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Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*

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I. Introduction

The general failure of city officials to embark on a sustained and comprehensive program of housing code enforcement may be explained by a variety of factors: housing codes often contain obsolete or impractical requirements;[1] successful code enforcement does not

 An earlier draft of this essay was circulated quite widely both among my colleagues at the University of Pennsylvania Law School and my friends living outside of Philadelphia. I am much indebted to all who responded for their many helpful suggestions. I should especially like to thank Professors Susan Ackerman, Guido Calabresi and Richard Posner whose incisive criticisms encouraged me to explore problems I might well have otherwise ignored.

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1. It would be pointless to attempt a detailed analysis of the anomalies contained in the thousands of housing codes and supporting regulations enacted by American municipalities. The most significant study of prevailing code requirements found little consistency between code provisions on the same points and found further that little or no scientific research has been attempted to support the standards selected. Its conclusion that "tradition, rule-of-thumb and personal experience" play the preponderant role in the formulation of standards corresponds to the intuition of any person hardy enough to read in full the requirements imposed by any urban housing code, complemented by its regulations. *See* Mood, *The Development, Objective, and Adequacy of Current Housing Code Standards*, in HOUSING CODE STANDARDS: THREE CRITICAL STUDIES 33 (NATIONAL COMMISSION ON URBAN PROBLEMS, Research Report No. 19, 1969). *See also* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 273-307 (1969).

For our purposes, it will suffice to characterize the nature of a housing code in highly generalized terms. The analysis presented here will consider the economic and ethical justification of *any* housing code which seeks to regulate the existing housing stock to prevent deterioration below a level of quality mandated by the relevant policy makers' sense of "decency." The critical limitation upon the scope of this essay lies in its exclusive concern with public control of the quality of older housing which is deemed to provide inferior amenity levels; no effort has been made to discuss the different problems posed by governmental control over the construction of new housing through the use of "building codes." With this caveat, the analysis presented here applies not only to quality parameters which have traditionally been a concern of housing codes, but to any plausible set of standards a decision maker might choose. Nevertheless, it will doubtless be of assistance

yield great political dividends for the incumbent administration; since code enforcement is such humdrum work, it does not often attract personnel of high quality; present methods of enforcing compliance with code requirements are woefully deficient; finally, the poor often lack the political power to maintain a sustained regulatory effort on their behalf.[2] All of these considerations are quite real and I do not mean to minimize them. Nevertheless, my casual conversations with both city officials and representatives of tenant organizations have suggested to me that these factors do not in themselves fully explain

to the reader to have a sense of the typical elements of the contemporary code, which is adequately conveyed by a Douglas Commission Research Report:

> The substantive content of most housing codes includes three broad subject areas; namely 1) minimum facilities and installed equipment; 2) maintenance of the dwelling unit and of facilities and equipment; and 3) use, maximum occupancy, and conditions of occupancy. A comprehensive coverage of provisions related to minimum facilities and installed equipment usually includes: water supply and waste water disposal; garbage and rubbish disposal; kitchen and hand washing sinks; bathing facilities; toilet facilities; means of egress; heating equipment for the dwelling unit and hot water supply; lighting; ventilation; and electrical service.
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> Most housing codes will contain specific provisions pertaining to maintenance of the dwelling and of the supplied facilities and equipment to include such items as: general sanitary conditions; chimneys, flues and other potential fire hazards; electrical wiring; insect and rodent infestation; internal structural repair; external structural repair; and dampness.
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> The sections of most housing codes that regulate use, maximum occupancy, and conditions of occupancy usually have provisions pertaining to: living space overcrowding; sleeping space overcrowding; doubling of families; separation of sexes; and mixed use of living space for business purposes.
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> Most, if not all, housing codes tend to rely on general words or phrases without defining them such as 'good repair', 'adequate', and 'safe condition.' These terms are difficult to interpret and sometimes create confusion. Much is left to personal judgment.

Mood, *supra*, at 15-16. *See also* U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, APHA-PHS RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE (Public Health Service Pub. No. 1935, 1969); NEW YORK CITY CHARTER AND ADMIN. CODE §§ D26-1.01 *et seq.* (1970); PHILADELPHIA CODE OF ORDINANCES §§ 7-100 *et seq.* (1963).

2. The literature evidencing this depressing litany is large and growing constantly. The most useful studies are: COMMUNITY SERVICE SOCIETY OF NEW YORK, CODE ENFORCEMENT FOR MULTIPLE DWELLINGS IN NEW YORK CITY (PART II): ENFORCEMENT THROUGH CRIMINAL COURT ACTION (1965); F. GRAD. LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS (NATIONAL COMMISSION ON URBAN PROBLEMS, Research Report No. 14, 1968); GRAD, WEISS & HACK, LEGAL REMEDIES IN HOUSING CODE ENFORCEMENT IN NEW YORK CITY (Legislative Drafting Research Fund, Columbia University 1965); B. LIEBERMAN, LOCAL ADMINISTRATION AND ENFORCEMENT OF HOUSING CODES (1969); PHILADELPHIA HOUSING ASSOCIATION, IMPEDIMENTS TO HOUSING CODE COMPLIANCE (1963); J. SLAVET & M. LEVIN, NEW APPROACHES TO HOUSING CODE ADMINISTRATION (NATIONAL COMMISSION ON URBAN PROBLEMS, Research Report No. 17, 1969); Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L. FORUM 60 (1968); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Lehman, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180 (1963); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115 (1956); Note, *Enforcement of the New Orleans Housing Code—An Analysis of Present Problems and Suggestions for Improvement*, 42 TUL. L. REV. 604 (1968); Note, *Administration and Enforcement of the Philadelphia Housing Code*, 106 U. OF PA. L. REV. 437 (1958).

the general failure of code enforcement programs. In large measure, the lethargy is itself a symptom of a more fundamental problem—most policy makers involved in housing code enforcement are themselves unsure whether code enforcement is a good thing. They are not convinced that strict enforcement of even an ideal code will really benefit the tenants whom the code is intended to "protect." They fear that landlords who are required to improve their properties to code standards will simply pass on the added costs to their tenants by increasing rents or that they will abandon the properties entirely, thereby depriving tenants of even sub-code accommodations. Thus, "effective" code enforcement may simply require the poor to allocate an additional share of their meagre budgets to the purchase of housing services when the poor themselves would prefer to purchase more food or entertainment or automobiles.

As a consequence, code enforcement tends to oscillate wildly between passive and active phases. At times, city officials—temporarily confident of their superior wisdom—impose their preference for better housing upon the poor and embark upon a moralistic code enforcement "campaign" which couples a "massive crash enforcement program" with an even more massive dose of invective against greedy slumlords and "intolerable" living conditions. Unfortunately, moral indignation is difficult to maintain indefinitely for any cause, however noble. And it may be expected to cool quite rapidly when landlord groups threaten to pass on the costs of code enforcement to the hapless tenantry and, even more devastatingly, when both landlord and tenant organizations prophesy that the "campaign" will induce a significant number of owners to withdraw their buildings from the rental housing market and even abandon their properties entirely—thereby reducing the available low rent housing stock and leaving the city free to become the biggest slumlord of all if it dares to foreclose its tax lien on the abandoned properties.

When faced with this rather dismal cycle of stern enforcement and benign neglect,[3] even an observer extremely sympathetic to the plight

3. No one has attempted to describe systematically the politics of code enforcement or to ascertain the degree to which the cyclical pattern suggested here has any basis in reality, although the history of code enforcement in New York City, over the very long term, has seemed to correspond with this hypothesis. *See* Gribetz & Grad, *supra* note 2, at 1259-67. While it is possible to document the cyclical theory with citations to various fragmentary newspaper reports, it would be more candid to rest the theory at this stage simply upon casual empiricism, which—despite its unsystematic character—may nonetheless be correct. As this essay will suggest, the existence of such a cycle would be readily predictable from a theoretical analysis of the consequences of a code enforcement program which is not supported by an appropriate subsidy effort. *See* p. 1112 *infra*.

of the slum tenant will tend to give code enforcement an unimportant place in any plausible strategy to ameliorate ghetto conditions. Perhaps one should enforce the code strictly against those houses which are so utterly indecent that a civilized society cannot tolerate the thought of yet another generation maturing in such a festering environment. Society may cry out that some houses are so abominable that they constitute an absolute evil, without concerning itself with what is to happen to the families who are deprived even of these execrable accommodations if the landlord responds to the commands of the code inspector by simply abandoning his property completely. However, if this cry of dismay can ever serve as a justification for social policy, it may only do so in the most extreme cases.

If code enforcement is to be considered a tool of broad utility, its use must be justified on quite different lines. This essay attempts such a justification, although—as should be anticipated—the analysis presented here certainly does not suggest that comprehensive code enforcement should be attempted at all times in all places. While refinements must await subsequent analysis, it will assist the reader if the main thrust of the argument is presented at the outset. Comprehensive code enforcement is considered here as a program which may, under certain conditions, redistribute income from the landlord class to the generally poorer tenant class. If a slum dweller has been paying $80 a month for a rat-infested apartment and is still paying $80 a month after the landlord is forced by code authorities to take effective steps toward rat prevention, the tenant has received something for nothing, while the landlord has paid out cash and received no additional returns. If the typical tenant would refuse to return to his former life among the rats even if he were given a monthly cash grant of $5 in compensation, code enforcement has in effect put an additional $5 a month in his pocket. Thus, once our society has determined that the poor tenant class has an unfair share of the national income,[4] compre-

4. It should be stated explicitly at the outset that this essay does not attempt to argue that the present distribution of income and wealth in contemporary America is seriously flawed, but proceeds from the premise that substantial redistribution to the poor may be justified in principle. Recent commentaries, emanating primarily from the Harvard Law School, seem to suggest that John Rawls' philosophy of social justice may serve as an appropriate theoretical basis for an active redistributionist effort. *See* Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14-16 (1969); C. FRIED, AN ANATOMY OF VALUES 61-74 (1970). *See also* W. RUNCIMAN, RELATIVE DEPRIVATION AND SOCIAL JUSTICE 247-95 (1966); *Reparations for Blacks?* in 4 G. HUGHES, SOCIAL JUSTICE 74-92 (unpublished course materials prepared for students in the New York University Law School, 1968). For the basic philosophical arguments, see Rawls, *Distributive Justice: Some Addenda*, 13 NAT. L. FORUM 51 (1968); Rawls, *Constitutional Liberty and the Concept of Justice* in NOMOS VI: JUSTICE 98 (C. Friedrich & J.

hensive code enforcement is one of the programs which may significantly contribute to righting the balance.

Before comparing the merits and demerits of code enforcement with proposals for a negative income tax and other income redistribution schemes, however, it is first necessary to consider the conditions under which economic theory suggests that landlords will not be able to pass on their code costs to tenants.[5] For it should be apparent that to the extent landlords increase rent above $80 when they eliminate the rats, the redistributive impact of code enforcement is diminished. And if landlords can increase the rent to $85 the redistributive effect of the program will be dissipated completely, since the typical tenant, by hypothesis, values a rat-free house at no more than that sum. Consequently, Section II of this essay develops a model of a city slum in which code enforcement generates no rent increases, thereby causing a significant income redistribution effect in favor of tenants. The most significant lesson to be learned from Section II is this: under certain conditions, a program in which the code is enforced comprehensively throughout the city's slums has a superior redistributive potential compared to a program under which enforcement is attempted in only a portion of a city's slums. In developing this model, it will become apparent that in many situations, code enforcement will fail as a re-

Chapman eds. 1963); Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958); Rawls, *The Sense of Justice*, 72 PHIL. REV. 281 (1963). While this corpus undoubtedly represents the most significant contemporary effort at systematic explication of a conception of justice requiring some degree of redistribution, I find myself unable to join the Rawlsian school and am instead compelled to look elsewhere to justify a movement toward a greater degree of economic equality than now exists. The reasons for this position are best postponed to a later writing, however, since they involve factors far removed from housing policy.

While the ultimate issue of distributive justice is deferred here, significant issues of fairness arise in an assessment of housing policy even within the context of an overarching commitment to significant redistributionism. These issues will be canvassed at pp. 1157-77 *infra*.

5. In contrast to the cornucopia of learning available to the student who wishes to understand the institutional detail surrounding housing codes and their administration, *see* sources cited at note 2 *supra*, there is virtually nothing of substance attempting even the simplest analysis of this issue, despite its central role in the entire regulatory effort. The only significant discussion may be found in A. SCHAFF, ECONOMIC ASPECTS OF URBAN RENEWAL: THEORY, POLICY, AND AREA ANALYSIS 10-15 (Research Report No. 14, Real Estate Research Program, Institute of Business and Economic Research, University of California, Berkeley, 1960), whose five pages contain several basic insights into the issue but which does not purport to be an effort at even moderately comprehensive analysis. Comments in the important recent works written by serious students of urban economics are so fragmentary as to be virtually useless. W. GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY 306 (1963); R. MUTH, CITIES AND HOUSING 134, 330-35 (1969); W. SMITH, HOUSING: THE SOCIAL AND ECONOMIC ELEMENTS 390 (1970). The poverty of scholarship in this area can probably best be explained by noting its position in the arid wasteland still separating law and economics—while the issue is too "theoretical" for the typical professor of property law, it is too "institutional" for the professor of economics. Consequently, it is ignored despite its significance for the rational formulation of public policy.

distribution program unless the government is willing to subsidize the slum housing market. After the dimension of this housing subsidy is discussed (Section III), the redistributive impact of code enforcement, when supported by a housing subsidy scheme, is compared to the redistribution potential of a negative income tax plan (Section IV). The principal lesson to be learned here is this: expenditure of *government* money upon a code enforcement-housing subsidy scheme will in many situations benefit the poor tenant class substantially more than the expenditure of the same sum of *government* money on a negative income tax plan. Succeeding portions of the essay attempt to provide a more complete assessment of the impact of code enforcement. Since these sections build upon the analysis of the earlier discussions, I shall not attempt to describe their argument in detail, but simply state what is perhaps the most important conclusion: the more monopolistic the organization of the slum housing market, the greater the tenant benefits generated by an expenditure of a dollar of *government* money on a code enforcement-subsidy program (Section VI).

After establishing the conditions under which the government's investment of a dollar in code enforcement will benefit the poor more than will a dollar of public money invested in a negative income tax, the essay compares these two programs along several additional dimensions by considering their relative fairness to the poor, fairness to the rich, fairness to the much maligned "slumlord" (all in Section VII), ability to correct market failures, and overall cost to society (both in Section VIII). As this multi-faceted comparison is developed, it becomes quite clear that code enforcement, even when backed by a special housing subsidy, cannot be seriously proposed as the sole strategy to be adopted by a government committed to a policy of substantial income redistribution; on the other hand, code enforcement can play an important role within a larger war on poverty which includes a system of cash grants. Indeed, a strategy which contemplated both housing code and cash grant programs would sometimes be superior to, and often no less desirable than, one which relied exclusively on the disbursement of cash grants. From this perspective, it will prove possible to evaluate not only the current federal effort to encourage local use of the code enforcement technique but also the now substantial movement joined by courts and legislators, as well as commentators, which seeks to alter dramatically the traditional law of landlord and tenant to provide the tenant with sufficient legal remedies to assure a decent home for his family (Section IX).

As this brief summary suggests, the argument advanced here pro-

ceeds in a manner which some of my readers will find overly abstract for their taste. Instead of beginning with a description of the structure of the slum rental market as it actually exists, I shall instead consider the impact of code enforcement on a series of hypothetical slum markets, each of whose relationship to reality is controversial. I have taken this course for three reasons. First, we do not yet know enough about the slum market to justify confident descriptions of its structure. All students of the slum market are, of course, greatly indebted to George Sternlieb for his pathbreaking study of central Newark[6] which cast grave doubt upon the popular stereotype of the rapacious slumlord earning monopolistic profits at the expense of an oppressed tenantry. The ownership of Newark's slums in the mid-1960's was found to be quite diffuse;[7] in addition, far more fragmentary data suggested that the rate of return earned by the typical landlord on his original in-

6. G. STERNLIEB, THE TENEMENT LANDLORD (1966).

7. In Sternlieb's sample of 385 "parcels," 42.8 per cent were owned by persons owning no other houses, 21.6 per cent by persons owning only one or two other properties, 10.9 per cent by those owning from three to six, 7.8 by those owning seven through twelve and 15.8 by those owning more than twelve. G. STERNLIEB, *supra* note 6, at 122-23. This distribution may, however, seriously understate the degree of concentration prevailing in Newark's rental markets, since each of the "parcels" in Sternlieb's sample did not contain the same number of apartments, *id.* at 46, and it is most likely that the "single parcel owner" who bulks so large in the data owned parcels which contain a far smaller number of apartments on the average than the multi-parcel owners. This is suggested by the fact that seventy per cent of the "single parcel owners" lived in the house they owned, *id.* at 131, 135, conjuring up a picture of a large number of "Mrs. Murphys" living on the ground floor and renting the second and third floors to two additional families.

Despite Sternlieb's unfortunate failure to take account of the imperfection of the "parcel" concept which serves as the basis of his study, the Newark figures do suggest a considerable diffusion of apartment ownership. Sternlieb's subsequent study of New York City's rental market reveals a somewhat smaller percentage of "single parcel" owners in his sample (39.1 per cent), although the pattern of parcel ownership remains extremely diffuse. *See* G. STERNLIEB, THE URBAN HOUSING DILEMMA 13-1—13-41, esp. Exhibit 1 at 13-2 (prelim. draft 1970). In this study, however, data are provided which explicitly indicate that "single parcel owners" control houses which contain substantially fewer apartments on the average than larger owners, *see id.* at Exhibit 1, 13-2, therefore making their share of the apartment market smaller than the study suggests. Moreover, the relevance of the New York data to an understanding of slum markets is attenuated since Sternlieb's sample was taken from all rent controlled apartments in the city, and from not solely slum districts.

An ambitious examination of housing and poverty in the city of Baltimore which is being presently undertaken by Professor William G. Grigsby of the University of Pennsylvania and his associates has uncovered a similar degree of concentration of slum ownership:

> According to our survey, over one-fourth of the private inner-city rental inventory is owned or controlled by about 50 professionals, with the largest having in excess of 1,500 units and the smallest, about 100. At the other end of the scale are what might be termed casual investors, persons owning fewer than five units. In between, are the small investors who have anywhere from five to 24 dwellings, and the medium-size owners with holdings of from 25 to 100 units. It is our guess, based on very small samples, that medium-sized investors hold somewhere around 15 per cent of the inventory, with the small and casual investors accounting for the remaining 60 per cent.

W. GRIGSBY, L. ROSENBURG, M. STEGMAN & J. TAYLOR, HOUSING AND POVERTY, ch. 6, at 6 (prelim. ed. 1971). It is unclear whether these figures contain the same theoretical imperfection noted in the Sternlieb studies.

vestment was not extraordinarily high considering the risks entailed in slum ownership.[8] Sternlieb's Newark of the 1960's, however, is not the world and it would be a great mistake to respond to a single study by replacing the stereotype of popular fable with a stereotype derived from the study. Indeed, it appears most likely that no single model of the slum market describes even approximately the hundreds of cities which are endowed with substantial quantities of inferior and decaying housing.[9] It thus would seem much more reasonable to conduct a systematic canvass of the impact code enforcement may be expected to have in a variety of market structures than to proceed from the premise that a single model will adequately describe all cities at all times within the foreseeable future.

Beyond the impropriety of assuming that all American slums have a fundamentally similar economic structure, there is a second reason for beginning the analysis by considering relatively simple (and therefore abstract) economic models. Given the present poverty of theoretical analysis in the field, an empirical study of the impact of code enforcement could well obscure potentially critical relationships in a mass of data collected without preexisting criteria defining the relevant parameters of inquiry. Thus, a consideration of the hypotheses proffered by economic analysis is an important precondition for fruitful empirical inquiry. Finally, and at least equally important, decision

8. Sternlieb found that the average "actual return on investment in terms of the overall parcel value is clearly in the neighborhood of 10 to 12 per cent." G. STERNLIEB, *supra* note 6, at 88. Unfortunately, this estimate of slum profitability seems to be based upon a sample composed of only 32 parcels owned by a single substantial tenement management company. *Id.* at 78. Arthur Sporn, in an earlier study based upon Wisconsin income tax returns submitted by 52 owners of 47 properties, found the average rate of return on owner's investment to be a substantially higher 20 per cent. Sporn, *Empirical Studies in the Economics of Slum Ownership*, 36 LAND ECONOMICS 333, 336 (1960). Even earlier, Chester Rapkin estimated rates of return prevailing in New York's West Side Urban Renewal Area to be approximately 10 per cent; again, however, the estimate was not based upon an extensive sample. C. RAPKIN, THE REAL ESTATE MARKET IN AN URBAN RENEWAL AREA 81-82 (1959). *See also* L. GREBLER, EXPERIENCE IN URBAN REAL ESTATE INVESTMENT 183-86 (1955). It should be plain, however, from even this brief description of these studies that their limited scope does not justify confident claims about the profitability of slum ownership.

A substantially larger sample of units was obtained by Sternlieb when, after his Newark experience, he moved on to supervise a study of the impact of rent control in New York City. Of 665 structures in the sample, approximately one half were found to be yielding less than 6 per cent of market value even before a correction for an appropriate management fee. All of the parcels in the sample, however, were under the rent control regime, and since New York stands virtually alone among American cities in its adherence to price control, little can be inferred from these figures—even assuming that they accurately reflect profitability in the New York ghetto, which of course was not the exclusive source of buildings composing Sternlieb's sample. *See* G. STERNLIEB, *supra* note 7, at 5-1—5-32, esp. Exhibit 20 at 5-30.

9. Indeed, the significant studies undertaken thus far suggest considerable heterogeneity. *See* notes 7 and 8 *supra*.

makers cannot indulge themselves in the luxury of awaiting the report of the ultimate (or penultimate) empiricist before deciding upon a strategy for regulating slum markets on behalf of the poor. The white knight, Empiricism, may well never appear on his charger, and meanwhile diverse groups have attacked upon winged chariots demanding action (or inaction) now before the passage of time stills the hopes and fears of this generation of landlords and tenants. In order to assist a policy maker before the white knight arrives, the theorist can at least define with some precision the economic worlds in which code enforcement and other efforts to control the housing market on behalf of the poor make the most sense and those in which it makes the least. If this is done successfully it will enable the decision maker who is acquainted with the realities of his own particular city to assess in rough terms the likelihood of success in improving the slumdweller's life-situation through code enforcement and similar techniques. Doubtless, a particular decision maker's understanding of the world he confronts may often, in the end, be bottomed on a species of empiricism so casual as to verge on cliché. However, it is vain to demand that the white knight appear instantaneously—thus decisions must be made without adequate empirical study. And assuming one is not burdened by an ideology which *unalterably* places the burden of embarking upon an elaborate empirical study either upon advocates of laissez faire or upon advocates of government regulation, the best one can hope for is that the makers of policy at least will ask the right questions about the "real world" they perceive, even though their perceptions of reality may be often infected not only by misinformation but also by personal prejudice and sheer pigheadedness.

Having discharged my obligation of providing the reader with notice of the fare that awaits him,[10] I shall now consider the conditions under which there is good reason to believe that slum landlords will be *completely unable* to pass on the costs of improving their properties (hereafter "code costs") to their tenantry, thereby assuring that code enforcement will have a substantial redistributive impact in favor of the poor. In considering this question, I shall attempt to make all of my important assumptions explicit. Unquestionably, it would be inappropriate for policy makers to indulge in some of these assumptions in some urban contexts. Nevertheless, for our purposes, introductory

10. For those of my readers who are somewhat daunted by the length of this essay, it may be useful to learn that Sections V and VI can be omitted without reducing the main line of the argument to utter gibberish.

exposition based on these axioms has the substantial advantage of providing a model of a city slum which can serve as both a normative and analytical benchmark: a normative benchmark, because aggressive code enforcement in the name of income redistribution makes more sense in this hypothetical slum than in many others; an analytical benchmark, because once the economic analysis in this simple case is understood, it will be easier to move on to more complex situations.

II. Slumville

Imagine a city called Athens whose slums are concentrated in one geographic area that we shall call Slumville. While the residents of Slumville are extremely mobile within the confines of the slum district, Athenians living outside Slumville are extremely reluctant to move into the area even if there is a significant improvement in housing quality. Of course, if there is an enormous change in the character of the neighborhood, the city's residents may change their view of Slumville. But a moderate change will not lead them to discard their fears about the quality of life, as well as the quality of housing, enjoyed by the area's inhabitants.

While the middle-class Athenian's substantial reluctance to live in Slumville is fundamental to much of the argument that follows, several additional assumptions will be altered at subsequent stages of this essay. For purposes of the present discussion, then, assume (1) both landlords and tenants act rationally in their self-interest;[11] (2) no landlord or group of landlords has successfully established a monopoly or oligopoly position in the rental market; (3) tenants are aware of the range of prices and quality levels of accommodations offered for rent in Slumville and experience no significant cost in moving from one part of Slumville to another; (4) all of Slumville's accommodations are not only slums, but are *equally* slummy;[12] (5) similarly, all of Slumville's tenants inflict *equal* damage upon the physical structures

11. The model under discussion is also restricted to a Slumville composed entirely of renters. While a subsequent portion of the essay considers certain difficulties which arise when owners themselves live in a home rented partly to tenants, *see* pp. 1174-75 *infra*, considerations of length have made it impossible to consider at this time the full range of complexities raised by the fact that some slumdwellers live in houses which they own.

12. To be more precise, I am assuming here that if parcel A were situated in another location within Slumville (site B) it would fetch the same rental as that which is currently obtained by the house at site B. It is not, however, necessary to assume that A and B are renting at the same price under this definition since rent is determined not only by the physical characteristics of the houses but also by numerous other factors including relative proximity to employment centers, recreational, educational and mass transit facilities, etc. This fact will be discussed further at pp. 1134-39 *infra*.

of the houses in which they reside; (6) a significant number of poor provincials are not entering Athens from the outlands nor are Slumvillites emigrating to the hinterlands; (7) *each* and *every* landlord in Slumville earns a rate of return on his investment which substantially exceeds the return available when the property is used for other purposes; indeed (8) even if the landlords are forced to bring their residential properties up to code, their rate of return would still exceed that available for any other use of the property; and (9) no landlord will find it more profitable to abandon his building entirely when faced with the necessity of investing substantial sums to bring his tenement up to code.

The implications of these last three assumptions can be misunderstood quite easily. They do not imply that the landlords of Slumville are making exceedingly high profits on their original investments.[13] Even if they were only making a very low rate of return after absorbing the costs of code enforcement, my description of Slumville's landlords would still be satisfied if they could only earn an even lower rate of return by converting their land to an alternative commercial use. Similarly, the ninth assumption enumerated above, which stipulates that no buildings be abandoned, does not necessarily suggest the existence of excessive returns. A landlord will seriously consider abandonment only if the discounted present value of the costs code enforcement imposes over time exceeds the capitalized value of the future profits he expects from the building. In other words, even if an investor originally purchased a building for $100,000 and is currently earning only one per cent or $1000 a year in profit before code enforcement, the only financially relevant question for him is the value the market places on the right to receive $1000. If a purchaser is willing to buy this future income stream for $5000, abandonment is irrational unless the anticipated stream of future code costs exceeds this amount after an appropriate discount rate is applied. Thus, the Slumville we have depicted is not one which invokes the legendary exploitative landlord; indeed, our model is compatible with a situation in which each landlord is earning an exceedingly low return on his *original* investment.[14] We have only excluded from consideration in this first simple

13. By "profit" here, I mean the rate of return on capital which remains after a sum is deducted that represents the market value of an owner's time if he chooses to manage the property himself rather than contract this task out to another.

14. Moreover, the relationship which the owner of the fee may have with a mortgage lender is also irrelevant to this analysis. If, for example, code costs will make it unprofitable for the fee owner to meet his mortgage payment, he will simply default and the new owner of the property (generally the mortgagee) will find himself in the same

model those landlords who are in a truly desperate financial situation in which the capitalized value of future profits is lower than the capitalized cost of code repairs.[15]

A.

We are now in a position to trace the economic consequences of a code enforcement program in Slumville. Given the model which has been developed, it follows that when the costs of code improvements are imposed upon Slumville's landlords *none* of them will have an incentive to remove their properties from the rental housing market. For we have stipulated that even after code costs are taken into account, the return on slum investment still exceeds the rate of return available when the land is used for other purposes or not used at all. Since the imposition of code costs upon the landlords does not induce a fall in the supply of housing, rent levels will be determined by the effect of code enforcement upon the demand for housing.

Two different demand responses can be anticipated, depending upon the extent to which the housing code is enforced. First, assume that the code is enforced strictly only in one part (Area X) of Slumville and that the rest of Slumville (Area Y) is entirely ignored by the housing code inspectorate. In this case, one would expect that some of the residents of Y will find X a more attractive place than formerly and will bid the rents up in Area X. Those residents of X who find the new rent levels too steep for their taste will of course move to Y, where apartments have been vacated by those moving into the newly improved housing in X. Consequently, a program of selective housing code enforcement in Slumville will, in fact, partially fulfill the expectations of those administrators who doubt the desirability of code enforcement: rents will increase in the target area and tenants who cannot "afford" the higher rents will leave the area to find new abodes in the now slummier sections of Slumville.

position delienated in the discussion in the text: he will either incur code costs to save the remainder of his $1000 annual income stream or he will withdraw the building from the residential housing market. Since in this introductory analysis we have assumed that this second alternative is not open, only the first alternative remains. All that code enforcement has accomplished in such a situation is to change the identity of the owner of the fee; this fact may be of significance, of course, and it will be considered at pp. 1174-75 *infra*.

15. It may be that an investment in code improvements will lengthen the economic lifetime of the structure and therefore increase the value of the income stream it generates. If such were the case, some owners who otherwise would be in this desperate position would not withdraw from the market. For the sake of simplicity, however, we shall permit this refinement to reside permanently in a footnote since it adds nothing important to the analysis.

B.

If, however, one assumes that the housing code is enforced strictly in all of Slumville, the same result will not follow. Since we have assumed that before the code was enforced, houses in Areas X and Y were equally dilapidated, the comprehensive enforcement of the code throughout Areas X and Y will raise the quality of housing in all parts of Slumville to an equal degree, thereby providing no special incentive for a resident of Area Y to want to move to Area X. Thus, rents will not rise because of competition *among* Slumville residents as occurred in the case of partial code enforcement just discussed.

Indeed rents will not rise *at all* in Slumville if only a single further condition is met. Paradoxically, code enforcement will have "zero rent impact" if and only if there exists a class of Slumville tenants who do *not* believe that code enforcement will significantly improve their lives. A simple mathematical example will make this clear. Assume that, before the code is enforced, two types of families live in Slumville's 100,000 rental units: 90,000 families (the "homelovers") would be willing to pay a significant amount of money for code housing; in contrast, 10,000 families (the "lukewarm" families) would not be willing to pay extra rent for improved housing.[16] This is not to say that even the lukewarm do not recognize that they will benefit from code enforcement—the improvement is simply not significant enough in their minds to warrant allocation of any more of their scarce funds to purchase it.

Now imagine that all of Slumville's landlords seek to pass their code costs on to tenants by raising rents by $25. While the 90,000 homelovers initially respond by paying the premium, the 10,000 lukewarm families act differently. Rather than paying the higher rent, they choose to pair up and share apartments instead, thus leaving 5000 units vacant. The lukewarm families will take this course since they believe that half an apartment at a lower rent is a better deal than a whole apartment at the inflated rental.[17]

16. This distinction between families who are relatively sensitive to market conditions and those who are not has antecedents in the literature. *See, e.g.*, W. GRIGSBY, *supra* note 5, at 47-83; Maisel, *Rates of Ownership, Mobility and Purchase*, in ESSAYS IN URBAN LAND ECONOMICS 76-108 (Real Estate Research Program, University of California, Los Angeles, 1966) although candor compels the recognition that our ignorance of the determinants of housing demand, especially the determinants of demand among slumdwellers, remains quite profound. For the most systematic effort thus far, see R. MUTH, *supra* note 5. *See also* Paldam, *What is Known About the Housing Demand*, 72 SWEDISH J. OF ECON. 130 (1970), Tong Hun Lee, *Housing and Permanent Income: Tests Based on a Three-Year Reinterview Survey*, 50 REV. OF ECON. & STAT. 480 (1968); Winger, *Housing and Income*, 6 WESTERN ECON. J. 226 (1968).

17. There is no necessity that the rent charged to each family when they double-up

When the 10,000 lukewarm families decide to double-up, however, the owners of the 5000 vacant apartments are faced with a serious problem. Since no new residents have (under our assumptions) been attracted to Slumville as a result of code enforcement, there is no reason to expect that they will successfully fill their apartments if they persist in demanding the $25 premium. Rather, a landlord can rent his units in only one of two ways: (a) by inducing one of the homelovers to move by cutting the premium below the $25 level or (b) by cutting the rent sufficiently to induce one of the lukewarm families to prefer an entire apartment to its more crowded quarters. It should be apparent that if a given landlord fills a vacant apartment by offering one of the homelovers a better deal than his present landlord, the competitive dynamic will continue, for the owner of the newly vacated apartment will find himself in the same bleak position as his now successful competitor once occupied. It is only when prices are set low enough to induce the lukewarm families to resume their former habits and live in individual apartments that the economic situation will regain equilibrium. But if a significant number of lukewarm families are willing to spend no additional money for the code improvements, equilibrium will not be attained until the competing landlords absorb all of the code costs and rent all of their units at the pre-code price. Q.E.D.

In order to introduce the subject as simply as possible, we have explained why rents will not rise by assuming that all landlords respond to code enforcement by initially passing on *all* of their code costs to *all* of their tenants. Additional complexities arise if one modifies this premise by making the equally plausible assumption that landlords will attempt to discriminate between the two different kinds of tenants—increasing the rent for the 90,000 homelovers, but absorbing the increase for the 10,000 lukewarm tenants. If landlords respond in this manner, it would appear at first glance that they will succeed in passing on the bulk of their code costs to the 90,000 homelovers.

A more thorough analysis indicates, however, that this attempt at price discrimination will fail even if one assumes that landlords can *perfectly* distinguish between homelovers and lukewarm families. For there will remain a financial incentive for each landlord to replace his

be precisely one-half of the inflated rental charged to a family desiring a whole apartment. It is only necessary that the per family rent for half an apartment be somewhat lower than the charge made when an entire unit is leased.

own lukewarm tenants with his competitors' homelovers, and thereby subvert the entire price discrimination scheme. To put the matter more concretely, assume that code enforcement will add $25 to the monthly cost of the average Slumville apartment and that, in response, all landlords are charging the old rent of $X a month to lukewarm tenants and X + $25 a month to homelovers. Each landlord clearly will profit in the short run if, instead of contenting himself with $X a month from a lukewarm tenant, he entices one of his *competitor's* homelovers by offering him the apartment at a rental of X + $10. Of course, once a homelover learns that a comparable apartment is available to him for X + $10 at a competing apartment house, he may be expected to let his landlord know that he will move unless the present rent is reduced. It can be easily seen that this process will continue until the entire discriminatory structure is undermined and homelovers are obtaining the full benefit of their lukewarm companions' indifference to code housing.

Indeed, it may well be doubted that landlords would attempt a price discrimination policy to begin with, given the difficulty of accurately differentiating between "homelovers" and "lukewarms," the ultimate futility that is likely to result and the danger of alienating tenants' good will in the process. Rather, if a substantial number of landlords respond to lukewarm tenant threats of moving by refusing to raise rents in the first place, it is much more probable that the other owners will be reluctant to raise their rents for fear of pricing themselves out of the market, even if none of their tenants verbalize a threat. Thus, if a strategically placed distribution of tenants threatens to move out in a credible way, it will not even be necessary for very many families to make good on their threat and actually double-up before a general rent rise is averted.

Now, of course, if the housing code forbids families from doubling-up,[18] and this prohibition is enforced, the lukewarm families may not be able to react to a prospective rent increase by moving in with friends and relations or making a credible threat to do so. Instead, under a code forbidding "overcrowding" they must resort to the remaining weapons in the tenants' arsenal: they could refuse to pay rent and force the owner to bear the costs of eviction and re-renting or they could vandalize the apartment in retaliation for the rent hike and force the landlord to bear the costs of repairs as well as eviction and re-renting. So long as

18. As suggested previously, *see* note 1 *supra*, the typical code does prohibit "overcrowding" although the definition of the term is subject to significant variation. For a brief and pointed discussion, see NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 278-80 (1969).

a substantial number of lukewarm families makes use of these weapons, the impact of code enforcement will remain on the landlord's shoulders for the reasons which have already been canvassed.

Indeed, our argument is not dependent upon the peculiarities of overcrowding, rent-skipping or vandalism, and may be generalized to any technique tenants may use to reduce the number of housing units they demand in Slumville in response to a rise in price. To see this clearly, it is necessary simply to consider the manner in which the rental value of Slumville apartments was set before code enforcement became the norm: why was the typical rent $100 rather than $1000 a month? The answer—by now—should be obvious: as soon as a significant number of landlords attempted to raise rentals beyond $100, demand for housing dropped (as a result of doubling-up, rent skips, etc.), thereby creating an incentive for landlords not receiving any rents at all to lower their prices to the equilibrium point (here $100). But if tenants had sufficient market power to maintain the $100 price *before* code enforcement, they will have the power to maintain the $100 rent *after* code enforcement, provided that "lukewarm families" exist who are unwilling to pay any more for code quality housing than for "sub-code units," and who are determined to reduce demand in one of the many ways at their disposal.

All this adds up to a somewhat paradoxical conclusion. While a *selective* program of enforcement may be expected to increase rents in the "target area," a *comprehensive* program of enforcement will not increase rents charged in Slumville, provided that there are a significant number[19] of lukewarm families who refuse to pay more for standard units than they paid for "inferior" units. While the conclusion appears counterintuitive, economists will recognize that it proceeds from an application of classical economic theory. Fundamentally, the analysis has invoked the theory of economic rent in a new context, whose contours are suggested—at least in part—by the writing of David Ricardo, Henry George, and Jens Jensen.[20]

19. In a world of pure theory, no rent rise will occur if only two families choose to double-up; nevertheless, as the number of tenants doubling-up or engaging in similar "lukewarm" activities increases to a significant—albeit not overwhelming—size, the speed at which the competitive process will abort any landlord's effort to pass on his code costs will increase dramatically.

20. D. RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 33-45 (Everyman's Library ed. 1965); H. GEORGE, PROGRESS AND POVERTY 153-221, 333-97 (1953); J. JENSEN, PROPERTY TAXATION IN THE UNITED STATES 48-99 (1931).

C.

Perhaps the sharp contrast between the consequences of partial and comprehensive code enforcement will appear overdrawn to some. While it is true that partial code enforcement will inflate the rents within the target area (X), will not this effect be dissipated completely by a corresponding rent *decline* in Y, where the code remains unenforced? If this were so, of course, the *average* rent level would not change as a result of partial code enforcement, and so the contrast we have chosen to delineate between a partial and a comprehensive program will appear exaggerated.

In our introductory discussion of partial code enforcement, we lacked the apparatus to deal with this issue; its resolution, however, should now be quite a simple matter. It should be clear that as a result of code enforcement in X, the rental situation in Y will temporarily be thrown out of equilibrium, as Y'ers emigrate to the newly improved X. Since some of the Y landlords thus find themselves with empty apartments, they will soon be caught up in an effort to fill their units with paying customers, even at the cost of lower rents. This cycle can be expected to proceed unless it is aborted by those families who formerly lived in X but are moving to Y as a result of the rent increase generated in the code enforcement zone. Thus, the key question for us is the attitude of these expatriate X'ers. Will they be willing to pay the rents previously prevailing in Y or will a significant number turn lukewarm at this pre-code level, engaging in demand-limiting strategies like doubling-up, rent skipping and such? Obviously, if a substantial number of ex-X'ers turn lukewarm at the old Y rents, rents will be depressed by competition until they have been placated; if not, not. Thus, there is no "invisible hand" benignly assuring that the rent increases in the code enforcement zone will be washed out by decreases in the non-enforcement area. While the contrast between partial and total enforcement in our primeval Slumville is sharp, it is not overdrawn.

Within the context of this basic analysis, however, it is possible to provide a rule of thumb to indicate the degree to which partial code enforcement will cause an increase in Slumville's average rent level. The rule is simple: the smaller the code enforcement area relative to the entire slum, the more probable that the overall rent level in Slumville will rise. To make this clear, assume that the code is enforced with respect to only one unit (X) out of the 100,000 units available in Slumville, forcing the unlucky landlord to bear $30 in code costs a month. If there is a *single* Slumville family that is willing to pay $29 extra for

the unit,[21] the landlord will be able to pass on the lion's share of the cost by renting the unit at a $29 premium to that tenant after evicting the present occupant. The evicted tenant must then find a home in Y (containing 99,999 units) and, unless he acts lukewarmly when confronted with the Y rent levels, Y's rents will remain intact. Since Y's rents will most probably remain constant and X's rent has increased, Slumville's overall rent level has increased. As the scope of the code enforcement program expands, however, an overall rent inflation becomes less probable, for it will become progressively more difficult for X's landlords to find Slumville tenants who value the improved housing so highly, while it will become increasingly likely that a significant number of those residents evicted from X will act in a lukewarm manner when confronted with the old Y rental structure.

Thus, even though partial enforcement may often fail to redistribute as much income as the comprehensive program, its efficacy as an income redistribution device is not necessarily minimal. For a last time, it is necessary to emphasize the important fact that the *marginal* tenant's tastes set the rent level. Thus, within X (the code enforcement zone), the level of the rent increase will be determined not by those who believe themselves benefited tremendously by code improvements but by those who are willing to pay relatively small increments for code housing without engaging in lukewarm strategies; similarly, it is the family least willing to pay for its inferior apartment in Y which sets the price level obtaining throughout the district.[22]

21. It is assumed here that the landlord cannot successfully raise the rental premium beyond the $30 level, since if that were possible, it would have been profitable for the landlord to make the improvements without government coercion because the marginal revenue obtained from the investment of $30 per month would then exceed the cost of the improvement. (The concept of cost is being used in the traditional economist's sense to include the profits the landlord has foregone in investing in the code improvements.)

The only situation in which the landlord could theoretically charge a premium in excess of $30 would be one in which code enforcement requires a community's landlords to make improvements which exploit "external benefits" that would otherwise remain unexploited. Since this possibility requires the consideration of a complex set of factors, its analysis has not been attempted in this introductory discussion, but has been deferred to pp. 1177-82 *infra*.

22. The text invokes here the notion of consumer surplus, the analytical value of which has been much disputed among economists in other contexts. *See* Patinkin, *Demand Curves and Consumer's Surplus*, in C. CHRIST ET AL., MEASUREMENT IN ECONOMICS 83 (1963) for the most precise analytical discussion known to me of the various meanings of the concept; Hicks, *The Rehabilitation of Consumer's Surplus*, 8 REV. OF ECON. STUD. 108 (1940) for the classic statement; and I. LITTLE, A CRITIQUE OF WELFARE ECONOMICS 166-84 (2d ed. 1957) for the best critique. While I recognize that the concept can be misused, its most telling limitations do not significantly undermine its utility in the present analysis.

One of the principal difficulties with the concept for economists in many contexts is that increasing the "consumer's surplus" for consumers generally yields an equivalent reduction in the "producer's surplus" going to producers; welfare economists, who remain

III. Slumville's Housing Supply: A More Exacting Scrutiny

A.

Now let us change one of our assumptions about Slumville. In our initial discussion, we assumed that even after code costs were imposed upon the landlords, all of their buildings would still be earning a return which was higher than that which would be obtained either by devoting the properties to a different use or by abandoning the parcels altogether. If, instead, we assume that imposing code costs on all buildings will so drastically lower the return on some of them that parcels will be either abandoned or converted to another use, our conclusions about the effect of code enforcement must be modified. A numerical example will clarify the problem. Assume again that there are 100,000 dwelling units in Slumville before code enforcement and that there are 100,000 families who reside in the area. Assume further that a broad campaign of code enforcement induces the owners of 5,000 units to convert their properties to commercial establishments or to abandon them entirely. It follows that 5,000 families will find themselves in the streets. Finding this uncomfortable, the street dwellers will bid up the rents in the remaining 95,000 units in an effort to obtain a dwelling place. Of course, insofar as they succeed, other families will find themselves completely homeless. As the rents rise, however, some of the dwelling units which were originally withdrawn from the market will

true to a commitment to value free science, find it difficult to explain why producers should be deprived of their surplus simply to increase the consumer's share. Within the value context in which we are operating, however, this is not a significant problem since the entire essay presupposes a social commitment to redistributing wealth to the poor (who in this case are consumers). It remains to be shown, of course, that it is fair to the producers (*i.e.*, the landlords) to require the surrender of some of their surplus when other producers are not placed under a similar obligation; this task will be undertaken at a later stage in the essay. If it is successfully discharged, at least the difficulties with the concept of consumer's surplus which have their source in the welfare economist's alleged value neutrality will not prove an obstacle here.

A second difficulty with the use of consumer surplus in the "partial equilibrium" framework invoked in this essay is that it is possible the extra consumer surplus gained as a result of code enforcement will be offset by consumer surplus lost by tenants in other transactions. Thus if the increase in demand for repair and maintenance services induced by code enforcement generates increased prices in that sector, as well as in other sectors which must bid higher for inputs as a result of the increased competition from the repair and maintenance sector, consumers may face higher prices when they go into the market to purchase goods other than a rental apartment. On the other hand, since the landlord has been deprived of income by enforcement, he will demand less of a wide range of goods, thereby inducing a decline in price for these articles. It is, of course, impossible to know a priori whether the effect of a diminished demand from landlords will have a greater or lesser impact on a wide range of non-housing prices than the increase in demand generated by code-related activities. It is assumed throughout this essay, however, that these second-order effects are relatively minor and need not be taken into account. This is a conventional assumption made in all cost-benefit studies and I see no reason to believe it is improperly made here. *See* Prest & Turvey, *Cost-Benefit Analysis: A Survey*, 75 ECON. J. 683, 704-05 (1965).

be again offered for rent. A new equilibrium position will finally be attained in which, let us say, 99,000 units are occupied and 1,000 families prefer to remain on the street rather than pay the prevailing rent levels. Of course, the thousand homeless families cannot be expected to take their fate passively—marches on city hall, sit-ins, even riots, may be anticipated as the homeless attempt to induce the politicians to provide them lodgings at rents that the homeless consider "reasonable." Once again, they might ameliorate their condition by agreeing to share apartments. In contrast to our earlier Slumville model, however, this "overcrowding" will not be a passing phenomenon which is simply a stage in the competitive dynamic. Here, "overcrowding" will be permanent. Code authorities will thus find it difficult to continue their strict enforcement campaign since "success" leads to a substantial worsening of living conditions for the "lukewarm" families, who often may be the poorest citizens of Slumville, thereby generating the cyclical pattern of enforcement and neglect noted in the introduction.[23]

Given our present assumptions concerning the rental market in Slumville, the optimal strategy for the code enforcement authority would *not* be comprehensive, strict code enforcement. Rather, the authority would do best to enforce the code strictly only in those apartment houses whose profitability was such that they would not be withdrawn from the market. In contrast, the code should be enforced in low profit houses only to the extent that doing so would not induce their withdrawal from the rental market. Under this strategy, housing supply would remain constant. As our earlier analysis indicated, however, rent levels in "code" houses would rise somewhat as residents from "subcode" apartments find the code houses relatively more attractive than before.

While the selective enforcement strategy is theoretically the soundest one to pursue within the hypothesized market structure, it has obvious practical difficulties. It would require the government to embark upon a detailed, factual investigation of the profitability of every building. In addition, it would subject the code enforcers to very substantial political pressures, since the strategy would lead to less code enforcement in the oldest and most dilapidated buildings. While this course of action might be justified on economic grounds, it does not commend itself to one's sense of justice; and it would probably be quite difficult for the code enforcement agency to maintain such a position for long in the political arena.

23. *See* p. 1095 *supra.*

B.

1.

These factors suggest that before government can embark on a program of vigorous code enforcement, it must insure that it will provide a number of dwelling units equal to the number that landlords remove from the market in response to the imposition of code costs (in our example, 5,000 units). But before one quickly adopts this criterion as the key to code enforcement success, another dimension of the housing market must be considered which has been overlooked up to this point. Until now, we have ignored the housing market in surrounding Athens. As our model becomes more complex, however, we can no longer afford this luxury. Activities in the larger housing market may well determine the extent to which the government must subsidize low income housing in support of vigorous code enforcement within Slumville. For in order to attain "zero rent impact," code enforcement need not rely solely upon government subsidy to make up the 5000 unit deficit; it is possible that the private sector will make available units which were previously inhabited by the upper classes of Athens, thereby making up part or all of the deficit without public subsidy.

To make this point clear, imagine that Slumville is surrounded by a lower-middle-class community (Middleburg) composed of decent buildings which do not at present violate the housing code, which in turn is surrounded by an upper-class zone (Snobtown). As a result of new construction for the rich and upper-middle class, a number of Snobtown houses, formerly occupied by these groups, may open up for the lower-middle-class Athenians who previously resided around the borders of Slumville. As the lower-middle class moves to the dwellings once occupied by their betters, Middleburg landlords will find it profitable to rent to the "Slumville-types" they shunned before. In short, some of the impact of new construction for the rich will "trickle down" to the poor as the lower-middle class move to the homes formerly occupied by the well-to-do.[24]

24. The literature on the "trickle down" effect, often also called "filtering," is substantial. It reflects a continuing uncertainty among researchers as to both the appropriate way in which filtering should be defined and, consequently, the extent to which filtering is occurring. For the best brief conceptual analysis, see Lowry, *Filtering and Housing Standards: A Conceptual Analysis*, 36 LAND ECON. 362 (1960); Professor Grigsby has usefully canvassed the literature in his HOUSING MARKETS AND PUBLIC POLICY 84-130 (1963). Interesting, though far from definitive, empirical studies have recently been provided by R. MUTH, *supra* note 5, at 241-303; J. LANSING, C. CLIFTON & J. MORGAN, NEW HOMES AND POOR PEOPLE (1969); and Sigal, *The Unchanging Area in Transition*, 43 LAND ECON. 284 (1967).
While our empirical understanding of filtering is quite imperfect, it nevertheless should

The rate at which housing can be expected to "trickle down" from Middleburgers to Slumvillites will depend—among other things—upon the degree to which the more privileged Athenians believe that new housing offers a higher level of amenity than that provided by their present dwellings, the birth rate experienced by Athenians of both high and moderate income, the willingness of the lower-middle-class families bordering Slumville to move,[25] and the intensity with which Middleburg landlords discriminate against ghetto émigrés. Whether the number of dwelling units trickling down is greater than, less than, or equal to, the number of units removed from the market as a result of strict code enforcement is an empirical question which cannot be answered a priori. Assuming, for the moment, that the houses trickling down are equal in number to the houses removed from the market, the rent level in the now-expanding Slumville will be a function of the quality of the houses which have recently been made available to Slumville residents. If the "ex-Middleburg" houses are equal in quality to the Slumville units which have been improved to code requirements, rent levels will remain unchanged as a result of code enforcement for the reasons previously considered. If the quality of the "new" housing is higher than that prevailing in a code enforced Slumville, rents will increase to the extent that Slumville residents are willing to allocate a larger share of their budget in order to purchase higher quality housing. Thus, the owners of the "ex-Middleburg" units will be constrained to rent them at the prevailing rent level or remove the units from the rental market altogether if there is no demand for "supercode" housing within Slumville. It should be emphasized, therefore, that rents will not rise unless a segment of the Slumville community really values the better housing that has trickled down.

be pointed out that several students have found that the number of vacant apartments available for rent in buildings in the ghetto markets under observation is surprisingly high: "A check of nearly six hundred dwelling units—owned by one individual and scattered throughout Newark's slum areas—was undertaken. The vacancy rate, as of April 1965, was nearly 18 percent. This rate prevailed at a time when the season was mild enough to reverse the doubling-up in heated units during the winter." G. STERNLIEB, *supra* note 6, at 93. Of course, vacancy rates can be expected to fluctuate over time as the rate of trickle down changes. *See, e.g.*, the wide variations in vacancies ranging from 2.3 to 30 per cent observed by Grebler on New York's Lower East Side over a period in excess of twenty years. L. GREBLER, HOUSING MARKET BEHAVIOR IN A DECLINING AREA 38 (1952). Nevertheless, the existence of high vacancy rates at least some of the time suggests the possibility that filtering may sometimes make it relatively easy to enforce the code comprehensively with a minimal rent increase even without government subsidy.

25. Of course, as ghetto émigrés move into the area, oldtime Middleburgers may view continued residence in a different light, choosing to accelerate their movement to Snobtown. *See* T. Schelling, *Neighborhood Tipping* (Harvard Institute of Economic Research, Discussion Paper No. 100, 1969).

Of course, if the number of housing units "trickling down" to Slumville is less than the number of dwellings removed from the market by code enforcement, the area will still confront a "housing shortage" as a result of code enforcement, and the authorities will be faced with the dilemma which has already been described—they will enforce the code only at the cost of requiring the poor to pay higher rents or live in the streets or double-up or skip rent more frequently than in the past. In order to avoid this dilemma, the government must make up the difference between the number of houses withdrawn from the market and the number of houses trickling down into Slumville through a subsidy program. If the public sector fulfills this task, the paradoxical conclusion reached in our earlier discussion remains intact: while a selective program of code enforcement will raise rents in the target area, a comprehensive enforcement plan will not.

2.

Up to the present point, we have only considered "trickle down" from a perspective which gives substantial comfort to the code enforcement proponent. But, alas, there is a more troublesome aspect to this phenomenon which is revealed when the code enforcement administrator stops asking "what can 'trickle down' do for me?" and considers what his program is doing to the trickle: will code enforcement increase the trickle to a flood of "new" housing for Slumvillites or will the code regime reduce the trickle to a droplet?

The general answer to this question seems clear: code enforcement will significantly diminish the trickle to the extent that the Middleburg landlord believes that Slumville-type tenants will wreak greater havoc upon his buildings than will the more sober Middleburgers. Insomuch as this is true, code costs will be heavier if the building becomes part of an expanding Slumville than if it remains in the lower-middle-class sector. And the greater the anticipated code cost differential, the more willing a landlord will be to continue renting his unit to the Middleburger at a lower price than he can extract from a Slumvillite, thereby attenuating the trickle down rate.[26]

26. This assumes, of course, that the code is being enforced in Middleburg as well as Slumville. If code enforcement is restricted to Slumville, the extra cost of renting to Slumvillites may be somewhat greater, for it may be that the profit-maximizing Middleburg landlord would over time choose to violate the housing code in renting to Middleburgers; once his neighborhood is identified in the code enforcer's mind as part of Slumville, however, the landlord will be unable to continue on this course since, by hypothesis, code enforcement authorities will insist upon compliance once they decide that the building has become part of an expanding Slumville. Thus, the added cost of renting to Slumvillites

This unfortunate tendency of code enforcement may, however, itself be checked by two important factors. First, effective enforcement of civil rights laws assuring Slumvillites "equal access" to Athens' housing may make efforts at price discrimination between "Slumville-types" and "Middleburger" tenants illegal, and therefore costly, to the Middleburg lessor.[27] Second, successful code enforcement in Slumville may itself have an impact upon the psychology of the Middleburg landlord. Whereas, in the pre-code past, each time a Middleburg lessor found his way into Slumville he was greeted by signs of obvious disrepair which he was apt to assign to tenant vandalism, the number of cases of scandalous living conditions will have been markedly reduced by a successful code enforcement-subsidy scheme, thereby (perhaps) inducing the Middleburger to revise his estimate of the degree of lower-class vandalism. Since the trickle down effect will only be influenced by the *anticipated* code cost differential, the creation of a more favorable image of the lower-class tenant in the landlord's eye (by whatever means) will diminish the differential, thereby reducing code enforcement's unfavorable impact upon the trickle down.[28]

C.

It should be clear, then, that in fashioning a proper subsidy policy it is not enough to consider the number of houses withdrawn from

may be not only the extra expense generated by their increased destructiveness, but also the cost of fulfilling the code, once a Middleburg neighborhood is considered to be "Slumville territory" and thereby triggers code enforcement action. Analysis of this extra cost is complicated, however, by the fact that any individual landlord may successfully rent a single apartment to a Slumvillite without the entire neighborhood being thereby identified as a part of Slumville in the mind of code enforcement officials. Thus, it could well be that while strict code enforcement will generate added costs if the neighborhood "tips" and becomes part of Slumville, this cost will not be considered in the calculus of any individual landlord, whose action in renting a single apartment to a member of the lower class will have little or no effect upon the "tipping." *Cf.* T. Schelling, *Neighborhood Tipping*, *supra* note 25.

27. The Civil Rights Act of 1968 forbids discrimination "in terms, conditions, or privileges of sale or rental of a dwelling," 42 U.S.C. § 3604(b) (Supp. V, 1970) and the exceptions to this mandate do not apply to the typical leasing situation. Similarly, the Civil Rights Act of 1866, as interpreted by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), also is applicable, as would be the typical local or state fair housing ordinance. *See* Abrams & Baldwin, *Local Fair Housing Legislation: Adoption, Enforcement, and Related Problems*, 2 URBAN LAW. 277 (1970). While theoretically it could be argued that a landlord who charges a lower-class black a higher rental than a lower-middle-class white is not "discriminating" against blacks because they are black but because they are members of a class who are believed, on a statistical basis, to cause greater damage to the leased property, there can be little doubt that such an argument would be rejected—especially given the absence of objective, satisfactory data to support such a belief. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

28. Housing codes may also increase the cost of dividing larger Middleburg units into smaller units more marketable to the lower class by requiring that certain amenities be available in every unit. Insofar as the code has this effect it will, once again, slow the rate of trickle down.

Slumville; one must also consider the rate at which houses are trickling down from Middleburg. However, some may suspect that even this is too myopic a view. It may be argued that imposing "code costs" upon Slumville owners will discourage new housing construction in the private sector, thereby lowering the supply of housing to low income groups in the long run—which in turn will mean an increase in rents to the poor. If it were economically feasible for the private sector to build new housing for the poor without government subsidy, this objection would have very substantial weight. But, in fact, unsubsidized new construction for the poor has long since ceased to be economically feasible.[29]

Since the poor are dependent upon old buildings, the argument that code enforcement discourages new construction must be recast in a different, and far less imposing, form. One must argue that when a developer is considering the profitability of a middle-class residential apartment house, he will seriously take into account the possibility that in twenty or thirty years time the building's profitability might be significantly reduced if (a) it is then within a slum district and (b) the city is then actively pursuing a comprehensive code enforcement program. Even those who have the greatest faith in the entrepreneurial abilities of the American businessman would concede that the sensible developer would discount the possible costs of code enforcement twenty years hence as de minimis. Thus, if the government wishes to run a comprehensive code enforcement program without (a) increasing rent levels or (b) forcing Slumville families onto the streets or into permanently overcrowded conditions, it simply must make up the difference between the number of units withdrawn from the Slumville market and the number trickling down from Middleburg. It may properly ignore the alleged "long run" impact the program will have on housing supply.

D.

While the preceding discussion has delineated the extent government must subsidize the housing market in Slumville before it can institute a broadly based code enforcement program without *raising* rents, it may be properly argued that the subsidy program of the dimension

29. The most sophisticated contemporary analysis of the costs of new construction, which amply justifies the assertion in the text, may be found in von Furstenberg, *Improving the Feasibility of Houseownership for Lower-Income Families Through Subsidized Mortgage Financing* and von Furstenberg & Moskof, *Federally Assisted Rental Housing Programs: Which Income Groups Have They Served or Whom Can They Be Expected to Serve?*, in 1 REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING (KAISER REPORT), TECHNICAL STUDIES 113-65 (1967).

envisaged does not in reality place rents at the levels they would have attained if the free housing market would have been permitted to operate without either code enforcement or subsidy. Under a free market regime, the arrival of additional housing trickling into the Slumville market would have depressed rental levels below those formerly prevailing. Old Slumville landlords who previously rented an apartment for $80 would reduce the rent to $70 in an effort to induce tenants to remain and not move to the "new" dwellings. Rents would be bid downward until a sufficient number of landlords found it more profitable to devote their properties to non-residential uses. If 5,000 units trickled down, rents would nose-dive until 5,000 units were removed from the Slumville market. Thus a code enforcement-subsidy program like that described in subsections III (B) and (C), which simply assured that rental levels remained constant, would deprive Slumville's tenantry of the benefit of the *lower* rents they would otherwise have obtained from the free market.

This argument is correct as far as it goes. It falls short, however, in failing to consider some of the peculiarities of the housing market. Once a landlord has reached the decision to remove his building from the rental market, the decision to relet his apartments is far from costless. If the property was converted to another commercial use, another investment will be required to ready it as a dwelling place. Similarly, if the property was simply abandoned because the owner could not make a return exceeding his variable costs at the lower rent, it will be expensive for the landlord to rent it out again. For once a building is abandoned in the slums, it is a victim of substantial depredation by the community: plumbing may be stolen, walls defaced and destroyed, windows broken.[30] Consequently, rent levels in Slumville would have to increase very substantially from the level they would reach on the free market before any significant number of the 5,000 houses removed in our hypothetical slum would be offered for rent again.

This means that the rent level attained as a result of competition among Slumville's landlords when faced with an influx of 5,000 units of "new" housing will not be in long run equilibrium. Once 5,000 units have been removed from the market, an individual landlord still in business will find that he can raise rents a bit without losing his tenant, since a small increase in rent will induce none of the owners of the withdrawn units to absorb the substantial costs of reentering the mar-

30. *See* W. GRIGSBY ET AL., *supra* note 7, at ch. 6, p. 21-22.

ket. Rents will continue to rise in this incremental fashion until there is substantial reentry.[31] Thus, Slumville's tenantry will obtain substantially less long run rent relief from an influx of housing "trickling down" from Middleburg than they will obtain in the short run. Nevertheless, if policy makers wish to assure themselves that code enforcement will not increase Slumville rents over the level they would attain under a completely free market regime, the government must take into account that tenants under laissez faire would have been receiving substantial short-term, and less significant long run rent relief from the houses trickling into an expanding Slumville.

Our discussion, then, has yielded an embarrassment of riches. Not one, but two, significantly different subsidy programs may be proposed to support a sustained code enforcement program: a smaller subsidy is required if government's goal is simply to assure that code enforcement will not cause a rent rise; a somewhat larger program is needed if policy makers wish to guarantee Slumville's tenantry the lower rents they would have obtained in the absence of a code enforcement program. Some principles are required to permit government to choose intelligently between these alternative plans. Even more fundamentally, it is necessary to decide whether the government should be spending its limited resources on a *housing* subsidy program at all. Would not the subsidy dollars be better spent if they were simply given to the residents of Slumville in the form of cash income-maintenance payments to do with what they wish? It is this more basic question we shall consider first.

IV. Subsidy Policy

A.

Thanks to the advocates of the negative income tax, ranging from Milton Friedman to James Tobin,[32] all of us recognize much more clearly that the city's particular difficulties in housing, education, health care and mass transit are in significant part merely symptoms of a more basic maldistribution of economic power which permits the

31. While the costs of reentry are considerable, Grebler found that over time a significant number of long-vacant structures did return to the market in response to changes in economic conditions. *See* L. GREBLER, *supra* note 24, at 40-42. More contemporary studies, unfortunately, have not attempted to view the same market over a substantial period of time and, hence, Grebler's report stands alone in the published literature.

32. M. FRIEDMAN, CAPITALISM AND FREEDOM 190-95 (1962); J. Tobin, *Raising the Incomes of the Poor*, in K. GORDON, AGENDA FOR THE NATION 77-116 (1968).

bottom quarter of our population only five per cent of the national income.[33]

The advocates of the negative income tax invite us to discard slipshod, ad hoc subsidy efforts which seek to cure particularly troublesome sorespots and instead pursue a much more generalized subsidy scheme. They argue that the money spent on special purpose subsidies will yield the poor greater benefits if spent upon income maintenance payments. The substance of the position can be made clear by the following hypothetical. Imagine that a Slumville family, if given a monthly $100 income supplement, would choose to spend none of its extra money on improved housing services. Indeed, if the family were forced to choose between receiving a $70/month car and $100/month in improved housing services, it would have great difficulty making up its mind which was preferable. On these facts, a $100 monthly subsidy which is tied to housing actually wastes $30 since a family would have obtained as much satisfaction from a $70/month car as the $100/month housing supplement. In economists' terms, there has been a "misallocation" of resources—"too much" money has been invested in housing; "too little" in automobile production. Thus, if government wishes to maximize the benefit the poor will receive from each subsidy dollar, it should choose to support a general income maintenance scheme—which permits the greatest degree of consumer sovereignty—rather than to persist in relying upon old fashioned special purpose subsidy schemes.[34]

Unfortunately, it would take us too far afield to launch a broadly based analysis of the conditions under which the general argument, adumbrated above, is valid.[35] Instead, I shall simply seek to indicate

33. G. KATONA ET AL., 1969 SURVEY OF CONSUMER FINANCES, TABLE 1-3 (Survey Research Center, Institute for Social Research, University of Michigan, 1970). The figures report the income distribution prevailing in 1968. There is little reason to believe that the poor's relative share has significantly increased since that time, given the increasing rates of unemployment experienced from 1968 to the time of this writing. *Cf.* U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, CONSUMER INCOME (Series P-60, No. 79, 1971). Analysis of the 1970 Census will permit more precise information on this point.

34. For a balanced statement of the received learning, see J. Tobin, *On Limiting the Domain of Inequality*, 13 J. LAW & ECON. 263, 275-76 (1970).

35. Surely a full fledged defense of this position would require its advocate to deal satisfactorily with the implications of the theory of the "second best" developed originally by Lipsey & Lancaster, *The General Theory of Second Best*, 24 R. ECON. STUD. 11 (1956), which has generated a debate that has not yet come to an end. For some of the more interesting contributions, see Davis & Whinston, *Welfare Economics and the Theory of Second Best*, 32 R. ECON. STUD. 1 (1965); Davis & Whinston, *Piecemeal Policy in the Theory of Second Best*, 34 R. ECON. STUD. 323 (1967); Fishlow & David, *Optimal Resource Allocation in an Imperfect Market Setting*, 69 J. POL. ECON. 529 (1961); McManus, *Comments on the General Theory of Second Best*, 26 R. ECON. STUD. 209 (1958-59); Turvey, *The Second-Best Case for Marginal Cost Pricing*, in J. MARGOLIS & H. GUITTON, PUBLIC ECONOMICS 336-43 (1969).

the extra dimension the preceding analysis of code enforcement adds to the general subsidy problem. I shall do so by demonstrating that, even if all the assumptions of the cash subsidy argument were accepted, it would still not necessarily undermine the case for a special purpose housing subsidy of the kind envisioned here.

The argument can be most easily understood if once again we take recourse to a simple mathematical example. As we have shown, a comprehensive code enforcement scheme in Slumville will induce a redistribution of income from landlords to tenants: landlords' expenses will increase; tenants will procure better living quarters; but rents will not increase so long as the housing supply and demand remain constant. Let us imagine that the average Slumville tenant family would value the improved apartment which code enforcement has produced at $20/month. Now also assume that, as a result of code enforcement, 5,000 of Slumville's 100,000 apartments are withdrawn from the market and that only 2,000 units have trickled down from Middleburg. In other words, the government must subsidize 3,000 units if it is to prevent an increase in Slumville rents. Suppose that it costs the government $50 a month to subsidize these 3,000 units and that these 3,000 subsidized families, like their unsubsidized neighbors, value the housing improvements at $20 per month on the average.

We can now compare the costs and benefits of the combined code enforcement-subsidy program with the costs and benefits of an income maintenance program of comparable dimension:

PROGRAM	COSTS	BENEFITS	
Code enforcement-housing subsidy	3,000 families × $50 per month = $150,000	97,000 families in unsubsidized housing × $20 per month	= $1,940,000
		3,000 families in subsidized sector × $20 per month	= $ 60,000
			$2,000,000
Income maintenance	3,000 families × $50 per month = $150,000	3,000 families × $50 per month	= $ 150,000

Putting aside for the moment all secondary costs of administering the alternative programs as well as their comparative effect on government tax revenues, the benefits of the code enforcement-special housing subsidy scheme are approximately fourteen times the benefits of a comparable expenditure of government funds upon an income main-

tenance program. The basic explanation for this phenomenon is quite simple. An expenditure of government funds on a negative income tax does *not* permit the government to initiate a second program which redistributes additional income to the poor at no expenditure of *government* money. A dollar spent on a negative tax yields a dollar in benefits to the poor: there is no "leverage" effect. In contrast, a dollar spent on a special purpose housing subsidy does have a "leverage" effect since it permits the government to initiate a second income redistribution program—comprehensive code enforcement—at no increase in *government* expenditure. Thus a dollar spent on the special housing subsidy not only benefits the *direct* recipient of the subsidy but also benefits all those families who receive better private rental housing—at no increase in rent—as a result of code enforcement.

Now, of course, the "leverage" effect is not a magic wand by which the government may generate benefits for the poor without social cost. Ex nihil nihil fit. Code enforcement does not cost the government anything beyond administration expense precisely because the program places the principal redistributive burden upon the private landlords of Slumville rather than the Athenian taxpayers at large: as a consequence, a major portion of the redistributive impact of the program only appears in the landlords' private budgets without denting the public fisc. Thus, it clearly would be improper at this stage in the analysis to embrace a code enforcement-special housing subsidy scheme for Slumville simply because the program generates more (redistributive) bang for the (government's) buck. Before passing final judgment, it is necessary both to consider the fairness of imposing a special burden for redistributing the wealth upon the landlords of Slumville and to assess the overall efficiency with which the code enforcement scheme redistributes both the government's and the landlord's contribution. This broader analysis will be attempted after an examination of the impact of housing code administration upon rent levels is concluded; nevertheless, even at this early stage, it seems important to emphasize the limited function of the question we are presently pursuing. At best, the analysis attempted in this section of the essay can establish that code enforcement—when backed by a special housing subsidy—*can* have a place within a larger redistribution strategy. It remains to be considered whether it *ought* to have such a place; and the simple perception that the code-housing subsidy approach may generate more bang for the government's buck cannot provide the basis for a sophisticated approval of the plan.

B.

In introducing the "leverage" concept, we found it simpler to ignore for a time the governmental costs generated by the two programs other than those state expenditures which directly passed into the hands of the recipients. In order to put "leverage" into perspective, however, the existence of costs of two other kinds must be considered. First, it may be argued that when costs of administration are taken into account the code enforcement-special housing subsidy scheme will appear far more expensive than our original comparison indicated. Indeed, since this essay only suggests the propriety of supplementing a national cash grant program with the code-housing subsidy scheme, the bureaucratic cost argument may be cast in a way which, on the surface, seems very strong indeed. For the bureaucratic costs involved in running *both* a negative income tax *and* a code-special subsidy scheme would appear to exceed by far the bureaucratic costs involved in relying exclusively upon the cash grant scheme. In order to redistribute supplementary income through the manipulation of the slum rental market it would be necessary to create a distinct, specialized bureaucracy to administer the program. In contrast, if the supplementary income generated by code enforcement were simply replaced by a higher cash payment administered through the pre-existing negative income tax bureaucracy, there would be almost no added bureaucratic expense involved in delivering the supplementary income to the poor. Thus, it could be argued that the "leverage" effect will be counterbalanced significantly—if not completely—by the added bureaucratic costs of regulating the rental housing market on behalf of the poor.

This argument loses much—though not all—of its surface appeal, however, when its critical premise is scrutinized with care. Only if it is assumed that code enforcement would be completely abandoned should it fail to fulfill the requisites of national redistribution policy will all of the bureaucratic costs involved in its administration be saved. As we shall see, even if code enforcement did not redistribute supplementary income optimally, certain aspects of the program could still be justified on the ground that enforcement provides the most efficient way to eliminate costly fire, health and safety risks imposed by individual slum dwellings upon the larger community (a phenomenon economists characterize by the increasingly familiar "externality" label).[36] Consequently, the bureaucratic costs appropriately charged to the added dimension of code enforcement justified by exclusive reliance

36. *See* pp. 1177-83 *infra*.

upon the income redistribution goal is only the *added* expense involved in maintaining a somewhat larger bureaucracy for regulating the housing market than would otherwise exist. When understood in this way, the extra bureaucratic costs seem quite small, though not de minimis. Once a code inspector has arrived in the tenant's apartment to determine whether the wiring system is a fire hazard (a step justified on externality prevention as well as income redistribution grounds), how much more expensive will it be for him to determine whether the apartment has hot running water (a code requirement which we shall assume can be justified exclusively by reliance upon the income redistribution objective)? It would seem that the added inspection time will be measured in minutes rather than hours, and the same can be said at later stages in the enforcement process. While even extra man-minutes add up when they are expended upon a large number of occasions, added costs of administration will probably counterbalance only a small part of the leverage effect.[37]

While our discussion has revealed that the omission of administrative expenses in our original cost-benefit analysis of the alternative programs does not lead to substantial distortion, costs of a second kind may be of greater significance in striking the proper cost-benefit comparison. The critic of code enforcement may suggest that depriving landlords of income will reduce the tax revenues the public treasury will receive from landlords, thereby increasing the true expense to the public treasury substantially beyond that originally suggested. Assuming that landlords are either in relatively high personal income tax brackets or are subject to the corporate income tax, will not the federal (and state) governments be losing in tax revenue a substantial portion of each dollar by which the landlord's profits are reduced through code enforcement?

The answer to this question is quite complex, even assuming relatively full employment of resources within Slumville.[38] Code enforce-

37. In addition to the costs of administering the code enforcement effort, there may be an additional cost involved in administering the housing subsidy component of the program. The importance of these bureaucratic costs will depend upon the form the subsidy takes. If government operates public housing, it is difficult to envision any "costs of administration" arising over and beyond the costs of building (or rehabilitating) and then operating the units, all of which have been already taken into account in our prior discussion of direct subsidy costs in subsection A at p. 1121 *supra*. If, however, the state chooses to subsidize private landlords, then in addition to the direct subsidy costs, there will be a significant cost of administration.

38. Following the custom of contemporary cost-benefit analysis, I am here assuming that the government has already selected the most appropriate mix of monetary and fiscal policy to achieve full employment and that the only question before us is the extent to which limited government resources should be devoted to one program rather than another. It is possible—indeed likely—that subsidized housing and code enforcement could some-

ment will induce a shift of resources into repair and maintenance operations, generating increases in total profits for management and total wages for labor in this sector and lower total profits and wages in those sectors from which resources have been shifted. Given both the imperfections in labor and product markets as well as the differing tax rates applying to different market sectors, it does not seem possible to determine a priori whether the increase in income tax revenue generated in the repair and maintenance sector will more than offset the decrease suffered in the sectors from which resources have been diverted. Thus it remains unclear whether the tax loss suffered as a result of the decline in landlord profits will be offset in part by an increase in tax revenues generated in the maintenance and repair sector. Even assuming absolutely no offset, however, the revenue loss suffered by the Treasury can weaken, but certainly not destroy, the logic of the leverage theory we have been exploring since loss of tax revenue can in the nature of things be but a fraction of the total amount expended by landlords upon code compliance.[39]

C.

With the "leverage effect" a bit battered but more alive than dead, it is necessary to consider its dynamics more precisely than a single example has permitted us to do. Indeed, it is not even always true that a housing subsidy-code enforcement scheme will yield greater benefits to the poor than will a comparable expenditure of public funds on a general income maintenance plan. A careful consideration of the simple example we have discussed reveals that the "leverage" of the special purpose housing subsidy is a function of six variables:

1. *The number of Slumville housing units driven off the market by code enforcement* has a profound impact since the larger the number of units, the greater the number of families that must be subsidized. The impact of withdrawal of Slumville units is offset by:

times be justified on Keynesian macroeconomic grounds as appropriate mechanisms for increasing aggregate demand at low points in the business cycle. Of course, when macroeconomic considerations support the microeconomic factors argued in the text, the merits of the effort at regulation will be enhanced. Nevertheless, I have not chosen to pursue the Keynesian arguments principally because they will at best support the program over only the depressed portion of the business cycle and consequently are insufficient to support a public commitment to a decent home in times of prosperity as well as depression.

39. Paradoxically, real estate taxes upon buildings which have been improved can be expected to increase, at least according to Sternlieb's study of Newark, which suggested that landlord improvements tend to induce tax assessors to raise their appraisals and hence the ultimate levy. *See* G. STERNLIEB, *supra* note 6, at 203-24. This counter-productive tendency of real estate assessors has properly been condemned, *id.*, but it should nevertheless be taken into account as a revenue gain generated by code enforcement until some mechanism is devised to control this real estate assessor response.

2. *The number of units trickling down from Middleburg.* It should be clear from our previous analysis[40] that the trickle down effect, if it is significant, mitigates the consequences of landlords withdrawing units from the Slumville market.

3. *The cost to the government of subsidizing each unit it must place on the market.* Obviously, the unit subsidy cost will depend on a variety of factors including the form the subsidy will take (traditional public housing, subsidized mortgage financing, rent supplements, etc.) as well as the number of abandoned buildings that could be rehabilitated at a price which is lower than that required by new construction.

While the first three variables are basically concerned with housing supply, the last three focus upon the demand for improved housing in Slumville:

4. The benefits of the housing subsidy-code enforcement plan increase with an *increase in the dollar value the average tenant in the private housing sector places upon the improved quality of his dwelling.* This factor, in turn, is to some extent counterbalanced by:

5. The extent to which the average tenant in the subsidized sector *would prefer spending his subsidy dollars on non-housing services.*

6. Finally, there must exist a significant number of Slumville residents in the private sector who are "lukewarm" in the sense previously defined and therefore are *unwilling to pay an increased rent for the code improvements.* It should be clear from the discussion in Section II that landlords will succeed in passing on their code costs up to the point where this condition is satisfied.[41]

40. See pp. 1113-17 *supra.*

41. Thus, imagine the extreme case in which the state undertook to house *only* those among the very poor who would react lukewarmly if confronted by a substantial rent hike in the private sector. If the state succeeded in this effort, our analysis indicates that private landlords would successfully pass on a substantial portion of their code costs despite the subsidy program. From this perspective, it would appear that the policies of traditional public housing programs, which tend to house the poorest of the poor, can be subjected to severe criticism on income redistribution policy grounds. Since the poorest members of the underclass are, for obvious reasons, most likely to act lukewarmly when confronted by a rent hike, a subsidy program like old-fashioned public housing, which attempted to house only the very poor, would deprive the private sector of the very tenants necessary to beat back the landlords' effort at raising rents. Housing subsidies made available through more recent programs, however, would seem to be less open to this attack, since they tend to subsidize a broader class of ghetto residents, selecting the lucky beneficiaries among this class on a relatively haphazard basis. A useful comparison of the various federal subsidy programs along these lines may be found in 2 NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, HANDBOOK ON HOUSING LAW, ch. V, pt. II, at 4-22 (1970). *See also* von Furstenberg, *The Impact of Rent Formulas and Eligibility Standards in Federally Assisted Housing* and studies cited, *supra* note 29.

While the nature of the group receiving the housing subsidy is of considerable importance in the case of comprehensive code enforcement, it is even more critical in those situations in which the code is enforced only in Area X while Area Y remains untouched. Area X will not undergo a significant rent inflation only if the state subsidizes housing for

The value the average tenant places upon improved housing services in both the subsidized and private sectors (factors four and five above) greatly affects the relative desirability of a code enforcement-subsidy program. If, for example, the average Slumville tenant only is willing to pay 50¢ for the improvements accruing as a result of code enforcement, a direct subsidy program would yield greater benefits:

PROGRAM	COSTS	BENEFITS	
Code enforcement-housing subsidy	3,000 families × $50 per month = $150,000	97,000 families in unsubsidized housing × 50¢ per month	= $ 48,500
		3,000 families in subsidized sector × 50¢ per month	= $ 1,500
			$ 50,000
Income maintenance	3,000 families × $50 per month = $150,000	3,000 families × $50 per month	= $150,000

Unfortunately, although both tenant preference variables are of great importance in evaluating the desirability of the special purpose housing subsidy, it is not easy to obtain very reliable data to measure them. It would be possible, of course, to interview residents of subsidized and unsubsidized housing and ask them an appropriate set of questions to determine the dollar value they place upon their improved housing conditions as a result of a code enforcement program. But the interview questions which must be asked would require tenants to engage in imaginative exercises of a sort to which they are ill accustomed. Indeed, even under the best of conditions, it is difficult to respond with much certainty to an interviewer who wishes to know, for example, whether the tenant would rather live in a very bad slum and drive a good car which costs $65 a month, or live in a code apartment and not drive any car at all, or whether—finally—the tenant would prefer a moderately defective car and a moderately substandard house to either of the two extreme alternatives. Casual answers to such questions may poorly reflect what the tenant would in fact do if he were faced with the hard choice in reality. Nevertheless, such questions must be asked if the interview is to yield results which would permit a meaningful

those (richer) tenants living in Y who would be willing to pay a substantial premium on the "new" code units in the enforcement zone (X). If, in contrast, the state provides housing for only those poorer tenants who are most likely to act lukewarmly, then substantial rises can be expected not only in Area X but also in Y as well, as will become readily apparent to the reader who reviews the material presented in subsection II(C) at pp. 1109-10 *supra*.

economic comparison between the income maintenance and housing subsidy-code enforcement programs.

While the obvious flaws of the interviewing process substantially undermine the validity of the results yielded, it is possible to devise an alternative method of obtaining more reliable data. Imagine an experiment in which a slumdweller were forced to choose between receiving supplementary incomes of varying amounts and the right to demand that his landlord improve his apartment to code level. Presumably, the amount of the supplement payment the slumdweller would forego in order to obtain code housing would indicate the money value he would obtain as a result of a comprehensive code enforcement program under conditions like those postulated in our Slumville model.[42]

In the absence of a social experiment of this kind, however, it would appear that decision makers must simply try to guess the dollar value of code enforcement to Slumville tenants both in the subsidized and unsubsidized sectors. In saying this, I do not mean to suggest that the guesswork will yield a completely arbitrary figure; it is only reasonable to expect, however, that a substantial error will enter in. Nevertheless, despite the error, the guess must be made before one is to support (or oppose) a housing subsidy of the dimension considered here. It is true, of course, that special purpose housing subsidies can be advocated (and opposed) on entirely different theories than the one which has been discussed in this essay. But unless both sides agree that aiding the poor is only a trivial part of the issue, they will be obliged to engage in the guesswork of the kind suggested here: they must try to quantify the dollar values both subsidized and unsubsidized tenants place upon their improved housing before determining whether a code enforcement-special housing subsidy is to be preferred over an income maintenance scheme.

One's guess at the value of housing improved to code levels will, of course, be in substantial measure determined by the skill of the draftsmen of the Athenian housing code. If the code is replete with trivial requirements, the value of code enforcement to the typical tenant

42. Of course, precautions must be taken to structure the experiment to simulate "real world" conditions. It should be recognized, however, that even under the best of conditions, quantification of benefits will be infected with significant error. Moreover, this is true not only in the evaluation of the program under discussion, but also of cost-benefit analysis generally, although on occasion more sophisticated statistical techniques are available. *See* MEASURING BENEFITS OF GOVERNMENT INVESTMENTS, (R. Dorfman ed. 1963). *Cf.* von Furstenberg, *The Inefficiencies of Transfers in Kind: The Case of Housing Assistance*, 9 WESTERN ECON. J. 184 (1971).

will be minimal. At the same time, poorly conceived code requirements will place a substantial burden upon Slumville's landlords, increasing the number of houses withdrawn from the market—thereby increasing the subsidy expenditure required to support effective, comprehensive code enforcement (factors one through three above). Consequently, our analysis cannot—without detailed case by case study of presently enacted codes—be taken to suggest that the comprehensive enforcement of *existing* codes, together with an appropriate housing subsidy, generates greater tenant benefits than would the expenditure of government money on a negative income tax in an urban setting similar to Slumville's. Nevertheless, the logic of the "leverage effect" certainly suggests that, given a market structure similar to Slumville's, a code could be proposed which would benefit a very substantial proportion of the slum tenantry—assuming government is willing to subsidize a relatively small number of them through a direct housing subsidy. It is possible, of course, to imagine a situation in which the enforcement of any code —no matter how skilfully drawn—will induce a massive withdrawal of rental housing. An extensive landlord exodus, coupled with a large per-unit subsidy cost, could conceivably require the government to spend such volumes of money that the benefits accruing to the tenantry as a result of code enforcement would not be greater than those which would accrue as a result of a comparable negative income tax scheme. Nevertheless, it seems unlikely that such a massive withdrawal from the market would occur.

D.

While the foregoing suffices to demonstrate that a code enforcement-housing subsidy plan may yield greater benefits to Slumville's poor under a broad range of conditions than a comparable expenditure of public funds on a negative income tax scheme, we have yet to consider, in a precise manner, the optimal level at which the housing subsidy program should operate. As has already been noted, there comes a point at which a special housing subsidy is no longer as effective as the more generalized income maintenance program like the negative income tax. To put the matter concretely, let us renew our consideration of the hypothetical considered in subsection IV(A), the essential characteristics of which may be summarized in the following chart.

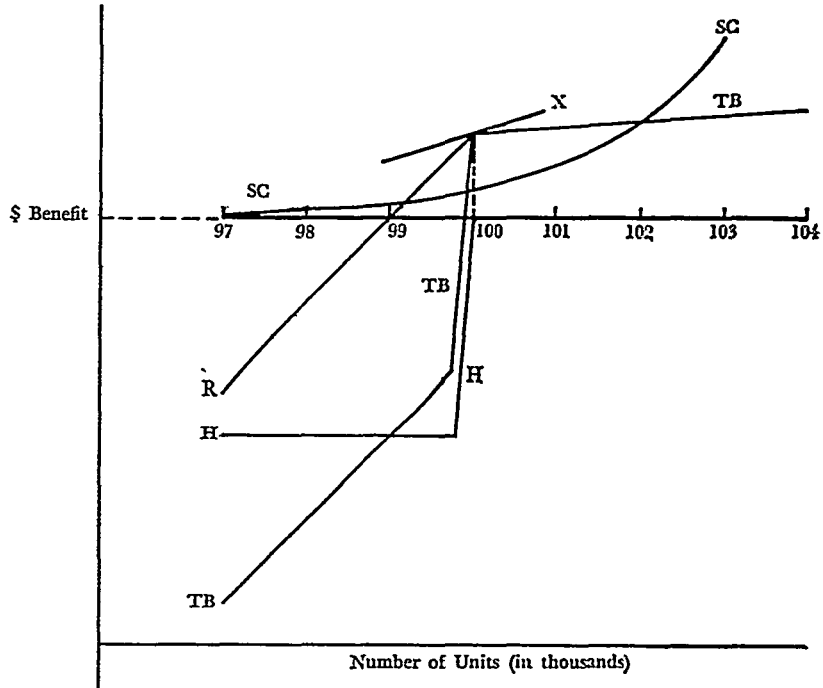
SLUMVILLE	
No. of families	100,000
No. of houses before code enforcement	100,000
No. of houses forced off market by code enforcement	5,000
No. of houses trickling into Slumville	2,000
Average dollar value of improved housing to non-subsidized tenants	$20/month
Average dollar value of improved housing to subsidized tenants	$20/month

Assume further that for every 1000 houses removed from Slumville, average rents increase by $20.

NO. OF HOUSES IN SLUMVILLE	RENTS
100,000	$100
99,000	$120
98,000	$140
97,000	$160

For purposes of simplifying the analysis to its bare essentials, we shall also assume that all families evicted from buildings forced off the market by code enforcement choose to remain on the streets rather than to double-up in one of the remaining apartments. Thus, if a municipality enforces the code comprehensively without a subsidy program, both the 97,000 families which find houses and the 3,000 which find themselves in the streets are worse off than before: the 97,000 families with homes each lose $40 (the difference between the value of the improvements to the average family and the rise in rent); the homeless lose even more. In strict monetary terms, their loss is something less than $60/month since we know both that the homeless were formerly willing to spend $100/month on a "sub-code" house and that they could now obtain a dwelling simply by bidding somewhat more than the $160 prevailing rent. But decision makers will also consider the political consequences of forcing poor people into the streets and let us assume that, when this factor is taken into account, the cost of having any significant number of families homeless is simply intolerable. If a housing subsidy is then introduced, rent levels decline and fewer

families are left homeless. The dynamics of the situation may best be portrayed diagrammatically:



R = Total Benefit to Residents; TB = Total Benefit; X = A line drawn tangent to TB and parallel to SC at 100,000 unit supply; H = Total Benefit to Homeless; SC = Subsidy Cost.

As the graph indicates, measuring the total benefit accruing to the tenant class is somewhat more complicated before 3,000 units of subsidized housing are provided. As the number of subsidized units is increased within the 0-3,000 range, the total benefit curve rises relatively rapidly for two reasons. First, every additional subsidized unit entering the market marginally reduces the general rent level, thereby benefiting all those Slumville residents who already have homes. Second, each additional unit entering the market provides a home for one of the 3,000 Slumville families remaining on the streets, thereby transferring a family which would have been bitterly angry as a result of the code enforcement program into one which has obtained a house which is on the average $20 per month better than those which were available formerly. Once 3,000 homes have been provided, however, the total

benefit curve increases much less rapidly—after that point, an increase in the number of housing units available in Slumville does not provide housing for the homeless; rather, it only benefits the tenantry by reducing the prevailing rent level.

While tenant benefits increase less rapidly beyond the 3,000 house level, the subsidy cost of providing additional housing units does not suffer a similar decline; indeed the marginal subsidy cost may well increase. For as rent falls below the $160/month level prevailing when there were only 97,000 houses on the market, some high cost landlords in the private sector will be driven off the market, and publicly subsidized housing must replace the newly abandoned properties if there is to be a permanent addition to the housing stock. If the rate at which houses are driven off the market increases as the rent is depressed below the $100 point prevailing with 100,000 houses, the marginal cost of providing housing beyond the 100,000 house level will increase. Assuming that the decision maker wishes to maximize only the efficiency of *government* expenditure, it follows that he will no longer prefer to spend government funds upon a special purpose housing subsidy rather than a negative income tax if the marginal subsidy cost of providing the 100,001st house exceeds the marginal benefit Slumville tenantry receive in the form of decreased rents. Since the rate at which a curve increases at a given point may be represented graphically by a straight line which is tangent to the curve at that point, the subsidy should cease when a line tangent to the total benefit curve is parallel to a line which is tangent to the subsidy cost curve. Thus, in the situation portrayed in the preceding diagram, the special purpose housing subsidy should terminate with the 3,000th house since a straight line (X), tangent to the total benefit curve (TB), may be drawn which is parallel to the subsidy cost curve (SC) at that point.

It is important to recognize, however, that there is no divine law which ineluctably commands that the special housing subsidy cease when the government makes up the loss of those houses driven off the market by code enforcement which are not replaced by dwelling units trickling down from Middleburg. As our previous discussion suggests, the point at which marginal subsidy cost will equal marginal tenant benefit will depend upon:

1. *The elasticity of housing demand within Slumville.* The greater the decline in rent levels precipitated by a given increase in supply of housing above the 100,000 mark, the greater the tenant benefit.

2. *The elasticity of housing supply within the unsubsidized sector.* The larger the number of dwelling units removed as a result of a given decline in rents, the larger the subsidy required to maintain the overall supply at a level higher than 100,000 units.

3. *The cost of adding an extra unit of housing to the Slumville market.*

If housing demand is relatively elastic, housing supply relatively inelastic and the cost of subsidy relatively low, the optimal subsidy level may well exceed 3,000 units.

We are now in a position to resolve the conundrum with which this section of the essay opened.[43] We were then confronted with the task of choosing between two different subsidy plans which colorably could be advanced to support a comprehensive code enforcement program. The first, more modest, proposal simply sought to maintain rents at pre-code enforcement levels. The second, somewhat more ambitious plan, sought to secure to the tenantry the rent decrease it would have otherwise obtained as a result of the flow of housing units trickling down from Middleburg. It is now easy to see that neither of the plans may be optimal in a given situation. Although they differ in other respects, the two proposals have a common flaw. Each plan sets as its goal a rent subsidy program that will lower the Slumville rent level to a certain "target" figure. In neither program, however, is the target necessarily set at the level at which the marginal benefits of the subsidy equal its marginal costs. And it is only when this point is reached that the subsidy should be terminated, assuming that the decision maker's goal is simply to maximize the impact of government expenditure. Using this "marginal cost-benefit" test we have seen that while a subsidy plan must fulfill the less ambitious subsidy goal (in our hypothetical 3,000 units), it may not be rational to go beyond this point—as suggested by the second, more ambitious plan—depending upon the elasticity of total housing demand, housing supply within the private sector and the marginal cost of adding an additional unit to the Slumville rental stock. At a later point in this essay, we shall modify this "marginal cost-benefit" test as we find it necessary for the decision maker to accommodate interests other than maximizing the redistributive impact of government funds in designing the code-subsidy program. Nevertheless, the cost-benefit discipline set out in this section

43. *See* p. 1119 *supra.*

demarcates the outer limit beyond which the code enforcement-subsidy approach should never be pursued, providing an important reference point for our subsequent consideration of factors which could well temper government's reliance upon code enforcement as a redistribution technique.

V. Slumville Revisited

It would be helpful, before continuing, to recapitulate. In the second section of this essay, an attempt was made to specify a model of a slum in which landlords could not pass on any of the costs of comprehensive code enforcement to their tenants. Finding the model's assumptions about housing supply primitive, the third part of the essay sought to state with greater sophistication the supply conditions under which landlords could not pass on any of the costs of a comprehensive code enforcement program. We found it possible to state a formula which would determine the extent to which a government subsidy was required to prevent landlords from passing on their code costs to tenants. After doing so it proved possible to develop a distinctive rationale to support the claim that a special purpose housing subsidy benefits the slum tenant class more than the expenditure of the same amount of government money upon a more general income maintenance scheme (Section IV). We are now in a position to consider the extent to which the assumptions made in Section II as to Slumville's market structure were necessary in reaching our conclusion that government money could—up to a certain point—generate more benefits to the poor when spent on a special housing subsidy in support of code enforcement.

A.

1.

In our earlier discussion we assumed that all of Slumville's housing was of equally poor quality before code enforcement. If this premise is abandoned, the analysis is complicated considerably, as the following exercise suggests.

Imagine once again that Slumville is divided into two districts, X and Y. On this occasion, however, we will be obliged to describe the nature of the two areas in somewhat greater detail. Assume, then, that for a significant number of Slumville residents, X and Y are comparable in all those aspects of community life which do not

depend upon the quality of the physical structures housing the inhabitants. Thus, with respect to such factors as the quality of educational, shopping, and recreational facilities as well as distance from employment centers and access to mass transportation facilities, a significant number of residents would be indifferent as to whether they lived in X or Y.[44] The only salient difference between the two neighborhoods lies in the quality of housing prevailing in the two areas. While the houses in X are below standard, the houses in Y are in substantially worse shape. Consequently, before code enforcement, X's houses rent for $100 per month while Y's are going for $60, the rent differential being determined, of course, by the actions of those who are relatively indifferent when they consider whether to live in one area or the other. With the imposition of comprehensive code enforcement, however, housing quality in Y will reach the new high code level attained in X and housing quality will no longer distinguish the two zones. Consequently, provided that there are a significant number of tenants in Y who will react lukewarmly to an attempt by Y's landlords to increase the rents beyond the old $60 level, rent levels in X will *decline* from $100 to $60 as a result of the newly intensified competition generated from area Y which has now become the equivalent of area X in all relevant aspects. Thus, comprehensive code enforcement will force rent levels down in slum areas which formerly offered relatively superior housing to the level prevailing in neighborhoods containing formerly inferior housing but comparable non-housing amenities.

If, however, Areas X and Y not only offer different housing quality but different levels of other kinds of community amenity, the situation must be analyzed further. X may stand in one of two relationships with Y. On the one hand, along with its better housing, X may also have better transportation, education, recreation etc. than Y; on the other hand, along with its better housing, X may possess non-housing ameni-

44. It should be apparent that the invocation of the notion of a "significant number" of Slumville residents who are indifferent to "non-housing" amenities in X and Y is an oversimplification. How large must the number be to be "significant"? Individual evaluations of housing, transportation and other facilities will, of course, differ substantially among Slumvillites. Thus, one group may think that X's "non-housing" amenities are far superior to Y's and another group may hold the opposite view. So long as the "pro-X" (or pro-Y) contingent is insufficient in number to fill *all* the units available in Area X (or Area Y), however, the rent level prevailing in the area will be determined by those Slumvillites who are indifferent as between the non-housing services generated in X and those provided in Y and who will leave X if rents there get out of line with those prevailing in Y. Thus a "significant number" of indifferent Slumvillites is a number large enough to make it impossible for a given area to be occupied completely by tenants who believe that its non-housing facilities are superior to those available in other slum zones.

ties which, in the aggregate, Slumvillites find *less* attractive than those offered in Y. These two cases must, alas, be considered separately.

Starting with the more likely situation, imagine that X is superior both in housing and non-housing characteristics. Here, the impact of comprehensive enforcement will be easy to assess: rents in X will decline to something below $100 as some residents find Y's $60 rent attractive, given the improved housing that it now offers; as X's rents decline to $90 (for example) some members of Y will find the $90 rental more attractive than the $60 level in Y, given X's superior non-housing amenities; if at $90, the number of ex-Y'ers moving into X equals the number of ex-X'ers moving into Y, X's rent will remain stable, and if not, the rent will continue to plummet until equilibrium is reached; while all this is happening in X, however, the $60 rental in Y will remain constant provided that a significant number of old-time Y residents are lukewarm to code improvements. Thus, when one area is more desirable with regard to other parameters as well as housing, its rents will decline *somewhat,* but will not plummet to the level obtained in the generally poorer quality area; at the same time, no compensating increase will be generated in the poorer area, provided that a significant number of old-time residents react "lukewarmly" to landlord efforts at raising the rent.

A different result follows when X only possesses superior housing structures, and contains inferior facilities of other kinds. In this case, rentals in Y will move beyond the $60 mark as a result of comprehansive code enforcement. Since Y will now have equal housing quality and superior non-housing amenities, it will attract X'ers who will be willing to pay at least their old rents of $100 for Y's units, while no Y'ers will voluntarily move out of their newly improved units so long as they remain priced at $60. This means that rents must increase in order to force Y'ers out of their old apartments so that the ex-X'ers' desires for high quality living can be fulfilled.

Thus far, however, we have only established that rents in Y will move beyond the $60 level. Can one go further to estimate the extent to which they will rise? The answer to this question depends upon how much X'ers and Y'ers value the area's non-housing amenities. If only a relatively small number of ex-X'ers arrive in Y, they will first successfully outbid those old-time Y families who were lukewarm about their code improved apartments at $60, then those who were lukewarm at $61 . . . etc.; but the supply of newcomers to Y will be exhausted long before Y's rent level approaches the old $100 mark previously prevailing in X. While Y's landlords would, of course, love

to charge the newcomers at least the $100 they were spending formerly, the competitive dynamic we have already examined will prevent this from occurring, since it is the spending propensities of the marginal families who will maintain Y's apartments at full occupancy which set the rent for all. If, however, a sufficient number of ex-X'ers arrive on the scene to displace *all* those Y'ers who are unwilling to meet the ex-X'ers' offer of $100 for their apartment, rents will of course increase to the old level formerly prevailing in X; if even more ex-X'ers arrive, rents will even be bid beyond the $100 mark.

Meanwhile, former Y residents who are unwilling to pay the new higher rents, must, of course, move somewhere. And since, in our model, they will find it difficult to move beyond Slumville's borders, they must, perforce, move to X. Once in X, the expatriates will find the price determined—as always—by the conduct of those residents (both new and old) who are least willing to pay the rent, even though X's houses formerly fetched $100 a month. Thus, assuming there are families who are lukewarm about housing code enforcement among the expatriates from Y, it follows that the new rent level in X will fall below $60. For if the lukewarm ex-Y'ers would have been unwilling to pay more than $60 a month for code-improved housing in Y, they will be unwilling to pay even that sum for newly code improved housing in X, since (by hypothesis) this area is substantially worse in other respects—having poorer schools, shops, transportation, etc. If the expatriates are willing to act in a lukewarm manner and double-up or skip rent until the rental levels are reduced below $60, rent reductions will in fact take place, regardless of the $100 level which generally prevailed prior to code enforcement when X had better housing quality than Y. It would appear, then, that in this last, most complicated and least likely case, comprehensive code enforcement will induce rents in Y to increase beyond the $60 level and may indeed generate a rent level exceeding $100 if enough ex-X'er's and old-time Y'ers value living in Y very highly; in the meantime, rents will plummet in X from $100 to something below $60 if there are a significant number of families among those emigrating from Y who are lukewarm about code enforcement. Thus while code enforcement here will sometimes induce an overall decline in rents (when the aggregate decline in X > aggregate increase in Y), it will sometimes lead to an increase in the average Slumville rental (when the reverse occurs).

Our original Slumville model, then, in assuming that the city's slum contained structures which were equally slummy included a significant oversimplification which served to understate the income redistribu-

tion potential of code enforcement. Except in one class of cases, comprehensive code enforcement may be expected to depress rent levels in the primeval Slumville hypothesized earlier rather than leave them unchanged, as our earlier analysis suggested. It is only in those unlikely cases where the area having relatively *poorer* housing also has relatively *better* non-housing amenities that comprehensive enforcement could conceivably generate an increase in the average rent level, and even here, there is no necessity that such a result obtain.

This is not to say that it is impossible to structure a housing code under which landlords would be unable to pass on any of their code costs even in those relatively rare cases where the poorer quality housing is located in areas having the better non-housing amenities. All that would be required here is a code which is "zoned" to demand a lesser degree of housing improvement in the area in which non-housing amenities were thought by significant numbers of residents of Slumville to be superior[45]—in our discussion, Area Y. For as our analysis made clear, rents in Y will increase beyond $60 only insofar as X'ers were attracted by the superior living conditions now made available in Y as a result of enforcement. And as the "zoned housing code" is structured to require fewer improvements in Y's housing, Y would attract fewer and fewer X'ers since the *total package* of housing and non-housing amenities obtained by living in Y no longer would seem superior in the judgment of many Slumvillites to those obtained by living in X. Thus the zoned housing requirements could be manipulated until a substantial number of X'ers and Y'ers would not care very much about the area in which they lived if apartments in both sectors rented at the same price. At that point, landlords in Y could no longer raise their rent above $60, since they would find themselves suffering a contraction of demand as some lukewarm Y'ers doubled-up, and others moved to X, while X'ers would no longer be attracted by Y's superior non-housing amenities since this superiority was now counterbalanced by its inferior housing. Similarly, landlords in X would find themselves forced to reduce their prices from $100 to $60 to meet the suddenly intensified competition from Area Y. Thus, with a properly zoned code, comprehensive enforcement can always be expected to depress prices throughout the slum to the levels prevailing in the areas which have the best non-housing amenities.

While "zoned codes" would thus make it impossible for landlords

45. Zoned housing codes, and the constitutional problems arising under them, are discussed in Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115, 1120-23 (1956).

to pass on their costs, even in those limited number of situations where they might succeed in shifting some of their costs under comprehensive enforcement of a uniform code, there are two obvious costs in using the zoning device. First, zoning means that the code's protection will be watered down for those who live in the worst structures—a position which is difficult to maintain in the political arena even though the worst buildings will be located in areas which offer compensating non-housing advantages. Second, adoption of a zoning scheme of any substantial complexity would invite large-scale corruption, as landlords seek to have the zone structured in a manner which is in their financial interest. Nevertheless, even when these costs are given full weight it remains likely that a moderate degree of zoning could appropriately be invoked to eliminate all attempts to pass on code costs in the limited number of situations in which this is a serious danger.

2.

Just as the earlier Slumville prototype assumed that the ghetto's housing was of equal quality, it also assumed that the ghetto's tenantry wreaked havoc equally upon their rented dwellings. Fortunately, modifying this assumption in the direction of realism does not require extensive discussion. If landlords obtain accurate information about a particular tenant's propensity to damage the premises, they will attempt to charge a rental which takes this fact into account, rewarding "good" tenants with lower rents and vice versa. Thus, since under our prototype it was assumed that landlords believed all tenants to be average, we are obliged to make a minor modification in the conclusions we have reached. Instead of talking about a *uniform* rent level, as has been our custom, we should have been speaking of an *average* rent level which was the mean value in a range of rents representing the effort by landlords to assess the extent to which particular tenants are better or worse than average. Needless to say, each landlord will be subject to a competitive constraint in making his determination of a specific tenant's propensity to destroy. For if he incorrectly guesses that a tenant is "bad," another landlord is always free to bid his customer away by charging the tenant a rent appropriate for an average or good risk; on the contrary, if he guesses that the tenant is "good" when he is "bad" this fact will soon become apparent as greater code costs are incurred than were anticipated. In this event, the landlord will either raise the rent or evict in the hope of finding a better tenant. Thus, while imperfect landlord information as to the quality of any particular tenant

may cause some pricing errors, there is little reason to believe that they will be of extremely long duration.[46]

B.

Our previous analysis assumed that a substantial improvement in housing quality would not induce a large number of Athenians living in Middleburg, let alone Snobtown, to consider moving into Slumville. This is clearly a critical premise which provides the underpinning for our argument that a special purpose housing subsidy may often generate greater benefits than a generalized income maintenance scheme. For if, as a result of comprehensive code enforcement, a large number of middle-class Athenians will enter Slumville, bidding up the rents, it should be quite clear that a very substantial proportion of code costs will be passed on to the tenantry within Slumville, perhaps forcing the poor into relatively small areas in which the code is not enforced because of the politicians' fear that a large number will be left homeless. Nevertheless, I believe that it is unnecessary to analyze in detail the dynamics of a possible in-migration of the lower-middle-class Middleburgers to Slumville, since it seems clear that the

46. While the recognition that tenants have unequal propensities to destroy their apartments has not substantially undermined our earlier analysis, it does reveal an important issue which the primitive Slumville model assumed out of existence. Thus far, we have concerned ourselves solely with the impact of imposing code liabilities upon landlords; but if tenants themselves vary in their propensity to destroy their accommodations, should not the law seek to deter serious tenant malefactors who are themselves causing code violations? If — as we have suggested — the market can discriminate with moderate success between good and bad tenants, this fact should be critical to a satisfactory resolution of the problem of tenant sanctions. For our discussion of market forces suggests that even without any state intervention, a tenant believed responsible for a serious code infraction can expect an eviction notice or rent hike from his present landlord; moreover, if the tenant finds himself evicted, he can expect to keep his past history secret only with difficulty. Landlords may generally be expected to protect themselves by asking tenants where they formerly lived and whether previous landlords were satisfied with their conduct. Once these questions are asked, the prospective tenant has only three options: he may tell the truth, lie, or refuse to answer. But lies may be checked by a telephone call to the landlord or credit bureau, and landlords may be expected to suspect the worst when their reasonable questions as to past history are answered evasively or not at all. Finally, even those few tenants who slip through the information net will again be confronted by either a rent hike or eviction notice if they continue their past practices.

Thus a tenant who imposes $100 in code costs upon a landlord will commonly find himself obliged to pay a "risk of ruin" premium which is suggested by his past history of vandalism. Indeed, there is every reason to believe that the tenant who has generated $100 of code costs in the past will ultimately pay a premium far greater than that sum in the future: since serious vandalism may substantially strain limited landlord resources, and the opportunities for obtaining risk-spreading insurance against vandalism in the slum are virtually nonexistent, ghetto owners can be expected to be quite risk-averse and charge high premiums to tenants whose histories suggest vandalism.

Consequently, if the tenant contemplating vandalism considered the pay-off in a sober manner, he would typically conclude that vandalism did not pay, given the relatively heavy penalty imposed by the market and the relatively small chance of avoiding detection. This is not to say that vandalism does not occur in the slums. The analysis simply suggests

mere enforcement of housing code standards will not generate such a population movement to any significant extent.[47]

On the other hand, the possibility of a different kind of population shift should be taken much more seriously. If (contrary to our previous analysis) one assumes that there is more than one Slumville in the city of Athens, it should be clear that the city cannot hope to enforce the housing code in one of the slums without taking into account the chance that inhabitants of the slums which are being ignored by the code inspectors will seek to move into the improved Slumville, bidding up the rents. Thus our earlier conclusion clearly assumes that if there is more than one slum in a community, the code must be comprehensively enforced in all of the slums. Of course, if slums are distant from one another, only a small number of families will be tempted to move as a result of code enforcement limited to any one of them. As distance increases, code enforcers will properly consider the problem of inter-slum movement to be insignificant. How great the distance must be before a slum is ignored will be determined after considering the city's transportation network, each slum's proximity to employment centers, the mobility of the population and similar factors. Despite the complexity of these factors, it is quite likely that a policy maker who is intimately involved in the life of his city should be able to make a rough guess as to intra-city movement which has considerable reliability.

It may be argued, however, that a code official who limits his concern to the possibility of *intra*-city population shifts—as is suggested here—will be ignoring a basic factor which will tend seriously to undermine his income redistribution effort. Jay Forrester, in his controversial effort at constructing a mathematical model depicting the growth and decline of the American city,[48] has argued that his model demonstrates that any public attempt to improve housing quality in the slums will in the long run prove counter-productive because it will induce an in-migration of the poor and unskilled from regions

that it is folly to expect that a systematic effort by the state to impose relatively small money fines on tenants who violate the code will be a very successful deterrent to tenant depradation; for the extra marginal deterrence to be gained by threatening the tenant with a $100 fine must be minimal if the threat of more substantial money penalties exacted by the market has been ineffective. In short, except for the most egregious cases of tenant vandalism which cry out for a symbolic display of public disapprobation, the cost of supplementing the rough justice meted out by the market seems far too substantial to merit the use of governmental sanctions.

47. Karl and Alma Taeuber in their comprehensive study, NEGROES IN CITIES (1965), found overwhelming data indicating the "virtual irreversibility" of the shift of a unit from white occupancy to non-white occupancy. *Id.* at 112 and *see* esp. Table 28.

48. J. FORRESTER, URBAN DYNAMICS (1969).

beyond the city. This, it is said, will in turn generate an enormous exodus of modern business enterprises into suburbia, thereby leaving the city in an economically stagnating condition. Thus, it could well be that Professor Forrester would consider the code enforcement-housing subsidy program examined here to be fundamentally misconceived. Nevertheless, an attack on code enforcement based upon the teachings of Forrester's *Urban Dynamics* should be rejected. A careful reader of the book will at no point find a reasoned defense of the author's belief that improving housing in the central city will generate substantial population movements on a national scale.[49] Moreover,

49. In theory, the power of Forrester's effort rests in its attempt at constructing a model containing a large number of simultaneous equations, each incorporating a mathematical statement of a well-known and non-controversial relationship between factors conditioning a city's rise and decline. The strength of this approach, of course, is that building from a set of relatively non-controversial equations, the mathematical model may generate a set of counter-intuitive conclusions, since the computer—when it is programmed correctly—may canvass the relationships implicit in the multi-equation model far more systematically than the human mind can organize the relationships which the model's equations incorporate. I have no difficulty with this approach on the level of methodological theory. However, it should be clear that the conclusions ultimately derived from the model *can only be as sound as the original equations which attempt to describe the relationships obtaining between the basic factors conditioning a city's growth, decline, and fall.* Thus, when the Forrester model grinds out a "counter-intuitive" conclusion which holds that the more and better housing provided to the poor, the greater the poor will be injured in the long run, the first question to ask is whether this counter-intuitive conclusion is a consequence of a faulty equation system which describes reality incorrectly. Insofar as the conclusion proceeds from faulty premises, the student should remain resolutely unimpressed by the argument, no matter how ornate the mathematical jargon in which the premises are expressed.

Applying this test to Forrester's Cassandra-like predictions, one finds them sorely wanting. The fifth equation in the model purports to describe the relationship which is alleged to exist between increasing housing supply on the one hand, and the in-migration of the poor on the other. Not surprisingly, given Forrester's "counter-intuitive" conclusions, the equation says that as the housing supply for the poor moves from shortage to surplus, the rate at which the poor will enter the city from the hinterland increases dramatically. *Id.* at 139-40. Given this equation, there can be little surprise when Forrester's model "concludes" that increasing the supply of housing will lead to a counter-productive influx of the unskilled—for the "counter-intuitive conclusion" was already explicit in the "counter-intuitive premise." Despite the critical nature of Equation 5's assertion that migration increases dramatically with relatively small increases in housing quantity, Forrester does not even attempt to cite a single piece of empirical research which tends to corroborate Equation 5, although he recognizes that "[s]ome social scientists who read the typescript of this book have objected to this housing multiplier on the basis that studies show that housing is not a strong determinant in regulating urban migration of the underemployed." *Id.* at 140. The author suggests, without any detailed analysis, that these studies are "not *necessarily* contradictory" (emphasis added) with his equation. Even taking this statement on faith, it nevertheless remains true that not a single study affirmatively supports Forrester's conclusion while a significant literature appears to refute it. At the very least, it appears incumbent upon Professor Forrester to explain *in detail* wherein the seemingly competent studies are mistaken. To make matters worse, Forrester's eleventh equation asserts that the existence of a public housing program will increase yet further the in-migration of the poor. *Id.* at 143. The meagre evidentiary basis for this equation is revealed by the following discussion, which contains the author's complete explanation:

> Equation 11 describes the influence of a low-cost-housing program. Living spaces were accounted for in Equation 5. Here in Equation 11 the attractiveness arises from the low-cost-housing-construction activity and the image of aid to the underemployed

Forrester's assumption is undermined by the substantial amount of empirical work which has attempted to explain migration patterns in general and those of minority groups in particular. These inquiries have unequivocally concluded that the primary magnet for migrants has been a strong job market. Indeed, even for those who have not uprooted themselves in search of work, there is some evidence that "the presence of friends and relatives matters a great deal more than such things as the housing supply or the availability of public assistance. If these conditions do make some marginal difference in the volume of a city's migration, most likely it is through the encouragement or discouragement friends and relatives already there give to potential migrants, rather than through a general spreading of the word among the would-be freeloaders."[50]

Another trend in urban population movements may prove much more important, although at present it is little more than a hope. It is conceivable that over time public policy will permit a substantial number of inner-city blacks to move directly from the urban core to the suburbs, thus skipping over Middleburg.[51] To a certain extent, improving all inner-city housing to code levels will slow the exodus by

which this creates. It says that active low-cost-housing-construction creates attractiveness above and beyond what arises from the physical housing units. This is partly because of the atmosphere of activity in behalf of the underemployed and also because the living units will be seen as more attractive than the deteriorated units composing much of the underemployed-housing pool itself.

Id.

The superficiality of this analysis speaks for itself; once again, no effort is made to deal with the seemingly inconsistent empirical literature. Nor is there a thoroughgoing effort to explore the extent to which the model's ultimate predictions are sensitive to changes in the equations discussed here.

50. Tilly, *Race and Migration to the American City,* in THE METROPOLITAN ENIGMA 124, 130 (J. Wilson ed. 1967). Tilly's article is an excellent summary of work in the field prepared by a sociologist of international reputation. For the overriding importance of economic opportunity, see H. SHRYOCK, JR., POPULATION MOBILITY WITHIN THE UNITED STATES 403-09 (1964); Kuznets, *Introduction: Population Redistribution, Migration, and Economic Growth,* in H. ELDRIDGE & D. THOMAS, DEMOGRAPHIC ANALYSES AND INTERRELATIONS, vol. III of POPULATION REDISTRIBUTION AND ECONOMIC GROWTH, UNITED STATES, 1870-1950, xxiii-xxxv (1964); Turner, *Migration to a Medium Sized American City: Attitudes, Motives, and Personal Characteristics Revealed by Open-End Interview Methodology,* 30 J. OF SOC. PSYCH. 229-49 (1949); for the factors which impel migration other than the search for a job, see H. SCHWARZWELLER, FAMILY TIES, MIGRATION, AND TRANSITIONAL ADJUSTMENT OF YOUNG MEN FROM EASTERN KENTUCKY (1964); J. MacDonald & L. MacDonald, *Chain Migration, Ethnic Neighborhood Formation and Social Networks,* 42 MILBANK MEMORIAL FUND Q. 82-97 (January, 1964); Rubin, *Migration Patterns of Negroes from a Rural Northeastern Mississippi Community,* 39 SOCIAL FORCES 59-66 (1960).

51. David Birch, in his study of THE ECONOMIC FUTURE OF CITY AND SUBURB (Committee for Economic Development, Supp. Paper No. 30, 1970), indicates that the rate at which blacks are migrating into suburbia increased significantly during the second half of the 1960's, although the absolute number of blacks involved in this particular migration remains so small that it cannot be expected to lead to a significant degree of black diffusion unless aided by far more affirmative governmental action than is now currently forthcoming. *Id* at 31. *See* A. DOWNS, URBAN PROBLEMS AND PROSPECTS 27-74 (1970).

making ghetto life more attractive. However, a simple code enforcement program will probably have a limited effect on the outflow so long as other municipal services remain in their present condition of disrepair. If, on the other hand, the exodus became substantial, there would probably be a large number of excess housing units on the market. While, over the long run, one may expect marginal landlords to respond to the diminution of housing demand by withdrawing from the market, it seems likely that there will be a substantial time lag during which the excess housing will cushion the impact of the withdrawal of some units precipitated by code enforcement. Thus the subsidy cost of comprehensive code enforcement may be reduced significantly if, for independent and pressing reasons, the government undertook a substantial effort at integrating blacks into the lily-white ring which surrounds the depressed core.

C.

Thus far this canvass of the theoretical underpinnings of the primeval Slumville model should bring joy to the heart of the code enforcement proponent. If anything, increasing the sophistication of the analysis has suggested that code enforcement, when backed by an appropriate housing subsidy, is an even more potent redistributive technique than our more primitive discussion indicated. Nevertheless, in our second visit to Slumville, we have thus far refrained from evaluating the fundamental assumption which serves as this essay's major premise. We have assumed throughout that the market for slum housing may be appropriately analyzed with concepts enshrined in economics theory textbooks. Does this assumption make sense? As we shall see, there is far too little empirical evidence collected to convert the confirmed skeptic to a new belief in the applicability of the analysis; nevertheless, the following paragraphs can at least suggest to those who tend towards skepticism that they may too easily discount the possibility that the theoretical market system is a slum reality, at least so far as rental housing is concerned.

1.

The critic of an economic analysis of code enforcement may appropriately begin by emphasizing the artificiality of our assumption that tenants incur no significant costs in moving from one apartment to another in Slumville. This assumption is clearly false as it stands. And one may argue that a rational landlord, recognizing that the tenant will incur moving costs, will exploit this fact by passing on at least

some of his code costs, confident that the tenant will bear the costs instead of going through the expense of moving.

There are, however, several weaknesses in this argument. First, a landlord also incurs costs when his tenant moves—the apartment may remain vacant for a considerable period of time, during which he receives no income. Moreover, a departing slum tenant may impose another set of costs on the landlord by departing with the plumbing, breaking windows or committing other acts of vandalism. While it is impossible to say how often such conduct occurs in fact, my impressionistic conversations with landlords indicate to me that vandalism by the departing, judgment-proof tenant is widely feared.[52] And it is the fear —rather than the fact—which will count in the landlord's decision whether to raise the rent. In short, it may well be that the landlord finds the departure of an average tenant just as expensive as does the tenant, in which case one would not expect the landlord to raise rents if there is any great chance that the tenant will respond by leaving. Since substantial evidence suggests that ghetto mobility is extremely high,[53] there is thus good reason to believe that rational landlords would not attempt to trade heavily on the exit costs of their tenantry.

There is yet another flaw in the argument that landlords will exploit tenant inconvenience in moving by passing on code costs. Assume—contrary to our argument above—that landlords *will* seek to exploit

52. The reality of tenant vandalism is further attested to by Professor Grigsby and his group in their study of Baltimore. *See* note 30 *supra*.

53. Maisel in his study of the determinants of mobility based upon 1960 census data in the Western United States found on the basis of standard statistical techniques that mobility increased as income declined. Maisel, *supra* note 16, at 95. Lower-class mobility is further suggested by the massive movements of blacks into formerly white neighborhoods, systematically documented by Taeuber & Taeuber, *supra* note 47, at 99-166. It should be noted that the Taeubers found that the areas which had recently changed from white to black were not composed of extraordinarily high proportions of blacks who had recently migrated into the region, *id.* at 145, thereby further rebutting the notion that the typical black ghetto resident, once settled, is relatively immobile. Finally, the raw data collected by the 1960 Census tells a similar story, although it has not been analyzed using sophisticated statistical techniques. The Philadelphia City Planning Commission, for example, describes the patterns revealed in the Philadelphia area:

> *More than half the residents under age 45 moved* during the 1955-60 period, but *less than one-third* of those 45 and older changed residence. Men were proportionately more mobile than women and *non-whites more mobile than whites*. Movers had more formal education and higher occupational status than non-movers; but curiously, they also had higher unemployment rates. Among the mobile population alone, "long distance" movers (migrants and movers between City and Environs) were younger, better educated and more highly skilled than "short distance" movers (those who remained within the City or within the Environs) (emphasis added).

PHILADELPHIA CITY PLANNING COMMISSION, MOBILITY IN THE PHILADELPHIA METROPOLITAN AREA, 1955-1960, at 11 (1965). These patterns are typical of those prevailing in metropolitan areas during that period according to my inspection of data available. *See* UNITED STATES BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, SUBJECT REPORTS: MOBILITY FOR METROPOLITAN AREAS, FINAL REPORT PC(2)-2C (1963); unfortunately, this report contains no effort to analyze the raw data contained in its tables.

substantially the tenant's moving costs. There is no reason for the exploitative landlord to await code enforcement in order to do so. Instead, it would make sense for the profit-maximizing lessor to increase his rents up to the point where his tenant would seriously consider moving, even if code costs were not imposed upon him. And if exit costs have already been fully exploited before code enforcement, the landlord cannot exploit them again, without inducing his tenant to leave. The argument from exit costs, then, falls between two stools—either "exploitative" landlords have already taken advantage of the inconvenience of moving before code enforcement or else they never will.

2.

Thus, those unpersuaded of the utility of classical forms of economic analysis cannot take refuge in vague claims that tenants are "locked into" the apartments they occupy, but must move to a higher plane of abstraction and directly question whether it makes sense to assume that landlords act to maximize their profits. If one abandons the profit-maximizing premise, it is, of course, quite easy to sketch out an argument which would indicate that landlords will pass on a large share of their code costs to tenants even under the market conditions developed in this essay. Under this view, one can claim that landlords only attempt to profit-maximize in a slipshod way; they do not constantly reevaluate the profit potential of their properties. Rather, once a rental for a particular apartment is determined it tends to be maintained until an extraordinary event jars the landlord into reevaluating the situation. Thus an apartment rented out to an individual for $100 will probably be rented out at that sum until the individual voluntarily moves despite the fact that it could be rented out to another tenant for $140. If, however, the code inspector requires repairs which cost $30 a month, the landlord will overcome his inertia and increase the rent charged to his tenant by $30.

I am unimpressed by this argument. Most important, it assumes that but for the code enforcement campaign, no other "extraordinary" event will occur which will rouse the landlord from his inertia and induce him to reevaluate his profit picture. But when one attempts to visualize the typical landlord's economic environment, it seems full of events which can be expected to induce an agonizing reappraisal of the rental structure: real estate taxes will be raised, mortgage payments typically must be met, the premises must often be repaired, and one tenant will be replaced by another at a new rental, all of which call the entire rental schedule into question. Thus the "inertia" argument

seems to hypothesize an idiosyncratic landlord psyche. For the argument assumes that the landlord will not reappraise his rental policies when confronted with other seemingly catalytic events, but will undertake a reassessment when prodded by code enforcement. It is much more plausible to recognize that the kind of stimulus code enforcement provides to landlords is not fundamentally different from that provided by numerous other events in the landlord's life: if some landlords are really *that* inert they will simply absorb code costs without thought; if they are not that sluggish, they will be induced by other events to maximize profits regardless of the existence of a code enforcement campaign.

Nevertheless, it remains true that no researcher has yet attempted to describe, let alone assess, the mental processes by which slum landlords of various kinds devise their rental schedules.[54] And in the absence of a substantial amount of research along this line, committed skeptics may retain their belief that prices are being set quite quixotically in the slum rental markets, despite the confidence of those who worship different gods that the profit-maximizing premise is legitimate.

3.

It may also be suggested that the models discussed in the essay are woefully defective in assuming that Slumville renters are both aware of the housing opportunities open to them and are conscious of the price differentials between units. The question is a controversial one, with some commentators claiming that the lower class does not endeavor to control its future in any way, let alone engage in a considered comparison of costs and opportunities. Other commentators, however, affirm that the poor are constantly aware of the problem of comparative cost, although they often resolve the problem by purchasing goods which are disfavored by the (upper) middle-class academics who analyze them.[55] I admit to holding the latter view, although given

54. Researchers have, however, discovered a substantial degree of landlord ignorance concerning the availability of federal programs which could assist them if they chose to improve the quality of their housing. *See, e.g.*, G. STERNLIEB, *supra* note 6, at 189; moreover, Professor Grigsby's study of Baltimore indicates that especially the small-time absentee owner lacks many of the special skills needed to obtain financing and deal with the distinctive problems of poor tenants. *See* W. GRIGSBY ET AL., *supra* note 7, at ch. 10. Nevertheless, the fact that a substantial number of landlords lack an insight into the complexity of federal subsidy programs or lack the skills required to deal with the lower class does not of itself suggest that they do not attempt to maximize their profits, given the constraints implied by their own personal limitations. That is to say, because landlords are unsophisticated, their cost curves are higher than they might be had they received better training; given this higher cost curve, however, it still remains likely that they price their units with a profit-maximizing goal. And it is only this premise which is required by the analysis advanced in this essay.

55. Professor Banfield is a leading exponent of the view which holds that, psychologically speaking, the lower class has never transcended Rousseau's state of nature:

the present state of our understanding, candor again requires the confession that it is faith and not compelling evidence which impels my choice (and, I might add, the choice of everyone else).

On a somewhat lower level of abstraction, however, it does seem possible to present three reasons why slum residents should be expected to compare alternatives when selecting an apartment. First, there is the simple fact that rent takes up a very substantial share of the poor person's budget. Second, beyond the cost, the place one lives has a great impact upon one's entire pattern of life. Third, the process of apartment hunting takes hours at least, and oftentimes days. As a result of this time-consuming process, it is reasonable to believe that the prospective tenant obtains some sense of the alternatives open to him in his area. Given that all the available evidence indicates an extremely high rate of ghetto mobility,[56] it would therefore seem remarkable if large numbers of ghetto families were not, at every point in time, engaging in the process of comparing and acting upon perceived alternatives. It is only necessary to indulge this modest assumption to accept the framework presented here.

D.

Finally, there remains the ultimate empirical question whether a significant class of slum residents exists which will act in an appropriately "lukewarm" fashion when faced with a rent increase on their newly code improved apartment. There is, alas, no evidence on this issue that I have found, in part because its significance has not been ap-

> If [a member of the lower class] has any awareness of a future, it is of something fixed, fated, beyond his control: things happen *to* him, he does not make them happen. Impulse governs his behavior, either because he cannot discipline himself to sacrifice a present for a future satisfaction or because he has no sense of the future. He is therefore radically improvident: whatever he cannot consume immediately he considers valueless.

E. BANFIELD, THE UNHEAVENLY CITY 53 (1968).

While Professor Banfield is careful to deny that all slum inhabitants are true members of the lower-class culture as he defines it, *id.* at 47-48, his entire analysis of the urban scene presupposes that a substantial number of slumdwellers are imbued with lower-class culture. In contrast, Elliot Liebow, in his brilliant study of the behavior of a group of ghetto blacks whose social center was a street corner, concludes:

> [T]he streetcorner man does not appear as a carrier of an independent cultural tradition. His behavior appears not so much as a way of realizing the distinctive goals and values of his own subculture, or of conforming to its models, but rather as his way of trying to achieve many of the goals and values of the larger society, of failing to do this, and of concealing his failure from others and from himself as best he can.

E. LIEBOW, TALLY'S CORNER 222 (1967). The book also contains a substantial bibliography of basic writings in the field for those who wish to explore these mysteries in depth. For a selection of more recent studies, see THE GHETTO MARKETPLACE (F. Sturdivant ed. 1969).

56. *See* data discussed at note *53 supra.*

preciated in the past.[57] Nevertheless, while opinions may appropriately differ as to whether a class exists which will respond lukewarmly to a minimal rate increase, there can be little doubt that a point will come at which a relatively small percentage of the tenantry will start limiting their demand even though a preponderant portion of the slum population (the homelovers) would be willing to pay higher prices for their code improvements before turning lukewarm.

In other words, even if rents did increase by $5 before *marginal* tenants began acting lukewarmly, the *average* tenant—who values his new improvements at $10—will receive at least a $5 advantage as a consequence of code enforcement. Thus, even if it were found that a significant lukewarm group did not exist when a very small rent rise was attempted, this finding alone would not critically impair the main thrust of this analysis. Indeed, the only empirical conclusion which would utterly destroy this essay's argument would be a finding that all of Slumville's residents valued code improvements in precisely the same degree. For it is only among this perfectly homogeneous tenantry that the distinction between the "lukewarm" and "homeloving" subclasses would be completely abolished—with disastrous effects for income redistribution policy. In such a world, the first significant group of tenants would turn lukewarm only after the rent has increased $10, thereby generating no improvement for the *average* tenant who similarly values the code improvements at $10.

VI. Slumville—Monopoly (Oligopoly) Style

While the preceding models of Slumville have departed substantially from the economist's conception of a perfectly competitive market, they have nevertheless assumed that Slumville is endowed with a large number of independent landlords, none of whom possess an appreciable share of the market. On the face of it, this assumption seems a reasonably plausible one. Certainly when housing is contrasted to other basic durable goods industries in this country, the comparison is striking: it must be the rare city (or city slum) in which the largest rental landlord has a market share equivalent to that enjoyed by General Motors or Ford or even Chrysler.[58] Nevertheless, appearances

57. Efforts at devising sophisticated estimates of the quantitative impact of quality variables are in their infancy. For the most interesting effort in this general area, see Kain & Quigley, *Evaluating the Quality of the Residential Environment*, 2 ENVIRONMENT AND PLANNING 23 (1970).

58. *See* the empirical evidence on this point discussed in note 7 *supra*.

may be deceiving—it is conceivable, for instance, that in many cities the rental policies of large numbers of small landlords are coordinated (indeed determined) by a small number of rental agents. Much more empirical work must be done before one can be certain of the answer.

While I, myself, would be quite surprised if the typical slum rental market were revealed to be even an extremely loose oligopoly, I can quite understand that many of my readers would suspect that monopolists (or oligopolists) may have a much greater ability to pass on "code costs" to tenants than would landlords confronting a more competitively organized market structure. The point is, of course, a critical one. As we have seen, the greater the special housing subsidy required to support a given comprehensive code enforcement program, the less attractive the program seems when it is compared to alternatives. Thus, it may well appear that if a monopoly or oligopoly controls Slumville the comparative case for comprehensive code enforcement would be substantially undermined.

It develops, however, that intuitions about the power of monopolists and oligopolists to impose code costs upon their hapless tenantry have no basis in economic theory. Indeed, as the succeeding sections will demonstrate, the prospective benefits to the poor that result from a given public investment in a code enforcement-housing subsidy program are *greater* in a monopolistic or oligopolistic Slumville than they are in a Slumville composed of a large number of independent landlords.

A.

To make this clear, we shall begin by tracing a hypothetical scenario from the halcyon days before the code, through the announcement of a code-subsidy program. After a concrete example is explored, we shall attempt a more general theoretical statement of the dynamics described.

Assume, then, that before code enforcement, Slumville's monopolist (named Avarice) knew that if he rented 70,000 units in Slumville, the typical rent would be $210 while if he offered 80,000 units, the average rent would be $200; under these circumstances, Avarice would rent the extra 10,000 units if the marginal costs of doing so were less than $1.3 million, the difference between total revenues at the 70,000 house level ($210 per unit $\times$ 70,000 = $14.7 million) and total revenues at the 80,000 house level ($200 per unit $\times$ 80,000 = $16 million). Since we shall assume pre-code marginal costs were $1 million, Avarice will rent the units, make a $300,000 profit happily until code enforcement strikes, at which time code costs of $310,000 are incurred upon the

marginal 10,000 homes, thereby increasing marginal costs of operating the last 10,000 units beyond the $1.3 million level to $1.31 million. In response, Avarice will evict 10,000 families, generating a situation in which 70,000 units are now renting at $210 with 10,000 families on the streets or leaving town.

The scene shifts dramatically, however, with the intervention of government. Let us suppose that in support of its code enforcement program, the state announces its intention to open public housing *in sufficient quantity* to force the private sector to depress its rent level to the $200 per unit which was charged before the code. Thus, as Avarice is evicting his marginal 10,000 families, the state is equally busy providing these families with code level homes at the $200 rental, perhaps using for this purpose the very 10,000 units Avarice has removed from the market after gaining possession of them through eminent domain. Moreover, the government goes further and opens 5000 additional units at $200 in order to induce Avarice to think again about his decision to limit supply for the purpose of charging a $10 premium in the private sector.

The ball is now in Avarice's court, and the government's subsidy moves make it impossible for Avarice to count upon renting 70,000 units at $210 as he could in the good old days before the sustained governmental effort at regulating the housing market—for the principal reason that Avarice formerly believed he could obtain a $10 premium at 70,000 units was that 10,000 displaced Slumvillites would bid vigorously for the remaining apartments.[59] Given the state's decision to supply 15,000 apartments at $200, Avarice will only be able to rent 65,000 if he insists upon the $210 fee; it is only if he drops his rent to $200 that he can expect to meet the state's competition and keep his 70,000 units fully occupied. Avarice's position can be portrayed in tabular form:

NO. OF UNITS RENTED		RENT		TOTAL REVENUE
65,000	×	$210	=	13.65 million
70,000		$200		14.00 million

59. Of course, given the fact that code enforcement has made each of Avarice's units somewhat more desirable than they formerly were, it can be expected that the 70,000 renters might be willing to spend a somewhat greater sum of money for the units when they are competing for their occupancy with the 10,000 families who will eventually be homeless. Nevertheless, this fine point may be ignored without prejudice to the analysis presented in the text.

The "70,000 units-$200 rent" strategy, then, yields $350,000 more revenue than the strategy involving a rent hike. Thus, if Avarice's cost of operating the 65,000th through 70,000th units does not exceed $350,000, he will maximize his profits by charging a $200 rent, thereby filling 70,000 units in successful competition with the government. Indeed, if Avarice finds it more profitable to reduce his housing stock to 65,000 in pursuit of a $210 unit rent, it should be clear that he has only served to postpone the day of reckoning. For if the government remains steadfast in its "no rent rise" subsidy policy it will simply place thousands more additional units on the market in an effort to force Avarice to lower his rent in order to retain his remaining 65,000 tenants. Indeed, only one of two possible outcomes is ultimately conceivable: either (a) at some output level, Avarice will find it more profitable to capitulate to the government and lower his rent to the $200 level rather than continue losing tenants or (b) Avarice will leave the market entirely, permitting the state to house all 80,000 Slumvillites.

Now, it is worthwhile to ponder the significance of this second alternative, for it contains the kernel of a more general understanding of the particular scenario we have been considering. In retrospect, it becomes clear that if code costs imposed on Avarice's original 80,000 units were less in the aggregate than his total monopoly profit, Avarice's effort to raise his rental was foolhardy indeed—for it has resulted in a situation in which Avarice has lost his *entire monopoly profit* as a result of government preemption of the market. In contrast, if Avarice had simply absorbed all code costs, continuing to rent 80,000 units at $200, he would have only sacrificed a *part* of his monopoly profit.

To make our point clear we have, of course, assumed that Avarice has embarked upon his supply reducing strategy without reckoning with the ultimate consequences of the government's subsidy strategy. But there is no reason to believe that Avarice would be that shortsighted if he controlled an entire city slum in reality; he could have seen the ultimate futility of his strategy as well as the reader of this article can. So long as he was convinced that the government meant business when it announced its intention to keep adding to the housing supply until rents went down to $200, he would never take the path of reducing his housing stock in a fruitless effort to increase the per-unit rental. Instead, if he were earning a monopoly profit of $50 on his marginal unit, he would simply absorb code costs which were less than $50 and make no effort to withdraw his unit from the market in the vain hope of raising the rent he could charge on his remaining houses. Indeed, the only time Avarice would find it profitable to limit supply would be

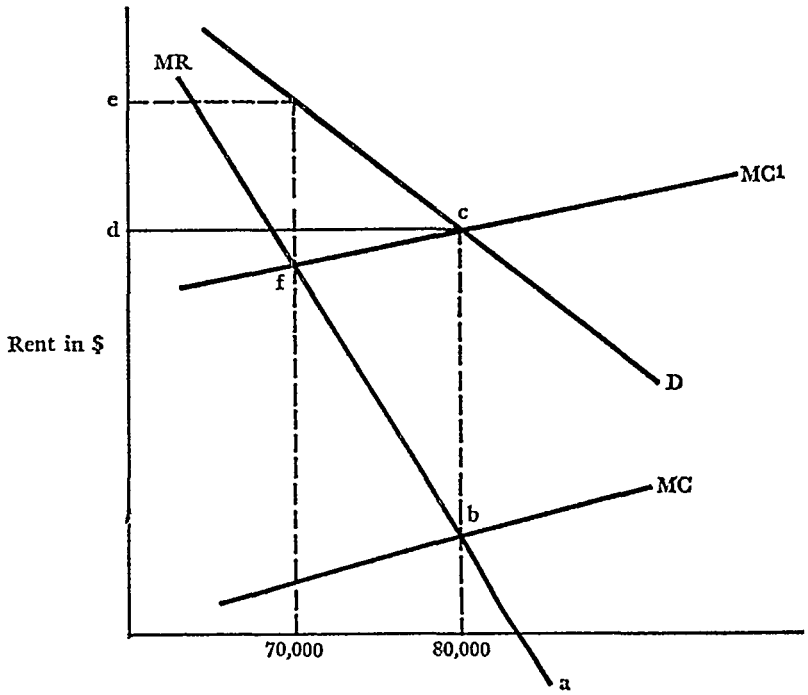
if code costs were in excess of $50, thereby pushing his marginal costs of operation beyond the $200 he would earn by renting the apartment. For it no more pays a monopolist to spend more than $200 in order to earn a mere $200 than it pays anyone else.

This means that simply by announcing a credible subsidy program, calculated to maintain rents at their old level in the private sector, the government can coerce the monopolist to pay the costs of comprehensive code enforcement out of his monopoly profits, rather than seeking to pass on any of the code costs to his tenantry. So long as the monopolist is convinced that the government means business, it is theoretically possible that many typical code enforcement programs could be undertaken without the actual expenditure of a single subsidy dollar, so long as they do not exhaust the monopoly profit the slum landlord was formerly earning on his marginal buildings!

Of course, this dramatic conclusion will hold in its pristine purity only if the monopolist is convinced that the government is determined to continue expanding the supply of subsidized housing until he capitulates by lowering the rental for code housing to the level stipulated by the state's policy makers. If, for example, Avarice does not believe that the state will ever provide more than 15,000 units to effectuate its goal, he will of course no longer be threatened with the loss of all of his monopoly profits but only with the extra monopoly profits (if any) he would earn by renting 80,000 units at the $200 rental, rather than 65,000 units at a somewhat higher price. Consequently, in this case, Avarice will maintain the original 80,000 housing stock only if code costs are not greater than the extra monopoly profits that could be earned by renting out 80,000 units rather than 65,000 units at a somewhat higher price. The effectiveness of the government subsidy announcement will, therefore, be a function of its credibility. We have already explored one polar situation in which the state's policy is recognized as announced in perfect earnest; at the other pole, of course, is the situation in which Avarice believes that the state is "only bluffing," and that he consequently can cut back his housing supply to 70,000 with perfect confidence that he will then be able to increase the unit rental from $200 to $210—in which case, the government will be obliged to start making houses available in sufficient number to make its threat credible. In most cases the government's subsidy threat will be neither completely believed nor completely disbelieved and the monopolist's decision whether to absorb code costs or call the state's subsidy bluff by reducing supply will be determined by a complex combination of personal, political and legal elements. In all cases,

however, the profit-maximizing monopolist will ask himself the same questions: (1) How much monopoly profit will I be making if I simply absorb code costs? (2) How much monopoly profit will I earn if I cut back supply?—which in turn requires an estimate of the rent rise the government will tolerate before it increases the supply of subsidized housing.[60]

60. I have tried to discuss the impact of subsidy policy upon code enforcement under a monopoly in intuitively plausible terms, at the cost of the inevitable imprecision which comes from using English rather than some more precise symbolism. For those who wish a somewhat more exact understanding, the following graph will be of assistance:



The straight solid declining line labelled MR represents the monopolist's marginal revenue curve before the code enforcement-subsidy scheme is announced (before code), while the solid line labelled MC represents Avarice's marginal cost curve before code. Following classical economic theory, the monopolist has rented out 80,000 units at rent d and has kept the remaining Slumville properties vacant—for his marginal revenue is equal to his marginal cost at this 80,000 unit level. Now assume that the housing code is enforced comprehensively without the announcement of any subsidy program and that code enforcement increases the monopolist's marginal cost schedule to MC1. Without an announcement of an appropriate subsidy policy, the monopolist would move to a new equilibrium point (labelled f) where MR = MC1 and charge rent e to each of 70,000 tenants. However, as a result of a credible government announcement that the state will continue increasing the supply of units until the private sector returns to the old rent level, Avarice's marginal revenue schedule takes the discontinuous form marked out by the line d-c-b-a. Since the monopolist's new discontinuous marginal revenue schedule intersects his new marginal cost curve at point c, he will continue offering 80,000 units at the old rental. If the new

In contrast, in a competitively organized Slumville, the government's announcement that it will support code enforcement with a special subsidy plan will have no similar impact on the number of units withdrawn from the market. In a competitive Slumville, none of the landlords have any monopoly profits—none of them have so substantial a market share as to have an incentive to limit their output to increase the rents they can obtain on the limited number of units they deign to place on the market. Instead, each competitor treats the prevailing market rent as his marginal revenue curve. Since, under our hypothesis, the government has merely announced that it will subsidize the housing market to keep the rent in Slumville constant, this announcement induces no change in the competitor's economic environment—even before the government's announcement he considered the prevailing market per unit rental as determining the marginal revenue he had obtained from the unit.

There is, then, excellent theoretical reason to believe that the amount the poor will benefit from the expenditure of a dollar of public funds upon a code enforcement-subsidy scheme will be far greater in a monopolistic Slumville than in a competitive one. Since it has already been demonstrated that a code enforcement-housing subsidy scheme often yields greater benefits for the poor tenant class than would a comparable expenditure of funds under a negative income tax plan in a competitive Slumville, the same result follows for an even broader range of cases in a monopolistic Slumville.

B.

It is quite doubtful, of course, that there exists a pure rental monopoly in any city or substantial slum in the United States.[61] The vision of a monopolist coerced into doing good by the mere threat of subsidized housing, without the actual expenditure of a nickel in cold cash from the public till does, however, provide a guide to the impact code enforcement, plus special housing subsidy, will have in those slums in which there is oligopolistic control over the rental market. Oligopoly theory is in an extremely unsatisfactory condition, with wildly varying

marginal costs are higher than the ones drawn in the graph (*i.e.*, the new MC curve is farther to the northwest), however, Avarice will begin to cut back somewhat on the units he will supply, since the marginal costs of operating the 80,000th house will be greater than marginal revenue. Similarly, if the government's announcement is not believed completely, the d-c segment of the new marginal cost curve will begin to move from the perfect horizontal which appears on the graph to a line which more and more closely resembles the old MR curve as the government's subsidy policy is increasingly disbelieved.

61. *See* material discussed at note 7 *supra*.

opinions as to the extent to which oligopolists of various kinds act more like monopolists or competitors. The question appears to be an empirical one, depending in large part on sociological as well as economic factors conditioning the ability of oligopolists to act consistently with their interests in retaining their monopoly profits.[62] Once again, there must be much more empirical work before one can make even an educated guess whether slum oligopolists in general perceive their community of interest in monopoly profits and are willing to act upon it. The most one can say is that—contrary to initial suspicions—the arguments presented in the monopoly case suggest that the redistributive potential of a code enforcement-special housing subsidy scheme is improved substantially to the extent that Slumville's oligopolists have approximated a monopolistic pricing and output strategy.

It is only in the case of a loosely organized oligopoly, whose member firms have failed to coordinate their pricing practices successfully, that the arguments canvassed previously do not apply and that a different factor—heretofore undiscussed—may come to the fore. If oligopolists have had difficulty communicating and agreeing upon a joint profit-maximizing strategy, it may be that they will fall back upon certain "natural signals" to indicate the propitious occasions upon which prices should be raised. Thus, just as two persons who wish to meet each other in New York City but have not agreed upon a meeting place may both head for Grand Central Station, so too oligopolists, who are unable to use other communications channels, may each choose to raise their rents and reduce their output because this action is "natural" when confronted with a coordinated code enforcement campaign and it is "reasonable" to expect that others will act in a similar manner.[63] Thus, it could be argued that code enforcement will generate widespread rental increases as oligopolists use it as a "signal" to embark upon their own campaign to obtain monopoly profits through a coordinated effort at limiting output.

Nothing is impossible in practice which is possible in theory. Nevertheless, there is every reason to discount the plausibility of the "signal" theory in this particular context. First, there is no reason to believe that oligopolists lack opportunities to engage in

62. *See* J. BAIN, INDUSTRIAL ORGANIZATION 118-24 (1968); T. SCITOVSKY, WELFARE AND COMPETITION 384-92 (1951).

63. For an interesting philosophical analysis of this phenomenon, see D. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 1-82 (1969); for a treatment of this problem in oligopoly theory, see J. BAIN, *supra* note 62, at 308; for the classic work in the theory of games, see T. SCHELLING, THE STRATEGY OF CONFLICT 21-52, 119-62 (1960).

more explicit communication and agreement if they so desire. Local trade associations are common; moreover, further coordination can be supplied by rental agencies which are in a perfect position to pass on recent pricing movements from one oligopolist to the next. Second, it is likely that communication is not restrained by the fear of prosecution under federal or state anti-trust laws which, to the best of my knowledge, have never been invoked against landlord cartels. Consequently, it would appear that a loose oligopoly will not need a catalyst like code enforcement to serve as a signal for a monopolizing strategy if it chooses to embark upon one. This is not to say that it will be easy to maintain an effective cartel—policing countless rent transactions to detect violations of pricing and market division policies will doubtless be costly and of limited utility. Nevertheless, an incipient oligopoly is unlikely to founder upon the failure of communication upon which the "signal theory" is premised.

VII. Fairness

The most we have shown thus far is that a dollar of *government* money will in many cases yield greater benefits to the poor tenantry when it is invested in a code enforcement-special housing subsidy program than when it is spent on a cash grant plan like the negative income tax. But how do the programs compare when the decision maker assumes a broader perspective and takes account of the fact that a substantial portion of the total costs of code enforcement does not appear in the public budget, simply involving an in-kind transfer of housing services between landlords and tenants without the intermediation of the public treasury? The succeeding two sections of this essay consider two fundamental aspects of this question. The present segment inquires into the fairness to landlords and tenants of creating a system of in-kind transfers rather than relying exclusively upon a system of cash payments; the next (Section VIII) considers the relative efficiency of requiring a system of in-kind payments.

A.

Let us first consider the extent to which code enforcement and cash payment schemes fairly distribute benefits among the poor. With regard to this dimension, it would appear that the advocate of a system like the negative income tax can properly claim a significant advantage. For such a scheme benefits all poor people on the basis of their relative need; in contrast, code enforcement redistributes income only

to poor tenants and the benefit each tenant family receives does not necessarily relate to the family's overall need. Two slumdwellers may have substantially different incomes, yet code enforcement treats each as equally needy if their houses are of equally poor quality. Moreover, even assuming that two tenants have identical incomes and live in similar slums, it still does not follow that each family will receive equal benefit from code enforcement. For one family may place a relatively high money value (say $20 a month) on the improvement in housing quality wrought by code enforcement, while another family would place a much lower value (say $2 a month) on the same improvements. Even though the two families obtain an "average benefit" of $11 each, the program would, of course, be much fairer if the two families each actually received $11. To put this last point in more general terms: the greater the variation of slumdwellers' desires for improved housing, the less just will be the distribution of benefits generated by code enforcement. Since we have shown that the success of code enforcement as a redistribution scheme depends upon the existence of a significant class of "lukewarm" tenants who place a relatively small value upon their improved housing, it would thus appear that the distributional impact of code enforcement will be far from the ideal since equally poor families will not be receiving equal benefits.[64]

Nevertheless, the significance of this unfairness may be overemphasized. For there is something very artificial in the notion—adumbrated in the preceding paragraph—which postulates one "family" placing a high monetary value on housing improvements. What we mean, of course, is that one set of *parents* value housing more than another. For it is the adults who have the preponderant voice in allocating the family budget. "Our 'individualism' is really 'familism'; all minors, the aged, and numerous persons in other classes . . . have their status-determining bargains made for them by other persons. . . . It is hardly necessary to point out that all arguments for free contracts are nullified or actually reversed whenever one person contracts on behalf of another."[65] Thus the simple fact that one set of parents desires housing improvements more than another does not necessarily indicate that their children's interests or desires have a similar relationship. Indeed,

64. For an effort to quantify the extent to which unequal disbursement of a benefit compromises the justice of a distributive scheme, see N. RESCHER, DISTRIBUTIVE JUSTICE 35-38 (1966). I have not attempted to invoke Rescher's approach in this essay because I am far from certain about its ultimate value. Nevertheless, it is extremely suggestive and merits more careful treatment than lawyers have thus far given it.

65. F. KNIGHT, THE ETHICS OF COMPETITION 49 (1935).

given the children's lack of access to economic power, it does not appear inappropriate for the state to intervene on their behalf to assure that certain of their "basic needs" are fulfilled in a minimally decent fashion before parents have the right to spend money upon activities which may not benefit their progeny in any significant way. Therefore, although housing codes distribute benefits unequally to parents of the same income level, this inequality may be considered in a more sympathetic light when the interests and desires of the children are placed in the balance.[66]

Even when this last factor is given some weight, however, the considerations of fairness considered in this section will suggest that a code enforcement-special housing subsidy scheme cannot be the exclusive plan invoked by a society determined to redress inequities in the pre-existing distribution of economic power. Indeed, to some extent this conclusion was already implied in the preceding analysis. For it was suggested that the code enforcement-housing subsidy strategy be used until the point at which the marginal costs of the subsidy equalled the marginal benefits of the plan. And it should be expected that a society which *exclusively* adopted a code enforcement strategy would find, after a relatively low subsidy level was reached, that the dollar value the tenants placed upon a further improvement of housing would be quite small—*i.e.*, they would trade off additional housing improvements for increasingly smaller quantities of food, entertainment, clothing or whatever else they desired most intensely. Thus the marginal benefits of a housing subsidy would be exceeded by marginal costs at a relatively low level of code enforcement. If the redistribution effort were to proceed beyond this point, a different strategy—like the negative income tax—would need to be invoked. The considerations

66. Doubtless far more could be said on the proper scope of the government's right to protect the interests of the child against their possible abuse by parents. I have refrained from expanding on the single paragraph in the text principally because an adequate discussion would require a consideration of factors far removed from the main concern of this essay. Nevertheless, it is appropriate to note that on a constitutional level, there seems a broad consensus which upholds not only the right of the state completely to deprive natural parents of the custody of their child when they generally fail to conform to minimally decent standards of treatment as defined by the state in its "child neglect" statutes, but which also upholds the state's right to require compulsory education (limited but not denied in Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)), *see* People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (Dom. Rel. Ct., City of N.Y. 1950), *aff'd*, 103 N.Y.S.2d 757 (Sup. Ct. 1951), *reaff'd*, 302 N.Y. 857 (1951), *appeal dismissed*, 342 U.S. 884 (1951), and compulsory vaccinations and transfusions even in the face of the parent's religious objections, *see* People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied*, 371 U.S. 890 (1962). Of course, the constitutionality of such state intervention does not warrant its wisdom, and given the limitations imposed by the scope of this article, it remains for each reader to ascertain the weight he would give to this factor in his fairness calculus.

of equity discussed in this subsection, however, may well take on decisive weight before the point at which marginal cost-benefit analysis would require that the government shift its redistribution efforts from a code enforcement-housing subsidy program to a negative income tax plan.[67]

B.

Proponents of the negative income tax may well claim that their plan is fairer along yet another dimension. They could plausibly argue that the tax scheme not only distributes benefits more fairly among the poor but that it also distributes the burden of supporting the poor more fairly among the richer social orders.

Under a fair income tax system, all of the members of the upper classes would each pay a substantial contribution to income maintenance in accordance with their "ability to pay";[68] in contrast, a substantial share of the housing plan is borne by the landlords of Slumville, who are by no means the richest members of the general society. Thus, it may be argued that code enforcement unfairly requires a relatively small landlord class—principally composed of petty bourgeois—to pay a disproportionately large share of society's debt to the poor.

This argument is not without force: once the propriety of income redistribution is conceded, it seems quite clear that no single class should be required to bear the exclusive financial burden. Insofar as a single-minded reliance on code enforcement would permit the rich in Snobtown to avoid a significant role in the redistribution program, the plan would clearly be wanting in equity. However, we have just seen that even the most zealous proponent of code enforcement cannot properly suggest that code enforcement should be the only weapon in a governmental war on poverty. No one is suggesting that

67. Thus, in the subsidy policy problem explored in the text at pp. 1129-34, it might well be appropriate for the decision maker to refrain from subsidizing more than 3,000 units—even in those cases in which the marginal cost-benefit test suggested a more ambitious policy—if, for example, he found that the extra subsidy money required for more than 3,000 units would be more equitably spent upon a program which would principally benefit those relatively poor families who own their own homes and hence do not benefit from code enforcement's redistributive potential.

68. For purposes of this essay, we shall ignore the ambiguities involved in the "ability to pay" formula and assume further that a progressive income tax based upon "ability to pay" is, in the absence of some special justification of the kind considered in the following pages, the fairest way to assess citizens for the cost of governmental projects. For critical discussions of these premises, see C. GALVIN & B. BITTKER, THE INCOME TAX: HOW PROGRESSIVE SHOULD IT BE? (1969); W. BLUM & H. KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION (1953).

the slum landlord bear the preponderant burden in society's redistribution program. Consequently, the critic of the code enforcement-housing subsidy plan must make a more ambitious—and more vulnerable—claim: to attack the equity of the program, he must argue that it is unfair for the government to impose even a somewhat larger burden on the slumlord than the simple "ability to pay" standard would require.

1.

In order to come to grips with this claim of injustice, it is essential to distinguish among several different elements upon which it may be based. On the simplest level, there is the question whether the landlord was given *fair warning* of his potential liability *at the time he embarked upon his adventure in slum ownership.* If it should be decided that fair warning was lacking, code enforcement would appear to offend against a fundamental principle in our legal system forbidding the imposition of liabilities upon persons who had no reason to believe their conduct was socially suspect. It is beyond the scope of this article to assess the strength of the reasons given to support the "fair notice" requirement; the only question to be considered here is the extent to which landlords can plausibly claim to be victims of this fundamental kind of unfairness.[69]

As to those increasingly large numbers of owners who purchased *after* a housing code was enacted in their jurisdictions, the answer seems quite clear. Many of them, of course, may have gambled that the code would not be enforced and consequently paid a higher price

69. The reasons for the fair notice policy have been discussed most thoroughly in connection with the *mens rea* requirement imposed in traditional criminal statutes as well as the constitutional prohibition barring ambiguous criminal statutes. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 136-58 (1968); Packer, *Mens Rea and the Supreme Court,* 1962 SUP. CT. REV. 107; Perkins, *Ignorance and Mistake in Criminal Law,* 88 U. OF PA. L. REV. 35 (1939); on vagueness, *see* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. OF PA. L. REV. 67 (1960). The impact of these policies may be somewhat attenuated in the context of a conviction for a housing code violation which does not carry with it the same social stigma as conviction for offenses which are more unequivocally condemned as immoral by the community. Thus, in order to establish a housing code violation, the state typically is not required to prove negligence on the part of the landlord, let alone recklessness or wilfulness. *See* Gribetz & Grad, *supra* note 2, at 1279-81. *Cf.* Sayre, *Public Welfare Offenses,* 33 COL. L. REV. 55 (1933); Wasserstrom, *Strict Liability in the Criminal Law,* 12 STAN L. REV. 731 (1960). Nevertheless, even though a landlord may be held criminally accountable for a *particular* infraction of the code for which he could have had no knowledge despite supreme diligence, it would be quite another matter for a landlord to be held responsible under an entire regulatory scheme of which he had no fair warning at the time he assumed his landlord status. This is not to say, of course, that a policy maker should always consider absence of fair warning of potential liability to be a decisive reason for rejecting a proposed regulatory scheme; it is simply to say that the fair warning argument should be considered extremely important where it appropriately can be advanced.

than was justified given code costs generated under a regime of strict compliance. Nevertheless, since these unlucky landlords clearly recognized the possibility that the law on the books could be enforced, their gamble certainly has no higher status than the countless others that arise in the life of every risk-taking entrepreneur and, in itself, justifies no special plea of unfairness when the gamble is lost.

In contrast, the expectations of a second class of owners affected by the code are much more worthy of a decision maker's concern. What of the landlord who sold out at a depressed price because he believed that the state meant what it said about requiring minimal levels of housing quality? These "true believers" in state credibility will doubtless be considerably demoralized if the state subsequently permits the code to lapse into desuetude. For this will simply mean a windfall for the new owner who bought in at a low price. It is one thing to suffer a loss so that the poor will benefit; quite another to be the gullible victim of a state scheme which has simply resulted in the transfer of income to another landlord who is in no way more deserving than the old owner. Since the state has an obvious and substantial interest in increasing the number of persons believing in governmental credibility, decision makers should be wary of demoralizing "true believers" by creating a situation in which they suffer windfall losses for no significant social purpose. This is not to say that a course of affirmative state action should not be terminated if it proves to be wrong-headed; it is simply to suggest that the decision will incur demoralization costs of an important kind[70] which should not be ignored, especially in close cases.

The analysis of the "fair notice" issue, therefore, suggests the desirability of enforcing the regulations, rather than the reverse, in the case of owners who bought after the code was enacted in their jurisdictions. A more difficult problem arises, however, when the spotlight is turned upon landlords who purchased *before* the code was enacted, and who have not yet sold their properties. Even with regard to these owners, I believe that few will be in a position to raise a substantial

70. Demoralization of the kind considered here seems the mirror-image of the phenomenon Frank Michelman describes in his essay *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). There, Michelman describes the demoralization suffered by the "true believers" in a private property system when they are either victimized by, or spectators of, state action which substantially deprives a property owner of the beneficial use of a thing he "owns" without compensation. Just as widespread demoralization of this kind has important, if difficult to quantify, social consequences, so too does demoralization of "true believers" in state credibility—especially in a society in which affirmative state regulation plays as important a role as it does in our mixed economy.

claim that they lacked fair warning of their potential liability when they purchased the building now in violation of the code. I begin from the premise that the purchaser of a long-lived asset, like an apartment house, is not entitled to assume that the American legal system, which has experienced constant change in the past, will remain immutable over the generation or more during which the apartment house will remain standing. Thus, a private property owner of a capital asset cannot make a substantial claim of "unfair notice" each time government moves to alter the legal status quo. Instead, the most the owner can demand is that the state abstain from imposing constraints upon property use of a kind *which were antithetic to the premises upon which the economy was functioning at the time of purchase.* For in such circumstances, the property owner can properly argue that even with the use of reasonable foresight, he had no reason to weigh the possibility of the type of government regulation he now confronts. While doubtless this formula is vague, it is easy to imagine clear cases in which it would apply. In an economic system based upon a rather thoroughgoing commitment to laissez faire with a principled reluctance to extend the ambit of affirmative governmental control, for example, I have little doubt that a landlord could properly claim unfair surprise if he were suddenly informed that henceforth he was under an obligation to provide a minimal level of housing quality to tenants who voluntarily and knowingly chose to rent inferior apartments. Despite some inspired efforts at self-deception, however, there can be little doubt that our economic organization is no longer permeated with a bias towards laissez faire in general; nor is there a particular prejudice against affirmative governmental action in matters relating to land use control—if anything, interventionism is even more common here than elsewhere. Consequently, the only real question open for discussion concerns the point in history at which it was no longer plausible for a landlord, in the exercise of reasonable foresight, to profess surprise when it was suggested that a housing code could well limit the use of his apartment house during its economic lifetime.

When the inquiry is framed in this way, it is obvious that it cannot be answered with great precision. The activist welfare state (of which the housing code is a minor part) did not "arrive" at a particular "point" in time; there is no litmus that will turn immediately from blue to pink to aid the legal historian when he considers whether it was *Euclid v. Ambler Co.* of the 1920's,[71] the first federal public housing

71. 272 U.S. 365 (1926). Indeed, the antecedents of the contemporary housing code

programs of the 1930's,[72] or the slow diffusion of housing codes from the eastern seaboard across the nation during the '40's and '50's,[73] which marked "the" point at which it was no longer reasonable for the entrepreneur to claim that he had no reason to expect that a housing code would constrain the use of his apartment house during the useful life of the asset. All that can be confidently asserted is that the historian's litmus would have turned a dangerous shade of blushing red at least twenty years ago, a good deal before Congress made housing codes a permanent fixture on the urban scene in 1964 by requiring a code of any city which wished to tender a "workable program" for H.U.D. subvention.[74]

And for our purposes, dating the demise of laissez faire in real estate markets even so late as 1950 suffices to defeat almost all "unfair notice" claims that could be plausibly made at the time of this writing. For, in order to establish a significant unfair notice claim, it is necessary for a landlord to show not only (a) that at the time of purchase he lacked reasonable warning of his potential liability but (b) that if he had received notice, he would have insisted upon a significantly lower price before purchasing the apartments. And no landlord who purchased in 1950 or before could properly fulfill the second branch of this test, which essentially requires a showing of significant harm resulting from the failure of notice. For as we have suggested earlier[75] the entrepreneur purchasing rental apartments in 1950 or before would discount the future costs of anticipated code enforcement a generation later in 1971 and beyond as de mimimis. Thus, those landlords who, on the most generous reading of history, can plausibly argue that they had no reason to believe that they would be charged

may be traced to the New York tenement house law of 1867 described in L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING, 25-29 (1968).

72. *See* M. STRAUS & T. WEGG, HOUSING COMES OF AGE (1938); L. FRIEDMAN, *supra* note 71, at 101-09, provides a succinct account of the most prominent events of the 1930's.

73. By 1955, some fifty-six communities—including such large eastern cities as Boston, New York, Philadelphia, Baltimore and Washington—had adopted codes. The Housing and Home Finance Agency then "required" a housing code as part of the "workable program" necessary to qualify for its assistance. In response to HHFA's demands, the number of localities with housing codes began to mushroom, reaching 493 by July 1961 and 736 by July 1963. HHFA 17TH ANNUAL REPORT 387 (1963); *See* L. FRIEDMAN, *supra* note 71, at 49-50.

74. "[C]ommencing three years after [September 1964], no workable program shall be certified . . . unless (A) the locality has had in effect, for at least six months prior to such certification . . . a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements, which is deemed adequate by the Administrator, and (B) the Administrator is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code." 78 Stat. 785 (1964); 42 U.S.C. § 1451(c) (Supp. V, 1970).

75. *See* p. 1117 *supra*.

with the obligation of meeting housing quality minima cannot persuasively suggest that they would have acted any differently in 1950 if they had known the truth about code enforcement in 1971. Consequently, their "fair notice" argument fails for want of the substantial reliance that makes lack of fair notice a source of concern.

2.

The fair warning issue, however, does not exhaust the larger question of justice. Even if the state were to give "fair notice" of its intention to place a surtax on all left-handed citizens, it nevertheless is clear that left-handers could raise a substantial claim of injustice. Similarly, the question before us is whether, regardless of notice, slum landlords have been unjustly singled out to shoulder a somewhat heavier burden in the overall redistribution effort undertaken by our society. Doubtless this issue is not of a constitutional dimension—even the most activist conception of the "new" Equal Protection Clause[76] would not justify the invalidation of a legislative decision to burden slum landlords on behalf of tenants through the imposition of housing quality minima. Nevertheless, Equal Protection—either new or old—is not the sole source of distributive justice in American society, and the non-judicial policy maker is entitled to a serious answer to the question whether he should weigh important considerations of fair treatment which courts—for familiar, if complex, institutional reason[77]—do not take into account in constitutional adjudication.

At this non-constitutional level, we may approach the problem of justice in the following way. Imagine that a slum landlord complained that the special burden imposed by code enforcement simply represented an ad hoc decision to single out "slumlords" without justifying the decision further by relating it to more general principles of public policy. I take it that this charge establishes a burden upon a just government to explain what further public good will be advanced by a decision which has clearly injured some of its citizens—here, the landlords.

76. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1159-89 (1969); for a convincing and succinct discussion of the constitutional dimension of an analogous issue, see Kurkland, *Guidelines and the Constitution: Some Random Observations on Presidential Power to Control Prices and Wages*, in G. SHULTZ & R. ALIBER, GUIDELINES, INFORMAL CONTROLS, AND THE MARKET PLACE 209, 211-18 (1966).

77. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); L. HAND, THE BILL OF RIGHTS (1958); *Toward Neutral Principles of Constitutional Law*, in H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

To fulfill this burden, the code enforcement apologist may invoke several arguments drawn from different intellectual traditions. First, he may suggest that placing a special burden upon slum landlords serves the broader policy of assuring a more efficient allocation of resources. Most taxes have the consequence of raising the price of one class of commodities more than another, thereby disturbing the pre-existing allocation of resources. Assuming that the pre-existing allocation has some claim to superior efficiency, leading contemporary commentators have advocated "neutral taxing" schemes which disturb as little as possible the relative prices of goods generated by the presumptively efficient market mechanism.[78]

This neutrality rationale may sometimes serve as a powerful justification for imposing a special burden upon slum landlords. As the hypothetical Slumville which introduced this essay demonstrated,[79] an impost upon landlords may generate no change at all in the price of rental housing; similarly, an impost, combined with the threat of a special housing subsidy, may have an identical consequence in a monopolized Slumville.[80] Thus, insofar as the real world approximates these two models, imposing a special levy upon landlords can be justified as a "neutral" tax which will not interfere with efficient resource allocation.[81]

78. *See* R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 140-54 (1959) which in addition to containing an illuminating discussion, collects the important literature. The "neutrality" formula has recently been taken up by Professor Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 725 (1970). Of course, "non-neutral" taxes are not per se evil since they may be justified on a wide variety of grounds, including the improvement of the allocation of resources, by requiring business enterprises to "internalize" social costs they would otherwise "externalize." *See* G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68-94 (1970). I am only suggesting here that "neutrality" is one of the acceptable rationales for a tax, not the exclusive one.

79. *See* pp. 1100-08 *supra*.

80. *See* pp. 1150-57 *supra*.

81. Even if it is conceded, however, that the "neutral tax-resource allocation" rationale justifies a special levy on the slum landlord on some occasions, the question remains whether the levy should take the form of a governmental demand that the landlord make an *in-kind* transfer to the tenant by providing code improvements or whether the governmental demand should rather require the landlord to make a *cash* payment into either a special fund to be distributed to tenants or a general fund to support any public activity.

This question is the central concern of Section VIII *infra*. For purposes of the present discussion, it will be assumed that code enforcement is the most appropriate way in which the landlord may be required to discharge his state-imposed burden. This will mean that increased sums will be spent on repair and maintenance services than was the case before the landlord was subjected to a special burden. Thus the price of repair and maintenance services may be expected to increase while the price of goods formerly demanded by landlords may decrease. However, this change in relative prices does not suggest an impairment of the resource allocation mechanism, but instead represents an appropriate market response to the fact that the distribution of income has been altered to benefit tenants at the expense of landlords.

It is true, of course, that in many contexts, code enforcement will induce a reduction in the private housing supply and so will fail to satisfy the "neutrality" test perfectly. While a government subsidy may make up the housing deficit, it will do so with funds collected by taxes which commonly generate misallocations of their own. Thus, as the market structure diverges from the primitive Slumville model, the resource allocation rationale should carry less weight.

Even in those cases, however, where the "resource allocation-neutral tax" argument for imposing a special burden upon landlords is relatively strong, the slum landlord's advocate may still raise the question whether it is responsive to his claim of unfairness. For he may argue that, unlike constitutional adjudication under the Equal Protection Clause, it is not enough here simply to invoke a policy which could *conceivably* justify code enforcement. Instead, in this non-judicial context, it is incumbent upon the code enforcement proponent to show that the state is *in fact* substantially committed to the "neutral tax-resource allocation" principle. The existence of such a commitment could be established by demonstrating that the state in fact follows a relatively consistent policy of selecting those taxes which promise to impair resource allocations least. If, however, one looks to our own society, it is not at all clear that such a demonstration can actually be made. The slum landlord may properly demand to know why, for example, his rents should be singled out for appropriation for governmental purposes, while the economic rents earned by other landowners, as well as the monopoly profits garnered by industrial enterprises, are not similarly treated, although taxes could be devised which would deny these rentiers and monopolists their infra-marginal returns[82] without inducing a diminution in the supply (or an increase in the price) of the goods they provide.

The claim that it is unjust to single out the slum landlord's economic rent and monopoly profit (if any) can be dismissed out of hand too easily. On first appearance, the slumlord's cry of injustice seems almost identical to the frivolous plaint of the speeding motorist who argues that he has been unfairly arrested since the highway patrolman has permitted countless other speeders to escape unscathed. Nevertheless,

82. I am invoking here the elementary economic propositions that both landowners and monopolists receive returns in excess of the marginal cost of providing their services and so may be induced to sacrifice these infra-marginal returns without altering price or output. For a sensitive discussion of the received theory, see R. MUSGRAVE, *supra* note 78, at 276-87; for a discussion of taxing the infra-marginal returns earned by landowners, see sources cited in note 20 *supra*.

the slum landlord cannot be dealt with so easily as the speeder. In the case of the motorist, one can plausibly explain that the administrative cost of catching (virtually) every speeder far outweighs the "cost of injustice" which arises as a result of enforcing the law against only one speeder in a hundred. In contrast, it is far from clear that a taxing program which sought to confiscate the infra-marginal returns earned by landowners and monopolists would be so expensive to operate as to be *administratively* impractical. Instead, it seems likely that such an ambitious taxing program has been rejected because the economic interests which would be prejudiced by monopoly and rentier taxes are so powerful that such a scheme has been rendered simply *politically* impractical.[83] Thus, if the government has not adopted a general policy in favor of "neutral taxes" which do not affect resource allocation, is it not unfair to rely upon the "neutral tax" argument in this single instance to justify imposing a special burden upon slum landlords?

I must confess that I am not at all sure. At times, I tend to the view that, since the legitimacy of the slum landlord's profit can be established principally by reliance upon the allocative efficiency of competitive markets inhabited by profit-maximizing entrepreneurs, those who earn profits as a result of their rentier or monopolist positions can advance no substantial reason why the profits the government is taxing were rightfully theirs in the first place.[84] At other times, even though the extra profits are mere windfall gains which cannot be legitimated by reference to the resource allocation objective, I am still impressed by the suggestion that fairness requires treating similar windfalls simi-

83. It is of course one of the purposes of antitrust law and industrial regulation to curtail the possibility of earning monopoly profit, although their effectiveness in this regard may well be doubted. Even more relevant here is the virtual failure of American jurisdictions to attempt to appropriate land rents through the use of a Henry George-type tax.

84. There are doubtless other theories which may be advanced to justify an economic system based upon the pursuit of private profit. Most important, private property regimes have been hailed as a safeguard for the development of personality, *see* Reich, *The New Property*, 73 YALE L.J. 733, 778-86 (1964) and the preservation of political freedom, *see* M. FRIEDMAN, CAPITALISM AND FREEDOM 7-21 (1962). *See also* Professor Frank Michelman's useful canvass of justifications for private ownership in *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, *supra* note 70, at 1202-13. However, it is difficult to see how the slum landlord may persuasively invoke these rationales in the present context. Enforcing a housing code does not so seriously undermine the entire private property system as to endanger significantly the assistance the system allegedly provides political freedom. Similarly, redistribution of income via enforcement, while diminishing the ability of the landlord to develop his personality, increases the ability of the tenant to do so. Since this essay is premised on the notion that a serious maldistribution of income exists between these two classes, it follows that, all other things being equal, it is better to permit the tenant to develop his personality than to permit the landlord to retain his income. For a fuller discussion of this point, see pp. 1170-74 *infra*.

larly and that there is a significant unfairness involved in singling out a small subclass of rentiers and monopolists (*i.e.*, "slumlords") for special unfavorable treatment. However this may be, there can be no doubt that the "neutral tax-resource allocation argument" does in a significant number of cases substantially attenuate—if not completely eliminate—the plea of unfairness by highlighting the desirability of levying imposts upon those income streams which least distort the effective operation of a competitive economy.

3.

Even if the "neutral tax-resource allocation" argument is relied upon for all it is worth, however, it cannot itself be a complete answer to the fairness question. For it is perfectly clear that the "neutral tax" ideal cannot justify code enforcement in those contexts in which a forceful inspectorate will induce a very substantial contraction in the private housing supply, thereby requiring large state housing subsidies—garnered by non-neutral taxes—if the code enforcement program is to have a satisfactory redistributive impact. Thus, if one is to exhaust the fairness question fully, he must abandon reliance upon the conceptual tools of the microeconomist and consider the question of distributive justice on its own terms.

Why is it fair to impose a special obligation upon slum landlords to redistribute their wealth beyond that assumed by the rest of the population who simply pay their allotted share of the progressive income and estate tax? The intellectually easy answer to this question takes the form of a confession and avoidance. Doubtless a substantial number of persons would confess that there is something unfair in singling slum landlords out, but would respond that this unfairness is far outweighed by the larger injustice presented by the existence of poverty in contemporary America. These committed redistributionists would simply remain unmoved when the Slumville landlord complains that the Snobtown rich are far wealthier than he and yet are not subject to similar special obligations. They would reply that there is no compelling reason to release the landlord from his redistributional obligations merely because other richer and more powerful groups have sufficient political weight to evade the proper measure of their responsibility to the poor.

While I have a great deal of sympathy with the committed redistributionists' view, two serious costs are involved if the state were to adopt a tax which even it conceded placed an unfair burden upon a small group. First, the group unfairly singled out for special burden

will be substantially demoralized by the prospect of a freeloading majority which concededly fails to contribute its fair share to the redistributionist effort. Second, by imposing unfair burdens upon relatively small groups in the population, the state will divert public attention from the larger contours of the income distribution issue, thereby debasing the quality of public discourse about society's obligation to the poor. Thus, imposing concededly unfair burdens in the name of a transcendent redistributionist goal threatens to undermine the coherence of the public discourse and consensus which must underlie a viable program of fundamental importance in a democratic society. While these factors are difficult to quantify, they are real enough to prompt a consideration whether the easy "confession and avoidance" answer to the slum landlord's complaint is the only possible reply, or whether, instead, one may properly deny the existence of *any unfairness whatever* in imposing a special obligation upon the landlord to sacrifice income by providing a minimally decent home to his slum tenants.

An affirmative defense of the justice of this special imposition must establish that a landlord retains an element of individual responsibility for his conduct in a society afflicted by maldistribution of economic power, while at the same time recognizing that the landlord is not exclusively responsible for the plight of the slum tenant. It appears to me that the argument advanced by the Tenant in the following dialogue satisfies these two criteria, asserting individual responsibility on the one hand, without indulging in scapegoatism on the other:

Landlord: I am only minding my own business; if you don't like this freezing, rat-infested apartment then either pay a higher rent or look for another place to live; I am not forcing anything upon you.

Tenant: This is true, but in a just society I would be able to afford a decent home.

Landlord: You might be right; but this is an argument better addressed to the legislature, which can enact a generous cash grant plan raised out of general revenue. Why am I responsible for the world's ills?

Tenant: Both you and I are perfectly aware that the legislature will not within the foreseeable future grant me my fair share of the national income. How long can you escape from any responsibility to act *as if* the world were justly organized?[85]

85. *Cf.* ARISTOTLE, Book III, ch. 4, in 10 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH §§ 1277a-1278b (Oxford 1921) which considers the extent to which the obligations of the good *man* are identical to those of the good *citizen*. Our question here is

Landlord: Even if I conceded that, given the failure of our social institutions to achieve social justice, I had an obligation to act *as if* justice were achieved, that's an awfully vague formula. What kind of practical maxim for conduct can you propose?

Tenant: Act so that in none of your ongoing relationships you permit another human being to exist under conditions which constitute a serious affront to his dignity as a person.[86]

Landlord: Well, I certainly see why a moral man wouldn't want to tolerate such an ongoing relationship. But, once again, how in the world do I know which relationships violate this maxim and which do not?

Tenant: Well, surely the easiest way is to imagine whether, if you were in my position, you would consider living in this apartment to be not merely inconvenient, but as making it virtually impossible to engage in many of those activities which make living a valuable experience.[87]

Landlord: Perhaps I can see how this principle applies here. But I am still unclear why I owe you this duty simply because I have rented you an apartment. Why don't I have a similar duty to share my wealth with any passerby who demonstrates to me that he is in dire need?

Tenant: Well, of course, a saint *would* respond to the cry of the passerby in the same way as he would to the indignation of his indigent tenant. But there is a difference, nevertheless, between the two cases. You, as a slum landlord, are making disregard for human personality *a fixture in your life,* an aspect of one of the fundamental activities in which you engage. And while I do not demand that you be a saint, I do assert that at the very least you should refrain from weaving the larger social injustice of the maldistribution of income into the fabric of your life,[88] as you do when you embark upon this continuing relationship with me.[89]

related but different: what are the obligations of the good *citizen* in an *unjust* society which is nevertheless capable of ultimate, but not immediate, reform?

86. *Cf.* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 53-54 (Beck transl. 1959), corresponding to 434-36 in the Standard Akademie edition.

87. *Cf.* R. HARE, FREEDOM AND REASON 7-50, 86-111 (1963).

88. It is true that in the relatively rare case, slum dwellings are operated by large publicly owned corporations. This fact raises the complex question whether individuals can legitimately argue that personal responsibility is diminished when such a corporate entity intervenes between the tenant and the ultimate beneficiary of slum ownership. This question is of fundamental moral significance in contemporary corporate society, but to mount the lengthy discussion it requires would be inappropriate here, given the limited presence of large publicly held corporations in the slum rental market.

89. *Cf.* Urmson, *Saints and Heroes*, in ESSAYS IN MORAL PHILOSOPHY 198 (Melden ed. 1958).

There is a weak analogy here to the obligation the criminal law imposes upon per-

Landlord: But where will this straight-laced moralism get you in the long run? For your argument permits me to wash my hands of our continuing relationship simply by abandoning the property. This will only worsen your position since the remaining landlords will thereby be enabled to charge even higher prices for their awful apartments. Moralism is unprofitable not only for me, but for you.

Tenant: I don't believe you. If you want to wash your hands of this relationship, you would rather sell out at a depressed price to someone else who would fulfill the code rather than abandon entirely. But even if you do abandon, I am told that the state is supporting code enforcement with a special housing subsidy, so I won't be worse off anyway. Morality may not pay for you; but it pays for me. And you shouldn't complain that you find morality somewhat unprofitable, at least financially. Isn't that what morality is all about?

I have sketched this argument in dialogue form to emphasize the tentative spirit in which it is presented. Obviously, an essay lengthier than this one would be required to explore adequately each of the stages in the Tenant's argument. Without undertaking this examination, we should nevertheless note at least one important difficulty involved in adopting the Tenant's position as the basis for singling out the Landlord as appropriately carrying a special redistributive burden with regard to his tenants. Even when generously construed, the Tenant's argument has its substantial appeal at the level of personal morality: it is relatively easy to understand, I think, why a moral man living in an unjust society would, *at a minimum*, personally seek to refrain from entering into long-lasting relationships which epitomize the larger social injustices surrounding him, *at least where refraining does not exacerbate the condition of the impoverished.* It is far less clear, however, that this dictate of personal morality justifies the *legislative* decision *requiring* each person to do the least that a personally moral man would undertake. Indeed, is it not high hypocrisy for a legislature to require some of its citizens to act "decently" in renting apartments to the poor when the need for this act of conscience is

sons to act affirmatively when, at no danger to themselves, they may save their close relations from serious harm. *See* Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 599 (1958); Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 621-23 (1942); *cf. The Moral Duty to Aid Others as a Basis of Tort Liability*, in F. BOHLEN, STUDIES IN THE LAW OF TORTS 291 (1926). Certain jurisdictions, moreover, impose the obligation to assist strangers in dire need. Hughes, *supra* at 631-34. Of course, the analogy to the duty owed by a close relation is far from perfect—thus, while a father may still have an obligation to protect his child even in a world in which income were fairly distributed, it may well be that in such a world a landlord ought not to be charged with a similar obligation with regard to his tenant. Such a world, however, is not our own.

generated precisely by the legislature's failure to enact an income redistribution program which would assure to each individual his fair share of the national wealth, thereby making it difficult for the poor to "afford" decent housing?

It is certainly possible to view the matter in this way, but this simplistic response is inappropriate given the political difficulty of achieving a more just distribution of income in our society. Given the vested and powerful political interests involved, the movement towards a just society will not be a matter of a single legislative session but of generations of effort. Thus, it need not be hypocrisy for a legislature to impose a special obligation upon those privileged citizens who enter into long-lasting relationships with the poor by requiring them to conform to certain minimum standards of decency. It is simply a recognition that the pursuit of distributive justice is one of society's most difficult tasks and that while the debate and struggle over the division of economic power continues, it is at least appropriate to require the beneficiaries of the presently flawed scheme of income distribution (among whom slum landlords are numbered) to conduct their lives with some restraint, cognizant of the moral ambiguities that accompany their superior wealth. Indeed, it may well be that the legal system's acceptance of the principle requiring the relatively advantaged to exercise self-restraint in dealing with the poor is an important factor permitting our political system to retain that modicum of integrity which enables it to function as a forum for the increasingly bitter dispute over the requirements of distributive justice which afflicts the polity at the present time.

It would appear, then, that it is not necessary to resolve the landlord's complaint that he has been victimized by an unprincipled decision by simply declaring that the inequity involved in imposing a special burden is outweighed by the more substantial injustice implied by permitting the average slum tenant to remain impoverished. Instead, one may affirmatively argue that in a society in which wealth is unjustly distributed it is fair to impose a requirement of decency upon those in the relatively privileged classes who engage in long-lasting relationships with the impoverished. The proper limits of this argument should be clearly marked, however. It is invoked here to support a legislative scheme which promises *successfully* to redistribute income from a generally richer to a generally poorer social class. I most emphatically do not suggest that the pursuit of decency can of itself justify a code enforcement program which lacks appropriate subsidy support, and which thereby leads to the improvement in

the position of some of the poor at the expense of a significant sacrifice made by others equally impoverished. In such a context, housing code enforcement would indeed be a form of hypocrisy, in which the legislature loudly proclaims its adherence to a tradition of social civility in matters of income distribution, while in fact, the "decency" is being purchased, at least in part, at the expense of some of the poor.[90]

C.

We have thus far considered the fairness of burdening landlords as if it made sense to believe that the equities of all landlords were alike. Whatever evidence we have suggests, however, that while a large number of rental apartments in the typical slum are owned by full time professionals, a substantial portion of the remaining units are owned by small time "amateur" landlords (often members of the lower-middle class who have fled the slum but have not sold their old homes); moreover, resident landlords also own a significant number of units. The class of resident owners contains a surprisingly large number of minority group members, and American ideology should be expected to be especially solicitous of the fate of this incipient group of "black (Puerto Rican, American Indian) capitalists."[91]

If decision makers do have a special concern in this direction, then they will view comprehensive code enforcement with some concern. Code compliance will cost money and financing is notoriously difficult within the ghetto. Since it is probable that black resident landlords will have the hardest time obtaining an improvement loan, it seems likely that they will sometimes be induced by code enforcement to sell out to larger "professional" landlords who have somewhat greater access to the money markets.

Code enforcement will therefore generate some forces leading to

90. Thus, the argument presented here would not justify a minimum wage law which had the effect of permitting some workers to receive more decent wages at the cost of forcing some other low income workers on to the unemployment and welfare roles *unless there was reason to believe that the welfare payments given the idle workers were higher than the wages they would have earned but for the minimum wage statute.*

91. Over a third of the parcels investigated in Sternlieb's Newark study were lived in by their owners. The study further revealed that more than one third of the parcels located in the sample area were owned by blacks. G. STERNLIEB, *supra* note 6, at 131-37. Although Sternlieb does not provide the precise percentage of parcels owned by blacks that were lived in by their owners, he does indicate that "the bulk of Negro owners own single parcels," *id.* at 137, and that resident landlords constitute 70 per cent of the sample of single parcel owners, *id.* at 135. Thus, it would appear that a very substantial proportion of black owners were resident landlords. Resident owners bulked less significantly in the New York study since the larger size of the multiple dwellings common in that city made it far more difficult, especially for poorer residents, to achieve ownership. *See* G. STERNLIEB, *supra* note 7, at 13-12.

a marginal shift in ownership from the incipient black bourgeoisie to the larger professionals unless active governmental steps are taken to assure adequate financing for minority owners. On the other hand, enforcement may generate other forces moving in the opposite direction. Fragmentary empirical data suggest that resident landlords maintain their slum properties in a significantly better condition than large professionals,[92] who in turn do a very much better job than small-time non-resident amateurs. Thus comprehensive code enforcement may be expected to hurt proportionately more non-resident than resident owners. If indigenous owners are, in fact, in a better position to maintain their properties as a result of their permanent residence, Slumvillites may be able to purchase subcode buildings from non-residents at prices which non-residents would consider acceptable, thereby inducing an increase in the number of units offered for sale to aspiring ghetto homeowners.

Thus, comprehensive code enforcement will generate opposite forces which may, or may not, cancel each other out, depending upon the dynamics of the particular urban situation, and the effectiveness of government efforts to provide mortgage money to minority groups. Even assuming, however, that the net effect of the program is the elimination of a number of marginal resident landlords, the question remains whether the upwardly mobile member of a minority group has a weightier claim upon social concern than the slum tenant. This obviously is a question upon which reasonable men may differ. In my view, however, the equitable claim of the poor black tenant to a decent dwelling is much stronger than the claim of the black petty bourgeois to a fee simple absolute; consequently, I would not give much weight to the marginal displacement of resident landlords, even if it were found to exist, in my own consideration of the relative merits of a program contemplating comprehensive code enforcement, supported by a special housing subsidy.

D.

We are now in a position to attempt an answer to the question with which this section of the essay began: which program apportions burdens and benefits more fairly—one which relies entirely upon the disbursement of cash grants like the negative income tax, or one in which the cash grant system is supplemented by a code enforcement-housing subsidy scheme?

92. G. STERNLIEB, *supra* note 6, at 171-76.

Our consideration of the equities of the two programs has yielded mixed results. On the one hand, it seems clear that a system exclusively relying upon cash grants distributes benefits more fairly than does code enforcement, even when the interests and desires of slum children are taken into account. On the other hand, the question of the fairness by which the two programs allocate burdens is a good deal more complicated.

I have argued that the slum landlord can advance no substantial claim that code enforcement unfairly singles him out as a scapegoat for society's ills: the landlord cannot advance a persuasive claim that he lacked fair warning of his potential liability at the time of his purchase; moreover, his special obligation can sometimes be justified by reference to the resource allocation objective and can always be supported by invoking an obligation upon members of the privileged classes to act decently in their continuing relationships with victims of an unfair distribution system. Similarly, the problem posed by the prospect of code enforcement forcing relatively poor black landlords to sell at a loss to those larger entrepreneurs with better access to capital does not seem serious, and in any event, may be resolved by appropriate government support of the slum mortgage market.

Even if the fairness of imposing a special burden upon slum landlords is conceded, the question of code enforcement's relative fairness in comparison with cash grant programs still remains. And, in order to answer this question, it is necessary to appraise the justice of the taxes levied by the state to support the negative income tax plan. Fortunately, the immediately preceding discussion provides a useful analytical benchmark in approaching this task. Our previous arguments have all responded to the question whether it would be appropriate to impose a special burden upon the landlord even in a society which relied solely upon a progressive income tax for raising revenue.[93] It follows a fortiori that code enforcement's relative equity is enhanced in a society like our own in which the general revenue fund is collected in significant part from taxes which are either regressive (like the sales tax) or haphazard and probably regressive (like the real estate tax),[94] and in which owners of real estate receive substantial federal tax advantages.

Thus, when one focuses simply upon the equities of the matter, it would appear that neither a program relying exclusively upon a cash

93. *See* p. 1160 *supra*.
94. *See* D. NETZER, ECONOMICS OF THE PROPERTY TAX 32-62 (1966).

grant system nor one in which somewhat smaller cash grants are supplemented by a code enforcement-special housing subsidy scheme is clearly the superior. Consequently, if a local government should consider the merits of supplementing a state or national cash grant scheme by launching a code enforcement program *which makes distributive sense*, considerations of equity should not prove to be a significant constraint.

VIII. It May Be Cheaper for the Government, But is it Cheaper for Society?

There remains one critical dimension along which code enforcement must be assessed. While we have shown that in a wide variety of cases, a dollar of *government* money will generate greater benefits to the poor tenant class, the suspicion remains that the dollars spent by the *landlords* in response to code enforcement could yield greater benefits to the tenants if they were not spent on improving housing, but instead were given directly to the tenants in the form of *cash*. The point can best be introduced by considering the following simple problem. Assume that it costs a landlord $5 a month to maintain an apartment at code standards. Assume further that—because of the structure of the market and the government's subsidy policy—the landlord can pass on none of his code costs. Will the tenant's benefit be greater or less than $5?

A.

Sometimes the average tenant will benefit by more than $5 as a result of a $5 investment in code enforcement. As Davis and Whinston have pointed out in a somewhat different context,[95] many improvements undertaken by an individual landlord will yield substantially greater benefits when similar improvements are made by all (or almost all) of the other landlords in the community. If only one landlord undertakes a rat prevention program, the rats will likely respond by moving to a neighboring house, where they will be an almost equal menace to tenants of the "rat free" house; on the other hand, if all landlords in a neighborhood attempt to kill the rats, all of the tenants will be free from the obvious and subtle dangers of close exposure to an expanding

95. Davis & Whinston, *The Economics of Urban Renewal*, 26 LAW & CONTEMP. PROB. 105, 107-12 (1961). *See also* Davis, *A Pure Theory of Urban Renewal*, 36 LAND ECON. 221 (1960).

rat population. While the small benefit a particular landlord (and his tenants) obtain from an individually initiated rat control program will often exceed the cost of such a program, the total benefits of a community-wide program would far exceed the costs borne by each of the individual landlords engaged in the cooperative effort. Although it is theoretically possible that a neighborhood's landlords will voluntarily undertake a community project, recognizing that all will ultimately profit thereby, the costs of coming to such an agreement will generally be extremely high and the temptation felt by each landlord to obtain a "free ride" as a result of the efforts of the others will be very great indeed. Consequently, it is unlikely that landlords will agree voluntarily to undertake a rat control program, even though it is in their interest to do so. Similarly, it would even be less likely that the neighborhood's tenants will band together to contribute to a fund devoted to bribing the landlords to invest in rat control.[96] For the costs of organizing such an agreement in the face of the natural tendency of each tenant to take a free ride would almost always be prohibitive. Thus, if enactment of a housing code requires the community to undertake rat control it could well be that a landlord investment of $5 per month will generate far more than that amount in benefits to the average tenant.

In addition to the benefits arising out of the coordinated activity made possible through enforcement on a community-wide basis, code regulation, when artfully devised, can force landlords to take steps that inexpensively reduce costs which would otherwise be externalized upon others living in the area.[97] Thus, if a building constitutes a fire risk which members of the surrounding community would pay $5000 a year to avoid, a code which requires the landlord to eliminate the risk at a cost of $2000 yields an efficiency gain of $3000.[98] Needless to say, the importance of the externality reduction argument depends to a considerable degree on one's estimate of the causal relationship between poor housing quality and various forms of anti-social activity which tenants may pursue. Thus, if one believed that poor housing substantially increased tenants' criminal propensities or undermined their edu-

96. Moreover, even if tenants could organize cheaply, requiring them to bribe landlords to undertake the improvements would have the undesirable redistribution effect of shifting income to the landlords.

97. An excellent general discussion of the factors which identify the individual who can most cheaply avoid a potential external cost may be found in G. CALABRESI, *supra note* 78, at 135-73.

98. We are assuming here once again that if the fire prevention burden were not placed upon the landlord but upon the other members of the community, the costs of organizing those threatened by the fire risk to band together to bribe the landlord to eliminate the danger would be prohibitively expensive.

cational achievement, the externality prevention rationale would be extremely weighty. Even if one's view is limited to uncontroversial matters involving the cheapest way of reducing damage to health and safety, however, the argument remains of obvious importance.

B.

While a properly devised housing code will yield many benefits of the kinds considered above, comprehensive enforcement will often create significant costs to the tenants by forcing at least some buildings off the market. Abandoned buildings impose a heavy external cost upon the surrounding community: they are fire hazards, uncontrolled garbage dumps, centers for the propagation of disease, hangouts for the criminal.

In theory, the external costs generated by code enforcement can be significantly reduced by the housing subsidy program which, as we have seen, is an essential lynch pin of an effective code enforcement program on those occasions when a substantial contraction of the private supply is generated. If the state assumes control over abandoned buildings either through the exercise of its power of eminent domain or through its police power,[99] and seeks to rehabilitate the properties, it will in effect be performing two services. First, it will be providing housing units required by the subsidy policy; second, it will be eliminating the serious external costs imposed by vacant buildings. Nonetheless, emerging case law promises seriously to constrain the use of housing subsidies in this way. Increasingly, lower federal courts are limiting governmental efforts at building new housing in the ghetto.[100] This tendency, taken to its extreme, would oblige policy makers to respond to the contraction of the private housing supply in Slumville by building new subsidized homes in Middleburg and beyond. While moving some Slumvillites into these more lily-white sectors may sub-

99. For an interesting discussion of the steps the state may constitutionally take to correct the problem caused by abandoned houses without compensating their owners, see Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers Over Slum Housing*, 67 MICH. L. REV. 635 (1969).

100. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), 304 F. Supp. 736 (N.D. Ill. 1969) (judgment order reported); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Shannon v. United States Dep't of Housing and Urban Dev., 436 F.2d 809 (3d Cir. 1970); for a state court decision, see El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (Ariz. Ct. App. 1969). *Gautreaux* and its progeny are discussed in 83 HARV. L. REV. 1441 (1970); 44 N.Y.U. L. REV. 1172 (1969); Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970); 44 TUL. L. REV. 385 (1970); Note, *Gautreaux v. Public Housing Authority: Equal Protection and Public Housing*, 118 U. OF PA. L. REV. 437 (1970); Note, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712 (1970).

stantially improve their lot, this will be accomplished to the prejudice of the poor remaining in the slum, who will be obliged to bear the heavy costs of the deserted buildings caused by code enforcement.

Clearly, this is not the place to canvass the constitutional arguments which are increasingly impelling the judiciary to check further subsidized construction in the heart of the ghetto. All that our discussion here can emphasize is that there are significant costs in funnelling all subsidized housing into white areas which should be fully considered by courts before adopting a per se rule against increased state support of ghetto rental markets—a course which has only been suggested, but not explicitly adopted, by the courts thus far.[101] Even if the use of housing subsidies is constrained significantly by the courts, it would still be possible to convert the abandoned sites into vest-pocket parks, community centers and other public facilities. While such conversions would of course require subsidy beyond that demanded by the code enforcement program, it is quite possible that these additional expenditures will be justified on distributional and cost-benefit grounds as well. It also seems that just at the time courts are constricting the supply of housing subsidies into the slums, the judiciary is beginning to discern that the Constitution requires the state to provide municipal services in the ghetto to the same degree that they are supplied in more privileged sectors.[102] Thus, while decision makers may be *barred* from rehabilitating an abandoned house for continued residential purposes, they may be *required* to transform it into a vest-pocket park: a noteworthy example of constitutional litigation almost simultaneously ex-

101. In *Gautreaux*, 296 F. Supp. 907 (N.D. Ill. 1969), 304 F. Supp. 736 (N.D. Ill. 1969) (judgment order reported), the court required the Chicago Housing Authority to construct the next 700 units of public housing plus 75% of all units built thereafter in white neighborhoods. This judgment order was based on the court's finding that the Chicago Housing Authority had intentionally limited sites for public housing to already black areas of Chicago in order to maintain racial segregation. Thus, it does not necessarily apply to cases in which intentional discrimination cannot be shown. Similarly, the court in *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La.. 1969) granted a preliminary injunction against both the Bogalusa Housing Authority and the Secretary of Housing and Urban Development enjoining further construction on those public housing sites which had been chosen for the purpose of maintaining racial segregation.

Finally, in *Shannon v. United States Dep't of Housing and Urban Dev.*, 436 F.2d 809 (3d Cir. 1970) the court held that HUD must consider the potential effects on racial concentration when reviewing an urban renewal plan contemplating subsidized rental dwellings, but it explicitly refrained from imposing a per se rule:

> There will be instances where a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one; which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.

Id. at 822.

102. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

acerbating and partly resolving a problem of which the litigants (and the judges) are, at best, peripherally aware.

C.

Whatever the constitutional trends, it should be clear that there is no ineluctable law which requires that external benefits (of the kinds considered in subsection A) be greater than, equal to, or less than external costs (of the sort considered in subsection B). Nevertheless, for purposes of further analysis, it will be useful to consider whether a tenant will benefit more or less from a $5 cash payment than from a $5 landlord investment in code improvements on the assumption that external benefits and external costs will precisely wash each other out.

Even in such a situation, the correct answer cannot be an unequivocal one. On the one hand, the landlord's $5 investment in code improvements will sometimes generate services which the tenant would value more than those he could purchase with $5 in cash. Since comprehensive code enforcement requires the landlord to engage in an improvement program on *all* his substandard properties, it may enable him to garner the economies of scale available by undertaking a larger repair operation than he would attempt without the code. Thus, for example, if the code requires the owner to undertake substantial electrical repairs and maintain them at a high standard, a landlord could well find it profitable to hire a full time electrician, thereby enabling him to improve each apartment's electrical defects far more cheaply than if each job were subcontracted out on an individual basis. This means that while it might cost an *individual* tenant $20 to get his landlord or an electrician to make a repair, it will cost the *landlord* only $5 to complete the task once code enforcement requires the owner to organize a more efficient and wide ranging maintenance service.[103] On the other

103. Some of the readers of earlier drafts of this article suggested that the economy of scale argument may be invoked with even more weight on behalf of the services performed by the code inspectorate. If there were no code enforcement at all, a tenant who wished to know the condition of the wiring or heating system in an apartment he was considering as a residence would often be required to hire the services of experts to give him special advice. Indeed, it could often happen that the same apartment would be inspected by different electricians hired by several different families before the apartment would ultimately be rented. In contrast, an effective code enforcement program could eliminate this waste by systematically appraising the safety of each apartment on a regular basis, providing information for all potential consumers. Moreover, even when the possibility of pointless, multiple inspections is set aside, systematic public inspection will provide relevant consumer information on a substantially cheaper per unit basis than will the alternative of private inspection. While a private inspector will only examine the apartment or apartments in which his customer is interested, the public official can save a great deal of money by inspecting all the units in the building at the same time, thereby obviating the need for countless limited purpose inspections under-

hand, in those contexts in which this economy of scale factor is not substantial, one would suspect that the $5 housing improvement will often benefit the tenant less than a cash payment of $5. For if the tenant has received $5 in *cash* he could presumably obtain his housing improvement simply by offering the $5 to the landlord, assuming that the costs of entering into the transaction are minimal.[104] However, there will be many tenants who would not choose to spend all their extra $5 on the housing improvements the code requires, but instead, would spend their extra income on other goods and services they desire more. To them, the landlord's $5 investment is worth less than $5 in cash. Concentrating myopically upon this possibility, it is easy for the critic of housing code enforcement to attack the program upon efficiency grounds. He would suggest that instead of redistributing landlord income through in-kind payments, it may be more efficient to *tax* slum landlords in *cash* and then distribute the *cash* to slum tenants to do with what they wish. Thus, not the negative income tax, but the "slumlord tax-tenant cash grant" plan appears as the ultimate antagonist of code enforcement.

While the "slumlord tax" has a certain initial charm to it, analysis reveals that there is more novelty than substance to this proposal. A comparison of a "slumlord tax" with a "code enforcement" scheme may fruitfully begin by inquiring whether the two alternative programs really differ from one another as much as their different labels suggest. When viewed from this perspective, analysis reveals that if the "tax" is substantial, it leads to results no different from "code enforcement."

taken at the behest of countless tenants.

While this argument is sound as far as it goes, it does not, alas, respond to the problem posed in the text. For the state's superior efficiency in providing consumer information does not justify code enforcement, but at most, a system of state inspections which would eventuate in a report posted in each apartment advising consumers of the existence of serious, non-obvious defects. Once consumers have been provided with this information, there is nothing in the information efficiency argument which suggests that they should be prevented from deciding for themselves whether they will endure the risks reported by the state or pay a higher rent for a less risk-laden apartment. Yet this is precisely what code enforcement, as opposed to a pure system of inspections, has the effect of doing.

Consequently, I have included this footnote principally to warn students of code enforcement that this argument, which seems on its face powerful indeed, justifies only a "pure" inspection program, but does not argue for moving beyond this to a coercive code enforcement operation.

104. This assumes further that even if there were no system of code enforcement, the state would furnish a mechanism like that described in note 103 *supra*, which provides the tenant with objective information regarding the existence of non-obvious defects latent in the apartments he is considering. As suggested in note 103's discussion of the consumer information problem, it seems quite clear that a system of state controlled inspections to unearth hidden defects can be justified on efficiency grounds which are quite independent of those that may be invoked on behalf of an enforcement program.

For when a landlord is threatened with a high "slumlord tax" he can avoid the tax simply by improving his building so that it no longer is classified as a slum. If he takes this option, his tenants benefit in the same way and to the same degree that they benefit from a code enforcement program. Indeed, the only difference between the two programs is that in one, the slumlord is threatened with something called a "tax"; in the other, he is threatened with a sanction labelled a "fine." Thus the "slumlord tax" alternative only remains a distinct option if the tax which is levied is *lower* than the amount required to induce universal improvement.

If, however, the tax rate is low enough that some of the landlords pay cash into the fund rather than improve their buildings, the taxing authority will encounter a far different problem in redistribution policy. The principal difficulty will become manifest if we assume—for a moment—that *none* of Slumville's landlords respond to the "slumlord tax" by seeking to improve their buildings. Thus, imagine that each landlord, who formerly charged a $100 monthly rental, is now obliged to pay $20 per unit per month into the fund and each tenant family receives $20 a month as a supplementary cash grant.[105] It should be easy to see that each landlord will quite promptly act to increase his rent to $120 and will succeed in this strategy. For if, prior to the slumlord tax, the marginal tenant was formerly willing to pay $100 without engaging in demand-limiting tactics, the marginal tenant will now be willing to "pay" $120 for this same apartment provided that he then receives a "supplemental grant" of $20: $120 — $20 = $100. Thus, if a "slumlord tax" is set low enough so that none of Slumville's landlords seeks to escape it by improving the building, each will rapidly succeed in raising his rent so that his tenant is no better off than he was formerly.

We are now in a position to assess the intermediate case in which some landlords respond to the tax by improving themselves out of the "slum" category while others find it cheaper to pay the tax. Assume, for purposes of simplicity, that of Slumville's 100,000 units, 10,000 are improved (X) while the remainder (Y) remain slummy, thereby opening a new set of alternatives to each ghetto family. On the one hand, they may live in inferior buildings and receive the $20 monthly supplement; on the other hand, they may foresake the $20 cash for the improved accommodations. Needless to say, the number of tenants taking one option

105. For purposes of simplicity, I shall temporarily assume away the cost of administering the "tax-grant" program, taking this matter up at p. 1185 *infra*.

rather than another will depend upon the pricing behavior of both the improved and inferior units. Imagine, for example, that the owners of the slummy Y units attempt to appropriate the entire benefit of the $20 government grant by raising their rents to $120, which is equivalent to the old $100 rent from the tenants' point of view once the $20 supplement is taken into account. Substantial numbers of Y's tenants could then be expected to move to the 10,000 X units since they have become relatively more desirable at the old $100 price. As the expatriate Y'ers move to X, they will of course bid up the rents beyond the old $100 level,[106] inducing old-time X residents to depart from their newly improved dwellings in search of the lower net rents prevailing in Y. Upon their arrival in Y, the ex-X'ers will confront the landlords of the slummy apartments recently vacated by the ex-Y'ers. As always, the rents resulting from the ensuing bargains will turn upon the preferences of the émigrés from X: if a significant number turn lukewarm at the pre-existing Y rent of $120 — $20, rents will decline; if not, not. All this means that the income redistribution effect of the "tax-grant" scheme will in a wide range of cases be singularly unimpressive: on the one hand, rent levels in the improved units will increase; on the other hand, the *landlords* will successfully obtain the benefit of the $20 cash subsidy unless the émigrés from X act lukewarmly when confronted by the old *net* rental prevailing in Y. Indeed, it would be necessary for the ex-X'ers to force the rent down by $20 before the entire grant would remain in the tenants' pockets. Thus, even in those cases in which, for example, $20 of code investment generate only a $10 benefit to the average tenant, it nevertheless does not follow that the average tenant will benefit more as a result of a "slumlord tax-cash grant" scheme which on its face promises to pay him $20 a month in cash. For in a wide variety of situations, the lion's share of the cash grant will be appropriated by slum landlords, with tenants remaining little better off than formerly.[107]

106. As the rental premium charged in the improved buildings increases, it will become cheaper for some of the landlords who initially selected the strategy of paying the "slumlord tax" to improve their buildings. This, in turn, will increase the competition in the newly improved sector, thereby depressing the rent that may successfully be charged tenants. This point may, however, be ignored without prejudice to an understanding of the basic arguments presented in the text.

107. This discussion casts some light upon another conceivable subsidy approach not considered in the text: what would be the result of a scheme which sought to pay cash grants *out of the general fund* to tenants living in substandard houses? The discussion here would suggest the likelihood that landlords, rather than tenants, would be the primary beneficiaries of this form of governmental largesse, although a canvass of further factors not considered here (notably the trickle down effect) would be necessary for a complete analysis. I have omitted a discussion of this subsidy approach here because it

Finally, there is a rather prosaic factor which makes the "tax-grant" scheme even less attractive. Up to the present time, we have assumed that the costs of administering a "slumlord tax-cash grant" plan were no greater than the code enforcement operation. It should be clear, however, that administering the "tax-grant" program would require the creation of an administrative behemoth far more costly than the bureaucracy required under code enforcement. Like the code enforcement authority, the taxing agency would be obliged to check the condition of the landlords' premises as well as engage in the sometimes cumbersome task of forcing a landlord to pay the cash due under the law. In addition to this, however, the taxing agency (unlike the code enforcement authority), would have to enter into an even more complex and costly effort when the time came to disburse the funds to Slumville's tenantry.[108]

When faced with these insurmountable obstacles, the "tax-grant" advocate most probably will be tempted to alter his proposal one final time, and suggest that instead of compensating Slumville's tenantry, the revenue raised from the slumlord levy should be placed in the general fund for worthy governmental purposes among which redistribution may be numbered. By revising the proposal in this way, however, the "tax" proponent has removed the only feature distinguishing it from the code enforcement alternative. For absent any effort to compensate the tenantry in cash, a "slumlord tax" is but a different label for a housing code enforced by "fines": if the "taxes" are very high, slum landlords will improve (or abandon) all their buildings to free themselves of their potential tax liability, just as they would when threatened by heavy "fines"; if the tax is lower, the result will be identical to partial code enforcement; if so low as to be *de minimis*, the result will be equivalent to ineffective enforcement.[109]

did not seem germane to the main line of the argument. Nevertheless, I suspect that one of my readers might find it rewarding to pursue this particular tangent, since it might well be that a number of contemporary efforts at subsidizing the housing of poor people may be seen in a different light as a result of the exercise.

108. Moreover, it should be recalled that not all of the cost of administering the code scheme is properly chargeable to the aspect of the plan which is concerned with redistributing wealth to the tenantry. *See* pp. 1123-24 *supra*.

109. In addition to the factors canvassed in the text, there is a final argument against any taxing scheme which many will find persuasive, though I am not numbered among them. Since effective code enforcement assures that the poor will live in "decent housing," it appeals to those paternalistic members of the middle and upper classes who gain psychic satisfaction in the knowledge that the life patterns of adults living in poverty conforms to middle-class norms; in contrast, however, the paternalists will be deprived of their satisfaction if poor adults are each given a share of the proceeds of a "slumlord tax," since the cash may be spent in ways not meeting the paternalists' approval. Thus, code enforcement can be conceived as a program which redistributes benefits not only to the tenantry but also to the paternalists in the upper classes. And

This final accounting of the relative merits of code enforcement, therefore, leaves the program relatively unscarred. Compared with the code program, the "slumlord tax-tenant cash grant" plan will generally have a far less significant redistributive effect and will in addition be substantially more expensive to administer. Finally, the "slumlord tax-general revenue fund" variation differs from code enforcement in name only.

IX. Beyond Slumville

A.

It has been my task to explicate the economic and ethical premises behind a government effort at regulating slum rental markets on behalf of the poor. As I cautioned in my introductory remarks, however, I have not attempted to prove that code enforcement will successfully redistribute income under all conditions. Indeed, under many conditions, the code must be supported by a special purpose housing subsidy if it is to be enforced at all successfully. Moreover, the redistributive impact of code enforcement also depends heavily upon the comprehensiveness of the enforcement effort: a localized effort may be relatively ineffective in a market structure in which comprehensive enforcement would yield significant results.

Instead of advancing code enforcement as a panacea, my task has been a more modest one. I have attempted to demonstrate that, even when it is compared to a redistributive system which relies exclusively upon a negative income tax, comprehensive code enforcement (backed by an appropriate subsidy) often has certain significant advantages: first, it may require landlords to make improvements which, except for bargaining costs, would have been in their interest—and in the interest of their tenants—to make anyway; second, it serves to tax away a substantial share of the rentier and monopoly profits earned by slum land-

if the satisfaction accruing to the paternalists may properly be counted, the code enforcement program has yet another advantage over the "tax-grant" alternative. *Cf.* Buchanan, *What Kind of Redistribution Do We Want?*, 35 ECONOMICA 185 (1968).

I am of the view, however, that the psychic benefits potentially derived by the paternalists should not be counted. For while I have argued that it is fair to impose a special burden upon the landlords to redistribute wealth to their poorer tenants, I can discern no plausible ground for imposing an obligation upon landlords to make investments which please the paternalist members of the privileged classes. Since the landlord's obligation only properly runs to his tenants, I would select the policy alternative which maximizes the benefits made available to the proper beneficiaries and ignore the benefits accruing to those beneficiaries whose interests the landlord has no obligation to respect. Thus, if it could be established that the "tax-grant" plan more efficiently provided benefits to the tenantry than the code enforcement-subsidy plan, I would opt for the "tax-grant" alternative. It is only because the considerations advanced in the text convince me that this will not be the case that the alternative has been rejected.

lords; third, it fairly imposes a burden upon landlords who, like other members of the privileged class, have an obligation to exercise self-restraint in their ongoing dealings with the poor; fourth, it generates the same total amount of benefit to the poor tenantry, at a much reduced expenditure of *government* funds.

In the world of pure theory, this last point could easily be ignored. One may argue—with a surface plausibility—that we are not interested in a program's cost to the government, but only in its overall cost to society. This argument, however, neglects an important aspect of the code enforcement problem. For if—as we have suggested—it is fair to impose a special burden upon slum landlords to redistribute income to their tenants, the "costs" landlords incur in fulfilling the code must be viewed in a different light from the way expenditures are normally considered in cost-benefit analysis. Normally, the analyst's calculation of "cost" presupposes the legitimacy of the existing distribution of income. Thus, when Jones is forced by government to spend $100 for a public purpose in which he does not benefit, the analyst counts the $100 as a "cost" of the program only because the government has deprived Jones of the opportunity to expend $100 for his own purposes. If, however, the government believes that it would not have been fair for Jones to have spent the $100 in the first place, the analyst should not count Jones' lost opportunity as a "cost." (Indeed, from the government's point of view, Jones' lost opportunity is—if anything—a benefit, not a cost.) It follows, then, that a reader convinced of the fairness of placing a special redistributive obligation upon slum landlords would not necessarily consider their expenditures incurred under code enforcement as a "cost" of the program, since the program has only deprived the landlords of funds they should not fairly have spent for their own purposes in any event. Indeed, in assessing the "cost" of the landlord's expenditure, the reader convinced by this essay should consider only whether in choosing code enforcement as the means of enforcing the landlord's special obligation to his tenants, the state lost the opportunity to adopt a redistribution scheme which generated even greater tenant benefits than code enforcement promises. As our consideration of the viability of "slumlord taxes" and "tenant cash grants" has just shown, however, code enforcement seems to be the most efficient form of discharging the landlord's special obligation to his tenantry. Consequently, those who are persuaded by this essay will consider the "opportunity cost" of code expenditures incurred by landlords to be zero. For the convinced reader, the only costs which must be weighed are those reflected in the *government's* budget, since in choosing to spend these

funds on the code enforcement-housing subsidy plan, the state has doubtless foregone opportunities either to embark upon alternative public projects or reduce the general tax level.

Even for those less convinced of the fairness of imposing a special redistributive obligation upon landlords, however, the significance of the relatively low governmental budgetary cost of the code-subsidy program should not be completely discounted. For in the world of American institutions, the point is not unimportant. Given the constraints on local taxing power imposed both by state constitutions and by competition among localities to attract new business, the relatively low budgetary cost of the code enforcement-subsidy scheme means that it is one of the few programs which could feasibly be instituted by city governments wishing to sustain a significant effort at income redistribution. Moreover, even if a negative income tax were adopted on the national level, we have shown that code enforcement would—under many circumstances—perform as an appropriate local supplement to the broader national effort. And it would appear that the case for housing code enforcement is even more persuasive given the present confusion we call our welfare system.

When all is said and done, of course, an approach to income redistribution which relies in part on code enforcement and a special housing subsidy deprives the tenantry (or at least the adult portion of the poor tenantry) of full freedom to use all of their subsidy money as they see fit. And this fact alone may, in the eyes of those who make their spiritual home the University of Chicago, be enough to invalidate the program's entire claim to legitimacy. For those less convinced of the supreme moral significance of consumer sovereignty than Milton Friedman, however, perhaps the most important utility of this essay will be its reminder that a sophisticated redistribution policy need not necessarily rest upon a single technique, however attractive its simplicity.

B.

On a lower level of abstraction, the analysis presented here permits an evaluation of existing federal policies governing code enforcement. Since 1965, HUD has been granting substantial subsidies "for the purpose of assisting . . . localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the

area."[110] Moreover, the federally subsidized concentrated code enforcement program contains a number of features which should commend themselves to the reader who has been persuaded by this article: special financing is provided to all property owners wishing to improve their buildings to code level, with a special preference given to owners of moderate income;[111] many tenants who are induced to leave their homes as a result of code enforcement are provided with relocation grants to compensate them for the expenses involved in moving and establishing themselves in a new home;[112] in addition, regulations

110. 42 U.S.C. § 1468 (Supp. V, 1970), § 311(a), 79 Stat. 477 (1965), *as amended* § 6(b), 81 Stat. 21 (1967), § 515, 82 Stat. 525 (1968), § 202(c), 83 Stat. 386 (1969). The federal share can be as much as two-thirds of the total program cost in cities with populations greater than 50,000 and as much as three-fourths total cost in smaller cities. *Id.* In addition, the Housing and Urban Development Act of 1968 authorizes grants of similar—though more limited—subsidies to support "programs to alleviate harmful conditions in slum and blighted areas which are planned for substantial clearance, rehabilitation, or federally assisted code enforcement in the near future but in which some immediate public action is needed until clearance, rehabilitation, or code enforcement activities can be undertaken." 42 U.S.C. § 1468(a) (Supp. V, 1970), § 514, 82 Stat. 525 (1968), *as amended* § 202(d), 83 Stat. 386 (1969).

111. Under § 312 of the Housing Act of 1964, 42 U.S.C. § 1452b (Supp. V, 1970), *as amended* § 207, 83 Stat. 387 (1969), HUD is authorized to grant 20 year loans at the subsidized interest rate of 3%, with priority for owners whose income is below that prescribed for occupants of projects funded under 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970). For more details, see HUD, REHABILITATION FINANCING RAA PROGRAMS HANDBOOK, RHA 7375.1, ch. III (1970). In addition, grants of up to $3,500 are available to families with very low incomes who, nevertheless, own their own slum homes, 42 U.S.C. § 1466 (Supp. V, 1970).

112. Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, tit. II, 84 Stat. 1894 (enacted Jan. 2, 1971) [hereinafter the Uniform Relocation Act], assistance is provided to all families who are evicted as a result of code enforcement activities, *see* implementing regulations §§ 42.55(c)(3)(a), 42.55(c)(3)(b)(2), 36 Fed. Reg. 8790 (1971), and to certain penurious families who move when confronted by substantial rent increases of a kind described more fully at note 117 *infra*. Eligible families are entitled to compensation for moving expenses, Uniform Relocation Act, § 202(a)(1), and, in addition, state authorities must find the emigrant a *code* level apartment in a neighborhood comparable in other respects to the one he is leaving, § 204(1), as interpreted by implementing regulations §§ 42.20(b), 42.20(c), 36 Fed. Reg. 8787 (1971); this right to demand a decent home may, however, be "waived" by the emigrant if he "refuses without justification reasonable choices of specifically identified replacement dwellings," § 42.120(b), 36 Fed. Reg. 8795 (1971)—an exception which seems capable of substantial manipulation by a reluctant relocation agency. In any event, if the tenant obtains a new apartment through the assistance of the relocation agency only to find that his rent has increased as a result of the move to a decent home, the Act undertakes to pay the difference between his old and new rent for a period of four years, up to a limit of $4,000, Uniform Relocation Act, § 204(1), and implementing regulations, § 42.95(c), 36 Fed. Reg. 8794 (1971). No mention is made of the fate of the tenant after the four years or $4,000 are exhausted, but it would seem probable that when the subsidy terminates, most will return to inferior housing in the ghetto, this time with no state assistance for moving costs.

Thus, the Act's approach to relocation is a curious mixture: on the one hand, by insisting that the tenant be placed in a code level house, the Act seems to require that he be put in a better position than formerly; by terminating all assistance after four years, it ultimately places the tenant in a worse position; moreover, there is no attempt to compensate the tenant for the non-monetary costs of uprooting himself from one neighborhood to another, as well as the further psychological dislocation involved in the probable subsequent move back to inferior accommodations after the four year period expires.

recognize the relationship between code enforcement and subsidy policy by providing that:

> *No displacement [shall] occur in a locality* which has less than a three percent vacancy rate in rental housing—adequate in size and within the financial means of those anticipated to be displaced—unless the locality undertakes replacement of housing units through rehabilitation of substandard units or new construction, as a minimum, on a one-to-one basis for each such unit removed from the housing supply.[113]

On the other hand, the program does not specifically address the problem of external costs generated by abandoned houses;[114] even more important, however, is the program's virtually exclusive concentration upon the importance of code enforcement in relatively small segments of the city's slums. While HUD naturally instructs each locality "to develop . . . long-range goals for community-wide code compliance," the agency requires the development of a "specific action program" only "with respect to . . . priority areas."[115] Not surprisingly, HUD policy verges on the incoherent when it comes to articulating the appropriate factors to be considered by local and federal officials in their attempt to define appropriate "priority areas" for code enforcement.[116] The

When this curious assortment of subsidies is weighed together, it seems fair to conclude that, at the very least, the Uniform Relocation Act does not significantly improve the position of the émigré and may indeed fail to compensate fully for the full range of monetary and non-monetary costs involved in the dislocation. Indeed, it would seem probable that a straight cash grant would provide a superior mode of compensating for dislocation than the present administrative amalgam.

113. HUD, CODE ENFORCEMENT GRANT HANDBOOK, RHA 7250.1, ch. 6, ¶ 1(d) (1969).

114. While a federal subsidy is authorized under certain limited conditions to underwrite in part the cost of demolition of unsafe structures, 42 U.S.C. § 1467 (Supp. V, 1970), there is no explicit requirement in the regulations promulgated under the concentrated code enforcement program demanding that municipalities take advantage of this section or go further and put the vacant lot to a beneficial use. Perhaps the general proviso that "[t]he municipality shall have a program satisfactory to HUD for providing all necessary public supporting improvements and services within the code enforcement project area," HUD, CODE ENFORCEMENT GRANT HANDBOOK, RHA 7250.1, ch. 2, at 1 (1968) implies that localities are responsible for resolving the abandoned building problem satisfactorily, either by using their own resources or by applying for a grant under another federal program.

115. HUD, WORKABLE PROGRAM FOR COMMUNITY IMPROVEMENT, RHA 7100.1, ch. 4, ¶ 4 (1968).

116. When the HUD Guide gives examples of appropriate priority code enforcement projects, the reader is treated to an endless list of unrelated criteria:

> EXAMPLES OF PRIORITY AREAS. Examples of areas having high priority need for code enforcement are: slum areas with especially urgent threats to health or safety, basically sound neighborhoods threatened by deterioration, urban renewal areas in which clearance is not imminent, Model City neighborhoods, older buildings on a scheduled basis, and dwelling units brought onto the market for sale or rental.

HUD, WORKABLE PROGRAM GUIDE, RHA 7100.1, ch. 4, ¶ 5 (1968). Moreover, when the Guide moves on to describe the fundamental factors involved, the program's failure to deal coherently with the income redistribution problem becomes manifest:

> CONSIDERATIONS RELATED TO CODE ENFORCEMENT. The requirement

core of the difficulty, of course, is that the redistributive consequences of partial code enforcement of the kind endorsed by HUD may be far less favorable than those implied by a comprehensive program regulating the private sector in all the city's slums, operating in conjunction with an appropriate subsidy policy. I do not suggest that HUD completely ignores the unpleasant fact that its present program of partial code enforcement can be expected to impose severe hardships on those poor tenants who are induced to flee the "priority area" when confronted by a significant increase in rents. The agency does attempt to aid at least the most penurious among the émigrés by both moving them to code level houses in other neighborhoods and assisting them in their effort to pay the higher rents generally associated with an apartment possessing a higher level of amenity than their previous substandard dwelling.[117] Nevertheless, even on the unlikely assumption that this program is administered with great success, it will often serve only to conceal, rather than eliminate, the fact that partial code enforcement may sometimes prove an ineffective redistribution device. It is true that, thanks to HUD, some of the émigrés from the "priority area" will not be obliged to move immediately to one of the inferior houses in areas where the code remains unenforced. However, by moving the émigré to a code house in another neighborhood, HUD will in all likelihood preempt one of the limited supply of code level apartments available to Slumvillites, thereby requiring the Slumville family which *otherwise* would have lived in the code apartment to obtain lodging in an inferior building.[118] Thus the result of the complex

that communities establish an effective program of code enforcement is based on the fact that unchecked deterioration of individual structures is an important cause of blight which affects the care given nearby structures and neighborhoods. *At the same time, it is recognized that communities may need to enforce housing codes in a flexible manner to avoid unduly harsh effects on low income families and individuals.*

Id. at ¶ 6 (emphasis added).

117. For a description of the subsidies provided and an assessment of their adequacy, see note 112 *supra*. Under the regulations interpreting the Uniform Relocation Act, a tenant who is confronted by a rent increase in excess of ten per cent is eligible for the assistance described in note 112 *supra*, provided that the new rental is in excess of the amount the local agency has determined to be the limit imposed by the tenant's "ability to pay," § 42.55(c)(3)(b)(1), 36 Fed. Reg. 8790 (1971). Obviously, the "ability to pay" formula is flexible indeed, and those émigrés found to be on the wrong side of the line are forced to bear the full brunt of dislocation.

118. It is only a relocation effort which substantially expands the number of units of code housing available to ghetto residents which is immune to the line of criticism pursued in the text. Such a program would require the agency to subsidize émigrés to such a degree that they would be capable of outbidding middle-class renters in Middleburg who—as a result—would purchase or rent new housing where they would otherwise have been content to live in an older unit, thereby increasing the rate at which Middleburg housing trickled down to Slumvillites. A consideration of the details of the

relocation effort may well be to change the identity of the families required to live in substandard units without changing the basic reality that rents have risen substantially in the "priority area" while they may have failed to decline in the areas ignored by the code inspector.

The federal government's code assistance is a relatively small-time affair, as such things go, with the estimated cost of the federal subsidy to localities running at $72 million in 1971 and $52 million in 1972.[119] In contrast, the more ambitious neighborhood development program (NDP), created by the 1968 Housing and Urban Development Act, promises to become of far greater importance.[120] The NDP is designed to short circuit the extraordinarily cumbersome planning process associated with traditional urban renewal procedures which often deferred significant action for unconscionable time intervals while the "planning process" crawled forward. Most important for our purposes, NDP districts are capable of combining subsidy and code enforcement strategies in much more flexible ways than seem available under the simple code enforcement program.[121] Nevertheless, the fact that the NDP effort is concentrated in specially selected target areas within the slums can be expected once again to induce the now familiar rent

present subsidy program, *see* note 112 *supra*, suggests that such liberal subsidies will not, in general, be forthcoming.

119. THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972 (APPENDIX) 532 (1971).

120. 42 U.S.C. §§ 1469-1469(c) (Supp. V, 1970). Estimated expenditures in 1971 incurred for NDP and the diminishing number of traditional urban renewal projects amounted to 939 million dollars. THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972 (APPENDIX) 532 (1971).

121. 42 U.S.C. § 1457 (Supp. IV, 1969). It should be noted, however, that when Barnet Lieberman questioned code enforcement officials in thirty-nine cities during 1965 and 1966 about their relationship with urban renewal and public housing subsidy programs, he found:

> To the question, "To what extent is code enforcement tied in or coordinated with the urban renewal or public housing programs?" 34 percent answered "none." Only 10 percent described the relationship between the urban renewal agency and the code agency as "close." In 54 percent of the municipalities, it was stated that the "tie-in" or "coordination" is minimal, as, for example, (1) in survey inspections by the code agency for Part I urban renewal applications by the LPA; (2) in the use of the code agency as a last resort against recalcitrant property owners in conservation areas; (3) in the making of relocation inspections by the code agency; and (4) in the renewal agency's use of housing inspectors to obtain entry for surveys of housing conditions in rehabilitation areas.
>
> It was interesting to observe the feeling and emphasis put into the answers to the question about LPA interest in a code compliance program. Thirty-four percent of the officials unhesitatingly used the word "none" and 21 percent replied "limited" or "very little." In only 20 percent of the municipalities was the interest described as "positive" or "good."

B. LIEBERMAN, *supra* note 2, at 10-11. This data was, of course, collected during the earliest stages of the federally supported concentrated code enforcement program and before the NDP program was established in 1968; it is possible that a survey taken today would yield somewhat different results.

inflation at the expense of some of the NDP's original inhabitants who will flee the area in their search for lower rents.[122]

To many, of course, all this will simply suggest that "urban renewal," despite latter-day modifications intended to restrain its use on behalf of the rich and merchant classes, remains, at the very least, a device which will serve the black lower-middle class without much concern for the black proletariat and lumpen proletariat. But there is another, admittedly more optimistic, way of considering the matter. While our society decades ago committed itself to the promise of a decent home for every American,[123] we have never been clear as to why we made this promise precisely because we have never soberly considered the relationship of this commitment to the larger question of income distribution; nor have we even seriously sought to establish the extent to which regulation of the private housing sector related to the housing subsidy policies which were being contemporaneously pursued. Instead, one aspect of housing policy has been isolated from its complement and the entire problem of "decent housing" isolated from the larger issue of income distribution of which it is an important part. Doubtless this intellectual failure does not in itself adequately explain the inadequacies of contemporary housing policy, which in many respects can be traced to a basic failure of political will. Nevertheless, this essay is premised on the notion that our inability to relate subsidy policy to regulation of the private sector has been abetted to a great extent by a failure to think through the fundamental conceptual problems involved in regulating housing markets on behalf of the poor, and that a sustained public discussion of these matters will contribute significantly to the development of a more sophisticated and humane housing policy.

C.

Our analysis of the conditions under which effective code enforcement is desirable may also cast some light upon the propriety of the proliferating number of legal remedies granted to poor tenants proposed in the literature or enacted by legislatures and courts. While the law

122. Particularly penurious émigrés from NDP, who qualify for subsidy under the conditions stated in note 117 *supra*, are eligible for the grants available under the Uniform Relocation Act, which are described in note 112 *supra*. The significance of this subsidy effort in ameliorating the burden upon émigrés has, however, already been discussed in the previous paragraph in the text.

123. *See* United States Housing Act of 1937, § 1, 50 Stat. 888.

here is in an especially chaotic condition,[124] it may be possible to clarify the confusion somewhat by recognizing that tenant rights may be ex-

124. In the absence of legislative action, common law notions of property rights and the principle that the covenants in a lease are independent have traditionally restricted tenant rights and remedies even where the landlord breached an express promise to repair. In an action by the landlord to recover rent, courts did recognize the defense of constructive eviction, however, but only where the tenant showed an actual abandonment due to outrageous conditions, 1 AMERICAN LAW OF PROPERTY § 3.51 (A. Casner ed. 1952). More recently, several modern court decisions, most notably in the District of Columbia, have broken away from these traditional doctrines. *See* Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) holding that notwithstanding the terms of the lease, the landlord is obligated to maintain the premises in habitable condition and his failure to perform will entitle the tenant to withhold his rent; Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968) declaring a lease void as an illegal contract because knowingly executed by the landlord in violation of the local housing code. *See also* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (Sup. Ct. N.J. 1970); Lemle v. Breeden, 462 P.2d 470 (Sup. Ct. Hawaii 1969) holding that in the lease of a dwelling there is an implied warranty of habitability and fitness for its intended use.

Movements on the judicial front, however, are dwarfed in significance by an increasing amount of legislative activity taking various forms. Five states have enacted repair and deduct statutes whereby tenants are authorized to make their own repairs and deduct the cost from the rent. CAL. CIV. CODE § 1942 (West Supp. 1971) (provided the cost does not exceed one month's rent); LA. CIV. CODE ANN. art. 2694 (1952) (provided the cost is "just and reasonable"); MONT. REV. CODES ANN. § 42-202 (1961) (provided the cost does not exceed one month's rent); N.D. CENT. CODE § 47-16-13 (1960) (no express limitation on the cost of the repairs); OKLA. STAT. ANN. tit. 41, § 32 (1951) (no express limitation on the cost of repairs). Ten others have gone further and enacted rent withholding or abatement statutes. CONN. GEN. STAT. ANN. §§ 19-347a-h (1969); ILL. ANN. STAT. ch. 23, § 11-23 (Supp. 1970); IND. ANN. STAT. § 48-6144 (Supp. 1970); MASS. ANN. LAWS ch. 111, § 127C (1967), *as amended*, MASS. ANN. LAWS ch. 111, § 127C (Supp. 1970), MASS. ANN. LAWS ch. 239, § 8A (Supp. 1971); MICH. COMP. LAWS ANN. §§ 125.530, 534 (Supp. 1971); MO. ANN. STAT. § 441.570 (Supp. 1970); N.J. STAT. ANN. § 2A:42-79 (Supp. 1971); N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1970); N.Y. REAL PROP. ACTIONS AND PROC. LAW § 755 (McKinney Supp. 1970), *amending* N.Y. REAL PROP. ACTIONS AND PROC. LAW § 755 (McKinney 1963); N.Y. REAL PROP. ACTIONS AND PROC. LAW §§ 769-82 (McKinney Supp. 1970); N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1971); R.I. GEN. LAWS ANN. § 45-24.2-11 (Supp. 1970). Many of these statutes provide that actions may be initiated either by a public agency (IND. ANN. STAT. § 48-6144 (Supp. 1970)), a welfare department (ILL. ANN. STAT. ch. 23, § 11-23 (Supp. 1970); N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966)) or housing department (*see, e.g.*, CONN. GEN. STAT. ANN. §§ 19-347a-h (1969)), or by the tenant himself acting alone (MASS. ANN. LAWS ch. 239, § 8A (Supp. 1969)), or jointly with others (N.Y. REAL PROP. ACTIONS AND PROC. LAW §§ 769-82 (McKinney Supp. 1970) requiring participation by one-third of the tenants in the building). Other statutes provide the tenant with a defense to an action for summary eviction (N.Y. REAL PROP. ACTIONS AND PROC. LAW § 755 (McKinney Supp. 1970), *amending* N.Y. REAL PROP. ACTIONS AND PROC. LAW § 755 (McKinney 1963)). The usual prerequisites for the statutory remedy is a code violation certified as causing the dwelling to be "unfit for human habitation" (PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1971)), or "dangerous, hazardous or detrimental to life or health" (N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966)). Once a violation has been certified, rents typically must be deposited in some form of escrow account and the landlord is generally given a period of time such as 90 days (ILL. ANN. STAT. ch. 23, § 11-23 (Supp. 1970)) or 6 months (PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1971)) to make the necessary repairs. Sometimes the period of time available to the landlord is not explicitly defined, requiring only that he have a reasonable opportunity to make the repairs (N.J. STAT. ANN. § 2A:42-79 (Supp. 1971)). If the landlord fails to make the repairs, the rents are either returned to the tenants (PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1971)), or allocated to a receiver appointed to make the repairs for him (CONN. GEN. STAT. ANN. § 19-347c (1969)), or an administrative penalty may be assessed on the withheld rent (ILL. ANN. STAT. ch. 23, (Supp. 1971)).

Some authors have urged courts and legislators to go beyond this and recognize slumlordism as a tort. Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967). *But see* Blum & Dunham, *Slumlordism as a Tort—A Dissenting View*, 66 MICH.

panded to protect two very different interests. On the one hand, a tenant may be given greater legal recourse when his *reasonable expectations* as to the condition of the premises have been disappointed. Consider, for example, the plight of the tenant who moved into his apartment believing (reasonably) that it was adequately heated, only to find it freezing during the winter. Under the old regime, the tenant was of course obliged to continue paying rent in the absence of an express landlord covenant to provide adequate heat upon whose fulfillment the tenant's obligation to pay rent had been explicitly made dependent; under the new, he might be entitled (a) to quit the premises and remain free of his obligations to continue rental payments required by his lease under an expanded doctrine of "constructive eviction" or (b) to put his rent into escrow until heat is restored or (c) to obtain a court appointed receiver charged with rehabilitating the heating system or (d) to demand even more drastic remedies. While much can be said concerning the propriety of the frozen tenant's demands, the fact remains that at least certain forms of relief may be justified on the ground that the tenant's reasonable expectations as to the quality of his apartment are entitled to legal protection.

In contrast to the "expectation interest," however, the expansion of tenant rights may be understood to protect an interest in a "decent home." Consider, for example, a tenant who moves into a freezing apartment in mid-winter and thus is perfectly well aware of the defect in the heating system. If this tenant is to be given any form of legal protection when he later attempts to induce the landlord to provide heat, it must be on the ground that the landlord has an affirmative obligation to redistribute some of his income to his tenantry for the sake of providing him with a "decent home." It should be apparent to the reader that the ethical and economic analysis which we have attempted in the body of this essay is relevant to a consideration of this claim. Most important, our discussion suggests that localized rent-withholding actions cannot be expected to be terribly successful in vindicating

L. REV. 451 (1968); Sax, *Slumlordism as a Tort—A Brief Response*, 66 MICH. L. REV. 465 (1968). Where a claim is based on the proposed tort theory, the tenant would not be required to show physical injury or severe emotional distress; instead, the court would examine the conduct of the landlord and the availability of housing alternatives to the tenant to determine whether there had been an "imposition of outrageous conditions." Sax & Hiestand, *supra*, at 889-906.

These trends, together with recommended extensions, have been examined in numerous law review commentaries. *See, e.g.*, Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304 (1965); Note, *Rent Withholding for Minnesota: A Proposal*, 55 MINN. L. REV. 82 (1970); Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368 (1968).

the "decent home" interest if they simply induce the isolated target landlord to improve his building. For in the medium run—if not the short run—the landlord will succeed in increasing his rent substantially as the residents of the surrounding slum find the improved apartments more desirable. Consequently, whatever virtue rent strikes may have in giving the poor a sense of self respect, they will frequently be rather ineffective income redistribution devices. The same may be said for even more drastic remedies, like receiverships and the suggestion that slumlordism be made a tort. If, however, rent withholding and similar actions are more than sporadic and isolated affairs, their value as a redistributive device holds greater promise. Traditional code enforcement methods are not only quite costly, but are often ineffective; if tenant organizations can achieve broad effectiveness throughout a particular Slumville, a properly drawn rent withholding statute may provide a mechanism by which tenant organizations may themselves take on the task of enforcing the code on a wide ranging basis. And, as we have shown, comprehensive code enforcement permits a significant possibility of substantial income redistribution in a wide range of situations. Of course, if there is a broadly based tenant organization in Slumville, it might not be necessary for the group to institute a large number of rent withholding actions in order to induce the landlords to obey the housing code. So long as a rent strike action is a credible threat, its deterrent value alone may lead most landlords to believe that code conformity is the best policy. Indeed, even if tenant organizations will never be so well developed as to bear the full weight of enforcing the code comprehensively, they may develop sufficiently to serve as a supplement to the city's enforcement efforts.

D.

Perhaps the most notable quality of property law in the United States is the extent to which its characteristic doctrines and institutions remain insulated from the broader currents of legal thinking. I refer not only to hoary problems such as whether specific performance should be granted in land transactions although the remedy is not generally available in other areas. Even analyses of the more "modern" legal institutions which structure contemporary land development seem highly idiosyncratic when viewed from a broader perspective. Thus, discussions of zoning rarely consider whether anything can be learned from other governmental efforts at industrial regulation.[125] Nor have I ever

125. For exceptions to this rule, see, *e.g.*, Dunham, *City Planning: An Analysis of*

seen a sophisticated and sustained legally oriented comparison between the regulatory pattern imposed by the Federal Home Loan Bank Board and that mandated by the Federal Reserve Board.

In suggesting that these comparisons—and hundreds of others—be considered seriously, I do not mean to argue that there are no good reasons for the distinctive characteristics of the legal institutions which surround land development. Indeed, this essay has attempted to trace a systematic relationship between property law problems—revolving around tenants' organizations, tenants' private remedies, code enforcement and housing subsidies—with more general considerations of income redistribution policy. Nevertheless, in testing property doctrine against a larger framework, I have little doubt that much deadwood will be revealed. Freed from provincialism by comparative analysis, property lawyers will be in a much better position to design institutions which will more effectively deal with the distinctive character of land development. While some work along these lines has been attempted in the past, much more needs to be done with dispatch if lawyers are to deal coherently with the pressing problems of both the center city and the suburban fringe.

the Content of the Master Plan, 1 J. LAW & ECON. 170 (1958); Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 S. CAL. L. REV. 548 (1965).