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Dale A. Whitman

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FIFTY YEARS OF LANDLORD-TENANT LAW: A PERSPECTIVE

*Dale A. Whitman**

It has been more than fifty years since the Wisconsin Supreme Court, in *Pines v. Perssion*,¹ became the first American appellate court to use the term “implied warranty of habitability.”² This case became the precursor to an avalanche of appellate cases adopting the concept—a shift in the law so radical that it was comparable to the creation of product liability.

Two fundamental concepts were joined in these cases. First, the view that the standard of housing quality embodied in the housing codes could be the basis, not merely for public enforcement by code inspection agencies, but also for private enforcement by tenants.³ Of course, it took time and case development to work out the details of this new private right of action. What sorts of rental units did it apply to? What remedies were available? What procedural hurdles did tenants need to overcome? But ultimately, through a combination of case development and statutory change, stimulated by the Uniform Residential Landlord-Tenant Act,⁴ the idea that tenants had a private action to enforce housing code standards became nearly universal in America,⁵ reversing the common law’s rule of *caveat emptor*.⁶

* Dale Whitman is a Distinguished Visiting Professor of Law at the University of Arkansas School of Law. Professor Whitman is one of the nation’s premier experts on property law. He coauthored five books and numerous articles in this area. During 1971 through 1973 he was involved with the nation’s federal housing programs, serving in Washington DC with the Federal Home Loan Bank Board and the Department of Housing and Urban Development. He was a member of the Executive Committee of the Association of American Law Schools from 1994 through 1997, and was its president for the year 2002. He was a co-reporter for the Restatement (Third) of Property (Mortgages), published in 1997, and reporter for the Uniform Power of Sale Foreclosure Act, approved in 2002 by the Commissioners on Uniform Laws. He is a member of the Order of the Coif, the American Law Institute, the American College of Mortgage Attorneys, and the American College of Real Estate Lawyers, and is a Fellow of the American Bar Foundation. Professor Whitman was the keynote speaker at the 2013 Ben J. Alzheimer Oral Symposium, *A Question of Balance: 40 Years of the Uniform Residential Landlord and Tenant Act and Tenants’ Rights in Arkansas*.

1. 111 N.W.2d 409 (Wisc. 1961).

2. *Id.* at 412.

3. See Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1449 (1974).

4. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (1972).

5. The single remaining exception seems to be Arkansas. See ARK. CODE ANN. § 18-17-601 (Supp. 2011) (requiring the tenant to comply with obligations imposed by applicable housing codes and keep dwelling unit safe and reasonably clean, but imposing no obligations on landlords).

6. See *Pines*, 111 N.W.2d at 413.

The second fundamental change, occurring more or less simultaneously, was the beginning of the rejection of the common law doctrine of independence of lease covenants.⁷ By “independence,” we mean that even if one party to a lease committed a material breach, the other party was not discharged from the duty of further performance.⁸ Thus, if a landlord failed to comply with the terms of the lease, the tenant had no means of escaping from the lease or withholding rent, but instead merely had the right to sue the landlord in damages for the resulting loss, while continuing to pay the rent in full.⁹ While general contract law long ago made contractual covenants dependent, so that one could terminate his or her duties if the other party materially breached and failed to cure,¹⁰ landlord-tenant law did not begin to accept this view until the latter half of the twentieth century.¹¹

In theory, the doctrine of independence of covenants was completely reciprocal and equally burdened landlords and tenants. But landlords managed, by the beginning of the twentieth century, to escape this burden by legislation in most states.¹² They obtained the passage of statutes that permitted them to terminate tenants’ leases for nonpayment of rent, and usually for nonperformance of other tenant covenants as well.¹³ Hence, as a practical matter, the independence of covenants doctrine burdened only tenants until the courts began to rethink and reverse it, beginning after the middle of the twentieth century.

These two concepts—the implied warranty and reversal of the independence of covenants doctrine—worked in tandem. The warranty created substantive rights in tenants, and the fact that the covenants were dependent

7. *See id.*

8. *See* Greg Tasker, Comment, *The Crippled Reform: Retention of Possession by Rent-Withholding Tenants in Ohio under Section 1923.061(B)*, 54 U. CIN. L. REV. 1035, 1035 (1986).

9. *Id.* at 1035–36.

10. RESTATEMENT (SECOND) CONTRACTS §242 (1981).

11. *See Pines*, 111 N.W.2d at 413.

12. The Arkansas statute provides a good illustration. *See* ARK. CODE ANN. § 18-17-701(a)(1) (Supp. 2011) (providing that the landlord in a residential tenancy may give the tenant notice of any “noncompliance by the tenant with the rental agreement,” and if the tenant fails to cure the noncompliance within fourteen days, the landlord may terminate the tenancy). However, this version of the statute is quite recent, having been adopted as part of the Arkansas Residential Landlord Tenant Act of 2007, 2007 Arkansas Laws Act 1004. The previous version of the statute was much narrower; providing merely that “Whenever a half-year’s rent or more is in arrears from a tenant, the landlord, if he or she has a subsisting right by law to reenter for the nonpayment of the rent, may bring an action of ejectment to recover the possession of the demised premises.” ARK. CODE ANN. § 18-16-201(a) (repealed 2007). Thus it applied only to rent default and not to other breaches by the tenant, and was available to the landlord only if the lease contained a right of entry clause.

13. *See, e.g., id.* § 18-17-701 (permitting a landlord to terminate a rental agreement on fourteen days notice if the tenant fails to comply with the agreement).

made it possible for tenants to assert those rights in a practical forum—usually defensively in an eviction proceeding. The result was vast expansion of remedies for tenants. Not only could they sue for damages if the landlord breached the implied warranty; they could also abate their rent, or could make repairs themselves and offset the cost of doing so against their rent liability. The tenants could move out, terminate the lease, and avoid liability for any further rent.

Other legal doctrines were developed to further advance the cause of tenants, and to make tenants' assertions of these remedies more meaningful. For example, many courts began to protect tenants from retaliatory evictions so that the exercise of a tenant's rights was less likely to land him or her on the streets.¹⁴ A few localities even passed formal rent withholding procedures.¹⁵ Even if tenants terminated their leases without legal justification, more and more courts began to hold that landlords would be expected to mitigate damages by making a good faith effort to find a replacement tenant whose rent could be applied against the old tenant's liability.

It was a new era. I have a vivid memory of almost all of this development, since it occurred after I began law school, and for the most part after I began teaching Property. I remember well the sense of optimism and excitement that accompanied it. Finally, after centuries of lethargy, the law was going to do something to help poor people improve their housing.

Of course, this excitement turned out to be remarkably naïve and disconnected to reality because it was based on a theory that was largely false: namely, that poor people lived in bad housing because of market failures, and that the market failures existed because the old legal rules did not permit proper markets to function. In its sharpest form, this misconception was represented by the idea of the "slumlord"—a predatory landlord who was able to extort near-monopoly profits from his tenants by taking advantage of the weakness of their legal position.

But as it turned out, the slumlord, like the Grinch in Doctor Seuss's famous Christmas poem,¹⁶ was largely fictional. There are, no doubt, limited times and places in which market failure for poor residential tenants occurs, but it is the exception and not the rule. People do not, for the most part, live in bad housing because they lack legal rights or cannot negotiate effectively for better dwelling. Rather, they live in bad housing because that is all they can afford.

14. See Lauren A. Lindsey, Comment, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 105 (2010).

15. See Tasker, *supra* note 8, at 1039.

16. DR. SEUSS, *HOW THE GRINCH STOLE CHRISTMAS* (1957).

Michael Stegman's brilliant study of the Baltimore housing market,¹⁷ published in 1972, makes this fact transparent. Stegman and a small army of graduate students inspected the housing, interviewed landlords and tenants, and actually reviewed the financial records of a large number of low-quality dwelling units—mainly row houses—in Baltimore.¹⁸ They learned that some of the units were owned by people who had previously lived in them, but had been financially successful enough to move to the suburbs.¹⁹ There were large numbers of landlords with relatively few units per landlord.²⁰ Far from being a source of fantastic profits, these units were extremely difficult to profit from at all.²¹ They operated on very thin margins.²² Some of them met or at least approximated meeting the housing code, while others did not; the difference, the researchers found, was often in whether the landlord performed his own maintenance or contracted it out.²³ If a stopped-up toilet required a visit from a licensed plumber, it would often become virtually impossible to maintain the unit at a code-complying level without taking a financial loss.

The lesson is that landlords are not, and cannot be expected to be non-profit organizations. If their tenants are poor and can only spend a limited amount on housing, then the landlord can only provide the level of housing quality that that amount of rent can buy. If the rent is too low to buy code-complying housing, then the landlord will usually provide non-complying housing. There simply is not enough money on the table to do any better.

Can this be changed by housing code enforcement or the assertion by the tenant of an implied warranty of habitability? Yes, but only in the short run. If the landlord comes under long-term pressure to raise the quality of the housing, there are only two courses of action open: to raise the rents accordingly (thus raising the quality of the unit, but at the same time, potentially making it unaffordable to existing tenants) or to abandon it entirely, thus removing it from the ordinary market and making it a resort of vandals or squatters.²⁴ Neither of these results is desirable from the viewpoint of low-income tenants, for both of them result in reducing the stock of housing they can afford, thereby tightening the market and driving up rents.

We have now, for the most part, adjusted our vision. We no longer believe that tinkering with legal remedies or court appearances by legal ser-

17. MICHAEL A. STEGMAN, *HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE* (1972).

18. *See id.* at 4.

19. *See id.* at 41.

20. *Id.* at 40.

21. *Id.*

22. *Id.* at 42.

23. STEGMAN, *supra* note 17, at 80.

24. *See id.* at 59.

vices lawyers on behalf of tenants will change the equation much. Only economic change—some infusion of additional rent money—is likely to improve the quality of our worst housing. In the present economy, no one would take seriously a proposal to increase the level of government spending on housing. Indeed, federal housing programs have never addressed the needs of more than a small minority—perhaps twenty-five percent at most²⁵—of American families who live in substandard housing.

In retrospect, the implied warranty of habitability has failed²⁶ if we thought its goal was to bring about a significant improvement in the quality of our worst housing. Yet while housing quality is notoriously difficult to measure over time,²⁷ there is little doubt that the worst American housing has improved very materially over the past fifty years.²⁸ Today, only a small core of extremely poor families lives in seriously substandard housing.²⁹ But the changes in the law probably have had only a marginal impact on this improvement. A far more important factor was the production of a great deal of new housing,³⁰ which allowed older but decent-quality housing to filter down to poorer families, and permitted the abandonment and demolition of the worst of the housing stock.³¹ Today the more prevalent problems are housing affordability, with about half of all households paying more than thirty percent of their income for housing,³² and homelessness.³³

25. See Michael A. Stegman, Walter R. Davis & Roberto Quercia, *The Earned Income Tax Credit as an Instrument of Housing Policy*, BROOKINGS 2 (June 2003), <http://www.brookings.edu/~media/research/files/reports/2003/6/metropolitanpolicy%20stegman/stegmanhousing.pdf> (discussion paper prepared for The Brookings Institution Center on Urban and Metropolitan Policy).

26. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 458–61 (2011).

27. See Richard B. Clemmer & John C. Simonson, *Trends in Substandard Housing 1940-1980*, 10 AM. REAL EST. & URB. ECON. ASS'N J. 442, 443 (1983).

28. As of 2007, HUD estimated that 430,000 unassisted very low-income renters (of a total population of about 300 million) lived in severely substandard housing. See U.S. Dep't of Hous. & Urban Dev., *HUD Strategic Plan FY 2010-2015*, HUD.GOV 18 (2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf.

29. See *id.*

30. From 1950 to 1999, home builders built seventy-three million new units, in addition to one million units of public housing and 1.6 million units of subsidized housing. See Kent W. Colton, *Housing at the Millennium*, John T. Dunlop Lecture 2 (May 4, 1999), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/m99-1_colton.pdf.

31. See KENT W. COLTON, HOUSING IN THE TWENTY-FIRST CENTURY, 18 (2003) (“In 1950 about ten percent of housing units were classed as ‘dilapidated.’”).

32. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., RENTAL MARKET STRESSES: IMPACTS OF THE GREAT RECESSION ON AFFORDABILITY AND MULTIFAMILY LENDING, fig. 2-4 (2011), available at <http://www.urban.org/UploadedPDF/1001550-Rental-Market-Stresses.pdf>.

33. See U.S. Dep't of Hous. & Urban Dev., *supra* note 28, at 18 (estimating that 1.59 million Americans were homeless in 2008).

Were the changes in the law a waste of time and energy by the lawyers, judges, and legislators who created them? Far from it. Market failures are real, even if they are not the pervasive pattern.³⁴ Overreaching and predatory landlords sometimes do exist, and unfair treatment of tenants, whether rich or poor, does sometimes occur. The landlord and tenant law of fifty years ago was so obviously and blatantly weighted in favor of the landlord that it was fundamentally unfair. Change was needed. Tenants are entitled to a level playing field. They are much closer to that goal because of the developments of the past fifty years. Unfortunately, Arkansas is a sad exception to that progress, as several of the participants in the 2013 Ben J. Alzheimer Oral Symposium demonstrated.

Where do we go now? In Arkansas, major reform is badly needed. Even in states that have participated fully in the revolution of the last half-century, there are still procedural changes needed to make the implied warranty more functional and effective. And in other areas of landlord-tenant law, unrelated to the implied warranty, there are adjustments that could make the lives of tenants easier and less fraught with pain and stress, while not adding materially to the landlord's burden. Let me list a few illustrations.

1. The recovery of security deposits that rightfully belong to tenants has improved a great deal, but it is still subject to abuse in many states.

2. Late fees remain unregulated in many jurisdictions, and can easily be misused by unscrupulous landlords.

3. Tenants who live in mobile homes on rental pads remain subject to manipulation by their landlords because of the enormous cost of moving the unit if the lease is terminated or not renewed.

4. Victims of domestic violence still do not have, in most states, a right to change the locks on the unit, or to terminate the lease and vacate the unit if necessary to protect themselves against further attack.

5. In a number of states, landlords continue to have immunity from liability for personal injuries caused by dangerous conditions on the leased premises.

6. The rights of landlords and tenants in holdover situations remain ambiguous or poorly defined in many states.

The drafting committee for the Revised Uniform Residential Landlord-Tenant Act is currently grappling with a number of these issues.³⁵ The committee has many opportunities to work significant improvement in the law. Indeed, it is discouraging to see how slowly and sporadically needed changes have occurred, and how many outmoded and dysfunctional com-

34. See COLTON, *supra* note 31.

35. See REVISED UNIF. RESIDENTIAL LANDLORD TENANT ACT § 303 (draft May 30, 2013).

mon law doctrines continue to litter our legal landscape. We are not about to run out of opportunities.