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COMMENTS

COMMENTS ON EDWARD H. RABIN, *THE REVOLUTION IN RESIDENTIAL LANDLORD- TENANT LAW: CAUSES AND CONSEQUENCES*

Lawrence M. Friedman†

I want to begin by calling attention to a point that is perhaps so obvious that it might easily be overlooked. Scholars commonly talk about "revolution" in this or that field of law; indeed, Professor Rabin put the word "revolution" in the very title of his paper. Does it belong there? Do we really know a revolutionary change when we see one? "Revolution" is a strong word. It means overthrowing some established order. I would like to raise at least a modest dissent as to whether a revolution has taken place in landlord-tenant law.

To put it simply, the changes discussed in Professor Rabin's article are "revolutionary" only if one assumes that there is something called "the law," which is captured, for example, by the Restatement of Property, or precisely delineated by the string of doctrines in a conventional treatise on property. The appellate decisions that are the raw material of restatements and treatises, however, are responses to particular stimuli. The stimuli consist of the facts of cases (and, to a certain extent, the legal arguments). Today's formulation of doctrine in landlord-tenant cases certainly *looks* very different (on paper) from formulation of doctrines 30, 50, or 100 years ago. On the other hand, however, fact-stimuli are probably different as well.

I do not suggest that the law of landlord and tenant has not changed in any way. Quite the contrary. I am suggesting that the change was a result of shifts in modal fact situations; and that it should come as no surprise that courts have reformulated doctrine in response. Landlord-tenant law in the nineteenth century and in the early part of this century, arose in quite a different context from our modern rental environment. First, I would venture to guess that very few of the old cases concerned residential real estate at all. Most were about agricultural land or commercial leases. Second, none of the earlier cases involved slum property. Third, there was nothing even remotely equivalent to the large scale luxury apartment buildings or complexes,

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owned by corporate landlords, with hundreds or thousands of tenants. Not many cases in the nineteenth and early twentieth centuries involved apartment buildings because few such buildings existed (except for tenements, which produced little or no litigation). The rise of the big corporate landlord is, I suspect, a critical new factor. I do not suggest that judges look on corporate landlords as malefactors of great wealth, but rather that the relationship between a corporate landlord and its tenants is quite different from the relationship between the owner of one or two units, and his tenants.

No one should therefore be surprised that a number of legal doctrines fit today's residential or commercial property poorly. One example of the way in which legal doctrine has responded to modern condition is the abolition of *distrain*. This remedy was arguably appropriate to an agricultural community. It is one thing to go onto land and gather crops, or seize a cow or two, but it is quite another to enter an apartment and start rummaging around in the drawers and closets for jewelry and furs. Distrain does not sit very well in a residential setting.

The big landlord is less important for slum cases than for nonslum cases. What is clear from Professor Rabin's account is that the "revolution" takes place under the stimulus of two types of cases which on the surface could hardly be more different. The first type crawls up out of the festering slums; the tenants are represented by legal services lawyers, the building is decaying, and the problems are problems of dilapidation, human suffering, and violations of housing codes. The second type emanates from luxury apartments. Essentially, tenants and tenant associations complain that the landlord has not lived up to his express or implied bargain.

No doubt the two groups of cases influence each other. Professor Rabin suggests that the major influence on landlord-tenant law comes from the slum cases; he calls the civil rights movement of the sixties "the dominant force behind the changes in landlord-tenant law."¹ This suggests that sympathy for the poor is the force behind the willingness of judges to jettison what they were at least *told* were time-honored rules. The motive is compassion or a quest, perhaps misguided, for social justice. Hence, the new rules tilt toward the tenant.

I would like to suggest another view: that it is at least as likely that the influence runs the other way. That is, the more powerful influence on the law derives from cases brought by rich tenants, outraged when they did not get what they thought they paid or contracted for. Imagine a tenant of this kind who consults a lawyer and learns what were supposed to be the rules of the landlord-tenant game. I can imagine his

¹ Rabin, *The Revolution in Residential Landlord-Tenant Law: Cases and Consequences*, 69 CORNELL L. REV. 517, 546 (1984).

angry response: This could not be the law, these rules make no sense; they are totally obsolete, unsuitable; no judge today will behave this way. And these, after all, are the people with the money, time, nerve, and will to fight for their rights.

Picture, for example, a wealthy tenant who finds that he cannot take possession of an apartment in New York City because the prior tenant refuses to vacate. He learns from a lawyer about the so-called American rule, which, as Professor Rabin puts it, made this nasty situation one that "the new tenant, not the landlord, had to resolve."² The rule seems monstrous, and nobody is surprised that it has been thrown overboard.

Of course, the "American rule" was not quite so monstrous when applied to tracts of nonresidential land, and particularly under the conditions of cloudy titles and uncertainty, in nineteenth-century land law. To some courts, the rule seemed quite logical. A lease is a conveyance, and the lessee gets the right to possession when the lease goes into effect. Arguably, it is the *lessee* who then has the right to recover possession from a hold-over tenant, not the landlord. This assumes a kind of symmetrical relationship between the landlord and the tenant, and under the facts of the old cases, I suspect that was not so absurd. The rule does not, however, suit residential property, especially where the landlord is in the business of renting on a large scale and the tenant is a private citizen. I am not saying that the tenant is necessarily oppressed, or powerless, but rather that under these circumstances, the "American rule" no longer fits renters' expectations.

I suggest, in short, that the trend Professor Rabin describes is largely independent of class and political ideology. Otherwise, why would the new rules be so uncommonly infectious? Although it is quite appropriate to point out the contribution of judges like Skelly Wright, liberal activism in the District of Columbia hardly explains why conservative Republican judges in Kansas or elsewhere should follow in his footsteps so slavishly. If the new law is so universally skewed toward tenants, something more fundamental must be afoot.

For example, the doctrine forbidding retaliatory eviction could not have emerged except in situations where landlords and tenants did not have close personal relationships. This is characteristic both of luxury housing and tenement housing. Although it would be a monstrous idea to suggest that a landlord cannot get rid of an obnoxious, complaining tenant who is living in his home, a house is not quite a landlord's home if it is fifty stories tall and full of strangers.

The retaliatory eviction rule is just one of many that would be extraordinarily unjust in a mom-and-pop boarding house or a duplex, but

² *Id.* at 540.

would seem quite reasonable to judges in more impersonal settings. I am not talking here about whether the new rule is more efficient than the old one; I am referring to quite different norms. There was not, and never will be, I presume, a rule that prevents a person from inviting only white people, or only black people, to dinner in his own home. There is, however, a strict rule against discrimination in public restaurants. The differences between the home and the restaurant are not simply differences in scale; they are differences in the relationship between the person preparing and serving the food and the person who is served. Similarly, nobody has to be an "equal opportunity employer" in hiring a housemaid or a baby-sitter. People who would find it very obnoxious to interfere with personal choice in these situations find nothing jarring about demanding that General Motors or Sears, Roebuck not discriminate.

The rule that forbids retaliatory eviction assumes that a person does not have to give up his apartment even though he is feuding bitterly with his landlord. Our relationship to large institutions, such as universities, the government, and enormous housing projects, is not a personal relationship at all. It can best be described as a relationship of citizenship. Citizenship carries with it the right, in this society at least, to be a member of the opposition. One can remain a loyal citizen, indeed an esteemed citizen, and at the same time fight against the government. In fact, that is what it means to live in a free society. Similarly, nobody sees anything wrong with living in Bel Air Vista Estates and suing the developers or the owners; or getting paid by the University of Illinois while suing it for sex discrimination. To the contrary, it would be wrong for the University to fire someone for "exercising her rights," just as it would be wrong for the government to put someone in jail for joining the opposition party.

Impressions about the "revolution" in landlord-tenant law are reinforced by looking at parallel changes in other fields of law. There is a developing "super-rule" that puts the mantle of legal protection around certain types of long-term relationships. This is happening, very definitely, in employment law. Scattered cases have discovered a brand-new tort: firing an employee "in bad faith." Some courts are edging gingerly toward the doctrine that an employer cannot just plain fire a worker, or fire him for a bad reason, even when the employment is legally speaking "at will." The analogy to the landlord-tenant cases is obvious. One is reminded particularly of the New Jersey statute that allows eviction only for "just cause." Perhaps this "super-rule" helps explain the popularity of rent control; rent control also protects and nourishes long-term occupiers of apartments.

The "super-rule" may also be significant for understanding the *Ma-*

*rina Point*³ case. The exact facts of the case are not irrelevant. When the plaintiffs first moved in, children were not forbidden; only later did the landlord change the rules to forbid children. Also, the case did not involve a refusal to rent to a family with children, but rather a refusal to renew a lease. The tenants thus were faced with eviction from their home for the crime of having a child. It is hard to imagine a case more likely to play on the sympathies of judges.

But I do not want to stress this aspect too much. Although *Marina Point*'s facts help to explain the particular case, they certainly do not explain the general flow of doctrine. A number of jurisdictions have reached similar results, by one road or another, that is, making it unlawful to refuse to rent to families with children. This is, of course, a rather odd form of "discrimination." Blacks have certainly been oppressed in American history; women have been legally and socially disadvantaged. One can hardly say the same for parents and little children.

Cases like *Marina Point* do shed light on the real meaning of antidiscrimination laws—a subject that I think Professor Rabin slights. Most commentators—Professor Rabin included—defend laws against housing discrimination. Indeed, Professor Rabin ends his paper with this point. Antidiscrimination measures, he says, "may reduce the profits of landlords" and thus "discourage the production or preservation of rental housing."⁴ But this is justified because of the "noneconomic goals achieved." This certainly calls for some further discussion. What precisely are the "noneconomic goals," and exactly what is the problem?

Why not allow a landlord to rent to whomever he pleases? If a landlord does not like people with red hair (the classic example), why must he have them in his house? Once more, the social norm (I am not talking about economic efficiency) distinguishes between small landlords and big landlords. A "housing complex" is incapable of love, annoyance, or hatred; it is also incapable of discriminating, if that term is defined as a psychological attitude. The prejudice is usually not the landlord's at all: it is the prejudice of other tenants. And the problem is not a problem, unless the prejudices of tenants in different places and different settings run parallel to each other.

Nobody questioned the right of landlords to refuse to rent to families with children until quite recently. It is not that a "prejudice" suddenly sprang up. Rather, the problem is that there developed a widespread *pattern*, which shut families with children out of large segments of the housing market. The pattern is perceived by those families, and many others, as harmful to society. If there was a sudden epidemic of landlords discriminating against redheads because of tenant pressure,

³ *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

⁴ Rabin, *supra* note 1, at 584.

or against people who work for Sears, Roebuck, or against accountants, or any other arbitrary category, to the point where these people felt they could not find housing, one would also see a demand for rules of law to remedy the problem. Even laws against race discrimination in housing are best analyzed as responses to social patterns. Race prejudice certainly existed and continues to exist; but it is in a sense irrelevant, just as it is irrelevant whether people want adults-only apartments because they are prejudiced against children, or mothers, or for some other reason. Similarly, the key to understanding *Shelley v. Kraemer*,⁵ a case which has mystified many constitutional theorists looking for an elusive "state action," is that the restrictive covenants there had formed too dense a pattern—like some particularly noxious weed, they had blanketed far too much of the landscape.

A general rule against discrimination has the effect of putting all landlords in the same position. It breaks the pattern. Now nobody can bar blacks, or families with children, at least not openly. Of course, as many fair housing organizations have shown time and time again, it is one thing to announce a rule against discrimination; it is quite another to enforce it.

The larger the landlord, however, the more difficult it is to violate the law. If a huge complex with 1,000 apartments ends up with *no* black tenants, the discrimination is too obvious to explain away. There will have to be at least token compliance. Besides, the larger the organization, the more difficult it is to break certain kinds of law, because this requires a conspiracy between the people on top and those who carry out the policies. Any link in the chain can betray the whole scheme. In addition, the very large landlords are the most exposed to public scrutiny. Large landlords, then, tend to obey the law at least on a minimum scale.

This casts some doubt on Professor Rabin's argument that landlords lowered their rents in the seventies to attract desirable tenants and used covert tactics, because they were no longer able to choose or reject tenants on grounds that were rational economically, but unacceptable on moral or policy grounds.⁶ There are assumptions here about strategic behavior that may or may not be empirically correct. First, these assumptions ignore the organizational problem: How *do* large landlords select tenants, and how practical are "covert" tactics? Second, if all landlords of a given class are in the same boat, legally speaking, then it is hard to see how any of them suffer from inability to choose tenants on "rational" economic grounds. In the case of luxury apartments, the only thing "rational" about excluding blacks who can afford the rents is that bigoted tenants (and there were of course plenty of these) would shun a

⁵ 334 U.S. 1 (1948).

⁶ Rabin, *supra* note 1, at 575.

building with blacks. But if all large developments have some blacks—even token blacks—then there is no advantage to anybody, and no landlord is worse off. The pattern has simply been broken. It is also true that the behavior induced by the law has brought about a new situation, and thus ultimately a new attitude among tenants. White tenants know they cannot expect a lily-white building, and perhaps they stop caring so much.

Understanding of the drift of the law might be improved if we take into account the way large landlords are organized and the *reason* why a “rational” landlord would choose to discriminate among tenants. The new rules may create a new situation, and thus a new rationality. There is at least a hint in Professor Rabin’s article that the new rules force landlords to rent to “undesirable” tenants, or to keep them on. This may well be true of slum landlords, but it is a much more dubious assumption for middle and upper class housing.