3-1-2008


Florence Wagman Roisman

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.unc.edu/nclr/vol86/iss3/9
Security of tenure is a critically important human need. While involuntary displacement can affect even conventional homeowners, it most often is imposed upon renters and those who own manufactured homes but lease the underlying land. Most such...
renters are not wealthy enough to obtain security of tenure by agreement with the landowner, and therefore rely upon the government to assure them some protection against arbitrary terminations of occupancy by the landowner.

Some jurisdictions in the United States have acted legislatively to require good cause for eviction, but in most states tenants and owners of manufactured homes on rented sites must rely on the common law for any such protection. The mid-century “revolution” in tenants’ rights stopped far short of protecting continued tenancy. This Article argues for a renewed litigation effort to realize security of tenure for such renters, by using either the implied covenant of good faith and fair dealing that is commonly applied to contracts and commercial leases or an implied covenant of security of tenure (or good cause for termination).

Dr. King in 1967, preaching in Chicago: “But I hope I can live so well that the preacher can get up and say he was faithful. That’s all, that’s enough. That’s the sermon I’d like to hear. ‘Well done thy good and faithful servant. You’ve been faithful; you’ve been concerned about others.’”

INTRODUCTION

Insecurity of tenure plagues millions of households in the United States, particularly those who rent their homes and those who own

1. DAVID GARROW, BEARING THE CROSS 555 (1986). This epigraph is for John, who has been, among many other admirable things, faithful.
manufactured homes but rent the land upon which the homes are sited. While a relatively small set of wealthy renters have enough market power to obtain the security they want from the landowner, and a relatively small set of renters live in jurisdictions that have legislatively provided some security of tenure, most renters in the United States are dependent upon the common law for any rights they may have in this regard.

In the mid-twentieth century, the judicial system took great strides in developing such protections, but progress stalled short of establishing a general principle of security of tenure for renters in the United States. Curiously, the problem was not that courts rejected such advances or that legal doctrine was inhospitable; rather, advocates simply stopped asking the courts to continue the logical and natural doctrinal development that already had begun. Aspects of security of tenure were litigated, and the general principle of security of tenure was pursued legislatively, but the general principle of security of tenure was not advanced in the courts.

This Article calls for a renewed litigation approach to recognition of the principle that renters—those who rent homes and those who rent the land upon which their homes are sited—are entitled to security of tenure, that is, that the landowner cannot terminate a tenancy absent a showing of good cause. (“Termination” for purposes of this Article means non-renewal of a leasehold, as well as actions that cut off a tenancy during the term or period of a lease.) Part I discusses the importance of security of

2. Some homeowners also suffer insecure tenure, particularly if they bear predatory or other expensive mortgage loans, but this Article does not address homeowners' issues except for owners of manufactured homes who rent the lots on which their homes are sited. See CAROLYN L. CARTER ET AL., MANUFACTURED HOUSING COMMUNITY TENANTS: SHIFTING THE BALANCE OF POWER 2 (2004) (stating there are about 2.3 million manufactured homes sited on rented lots in manufactured housing communities in the United States).

3. The absence of protections in the United States contrasts sharply with strong security of tenure for tenants in Europe and in other countries. In France, for example, most tenancies are required to be for terms of three or six years and are renewed automatically; they can be terminated at the end of a term only for one of three specified reasons. Jane Ball, Renting Homes: Status and Security in the UK and France—A Comparison in the Light of the Law Commission's Proposals, 67 CONV. & PROP. LAW. (N.S.) 38, 50–52 (2003). Similar protections are provided in other countries. See, e.g., Barreto v. Portugal, 334 Eur. Ct. H.R. (ser. A) at 8 (1995) (rejecting a landowner's effort to reclaim property for his own use because the landowner had shown only that his "living conditions would certainly be better and more comfortable in the house," but had not shown the "real need" required by the case law).

4. See infra note 75 and accompanying text.

5. See infra notes 74–75 and accompanying text.

6. The New Jersey and District of Columbia statutes apply to lease renewals, as does the good cause protection in the Low Income Housing Tax Credit ("LIHTC") Program. See N.J. STAT. ANN. § 2A:18-61.1–61.12 (West 2000); D.C. CODE § 42-3505.01(a) (2001) (specifying that absent one of the ten reasons that constitute good cause, "no tenant shall be evicted from a rental unit, notwithstanding the expiration of the tenant's lease or rental agreement."); Carter v. Md. Mgmt. Co., 835 A.2d 158, 166 (Md. 2003) (holding that in the LIHTC program, a "tenancy

2008] RIGHT TO REMAIN 819
tenure; Part II describes the development of protections for security of tenure; Part III considers the relative advantages of legislative and judicial protections for security of tenure; and Part IV reviews common law bases for protecting security of tenure.

I. THE IMPORTANCE OF SECURITY OF TENURE

Security of tenure is one of the most important elements of the human right to housing. As a housing rights expert has written, "Of all elements of the right to housing, it is perhaps the right to security of tenure that forms the most indispensable core element of the norm."7

Security of tenure is fundamentally important because it is the basis upon which residents build their lives. It enables people to make financial, psychological, and emotional investments in their homes and neighborhoods. It provides depth and continuity for children's school attendance and for the religious, social, and employment experiences of children and adults. Security of tenure enables tenants "to fully participate in social and political life."8 All people have a strong interest in being

---

8. Deborah Hodges Bell, Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate, 19 GA. L. REV. 483, 532 (1985) (arguing that "[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"). Professor Bell is referring only to the landlord's "using the leasehold as a punitive or coercive device," which is the only situation she is seeking to redress. See infra notes 130-31 and accompanying text. I believe, however, that Professor Bell's point applies more broadly, to protect tenants from termination even where the landlord's reason is not punitive or coercive, but is economically based. Even in that situation, security of tenure contributes to tenant participation in political activity, if only because the tenant will not have to devote time, energy, and attention to securing a new home and will be able to use those additional resources to engage in political activity, among other things. People who are focused on keeping a roof over their families' heads and bread on their families' tables will be substantially limited in their ability to participate in public discussions. See Frank I. Michelman, Mr. Justice Brennan: A Property Teacher's Appreciation, 15 HARV. C.R.-C.L. L. REV. 296, 298-99 (1980) (describing a vision in which "property would both assure the necessary material foundation for political competence and provide a haven for
treated fairly and in minimizing the impact of arbitrariness in their lives:

"In a society in which many individuals cannot realistically expect to become homeowners, providing some security of tenure in rental housing is an important step toward encouraging the sense of autonomy and stability associated with the concept of home."

Involuntary displacement disrupts these educational, religious, social, and employment connections. Residential instability is a major cause of

The security of tenure element of rent control:

It relates to community participation and to the potential community benefits of improved housing. I resist the term 'positive externality,' but that's what I am talking about—that nice housing benefits other neighborhoods. In big city neighborhoods that are largely rental housing with absentee landlords, the landlords may have very little incentive to use the public sector to upgrade neighboring housing. Someone else may have to take their place. The someone else is obviously the tenants. What rent control does is reallocate property rights from landlords to tenants, and there may be some desirable consequences from it. The tenants may become more active in the community. They may start behaving like suburban home owners. If you think that community participation by tenants is a good thing, giving tenants some property rights in their own units may, in fact, have some beneficial effects.

Timothy P. Terrell, Edited Transcript of Proceedings of the Liberty Fund, Inc. Seminar on the Common Law History of Landlord-Tenant Law, 69 CORNELL L. REV. 623, 679 (1983). Professor Donald M. McCloskey agreed, observing that "[t]here is a long history of landlord-tenant law in agriculture [involving] ... the issue of the possible benefits of providing the tenant with security, that is, some property interest in the land.").

9. See Sheila Crowley, The Affordable Housing Crisis: Residential Mobility of Poor Families and School Mobility of Poor Children, 72 J. NEGRO EDUC. 22, 23-24 (2003) (stating that "[h]ousing that provides parents with a sense of control, choice, and well-being supports good parenting. Parents whose housing limits their sense of choice and control are more susceptible to relying on reactive and punitive parenting . . . " and that "[m]oves that are sudden or unplanned and that are the result of family disruption, such as divorce, death, or eviction, carry the most serious risk of emotional or psychological harm"); see also Karla Buerkle & Sandra L. Christenson, A Family View of Mobility Among Low-Income Children, CTR. FOR URB. & REGIONAL AFF. REP., Apr. 1999, at 7, 10, available at http://www.cura.umn.edu/reporter/99-Apr/article2.pdf (discussing the importance of a sense of control over one's life); James A. Thorson & Ruth Ellen Davis, Relocation of the Institutionalized Aged, 56 J. CLINICAL PSYCHOL. 131, 133-34 (2000) (discussing the importance of a sense of control in other contexts); John Leland, As Owners Feel Mortgage Pain, So Do Renters, N.Y. TIMES, Nov. 18, 2007, at 1, 22 ("'Renting a house, I should have rights like everybody else,' [one renter] said. 'I paid my rent. That should entitle me to some security, right?' [The renter] added, 'I hate the fact that I’m put in the position where I may not have a choice of where my kids go to school.' ").

10. Bell, supra note 8, at 541.

11. See Shana Pribesh & Douglas B. Downey, Why are Residential and School Moves Associated with Poor School Performance?, 36 DEMOGRAPHY 521, 521 (1999) (stating that from a social capital perspective, "moving often damages, and sometimes completely severs, important social ties that ‘inhire in family relations and in community organization and that are useful for
school instability, which has grave consequences not only for the transient students, but also for the “stable students in a classroom afflicted with high transience,” who themselves experience “serious educational and social disruptions.” 12 For elderly people, involuntary displacement can cause illness, and even death. 13

Involuntary displacement also can cause significant economic loss, most obviously for owners of manufactured housing who rent the sites on which their homes are located, but also for those who rent both homes and land. 14 Manufactured housing—often, inaccurately, referred to as “mobile

the cognitive or social development of a child or young person’ ” (quoting J.S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300 (1990)).

12. Todd Michael Franke & Chester Hartman, Student Mobility: How Some Children Get Left Behind, 72 J. NEGRO EDUC. 1, 1 (2003); see also Buerkle & Christenson, supra note 9, at 8–9 (stating that the “findings strongly suggest that mobility negatively influences school performance” and that “[t]he close relationship between mobility and limited quality housing options for low-income families was clear,” but urging consideration of multiple factors); Pribesh & Downey, supra note 11, at 521 (“[M]ost studies show that students who experience a residential move perform less well in school than students who do not move . . . .”); Russell W. Rumberger, The Causes and Consequences of Student Mobility, 72 J. NEGRO EDUC. 6, 7 (2003) (noting also that the “incidence of student mobility varies by race, ethnicity, and family income,” with low-income students of color most likely to move). Many distinctions are important: for example, involuntary moves probably are more damaging than voluntary moves, see Buerkle & Christenson, supra note 9, at 9–10 and moves in single-parent households may be more damaging than moves in two-parent households. Jack Tucker et al., “Moving On”: Residential Mobility and Children’s School Lives, 71 SOC. EDUC. 111, 114 (1998) (finding less harm for households in which both biological parents are present). For a sampling of the literature on this point, see generally Symposium, Student Mobility: How Some Children Get Left Behind, 72 J. NEGRO EDUC. 1 (2003); Necati Engec, Relationship Between Mobility and Student Performance and Behavior, 99 J. EDUC. RES. 167, 167, 177 (2006) (showing that as student mobility increased, test performance decreased and suspension rates increased).

13. For a thoughtful, sophisticated review of the issues, see generally F. Oswald & G.D. Rowles, Beyond the Relocation Trauma in Old Age: New Trends in Elders’ Residential Decisions, in NEW DYNAMICS IN OLD AGE: INDIVIDUAL, ENVIRONMENTAL AND SOCIETAL PERSPECTIVES 127 (H.-W. Wahl et al. eds., 2006); see also O’Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 784 n.16 (1980) (referring to studies showing that involuntary transfers for nursing home patients “may cause ‘transfer trauma,’ increasing the possibility of death or serious illness for elderly, infirm patients”); Nicholas G. Castle, Relocation of the Elderly, 58 MED. CARE RES. & REV. 291, 291 (2001), available at http://mcr.sagepub.com/cgi/content/abstract/58/3/291 (reviewing seventy-eight prior studies in assessing consequences in the relocation of the elderly); Stanislav V. Kasi, Physical and Mental Health Effects of Involuntary Relocation and Institutionalization on the Elderly—A Review, 62 AM. J. PUB. HEALTH 377, 377–78 (1972) (calling for more research but noting that “the elderly appear to be the most vulnerable to the adverse effects of the involuntary relocation” and that “[f]or the elderly, who are a particularly vulnerable group from the economic and socio-medical perspective,” involuntary relocation “could indeed have major health consequences”); James A. Thorson & Ruth Ellen Davis, Relocation of the Institutionalized Aged, 56 J. CLINICAL PSYCHOL. 131, 137 (2000) (concluding that “change, and the threat of change, is disrupting to people who are near the end of their lives).  

14. See, e.g., Paul Sullivan, Note, Security of Tenure for the Residential Tenant: An Analysis and Recommendations, 21 VT. L. REV. 1015, 1059 (1997) (“In some situations, it might be more difficult for the renter of a conventional home to relocate. For example, the renter of a
homes" or "trailers"—is in fact generally immobile, both because "the homes are subject to damage during transportation" and because "moving a home is a very expensive proposition and can easily cost $5,000 to $10,000 . . . ."

15 For those who are renting their homes, too, "[r]elocation costs may be significant, including costs of moving, possible temporary storage and lodging, and additional deposits concerned with a new tenancy,"16 in addition to the probable higher cost of replacement housing.

Loss of a home, especially for poor people living in tight housing markets, may mean literal homelessness.17 And homelessness may lead to division of families, with children wrested from their parents' custody to be institutionalized or placed into foster care.18

---

15. See Yee v. City of Escondido, 503 U.S. 519, 523 (1992) ("Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved."); CARTER ET AL., supra note 2, at 2 (adding that another barrier to moving a manufactured home is the "growing shortage of manufactured housing communities to move to"); see also Amy J. Schmitz, Promoting the Promise Manufactured Homes Provide for Affordable Housing, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 384, 389-90 (2004) (stating that "[e]xpenses of moving a [mobile home] may exceed $10,000," "most older [mobile homes] 'simply cannot be moved' because of road worthiness or strict age and condition restrictions on park admissions," and "it is very difficult for [mobile home] owners to move their [mobile homes] if . . . [mobile home] sites are limited due to zoning restrictions and dwindling lot space. Furthermore, [mobile home] park owners generally impose strict limitations on new [mobile home] admission . . .."). With respect to the difficulty and expense—or impossibility—of moving manufactured housing, see also J. Royce Fichtner, Note, The Iowa Mobile Home Park Landlord-Tenant Relationship: Present Eviction Procedures and Needed Reforms, 53 DRAKE L. REV. 181, 188-91 (2004).

16. Bell, supra note 8, at 534.


Furthermore, involuntary displacement can provoke intense psychological harm. Marc Fried's classic study of displacement from the West End of Boston identified "a grief response showing most of the characteristics of grief and mourning for a lost person."\textsuperscript{19} The Fried study noted that "relocation was a crisis with potential danger to mental health for many people"\textsuperscript{20}.

Any severe loss may represent a disruption in one's relationship to the past, to the present, and to the future. Losses generally bring about fragmentation of routines, of relationships, and of expectations, and frequently imply an alteration in the world of physically available objects and spatially oriented action. It is a disruption in that sense of continuity which is ordinarily a taken-for-granted framework for functioning in a universe which has temporal, social, and spatial dimensions. From this point of view, the loss of an important place represents a change in a potentially significant component of the experience of continuity.\textsuperscript{21}

As Professor Deborah Bell has written:

Loss of a home can inflict on a tenant injury beyond economic harm because a home 'represents things that money itself can't buy—place, position, relationship, roots, community, solidarity, status.' These developments [toward legal recognition of the right to security of tenure] reflect an underlying notion of 'the sanctity of the home' as an aspect of an individual's personal integrity and dignity. The movement toward security of tenure 'incorporates the normative judgment that tenants should be allowed to become attached to places and that the legal system should encourage them to do so.' In today's society, a tenant makes an apartment his or her home in the sense of a sanctuary needed for personhood.\textsuperscript{22}

The strength and depth of one's attachment to one's home has been recognized and celebrated in poetry\textsuperscript{23} and in prose\textsuperscript{24} and explored by

\begin{itemize}
\item \textsuperscript{19} Marc Fried, Grieving for a Lost Home: Psychological Costs of Relocation, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 377 (James Q. Wilson, ed., 1966) (describing the damaging consequences of displacement and relocation for residents of the West End of Boston).
\item \textsuperscript{20} Id. at 361.
\item \textsuperscript{21} Id. at 361–62.
\item \textsuperscript{22} Bell, supra note 8, at 530 (quoting Frank I. Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097, 1112 (1981) and Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 991 (1982) (citations omitted). Professor Michelman is writing about "property"; Professor Bell applies Professor Michelman's comments to housing).
\item \textsuperscript{23} See, e.g., ROBERT FROST, The Death of the Hired Man, in NORTH OF BOSTON: POEMS 7, 11 (Edward Connery Latham ed., Dodd, Mead & Co. 1977) (1914) ("'Home is the place where, when you have to go there,/ They have to take you in.'")).
\end{itemize}
sociologists, psychologists, and planners. Literature and social science recognize in particular that forced, involuntary displacement from one’s home is a particularly wrenching experience which can be especially harmful to children. The law, too, has acknowledged the power of the connection to one’s home, perhaps most famously in Blackstone’s observation that “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never

24. GEORGE ELIOT, THE MILL ON THE FLOSS, 42 (Modern Library Paperback Ed. 2001) (1860) (“We could never have loved the earth so well if we had had no childhood in it,—if it were not the earth where the same flowers come up again every spring that we used to gather with our tiny fingers as we sat lisping to ourselves on the grass—the same hips and haws on the autumn hedgerows—the same red-breasts that we used to call ‘God’s birds,’ because they did no harm to the precious crops. What novelty is worth that sweet monotony where everything is known, and loved because it is known?”).


26. See, e.g., GEORGE ELIOT, ADAM BEDE 348–50 (Modern Library Paperback Ed. 2002) (1859); see also Fried, supra note 19, at 359 (regarding the pain caused by involuntary displacement); Patrick M. McFadden, The Right to Stay, 29 VAND. J. TRANSNAT’L L. 1, 2–5 (1996) (same). In Chapter XXXII of Adam Bede, the landlord, Squire Donnithorn, uses a threat of eviction as he tries to persuade his tenant, Mr. Poyser, to agree to an arrangement that would benefit the squire: “And I shall not forget your readiness to accommodate your landlord as well as a neighbour. I know you will be glad to have your lease renewed for three years, when the present one expires; otherwise, I daresay Thurle, who is a man of some capital, would be glad to take both the farms . . . . But I don’t want to part with an old tenant like you.” ELIOT, supra, at 348. Mr. Poyser is “really alarmed at the possibility of their leaving the old place where he had been bred and born—for he believed the old Squire had small spite enough for anything . . . .” Id. at 348. He says to his wife, who had spoken back to the squire: “‘But thee wotna like moving from th’ old place, . . . and going into a strange parish, where thee know’st nobody. It’ll be hard upon us both, and upo’ father too.’” Id. at 350. In Chapter XXXIII, the rector’s mother observes that “it will be a bad business if the old gentleman turns them out of the farm . . . .” and the rector responds “‘Oh, that must not be . . . . [I]f he should give them notice . . . . Arthur and I must move heaven and earth to mollify him. Such old parishoners as they are must not go.’” Id. at 352.

27. See supra text accompanying notes 9, 11–12 (discussing the damage caused to children by disruptions in school attendance and homelessness). The impact of displacement on children suggests that some arguments for security of tenure might be based on laws protecting children, including the International Covenant on the Rights of the Child. This Article will not explore that further. For more on this subject, see generally Martha F. Davis, Human Rights in the Trenches: Using International Human Rights Law in “Everyday” Legal Aid Cases, 41 CLEARINGHOUSE REV. 414 (2007); Connie de la Vega, Protecting Economic, Social and Cultural Rights, 15 WHITTIER L. REV. 471, 480–86 (1994) (discussing ways in which international human rights law can be used in U.S. litigation to secure education and welfare rights); Connie de la Vega, Using International Human Rights Law in Legal Services Cases, 22 CLEARINGHOUSE REV. 1242, 1252 (1989) (discussing the “granting of ... parents’ application under the Immigration and Naturalization Act for suspension of deportation” in a case where “potential separation of children with U.S. citizenship from their alien parents constituted sufficient hardship”); and Roisman, supra note **, at 1.
suffer it to be violated with impunity . . . .”28 More generally, the law “recognizes that long-continued enjoyment of property in and of itself, creates an entitlement to the property.”29 As Oliver Wendell Holmes wrote:

A thing which you have enjoyed and used as your own for a long time . . . 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. The law can ask no better justification than the deepest instincts of man.30

Partly to vindicate these “deepest instincts of man,” and partly “to quiet all titles which are openly and consistently asserted,”31 Anglo-American law allows even willful trespassers and converters to acquire title to real and personal property by adverse possession—that is, possession that is hostile, open, notorious, exclusive, actual, and continuous.32

In life and in literature, the strength of the bond between the resident and the home is unrelated to the nature of the resident’s tenure: a tenant may have as powerful a connection to her home as a homeowner might have.33 The law, too, recognizes that the integrity of the home must be as protected for a tenant as for a homeowner; the Fourth Amendment, for

28. 4 Sir William Blackstone, Commentaries on the Laws of England 175 (Wayne Morrison ed., Cavendish 2001) (1769); see also Wilson v. Layne, 526 U.S. 603, 609–10 (1999) (referring to Semayne’s Case, 77 Eng. Rep. 194, 195, 5 Co. Rep. 91a, 91b 195 (K.B.) (1604), which made “the now-famous observation that ‘the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose’”).

29. Cases and Text on Property 125 (Casner et al. eds., 5th ed. 2004) (referring to any property, not only one’s home).


31. Henry W. Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 135 (1918).

32. See Lee Anne Fennell, Efficient Trespass: The Case for “Bad Faith” Adverse Possession, 100 NW. U. L. Rev. 1037, 1059 (2006) (discussing the rationales for the doctrine of adverse possession, rejecting both of those mentioned in the text, and arguing that only bad faith possessors should be capable of achieving title through adverse possession). In part also to vindicate these “deepest instincts of man,” the constitutional protection against deprivation of property without due process of law has been extended to interests far beyond the traditional understanding of “property.” See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (utility services); Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (disability benefits); Goldberg v. Kelly, 397 U.S. 254, 261–62 (1970) (public assistance benefits); Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (public education). All of the reasons that support the requirement of a showing of good cause to terminate these “new property” interests apply to termination of the established property interests of tenants in their homes, even though the former termination is effected by the government and the latter by private parties. The fact that the private parties use the government—the judicial system—to effect the termination offers an independent basis for requiring good cause for termination. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948). This is yet another area that is not explored in this Article but should be developed elsewhere.

33. See, e.g., Eliot, supra note 26, at 348 (describing the Poyzers’ pain at the thought of losing their tenancy). See generally Ballard, supra note 25, at 279–81.
example, protects the “houses” of tenants (and even the encampments of homeless people) as well as of homeowners.\textsuperscript{34}

In a variety of situations, courts and legislatures have acted to protect renters from displacement from their homes and have specified some of the interests that are served by doing so. The New Jersey legislature, for example, which created a state-wide requirement of good cause for tenancy termination, including non-renewal, identified some of the personal hardships caused by displacement—hardships the legislature found are “particularly severe for vulnerable seniors, the disabled, the frail, minorities, large families and single parents.”\textsuperscript{35} The statute provides:

Such personal hardship includes, but is not limited to: economic loss, time loss, physical and emotional stress, and in some cases severe emotional trauma, illness, homelessness, or other irreparable harm resulting from strain of eviction controversy; relocation search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; employment, education, family and social disruption; relocation and empty unit security hazards; relocation to premises of less affordability, capacity, accessibility and physical or environmental quality; and relocation adjustment problems, particularly of the blind or other disabled citizens.\textsuperscript{36}

The New Hampshire Supreme Court, holding that expiration of a lease did not constitute good cause for eviction, noted that evictions for no fault of the tenant create substantial hardships for tenants. At worst, tenants may become homeless as a result. Even when another residence is procured, the tenant must bear the expenses and inconveniences of moving. Relationships with friends and neighbors may be disrupted, children may be forced into new school districts, and local services and support systems for elderly and disabled tenants may be lost.\textsuperscript{37}

Forced displacement causes problems not only for the individuals affected, but also for society, which has many important, well-recognized interests in housing—such as in assuring that housing is maintained in decent condition and administered without discrimination and that

\textsuperscript{34} See generally Ballard, supra note 25, at 291–92 (discussing the protections of the home guaranteed by the Fourth Amendment). See also State v. Mooney, 588 A.2d 145, 159 (Conn. 1991) (holding invalid a search of items left by a homeless person on public land in “a secluded area that the police knew he regarded as his home”).

\textsuperscript{35} N.J. STAT. ANN. § 2A:18-61.1a(d) (West 2000) (containing legislative findings and intent).

\textsuperscript{36} § 2A:18-61.1a(e) (containing legislative findings and intent).

relationships between landlords and tenants are civil, predictable, stable, and fair. As Justice Holmes wrote for the Supreme Court in 1921, "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."38 These societal interests cannot be protected if a tenant does not have security of tenure: "If the tenant remained subject to the landlord’s power to evict, the attempt to limit the landlord’s demands would fail."39

Stability of tenure is important to society, which suffers when children’s school performance and the school environment are degraded because of forced displacement. When low-income elderly or disabled people, children, or others, suffer physical or mental injury because of forced displacement, society bears heavy financial and other costs. Society pays a high price for family disruption, homelessness, and foster care placement. As the New Jersey legislature found, "[i]t is in the public interest of the State ... to avoid ... displacement and resultant loss of affordable housing ...."40 In enacting the Tenant Protection Act of 1992, the New Jersey legislature found that the provision and maintenance of an adequate supply of housing affordable to persons of low and moderate income in this State has been and is becoming increasingly difficult as a result of economic and market forces which require special public actions or subsidies to counteract. One particularly acute result of this has been the continual increase in the number of displaced or homeless persons .... [I]t is necessary to protect residential tenants, particularly those

39. Id. at 157–58 (1921); see also Ball, supra note 3, at 44 ("[T]he occupier’s lack of security may make it hard to enforce the landlord’s contractual obligations.” This is inherent in tenancies terminable on short notice, because the security of the tenant is dependent on the goodwill of the landlord or on good practice, unenforceable by the tenant.").
40. § 2A:18-61.1a(d) (containing legislative findings and intent); see also A.P. Dev. Corp. v. Band, 550 A.2d 1220, 1224 (N.J. 1988) (stating that "[t]he Act ... flowed from a recognition of the severe housing shortage in the state" and quoting the statement attached to the Act when it was proposed: “At present, there are no limitations imposed by statute upon the reasons a landlord may utilize to evict a tenant.... This is a serious matter, particularly now that there is a critical shortage of rental housing space in New Jersey.”); Chase Manhattan Bank v. Josephson, 638 A.2d 1242, 1243 (N.J. 1994) (“In passing the Act the Legislature was responding to ‘a critical shortage of rental housing space in New Jersey,’ ... a situation that has not abated.”); Montgomery Gateway E. I v. Herrera, 618 A.2d 865, 868 (N.J. Super. Ct. App. Div. 1992) (“The Anti-Eviction Act protect[s] residential tenants from the effects of what has become a critical housing shortage.”). In 1988, the court took “judicial notice that the housing shortage remains severe in New Jersey.” A.P. Dev. Corp., 550 A.2d at 1224; see also id. at 1228 (“[G]iven the acute housing shortage in this state, the total effect of forfeiture on the tenant can be comparable in severity to the effect of forfeiture on a purchaser of land.”); id. at 1231 (“[T]he Legislature intended the Act to be remedial and to be liberally construed, particularly in view of the continuing critical shortage of affordable housing in this state.”).
of advanced age or disability, or lower economic status, from the effects of eviction from affordable housing in recognition of the high costs, both financial and social, to the public of displacement from affordable housing and of homelessness.\textsuperscript{41}

Thus, society at large shares with individual tenants an interest in the ability of tenants to continue to reside in their homes—not forever, under any circumstances, but until and unless the landlord can make a showing of good cause for terminating the tenancy. The law long ago recognized that tenants and society have an interest in not allowing landlords to effectuate immediate, self-help evictions—requiring some prior notice and, usually, use of judicial process.\textsuperscript{42} No matter what the lease may say, these restrictions on the landlord’s power are imposed by the law. Similarly, the law does not allow a landlord an absolute right to terminate a tenancy if the termination would frustrate the public interest in assuring the quality of housing or protecting against many forms of discrimination or retaliation. In the same way, the law today should recognize that tenants and society have an interest in protecting the ability of tenants to remain in their homes, unless and until the landlord can show a good reason for evicting them. This security should apply not only to tenants who can negotiate long-term leases, but also to tenants whose lack of market power means that they can secure only periodic or short-term leases and cannot bargain for protections of security of tenure or anything else: “The tenant has ‘no more choice in fixing [these] . . . terms than he has about the weather.’”\textsuperscript{43}

II. THE DEVELOPMENT OF PROTECTION FOR SECURITY OF TENURE

In light of the importance of security of tenure—to individuals and to society—it is not surprising that both courts and legislatures have developed significant protections against arbitrary terminations of tenancies. In the mid-twentieth century, the United States experienced a substantial transformation—sometimes called a “revolution”—of landlord-tenant law, increasing the legal rights of tenants (and applicants for

\textsuperscript{41} § 2A:18-61.41 (containing legislative findings and declarations supporting legislation protecting elderly, disabled, and low-income tenants from conversion to condominium or cooperative use).

\textsuperscript{42} See Ballard, supra note 25, at 289-90; see also Mary Ann Glendon, The Transformation of American Landlord-Tenant Law, 23 B.C. L. REV. 503, 507 (1982) (noting that “even in the eighteenth century, courts were hesitant to subject a tenant to immediate dispossession unless it was clear that both parties had agreed to such an arrangement” and that, in the nineteenth century, “[l]ike the courts in Blackstone’s day, state legislatures were concerned about the effects an abrupt termination could have upon a tenant”).

\textsuperscript{43} Robert S. Schoshinski, Remedies of the Indigent Tenant: Proposal for Change, 54 GEO. L.J. 519, 554 (1966) (quoting Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 204 (2d Cir. 1955) (Frank, J., dissenting)).
tenancies) and restricting landlords' control over the relationship.\textsuperscript{44} To a large extent, the changes were accomplished first by judicial action and then by legislation,\textsuperscript{45} and represented the application to the landlord-tenant relationship of both contract principles and public policy considerations.\textsuperscript{46}

The "revolution" affected several aspects of landlord-tenant law.\textsuperscript{47} While much scholarly attention has focused on the development of the "implied warranty of habitability," another area of substantial change

\begin{quote}

45. See Gerald Korngold, \textit{Whatever Happened to Landlord-Tenant Law?}, 77 Neb. L. Rev. 703, 706 (1998) ("After the initial pathbreaking judicial decisions, legislatures began supplanting courts as the key reform agents in the field."); cf. Cunningham, \textit{ supra} note 44, at 6 ("In a majority of . . . jurisdictions, the principle [of the implied warranty of habitability] resulted entirely from legislative action."); \textit{id.} at 74–76 (discussing "the modern era of judicial activism in the expansion of tenants' rights").

46. See Korngold, \textit{ supra} note 45, at 705 (The "notion of the lease as a contract formed the basis for many of the courts' key decisions . . . . The legacy of this reform is still seen in current decisions applying contract principles to leases, yielding different results than under traditional property rules."). Public policy considerations were applied both independently and as part of contract doctrine. See Jay M. Feinman, \textit{Relational Contract Theory in Context}, 94 NW. U. L. REV. 737, 738–39, 742–43 (2000) ("The external criticism [of classical contract law] situated the rules in the world of actual contracting practice, arguing that the law's approach needed to be changed to serve the objectives of contract law. Neoclassical contract law—the law of the Uniform Commercial Code, the Restatement (Second) of Contracts, and today—is the product of this criticism. . . . Contract is still fundamentally about achieving one's own ends, but those ends are understood largely in terms of the context out of which they arise. In some cases, moreover, these ends may be subordinated to external social policies."). But see Glendon, \textit{ supra} note 42, at 504–05 (stating that "landlord-tenant case law was already deeply pervaded by contract notions by the end of the nineteenth century" and that what was "new, if not revolutionary," in the mid-twentieth century was "that residential and commercial landlord-tenant law have gradually diverged, the former more influenced by developments in consumer law" and subjected to "pervasive, mostly statutory, regulation").

47. Other changes in landlord-tenant law included the imposition on landlords of tort liability for injuries to tenants even when caused by third parties, see Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477, 481 (D.C. Cir. 1970); Whetzel v. Jess Fisher Mgmt. Co., 282 F.2d 943, 949–50 (D.C. Cir. 1960); Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973), general adoption of the contract principle of dependency of covenants, and imposition on the landlord of a duty to mitigate damages, see Thomas W. Merrill & Henry E. Smith, \textit{The Property/Contract Interface}, 101 COLUM. L. REV. 773, 821–22 (2001); see also Rabin, \textit{ supra} note 44, at 521–40 (discussing "limitations on landlord's common law right to offer substandard units," limitations on the "landlord's common law right to set the offering price of a rental unit (rent control)," "expansion of landlord's tort liability," "limitations on landlord's common law right to choose or reject new tenants" (including assignees and subtenants), "limitations on landlord's common law right to evict tenant at termination of lease," "limitations on landlord's common law remedies following tenant breach," regulations regarding security deposits, and establishment of a landlord duty to place tenants in actual, as opposed to merely legal, possession).
\end{quote}
involved security of tenure—the landlord's ability to terminate tenancies, including the right to refuse to renew a tenancy.\textsuperscript{48} Security of tenure is the focus of this discussion.

At common law, the general rule was that, absent restrictions in the lease, the tenant could be evicted for "any reason or no reason at all."\textsuperscript{49} At the end of the period of a periodic tenancy or the term of a tenancy for a term, absent some provision in the lease, the landlord was under no obligation whatever to renew the tenancy.\textsuperscript{50} The tenant's only entitlement was to durationally appropriate notice of the termination.\textsuperscript{51}

Restrictions on the landlord's ability to terminate a tenancy "for any reason or no reason at all" developed with respect to tenants in both subsidized and unsubsidized housing. The protections for tenants in subsidized housing began with tenants in government-owned public housing and then were extended to tenants in privately-owned housing where government subsidies were provided either to the tenant or to the landlord.\textsuperscript{52} For tenants participating in government housing programs, the courts and then Congress imposed both procedural and substantive protections from dispossession.\textsuperscript{53} The procedural protections assured tenants notice and an opportunity for a hearing with regard to proposed dispossession; the substantive protection was a requirement that the government agency or landlord prove good cause for dispossession.\textsuperscript{54}

\textsuperscript{48} See Rabin, supra note 44, at 533–37.

\textsuperscript{49} Glendon, supra note 42, at 539–40. "Lease" is used in this Article to mean any rental agreement, written or oral.

\textsuperscript{50} Id. at 539–40; accord Bell, supra note 8, at 491–92 (noting that, at common law, "[t]he landlord had no obligation to renew the lease or to notify the tenant of the expiration prior to filing eviction proceedings).

\textsuperscript{51} Bell, supra note 8, at 492.


\textsuperscript{53} See HUD HOUSING PROGRAMS, supra note 52, §§ 14/1–14/6; RHCDS (FMHA) HOUSING PROGRAMS, supra note 52, ch. 14; Bell, supra note 8, at 500–01; Glendon, supra note 42, at 542–43; 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, 719–30 (1994) (describing the evolution of these principles).

\textsuperscript{54} The underpinning of the good cause requirement in government-sponsored housing programs is the Due Process Clause of the Fifth and Fourteenth Amendments; the obligation has been codified for many assisted housing programs, even where the landlord is a private entity rather than a government agency. See HUD HOUSING PROGRAMS, supra note 52, §§ 14/6–14/14; see also 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.05 [2] & nn. 47–48 (3d ed. 2007) (discussing the circumstances in which there exists a good-cause requirement for eviction).
For tenants in "private" housing not directly benefiting from government subsidies, protections from dispossession developed more slowly. Courts and then legislatures established a list of limitations on the landlord's right to terminate tenancies or take other actions disadvantageous to tenants: landlords were forbidden to retaliate against tenants for reporting housing code violations to enforcement officials, for complaining about bad housing conditions, or for seeking to use tenant remedies. In at least one jurisdiction, courts protected tenants from termination for refusing to commit perjury in a civil action against the landlord and for reporting the landlord's sexual molestation of the tenant's daughter. Landlords also were forbidden to dispossess or otherwise disadvantage tenants because of race, color, national origin, religion, sex, disability, or the presence of children in the household. In some jurisdictions, landlords also were forbidden to discriminate on the bases of marital status, sexual orientation, source of income, or other characteristics. In some jurisdictions, tenants were given some protection

Privately-owned developments subsidized under the Section 8 program, and private owners who have tenants who have Section 8 certificates or vouchers, originally were required not to terminate the tenancies without good cause. Since 1996, however, Congress has required good cause for eviction in the Section 8 program only during the term of the lease. Good cause for eviction is required in the subsidized housing programs of the Department of Agriculture's Rural Housing and Community Development Service. See 7 C.F.R. § 3560.159 (2007); RHCD (FMHA) HOUSING PROGRAMS, supra note 52, ch. 14. Similarly, in the Low Income Housing Tax Credit program, created in 1986, owners are required to show good cause in order to terminate tenancies and to fail to renew. See Carter, 835 A.2d at 165; California Tax Credit Committee Notifies Owners of Requirement for Good Cause To Terminate Tenancy, HOUS. & DEV. REP. (West), May 9, 2005, at 300 (reporting that the California Tax Credit Allocation Committee had notified project owners that Rev. Rul. 2004-82, 2004-2 C.B. 350, "requires all tax credit regulatory agreements to include a prohibition against eviction or termination of a tenancy without good cause for the duration of the extended use period, as well as for the following three years" and that "'[t]his prohibition includes any non-renewal of a lease or rental agreement' ").

55. I put "private" into quotation marks and distinguish between obvious and subtle government subsidies because virtually all apparently "private" housing benefits from government subsidies. This is perhaps most important with respect to single-family homeownership, which benefits from multiple government subsidies, including, but not limited to, the deductibility of payments for real estate taxes and mortgage interest. See Peter Dreier, Federal Housing Subsidies: Who Benefits and Why?, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 105, 107–10 (Rachel G. Bratt et al. eds., 2006).


58. See Bell, supra note 8, at 498 nn.78–80 (citing cases so holding).


from dispossession by conversion to condominiums, cooperatives, or other uses,\textsuperscript{61} or by sale of the property; these protections take the form of entitlement to remain as a renter or a right to renew the tenancy or purchase the property.\textsuperscript{62}

As scholars reviewed the changes in the 1960s and 1970s, they expected further common law development of security of tenure for tenants in private, as well as subsidized, housing. Specifically, what they anticipated was the recognition of a requirement of either good faith or good cause for termination. Professor Glendon, for example, foresaw "the habitability issue . . . yielding center stage" to other developments, including "security of tenure for the tenant, and the qualification of the landlord's traditional rights to alienate the freehold or to convert it to another use."\textsuperscript{63} Professor Margaret Radin wrote in 1982 that if a leasehold were a personal residence, the law should grant tenure during good behavior, regardless of the lease term.\textsuperscript{64} Professor Deborah Hodges Bell wrote a 1985 article proposing "that the courts directly recognize a tenant's expectation of security by imposing on landlords a duty to terminate [only] in good faith."\textsuperscript{65} *Powell on Real Property* states that a right to good-cause-eviction-only not rooted in constitutional or specific statutory provisions could be based either on public policy or as implied in fact from the parties' continual renewal of a lease, and discusses also the analogous development of a good cause requirement for termination of franchise agreements.\textsuperscript{66}

Despite the expectations of these and other academicians,\textsuperscript{67} only a very few jurisdictions limited residential terminations to those for which

\footnotesize{1999) (source of income); Levin v. Yeshiva Univ., 754 N.E.2d 1099, 1102 (N.Y. 2001) (sexual orientation); see also Rabin, supra note 44, at 531–32 (discussing California's Unruh Act, which has been said to bar discrimination based on such characteristics as student enrollment, "occupation, political affiliation, or age").

61. See 2 *POWELL*, supra note 54, § 16B.05[3]; Bell, supra note 8, at 493–94, 494 n.55; Glendon, supra note 42, at 553; Rabin, supra note 44, at 535–37, 556–58, 582. The New Jersey Tenant Protection Act of 1992 protects from conversion to condominium or cooperative use tenants who are "of advanced age or disability, or lower economic status." N.J. STAT. ANN. § 2A:18-61.41 (West 2000) (legislative findings and declarations).

62. 2 *POWELL*, supra note 54, § 16B.05.

63. Glendon, supra note 42, at 505.

64. Rabin, supra note 22, at 994.


66. 2 *POWELL*, supra note 54, § 16B.05[2].

67. See, e.g., Green, supra note 53, at 714 (writing, in 1994, that "[e]stablishing a right to continued possession beyond the lease term and abandoning the termination or nonrenewal without cause rule may be the next logical step in the 'lease as a contract' paradigm.")).
the landlord could establish good cause, and the few jurisdictions that did so used legislation, not litigation, for that purpose. The Uniform Residential Landlord-Tenant Act ("URLTA") "require[d] both parties to the lease to engage in good faith in the performance of lease agreements and duties, an obligation that is broad enough to include the requirement of good cause to evict.").\(^6\) Good cause for termination was required in jurisdictions that had rent control legislation.\(^6\) Some legislatures required good cause to terminate the tenancies of some owners (and sometimes renters) of manufactured housing.\(^7\) A good-cause-for-termination requirement protects elderly and disabled tenants in Connecticut.\(^7\) New Hampshire requires good cause for eviction in much, but not all, rental housing.\(^7\) In New Jersey and the District of Columbia, as well as Seattle,

---

68. Unif. Residential Landlord and Tenant Act § 1.302, 7B U.L.A. 427–508 (1985 & Supp. 1998) ("Every 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 performance or enforcement."); see 2 POWELL, supra note 54, § 16B.05[2] ("The Uniform Residential Landlord and Tenant Act does not, by its terms, require the landlord to have good cause to evict. However, URLTA does require both parties to the lease to engage in good faith in the performance of lease agreements and duties, an obligation that is broad enough to include the requirement of good cause to evict."). But see Sullivan, supra note 14, at 1046 ("Under common law, no court has applied the Act's good faith provisions to termination or nonrenewal of tenancies.").

69. See Glendon, supra note 42, at 543; Michael D. Bergman, Property Law: Recent Developments in Rent Control and Related Laws Regulating the Landlord-Tenant Relationship, 1989 ANN. SURV. AM. L. 691, 693 (1991) (stating some rent control laws "give the tenant a 'statutory tenancy' whereby the tenant is protected from lease termination except for cause or for enumerated statutory exceptions").

70. See CARTER ET AL., supra note 2, at 62 (stating that eleven states now "limit a community operator's right to evict for noncompliance with rules"); see also Sullivan, supra note 14, at 1057-59 (discussing the judicial extension to renters of mobile homes of the good-cause-for-termination requirement legislatively provided to owners of mobile homes).

71. CONN. GEN. STAT. § 47a-23c (2004) ("Prohibition [of] eviction of certain tenants except for good cause"); see 2 POWELL, supra note 54, § 16B.05[2], n.49; see also Sullivan, supra note 14, at 1056-57 (discussing the Connecticut legislation).

72. N.H. REV. STAT. ANN. § 540:2 (2006) requires good cause for eviction by landlords who rent restricted property: "[L]andlords who are generally in the business of renting residential property, and whose main concern is, presumably, profit." Aimco Properties, L.L.C. v. Dziewisz, 883 A.2d 310, 313 (N.H. 2005). This requirement does not apply to single-family houses if the owner of such a house does not own more than three single-family houses at one time, rental units in an owner-occupied building containing a total of four units or fewer, rental units in a vacation or recreational dwelling rented during the off-season for certain purposes, or single-family houses acquired by banks or other mortgagees through foreclosure.

Id. (citations omitted); see also Sullivan, supra note 14, at 1055–56 (discussing the New Hampshire legislation).
Oakland, San Francisco, and other cities, good cause for termination is required for all tenants.73

While some legislatures have imposed a good-cause-for-termination requirement, judicial creation of the doctrine has been essentially non-existent. As Powell on Real Property states, "the argument for a good cause requirement for the termination or nonrenewal of tenancies has been accepted more by the commentary than the cases."74 It is important to note, however, that the problem is not that the courts have been rejecting a requirement of good cause for termination; rather, the problem is that litigants have not been asking courts to impose that requirement as a matter of common law.75

Thus, in general, at common law, a landlord is free to terminate a tenancy so long as he honors the lease, gives proper notice, and cannot be shown to have a specifically forbidden motivation; in general, the well-behaved, respectful, law- and lease-abiding tenant can be evicted (with proper notice) no matter how long she has lived in the premises, how much she has improved the premises, or how attached she is to her home.76 Tenancies can be terminated without regard to the impact on stability of school attendance, medical treatment, employment or religious requirements, or disruption of family relationships.


74. 2 Powell, supra note 54, § 16B.05[2]. But see Bell, supra note 8, at 507-08 (assuming that "imposition of a good cause requirement" would "requir[e] . . . legislative action").

75. I base this statement on the facts that (a) I have been unable to find reported decisions of such cases or articles referencing such decisions and (b) on June 5, 2007, I asked members of the National Housing Law Project's Housing Justice Network listserv if any of them had litigated or knew of any litigation concerning a good-cause-for-eviction requirement in private, unsubsidized housing (other than under statutes like those in New Jersey and Connecticut). The responses, from vastly experienced and sophisticated tenant advocates, were negative. See E-mail from Kenneth Goldman, Senior Attorney, South Jersey Legal Services, Inc., to Housing Justice Network (June 16, 2005, 14:51 PST) (on file with the North Carolina Law Review).

76. See Ishbel Dickens, American Dream or Nightmare?: Identifying and Meeting the Needs of Owners of Manufactured Homes, 40 CLEARINGHOUSE REV. 637, 637 (2007) (discussing the problems of the owners of manufactured homes that are placed on leased property: "These tenants may have paid their rent on time, followed community rules, invested in their home's infrastructure, and have otherwise been model citizens in their communities. Yet they have little, if any, protection if the landlord chooses to sell the land beneath their homes.").
There is no reason for this situation to continue; as the academicians set out more than twenty years ago, common law doctrines provide ample basis for imposing a good-cause-for-termination requirement on those who rent homes and those who rent land on which owners of manufactured homes places their houses. Part III considers why these doctrines have not been advanced in the courts; Part IV discusses the common law doctrines that support a good-cause-for-termination requirement.

III. GOOD CAUSE FOR TERMINATION: LEGISLATIVE VS. COMMON LAW DEVELOPMENT

Advocates for low-income renters (of homes and land) have successfully asked courts to slice deeply into landowner prerogatives. Among many other things, in most situations, the occupant now can compel a landowner to put and maintain property in standard condition and can prevent termination by a showing that the landowner's reason for displacement violates some important public policy.  

Covenants in a lease generally are considered dependent. Landlords are required to mitigate damages when tenants abandon the property. Landlords are subject to strict regulation of their use of security deposits. Although some of this was achieved by legislation, most of it is rooted in judicial development of the common law, working radical changes in the nature of the estate concept that used to govern real estate rental relationships. These advocates also have persuaded the courts to make exceptions to the landowner's ability to terminate a tenancy "for any reason or no reason at all," but have stopped short of asking the courts to reverse the general rule and establish instead the general principle that a tenancy may continue unless the landowner can show good cause for termination. Why this reluctance?

The reluctance is not due to some sense that the good-cause-for-termination requirement is itself inappropriate. To the contrary, advocates have been assiduous in advancing the good-cause-for-termination principle in legislation—in federal subsidy programs, for manufactured housing owners, for some or all renters, as in Connecticut, New Hampshire, New York, and Oregon.}

77. See Rabin, supra note 44, at 521-27 (regarding conditions); id. at 533-38 (regarding termination).
78. Id. at 524.
79. Id. at 539.
80. Id. at 539-40.
82. See supra notes 49-62 and accompanying text.
Jersey, the District of Columbia, Seattle, and elsewhere. But the advocates have not advanced this principle in the courts. In this area of landlord-tenant law, at least, legislatures have replaced the courts as the institutions to which advocates look for reform.

This preference for legislative action seems to be rooted in a sense that imposition of a good-cause-for-termination requirement is a more dramatic infringement of landowner rights than were other elements of the landlord-tenant “transformation” and that legislation therefore is a more appropriate way of making changes in this regard. Careful analysis shows, however, that good cause for termination is not a more dramatic infringement of landowner rights than other tenant victories have been, and that common law development in this area may be superior to legislative development and is necessary to enable the common law courts to perform their basic function of pursuing justice.

Advocates today may see as commonplace such doctrines as the implied warranty of habitability, retaliatory eviction, and prohibitions against racial and other forms of discrimination in housing, but in their day, each of these doctrines was at least as controversial as good cause for eviction is today. As Judge Albie Sachs wrote about the end of apartheid

83. See supra notes 71–73 and accompanying text.

84. Professor Korngold says that “landlord-tenant law no longer occupies the center stage in real property law” that it held in the late 1960s and early 1970s. Korngold, supra note 45, at 704 (“We have not seen cases declaring paradigmatic shifts . . . . The new Restatement of Property has moved on to other areas . . . . and the number of law review articles on the subject of landlord-tenant published during the period of 1991–1997 was only one-half the number published during 1967–1973”). While this may indicate a lack of academic interest, tenant advocates have continued to work aggressively, both on behalf of individual tenants and to secure change in the law. For the latter effort, however, the advocates have focused more on legislative change than on change through the courts. See supra notes 69–73 and accompanying text.

There might also be concern about the conservatism of courts, but (a) many courts were conservative in the days of the landlord-tenant transformation, and (b) many legislatures today are conservative. See Brian Gilmore, Love You Madly: The Life and Times of the Neighborhood Legal Services Program of Washington, D.C., 10 D.C. L. REV. 69, 86 (2007) (stating that the efforts of the D.C. Neighborhood Legal Services Program “were so dramatic in the city’s Court of GeneralSessions that the judges on the Court accused the program’s lawyers of abuse and delaying tactics”); id. at 92 (quoting this author as describing the D.C. Court of Appeals as “very conservative” at that time”).

85. See, e.g., Cunningham, supra note 44, at 140–43 (discussing criticism of the doctrine of implied warranty of habitability); Charles Meyers, The Covenant of Habitability and the American Law Institute, 27 STAN. L. REV. 879, 879 (1975) (criticizing the doctrine). All of these changes seem very dramatic until they happen, and then they become part of the accepted mores of society. See Chused, supra note 81, at 200–06 (discussing the difficulties of establishing some of these principles); Gilmore, supra note 84, at 106 (describing the adoption of formerly controversial doctrines).
in South Africa: "All revolutions are impossible until they happen, then they become inevitable." 86

A good-cause-for-eviction requirement may seem offensive because it involves the continued presence of the tenant on the property over the objection of the landlord, thus apparently imposing a physical intrusion onto the landlord's property with the continued, unwelcome occupancy by the tenant. 87 This vision draws on a visceral, atavistic commitment to "property rights" and an aversion to physical intrusions, evidenced perhaps most obviously in the Loretto doctrine of per se taking for even a minor physical intrusion. 88

86. ALBIE SACHS, RUNNING TO MAPUTO 173 (1990).

87. See, e.g., Laura L. Westray, Note, Are Landlords Being Taken by the Good Cause Eviction Requirement?, 62 S. CAL. L. REV. 321, 323 (1988) (arguing that the good-cause-for-eviction requirement of Santa Monica's rent control ordinance "effectuate[s] a taking by authorizing a permanent, physical occupation at the tenant's will"); see also Yee v. City of Escondido, 503 U.S. 519, 526 (1992) (arguing that limitations on rent increases and evictions assured tenants of "permanent physical occupation" of the landowner's land, thus amounting to a taking without just compensation); Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 300 (2d Cir. 1998) (discussing the so-called "endless lease," the caricature used to eviscerate the good-cause-for-termination requirement in the Section 8 existing housing program. Landlords complained, successfully, that requiring good cause for termination was the equivalent of giving the tenant an "endless lease"). Careful analysis will show, however, that by definition the lease and the tenancy are not endless or permanent, but may be terminated; the only requirement is that there be good cause for the termination—thus making the definition of good cause the crucial issue. See Aimco Properties, L.L.C. v. Dziewisa, 883 A.2d 310, 314 (N.H. 2005) (stating that, in a good cause regime, "[a] landlord, of course, is not forced into a perpetual landlord-tenant relationship, and may terminate the tenancy for good cause").

88. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); see also Block v. Hirsh, 256 U.S. 135, 155 (1921) (Justice Holmes wrote for the Court, "The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed."); Alex M. Johnson, Jr., Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases, 74 VA. L. REV. 751, 751 (1988) (referring to "land—real property—which has mystical connotations in our legal system."). For an example of such a property-rights-oriented approach, see Manufactured Hous. Communities of Wash. v. State, 13 P.3d 183, 187 (Wash. 2000) (and note the concurring judge's citation to the CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 106TH CONGRESS (Edward H. Crane & David Boaz eds., 1999)). See also Bergman, supra note 69, at 713–14 (criticizing the use of permanent physical occupation analysis for rent control and land use regulation). Professor Bergman states that regulatory analysis provides a more appropriate framework for scrutinizing rent control ordinances because it considers the public interest inherent in the landlord-tenant relationship. The Supreme Court has rejected the application of the narrowly applied permanent physical occupation theory of Loretto in the rent control context. Physical occupation requires an actual appropriation of the property, whereas the housing ordinances in question are economic regulations which do not constitute an actual physical invasion.

Bergman, supra note 69, at 713–14.
But neither “property rights” nor “physical intrusion” justifies allowing terminations of tenancies without good cause. Both the landlord and the tenant have property interests. The issue is not whether to protect property interests, but rather how to accommodate the competing property interests of the landlord and the tenant. The Supreme Court already has recognized that a tenant has a property interest in the expectation that a lease will be renewed. Moreover, it is not more intrusive to restrain the landowner’s ability to terminate a tenancy than to control the landowner’s maintenance of the property during the tenancy or the landlord’s ability to reject a subtenant or assignee. And the common law already has established that there are circumstances in which a tenant may remain on the property over the objection of the landlord. The issue raised here is not whether there are situations in which a tenant may remain on the property over the objections of the landlord, but rather what are those situations.

The debate about what should be done by legislation and what should be done by common law development is perdurable. In every instance of reform, some have argued that changes should be made by legislation rather than the courts. And there are, to be sure, some advantages to using legislation rather than judicial action.

There also are, however, some advantages to using common law development, and those advantages are particularly salient with respect to

89. See, e.g., United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (recognizing a tenant’s property interest in the tenancy). This may seem an obvious statement, but it is not: courts, including the Supreme Court, often refer to the leased premises as “the landlord’s property,” ignoring the fact that the tenant also has a property interest. See, e.g., Lindsey v. Normet, 405 U.S. 56, 72 (1972) (“The tenant is, by definition, in possession of the property of the landlord . . . .”). In fact, the litigation’s purpose is to determine whether the possessory interest is the landlord’s or the tenant’s. See Green, supra note 53, at 716–18 (discussing the recognition of a right to continued possession as an aspect of the tenant’s property interest).

90. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973) (holding that, in condemnation case, possibility of lease renewal is to be taken into account in determining value of the leasehold).

91. See Green, supra note 53, at 713 (“It is difficult . . . to see how the consequences of the intrusion would differ significantly from the effects of the rejection of the no-repair rule.”).

92. See, e.g., Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969) (showing that retaliatory eviction is one example of a situation in which a tenant may stay despite a landlord’s objection).

93. See, e.g., id. at 704 (Danaher, J., dissenting) (establishing the doctrine of retaliatory eviction). Judge Danaher argued that any protection from retaliation should be provided by the legislature, not by the courts. Id.

94. See, e.g., Korngold, supra note 45, at 706 (“Law reform by legislation rather than judicial decision offers certain advantages. Legislatures can engage in fact finding, fully consider an issue, and determine public policy and priorities as well as craft comprehensive solutions. In contrast, courts can only decide issues before them. Moreover, principles of separation of powers arguably require that legislatures make policy choices.” (citations omitted)).
requiring just cause for eviction. The common law’s focus on the particular facts of particular cases is especially important here, for development in this area requires making many distinctions and balancing competing interests. The result in any particular case will vary depending upon many factors, including: whether the tenancy is commercial or residential; whether the residential property is a single-family or multi-family home; whether the landowner lives on the property; whether the landowner is a large or small participant in the rental housing business; how long the tenant has lived at that location; how much of a financial investment the tenant has made in the property; what representations the landowner may have made about continued occupancy; how many times and for what length of time the tenancy may have been renewed in the past; how important continued residence may be for educational, health, religious, employment, psychological, or other reasons; and how “tight” the local housing market may be and how difficult and how expensive it may be, for any reason, for the tenant to secure replacement housing. It is the case-by-case development of the common law that best accommodates the explication of standards to resolve such conflicts.95

Finally, common law growth in this area is essential to vindicate the integrity of the common law itself. As Justice Cardozo wrote, “the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.”96 The elaboration of such judicial creations as the implied covenant of good faith and fair dealing and other doctrines we will be discussing in Part IV is essential to vindicate “a commitment to the most fundamental objectives a legal system can have—justice, and justice according to law.”97

IV. COMMON LAW DOCTRINES TO PROTECT SECURITY OF TENURE

As this Part will show, well-established common law doctrines are available to protect tenant security of tenure at varying levels of generality.

95. See BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 64–65 (1924) (indicating the need for common law development to avoid “harsh or bizarre conclusions, at war with social needs”); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 51 (1954) (noting the legislature “cannot make laws so complete and all embracing that the judicial organ will not be obliged to exercise a certain law-making function also”); id. at 54–56 (discussing the importance of judicial discretion); id. at 69 (“Where legislation is ineffective, the same difficulties that prevent its satisfactory operation require us to leave a wide margin of discretion in application.”); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 194 (1996) (“[C]ase-by-case particularism has advantages over the creation of and application of broad rules.”).
In certain kinds of situations, particular tenants' interests in security of tenure should be protected by such principles as unconscionability, estoppel, and adhesion\textsuperscript{98} or by implied-in-fact requirements of good faith and fair dealing, reasonableness, or good cause for termination.\textsuperscript{99} In applying such doctrines, courts would take into account such factors as the length of time the tenant had occupied the premises, the number of times the tenancy had been renewed in the past,\textsuperscript{100} investments the tenant may

\textsuperscript{98} As to unconscionability, see M.P. Ellinghaus, \textit{In Defense of Unconscionability}, 78 YALE L.J. 757, 808–12 (1968); and Audrey Goldstein Fleissig, Note, \textit{Unconscionability: A New Helping Hand to Residential Tenants}, 1979 WASH. U. L.Q. 993, 993–94. For a discussion of the use of unconscionability doctrine with respect to termination of franchise agreements and, by analogy, to leases, see Bell, supra note 8, at 536 ("[T]he doctrine is inappropriate unless courts are to hold that, because of the inherent inequality of bargaining power between landlord and tenant, an express or implied power to terminate a tenancy for any reason is unconscionable."). \textit{See also id.} at 508, 521 n.182, 523, 527 n.214; Edward Chase & E. Hunter Taylor, Jr., \textit{Landlord and Tenant: A Study in Property and Contract}, 30 VILL. L. REV. 571, 680 (1985) (discussing unconscionability). As to estoppel, see, for example, Chase & Taylor, supra, at 674 n.368 (stating that "where the tenant's reliance upon the assumption that the landlord may not terminate at will is crucial to the case, flexibility in result is attainable under the pliable promissory estoppel doctrine formulated in the \textit{Second Restatement} of Contracts, § 90). As to adhesion, see Schoshinski, supra note 43, at 555–56:

All of the elements of adhesion contracts and characteristic circumstances surrounding their execution exist in the case of a lease by an indigent tenant. Most landlords use a standardized form of lease or at least standardized language. The landlord is the draftsman and the terms strongly favor him. The tenant has no choice but to adhere by signing the lease or to reject the entire transaction and remain homeless. If the courts have been willing to provide relief in the case of automobile purchases, how much more willing should they be to provide similar relief for the indigent tenant when the basic necessity of shelter is at stake?

\textit{See also id.} at 554 (These are "contracts of adhesion" or "take-it-or-leave it" contracts.); Johnson, supra note 88, at 807 ("Form leases of limited duration should be ... subject to the normal rules of contracting, including adhesion and unconscionability. These leases are contracts that may be susceptible to bargaining imperfections; for example, residential leases and leases of a limited duration (say three years or less) may fall within this category presumptively.... These [bargaining] imperfections may result in formulations that, for policy reasons, such as decreasing instances of unconscionable behavior, the court may examine and strike.").

\textsuperscript{99} As to good faith and fair dealing, see Julian v. Christopher, 575 A.2d 735, 738–39 (Md. 1990). As to reasonableness, see Shell Oil Co. v. Marinello, 307 A.2d 598, 603 (N.J. 1973). As to good cause for termination, see 2 POWELL, supra note 54, § 16B.05[2] (making the case for an implied-in-fact warranty of security of tenure absent good cause for termination and stating that "[i]n an era of severe housing shortages, continuity of possession is not less vital to the tenant than the quality of possession recognized in the implied warranty of habitability, residential tenants lack the bargaining power to secure an express good cause termination provisions, and relevant analogies to the law of sales of goods suggest that such a right exists.").

\textsuperscript{100} As Powell on Real Property states:

[I]n cases in which the landlord over a period of time has continually maintained or renewed an existing tenancy, a good cause termination right could be implied in fact from the parties' course of performance under the lease. The landlord's continuation of
have made in the property, the landowner’s past policy with respect to continued occupancy, the landlord’s purpose in seeking to terminate the tenancy, the hardship that displacement would cause the tenant, and any representations the landowner might have made with respect to continued occupancy.\(^\text{101}\) Certainly, this would mean that when a landowner assures a tenant that a property will not be sold or that the tenancy would not be terminated, especially when the tenant had made a substantial investment in the property in reliance upon that representation, the landowner will not be allowed to renege on those representations.\(^\text{102}\) These traditional equitable doctrines should be useful to advocates representing both owners of manufactured housing sited in manufactured housing communities and tenants.

More tenants would be protected by recognition of an implied-in-law requirement of good faith and fair dealing or an implied-in-law requirement of good cause for eviction. There are powerful precedents for both. The tenancy in such cases creates a legitimate expectation in the tenant that the tenancy will continue, and the implied good cause term protects that expectation.

\(\text{Id.};\) see also Almota Farmers Elev. & Warehouse Co. v. U.S., 409 U.S. 470, 481 (1973) (Rehnquist, J., dissenting) (discussing renewals); Bell, supra note 8, at 516–18 (discussing an implied-in-fact requirement of good faith). The issue of expectations is very complex. On the one hand, many tenants do in fact have an expectation that their tenancies will continue. See Bell, supra note 8, at 539–40 (“In residential leases for a fixed term, the landlord typically renews the lease for additional periods if the tenant wishes to continue in the tenancy and has complied with terms of the previous lease. In practice, the relationship is similar to a periodic tenancy in terms of the expectations of the parties. While the tenancy is explicitly rather than automatically renewed at the end of the period, the parties nonetheless anticipate a continuing relationship. Under these circumstances, the tenant’s expectation of continuity is as real as the expectation of continuity in the periodic tenancy, and the injury resulting from a coercive or vindictive [or any other] refusal to renew the lease is as great.”). Landlords, especially in tight housing markets, probably understand that tenants expect that their tenancies will be renewed. On the other hand, written leases and legal rules often contradict this expectation by authorizing the landowner to terminate. In these circumstances, it seems to me difficult to define what are the reasonable or legitimate expectations of tenants. I have not tried to resolve this difficulty in this Article. See generally Cynthia L. Estlund, How Wrong Are Employees About Their Rights, and Why Does it Matter?, 77 N.Y.U. L. REV. 6 (2002) (discussing these issues in the related context of employment).

101. See, e.g., Bell, supra note 8, at 517 nn.165 & 167 (discussing employment cases in which the length of employment was a factor in holdings that an implied covenant of good faith had been violated).

102. See Dickens, supra note 76, at 644 (“Often, before moving into a community, prospective purchasers [of manufactured homes] ask the community owner or manager if the community may be sold in the near future. Reassured that it will not be, they purchase their home and move into the manufactured-housing community only to receive a twelve-month closing-of-park notice, sometimes within mere months of moving into the community.”). Such doctrines as fraud in the inducement and promissory estoppel also would be useful in this kind of situation. See, e.g., Chase & Taylor, supra note 98, at 674 n.368.
remainder of this Part will discuss each and the factors that would be relevant in applying either.

A. The Implied Covenant of Good Faith and Fair Dealing

An implied covenant of good faith and fair dealing has been recognized in contract law for decades. *The Restatement (Second) of Contracts* recognized prior judicial holdings by specifying that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." This has been part of the *Restatement (Second) of Contracts* since 1979. It is codified by the Uniform Commercial Code. The overwhelming majority of jurisdictions apply it as a matter of common law. The doctrine furthers "the most fundamental policy objectives of any legal system: ‘[b]y invoking good faith . . . it may be possible for a judge to do justice and do it according to law.’"

The reasons for the implication of a covenant of good faith and fair dealing into contracts apply with full and equal force to leases. Indeed, in some of the seminal articles about the implied covenant, contract scholars chose to use leases as examples of the application of the implied covenant:

Since the publication of the *Restatement* in 1981, a vast number of courts have come to rely on the implied obligation of good faith as a

---

103. *RESTATEMENT (SECOND) OF CONTRACTS* § 205 (1981); see Summers, supra note 97, at 810–14 (discussing the background of the Restatement provision).

104. See Summers, supra note 97, at 810 (discussing the *Restatement (Second) of Contracts* duty of good faith and fair dealing, which was adopted by the American Law Institute in 1979 and published in final form in 1981).


106. Diamond & Foss, supra note 105, 585–86 n.1 (“Only Texas has expressly refused to recognize the covenant’s relevance to arms’ length contracts and limited its application to cases in which a special relationship between the parties is found, such as in insurance contracts” (citations omitted)).


108. See Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HARV. L. REV. 369, 384–85 (1980); Summers, supra note 97, at 831 (using the illustration of a lease to resolve a disagreement among contracts scholars).
sort of "‘safety valve’ to which judges may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language."109

Judges interpreting leases, no less than judges interpreting other contracts, have need of such a "safety valve."110

And courts long have been applying the covenant of good faith and fair dealing to leases.111 To take but one example, in *Julian v. Christopher*,112 the Maryland Court of Appeals said that since 1964, it had "recognized that in a lease, as well as in other contracts, ‘there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others.’"113 The court then held that under the implied covenant of good faith and fair dealing, a lease provision requiring landlord permission for a sublease would be interpreted as requiring the landlord to act reasonably in deciding whether to grant such permission.114 It is generally recognized that the implied covenant of good faith and fair dealing applies to leases, although virtually all the cases applying the implied covenant to leases have involved leases that were commercial rather than residential.115

The implied covenant of good faith and fair dealing in contract law applies to performance and enforcement of the contract, including "abuse of a power to determine compliance or to terminate the contract."116 The covenant has been used to protect continued occupancy in a situation very similar to that of a leasehold—the situation of parties labeled "franchisees" rather than "tenants." These cases include situations in which the franchisee


110. Professor Houh argues that case analysis shows "that, notwithstanding the principles of justice and fairness that theoretically justify the *Restatement/excluder*-analysis approach, good faith analysis is used consistently to effect economic outcomes and norms and as a proxy and rhetorical framework for breach of contract analyses." Houh, *supra* note 105, at 14.

111. Bell, *supra* note 8, at 534–35 (noting that "[w]hile use of good faith in this particular manner is a novel concept in landlord-tenant law, the obligation of good faith is well-established as a basic principle governing lease agreements" and noting also that the Uniform Residential Landlord and Tenant Act imposes an obligation of good faith generally).

112. 575 A.2d 735 (Md. 1990).

113. *Id.* at 793 (quoting Food Fair v. Blumberg, 200 A.2d 166, 174 (Md. 1964)).

114. *Id.*

115. This is curious because, in general and in this case, the reasons for recognizing implied requirements apply more strongly to residential than to commercial leases; residential tenants generally are more in need of judicial assistance than are commercial tenants. See, e.g., Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. RICH. L. REV. 145, 162–77 (1994) (discussing the reluctance of many courts to apply to commercial leases the implied warranty of habitability that was developed for residential tenancies).

contracts expressly permitted termination of the franchise without cause and at least "two decisions [that] impose upon the franchisor an obligation of good faith when determining whether to renew a franchise that automatically expires at the end of a specified period." 117 Earlier franchise law, like landlord-tenant law, allowed non-renewal for any reason or no reason at all, and earlier "[c]ourts held that the [franchisor's] motive [for termination] was irrelevant because the franchisor had the legal right to terminate the franchise under the contract, a result the franchisee could have avoided by contracting for a protective provision requiring good faith or good cause for termination." 118 In these more modern cases, however, "a number of courts upheld the claims of franchisees who were unilaterally terminated under contract provisions. They did so ... primarily by imposing an obligation of good faith on the franchisor's exercise of the right ..." 119

Just as the implied covenant of good faith and fair dealing has been applied to efforts to terminate (or not renew) contracts, it should be applied to efforts to terminate (or not renew) leases. Nonetheless, the courts that limited the franchisor's ability to terminate by applying the implied covenant of good faith and fair dealing insisted that they were doing so for franchises and not for leases. 120 The "distinction between leases and franchises pervades the case law, with courts refusing to impose a good faith obligation in transactions that are labeled leases." 121

117. Bell, supra note 8, at 524–25. But see Diamond & Foss, supra note 105, at 587 ("[T]he covenant applies only when the propriety of the conduct is not resolved by the terms of the contract or by another default rule."). This is contradicted by some cases and by one of the persons responsible for creating the doctrine. See Summers, supra note 107, at 198 (stating that the purpose of the doctrine—and related doctrines—is to "limit and quantify specific legal rules and contract terms").

118. Bell, supra note 8, at 521–22.
119. Bell, supra note 8, at 523.
120. See Chase & Taylor, supra note 98, at 687.
121. Id. at 686–87 ("[T]he terminability question exists regardless of whether the arrangement is a lease or a franchise. The vital question would appear to be not whether the arrangement was a lease or a franchise, but whether any arrangement which specifies a definite term can be construed to require renewals."). Chase and Taylor conclude

"it is clear that if a transaction is categorized as a lease, an automatic and unyielding consequence attaches. Neither the landlord's right to terminate in accordance with the terms of the lease nor his right to refuse to renew a lease upon its expiration are encumbered by a good faith requirement. On the other hand, if the transaction is classified as a franchise, the termination or nonrenewal right is magically transformed from one without restriction to one bridled with the requirement of good faith.

Id. at 688. The problem Chase and Taylor identified, publishing in 1985, was that "the modern lease has not been fully absorbed into general contract law." Id. More than two decades later, with contract law much more generally applied to leases, the sensible rules developed in the franchise cases should be applied to leases as well.
This distinction is analytically unsound. As Chase and Taylor point out:

The courts adhering to this dubious distinction between leases and franchises have failed to distinguish between historical and logical incidents of common law tenancies. If the obligation to deal in good faith were precluded by common law concepts, then the recent and widely adopted doctrine of retaliatory eviction would be quite impossible. That doctrine imposes a negative obligation on the landlord to avoid dealing in bad faith, which is analytically akin to the affirmative obligation to deal in good faith, an obligation which we believe should be generally recognized. It is curious that courts that have no difficulty requiring the landlord to avoid the one should have such great difficulty in requiring him to achieve the other. Perhaps if courts were to see this connection, the obligation to deal in good faith would lose its apparently alien appearance.122

Indeed, the application of an implied covenant of good faith and fair dealing to terminations of tenancies was analyzed and approved in the 1980s. In her seminal 1982 article, Professor Glendon wrote:

Even without legislation, the case law developments could go quite far in the direction of limiting the landlord's ability to terminate tenancies. The increasing disposition of courts to carry new and old principles of contract law over into residential lease law, together with the "good faith" clause in URLTA section 1.302, modelled [sic] on the Uniform Commercial Code's section 1-203, might well result in holding landlords to a standard of good faith that would be much broader in scope than the retaliatory eviction concept.123

In her 1985 article, Professor Bell spelled out in detail one way in which "the obligation of good faith, which is already implied in leases, as it is in all contracts, should be interpreted by courts to prohibit a landlord's

Professor Bell considers why the good faith obligation has been more readily accepted in the franchise cases than in the employment cases. She finds three explanations. First, "that franchising is a relatively recent phenomenon, without the long history and well-established precedent of at-will termination that exists in the employment context." Second, "the franchisee did not have to overcome, as did the employee, the still-influential notion of an employer's 'property' right in the employment." And, third, "because the perceived loss to the franchisee—investment of money in the business—is strictly economic, courts may be more comfortable protecting that interest from vindictive action than in the employment cases where losses may be partly economic and partly non-economic." Bell, supra note 8, at 528. She says that this makes the argument harder in the landlord-tenant situation because "[t]he landlord-tenant relationship, like the employment relationship, carries with it long-standing notions of property rights and an historically recognized right of termination. In addition, the interest of and resulting injury to the tenant are less directly economic than in the case of the franchisee." Bell, supra note 8, at 528.

123. Glendon, supra note 42, at 542 (footnotes omitted).
exercise of otherwise permissible termination rights in a bad faith manner that contravenes the tenant's expectation of continued occupancy."\(^{124}\)

The implied covenant of good faith and fair dealing can protect tenants from various kinds of oppressive conduct.\(^{125}\) Considering only its application to efforts to terminate tenancies, judges could use the implied covenant, in appropriate cases, to modify the conditions of the termination as well as to prevent the termination altogether. Thus, for example, in appropriate cases, a judge might hold that good faith and fair dealing requires that a tenant be given a longer period of time in which to move, or that the landowner be required to provide replacement housing,\(^{126}\) or that displacement not be scheduled until the end of a school year,\(^{127}\) or that displacement not occur during notably hot or cold weather.\(^{128}\)

124. Bell, supra note 8, at 508; see also id. at 509–10, 520 ("analogizing the move to implying such obligations in leases to similar shifts in employment cases"). For consideration of reasons why protection in the home may be even more important than protection in the workplace, see, for example, Michelle Adams, Knowing Your Place: Theorizing Sexual Harassment at Home, 40 Ariz. L. Rev. 17, 21–28 (1998).

125. Compiling a list of such possibilities is beyond the scope of this Article, but it is not "good faith and fair dealing" to, for example, lease units that have lead-based paint, lease units when one does not have required certificates and licenses, or engage in oppressive or harassing management practices. Any landowner conduct that any advocate would consider objectionable if applied to herself is a good candidate for being characterized as not "good faith and fair dealing." It also will be helpful for tenant advocates to draw upon the development of contract law standards when seeking to apply the covenant of good faith and fair dealing. See, e.g., Diamond & Foss, supra note 105, at 590–600 (discussing various approaches to determining when conduct is of the kind that violates the covenant of good faith and fair dealing).

126. See Ball, supra note 3, at 57 (stating that in France, "the evicting judge may provide for the tenant to pay arrears by installments over two years or delay the eviction for up to three years for reasons including social reasons and the attitude of the tenant"). It is interesting (and embarrassing to the honor of the United States) to note that, in addition, in France, a physical eviction can only be carried out by the police for the central state, because it is a procedure which would normally be a breach of a person's human rights . . . . Thus the additional permission of the préfet . . . . is required for the use of public force. This can be refused, following enquiry, if the tenants will not leave, perhaps because they are needy . . . . If permission is refused, the landlord can apply to the administrative tribunals for compensation from the state, usually equal to the rent.

Ball, supra note 3, at 57. For a requirement of replacement housing, see Ball, supra note 3, at 56 (stating that there is a compulsory departmental plan for re-housing disadvantaged people).

127. See, e.g., Crowley, supra note 9, at 26 (stating that in Houston, Texas, "school officials negotiated with landlords to use one-year leases that end on June 30 in order to curtail moves during the school year").

128. See D.C. CODE § 42-3505.01(k) (2001 & Supp. 2007) (prohibiting most evictions "on any day when the National Weather Service predicts at 8:00 a.m. that the temperature at the National Airport weather station will fall below 32 degrees Fahrenheit or 0 degrees centigrade within the next 24 hours"). In addition, "the practice of the [U.S.] Marshals [in the District of Columbia] is also not to do the eviction if it is raining." E-mail from Julie Becker, Esq., Senior Staff Attorney, Legal Aid Society of D.C., to Florence Wagman Roisman, William F. Harvey Professor of Law, Indiana University School of Law-Indianapolis (Aug. 16, 2007, 13:37 CST)
With respect to termination vel non, the covenant of good faith and fair dealing would prohibit termination (or non-renewal) in situations where the landowner is being malicious or vindictive or is taking undue advantage of the tenant. In the franchise cases, for example, "commentators do agree that the . . . good faith obligation is an appropriate vehicle to prohibit opportunistic or vindictive franchisor behavior."  

Case-by-case common law development would be necessary to illuminate the application of these standards. Professor Bell says, for example, that the implied covenant of good faith and fair dealing prohibits conduct that is "opportunistic." Discussing the franchise cases, she writes that "[t]he good faith obligation, while prohibiting vindictive or coercive termination . . . , does not prevent termination where the franchisor has a solid business reason for ending the relationship." But the line between "opportunistic" or "coercive" conduct on the one hand, and "solid business reason[s]," on the other, is not easy to draw. In the franchise cases, courts found that the covenant was violated when the franchisor took advantage of his market power. In Julian v. Christopher, the court held that the implied covenant of good faith and fair dealing was violated when the landlord withheld permission for a sublease apparently in order to extort a higher rent from the tenants. This is as appropriately characterized as "coercive" or "opportunistic" conduct as "good business judgment." When the owner of a manufactured housing community is able to make more money by putting the property to some other purpose, is this opportunism or good business judgment? If a landlord who is making a reasonable return on his investment tries to displace long-time tenants into a tight housing market because he can increase his profit by using the property for another purpose, is this "opportunism" or "good business judgment?" These considerations suggest that, pace Professor Bell, there

(see also Ball, supra note 3, at 56 (stating that in France, no evictions are allowed between November 1 and March 15 "in the absence of re-housing").)

129. Bell, supra note 8, at 527.
130. Id. at 526–27 (stating that commentators may criticize a good-cause-for-termination requirement for franchises, but "do agree that the more limited good faith obligation is an appropriate vehicle to prohibit opportunistic or vindictive franchisor behavior"); id. at 527–28.
131. Id. at 525.
133. Id. at 735 (holding that refusal simply to gain higher profits is unreasonable unless the sublease would lead to additional expenses or higher financial risks for the landlord).
134. See, e.g., Schmitz, supra note 15, at 388–89 (pointing out, under the heading "Park Landlords' Potentially Abusive Dominance," that park owners "often push mobile home owners to sell their homes at distressed prices to the landlords" and that "the fairness of these purchases can be suspect in light of a park owner's affiliation with retail outlets").
are situations in which the covenant of good faith and fair dealing should prohibit conduct that is motivated by "sound business judgment."

As this discussion shows, an implied covenant of good faith and fair dealing that prohibits "opportunistic" conduct by a landowner could provide substantial protection for tenants faced with termination. Just as that implied covenant prohibited the landlord in Julian v. Christopher from denying a request for a sublease in order to insist on higher rent, the same implied covenant should prohibit a landowner from terminating a tenancy in order to sell the land for more money. Depending upon the circumstances, the latter can be as opportunistic as the former.

There is, however, another way in which the common law offers tenants protection from arbitrary terminations of tenancies: by application of an implied covenant requiring good cause for termination. This is discussed below.

B. The Implied Covenant of Security of Tenure or Good Cause for Termination

For the same reasons that common law courts recognized and applied the implied-in-law warranty of habitability and the implied-in-law covenant of good faith and fair dealing, courts should recognize and apply an implied-in-law covenant of secure tenure absent good cause for termination. The New Jersey Supreme Court did this in Shell Oil Co. v. Marinello, a case involving a franchise agreement and lease. In Marinello, the court held that a "provision giving Shell the absolute right to terminate on 10 days notice" was void and that the law "read into" the lease and dealer agreement "the restriction that Shell not have the unilateral right to terminate, cancel or fail to renew the franchise, including the lease, in absence of a showing that Marinello has failed to substantially perform his obligations under the lease and dealer agreement, i.e., for good cause . . . "

This covenant of good cause for termination should be implied into at least some residential leases just as it was implied into the commercial lease-plus-franchise-agreement involved in Marinello. The principal basis for the holding in Marinello applies much more strongly to residential leases.

136. Id. at 603; see also Chase & Taylor, supra note 98, at 672 ("[T]he requirement of good cause as a condition of termination has been imposed in cases involving franchises terminable at the sole discretion of the franchisor.").
137. Marinello, 307 A.2d at 603.
In *Marinello*, the principal basis for the court’s implying the good cause requirement was “the uneven bargaining power of the parties.”\(^{138}\) Inequality of bargaining power is, at best, as often a problem for residential tenants than for commercial tenants or franchisees, such as those involved in *Marinello*. Inequality of bargaining power is a severe problem for renters today—even more of a problem for renters today than it was when the implied warranty of habitability was adopted (largely because of perceived inequality of bargaining power)\(^{139}\). “Nationwide there are about 9 million renter households with extremely low incomes and only 6.2 million rental units they can afford.”\(^{140}\) The burden on poor renters is especially heavy:

\[\text{[T]he proportion of income devoted to housing costs is far larger among low-income renters than among high-income renters. The most extreme rent burdens are observed for poor households (roughly the bottom 12 percent of households). In 2000, the median poor renter households devoted 64 percent of income to rent. . . . Among poor households, 77 percent devoted more than 30 percent of their incomes to housing costs, while 57 percent spent over half their incomes for housing.}^{141}\]

\(^{138}\) Bell, *supra* note 8, at 525 n.200; see also Glendon, *supra* note 42, at 512–17 (discussing *Marinello*); Murray, *supra* note 115, at 148–52 (discussing the proposition that “[g]radually, in recognition of the bias toward the landlord, courts began to exercise equitable power in favor of the defendant-tenant”).

\(^{139}\) See John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn’t It More Affordable?*, 18 J. ECON. PERSP. 191, 199 (2004) (containing Table 4, below, which shows the extent to which the percentage of rental stock affordable to poor renters declined from 1960 to 2000. The numbers in parentheses indicate the proportion of renter households that were poor at each point; these percentages are relatively stable.

\|
<table>
<thead>
<tr>
<th>Year</th>
<th>Proportion of Poor Renter Households</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>13 (27)</td>
</tr>
<tr>
<td>1970</td>
<td>12 (22)</td>
</tr>
<tr>
<td>1980</td>
<td>12 (22)</td>
</tr>
<tr>
<td>1990</td>
<td>9 (22)</td>
</tr>
<tr>
<td>2000</td>
<td>4 (23)</td>
</tr>
</tbody>
</table>

See also *id.* at 199 (stating that “[t]he proportion of the rental housing stock that is affordable . . . to the median renter has declined markedly,” especially for poor renters); JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *STATE OF THE NATION’S HOUSING 2007*, at 22 [hereinafter *STATE OF THE NATION’S HOUSING*] (showing that renters are poorer than they have been in the past and that the “share of renters in the bottom income quartile [increased] from 38 percent in 1995 to 41 percent in 2005”).

\(^{140}\) Editorial, *Raise the Roofs: A Bill To Construct More Affordable Housing Units*, WASH. POST, July 30, 2007, at A14; see also Quigley & Raphael, *supra* note 139, at 199–200 (stating that the evidence “suggest[s] a substantial undersupply of rental dwellings available for low-income households, even those willing to devote a large fraction of income to rent”).

\(^{141}\) See Quigley & Raphael, *supra* note 139, at 198 (stating that most nonelderly poor and near-poor households are renters, not homeowners).
There have been "pronounced increases in the typical rental burdens for poor and near-poor households"\(^{142}\) as "the number of renter households paying 30 to 50 percent of income on rent has increased by 3 million, and the number of rental households paying more than 50 percent of income on rent has increased by another 3.6 million."\(^{143}\) Also, a much higher percentage of minorities than of white Anglos are renters rather than homeowners;\(^{144}\) as minorities, they face housing discrimination which makes rental housing more expensive for them than the housing would be for white Anglos.\(^{145}\)

Inequality of bargaining power also is a grave problem for owners of manufactured homes. Many owners of manufactured homes are low-income people;\(^{146}\) most live in manufactured home communities, and have "generally weak bargaining power," while the park owners enjoy "[p]otentially [a]busive [d]ominance."\(^{147}\)

The inequality of bargaining position and the strong personal and societal interests in stable occupancy, all discussed in Part I, argue powerfully for judicial implication of a covenant of security of tenure or good cause for termination. Since most tenants are unable to secure such

---

142. Id. at 192, 198 (concluding that the evidence "suggests that inequality in rent burdens has increased over the past four decades"). Also,

[i]n 1960 and 1970, the median renter devoted 20 percent of income to rent. By 1980, this figure increased to 25 percent, and it subsequently rose slightly. Similar patterns are observed for the proportion of renter households/ spending greater than 30 percent of incomes on housing costs, although for this measure, the post-1980 increases are pronounced.

Id. at 197–98.

143. Id. at 212.

144. Id. at 193 (stating that "there are pronounced racial and ethnic differences in homeownership rates (for example, the white-black difference in homeownership rates is 26 percentage points"); see also STATE OF THE NATION'S HOUSING, supra note 139, at 36 (showing that the racial gap in homeownership has not changed over the years, though the homeownership rates have increased).


146. Schmitz, supra note 15, at 385 (stating that manufactured housing is "an important source of housing for families that cannot afford to purchase conventional homes, or even to rent decent apartments" and referring to "the relatively high percentages of low-income and minority families living in [mobile homes]").

147. Id. at 388; see supra text accompanying note 15 (discussing reasons for the financial weakness of many owners of manufactured homes).
security by bargaining, the law should provide the security by implication.\footnote{148}

Professor Bell, who makes a powerful case for applying to lease terminations the implied covenant of good faith and fair dealing, considers that the implied covenant of good cause for termination “extends beyond the good faith obligation.”\footnote{149} As discussed, she considers that “[t]he good faith obligation, while prohibiting vindictive or coercive termination of the franchise, does not prevent termination where the franchisor has a solid business reason for ending the relationship.”\footnote{150} She writes:

In contrast, the good cause limitation permits termination only upon a showing that the franchisee has breached the agreement or failed to perform adequately under the contract, thus excluding a right of termination for business reasons unrelated to franchise performance. While a franchisor terminating the franchise for business reasons acts in “good faith,” he does not exhibit “good cause.”\footnote{151}

Upon this basis, Professor Bell argues that “[j]ust cause requirements . . . represent such a drastic departure from the common law rules that legislative action would be necessary to implement them.”\footnote{152}

Further

\footnote{148. A fundamental reason for courts to use implied covenants to impose protections is that individuals cannot secure those protections for themselves because they lack bargaining power (or power in the legislature), but the courts consider those obligations essential to protect important interests of the individuals and of society. \textit{See} Bell, supra note 8, at 531–32 (showing that this process of redefining common law rules governing the landlord-tenant relationship to fit changing societal mores has gone on for centuries). With respect specifically to changing the rules governing termination, Professor Bell states that  

\begin{quote}
[Since] farmers under tenancies at will could be removed without notice even after planting their yearly crops[,] . . . 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. Thus, the basic form of the landlord-tenant relationship that now appears in need of restructuring was itself developed primarily as a judicial tool for recognizing what were at that time legitimate tenant expectations."
\end{quote}

\textit{Id.}; see also Johnson, supra note 88, at 808 (stating that “residential leases should be subject to implied terms designed to correct inequities due to bargaining imperfections”). As discussed supra note 102, I think it problematic to rely on “expectations”; I consider, however, that what Professor Bell here attributes to expectations appropriately is attributed to strong tenant and societal interests.}

\footnote{149. Bell, supra note 8, at 525.}

\footnote{150. \textit{Id.}; see supra notes 124–28 and accompanying text.}

\footnote{151. Bell, supra note 8, at 525.}

\footnote{152. \textit{Id.} at 537; see also \textit{id.} at 507–08 (stating that a good cause requirement would effect “a complete reversal of the landlord-tenant relationship”).}
analysis, however, shows that despite Professor Bell’s objections, there are persuasive arguments for judicial implication of a good cause requirement.

As discussed, the covenant of good faith and fair dealing is not as narrow as Professor Bell suggests. The distinction between “opportunism” and “sound business judgment” is hard to draw, and the covenant of good faith and fair dealing has been used to invalidate decisions made for business reasons. The franchise termination decisions all were made for business reasons—to make more profit for the franchisor. The refusal to allow a sublease in *Julian v. Christopher* was made for business reasons—to make more profit for the landlord. In most of the franchise cases and in *Julian v. Christopher* and similar cases, nonetheless, the courts held that the effort to make more money conflicted with the duty of good faith and fair dealing. Thus, the fact that a covenant may invalidate a decision made for business reasons is not on its own a justification for requiring that that covenant be created legislatively.³⁵³

Arguing that legislation is necessary to create a good cause requirement, Professor Bell states that a just-cause standard “provides the greatest degree of tenant security, going beyond even the good faith obligation. Just cause standards basically provide the tenant with a life estate in the leased property, subject to interruption only for failure to comply with lease conditions.”¹⁵⁴ Two points need to be made about this. First, good cause for termination may mean things other than failure to comply with lease provisions. Second, there is nothing inherently wrong with assuring a tenant a life estate in a tenancy, subject to certain conditions: “A lifetime right to possession may appear to be a reasonable

153. Professor Bell’s unduly narrow reading of the covenant of good cause and fair dealing is illuminated by her concluding analysis of the difference between that covenant and the good cause covenant. Writing about the franchise cases, she says that

[w]hile a franchisor terminating the franchise for business reasons acts in ‘good faith,’ he does not exhibit ‘good cause.’ But the good faith covenant does not require good faith only; it also requires ‘fair dealing,’ which has a broader meaning. And when one party terminates an agreement in order to take advantage of a superior position in the market, his action may be in ‘good faith’ but not ‘fair dealing.’

Bell, *supra* note 8, at 525.

154. *Id.* at 537. Professor Bell also supports her argument that legislative action is needed because “[i]t stretches the imagination to imply, as a matter of contractual interpretation, that the parties may reasonably expect that the landlord cannot terminate the lease even for legitimate business reasons.” *Id.* at 537. We have adverted, *supra* notes 95 and 140, to the problems with resolving issues based on expectations. Moreover, the New Jersey Supreme Court, in *Marinello*, said that an agreement that specifically gave Shell the “absolute right to terminate on 10 days notice” had an implied-by-law requirement that Shell exercise that right only for good cause. *Shell Oil Co. v. Marinello*, 307 A.2d 598, 603 (N.J. 1973).
or an extreme construction depending on the circumstances of the agreement... [And if] the lifetime occupancy construction appears unreasonable under the circumstances, ... [the lease can be] construed to authorize occupancy by the tenant for a reasonable period.”

As to the first, it is true that the New Jersey Supreme Court said in Marinello that good cause means failure to comply with lease provisions. But “good cause” does not necessarily mean only failure to comply with lease provisions. It may also mean desire to put the property to personal use or to use the property for another purpose altogether—purposes that have been defined as good cause for termination in New Jersey, the District of Columbia, and elsewhere. In any given situation, it will be up to a court to consider whether a particular reason does or does not constitute good cause for termination.

In deciding whether a particular landowner does or does not have good cause for terminating a tenancy (as in deciding whether a particular landowner does or does not act in good faith or engage in fair dealing when terminating a tenancy), a court will take into account a variety of factors. Among many other factors, the court will consider the relative financial situations of the landowner and the tenant—some landowners are wealthy, powerful, national or international mega-businesses, and some are individual, “mom-and-pop” landlords. Some tenants are wealthy, although most are low-income and many also are minorities. The court will consider how tight the housing market is, implying more protections

155. Chase & Taylor, supra note 98, at 674. For example, the tenancy could be permitted to continue until the end of a school year or for long enough to allow the tenant to secure alternative housing.

156. Marinello, 307 A.2d 598 at 600.

157. See, e.g., N.J. STAT. ANN. § 2A:18-61.1–61.12 (West 2000); D.C. CODE § 42-3505.01 (2001) (setting out what constitutes good cause for eviction). The D.C. Rental Housing Act of 1985 sets forth ten conditions that constitute good cause for eviction: nonpayment of rent, breach of the lease, commission of a crime on the premises, personal use and occupancy by the landlord or a buyer, vacancy-required renovations, substantial rehabilitation, discontinuance of housing use, demolition, and conversion to condominium or cooperative status. Only the first three are related to tenant conduct. See D.C. CODE § 3505.01(a)–(k) (2001).

158. See STATE OF THE NATION'S HOUSING 2007, supra note 139, at 21 (“In 2001, individuals and married couples owned 19.3 million of the nation’s rental units, while partnerships, corporations, and other institutions owned another 15.6 million ... Individuals and couples are more likely to own smaller properties, holding 84 percent of the rental properties with 1–4 units and 65 percent of those with 5–19 units.”); see also id. at 22 (stating that individuals and couples “tend to own older properties and charge lower rents” and that these owners “may face low or negative net operating incomes.” Their properties may be appreciating in value.) The solution to the problems of these small landlords, however, is not to be found in burdening their tenants; as the authors of STATE OF THE NATION’S HOUSING 2007, supra note 139, conclude, “[t]he fate of the affordable housing supply therefore relies critically on finding ways to assist these small property owners in preserving their rental buildings,” id. at 22.

159. See supra notes 138–47 and accompanying text.
RIGHT TO REMAIN

for tenants when a tight housing market indicates that the tenants have little or no bargaining power.\textsuperscript{160}

Courts also will consider the kinds of factors that would be relevant to the application of the equitable doctrines that were discussed above, such as the length of time the tenant had occupied the premises, investments the tenant may have made in the property, the landowner's past policy with respect to continued occupancy, the hardship that displacement would cause the tenant, any representations the landowner might have made with respect to continued occupancy, and the number of times the tenancy had been renewed in the past.\textsuperscript{161}

Certainly, one of the factors the court will consider in applying either of these implied covenants is the landlord's purpose in seeking to terminate the tenancy. If the landlord's purpose is vindictive or opportunistic, the covenant of good faith and fair dealing would apply. Even if the landlord has a "sound business reason" for the termination, either the covenant of good faith and fair dealing or the covenant of good cause for eviction might apply. The fact that a landlord desires to transfer a property to his own personal use does not necessarily overwhelm the tenant's and societal interests in continued occupancy.\textsuperscript{162} The fact that a landowner can make more money by transforming the property to another use does not necessarily overwhelm the tenant's and societal interests in continued occupancy.

It certainly is not the case that a landowner is entitled to do whatever will produce the highest profit for him. Thus, for example, a landlord could make more money if he did not pay for maintenance, but housing codes and the implied warranty of habitability forbid that. A landlord may be able to make more money if he limits his tenancy to white people, but the law does not allow him to do that. A landlord could make more money if he did not have to make reasonable accommodations for tenants with disabilities, but the law does not allow him to do that. Shell Oil Company presumably considered that it could make more profit if it terminated the franchise agreement with Mr. Marinello, but the court held that did not constitute good cause for termination.\textsuperscript{163} Similarly, what a landowner

\textsuperscript{160} Bargaining power between the parties may vary with location—in some markets, landlords may have far more power than in others. See \textsc{State of the Nation's Housing 2007}, supra note 139, at 20 (noting that, in the West, 2006 marked "the third straight year of vacancy rate reductions" and "rents in the West rose more than twice as fast as in any other region").

\textsuperscript{161} See supra notes 100-02 and accompanying text.


\textsuperscript{163} The New Jersey Supreme Court said that Mr. Marinello "attributed his present difficulties with Shell to his refusal to accede to Shell's request that he lower his price from 3 cents to 5 cents a gallon during an area 'gas war'. . . . He also said that he was told . . . that one
considers the exercise of sound business judgment may not be consistent with the requirements of good faith and fair dealing. In each case, the court will weigh the competing interests and make an appropriate judgment.\textsuperscript{164}

To some extent, the impact of such a rule will be to make private ownership of rental housing for low income people less attractive than it is now, but to the extent that such ownership is attractive because landlords can oppress the tenants, such ownership should be made unattractive. The provision of decent, affordable housing for poor people is not an area for private enterprise. It is a government responsibility, and the government should not evade this obligation by allowing private landowners to cheat tenants and society of what they need.\textsuperscript{165}

\textbf{CONCLUSION}

Current landlord-tenant law with respect to security of tenure imposes a per se rule—no matter how strong the tenant’s and societal interests in continued occupancy or how weak the landlord’s interest in termination, the landlord’s interest will prevail unless the tenant has bargaining power, save for a few relatively narrow situations dealt with by specific doctrines such as retaliatory eviction or anti-discrimination standards. Current law provides no general recognition of the tenant’s or societal interest in security of tenure, simply a prohibition of specific motivations for termination. Applying the doctrines discussed in this Article would simply extend to the situation of tenancy termination the principle that a landowner’s interest in how he handles his property is not absolutely privileged; it is to be judged in balance with the interests of the tenant and society in general.

\textsuperscript{164} When good cause for termination is required but there is no rent control legislation, courts will have to make judgments about whether proposed rent increases are appropriate, given the balance of landowner, tenant, and societal interests. Rent increases that are attempts to circumvent the good faith or good cause requirement would have to be prohibited to protect the integrity of the good faith or good cause requirement. Courts make similar judgments now in such areas, see Aimco Props., L.L.C. v. Dziewisz, 883 A.2d 310, 313 (N.H. 2005), and in situations where rent increases are challenged as retaliation for protected activities or having a prohibited discriminatory purpose or effect. In Connecticut, the good-cause-for-termination requirement is protected by an explicit, legislative requirement that any proposed rent increase be “fair and equitable.” CONN. GEN. STAT. § 47a-23c(b)(1)(B) (1999), listing as a good cause for termination “refusal to agree to a fair and equitable rent increase, as defined in subsection (c) of this section.” The criteria in § 7-148c include tenant hardship. \textit{id.} § 7-148c(9).

\textsuperscript{165} See \textit{STATE OF THE NATION’S HOUSING 2007}, supra note 139, at 22; Glendon, supra note 42, at 575 (stating that “[b]y promoting the illusion that the problem of housing the poor can be resolved within the private rental sector, [landlord-tenant law reforms] are further evidence of our collective inability to ‘come to grips’ with an aspect of the problem of poverty’").
Imposing an implied-by-law requirement of good cause for termination of a tenancy, including non-renewal of a tenancy, is not a radical step and will not cause destruction of the residential rental market. The feasibility of a good cause for termination rule is demonstrated unequivocally by the experience in the jurisdictions that require good cause for termination of tenancies for owners of manufactured housing and others, notably the District of Columbia and New Jersey, the latter of which "has had statewide 'good cause' statutory eviction/lease renewal protections since 1974."\(^\text{166}\)

Just as with the implied warranty of habitability, and the application of the implied covenant of good faith and fair dealing to franchise terminations, these statutory requirements should be taken into account by the courts in redressing the imbalance in power between tenants and landlords and taking account of the powerful interests of tenants and society in assuring security of tenure for those who rent their homes or the land on which their homes are sited.

---

\(^{166}\) E-mail from Kenneth Goldman, Senior Attorney, South Jersey Legal Services, Inc., to Housing Justice Network (June 16, 2005, 14:51 PST) (on file with the North Carolina Law Review). *The State of New Jersey Housing Policy and Status Report*, issued on August 10, 2006, does not include in a list of "housing providers' concerns" any reference to the good-cause-for-eviction requirement; indeed, there is no reference to that requirement in the report. *THE STATE OF NEW JERSEY HOUSING POLICY AND STATUS REPORT* 41–42 (2006), http://www.state.nj.us/dca/housingpolicy06.pdf.