SECURITY OF TENURE FOR THE RESIDENTIAL TENANT: AN ANALYSIS AND RECOMMENDATIONS

INTRODUCTION

The central goal of our nation's housing policy is to provide "a decent home and a suitable living environment for every American family."[1] This Note explores the struggle to provide residential tenants with such a home. The law of landlord and tenant reflects a choice between the freedom of the landlord to do whatever she wants with her property and the security of the tenant who has relied on access to the landlord's property in the past or who has relied on the continuation of the relationship.[2] Tenants may see their homes as a basic survival need, an expression of personhood, status, and a place of security, domesticity, and privacy.[3] Landlords may see their rental properties as a means to benefit society by providing others with homes, a source of economic security, and as future homes for themselves and their families. Oliver Wendell Holmes wrote, "[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[4] Landlords and tenants alike are subject to this instinct.

During the last fifty years the law of landlord and tenant underwent what some commentators term a "revolution" and others a "culmination . . . of certain long-standing trends."[5] Accompanying this change was the rejection of the common law "no repair" rule absolving the landlord from maintaining the physical condition of the rented property.[6] To a lesser degree, the change also was accompanied by the introduction of a principle which recognized the tenant's presumptive right to continue in possession,[7] rejecting the traditional common law rule that a landlord may refuse to

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1. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 43 (codified as amended at 42 U.S.C. § 1441 (1994)).

2. *See* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614, 623 (1988).

3. *See* Lawrence B. Simons, *Overview: Housing Options for the 1990s, Toward a New National Housing Policy*, 6 YALE L. & POL'Y REV. 259, 259 (1988).

4. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

5. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504 (1982).

6. *See infra* note 122 and accompanying text.

7. *See* Glendon, *supra* note 5, at 542.

renew a lease for any reason or no reason at the end of the lease period.[8]

This Note traces the historical development of this principle, often termed "security of tenure," and questions the reasons why modern courts and legislative bodies generally recognize this principle to a lesser degree and more indirectly than rules requiring the landlord to maintain the physical condition of the rental property. Methods by which security of tenure is being, or could be, provided to tenants are categorized according to the legal obligations of the parties from which these methods derive. These methods are analyzed to determine whether they may be applied reasonably and fairly to the law of landlord and tenant. Finally, suggestions are offered which may be adopted to provide tenants with greater security of tenure.

I. THE MODERN LEASE: A MARBLED COMPOSITE OF PROPERTY AND CONTRACT

"A *tenant* is one who holds a possessory estate in land for a determinate period or at will by permission of another, the landlord, who holds an estate of larger duration . . . ."[9] The lease embodies this relationship between landlord and tenant. The modern lease is a marbled composite of property and contract. In property it is a hybrid of personal and real property, a "chattel real," and in contract it is a bilateral contract descended from independent covenants.[10] The lease is a contractual instrument which conveys property, an "estate," for a period of time, a "term," which signifies not only the limitation of time, but the estate and interest that pass for such time.[11] Obviously, the nature of the lease contract is complex, raising the need for definitional guidelines of contract and property in order to understand how legal obligations arise under the lease and how property rights are divided between the parties.

First, what is contract? A contract may be defined as "a promise or set of promises for the breach of which the law gives a remedy, or the

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8. One commentator terms this as a "termination or nonrenewal without cause" common law rule which provides that "a property owner is free to refuse to enter into, or to continue, a landlord-tenant relationship for any reason or no reason." Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 713 (1994).

9. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 6.1 at 249 (2d ed. 1993) (emphasis added).

10. *See* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1:1 (1980 & Supp. 1995); Glendon, *supra* note 5, at 505.

11. *See* JOHN N. TAYLOR, A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT 4 (R.H. Helmholz & Bernard D. Reams, Jr. eds., William S. Hein & Co. 1981) (1844).

performance of which the law in some way recognizes a duty."[12] The free market model of contracting, based upon the social contract theory of Hobbes and Locke, assumes that legal obligations arising under contracts have two main sources: "the unilateral imposition of a duty by the state . . . and the articulated agreement in full conformity to the established procedures for contracting."[13] This paradigm therefore understands individuals to be connected to each other legally through either the universal community of the state or through private agreements.[14] These duties usually are imposed by the state through the legislature and courts, and are based upon notions of public policy, while private agreements are based upon promises of the parties expressly made through the agreement itself.

A third, "more fluid,"[15] source of legal obligations under this theory of contract includes "relations of interdependence, as either an uncertain penumbra of the articulated agreement or an equitable qualification to the basic principles of the law."[16] Obligations such as promises implied in fact, the doctrine of equitable estoppel, the implied warranty of habitability, and the implied covenant of good faith and fair dealing derive from this source. This third source of legal obligations may arise from the promises of the parties made at the formation of the contract. Obligations under the third source also may arise from duties imposed through the courts based on equity or derived from legislative public policy.

Professor Joseph William Singer identifies a fourth source of such obligations which arises not from any express or implied promise of the parties or state-imposed duty, but which emerges over time[17] from the

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12. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1977).

13. Singer, *supra* note 2, at 653 (quoting ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 81 (1986)). Singer explains that the social contract theory pictures the world as made up of autonomous individuals. *See id.* at 652. These individuals are understood as fundamentally separate from each other; they are alone in the world. *See id.* They are basically self-interested, and their interests conflict. *See id.* To protect themselves from each other, they band together to form the state. *See id.* Once this system is set up, obligations have two main sources: commands of the state and voluntary agreements. *See id.* Initially, the state allocates property rights and determines how they may be otherwise acquired. *See id.* It also defines legally protected personal interests of security through tort law. *See id.* After this initial definition and allocation of entitlements, individuals exercise their property rights or rights of personal freedom, limited only by the duty not to infringe on someone else's rights. *See id.* Any further obligations are voluntarily assumed by agreement. *See id.*

14. *See id.* at 652-53.

15. *Id.* at 653.

16. *Id.* at 653-54 (quoting ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 80-81 (1986)).

17. *See id.* at 653.

parties' reliance on the ongoing relationship within the common enterprise.[18]

> [This concept] implies that obligations do arise primarily from relationships of mutual dependence that have been only incompletely shaped by government-imposed duties or explicit and perfected bargains. The situations in which either of these shaping factors operates alone to generate obligations are, on this alternative view, merely the extremes of a spectrum. Toward the center of this spectrum, deliberate agreement and state-made or state-recognized duties become less important, though they never disappear entirely. The closer a situation is to the center, the more clearly do rights acquire a two-staged definition: the initial, tentative definition of any entitlement must now be completed. Here the boundaries are drawn and redrawn in context according to judgments of both the expectations generated by interdependence and the impact that a particular exercise of a right might have upon other parties to the relation or upon the relation itself.[19]

Professor Singer's concept of contract obligations, termed "the social relations approach,"[20] is a counter-vision to the sources of contract obligation present in the free market model.[21] By assuming "that there is a basic connectedness between people instead of assuming that autonomy is the prior and essential dimension of personhood,"[22] contract obligations can be seen to grow from the cultivation of this connectedness. "[T]he slender tie of the initial contract is overgrown by a network of tissue, nerves and tendons, as it were, which gives the relation its significance."[23] The methods discussed in this Note by which security of tenure is being, or may be, provided to tenants will be grouped according to these four categories of legal obligations.

Professor Felix Cohen described the nature of property as being "[a thing] to which the following label can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."[24]

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18. *See id.* at 657.

19. ROBERTO MANGABEIRA UNGER, THE CRITICAL STUDIES LEGAL MOVEMENT 81 (1983).

20. Singer, *supra* note 2, at 655.

21. *See id.* at 654 (quoting UNGER, *supra* note 19, at 81).

22. Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 127 (1987).

23. Leon Green, *The Case for the Sit-Down Strike*, 90 THE NEW REPUBLIC 199 (1937).

24. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

In other words, "private" property is the norm.[25] This model of property has several features. First, it seeks to identify a single owner of all valued resources and to give that owner the power to control those resources to the exclusion of others.[26] Second, to promote a policy of autonomy and self reliance, the free use of property by the owner is generally favored.[27] Owners are usually permitted to do anything they wish with their property, including destroying it, even if doing so interferes with the interests of others.[28] Third, in order to promote the policy of free alienability of property in competitive markets, property owners have the legal power to transfer or share their property as they wish and are immune from having their property interests transferred to others against their will.[29] Finally, the state usually allows individuals to make agreements regarding access to property or exchange of entitlements and will enforce those agreements in accordance with their terms.[30]

Without the endorsement of the state, however, there is no enforceable "private" interest in property. Around property's core of possessive individualism there exists a periphery of altruistic obligations imposed by the state which may control, although these obligations are traditionally dormant and supplementary under the free market model.[31] Nonetheless the state, as ultimate landlord, regulates the flow in the conduits that connect each party to the land and to the other party. In recent years, the state regulated this flow more stringently in the area of landlord and tenant law, shifting the residential landlord and tenant relationship from the domain of private towards that of public law.[32] The

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25. Professor Cunningham lists five theories which are advanced as justifications for the institution of "private" property:

> (1) the "occupation" theory—that the simple fact of occupation or possession of a thing justifies legal protection of the occupier's or possessor's claim to the thing; (2) the "labor" theory—that a person has a moral right to the ownership and control of things he produces or acquires through his or her labor; (3) the "contract" theory-that "private" property is the result of a contract between individuals and the community; (4) the "natural rights" theory—that the "natural law" dictates the recognition of "private" property; and (5) the "social utility" theory—that the law should promote the maximum fulfillment of human needs and aspirations, and that legal protection of "private" property does, in fact promote such fulfillment.

CUNNINGHAM, *supra* note 9, § 1.1 at 2.

26. *See* Singer, *supra* note 2, at 634; *see also* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1189 n.1 (1985).

27. *See* Singer, *supra* note 2, at 634.

28. *See id.*

29. *See id.* at 635.

30. *See id.*

31. *See id.* at 634-35.

32. *See* Glendon, *supra* note 5, at 552.

landlord's "private" rental property now often is treated as public property.[33] Landlord and tenant law, unlike most other areas of property law, embodies a relatively more balanced contest between "private" notions of property and the altruistic rules which require citizens to look out for the interests of others with whom they establish relations of mutual dependence.[34] Legal obligations under the lease now often are duties unilaterally imposed by the state, causing some commentators to question whether the law of landlord and tenant is reverting to status, where the provisions of a regulating statute are nondisclaimable by the parties.[35] To better understand the reasons behind this movement in the landlord and tenant law and to assess whether it might result in fairer laws and a "decent" home for the tenant, it is helpful to place the historical evolution of the leasehold estate in the context of the development of our system of property.

II. "FROM STATUS TO CONTRACT TO PROPERTY TO MODERN CONTRACT"[36] TO PUBLIC REGULATION: THE EVOLUTION OF THE MODERN LEASEHOLD

In 1961, Dean Lesar stated that "[h]istorically, the landlord-tenant relation has moved from status to contract to property to modern contract."[37] This movement relates to the development of our system of regulating property, which descended from the feudal system instituted in England by William the Conqueror following the Battle of Hastings in 1066.[38] William retained part of the English lands as his own demesne, and out of the rest made large grants of land, called fees, to the principal

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33. *See, e.g.*, Lawrence Berger, *The New Residential Tenancy Law—Are Landlords Public Utilities?*, 60 NEB. L. REV. 707 (1981) (exploring the idea that current landlord-tenant law regulates residential landlords much as it does public utilities).

34. This conflict between individual and collective goals in the area of landlord and tenant law is parallelled in the laws of tort and contract:

> Torts is characterized by a contest between the relatively more individualistic negligence principle and the relatively more altruistic strict liability principle. Contracts is characterized by a contest between the individualistic assent principle and the altruistic principles of reliance, good faith, unconscionability, and remedies for unjust results of unequal bargaining power.

Singer, *supra* note 2, at 636.

35. *See* Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 375 (1961); Singer, *supra* note 2, at 683 n.244. For further discussion of the status relationship between landlord and tenant see Part II of this Note.

36. Lesar, *supra* note 35, at 377.

37. *Id.*

38. *See* HENRY C. DEANE, AN EPITOME OF THE LAW OF CORPOREAL HEREDITAMENTS AND CONVEYANCING 7 (1875).

chieftains, or barons, who accompanied him from Normandy.[39] The fee was conferred for life to the baron, and descended to his issue after his death.[40] Ultimate ownership, however, remained with the king, or lord, and his successors.[41] Each estate granted to a baron, and its adjoining lands, was called a manor.[42] The baron, in turn, divided his manor into two parts, reserving half for his own demesne, and distributing the other half in fees to his vassals.[43]

"All fees granted at the Conquest, whether to the barons, or by them to their vassals, were held by the tenure of Knight Service."[44] Because this tenure was conditioned upon the performance of military service when required, it was considered the most honorable form of tenure.[45] This was a "free" tenure, meaning that the services to be rendered in return for the fee were worthy of being performed by a free man.[46] In addition to Knight Service, which William and the Normans brought with them from France, Socage tenure, which was recognized in England by the Saxons before the Conquest, came to be recognized under the new system.[47] Among the conquered Saxons were a group of middle class landowners, or coerls, who did not take part in the struggle between William and Harold.[48] They were allowed to keep their lands following the conquest, but:

> after a time, when a strong personal hatred had sprung up between the Saxons and Normans, the lands of all the coerls were comprised indiscriminately in the grants made by the king. The Saxons, therefore, complained to William, who, after consulting his barons, decided that what the coerls could obtain of their [Norman] lords should be their own by inviolable right.[49]

Thus, Socage, being based on "inviolable right," was, like Knight Service, a free tenure.[50] The Norman lords were not disposed to give up part of their newly acquired lands without some consideration, and so the Saxons

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39. *See id.*
40. *See id.* at 6.
41. *See id.*
42. *See id.* at 7.
43. *See id* at 7-8.
44. *Id.* at 8.
45. *See id.*
46. *See id.*
47. *See id.* at 9-10.
48. *See id* at 9.
49. *Id.*
50. *See id.*

held their fees on the terms of paying rent or rendering services.[51] Rent could be paid in either money or kind, and the services rendered usually consisted of assisting the lord in cultivating his demesne.[52] The Socage tenant, because his services were worthy of being performed by a free man, was secure in his tenancy as long as he performed these conditions, although his tenure was less highly esteemed than that of tenure by Knight Service.[53] By the time of the reign of Edward the First, the Socage tenure likely was held by both Saxons and Normans as a result of the increasing settlement of the kingdom and the increase in trade.[54]

A third form of tenure, Villein, arose among the serfs, or slaves, "who were either the descendants of the ancient Celtic population, or else Saxons who, through extreme poverty, or the commission of some crime, had fallen into a state of slavery."[55] The Villein tenant was employed cultivating the lord's demesne lands, and was in turn allotted a small plot of ground from which to extract subsistence.[56] Villein tenants were themselves the property of their lord.[57] Unlike Socage and Knight Service, the Villein tenant held his lands entirely at the will of the lord, similar in this sense to the modern-day tenant at will.[58] Moreover, the Villein tenant was unable to quit the manor without the lord's permission.[59]

The status phase of landlord and tenant law referred to by Dean Lesar was the original nonfreehold tenure of the Villein tenant immediately

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51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at 10-11.

55. *Id.* at 13.

56. *See id.*

57. *See id.* at 14.

58. *See* Lesar, *supra* note 35, at 367.

59. *See* DEANE, *supra* note 38, at 14. Deane further relates that:

> There was also another variety of Socage tenure [called Villein Socage] which deserves mention. We learn from Bracton that there were in his time (about 1285) on the king's demesne, in addition to serfs, free men (probably of the lowest class amongst the Saxons), who had formerly held their lands by services free and certain, and that after the Conquest these received their holdings back again to hold in villeinage (that is, by Villein tenure) on condition of performing services base, but freely performed and certain. "These indeed," he says, "are said to be bound to the soil, but they are none the less free, and although they may do base services, they do them, not by reason of their personal condition, but by reason of their tenure; and they are said to be bound to the soil because they enjoy the privilege that they cannot be removed so long as they perform their due services; nor can they be compelled to remain unless they choose. And to these no deeds" (showing title to their lands) "are given; but if wrongfully dispossessed of their lands they can be restored, because they can show that they knew the certainty of their services and works by the year."

Id. (footnote omitted).

following the Norman Conquest.[60] During this stage of the evolution of the leasehold estate, the tenant held at the will of the lord upon the performance of services as directed by the lord.[61] Unlike the free tenant, who performed only the particular service his tenure required, the unfree Villein tenant performed whatever task the landlord set for him that day.[62] The Villein tenant's lot was largely that of the common laborer.[63] "In theory, the Villein tenant held at the will of the lord with no right to alienate and with no right to pass the land on to his heirs."[64] In sum, the landlord was not obliged legally to provide his tenants with anything, including a home.

"Customs of the manor" arose, however, which provided the Villein tenant with some security of tenure.[65] Under this law in the manor court, the Villein tenants did not lose their land unless they acted in a manner which merited forfeiture.[66] The interest of the Villein tenant was protected in the manorial courts but was not recognized by the common law courts.[67] By the end of the fifteenth century, the common law courts adopted the "customs of the manor" and "were ready to come to the assistance of any tenant ejected by his lord other than in accordance with the custom of the manor, and tenure in villeinage, its right and obligations now defined by the manor records, came to be known as Copyhold tenure."[68]

The initial contract phase of the landlord and tenant relation resulted from the emergence of an estate for a fixed term. The fixed term of years developed in response to a labor shortage and changing social conditions, allowing the Villein tenant to leave the manor to become a "rent-paying, wage-earning tenant."[69] This fixed term was used as a device to circumvent the Church's prohibition on usury.[70] Moreover, a labor shortage resulted from the Black Death of 1348 and 1361, enabling agricultural tenants to exact definite terms regarding the type of services

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60. *See* Lesar, *supra* note 35, at 367.

61. *See* SCHOSHINSKI, *supra* note 10, § 1:1 n.2.

62. *See* Lesar, *supra* note 35, at 367.

63. *See id.*

64. *Id.*

65. *Id.*

66. *See id.*

67. *See id.*

68. *Id.* at 367-70 "[T]hus [the Copyhold tenants'] position was made much the same as that of the tenants by Villein Socage: The various services which they were bound to render being, as a rule, gradually converted into fixed money payments." DEANE, *supra* note 38, at 22.

69. Lesar, *supra* note 35, at 370 (quoting MEGARRY & WADE, REAL PROPERTY 25 (1957)).

70. *See* SCHOSHINSKI, *supra* note 10, § 1:1.

and duration of their holding through the husbandry lease.[71] This commercial term of years eventually displaced villeinage.[72]

While the Villein tenant still technically was unfree, "[t]he clergy of that day lost no opportunity of impressing upon the lords the sinfulness of keeping their Christian brethren in bondage, whilst the courts were quick to construe any dealings between the lord and his villein as the manumission of the latter."[73] This system "allow[ed] persons of inferior degree to cultivate lands belonging to the lords on condition of accounting for the produce, out of which they received a certain allowance for themselves."[74] Rights under the lease were more contractual than proprietary since the purpose of the lease itself did not concern subsistence or shelter.[75] The Villein tenant became an itinerant farmer who leased land for commercial, rather than residential, purposes. The lease became "a common part of the machinery whereby land was gaged for money lent."[76] The landlord's obligations under the lease were solely of a commercial nature. The freehold estates, meanwhile, "normally served as the continuing economic basis of the family."[77]

In this phase of the law, however, the tenant was without possessory remedies, and his rights could be vindicated only through an *in personam* action of covenant to recover damages.[78] Unlike the Villein tenant who remained on the manor with his new Copyhold status, the tenant for years was unprotected by "customs of the manor," and therefore was not secure in his tenancy at the end of the lease period.[79]

The landlord and tenant relationship entered the Property stage of its evolution at the end of the fifteenth century upon the full development of

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71. *See id.*

72. *See* Lesar, *supra* note 35, at 371.

73. DEANE, *supra* note 38, at 20.

74. *Id.* at 30.

75. *See* Glendon, *supra* note 5, at 505.

76. *Id.* at 506 (quoting 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 36, 112 (2d ed. 1923)).

77. *Id.*

78. *See* Lesar, *supra* note 35, at 370. Dean Lesar explains why the tenant was without possessory remedies:

> Whether because of this commercial character of the ordinary lease for years or because of a matter of legal theory—that the lessee had possession but not seisin—is not clear, but the lessee was denied the benefit of the real actions in the king's courts. He could defend his possession and recover it or damages from his lessor in an action of covenant, and in 1235 he was given an action to recover possession against an ejector who had purchased from his lessor.

Id.

79. *Id.* at 369.

the action of ejectment, which provided the tenant for years with a complete possessory remedy to protect his holding.[80] "Once the tenant for years had secured the benefit of ejectment, his position was as good as that of the owner of any estate in land."[81] The custom of letting lands became general, and a tenancy for a fixed term ceased to imply the superiority on the part of the person who let the land over the person to whom it was let.[82] The lessees consequently arrived at a more independent position, paying a fixed rent for their lands, and, provided they did this, also complied with any other conditions on which they held, were entitled to undisturbed possession during their term.[83]

Although the leasehold was classified as personal property because only a personal action was available to redress violations of the tenants' possessory rights, the leasehold gained parity with the freehold estates through the development of the action of ejectment which allowed an ousted tenant to recover possession of the leased premises.[84] Providing the tenant with a possessory remedy to protect his interests served a valuable governmental purpose, since "the landlords, without a labor-service system, tended to convert arable land to pasture, a practice the government desired to end."[85]

Reflecting this reclassification of the lease, Blackstone grouped the leasehold estate ("estates less than freehold") with freehold estates in real property, rather than with personal property or contracts.[86] The lessee became a true owner of an estate in land known as a "chattel real."[87] The leasehold was treated as real property, constituting a purchase by the tenant of the right to possess land for a certain period of time.[88] Since the estate

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80. *See id.* at 370-71.

81. *Id.*

82. *See* DEANE, *supra* note 38, at 30.

83. *See id.*

84. *See* SCHOSHINSKI, *supra* note 10, § 1:2.

85. Lesar, *supra* note 35, at 370. Professor Deane offers another explanation, stating that a complete possessory remedy was necessary to protect the lessee from fraudulent action by the lessor, where the lessor would conspire with another person claiming title paramount to the lessor:

> For then the lessee could indeed bring an action against his lessor for not securing him undisturbed possession of the land, but could not recover the land itself. This was made a means of defrauding the tenant, for a lessor who wished to put an end to a lease, would get some friendly plaintiff to bring a preconcerted action against him for the land, which he would take care not to defend; judgment would accordingly be given against him, and the plaintiff could then proceed to eject the lessee.

DEANE, *supra* note 38, at 30-31.

86. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 (Garland Publishing, Inc. 1978) (1783).

87. SCHOSHINSKI, *supra* note 10, § 1:2.

88. *See* Glendon, *supra* note 5, at 506.

for years by definition terminated at the end of the lease period, the lessee enjoyed no security of tenure beyond the lease period, and thus the common law rule developed which allowed the landlord to repossess at the end of the lease period for any reason or no reason. This property theory of the leasehold endured until the Industrial Revolution.[89]

"The discovery of America conferred upon the government by whose authority such discovery was made, the ultimate dominion of the soil, with the right of granting title thereto, subject only to the Indian right of occupancy."[90] The burdens of the feudal tenures did not cross the Atlantic to America. The colonists, who received royal patents to occupy their chartered domains (demesne), held their lands "in free and pure *allodium*."[91] The concept of land division behind the feudal system, however, did cross the ocean. The American Revolution transferred ultimate dominion from the crown to the people, and the "lord" of the manor became the people of the State in which such land was situated.[92] All titles to land in America, therefore, derive either from grants from the states following the Revolution or royal grants from chartered governments prior to the Revolution.[93] The modern lease derives from the subdivision of the royal grants.[94]

Because these grants were so large, they were of little use *in toto* to their original proprietors.[95] They also were potentially dangerous to the states, because vast areas of land were left unpopulated and difficult to police.[96] By subdividing these lands, the citizenry benefited from both increased security and greater economic activity.[97] The tenants on these quasi-manors usually held at will, like the Villein tenant, and paid rent in kind or by rendering services in the landlord's family.[98]

As agriculture improved and monetary wealth increased, this rent system became burdensome to the landlord, who discovered that the produce of these large estates could be disposed of more conveniently by the tenants who raised it.[99] Instead of paying rent in kind, tenants paid in

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89. *See* Lesar, *supra* note 35, at 372-73.

90. TAYLOR, *supra* note 11, § 1, at 2 (footnote omitted).

91. *Id.* "Allodial" lands are free lands, held in absolute ownership, for which no rents, fines, or services are due. THE OXFORD ENGLISH DICTIONARY 340 (2d ed. 1989).

92. *See* TAYLOR, *supra* note 11, § 1, at 2.

93. *See id.*

94. *See id.*

95. *See* TAYLOR, *supra* note 11, at 2.

96. *Id.*

97. *See id.* § 1, at 2-3.

98. *See id.* § 1, at 3.

99. *See id.*

services and money.[100] Finally, the tenant at will was granted a lease for a fixed period of time because it was discovered that farms were better cultivated when the tenant enjoyed greater security of tenure.[101] Thus, the landlord's legal obligations under the lease were related to ensuring that the landlord and tenant relationship would be commercially profitable; the landlord was not called upon to provide the tenant with a decent home.

During the eighteenth century, three types of leasehold estates were recognized. The *estate for years* is an estate of fixed duration, the certainty of the duration being its essential characteristic.[102] This estate remains the same today.[103] The exact maximum duration must be certain or reducible to certainty when the tenancy begins.[104] "When the lease fails to create a tenancy for years because of indefiniteness, but possession is taken by the lessee, the traditional approach has been to find a tenancy at will, a periodic tenancy, or, where the intentions of the parties are clear, a defeasible fee simple or a life estate."[105] A *tenancy at will* at common law was a tenancy which could be terminated by either party at any time without formal notice.[106] "Since the existence of the estate requires the continuing will of both parties, it terminates upon the death or incapacity of either or upon transfer of either party's interest."[107] A *tenancy at sufferance* was, and still is, not a true estate. It is wrongful occupancy by one who lawfully gained possession of the premises and retained it after the right to possess the land ceased.[108]

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100. *See id.*

101. *See id.* Professor Bell elaborates:

> [I]t appears that the common law courts created the periodic tenancy estate to protect agricultural tenants from the harsh effects of termination under the tenancy at will. According to Tiffany, at one time farmers under tenancies at will could be removed without notice even after planting their yearly crops. In order to protect the tenant's reasonable expectation of security of tenure for at least a brief period, the yearly periodic tenancy was developed by the courts. Similarly, once the periodic tenancy was established, the common law began to require that the tenancy could only be terminated by giving notice a specified time in advance of leasehold termination.

Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 531-32 (1985) (footnotes omitted) (citing HERBERT THORNDIKE TIFFANY, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 14, at 121 (1912).

102. *See* BLACKSTONE, *supra* note 86, at 140.

103. *See* SCHOSHINSKI, *supra* note 10, § 2:3.

104. *See id.*

105. *Id.* § 2:7 (footnotes omitted).

106. *See* BLACKSTONE, *supra* note 86, at 145.

107. *See* SCHOSHINSKI, *supra* note 10, § 2:16.

108. *See* BLACKSTONE, *supra* note 86, at 150; SCHOSHINSKI, *supra* note 10, § 2:20.

The common law which governed the lease during this stage remained relatively unchanged from the sixteenth century and into the twentieth century, directed by two influences. First, most of the leases in the period when the rules of landlord and tenant law were being formed were of agricultural land.[109] Second, because the lease was based primarily on notions of property, transferring an interest in land, a landlord could refuse to renew a tenancy for a term of years or terminate a periodic tenancy for any reason or no reason at the end of the lease period.[110] Moreover, the principle of caveat emptor governed:

> The lessee took the premises as he found them, and the lessor implied no warranties of fitness or habitability. Nor was the lessor under any obligation to repair the premises unless he expressly covenanted to do so. Even if the lessor promised to repair, his breach of the covenant afforded no excuse for the lessee's nonpayment of rent. These covenants remained independent of one another. All of this perhaps made sense in an agrarian economy where the land was of paramount value and the tenant-farmer was capable of making his own repairs.[111]

During the nineteenth century, these two influences behind the common law underwent a transformation, and the direction of the common law in regards to the lease changed dramatically. First, the national economy shifted from farming to industry.[112] The residential tenant's interest in the landlord's property became primarily as a place to live instead of as a means of subsistence.[113] As a result of this shift, unwritten lease contracts became the norm among low-income, urban tenants, and written lease contracts became standardized since they were more numerous and more detailed.[114] This caused the lease to be based on notions of modern contract to a larger degree than of property. The movement of the lease towards modern contract also resulted in recreating a status between the landlord and tenant which favored the landlord.[115]

Yet at the same time, events following the Great Depression changed the course of the common law. Prior to the 1930s, the Supreme Court "expansively read the Fourteenth Amendment Due Process Clause while

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109. *See* Lesar, *supra* note 35, at 371.

110. *See* Bell, *supra* note 101, at 492.

111. SCHOSHINSKI, *supra* note 10, § 1:1.

112. *See id.*

113. *See id.*

114. *See* Glendon, *supra* note 5, at 508-09.

115. *See infra* notes 137-141 and accompanying text.

narrowly construing Congress' commerce and taxing power."[116] After the Great Depression, the Supreme Court drastically narrowed its views on substantive due process and freedom of contract, which resulted in greater governmental intervention in private commerce.[117] Consequently, the government began to impose its own "status" onto the landlord and tenant relationship.

As a result of the Industrial Revolution, the national economy shifted from farming to industry and the population became concentrated in urban centers. The lease contract proved popular in these cities. In 1961, Dean Lesar wrote:

> The modern city dweller is content to place his investments in stocks, bonds, and annuities and live in a rented apartment—complete with everything from air conditioning to uniformed doorman. And the lease has been a means of filling a basic need . . . without the outlay of capital required to purchase a fee.[118]

Due to this increased urbanization, the lease evolved towards modern contract. The bare possessory interest in land accepted by the agrarian tenant was unacceptable to his urban counterpart. Unlike the periodic tenant of the fourteenth century, the urban residential tenant did not seek to work for the landlord. The urban residential tenant's interest in the leasehold was solely as a dwelling, and did not relate to the tenant's subsistence.[119] This home was primarily a package of goods and services which the landlord was relied upon to provide.[120]

Consequently, the contractual principle of mutual dependency of obligations was applied to the residential lease relation.[121] The caveat emptor and no-repair rules were often rejected by the common law for lack of justification.[122] It was held that a landlord who leased premises on a

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116. Green, *supra* note 8, at 703.

117. *See id.*

118. Lesar, *supra* note 35, at 372.

119. *See* SCHOSHINSKI, *supra* note 10, § 1:1.

120. *See id.*

121. *See* Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826). *But see* Lindsey v. Normet, 405 U.S. 56, 65-67 (1972) (holding that the doctrine of mutual dependency of lease covenants is not constitutionally required).

122. *See* SCHOSHINSKI, *supra* note 10, § 1:1. As one commentator has observed:

> It all made sense back in those days with the landlord off on the hunt or drinking port in the quiet of the evening, and the tenant asking to be left alone to tend his fences and to shear his sheep. The heart of the system was land and its possession. The model landlord was the one who did the least. The tenant, in turn, was expected to run the farm, to be the omnicompetent man fully prepared to see to his own shelter, heat and

"furnished" basis for a short term had a contractual duty to put them in "habitable" condition before the tenant took possession.[123] In order to be "habitable," the landlord must put the premises into a condition suitable for its intended use if the lease restricted the tenant to a specified use and the lease was made before completion of the construction or alteration of the premises.[124] Further, the rights of tenants were increased as the judiciary began to recognize and apply the doctrine of constructive eviction.[125]

The application of modern contractual principles to the lease, however, did not necessarily signal a change in the common law resulting in a general improvement in the residential tenants' position. The lease evolved in a manner which both benefitted and burdened the residential tenant. The *periodic tenancy* which first arose following the Black Death in the fourteenth century once more grew in popularity among the mobile population.[126] These tenancies endure for a certain period of time and for successive periods of equal length unless terminated at the end of any one period by notice of either party.[127] The chief characteristics of the periodic tenancy are the continuity of the term and the requirement of notice to terminate the tenancy.[128]

Because of these characteristics, the periodic tenancy was employed by the courts during the nineteenth century as a means of increasing security of tenure while the importance of the tenancy at will diminished.[129] Tenants benefitted from this greater protection. Many, if not most, low-income tenants, however, held month-to-month or week-to-week periodic tenancies, and these tenants remained "in a very vulnerable position [in terms of continuing their tenancy] if they sued their landlords for breach of express covenant to repair or to provide essential services, because their tenancies could be terminated, without cause, by the landlords' giving the notice required at common law or statute."[130] These low-income, urban tenants were quite different from the stock-owning urbanite living in an apartment "complete with everything from air conditioning to uniformed

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Thomas Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 231 (1969).

123. *See* Hacker v. Nitschke, 39 N.E.2d 644 (Mass. 1942).

124. *See, e.g.*, Woolford v. Electric Appliances, 75 P.2d 112 (Cal. Dist. Ct. App. 1938).

125. *See* CUNNINGHAM, *supra* note 9, § 6.36, at 293.

126. *See* Glendon, *supra* note 5, at 508.

127. *See* SCHOSHINSKI, *supra* note 10, § 2:10.

128. *See id.*

129. *See id.*; BLACKSTONE, *supra* note 86, at 147; Glendon, *supra* note 5, at 507.

130. CUNNINGHAM, *supra* note 9, § 6.37, at 295.

doorman" described by Dean Lesar.[131] They held an estate which resembled the nonfreehold estate of the Villein tenant in that the tenants held their property essentially at the will of the landlord.[132]

Tenants with written lease contracts experienced similar mixed effects from the evolution of the lease towards modern contract. Most written leases were for a fixed term because unwritten leases were usually interpreted by the courts as periodic tenancies.[133] Since goods and services, and not a bare possessory interest in land, were the predominant subject of the lease, written lease contracts were necessarily longer than before.[134] The development of more detailed, written leases strengthened the contractual nature of the relationship between landlord and tenant.[135] The lease became less a conveyance of land, and more a bilateral contract in which the parties worked out the details of their relationship.[136]

Instead of resulting in greater freedom of contract, however, the combination of a greater number of written leases and increased length of each lease resulted in the standardization and mass production of the lease form; the lease form itself became essentially an adhesion contract

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131. Lesar, *supra* note 35, at 372.

132. *See* Glendon, *supra* note 5, at 508.

> [The urban, low-income tenants] "rent" a space in which to live, agreeing to pay so much every week or every month, out of the periodically received pay check or pay envelope. Duration of the occupancy is undiscussed. The tenant's ability to pay is so dependent on the unpredictable regularity of earnings, and his desire to remain is so dependent upon possible changes in his place of employment, that an agreement obligating him to an estate for years is not commonly made. From the lessor's angle, no useful end is likely to be served by a more definitive arrangement. Few of these tenants have assets sufficient to make a judgment collectible. The uncertainties of life which beset our mobile industrial and white-collar population are suited by the fluidity of arrangement implicit in this type of nonfreehold estate. Two results flow from the foregoing. This type of estate is tremendously important sociologically in that occupancy thereunder conditions the home life of a very substantial fraction of the population. On the other hand, the financial smallness of the involved rights results in a great dearth of reported decisions from the courts concerning them. Their legal consequences are chiefly fixed in the "over the counter" mass handling of "landlord and tenant" cases of the local courts. So this type of estate, judged sociologically, is of great importance, but judged on the basis of its jurisprudential content, is almost negligible.

Id. (quoting 2 RICHARD R. POWELL & GERALD KORNGOLD, THE LAW OF REAL PROPERTY, ¶ 253 (Patrick J. Rohan ed., 1977)) (footnote omitted).

133. *Cf.* CUNNINGHAM, *supra* note 9, § 6.15, at 265 ("When a periodic tenancy does arise, the courts will charge the parties with the provisions of their informal lease, except for the agreement on the term."). Also, most leases for over one year must meet the writing requirement of the Statute of Frauds. *See id.*

134. *Cf.* Glendon, *supra* note 5, at 508 (stating that "the written lease . . . became longer").

135. *See* Glendon, *supra* note 5, at 508; POWELL, *supra* note 132, ¶ 221[1][a]. Most periodic tenancies are formed by oral agreement, and largely are implied. *See* CUNNINGHAM, *supra* note 9, § 6.17, at 267.

136. *See* Glendon, *supra* note 5, at 508.

consisting of boilerplate language drafted in favor of the landlord and not subject to bargain.[137] "This impact of the phenomenon of standardization in reducing the possibility of negotiation over terms has prompted one observer to suggest that, in contrast to the 'movement *from Status to Contract*' that Sir Henry Maine detected in 1861, there is now a 'distinct veering back to status.'"[138] A study of sixteen form leases used in major cities throughout the country concluded that "[t]he leases almost all treat the residential tenant as a latter-day serf."[139] With the advent of detailed written leases, the common law was increasingly displaced by the parties' contract and became "a kind of stop-gap law that applied if the parties had not agreed otherwise."[140] Since these leases were often adhesion contracts drafted by the landlord, the common law's deference to the parties' contract strongly favored the landlord.[141] Yet as the discussion in Part III of this Note demonstrates, the state reacted to modern contract's failure to equitably distribute legal obligations under the lease by imposing its own form of status onto the landlord and tenant relationship.

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137. *See id.* One study of residential leases revealed that even in an area where educational level is high, only fifty-seven percent of the tenants carefully read all of the lease before they signed. *See* Warren Mueller, *Residential Tenants and their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 286-87 (1970). Another forty-two percent carefully read only the non-printed parts of the lease. Even less attention was paid when leases were renewed. *See id.* Only about fifty percent of the tenants interviewed were able to answer simple questions about standard lease terms. *See id.* Only four percent consulted lawyers before signing. *See id.* The study found that "the standard-form lease does not appear to be a negotiated document." *Id.* at 276.

138. E. ALLEN FARNSWORTH, CONTRACTS § 4.26, at 312 (2d ed. 1990) (quoting SIR HENRY SUMNER MAINE, ANCIENT LAW 170 (Dorset Press 1986) (1861)); *see* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 40 (1917-18).

139. Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 835 (1974).

140. Glendon, *supra* note 5, at 508.

141. The tendency of standardized contracts to favor the drafter is explained by one commentator:

> Dangers are inherent in standardization, however, for it affords a means by which one party may impose terms on another unwitting or even unwilling party. Two circumstances facilitate this imposition. First, while the party that proffers the form has had the advantage of time and expert advice in preparing it, the other party is usually completely or at least relatively unfamiliar with its terms. That party may have no real opportunity to read the form, and is often not expected to do so. The opportunity to read it may be diminished by the use of fine print and convoluted clauses. Second, bargaining over terms may not be between equals or, as is more often the case, there may be no opportunity to bargain at all. The standard form may be used by an enterprise with such disproportionately strong economic power that it simply dictates the terms.

FARNSWORTH, *supra* note 138, § 4.26, at 311-12.

III. THE RISE OF THE ADMINISTRATIVE STATE: EFFORTS TO CREATE A "DECENT HOME" FOR RESIDENTIAL TENANTS THROUGH GREATER GOVERNMENTAL REGULATION

Along with the shift from an agrarian to an industrial society, the rise of the administrative state in America during the twentieth century heralded change in the landlord and tenant relationship. The Great Depression created a "submerged middle class" which, although poor, retained its middle-class culture and outlook, and constituted a "discontented army of men and women of high demands and high expectations [who] stood ready to insist on decent housing from government or at least stood ready to approve and defend it."[142] During this era, the Supreme Court drastically narrowed its views on substantive due process and freedom of contract, which resulted in greater governmental intervention in private commerce.[143]

With heightened public interest in the housing area and less judicial scrutiny of governmental intervention, the federal government exercised its power as ultimate landlord more expansively. The United States Housing Act of 1937 was passed, establishing public housing programs,[144] although "[f]ew pretend that the original Housing Act was solely an act of charity," especially where public housing was concerned.[145] Lawmakers perceived public housing to be a stimulus to jobs and business.[146] Public housing programs at least in part arose from "concerns about social unrest among unemployed city workers."[147]

After World War II, war veterans arose as a new class of persons asserting claims to public housing.[148] The "legal and moral claims of veterans [to public housing] forced the adoption of an aggressive strategy to remove the revived middle class from public housing, where it had grown comfortable and wanted to remain."[149] During the 1950s, the veterans were supplanted in public housing by a group "comprised largely of blacks, immigrants from the South, and female-headed and elderly households."[150] As Professor Abbot explains:

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142. Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642, 646 (1966).

143. *See* Green, *supra* note 8, at 703.

144. Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437 to 1437j (1994)).

145. Green, *supra* note 8, at 688.

146. *See* Friedman, *supra* note 142, at 646.

147. Green, *supra* note 8, at 689.

148. *See id.* at 691.

149. *Id.*

150. *Id.* at 691-92.

> By 1949, the effect of little new construction during the Depression and World War II had created considerable obsolescence in the center city housing stock. Most of the available land within cities had been developed. The middle class exodus to the suburbs gathered momentum as the insurance benefits provided by the Veterans Administration and the Federal Housing Administration brought mortgage financing of new home purchases within the financial reach of an upwardly mobile urban middle and lower-middle class. The migration to the cities of lower income blacks and whites from rural America, increasing during the war years, continued unabated.[151]

Unlike the submerged middle class and war veterans, this group could not generate any sympathy to prompt the subsidization of public housing.[152] "It could offer no causes to champion, nor could it convince the nation that its need was the result of some fault other than its own."[153] The lack of available subsidies and the resistance of fringe areas of cities and suburban communities to public housing[154] prompted the government to search out "fresh cures for bad housing and slums."[155] This search prompted a greater degree of state intervention in the private landlord and tenant relation.[156] Where state legislatures encountered difficulty remedying the housing problem, the judiciary assisted.

The Housing Act of 1949 committed the United States to a national policy of achieving "as soon as feasible" the goal of "a decent home and suitable living environment for every American family."[157] This federal goal was adopted by the states. State legislative and judicial intervention in the private housing arena took two broad forms, prompted by both the urbanization of society and the rise of the administrative state. First, the state legislatures and judiciaries took measures to ensure the quality and availability of rental housing which were directed to the physical condition of the housing stock.[158] Housing codes and the implied warranty of habitability are the most prominent examples.[159] State legislatures imposed

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151. Samuel Bassett Abbot, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1, 43 (1976) (footnote omitted).

152. *See* Green, *supra* note 8, at 692.

153. *Id.*

154. *See id.*

155. Friedman, *supra* note 142, at 649.

156. *See infra* notes 182-189 and accompanying text.

157. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 43 (codified as amended at 42 U.S.C. § 1441 (1994)).

158. *See infra* Part III.A.

159. *See id.*

greater duties upon the landlord to maintain the physical condition of the property.[160] Accordingly, state legislatures rejected the common law "no repair" rule, which placed the burden of maintaining the rental property on the tenant.[161]

The movement toward security of tenure did not occur as rapidly as the recognition of the warranty of habitability.[162] Given the urbanization of society and the greater level of government regulation of housing, it was not too great a step for the state to impose unilaterally a duty on the part of the landlord to provide the tenant with a home which met certain minimum standards of habitability. This duty implied that the landlord promised to provide the tenant with such a home in consideration of the public policy of providing every American family with a suitable living environment. With security of tenure, the effect of these societal influences on the law was more attenuated. The movement towards greater security of tenure occurred indirectly, "focusing on specific abuses of landlords and particular types of tenancies rather than on a tenant's general expectation of continued occupancy."[163]

In order to provide tenants with greater security of tenure, legislative and judicial intervention must involve tenants and the government, not the landlord, deciding which tenants will live in the landlord's rental property. This intervention may occur even before a tenancy is formed. For example, the Federal Fair Housing Act of 1968 (Fair Housing Act), which prohibits the landlord from discriminating against tenants on the basis of "race, color, religion, sex, familial status, or national origin,"[164] exemplifies a recognition of this tenant right even when there was no prior landlord-tenant relationship. The Fair Housing Act compels, in some situations, a landlord to rent to a particular class of individuals if the landlord's refusal is considered discriminatory under the statute.[165] More often, however, this second form of intervention takes place only after a landlord-tenant relationship is formed, recognizing a presumptive tenant right to continue

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160. *See id.*

161. *See* Green, *supra* note 8, at 707-12.

162. *See* Bell, *supra* note 101, at 504.

163. *Id.*

164. 42 U.S.C. § 3604 (1994). Sex discrimination was not prohibited by the 1968 Fair Housing Act, but was added to the list of prohibitions by the Housing and Community Development Act of 1974. *See* Pub. L. No. 90-284, Title VIII, §804, 82 Stat. 73 (1968); Pub. L. No. 93-383, § 109(a), 88 Stat. 633 (1974).

165. *See, e.g.*, Sanford v. R.L. Coleman Realty Co., 573 F.2d 173 (4th Cir. 1978) (holding that plaintiff is entitled to injunctive relief where flagrant evidence of defendant's discriminatory practices under 42 U.S.C. § 3604 is provided by undisputed "coding" of any black applicant for rental housing followed by denial of his application).

in possession after the end of the lease period, thereby rejecting the common law rule that a landlord could terminate or refuse to renew a tenancy for any reason or no reason.[166] Other examples of this type of intervention are prohibitions against retaliatory evictions, just cause eviction legislation, and the eviction control component of rent control laws.

A. Measures Taken to Create a "Decent Home" by Improving the Physical Condition of Residential Rental Housing

Six years after the Housing Act of 1949, housing codes proliferated throughout the country providing minimum housing standards.[167] The housing codes were a more encompassing regulation than a municipal ordinance: "Realistically, [the housing code] includes the entire body of state and local law that may be relied upon to provide the source of power or authority for enforcement sanctions and remedies."[168] Since violations of the housing code were enforced administratively, a violation of the code was not considered a breach of any duty owed by the landlord directly to a tenant.[169] The tenant lacked any direct remedy for a code violation.

By the 1960s, it was clear to most observers that the administrative methods of enforcing the housing code were not proving effective.[170] The courts began to take measures to enforce the legislative intent behind the housing codes. In *Brown v. Southhall Realty Co.*, the District of Columbia Court of Appeals held that a tenant could successfully avoid liability for unpaid rent by proving that serious violations of the D.C. Housing

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166. *See* Green, *supra* note 8, at 713-19.

167. "[T]he 'workable program' requirement of the 1954 Federal Housing Act gave impetus to the spread of housing codes." CUNNINGHAM, *supra* note 9, § 6.37, at 297. The first housing codes, enacted by the United States Housing Act of 1937, were not enacted to guarantee a "decent" home, but to "address slum housing conditions that were thought to threaten the public health and well-being, such as diseases (smallpox, dysentery, tuberculosis), fire hazards, and crime." Green, *supra* note 8, at 686-87 (footnote omitted).

168. F. GRAD, NATIONAL COMM'N ON URBAN PROBLEMS, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 1-6 (1968).

169. *See* CUNNINGHAM, *supra* note 9, § 6.37, at 297.

170. Professor Cunningham explains:

> [A]ll observers agree that local governments have been notably unsuccessful in code enforcement. In part the lack of success stems from the institutions charged with enforcement. Most code enforcement agencies are understaffed and underfunded because of the low level of public awareness of code enforcement problems and lukewarm support by local elected officials. Periodic inspections are not carried out on any regular schedule and, since housing inspectors are not very well-paid, code enforcement has been hindered by corruption. Even honest housing inspectors may grow discouraged and apathetic because of the ease with which landlords can obtain "variances," and public prosecutors rarely demonstrate much zeal in code enforcement.

Id. at 298 (footnotes omitted).

Regulations existed on the premises when the tenancy began. The Regulations, however, did not expressly authorize tenants to set up such violations as a defense to a landlord's action for unpaid rent.[171]

The court held the lease "void as an illegal contract" after pointing out that "the violations known by the [landlord] to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the 'habitation' unsafe and unsanitary," and to establish that the premises were not "maintained or repaired to the degree contemplated by the regulations."[172] This "illegal contract doctrine" led Judge Robb of the District of Columbia Court of Appeals to remark, "[the illegal contract theory] seems to be that if not an outlaw[,] a landlord is at least a public utility, subject to regulation by the court in conformity with its concept of public convenience and necessity . . . which in practical application will commit to the discretion of a jury the management of the landlord's business and property."[173]

Another judge-made method of enforcing the intent behind the housing codes is the "implied" warranty of habitability. The traditional rule in landlord and tenant law was that the tenant's contractual duty, or "covenant," to pay rent was independent of the landlord's covenant to maintain the premises in good repair.[174] On the federal level, Judge Skelly Wright, writing for the court in *Javins v. First National Realty*, held that the landlord is subject to a continuing duty to correct housing code violations which "ar[ose] since the term of the lease commenced."[175]

Instead of applying the traditional rule of independent covenants, Judge Wright applied the modern contractual principle of dependent covenants, under which breach of a substantial covenant by one party

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171. *See* Brown v. Southhall Realty Co., 237 A.2d 834, 834-35 (D.C. 1968).

172. *Id.* at 836.

173. Robinson v. Diamond Hous. Corp., 463 F.2d 853, 871 (D.C. Cir. 1972) (Robb, J., dissenting). This doctrine gained few adherents outside the District of Columbia. *See* CUNNINGHAM, *supra* note 9, § 6.37, at 301. *See generally* Berger, *supra* note 33, at 708 (exploring the idea that current landlord-tenant law "tends to regulate residential landlords as much as it does public utilities").

174. *See* SCHOSHINSKI, *supra* note 10, § 1:1.

175. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072 (D.C. Cir. 1970). Judge Wright analogizes to consumer protection cases stating that:

> [i]n dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely "with the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities . . . and decide for himself whether they are reasonably fit for the purposes."

Id. at 1079 (citation omitted). However, "[t]he Javins court's . . . [holding was] clearly not based on the supposed analogy to the 'consumer protection' cases relied on by Judge Wright, but it does seem to be justified by the policy underlying the District of Columbia housing code." CUNNINGHAM, *supra* note 9, § 6.38, at 307 (footnote omitted).

justifies nonperformance of a covenant by another party.[176] This duty on the part of the landlord "was one 'implied . . . by the operation of law,' regardless of whether the landlord in fact implied it or the tenant understood the landlord to have implied it, and regardless of whether the lease purported to waive the warranty."[177] Since the landlord's breach in *Javins* was based on a code-imposed duty (implied in law), and not a promise implied on the part of the landlord (implied in fact), it is not a "true" implied warranty case.[178]

This is an important distinction, since a tenant can waive or negate a covenant implied in fact, but not a covenant implied in law.[179] The nondisclaimability of this statutory provision creates a judicially-imposed status between the landlord and tenant.[180] The warranty of habitability decisions signal the willingness of the courts to look beyond express contract terms and to impose legal obligations "based on current community values and changing legal concepts regarding tenants' legitimate expectations concerning housing quality."[181]

In 1972, the Uniform Residential Landlord and Tenant Act (URLTA) was published in final form and recommended for adoption by the several states.[182] URLTA was, in part, a legislative response to the judicial action being taken to improve the physical condition of rental housing. The goals of the commissioners enacting URLTA were to equalize the bargaining position of landlords and tenants, to force landlords to meet minimum standards for providing safe and habitable housing, to spell out the responsibilities of tenants for maintaining the quality of their housing units,

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176. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 524 (1984).

177. *Id.* at 523 (quoting *Javins*, 428 F.2d at 1081 n.56).

178. *See* Rabin, *supra* note 176, at 525.

179. *See id.* at 525-26. The courts, however, did create a true implied warranty of habitability in some cases. For example, in *Lemle v. Breeden*, the court recognized the existence of the implied warranty even though there was no housing code in effect:

> The Supreme Court of Hawaii held that the tenant's obligation to pay rent was dependent on the landlord's performance of her implied warranty of habitability. Because the landlord had breached the implied warranty, the tenant was excused from performing his dependent covenant to pay rent. In *Lemle* the covenant was real although unexpressed, and the duty breached was truly a contractual one. . . .

Id. (citing Lemle v. Breeden, 462 P.2d 470 (Haw. 1969)).

180. See Singer, *supra* note 2, at 683 n.244 for the definition of a "status."

181. Bell, *supra* note 101, at 489.

182. *See* CUNNINGHAM, *supra* note 9, § 6.39, at 312 n.14. *See generally* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 423 (1985).

and to ensure tenants the right to occupy a dwelling as long as they fulfill their responsibilities.[183]

At least twenty states enacted legislation based on URLTA, which includes detailed provisions imposing a duty on landlords to put and keep premises leased for residential use in a habitable condition, as well as prescribing in detail the remedies available to the tenants when there is a breach of the landlord's duty.[184] At least two other states enacted similar comprehensive legislation based on the American Bar Foundation's Model Residential Landlord-Tenant Code (Model Code).[185]

Both URLTA and the Model Code extended legislative regulation over housing beyond that of the housing codes. Both URLTA and the Model Code are applicable to almost all residential units within a state, rather than to just rental units in multi-family dwellings or to housing covered by state or local housing codes.[186] Moreover, URLTA-derived statutes require a landlord to keep a rented dwelling unit habitable even if it is not covered by a housing code, and to keep the rented dwelling in compliance with standards that may be higher than those imposed by the applicable housing code requirements.[187] This creates a legislatively-imposed status between the landlord and tenant because most of the statutes based on URLTA contain, in substance, the URLTA prohibition against rental agreements including waivers of tenant's rights or remedies.[188] As Professor Glendon remarked, "[a]s a term implied in nearly every residential lease, regardless of the will of the parties, [the warranty of habitability] does not belong to the domain of contract but to that of regulation."[189]

B. Efforts to Increase Security of Tenure Among Private Residential Tenants

If a landlord refuses to renew a lease at the end of a term, should the law require the landlord to provide more of a justification for nonrenewal than merely "any reason or no reason?"[190] If so, courts and legislatures

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183. RICHARD P. FISHMAN, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW 603 (1978) (citing J. McCabe, *The Uniform Residential Landlord and Tenant Act* [Article 1 of a five-part series explaining the URLTA, National Conference of Commissioners on Uniform State Laws, Chicago] (1973)).

184. *See* CUNNINGHAM, *supra* note 9, at 312.

185. *See id.* at 313.

186. *See id.*

187. *See id.* at 313-14.

188. *See id.* at 317.

189. Glendon, *supra* note 5, at 548.

190. *See* Green, *supra* note 8, at 713.

might consider taking a more direct and expedient course in providing security of tenure to residential tenants than has been taken to date. Currently, a habitable home for a residential tenant must meet certain physical standards, but the concept of a habitable home for a tenant usually does not include the security of tenure afforded to the homeowner. Tenants receive little or no security to stay in the same home from their bargain with the landlord.

For a number of reasons, a legislature or court initially might find it easier to justify providing a tenant with a physically habitable home than to justify providing a tenant security of tenure. First, to tell a landlord to maintain his property in accordance with certain minimum standards of quality seems less burdensome to the notion of "private" property than to tell a landlord that he must grant the current month-to-month tenant what might amount to a life estate in the property. Second, the provision of a "decent home" is more easily applicable to the physical property itself than to any need for an option to stay in one particular home for life. It is easier to grasp the concept of "home" as relating to a physical location, rather than to a right to remain in one location. Third, many tenants do not necessarily wish to stay in one place for very long, while most tenants do prefer a home which is habitable. Finally, the public policy behind the warranty of habitability spans all rental units because the warranty relates to intrinsic physical characteristics present in all homes. In contrast, the public policies most often utilized to provide security of tenure through rent control or just-cause eviction legislation are linked to extrinsic socioeconomic influences on housing that may or may not be present in a given locale. These differences might help to explain why legislatures and courts have improved the tenants' position by focusing upon improving the physical quality of rental dwellings to a greater degree than by providing tenants with greater security of tenure in those homes. The differences, however, do not justify the failure of a court or legislature to provide this security to tenants in situations where it is needed.

1. Security of Tenure under the Free Market Model of Contract

As discussed in Part I of this Note, the free market model of contract recognizes two "magic moments"[191] when parties may incur contract obligations: when the parties expressly agree to incur obligations, or when the duty is imposed by the state.[192] Under this model, contract obligations

191. Singer, *supra* note 2, at 653.

192. *See supra* notes 13-14 and accompanying text.

may also arise out of "relations of interdependence."[193] This third source of legal obligations is recognized through the legal construction of an implied promise made by a party to the contract at the time of the actual agreement.[194] It is also recognized through the qualification of the basic law by equitable principles or derived from legislative public policy.[195] Since an express warranty of habitability or an express promise to provide security of tenure presumably would be enforced by the law, the discussion of duties in a lease contract which follows will be limited to four categories: (1) duties implied by the judiciary into the lease contract which are derived from the parties' express promises; (2) duties expressly imposed by the judiciary for equitable reasons; (3) duties implied by the judiciary which are derived from duties expressly imposed by the legislature; and (4) duties expressly imposed upon the parties by the legislature.

a. Duties Implied by the Judiciary which are Derived from the Parties' Express Promises

A court recognizing the existence of the warranty of habitability assumes that a tenant implicitly bargains with the landlord for a "habitable" home regardless of the express agreement of the parties. A house which does not meet the tenant's minimum standards of habitability is not a home to the tenant. This promise may be related back to the moment of the parties' actual agreement, since the landlord's promise to the tenant to provide a habitable dwelling would be implied at the time of contracting. The warranty of habitability may transfer to the tenant a portion of the landlord's right to possess the property.[196] It is much more difficult to argue, however, that a tenant who expressly bargained to stay in a home

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193. *See supra* notes 15-16 and accompanying text.

194. This is essentially a judicially-recognized relation back to the moment of the express contract.

195. This constitutes a judicially-imposed legal obligation which is a proxy for the magic moment of the state-imposed duty based on public policy.

196. This transfer is described by Professor Singer as follows:

> [B]y giving the tenant the power to call on state or local officials to force the landlord to comply with the warranty, the law assigns to the tenant substantial powers to control the use of the property during the lease term.
>
> By giving the tenant immunity from being evicted and by allowing the tenant to possess the property for free (or for a reduced rent) when the warranty has been breached, the law limits the landlord's right to exclude by determining the terms on which the tenant will occupy the premises; it transfers from the landlord to the tenant part of the landlord's right to possess the property.

Singer, *supra* note 2, at 680.

for one month, or one year, was actually bargaining for the option to stay for the rest of her life. On the contrary, "[t]ypically the only provisions in residential leases [which] are [expressly] 'bargained for' are the rent and the duration of the lease."[197] Further, a landlord's implied promise to the tenant to provide security of tenure usually would not arise at the moment when the parties initially contracted. Instead, any such promise would develop over the course of the landlord-tenant relationship and would not necessarily be part of their actual agreement. Most importantly, providing security of tenure may effect a transfer of possession *in toto*, in effect giving the tenant an estate for life determinable at the tenant's election or upon failure to meet the normal lease obligations.[198] Because of these differences, courts are more cautious to recognize security of tenure as an implied promise by the landlord because it transfers a greater interest in property. Recognition is slow and indirect since any legal obligation to provide security of tenure cannot be related back through implication to the moment of the parties' agreement.

b. Duties Imposed by the Judiciary for Equitable Reasons

Courts may impose duties on parties to a contract in a variety of ways. For example, a court may employ an equitable doctrine such as promissory estoppel[199] to enforce a promise. If a court finds, however, that there was no promise to provide security of tenure made either expressly or impliedly at the formation of the lease contract, it is not legally justifiable for the tenant to employ the doctrine of promissory estoppel to argue that he unjustly relied on such a promise.[200] Since the lease period is usually one of the provisions of the lease contract that is bargained for expressly,[201]

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197. Glendon, *supra* note 5, at 555.

198. *See* SCHOSHINSKI, *supra* note 10, § 2:1. "[T]he landlord's interest begins to resemble what property lawyers call a bare reversion, while the tenant acquires rights to continuity beyond the present possessory interest. The greater these rights, the more the tenant's interest looks like a new form of determinable life estate, created by operation of law." Glendon, *supra* note 5, at 544.

199. Section 90 in the RESTATEMENT (SECOND) OF CONTRACTS defines promissory estoppel as:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

200. "[T]he promisee's unsolicited reliance is not consideration because it is not bargained for." FARNSWORTH, *supra* note 138, § 2.19, at 92.

201. *See supra* note 102 and accompanying text.

tenants in most cases will be unable to argue that they should be provided security of tenure under this doctrine.

Tenants with written lease contracts may argue that the standardization of the lease contract[202] should relieve the tenant of obligations under the agreement. Although courts are usually loathe to grant relief based on this principle, courts may apply it in compelling cases,[203] for instance where there is a large inequality of bargaining power between the parties.[204] Three techniques for disregarding writings as contracts are employed by the courts.[205] These techniques are essentially indirect methods of finding the contract unconscionable.[206] First, courts may find that the contractual writing was not an offer at all, "refus[ing] to hold a party to a writing on the ground that it was not of a type that would reasonably appear to the recipient to contain the terms of a proposed contract."[207] This principle is unlikely to apply to lease contracts since they can reasonably be expected to contain contractual terms.[208]

A second technique "is to refuse to hold a party to a term on the ground that, although the writing may plainly have been an offer, the term was not one that an uninitiated reader ought reasonably to have understood to be a part of that offer."[209] The print size and type of the writing and its location in the contract are factors which the court considers in determining whether the term was a part of the contract. This technique would only be applicable in the context of providing the tenant with security of tenure in two situations. First, this technique might be applicable if the law gave the tenant a waivable right to security of tenure beyond the lease period which was then supposedly waived in the fine print of the standardized contract. Since there is currently no law which is both waivable and provides security of tenure beyond the lease period, this situation will not arise under current law. Second, it would be applicable when the landlord promised in a handwritten note to allow a tenant to stay beyond the lease period in the contract, but waived that duty in the standardized lease contract. Since the lease period is usually a term which is not in the fine print, and therefore even "uninitiated" tenants will understand the lease

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202. *See supra* notes 137-140 and accompanying text.

203. *See* FARNSWORTH, *supra* note 138, § 4.26 at 312-13.

204. *See id.* at 311-12.

205. *See id.* at 313.

206. *See infra* notes 212-220 and accompanying text.

207. FARNSWORTH, *supra* note 138, § 4.26 at 313. "The argument that the writing is not an offer is particularly compelling with respect to tickets, passes, and stubs." *Id.*

208. *See id.* at 313-314.

209. *Id.*

period term to be part of the lease contract, this is unlikely to occur. A third technique courts use to avoid holding a party to a written term is to interpret the language of the term to favor the weaker party.[210] "[This] technique of interpretation is aided by rules under which terms are generally interpreted against the drafter, and separately negotiated terms are given greater weight than standardized terms and handwritten or typed terms given greater weight than printed ones."[211] For example, if a standardized lease contract contained a term in the boilerplate language stating that a periodic tenancy was formed, but a written notation on the lease indicated that the tenancy was for a one-year term, this technique might compel the landlord to allow the tenant to stay for one year. This technique is unlikely to be employed in the context of security of tenure since it would be difficult for a court to construe a lease term to be so different from the stated period as to provide the tenant with an option to stay for life. One way in which a court might employ this technique would be to construe the stated lease period as referring to a time schedule for making rent payments rather than to the time at which the lease would terminate. Under the free market model, such a construction would require either the implication of a promise by the landlord not to terminate the lease for any reason or no reason at the actual formation of the lease contract, or it would require a public policy justification sufficient to reinterpret the common law rule of termination for any reason or no reason.

Even where there is no written contract, courts may also impose duties on the landlord through the equitable doctrine of unconscionability. Traditionally, contracts which were so substantively unfair as to "shock the conscience of the court" would not be enforced in equity.[212] If the consideration exchanged at the moment of the parties' actual agreement was considered grossly inadequate by the court, then the promise sought to be enforced was "so gross as to render the contract unconscionable."[213] The traditional focus of this doctrine, therefore, was upon "unfairness in contract formation rather than unfairness in the exercise of contractual power."[214] The "conscience-shocking" substantive unfairness of the bargain was also usually "mixed with an absence of bargaining ability that does not fall to the level of incapacity or with an abuse of the bargaining process

210. *See id.* at 315.

211. *Id.* (citation omitted).

212. *See id.* at 320.

213. *Id.* (citing Marks v. Gates, 154 F. 481, 483 (9th Cir. 1907)).

214. Bell, *supra* note 101, at 536.

that does not rise to the level of misrepresentation, duress, or undue influence."[215]

The URLTA codifies the doctrine of unconscionability[216] and changes the traditional doctrine by allowing courts to enforce legal obligations based upon both the parties' actual agreement and upon public policy. This section of URLTA is adapted from the Uniform Commercial Code (UCC) and the Consumer Credit Code.[217] The UCC provides that the section dealing with unconscionability is intended to make it possible for the courts to police explicitly against the kind of injustice which in the past was accomplished indirectly through "[the] adverse construction of language, by manipulation of rules of offer and acceptance or by determination that a clause is contrary to public policy or to the dominant purpose of contract." [218]

Thus, cases involving unconscionability under the UCC will often involve the enforcement of legal obligations based upon both parties' actual agreement and upon public policy. Yet "[c]ourts have generally rejected the doctrine of unconscionability as an appropriate means of limiting a party's exercise of an express or implied contractual right to terminate at will"[219] for the same reasons courts reject the argument that tenants should not be held to certain clauses under standardized contracts.[220] Without the recognition of a promise by the landlord to provide security of tenure or a public policy justifying its imposition into the landlord-tenant relationship, courts will not recognize security of tenure through the doctrine of unconscionability.

URLTA provides that "[e]very duty under this Act and every act which must be performed as a condition precedent to the exercise of a right or remedy under this Act imposes an obligation of good faith in its

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215. FARNSWORTH, *supra* note 138, § 4.27, at 321. The presence of these circumstances is termed "constructive fraud." *Id.*

216. URLTA § 1.303(a)(1) codifies remedies for unconscionability in a rental agreement:

> (a) If the court, as a matter of law, finds
>
> (1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result. . . .

This definition borrows from the definition of unconscionability codified in U.C.C. § 2-302. *See* FARNSWORTH, *supra* note 138, § 4.27, at 324.

217. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.303 cmt., 7B U.L.A. 427 (1985).

218. U.C.C. § 2-302:1 cmt. (1982).

219. Bell, *supra* note 101, at 536.

220. *See supra* notes 202-208 and accompanying text. This parallel between the doctrine of unconscionability and the enforcement of standardized contracts is borne out by the fact that "[m]ost of the U.C.C. § 2-302 cases involve buyers of goods that object to the unfairness of a particular clause in a form contract." FARNSWORTH, *supra* note 138, § 4.28, at 328.

performance or enforcement."[221] "Good faith" is defined by the UCC as including "observance of reasonable commercial standards of fair dealing in the trade."[222] The UCC definition of good faith is followed by URLTA.[223] Under common law, no court has applied the Act's good faith provisions to termination or nonrenewal of tenancies.[224]

Under a strictly free market model, the covenant of good faith and fair dealing lacks applicability in the context of a tenant who wishes to continue a tenancy after the lease contract has ended. If the lease contract contained a termination date, the landlord would no longer owe the tenant a duty as per the lease contract to deal fairly with the tenant and to act in good faith after the termination date. If a lease period was not bargained for at the creation of the lease, a court would have to interpret the lease as granting the tenant an option to renew indefinitely with each payment, subject to the landlord's right to terminate in good faith. In other words, a court would be required to reinterpret the parties' express agreement to such a degree as to ignore it, or to change the common law rule of interpreting leases as granting periodic tenancies where a lease period was not contemplated. A court willing to engage in such a drastic reinterpretation of the law would likely do so hesitantly and indirectly, and only if it felt there were a significant public policy rationale for doing so.[225]

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221. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.302, 7B U.L.A. 427 (1985).

222. U.C.C. § 2-103(1)(b) (1996 revision). Professor Unger offers an alternative definition of "good faith" describing it in terms of solidarity, "the social face of love," and the standard in terms of "a mean between the principle that one party may disregard the interests of the other in the exercise of his own rights and the counterprinciple that he must treat those interests exactly as if they were his own." ROBERTO UNGER, LAW IN THE MODERN SOCIETY 206, 210 (1976). *See infra* notes 316-326 and accompanying text for a discussion of the possible effects of defining "good faith" in this manner.

223. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.302 cmt., 7B U.L.A. 427 (1985).

224. Bell, *supra* note 101, at 534 n.230.

225. Some courts have found that there is a sufficient public policy rationale to require the landlord to act in a manner which does not infringe upon community standards and values. *See infra* note 238. Professor Bell argues that "beyond concern for an individual's loss of home," there are persuasive reasons to reinterpret the law in this manner:

> Because leasehold termination involves such drastic loss to the tenant, the landlord may significantly affect the tenant's ability to fully participate in social and political life. A tenant who fears loss of an interest as vital as his home may forego associations or actions that are a normal part of self-determination and self-expression. The American ideal of a fully participating society recognizes such actions as "an indispensable ingredient in the constitution of the individual as a participant in the life of society." Recognizing an interest in continuity of tenancy free from landlord coercion will accord tenants the opportunity for "fair and effective participation in the constituted order."

Id. at 532 (quoting Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 304, 306 (1980)).

c. Judicially Implied Duties which are Derived from Express Duties Imposed by the Legislature

When necessary, courts do impose duties on the parties to a lease contract derived from legislative public policy. The common law doctrine of retaliatory eviction allows the courts to impose legislative public policy into the landlord and tenant relationship. Until recent times, "the common law made no inquiry into the purpose or motives prompting a landlord to take what otherwise appears to be legitimate actions concerning his relationship with a tenant."[226] The reasons why a landlord refused to renew a tenancy, raised the rent, or otherwise altered the terms of the tenancy after expiration of the original lease term were considered irrelevant. The common law rule was that a landlord could refuse to renew a lease for any reason or no reason.[227]

In recent years, "[a] body of case law . . . emerged which restricts the right of a landlord to act in retaliation against [a] tenant for engaging in certain types of conduct" which the courts find to further important legislative public policies.[228] In the landmark case of *Edwards v. Habib*, the United States Court of Appeals for the District of Columbia held that a landlord who gave his tenant a thirty-day notice to quit after she complained to authorities of housing code violations was not free to end the tenancy and dispossess the tenant.[229] The eviction could be barred on grounds of "statutory construction and for reasons of public policy" if the court found the tenant's complaints motivated the eviction.[230] The court found that the enactment of housing and sanitary codes indicated a strong and pervasive legislative concern which would be thwarted if landlords were allowed to terminate tenancies when tenants reported violations of these public policies.[231] In other words, the court attempted both to enforce the specific legislative intent of the statute and to further more broadly the public policies it derived from that legislation.

"[T]he types of tenant activities [a court will protect] under the [retaliatory eviction] doctrine depend[s] upon the legislative objectives and policy considerations the court is attempting to further or the constitutional guarantees sought to be protected by restricting landlord action."[232] Courts

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226. SCHOSHINSKI, *supra* note 10, § 12:1.

227. *See id.*

228. *See id.*

229. Edwards v. Habib, 397 F.2d 687, 688 (D.C. Cir. 1968).

230. *Id.* at 699.

231. *See id.* at 700.

232. SCHOSHINSKI, *supra* note 10, §12:2.

appear to be willing to apply the doctrine to further public policy considerations for decent housing and to protect tenants' First Amendment rights to free speech and assembly.[233] The First Amendment theory is not often utilized by the courts because plaintiffs need to prove state involvement in the eviction since the Fourteenth Amendment does not prohibit private landlords from interfering with First Amendment rights.[234]

Although some courts read the public policy rationale of *Edwards* narrowly to protect only those tenant activities related to basic habitability,[235] other decisions are not so restrictive. The cases utilizing the public policy theory may be categorized into four groups based on the tenant activity entitled to protection: "(1) the reporting of housing code violations; (2) activity related to the warranty of habitability; (3) activities that relate to aspects of the tenancy other than the warranty of habitability; and (4) non-tenancy related activities that further significant social concerns."[236] Courts consistently uphold the retaliatory eviction defense when a landlord terminates a month-to-month tenancy because the tenant reported housing code violations.[237] With increasing frequency, courts are extending the public policy doctrine to protect tenants from retaliation for activity unrelated to the tenancy.[238] Measures taken by the state legislatures

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233. *See id.*

234. *See* U.S. CONST. amend. XIV, § 1 (providing that no state shall "deprive any person of life, liberty, or property"). In *Hosey v. Club Van Cortlandt*, however, the District Court for the Southern District of New York did hold that eviction of a tenant through state court proceedings constituted a violation of the Fourteenth Amendment when the eviction was in retaliation for the tenant's organizing of other tenants to obtain repairs. *See* Hosey v. Club Van Cortlandt, 299 F. Supp. 501, 506 (S.D.N.Y. 1969). The court stated: "There is no doubt today that judicial action in private disputes is a form of state action required for application of the amendment." *Id.* at 505. This holding was not widely followed.

235. Some courts narrowed the scope of protected activity beyond that of the *Edwards*'s court. In *Dickhut v. Norton*, the Wisconsin Supreme Court held that a tenant is permitted to raise the defense of retaliatory eviction only if he proves that the housing code violation of which he complained in fact existed, that the landlord knew of the violation and was aware of the tenant's complaints, and that his sole motive for terminating the tenancy was to retaliate for such reports. *See* Dickhut v. Norton, 173 N.W.2d 297, 302 (Wis. 1970); *see also* Sunset Mobile Home Park v. Parsons, 324 N.W.2d 452, 459 (Iowa 1982) (providing that the common law doctrine is "limited to specific retaliation by a landlord due to a tenant's complaints of a landlord's violation of housing statutes, participation in a lawful organization of tenants, or other exercises of first amendment rights").

236. Bell, *supra* note 101, at 496.

237. *See id.*; Robinson v. Diamond Hous. Corp., 463 F.2d 853, 862 (D.C. Cir. 1972); Clore v. Fredman, 319 N.E.2d 18, 21 (Ill. 1974); Markese v. Cooper, 333 N.Y.S.2d 63, 69 (Monroe County Ct. 1972); Dickhut v. Norton, 173 N.W.2d 297, 301 (Wis. 1970).

238. *See generally* Pohlman v. Metropolitan Trailer Park, Inc., 312 A.2d 888 (N.J. Super. Ct. 1973) (relying on the state's public policy to aid mobile home owners in finding rental spaces to protect such an owner from reprisal for his activities in opposition to a zoning amendment which would have resulted in loss of his tenancy); Windward Partners v. Delos Santos, 577 P.2d 326 (Haw. 1978) (protecting tenant activities opposing landlord efforts to rezone leased premises); Barela v.

are also solidifying the common law retaliatory eviction doctrine. Statutes in some thirty states incorporate the doctrine of retaliatory eviction into the landlord and tenant law.[239] URLTA is the source for over half of these statutes.[240]

Retaliatory eviction is limited in its ability to provide security of tenure to residential tenants for a number of reasons. First, the doctrine is more limited than good cause eviction control because it addresses only vindictive, and not capricious, evictions.[241] Second, retaliatory eviction is difficult to prove and retaliatory motive dissipates over time, making it difficult for courts to renew leases in situations where the tenant previously raised the defense.[242] This situation applies to both long-term and short-term tenancies. A tenant with a longer term, for example, a one-year term, will find it difficult to assert the defense when the landlord refuses to renew at the end of the term if the tenant's action occurred early in the tenancy. In this situation, it will be more difficult for the court to draw an inference that the landlord's motive for eviction is retaliatory and not legitimate. Where month-to-month tenants are concerned, if the tenant successfully asserts the defense once, it is unclear whether she will be able to assert it again at the end of the next term.[243] For these reasons, the doctrine of retaliatory eviction will fail to provide security of tenure to residential tenants to the same degree as provided by good cause eviction control. If a court or legislature wishes to protect tenants from eviction for

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Superior Court, 636 P.2d 582, 586 (Cal. 1981) (stating that defense available under the common law doctrine of retaliatory eviction and under CAL. CIV. CODE § 1942.5(c) which prohibits retaliation for a tenant's exercise of "any rights under law"); Custom Parking, Inc. v. Superior Court, 187 Cal. Rptr. 674 (Cal. Ct. App. 1982) (holding that public policy prohibits a landlord from evicting a tenant for refusing to commit perjury in a civil action in which the landlord was a defendant).

239. *See* CUNNINGHAM, *supra* note 9, § 6.81 at 406.

240. *See id.*

241. *See* Richard E. Blumberg & Brian Quinn Robbins, *Beyond URLTA: A Program For Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 44 (1976). Capricious eviction is for no reason, and therefore cannot be retaliatory. If it were retaliatory, there would be a reason.

242. *See* SCHOSHINSKI, *supra* note 10, § 12:5.

243. In *Cornell v. Dimmick*, the tenant complained to authorities about inadequate heating. The landlord brought suit to evict, and the tenant successfully asserted the retaliatory eviction defense. Citing *Edwards*, the court stated that once the heating system was put in good working order the defense of retaliatory eviction would no longer be available to the tenant. *See* Cornell v. Dimmick, 342 N.Y.S.2d 275, 281 (Binghamton City Ct. 1973). In another New York case, the court was of the view that the tenant should be permitted to remain until the landlord has made the repairs required by law. After that, even if his original retaliatory motive continues, he may evict. The court noted, however, that in such a case the tenant should be given sufficient time to find other suitable housing without the pressure of a holdover proceeding. *See* Markese v. Cooper, 333 N.Y.S.2d 63, 75 (Monroe County Ct. 1972).

capricious or vindictive reasons, retaliatory eviction controls will provide only a partial solution.

d. Express Duties Imposed upon the Parties by the Legislature

Rent control laws were first imposed by the District of Columbia during the housing shortage that followed World War I.[244] Faced with a more widespread housing shortage, the federal government imposed rent control mainly in urban areas during World War II which continued in some cities until the end of the Korean War.[245] These laws were part of a general system of price control established by the Emergency Price Control Act of 1942.[246] Rent control laws enacted during World War II re-emerged in the late 1960s and the 1970s as the result of a number of factors, including a general escalation in the rate of inflation and a static supply of low- and moderate-income rental housing.[247] During this period, zoning restrictions and high construction costs drastically curtailed new development of unsubsidized moderate and low-income housing.[248] Ever-increasing maintenance and rehabilitation costs caused significant withdrawal of low- and moderate-income housing from the rental market.[249] These severe rent increases threatened to place reasonably-priced housing beyond the reach of many low-income citizens and forced others to pay a disproportionate share of their income in rent.[250]

"[P]rior to the 1960s, . . . rent-control . . . was limited to war-related crises or emergencies which necessitated across-the-board rent freezes."[251] "These controls generally did not permit any increase in rent."[252] In 1971,

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244. *See* CUNNINGHAM, *supra* note 9, § 6.55, at 371. Rent control laws are not unique to the United States; one author lists over 100 countries where rent control legislation was adopted. John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 93-94 (1950). Blumberg and Grow give a brief historical background to modern rent control:

> In ancient Rome, rent controls were enacted to relieve the burdens of discrimination against the Jewish community. In the 1500s, a severe housing shortage in Spain and a plague in Paris caused the enactment of rather strict rent controls (rents were reduced by 25% to 50%), and an earthquake in Portugal in 1755 caused a similar response.

RICHARD E. BLUMBERG & JAMES E. GROW, THE RIGHTS OF TENANTS 153 (1978).

245. *See* SCHOSHINSKI, *supra* note 10, § 7:1.

246. *See* CUNNINGHAM, *supra* note 9, § 6.55, at 371. The only contrast to this pattern occurred in New York City, where rent controls were first enacted in 1921 and remained in use until the present day, excepting a period between 1929 and 1942. *See* SCHOSHINSKI, *supra* note 10, § 7:1.

247. *See* SCHOSHINSKI, *supra* note 10, § 7:1.

248. *See id.* at 502.

249. *See id.*

250. *See id.*

251. BLUMBERG & GROW, *supra* note 244, at 154.

252. *Id.*

President Nixon instituted a four-phase Wage, Price, and Rent Control system under the Economic Stabilization Act in response to the national economic crisis evidenced by spiraling inflation.[253] Phase I of the system, which lasted ninety days, provided an absolute freeze on rent.[254] "Phases II to IV [however,] moved toward gradual decontrol [by the federal government] and 'voluntary compliance,' which . . . provided no protection to tenants against rent increases."[255] In response, many states and cities which felt that the federal system did not adequately address their needs "began to consider and enforce their own rent-control programs."[256]

In contrast to the wartime emergency rent freezes, rent controls emerging from states and municipalities, termed "second generation" rent controls, were not absolute rent freezes.[257] Second generation rent control laws "permit landlords to impose rent increases, but restrict the amount of the increase."[258] Moreover, state and federal courts abandoned the constitutional requirement of a housing "emergency" to validate a rent control ordinance which facilitated increased use of rent control ordinances.[259] "Virtually all rent control legislation [nevertheless] contains a declaration of the existence of a housing emergency."[260] To qualify as

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253. *See id.*

254. *See id.*

255. *Id.*

256. *Id.*

257. *See id.*

258. *Id.*

259. *See* Rabin, *supra* note 176, at 527-28. A housing emergency prerequisite stems from an "economic due process" doctrine applied by the Supreme Court in the early part of this century. Under this view, legislation regulating the amount to be charged for goods and services generally met substantive due process requirements only if an emergency existed or if it involved a business "affected with a public interest." SCHOSHINSKI, *supra* note 10, § 7:4. In the landmark case *Nebbia v. New York*, the Court abandoned the emergency test by holding that if, in the opinion of the legislature, a regulation of prices serves the public interest, it is "unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." Nebbia v. New York, 291 U.S. 502, 539 (1934). Although this standard was not immediately followed by the courts in regards to rent control, in 1969, Judge Friendly of the Second Circuit, in dicta, rejected the emergency test. *See* Eisen v. Eastman, 421 F.2d 560, 567 (2d Cir. 1969). In 1975 and 1976, the high courts of California, Maryland, and New Jersey followed the view of the Second Circuit by rejecting the emergency requirement as applied to rent regulations. *See, e.g.*, Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1019 (Cal. 1976); Westchester West No. 2 Ltd. Partnership v. Montgomery County, 348 A.2d 856, 865 (Md. App. 1975); Hutton Park Gardens v. Town Council, 350 A.2d 1, 10 (N.J. 1975).

260. SCHOSHINSKI, *supra* note 10, § 7:4; *accord* FLA. STAT. ANN. § 125.0103 (West 1990) (requiring that a finding of a housing emergency is a statutory prerequisite to enactment of local rent control in Florida); Civitarese v. Middleborough, 591 N.E.2d 1091, 1093 (Mass. 1992) (holding that a declaration of a public emergency is a prerequisite to the valid enactment of rent control legislation in Massachusetts); Kaplen v. Town of Haverstraw, 511 N.Y.S.2d 44 (N.Y. App. Div. 1984) (stating that in New York State a local determination of the existence of a public emergency is a statutory prerequisite to enactment of rent control).

an emergency, legislation normally specifies that circumstances must prevail which prevent "a significant segment of the population from securing decent housing at reasonable rent."[261] Emergencies are also presumed to be temporary.[262] Rent control, therefore, is utilized by most legislatures as a stop-gap means of providing security of tenure. Moreover, the imposition of rent control is based upon the occurrence of widespread housing problems instead of upon the needs of individual tenants to secure decent housing at a reasonable rent.

"Rent control is invariably accompanied by some form of eviction control,"[263] most often including provisions which limit evictions to instances where a landlord is evicting for a good reason.[264] Moreover, to assure this security of tenure, ordinances often require the landlord to offer tenants renewal leases.[265] Eviction control necessarily accompanies rent control because most residential tenancies are brief in duration, and if a landlord could evict a tenant at the end of the lease term, the landlord would gain a great deal of leverage to demand an unreasonable and unlawfully higher rent in exchange for renewal of the lease.[266] The security of tenure provided through eviction control laws is a "necessary concomitant" to rent control laws with regard to the extension of tenants' rights.[267]

While most laws regulating rents and evictions treat eviction control as an adjunct to rent control,[268] in 1974, New Jersey focused predominantly upon the regulation of evictions by enacting a good cause eviction statute which applied generally to private housing tenants.[269] At that time, the

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261. SCHOSHINSKI, *supra* note 10, § 7:4.

262. *See id.*

263. Berger, *supra* note 33, at 727.

264. *See* SCHOSHINSKI, *supra* note 10, § 7:10. Such provisions usually permit evictions only for the following reasons: continuing violations of other lease provisions, nonpayment of rent, illegal use, landlord's desire to use premises for his own use or otherwise discontinue leasing, landlord's intention to sell or remodel. *See, e.g.*, District of Columbia Rental Accommodations Act, D.C. CODE ANN. § 45-1616 (1981).

265. *See* Berger, *supra* note 33, at 727-28.

266. *See id.* at 727.

267. SCHOSHINSKI, *supra* note 10, § 7:10.

268. *See* Berger, *supra* note 33, at 728.

269. N.J. STAT. ANN. § 2A:18-61.1 (West 1987 & Supp. 1996). The following types of private housing do not receive good cause eviction protection under the statute:

> (1) owner-occupied premises with not more than two rental units or a hotel, motel or other guest house or part thereof rented to a transient guest or seasonal tenant;
>
> (2) a dwelling unit which is held in trust on behalf of a member of the immediate family of the person or persons establishing the trust, provided that the member of the immediate family on whose behalf the trust is established permanently occupies the unit;
>
> (3) a dwelling unit which is permanently occupied by a member of the immediate family

New Jersey legislature determined that a landlord could evict a tenant for thirteen good causes.[270] Since 1974, the list has been expanded to include sixteen good causes.[271] This statute introduces "through the backdoor" a judicially-administered rent control scheme. Under the statute, a landlord cannot evict a tenant after service of a valid notice to quit and notice of a rent increase unless a court determines that the increase in rent "is not unconscionable and complies with any and all other laws or municipal ordinances governing rent increases."[272] In other words, a landlord cannot force a tenant to vacate at the end of the lease term by drastically raising the rent without the approval of a court.

Instead of providing the general regulation of rent levels associated with legislatively-imposed rent control, judicial rent control may be accomplished on a case-by-case basis.[273] Judicial rent control circumvents arguments that rent control has a chilling effect on construction of new rental housing[274] and an adverse impact on the tax base of the community[275] since it is applied specifically to each case and not generally to all rental units. Professors Blumberg and Robbins argue that "vindictive rent increases can be controlled without the general regulation of rent levels associated with rent control."[276] Such control may be effected by conditioning the availability of the "good cause" of tenant nonpayment of rent in the context of a recent rent increase upon two factors: (1) whether the rent increase was nondiscriminatory; and (2) whether the landlord could, in fact, rent the unit at the higher rate.[277] "The combination of these two conditions greatly increases the effectiveness of market controls, in that

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> of the owner of that unit, provided, however, that exception (2) or (3) shall apply only in cases in which the member of the immediate family has a developmental disability [except upon establishment of good cause];

Id.

270. *See id.*

271. *See id.*

272. *Id.* at § 2A:18-61.1(f).

273. *See* Blumberg & Robbins, *supra* note 241, at 43-44.

274. *See* GEORGE STERNLIEB & JAMES W. HUGHES, THE FUTURE OF RENTAL HOUSING 93 (1981) ("In a time of inflation, owners and lenders simply are not willing to venture into areas in which the absolute rents (as well as rates of return) will be limited.").

275. As one commentator explains:

> According to this theory, the income-producing capacity of a property is restricted under a rent control scheme so that all other property taxpayers in the community are forced to bear the tax burdens of rental revenues growing at a slowed rate of return.

Joseph W. McQuade, Note, O'Brien Properties Inc. v. Rodriguez: *Upholding Statutory Eviction Protection for Elderly, Disabled, and Blind Tenants in Connecticut*, 24 CONN. L. REV. 599, 616-17 (1992).

276. Blumberg & Robbins, *supra* note 241, at 43-44.

277. *See id.*

the landlord must be able to secure a general increase in rents for all units rather than for only that of the evicted tenant."[278]

Most state legislatures engage in rent and eviction control to address chronic, and not just temporary, problems like retaliatory eviction for reporting a housing code violation, thereby obviating their own requirement of a housing emergency. These legislatures do so indirectly by utilizing judicial rent and eviction control. If eviction control is inseparably linked to rent control,[279] then a legislature which enacts eviction control legislation will either enact rent control legislation or force the judiciary to administer a rent control scheme. Accordingly, a legislature or judiciary which prohibits eviction at the end of a periodic tenancy, when the cause for eviction is shown to be based upon a retaliatory motive, would be contravening the public policy established by most legislatures of requiring a housing emergency unless an "emergency" could be defined to include the consequences of retaliatory evictions. Arguably, such a definition would meet the first requirement of being a housing emergency because a significant segment of the population, that is, tenants, may be unable to secure decent housing at a reasonable rent if they are unable to report housing code violations or engage in activity which furthers other public policies. The second definitional requirement of a housing emergency is not met, however, since the problem of retaliatory eviction is chronic, and not temporary; for at least the foreseeable future, landlords will be able to evict tenants for retaliatory reasons.

The following hypothetical illustrates this situation: A month-to-month tenant reports housing code violations by the landlord to the authorities. In retaliation, the landlord serves the tenant with a notice of drastically increased rent. The tenant, who cannot pay the new rent, argues at the eviction proceedings that he is being evicted in retaliation for "blowing the whistle." If a tenant was protected from retaliatory eviction under the laws of the state, which would usually be the case,[280] the court would be entitled to engage in both rent and eviction control if it found that the drastic rent increase was such that it could only be in response to the tenant's protected activities. Even if the landlord retaliated by simply serving the tenant with a notice to vacate, if the tenant were able to argue successfully that the eviction was retaliatory, the court would necessarily need to monitor future

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278. *Id.* at 44.

279. *See generally* Berger, *supra* note 173, at 727 ("[R]ent control would be unworkable without controlling the right to refuse renewal.").

280. Statutes in some thirty states incorporate the doctrine of retaliatory eviction into the landlord and tenant law. *See* SCHOSHINSKI, *supra* note 10, §12:1; *see also* discussion *supra* note 226-44 and accompanying text.

changes to the periodic tenancy, including rent increases, to prevent the landlord from evicting the tenant for a retaliatory reason.

Since many state landlord and tenant statutory schemes protect periodic tenants from retaliatory evictions at the end of the lease period, the definition of "emergency" in the landlord and tenant schemes of these states implicitly includes perpetual emergencies, such as the consequences of retaliatory eviction. Since the Supreme Court abandoned the requirement of a housing emergency for rent control, it would be both constitutional and more protective of the individual tenant's need for decent, affordable housing if legislatures were expressly and directly to provide security of tenure without requiring a widespread housing emergency.

In 1985, the New Hampshire legislature took such a direct approach by enacting a good cause eviction scheme without the requirement of a temporary housing emergency.[281] The purpose of the statute is to remedy a societal problem created by an imbalance of power between landlords and tenants by "further expand[ing] tenants' rights."[282] The provisions of the statute are unwaivable because the legislature felt that any status it might create between the landlord and tenant would be preferable to a rental market dictated by landlords.[283] The statute delegates the administration of eviction control to the judiciary.[284] The statute also creates judicially-

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281. *See* N.H. REV. STAT. ANN. § 540:2 (Supp. 1995).

282. Journal of the Senate, 1985 Sess., Vol. I, p. 1043 (statement of Sen. Boyer). In the words of one of the bill's sponsors, "everyone is in desperate straits if you have to hit the streets in NH." *Limiting Grounds for Eviction of Tenants from Certain Rental Units, 1985: Hearings on H.B. 95 Before the New Hampshire Senate Public Affairs Comm.* (1985) (statement of Conrad Quimby, Representative).

283. The following exchange between New Hampshire senators reflects this philosophy:

> Senator Stephen: [The bill states that] no lease or rental agreement, oral or written, shall contain any provision by which a tenant waives any of his rights under this chapter. What do you mean by waiving any of his rights?
>
> Senator Boyer: Senator Stephen, that is a common statutory piece of language, because what will happen is a lot of landlords seeing this law, will try to get tenants to waive their rights under this bill and not allow them to have an apartment unless they waive their rights under this bill. What we are saying is that we don't care what you folks agree to, we aren't going to give up the rights under this bill. It isn't only applicable in this, but it is the philosophy that if the legislature passes a law and thinks an area of law is so important that the parties shouldn't be able to say that law isn't applicable here. That is what that is all about.

Journal of the Senate, 1985 Sess., Vol. I, p. 1042 (statements of Sen. Boyer & Sen. Stephen).

284. The five specifically enumerated good causes effectually serve as examples since the judiciary is given broader authority to evict under the "other good cause" catch-all provision of the statute. N.H. REV. STAT. ANN. § 540:2 (e) (1992). This allows the courts to set eviction guidelines, as evidenced in the following exchange in the New Hampshire Senate:

> Senator Stephen: Senator Podles, on page three of the bill, in order to terminate a tenant, you have other good cause. Could you explain other good cause?

administered rent control although the New Hampshire courts have shown unwillingness to enforce the statute where the purpose of the rent increase is to force the tenant to quit the rental property.[285] If the New Hampshire courts do not administer rent control by refusing to allow unconscionable rent increases, the good cause eviction provisions of the statute will be severely limited, if not entirely ineffectual. The statute will be easily sidestepped by landlords who wish to evict tenants for capricious or vindictive reasons. These landlords will simply raise the rent to an amount that their current tenant will be unable to pay, and then reduce the rent to its normal amount once the current tenant has vacated the rental property.[286]

Two other chronic problems which legislatures choose to address through limited and indirect good cause eviction controls are providing for the special needs of the elderly, disabled, and blind,[287] and the protection of the rights of low- and moderate-income tenants who live in mobile homes.[288] In Connecticut, the rationale behind providing such protection to the elderly, disabled, and blind is:

> to preserve a number of dwelling units as rentals for those persons who, because of increasing age, infirmity, or other functional limitations, are least likely to be able to afford to purchase housing and are most susceptible to mental and physical health problems that may result from the trauma of being forced to search for housing in a market where the vacancy rate for residential rental units is approaching zero.[289]

> Senator Podles: It could be for any other reason.
> Senator Stephens: Who decides that?
> Senator Podles: The landlord could do it for any other cause. The judge can decide if it is taken to court.

Journal of the Senate, 1985 Sess., Vol. I, p. 1042 (statements of Sen. Podles & Sen. Stephen). This broad grant of judicial authority to control evictions will necessarily result in a similar power to control rents.

285. *See, e.g.*, Muse v. Merrimack Valley Nat'l Bank, 327 A.2d 719 (N.H. 1974) (providing that written notice to tenant, stating that rent would be increased from forty dollars to one hundred dollars per month, and stating that the tenant was a source of aggravation and should move if the rent was not satisfactory, constituted adequate notice to quit).

286. The New Jersey good cause eviction statute is not weakened in this manner. It provides that failure of the tenant to pay a rent increase will constitute good cause "provided the increase in rent is not unconscionable and complies with any and all other laws or municipal ordinances governing rent increases." N.J. STAT. ANN. § 2A:18-61.1(f) (West 1987 & Supp. 1996).

287. *See generally* McQuade, *supra* note 275; CONN. GEN. STAT. § 47a-23c (West 1994 & Supp. 1996)); N.Y. UNCONSOL. LAW § 8585 (McKinney 1987); D.C. CODE ANN. § 45-1616 (1981) (1996 replacement ed.).

288. *See generally* Luther Zeigler, *Statutory Protections for Mobile Home Park Tenants—The New York Model*, 14 REAL EST. L.J. 77 (1985).

289. Act of May 23, 1980, No. 80-370, § 1(a)(3), 1980 Conn. Acts. 493, 493-94 (Reg. Sess.) (concerning condominium conversion and the encouragement of new rental housing).

The legislature states in its findings and statement of purpose that there is a "statewide housing emergency" which is to be addressed through this legislation.[290] It is the responsibility of the courts to quell this emergency.[291] The "emergency," however, is not due to a temporary housing shortage, but rather to the perpetual difficulties faced by elderly, disabled, and blind tenants. These individuals are negatively impacted by being uprooted from their homes whether there is a rental shortage or not.[292] The Connecticut legislature, therefore, implicitly finds justification for providing less protection to a disabled person who encounters difficulty finding a house when there is no housing shortage than to a similarly situated individual who cannot find a house when there is a housing shortage.

This distinction might be justified by arguing that the emergency being properly addressed by the Connecticut legislature is created by the greater numbers of elderly, disabled, and blind tenants who will need and seek this protection during a housing shortage. The Connecticut legislature, however, chose to allow the courts to address this problem. Courts may fashion a remedy on a case-by-case basis and do not usually fashion specific remedies for large numbers of individuals. It would be more reasonable and equitable, therefore, for the courts to condition the grant of eviction protection on whether the elderly, blind, or disabled individual can actually find another suitable home, and not upon whether there is a housing shortage. These findings may involve a consideration of whether there is a housing shortage which might prevent an individual from finding another home, but the grant of relief should not be contingent on that finding. To require otherwise dilutes the protection the legislature claims it is willing to provide.

Like Connecticut, Vermont chooses to provide security of tenure to certain classes of individuals. In Vermont, security of tenure is provided to mobile home park tenants through the Vermont Mobile Home Parks Act

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290. *Id.*

291. Senator Leonhardt commented that this was "a declaration of an emergency to give the courts legislative guidance on the Legislature's intent." 23 S. Proc., Conn. Gen. Assembly, Pt. 5, 1980 Sess., p. 1392 (statement of Sen. Leonhardt).

292. The Connecticut Commissioner on Aging testified in committee hearing that:

> Transfer trauma with the elderly is a known fact and when you are dealing with people who are uprooted [and elderly and frail]. . . [t]he very fact that you are transferring [them] is, indeed, more than upsetting to many of them. Many of them do not make this transfer and stay well. . . . [M]any of them do not live long if they are very frail [and] very elderly.

Conn. Joint Standing Comm. Hearings, General Law, Pt. II, 1980 Sess., p. 374 (statement of Comm'r Shealy).

(VMHPA).[293] Mobile home tenancies differ from other tenancies due to the mobile home tenant's peculiar ownership interest.[294] A tenant in a mobile home park often owns the mobile home and merely rents the pad on which the home rests.[295] The phrase "mobile home" is actually a misnomer because once a mobile home is in position, it cannot be moved easily.[296] As a result, the interest of the mobile home tenant in remaining in the park places the tenant in a very vulnerable position since mobile home tenants will tend to incur higher relocation costs than tenants living in conventional housing.

The rationale generally given for requiring good cause to evict a mobile home tenant is that, absent protective legislation, mobile home park owners are able to dictate unfair lease terms to mobile home owners because of limited availability of space and high cost of relocation.[297] This rationale distinguishes between mobile home tenants and conventional tenants based upon the economic burdens inherent in moving a mobile home. By the early 1980s, a majority of states enacted laws protecting mobile home park tenancies.[298]

While this rationale was used to provide security of tenure in the limited context of mobile homes, there is some question whether the rationale fully explains the enforcement of these laws in Vermont. In 1993, the Supreme Court of Vermont recognized, in *Vermont Agency of Development & Community Affairs v. Bisson*, that the good cause eviction protection codified in the VMHPA extended to tenants who did not own the mobile homes they were renting.[299] VMHPA provides that a "mobile home resident" may only be evicted for four good causes.[300] The court

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293. VT. STAT. ANN. tit. 10 § 6237 (1993).

294. *See* Zeigler, *supra*, note 288, at 78. *See generally* Joanne M. Ertel, Note, *Vermont's Efforts to Protect Mobile Home Park Tenants: Is There a Taking?*, 16 VT. L. REV. 1027 (1992).

295. *See* Zeigler, *supra* note 288, at 78.

296. *See id.* In 1980 the United States Department of Housing and Urban Development changed its designation of mobile homes to "manufactured homes" in recognition of the diminished mobility of these dwelling units. *See* WELFORD SANDERS, AMERICAN PLANNING ASS'N, REP. NO. 398, REGULATING MANUFACTURED HOUSING 1 (1986).

297. *See generally* Lyle F. Nyberg, Note, *The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship*, 52 B.U. L. REV. 810 (1972) (detailing the predicament of mobile home owners that led to protective legislation).

298. *See* Thomas G. Moukawsher, Note, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 CONN. L. REV. 811, 816 (1985).

299. Vermont Agency of Dev. & Community Affairs v. Bisson, 161 Vt. 8, 10, 632 A.2d 34, 36 (1993).

300. Section 6237(a) provides in part: "A mobile home resident may only be evicted for nonpayment of rent or for a substantial violation of the lease terms of the mobile home park, or if there is a change in use of the park land or parts thereof or a termination of the mobile home park." VT. STAT. ANN. tit. 10 § 6237(a).

concluded that the term "mobile home resident" included both renters and owners of mobile homes.[301]

The defendant in *Bisson* argued that applying the good cause eviction provisions of the Act to renters of mobile homes would mean that those renters would be treated more favorably than non-mobile home renters for no apparent purpose since the rationale behind the statute was based upon the difficulties in relocating the mobile home.[302] A mobile home renter would not face that difficulty. The court acknowledged that the defendant stated one purpose underlying the statute,[303] but ultimately rejected the defendant's argument after examining the findings of the Vermont legislature supporting the Act, where the legislature found that "there is a substantial need for new housing . . . for moderate and low-income groups, which need is likely to increase in the future," that the "construction of conventional homes has failed to provide sufficient low-cost housing," and that "most of the new housing available to moderate and low-income groups consists of mobile homes."[304] Using this broader rationale, the court was able to justify giving greater security of tenure to "renters of mobile homes, who tend to be lower-income groups that may have difficulty finding alternative housing."[305]

In essence, the *Bisson* court determined that the legislative intent behind the VMHPA was, in part, to provide security of tenure to low- and moderate-income tenants, but that such security was conditioned upon whether the tenant lived in a mobile home. Any distinction, however, between low- or moderate-income mobile home renters and similar renters of conventional homes is arbitrary in relation to their economic status, since they will incur similar costs in relocating. In some situations, it might be more difficult for the renter of a conventional home to relocate. For example, the renter of a conventional home who places an above-ground pool, or a workshop with heavy equipment, on the rental property could face higher relocation costs than a mobile home renter with easily-movable personal property.

From a standpoint of administrative efficiency, the Vermont legislature's choice to provide good cause eviction protection to low- or moderate-income tenants based upon whether those residents live in mobile

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301. *See Bisson*, 161 Vt. at 14, 632 A.2d at 38.

302. *See id.* at 13, 632 A.2d at 37.

303. *See id.* ("[The Court] acknowledge[s] that the purpose stated by defendants is an underlying purpose of the Mobile Home Parks Act."); Eamiello v. Liberty Mobile Home Sales, Inc., 546 A.2d 805, 818-19 (Conn. 1988).

304. Act effective June 1, 1970, No. 201, § 1(d), (e), 1969 Vt. Acts & Resolves 425-26 (providing for the encouragement of the development of attractive sites for mobile homes).

305. *Bisson*, 161 Vt. at 14, 632 A.2d at 38.

homes has at least three advantages. First, the classification is relatively easy for the courts to apply since they may condition the grant of a remedy upon whether a lower-income tenant lives in a mobile home, which is an uncomplicated factual determination. Second, the classification is tailored to afford a remedy to lower-income tenants since mobile home tenants in Vermont tend to be of lower-income.[306] Third, the landlord's interest in the rental property is more well-protected if good cause eviction protection for lower-income tenants is conditioned upon whether the tenant resides in a mobile home. A mobile home landlord will know before entering a lease agreement that he will be subject to these greater burdens on his property interest. If a legislature were to condition good cause protection solely upon whether a tenant was of lower-income, the landlord would potentially be given little or no notice of this greater burden.

Administrative convenience aside, the Vermont public policy of according eviction protection to low- and moderate-income tenants might be limited unnecessarily by extending such protection only to mobile home tenants who live in mobile home parks. As of 1994, there were 46,750 low- and moderate-income Vermonters in need of decent, affordable rentals.[307] At that time, however, there were no more than 8150 Vermonters renting space in mobile home parks.[308] Thus roughly seventeen percent of low- and moderate-income Vermonters in need of decent, affordable rentals received good cause eviction protection. Affording greater security of tenure only to renters in mobile home parks, therefore, does not increase significantly the degree of security afforded to low- or moderate-income Vermonters.

It might be more effective for the Vermont legislature to provide heightened eviction protection to a broader classification of renters. For example, in 1994, approximately seventy-two percent of all tenants in Vermont were of low or moderate income.[309] Since the percentage of renters in Vermont who are of low or moderate income is significant, the needs of this group of Vermonters might be better served by extending good cause eviction protection to all tenants in Vermont. A court could then determine on a case-specific basis whether to afford a remedy. In

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306. *See id.* at 14, 632 A.2d at 38 (finding that "owners *and* renters of mobile homes . . . tend to be lower-income groups").

307. *See* VERMONT AGENCY OF DEV. & COMMUNITY AFFAIRS, CONSOLIDATED PLAN FOR HOUSING AND COMMUNITY DEVELOPMENT PROGRAMS 1 (1995).

308. *See id.* Summary 3.

309. In 1990, there were 65,282 renter-occupied housing units in Vermont. *See id.* tbl. 14. As of 1994, an estimated 46,750 low- and moderate-income households need decent, affordable rentals. *See id.* Summary 1. Assuming that the 1990 figure was still accurate in 1994, 72% of all tenants are in need of decent, affordable housing.

terms of the three factors relating to administrative convenience mentioned above, protecting all tenants would be as efficient as protecting only mobile home tenants. The only necessary factual determination to qualify for the protection would be whether the person was a renter. The classification would be closely-tailored since a significant number of tenants in Vermont are of low or moderate income, and the landlord would receive similar advance notice of the added burden.

Assuming the Vermont legislature was uneasy about extending heightened eviction protection to such a comprehensive degree, there are more reasonable incremental steps it might take other than limiting protection to mobile home park tenants. For example, the legislature might use the approach taken by New Jersey and New Hampshire, where good cause eviction protection extends only to tenants living in certain statutorily-enumerated types of housing.[310] In this manner, the Vermont legislature could utilize a good cause eviction statute as a reasonable means of balancing the competing interests of landlord and tenant.

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310. The New Jersey law provides:

> No lessee or tenant or the assigns, under-tenants or legal representatives of such lessee or tenant may be removed by the Superior Court from any house, building, mobile home or land in a mobile home park or tenement leased for residential purposes, *other than* (1) owner-occupied premises with not more than two rental units or a hotel, motel or other guest house or part thereof rented to a transient guest or seasonal tenant; (2) a dwelling unit which is held in trust on behalf of a member of the immediate family of the person or persons establishing the trust, provided that the member of the immediate family on whose behalf the trust is established permanently occupies the unit; and (3) a dwelling unit which is permanently occupied by a member of the immediate family of the owner of that unit, provided, however, that exception (2) or (3) shall apply only in cases in which the member of the immediate family has a developmental disability, except upon establishment of . . . good cause.

N.J. STAT. ANN. § 2A:18-61.1(f) (West 1987 & Supp. 1996) (emphasis added).

The New Hampshire good cause statute does not provide protection to tenants residing in "nonrestricted property," which the statute defines as:

> I. . . . [A]ll real property rented for nonresidential purposes and the following real property rented for residential purposes:
>
> (a) Single-family houses, if the owner of such a house does not own more than 3 single-family houses at any one time.
>
> (b) Rental units in an owner-occupied building containing a total of 4 dwelling units or fewer.
>
> (c) Rental units in a vacation or recreational dwelling, rented during the off-season for purposes which are not vacation purposes or which are nonrecreational.
>
> (d) Single-family homes acquired by banks or other mortgagees through foreclosure.

N.H. REV. STAT. ANN. § 540.1 (Supp. 1995).

2. Security of Tenure Under the Social Relations Model

The free market and social relations approaches to the lease contract may be differentiated through the following hypothetical. Suppose a tenant and her extended family, that is, her husband, children, and parents, rented adjacent apartments. The family lived in the apartments for five years after signing a month-to-month lease contract at the beginning of their tenure. Over those five years, the adults secured jobs in the neighboring area and the children attended the local school. The adults and children alike formed relationships with the surrounding community. The family did not bargain for a more permanent rental arrangement for two reasons. First, the landlord never offered the option for a longer lease period. Second, the family grew comfortable living in the apartment and were good tenants. Since the landlord and tenant relationship was largely informal, they did not see a need to bargain for a longer lease, nor did they fully understand the need for one. They assumed they would be able to stay because, although they did not explicitly know the law, it seemed "fair" that as long as they were good tenants and paid their rent, their landlord would have no cause to make them leave.

Unfortunately, the husband had a series of strokes which made it difficult for him to interact with other people and nearly impossible to work. The landlord became worried that the husband's condition might bother the other tenants and threaten the family's ability to pay rent. To preempt any potential problems, he served both apartments with a notice to quit, giving the month's notice required by statute to terminate a month-to-month tenancy. When the family asked why they were being made to leave, the landlord told them that he simply did not want them living in the apartment any longer.

Under the free market model, the family would be forced to vacate the apartments because the landlord did not owe the family a recognized legal obligation. The express promise between the parties was for a one-month period. To argue that the landlord impliedly promised to give the tenant an option to stay indefinitely is likely to be untenable since the express promise directly contradicts such an implication. Moreover, the law generally imposes no duty on the landlord to provide the tenant with security of tenure beyond the security for which the parties contract. A court which found this situation to be inequitable would be hard-pressed to justify a decision which allowed the tenant to stay. The landlord can terminate the tenancy for no reason, and would not need to justify his decision. The eviction would not be retaliatory because it was not a reaction to the tenants' attempts to further a public policy. Even if this were to occur in New Hampshire, where good cause is technically required,

the landlord could simply double the rent and tell the family they could leave if they did not want to pay the higher rent. Once the family vacated, he could lease the apartments to more acceptable tenants at the lower rent. Since the landlord is legally considered the owner of the property, his rights to the property are paramount.

This hypothetical illustrates potential inequities in the free market model which might be remedied under the social relations approach. The social relations approach "shifts our attention from asking 'Who is the owner?' to the question 'What relationships have been established?'"[311] The shift is from a perspective that focuses on the owner as an isolated individual whose presumptive control of the resource is absolute within her sphere of power to a perspective that understands individuals to be in a continuing relation to each other as part of a common enterprise. "Rights are not limited to the initial allocation of property entitlements or the agreement of the parties, but emerge and change over the course of the relationship."[312]

Instead of focusing upon the "magic moments" where the parties expressly contract or where the state imposes an obligation, this approach recognizes that, over time, parties establish relationships as components of a "common enterprise."[313] Rather than emphasizing specific promises, the ongoing relationship between the parties taken as a whole is central. By concentrating on the character of relationships and requiring owners to take into account the interests of others when they decide to use their property, the social relations approach recognizes that property owners, who control a valuable social resource, have a moral obligation to hold their property "partly for their own benefit and partly in trust for the community and for others with whom they establish continuing relationships."[314] This

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311. *See* Singer, *supra* note 2, at 657. Professor Singer explains:

> When several parties share legal rights in property, any identification of a single person as the "owner" is likely to be both arbitrary and misleading. It is arbitrary because we could just as easily identify someone else as the owner. It is misleading because it denies the existence of joint interests and the need to determine the legal relations among all the persons with legally protected interests in the property. The "owner's" rights are limited by the rights of others with entitlements in the property. Identifying the owner does not tell us who these other people are or what their rights are.

Id. at 638.

312. *Id.* at 657.

313. *See id.*

314. *Id.* at 659.

approach would require a landlord to act fairly and in accordance with community standards and values.[315]

In her article entitled *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, Professor Deborah Hodges Bell argues for a recognition of security of tenure in landlord-tenant law through an implied covenant of good faith.[316] Professor Bell outlines how the implied covenant of good faith and fair dealing is recognized in employment and franchise cases and argues through analogy that:

> courts should imply a good faith obligation on landlords. The tenant deserves recognition of a more extensive and uniform expectation of continued occupancy which does not significantly affect the landlord's operation of his business or require legislation to completely restructure the landlord-tenant relationship. The obligation of good faith . . . should be interpreted by courts to prohibit a landlord's exercise of otherwise permissible termination [of] rights in a bad faith manner that contravenes the tenant's expectation of continued occupancy.[317]

The practical effect of a recognition of this duty would be the creation of a shifting burden of proof which would require the tenant to make a prima facie case of bad faith termination.[318] The burden of proof would then shift to the landlord to show a legitimate reason for eviction.[319] "If the landlord shows a legitimate reason, the tenant would have the burden to show that the articulated reason was simply a pretext for the improper motive."[320] The burden of proof is allocated in this manner to "avoid

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315. Professor Linzer explains the need for this heightened responsibility:

> In a sense I am calling for a return to common law creativity. When people deal informally with one another, conscious assent is often non-existent, except perhaps when the parties start to deal with each other. Terms may not even be discussed; people just do not think in terms of rules in many relationships. Yet the parties have expectations and they each contribute to the relationship. Traditional notions of contract and property greatly favor the economically dominant party, even though a strong case can be made that all contributors to an enterprise deserve some security and some share of the enterprise itself. The focus [should be] on the relationship as a firm with the members' rights depending on communal notions of fairness.

Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 425 (1986).

316. *See* Bell, *supra* note 101, at 484. "This Article proposes that the courts directly recognize a tenant's expectation of security by imposing on landlords a duty to terminate in good faith." *Id.*

317. *Id.* at 508.

318. *See id.* at 538.

319. *See id.*

320. *Id.*

requiring the landlord to prove the reasons for eviction unless the tenant could make out a prima facie case of improper motive, thus balancing the landlord's interests in maintaining the right to terminate with the tenant's interest in security from malicious termination."[321]

Professor Bell identifies three categories where a landlord may terminate in good faith: "legitimate business reasons unconnected with the tenant's performance," "justifiable reasons connected with the tenant's performance of her obligations under the lease," and "termination for no reason at all."[322] "Bad faith" is defined as a landlord's use of the leasehold as a "punitive or coercive device."[323] An example would be a situation where a landlord refuses to renew the lease of a tenant for "non-tenancy related activities that further significant social concerns."[324] A recognition of this legal obligation of good faith would signal that the courts "are willing to look beyond an express agreement to balance competing interests of the contracting parties according to norms of fairness and community standards and values."[325]

The definition of good faith espoused by Professor Bell does not fit the definition of good faith followed by URLTA and the free market model; rather it falls under the social relations approach. In the free market, a landlord need only observe "reasonable commercial standards of fair dealing."[326] Under Professor Bell's approach, a landlord may observe these reasonable commercial standards and still be found to be acting in bad faith if a court decided that "community standards and values" were infringed.

For Professor Bell's approach to succeed under the free market model, a court would need to find an implied promise on the part of the landlord when the agreement was made not to act towards the tenant in a manner which would infringe upon community standards and values even after the lease contract terminated. A court could also impose a heightened good faith requirement into the landlord-tenant relationship for reasons of public policy. In either circumstance, a court would be required to imply a relationship between landlord and tenant which goes beyond the relationship as established by the parties themselves through the lease contract.

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321. *Id.* at 538-39.

322. *Id.* at 537.

323. *Id.* at 532.

324. *Id.* at 496.

325. *Id.* at 520.

326. *Id.*; *accord supra* notes 222-224 and accompanying text.

If a court or legislature were to take the social relations approach and attempt to determine what relationships have been established by the parties to the ongoing enterprise and whether certain interests merit legal protection, it might ask the following series of questions which can only be partly answered by reference to the contract between the parties:

> What relationships have been established? What expectations have been generated on both sides by continuation of the relationship? To what extent should those expectations be protected? What was the explicit agreement between the parties? What is the distribution of power in that relationship? What alternatives do the parties have open to them? How have the parties relied on continuation of the relationship? How have the parties contributed to the joint enterprise? What are the consequences of giving complete control of the property to the putative owner or limiting the [landlord's] obligation to those agreed to in the contract? What are the consequences of imposing greater obligations on the [landlord] toward the [tenant]? What moral obligations should the more powerful party have in this context to protect the more vulnerable party?[327]

While recognizing the importance of the explicit agreement between the parties, these questions serve to contextualize the landlord and tenant relationship in the broader arrangement of societal dependencies, widening the scope of legal inquiry beyond the leasehold to its potential effects on the surrounding community. A legislature would ask these questions when determining what kinds of eviction laws might generally result in a fairer society, while a court might ask these questions to decide a case before it. In regards to the preceding hypothetical, a court asking these kinds of questions might be able to take into account considerations such as the effects of relocation upon the children, any problems associated with the husband's disability, the difficulties in trying to secure housing commodious enough to support an extended family, and the fact that the family members were good tenants for a protracted period and began to consider the landlord's rental property as their home.

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327. Singer, *supra* note 2, at 658-59. In regards to this final question, Professor Radin has argued that society should make a fundamental moral distinction between personal and fungible property. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

3. Recommendations

There are three significant deterrents to providing tenants with greater security of tenure regardless of whether doing so results in a more equitable situation for the tenant. First, affording tenants more rights to rental property will necessarily result in an infringement on the rights traditionally recognized as belonging to the owner of the property. In terms of a tenant's right to occupy the property, the good tenant is provided by law with what resembles a new form of life estate.[328] Moreover, the landlord's control of the property is diminished if the court or legislature decides that the amount at which the landlord rents the property is unconscionable, or if the free market is burdened by an artificial ceiling on rents. Second, the methods by which security of tenure is currently provided to tenants lack reciprocity of obligation between the parties. Under good cause eviction statutes, the landlord must let the good tenant stay, but the tenant is under no similar obligation and may vacate the rental property at will at the end of a lease period.

A state legislature might alleviate these first two concerns and also provide tenants with greater security of tenure by enacting an eviction statute which imposed a duty on the landlord to give first preference to the current tenant to renew the lease. The landlord would be required to renew the lease unless she could find someone else who was willing to pay a higher rent than the current tenant was willing to pay. This would create a judicially-administered rent control scheme that only controls rents which are vindictive and unreasonably high in relation to the market. The landlord would need to present sufficient evidence that the apartment could in fact be rented at the higher price. Testimony from a third party stating an intention to move into the apartment at the higher rent could serve as sufficient evidence. In order to deter a landlord from circumventing this provision, significant fines could be imposed upon landlords later found to be acting fraudulently. The landlord could also refuse to renew if the tenant acted in a way to breach the lease contract. The same statutory grounds for eviction that are currently applied by the state during the lease contract could apply in that situation.

This preference right would not be waivable in verbal lease contracts; tenants who were willing to waive their preference right verbally would simply move out and not attempt to enforce their right in court. The unwaivability of this provision in verbal lease contracts would provide the landlord with an incentive to enter into written lease contracts, which in

328. *See supra* note 198 and accompanying text.

turn would make it easier for courts to determine the substance of the parties' agreement.[329] The landlord would not need to renew if the tenant waived the preference right in writing. If the tenant waived the preference right, the same statutory grounds for nonrenewal that are currently applied by the state during the lease contract would apply. To prevent a landlord from simply including a waiver of the tenant's preference right in the fine print of the standardized lease form, the legislature might require any waiver provision to be in large print on a separate, colored piece of paper.

It might be argued that requiring a waivable preference right will not result in any real change beyond the addition of a meaningless piece of colored paper to every written lease contract. If it were economically advantageous, landlords would already enter into lease contracts containing a preference to renew, and since they do not usually do so, they will simply refuse to enter into a written contract with a tenant who refuses to waive the right. While this argument may have merit, the imposition of a waivable preference right into the contract would still benefit tenants by giving landlords an incentive to enter into written, as opposed to verbal, lease contracts.

The addition of the preference right also could be made economically attractive to the landlord by imposing a reciprocal duty to renew on tenants who bargained for the preference right in a written lease contract.[330] Tenants who breached this lease provision would be subject to significant fines. A tenant could avoid performance of the duty by assigning the lease to a third party who was agreeable to the landlord. A tenant could also avoid performance by stating a "good" reason to vacate. A legislature might statutorily enumerate good reasons, such as locating an apartment for less rent. If the current landlord wished the tenant to renew, the landlord could require the tenant to provide sufficient evidence that the new apartment was actually less expensive and that the tenant intended to move into the new apartment. A tenant could be deterred from circumventing this provision by the imposition of significant fines upon tenants later found to be acting fraudulently by failing to renew.

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329. Professor Blumberg discusses the problems inherent in oral rental agreements:

> The main problem with oral rental agreements is in proving the substance of the agreement. [The] landlord can promise [a tenant] everything, but when it is time to deliver, [the tenant is] likely to get nothing. Because it is [the tenant's] word against the landlord's, courts are generally skeptical of alleged oral agreements.

BLUMBERG & GROW, *supra* note 244, at 16.

330. Imposing a reciprocal duty to renew on tenants with verbal lease contracts would be unjustifiable since those tenants did not bargain for the preference right; in their case, the duty is imposed by the state in order to provide an incentive for landlords to enter into written lease contracts.

Other good reasons for nonrenewal on the tenant's part could be: the landlord raised the rent and the tenant does not want to pay the higher amount; the tenant needs to relocate for work-related reasons; or a catch-all provision incorporating "any other good faith reason." In the circumstance of the catch-all provision, the courts would ultimately be responsible for determining whether there was a good reason. Finally, a tenant could vacate if the landlord waived the right to hold the tenant to the duty to renew. Requiring this waiver in writing would eliminate any disputes as to whether such a waiver in fact occurred. If a tenant failed to provide a good reason to vacate, the court could require the tenant to compensate the landlord for lost rent, while the landlord would be required to mitigate damages by attempting to find a new tenant.

In states where there is an overabundance of rental housing, a duty on the tenant's part to renew the lease would prove attractive to landlords because it would guarantee future income from the rental property. If a state were affected by a housing shortage, landlords would still benefit from the imposition of a duty to renew. For example, where there was a housing shortage, a landlord might initially refuse to enter into a longer-term lease contract which gave the tenant a renewal preference. Instead, the landlord would enter into a short-term periodic tenancy for two reasons. First, since there was a housing shortage, landlords would value the ability to raise the rent as soon as possible and a longer-term tenancy would not give the landlords the flexibility they desire.

Second, a housing shortage would produce an overabundance of tenants, giving the landlord the luxury of picking a "good" tenant who pays the rent on time and does not disturb the landlord or other tenants. A short-term tenancy would give the landlord the greatest ability to get rid of bad tenants and replace them with good tenants. Even in a housing shortage, however, a good tenant would be valuable since they guarantee a consistent income to the landlord and cause few problems. Landlords who found good tenants would have an incentive to offer them a renewal preference, realizing that the tenant would reciprocally be obliged to renew. Although the landlord might want to maintain a short-term tenancy to maximize his return from the property, good tenants would be granted the opportunity to stay in the same home for as long as they remained good tenants. At the same time, landlords would be able to adjust their rents according to market conditions.

Finally, a third possible deterrent to extending the breadth of legal inquiry into the landlord and tenant relationship is that it will result in an

unmanageable caseload for the courts.[331] Professor Bell argues that this fear is probably exaggerated because only a small percentage of evictions are based on reasons other than nonpayment of rent, meaning that the tenant will be only infrequently provided with an opportunity to defend against a summary eviction.[332] Moreover, "a tenant who is inclined to raise a frivolous defense . . . could presently do so in most states by arguing that the landlord was terminating the tenancy in retaliation for the tenant's request for repairs."[333] Moreover, any additional litigation costs incurred by the landlord would be relatively small due to the simplicity of the litigation involved, and even if these costs were passed on to the tenants, any increase in rents would be offset by the valuable security of tenure provided to the tenant.[334]

CONCLUSION

Some tenants are nomadic, ceaselessly travelling from place to place. For these tenants, a "decent" home is a home that moves. This is not to say that they prefer a mobile home. Rather, they require a physically habitable home wherever they go. Half a century ago, these tenants were responsible for creating such a home. Currently, the landlord must shoulder this responsibility in most states. Other tenants, however, prefer to stay in one place, involving themselves in the social and political life of their community. To these tenants, a decent home necessarily includes some assurance that they will be able to stay in the house nearby where they work and where their children go to school, and where they might plant a garden or otherwise improve the property to their own liking and with the landlord's approval. In a word, they would like what relatively settled people consider a "home." Currently, it is the tenant's responsibility to create such a home by either buying a house or entering into a long-term

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331. Senator Preston of New Hampshire expressed this concern over the good cause legislation eventually adopted by that state:

> I don't oppose the elderly, the homebuilders, the realtors, the council of churches. I'm not opposed to good tenants nor do I support bad or irresponsible landlords. What I do see here is a real clogging of the courts, endless litigation, and support of a constituency out there that is not responsible tenants or perhaps this is an excellent bill for the legal profession. I see further virtual harassment for irresponsible landlords and good tenants suffering as a result. I think it will clog the courts with cases relating to whether there is good cause or not that exists. I see something [like this] occurring every session I have been here, and I'm almost embarrassed to own private property.

Journal of the N.H. Senate, 1985 Sess., Vol. I, p. 1044 (statement of Sen. Preston).

332. *See* Bell, *supra* note 101, at 539.

333. *Id.*

334. *See id.*

lease. Often, this does not occur for many reasons, a good number of which are outside a tenant's direct control.

For tenants who cannot obtain security of tenure and yet desire it, their homes are also the landlord's rental property. Unfortunately for these tenants, property law traditionally favors the landlord's interest in the property. Although it is a tenant's responsibility to obtain security of tenure, it is often the landlord's decision as to whether a tenant will obtain that security. Accordingly, the term of years which has persisted since the fourteenth century does not satisfy the need of many tenants to inhabit a dwelling for a potentially lifelong term. The question addressed here is whether our society wants to help these tenants nonetheless by providing tenants who are "good" with more security of tenure, or by giving landlords some incentive to enter into longer-term relationships with good tenants. It appears that in an increasing number of states our society does wish to help. If so, this goal should be squarely in the minds of future legislatures and courts so that their future action will reflect the choice to provide greater security of tenure to residential tenants.

Paul Sullivan