 (1972).

209. *See supra* text accompanying notes 202-05.

injunction proceeding would not make the procedure cost prohibitive for low-income tenants.

2. Ensuring Proper Notification and Education of Tenants Regarding Tenants' Rights in Cases of Probable Retaliatory Eviction

The low probability that tenants bringing retaliatory eviction claims will have legal representation[210] increases the need for effective education of tenants concerning their rights under anti-retaliatory eviction laws and the summary preliminary injunction procedure. Even if enacted, the procedure will be ineffective if tenants are unaware of their legal right to seek an injunction against landlords' retaliatory actions. Therefore, because many tenants appear pro se in summary eviction courts,[211] written instructions describing the elements they are required to prove should be provided to tenants filing a summary preliminary injunction action. While studies show that pro se tenants have difficulty presenting valid and successful defenses,[212] "there is a small but significant number of tenants who, as shown by [the] data, probably could have asserted effective habitability defenses had they known how to do so correctly before the eviction process was initiated."[213] The simple education of tenants regarding their rights, and what proof they would need to be successful in court, could significantly improve their ability to take advantage of the protections offered by retaliatory eviction laws in their jurisdictions.[214]

a) Notification and Education of Tenants

In order to effectively educate tenants about their rights, the statute or ordinance enabling the use of the summary preliminary injunction procedure should require that tenants be given a notification of rights prior to the instigation of the summary eviction process. There are two critical junctures at which such notification would be most effective for a tenant: either at the signing of the lease or upon the completion of a protected action.[215] The

210. NO TIME FOR JUSTICE, *supra* note 2, at 13; *see also supra* text accompanying notes 107-09.

211. *See* HALL, *supra* note 2, at 2; NO TIME FOR JUSTICE, *supra* note 2, at 15-16.

212. *See* NO TIME FOR JUSTICE, *supra* note 2, at 15-16.

213. *Id.* at 22.

214. *See id.* (noting that "[t]enant education could . . . have a profound impact on tenants' ability to participate as equals in the adversarial process"); *see also supra* text accompanying notes 113-14.

215. For a list of the most common tenant actions protected by anti-retaliation statutes, see *supra* notes 28-30 and accompanying text.

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relevant lawmaking body could adjust the precise method and contents of such notification as necessary to fit needs of the jurisdiction.

To mandate notification regarding the summary preliminary injunction procedure at signing, lawmakers would simply need to amend or modify the list of notifications that landlords are already required by law to provide in many jurisdictions. For example, the City of Chicago requires all landlords, upon the signing or renewal of a lease, to notify tenants of any code violations for which the rental unit has been cited within the preceding twelve months.[216] Illinois law also requires the landlord to notify prospective tenants of rental units built before 1978 regarding the health risks associated with lead exposure.[217] These statutes requiring health notifications upon the signing of a lease demonstrate how easily an additional mandatory notification of tenants' rights under anti-retaliatory eviction laws could be implemented.[218]

Mandatory notification immediately after a tenant has taken a protected action could be an even more effective procedure for ensuring tenants' rights. For example, the relevant statute or ordinance could mandate that the person

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216. CHI., ILL., MUN. CODE § 5-12-100 (1990).

217. *See* 410 ILL. COMP. STAT. ANN. 45/9.1 (West 2005) (requiring that "[b]efore entering into a residential lease agreement, all owners of residential buildings or dwelling units built before 1978 . . . give prospective lessees information on the potential health hazards posed by lead in residential dwellings by providing the prospective lessee with a copy of an informational brochure").

218. A more passive option is to require notification to the general public through the distribution of brochures in public venues, such as public transportation, libraries, courthouses, and schools. One study on the summary eviction process reported that advertising in public areas by "directing tenants to toll-free numbers or public service websites has been effective in the public health field," and concluded that similar public service advertising would likely prove effective if utilized in the field of landlord-tenant law. NO TIME FOR JUSTICE, *supra* note 2, at 23. The State of Illinois has for some time mandated a notification-by-uniform-brochure method in the Lead Poisoning Prevention Act, 410 ILL. COMP. STAT. ANN. 45/9.1, requiring landlords to provide tenants with "an informational brochure provided by the [state public health] Department."

In the retaliatory eviction context, the brochure, toll-free numbers, or public-service websites given to tenants would inform them of the law prohibiting retaliatory eviction, their right to either raise retaliatory eviction as a defense or bring a preliminary injunction action against a landlord's retaliatory eviction in summary eviction courts, and the evidence they are required to show to succeed in their claim. To ensure that the information provided to the public is uniform, effective, and comprehensive, the regulating government authority should compose this information and make it available to tenants.

Of course, the major drawback to this kind of general public notification is that it places the burden of obtaining or accessing the information on those who most need the information, many of whom may not frequent the places where the information is distributed. Mandatory notification at signing thus represents a better approach, especially in light of the minimal burden such mandate places on landlords.

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or entity who receives a tenant's complaint (whether a government agency or the landlord) provide the tenant with an informational brochure at the time of receiving such complaint; likewise, tenant organizations could provide such information to new members.[219] Because it creates a nexus between a tenant's actual conduct and notification of his rights, this kind of requirement would better guarantee that those tenants who are most likely to be victims of retaliatory action have pertinent information regarding their rights.

b) Mitigating the Intimidation Factor: Enabling Pro Se Tenants Through Procedural Accommodations and Courtroom Orientation

The procedural complexities of appearing in summary eviction court, whether as a plaintiff or defendant, can create an intimidating and frustrating experience for the pro se tenant.[220] To alleviate the intimidation factor, and to give the pro se tenant confidence to bring a summary preliminary injunction action in court, jurisdictions could provide clear procedures for filing the suit, along with easily accessible educational materials regarding trial procedure and evidentiary requirements.

First, jurisdictions could offer an easily accessible and efficient method for filing a summary preliminary injunction suit. Most jurisdictions with summary eviction procedures already offer the landlord an efficient and inexpensive method of filing an eviction proceeding.[221] Landlords, who themselves often appear pro se,[222] are easily able to file for summary eviction and can have their claims adjudicated within a matter of days.[223] The simple process provided for landlords could also be offered to tenants filing summary preliminary injunction proceedings. Courts have developed simple filing procedures in a variety of other contexts where plaintiffs are likely to appear pro se. For example, in many states the process of requesting a protective order to prevent domestic violence is intentionally efficient and simple, making it more accessible to pro se plaintiffs seeking physical protection.[224]

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219. Government agencies, landlords, and tenant organizations are the typical recipients of complaints protected by law. *See supra* notes 28-30 and accompanying text.

220. *See* NO TIME FOR JUSTICE, *supra* note 2, at 22.

221. *See* discussion *supra* Part II.B and text accompanying notes 202-04.

222. *See* NO TIME FOR JUSTICE, *supra* note 2, at 13; s*ee also* HALL, *supra* note 2, at 11-12.

223. *See supra* notes 25-26 and accompanying text.

224. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-15 (West 2009) (requiring use of application forms and describing the application process); CAL. FAM. CODE §§ 6222, 6226 (West 2004 & Supp. 2010) (providing that the application for a protective order can be filed without a filing fee and requiring the Judicial Council to "promulgate forms and instructions for applying for [protective] orders"). In Connecticut and California, as well as in other states with similar protective order legislation, informational brochures or websites are commonly available to aid the pro se applicant when filing a protective order. *See, e.g.,* Connecticut Network for Legal

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Courts can develop similarly efficient and simple methods for filing summary preliminary injunction lawsuits to empower pro se tenants seeking protection from retaliatory action by their landlords.

Another service that may mitigate the intimidation factor is the creation of easily accessible educational materials clearly describing trial procedures and evidentiary requirements. In addition to a government-issued brochure describing the tenants' rights and the evidentiary requirements at trial,[225] the state or pro bono legal services could create more detailed educational materials, such as a video, describing the process of the summary preliminary injunction and the evidentiary requirements. For example, the pro bono organization Illinois Legal Aid has produced a series of educational videos that are available to pro se parties on the internet free of charge.[226] One video, specifically describing actions in the summary eviction courts, details appropriate courtroom decorum, how to locate the courtroom, where to sit or stand, and when to present the appropriate evidence.[227]

A similar video produced for the purpose of educating pro se tenants on the summary preliminary injunction procedure could describe the four elements of evidence necessary to establish a prima facie case. For example, the video could inform the tenant of specific evidence that would likely fulfill the evidentiary requirements for each element. It could instruct the tenant to bring to court pictures of the substandard housing conditions, a record of complaints to a governmental agency, receipts proving timely payment of rent, and witnesses to testify to the landlord's threat of eviction, among other possible pieces of evidence. Additionally, the video might inform the tenant of the practicalities of courtroom procedure, such as when to present evidence and when the landlord has the opportunity to defend herself. Such a video, or any kind of detailed information provided to the tenant, could give a tenant the confidence to bring a suit pro se and increase the chances that the tenant will prevail.[228]

Aid, How to Ask for a Restraining Order, http://www.ctnla.org/how-to-ask-for-a-restraining-order (last visited Nov. 11, 2010); eHow, How to File a Restraining Order in California, http://www.ehow.com/how_4799421_file-restraining-order-california.html (last visited Nov. 11, 2010). In Connecticut, the forms required to file for a domestic violence restraining order are available online, *see* State of Connecticut Judicial Branch, Official Court Webforms, http://www.jud2.ct.gov/webforms/#FAMILY2 (last visited Nov. 11, 2010) (follow the "JD-FM-137" hyperlink and the "JD-FM-138" hyperlink) (providing .pdf copies of "Application For Relief From Abuse" and the supporting affidavit form).

225. *See* discussion *supra* Part VI.B.2.a and note 218.

226. *E.g.*, Going to Daley Center Eviction Court (Illinois Legal Aid 2007), http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=5552.

227. *See id.*

228. *See* NO TIME FOR JUSTICE, *supra* note 2, at 22; *see also* discussion *supra* Part V.

c) Effect of the Preliminary Summary Eviction Procedure on Tenants with Representation

Even though the majority of tenants appear pro se in summary eviction courts, studies show that a small percentage of them retain lawyers for representation.[229] A study of Chicago summary eviction courts demonstrated that the tenants who were taken to court in eviction actions brought by their landlords typically lost, whether or not they had retained legal representation.[230] This reveals an overall bias in favor of landlords in summary eviction proceedings, which even the representation of a capable lawyer cannot effectively combat.[231] Thus, allowing a tenant to bring an efficient protective action against imminent retaliatory eviction by a landlord *before* encountering the bias inherent in the summary eviction process may aid not only pro se tenants but those with legal representation as well. The summary preliminary injunction proceeding would undoubtedly impose a significant evidentiary burden on the tenant, especially the pro se tenant. Nevertheless, evidence shows that this burden would not be insurmountable if the tenant is properly educated or has legal representation. The evidentiary burden would be considerably less daunting for the tenant with legal counsel, and that tenant would therefore have a good chance of prevailing on the merits if his claim of retaliatory eviction was meritorious. Therefore, vulnerable tenants, whether proceeding pro se or with representation, could successfully use the summary preliminary injunction to protect their homes.

C. Fulfilling the Policies Underlying Retaliatory Eviction Law

The opening of summary eviction courts to preliminary injunction actions brought by tenants with legitimate fears of retaliatory conduct would further the foundational public policies of retaliatory eviction law.[232]

First, preliminary injunction actions would fulfill the public policy of improving public housing in two major ways. One, the increased protection offered to tenants, through their ability to bring a preliminary injunction action

229. *See, e.g.*, HALL, *supra* note 2, at 9-11; NO TIME FOR JUSTICE, *supra* note 2, at 13; *see also supra* text accompanying notes 107-09.

230. *See* NO TIME FOR JUSTICE, *supra* note 2, at 16-18. This fact has engendered some debate over what difference, if any, legal representation for the tenant makes for the general outcome of the case. *Compare id.* at 17 (finding no indication that represented tenants' cases were less likely to result in eviction than pro se tenants' cases, though often the final eviction was delayed longer if the tenant had representation), *with* HALL, *supra* note 2, at 2, 11-13 (noting that tenants' odds of prevailing increase with representation).

231. *See* NO TIME FOR JUSTICE, *supra* note 2, at 17-18, 20-21.

232. *See* discussion *supra* Part III.C.

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to protect their interest in security of tenure, would encourage more widespread reporting of housing, sanitary, and health code violations. Two, the tenant's ability to bring an efficient and low-cost preliminary injunction action would also dissuade retaliatory-minded landlords from making threats of eviction as a means of tenant control, because such threats could later serve as evidence upon which the preliminary injunction against eviction could be granted. So if the procedure discouraged landlord threats and facilitated better enforcement of legal protections for tenant complaints, greater overall compliance with applicable housing, sanitary, and health codes would seem to naturally result. This dynamic would promote the upkeep of decent housing for low-income tenants.

Second, summary preliminary injunction action would serve the policy of social stability. Not only would tenants be able to take action toward improvement of their living conditions, but they would be better able to protect their interest in remaining in their homes, with all the benefits security of tenure brings. The procedure would therefore avoid many of the negative social effects triggered by involuntary displacement, such as educational problems, loss of employment, unnecessary economic loss, and homelessness.

Third, the costs of eviction that accrue to the government would decrease in proportion to the number of wrongful evictions that would be avoided each year. Though governmental entities would still bear the financial burden resulting from the effects of rightful evictions, the summary preliminary injunction procedure would necessarily reduce the overall number of evictions. For every tenant able to remain in his home as a result of an injunction against his landlord's retaliatory action, the government would save the post-eviction clean-up or housing costs that it would otherwise incur if the tenant had been wrongfully evicted.[233]

VII. Responses to Arguments Against the Introduction of the Summary Preliminary Injunction Procedure

A. Effect on the Overloaded Dockets of Summary Eviction Courts

Opponents of the proposed summary preliminary injunction procedure may claim that its introduction would put greater stress on the already overcrowded summary eviction court dockets, thus even further diminishing a tenant's ability to represent himself.[234] But careful analysis reveals at least two reasons why the proposed procedure is likely to have little impact on the actual number of cases adjudicated in summary eviction courts. First, the likelihood of

233. *See supra* note 77 and accompanying text.

234. *See supra* text accompanying notes 115-16.

frequent resort to the summary preliminary injunction procedure is minimized by the limited conditions under which the action could be brought—namely, either actual threats of retaliatory eviction or good cause to believe that the tenant will suffer a retaliatory eviction in response to an action protected by retaliatory eviction laws.[235] Second, if the tenant is successful in his preliminary injunction claim because of probable retaliatory eviction, that case is likely to replace the eviction action that the landlord might have otherwise intended or threatened to file. Similarly, if the tenant loses his preliminary injunction action, it is likely because the landlord has evidence of her good cause for eviction and therefore could win on a counterclaim for eviction brought in the same hearing.

Moreover, even in the unlikely event that the addition of the summary preliminary injunction procedure were to put greater pressure on eviction court dockets, the overall increase in fairness to tenants would outweigh any minor loss of efficiency that the procedure might cause. Regardless of the time constraints placed on summary eviction courts, tenants' cases should be heard. Summary eviction courts provide a venue for landlords to get an efficient adjudication of their rights,[236] and tenants should be afforded the same opportunity when circumstances warrant their protection. Further, tenants' ability to protect their rights proactively in summary eviction courts effectuates the policies underlying anti-retaliatory eviction laws.[237] And the narrow scope of the procedure will prevent any dramatic influx of cases, thus preserving the intended efficiency of summary eviction courts. These considerations point to the conclusion that the public interest in protecting tenants' rights and enforcing anti-retaliatory eviction laws significantly outweighs the minimal loss of efficiency that the summary preliminary injunction procedure *might* cause.

B. Potential for Tenant Abuse

Opponents of the summary preliminary injunction procedure may also claim that tenants would abuse the procedure by instigating a summary preliminary injunction action for the purpose of delaying a proper eviction. The opponents may cite studies such as one California study that claimed that the vast majority of tenant-defendants in summary eviction procedures only contest

235. *See* discussion *supra* Part VI.A.2.
236. *See* discussion *supra* Part II.A.
237. *See* discussion *supra* Part VI.C.

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their cases as a means of delaying eviction.[238] This study, however, failed to provide any statistical evidence to support its claim.[239]

Moreover, contesting a landlord's summary eviction claim and affirmatively seeking injunctive relief are two very different postures. In the former, tenants have already involuntarily been made a party to an eviction claim against them and therefore have little to lose by contesting the eviction, which may buy a few days or weeks for a tenant to locate a new apartment. By contrast, tenants contemplating an action for summary preliminary injunction have greater incentive to proceed cautiously. First, the tenant might face having to pay the court costs and his attorneys' fees if he loses the case.[240] Such costs can be a serious consideration for a low-income tenant. Second, if the tenant's purpose is to delay his proper eviction, he is in no way guaranteed that a summary preliminary injunction suit will accomplish this. In fact, he may inadvertently accelerate his eviction. For example, if a tenant who has no evidence to support a claim of retaliatory eviction files a claim for a summary preliminary injunction, the landlord with good cause to evict is likely to appear at trial, counterclaim for eviction, and in turn receive a writ of possession. Thus, the tenant may bring the landlord into court with a summary preliminary injunction claim before the landlord has a chance to bring the tenant into court under an FED claim.

Moreover, even if some tenants do use the summary preliminary injunction procedure as a means of delay, this tactic would impose only a minor inconvenience on landlords. Tenants using the procedure purely as a delay tactic are unlikely to have sufficient evidence to meet the detailed elements necessary to make out a prima facie case.[241] The tenant's case would then fail, and the landlord would be left with two rather positive outcomes. First, if the landlord did not file a counterclaim for eviction, the efficiency of the summary eviction courts would virtually ensure dismissal within a matter of days or weeks, and the landlord would only have lost the time required to appear in court. Second, if the landlord filed a counterclaim for eviction and prevailed, she would receive a writ of possession earlier than anticipated. Therefore, the summary preliminary injunction procedure is unlikely to be abused by tenants

238. CAL. APARTMENT LAW INFO. FOUND., UNLAWFUL DETAINER STUDY 1991 (1991), *cited in* Gerchick, *supra* note 8, at 794.

239. Gerchick, *supra* note 8, at 794 n.126.

240. *See* discussion *supra* Part VI.B.1. Filing a frivolous case as a means of delay could also form the basis for sanctions analogous to those possible under federal Rule 11. *See* FED. R. CIV. P. 11(b)(1)-(2), (c).

241. Recall that one reason for making the tenant's prima facie case detailed and difficult to prove is to deter abuse by tenants and to protect landlords from being unnecessarily drawn into court. *See* discussion *supra* Part VI.A.2.

seeking to delay their proper evictions and would impose no great burden on landlords even if used unwisely as a delay tactic.

VIII. Conclusion

The summary eviction courts were created to preserve the interests of both landlords and tenants; however, the daily operation of these courts provides little protection to tenants who are the potential victims of retaliatory evictions. These are tenants who in good faith have sought to improve their living conditions through reasonable and protected methods, and as a result are suffering from legitimate fears of a landlord's impending retaliatory action. Such tenants deserve the ability to bring a summary preliminary injunction action in the efficient and accessible summary eviction courts. Allowing tenants to bring such actions would relieve much of the fear and intimidation many tenants face and would promote the important policies underlying retaliatory eviction law, while not overburdening landlords. Summary eviction courts should be opened to plaintiff-tenants to provide them greater protections against retaliatory eviction.

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