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## SLUMLORDISM AS A TORT

Joseph L. Sax\* and Fred J. Hiestand\*\*



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*The case is one in which the recitation of the facts to an average member of the community would arouse his resentment . . . and lead him to exclaim, "Outrageous!"*†

### *Introduction*

**T**HE war against poverty has been fought with rather more vigor than its initiators contemplated. Thus far, however, the major engagements have taken place in the streets of Watts and Chicago, which is not quite what they had in mind. Some, who think it odd

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† RESTATEMENT (SECOND), TORTS § 46, comment *d* at 73 (1965).

that as we pass more laws we get more lawlessness,<sup>1</sup> will perhaps content themselves by observing that the feeding hand is always bitten. Those less easily satisfied have begun to see the need for adopting some legal solutions as far reaching as the problems they are designed to abate; the following article is addressed to them.

As an issue which is illustrative both of enormous need, and of great expenditure of traditional legal technology directed toward mitigating that need, perhaps nothing surpasses the problem of slum housing. Today, half a century after slum dwelling laws were widely enacted in response to public outrage,<sup>2</sup> and a generation since the principle of public housing became operative,<sup>3</sup> there remain vast numbers of urban housing units in which the most appalling living conditions continued to exist.<sup>4</sup> Yet, it would be difficult to find a social wrong that has been more thoroughly and elaborately attacked in law. For example, New York, the first city of America in the quantity and detestability of its slum dwellings, as well as in other things, has at least five major legal devices designed to eliminate substandard housing: The owners of such housing can be criminally prosecuted;<sup>5</sup> the offending building can be ordered vacated;<sup>6</sup> rent can in some circumstances be withheld or abated;<sup>7</sup> controlled rents can be involuntarily reduced;<sup>8</sup> and the building can even be put into

1. It has been widely observed that opportunity triggers increasing expectations, so that times of social progress are pre-eminently times of social unrest, with the level of dissatisfactions tending to outrun the rate of progress. *E.g.*, 1 STOUFFER, *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE* 153, 257 (1949); Grimshaw, *Lawlessness and Violence in America and Their Special Manifestations in Changing Negro-White Relationships*, 44 J. NEGRO HIST. 52 (1959); Reston, *The Shame of the Cities*, N.Y. Times, July 24, 1966, p. 10E, col. 5. This recognition prompts, rather than pre-empts, the lawyer's task, for his role is to prevent the disorder which that gap engenders by providing legal forums into which new and legitimate demands may be channeled.

2. See WENDT, *HOUSING POLICY—THE SEARCH FOR SOLUTIONS* 145 (1962); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 315 (1965).

3. The federally aided public-housing program began with the Housing Act of 1937, 50 Stat. 888.

4. The 1960 Census of Housing shows over 15 million deficient housing units, out of a total inventory of some 58 million units, of which over 6 million are either dilapidated or deteriorating and lacking plumbing facilities. U.S. CENSUS OF HOUSING 1960, vol. 1, *States and Small Areas, Part 1* xxxvi. A committee of the Illinois General Assembly, after touring slum housing in 1965, reported: "It is hardly possible to believe that human beings live in a modern city in the conditions which the Committee observed." REPORT OF THE COMMITTEE OF THE ILLINOIS HOUSE OF REPRESENTATIVES ON SLUM HOUSING AND RENT GOUGING 4 (June 1, 1965). See also the remarks of Vice President Humphrey, N.Y. Times, July 19, 1966, p. 1, col. 2.

5. N.Y. MULT. DWELL. LAW § 304; N.Y. PEN. LAW § 2040.

6. N.Y. MULT. DWELL. LAW § 309.

7. N.Y. SOC. WELFARE LAW § 143 (b); N.Y. MULT. DWELL. LAW § 302-a; N.Y. REAL PROP. ACTIONS LAW §§ 755, 776(b).

8. N.Y. UNCONSOL. LAWS tit. 23, app. § 34 (2) (McKinney 1961); N.Y.C. ADMINISTRATIVE CODE § Y-51-5.0 (h) (1963).

receivership, so that the city can make repairs and obtain a lien on rents to secure reimbursement.<sup>9</sup> These are certainly strong—some might say draconian—measures; yet, despite their presence, abominable slum housing conditions persist in very great quantity. What is most notable about these remedies is neither their variety nor their severity, but rather their four common weaknesses.

1. Because they are essentially public enforcement measures, they embrace all the most unattractive elements of paternalism. Although the tenant is a critically interested party, housing code enforcement is basically a two party proceeding, between the enforcement official and the landlord, with the former deciding when and in what way to proceed, how vigorously to press enforcement,<sup>10</sup> and what remedies to seek. Since the tenant is not vested with the basic prosecutorial initiative, nor with authority to control the proceeding, some third party must make for him decisions which vitally affect his interests, such as whether to take the risk that vigorous enforcement will lead to abandonment, eviction, or rent increases. These are decisions which even the saintliest official would find it difficult to make with proper discretion and sensitivity. Is it then any wonder that housing code enforcement so often backfires, leaving its intended beneficiaries puzzled, resentful, and hostile, and thus more ready than ever to bite the paternalistic hand?

2. While almost everyone agrees that the slum tenant has been wronged by the maintenance of seriously substandard housing, no serious effort has ever been made to see that he is compensated for the wrong that has been inflicted upon him. Ordinarily, enforcement officials are highly pleased if their work results in future improvement of the property; if they are successful in that effort, they are perfectly happy to let bygones be bygones. As one writer aptly put it, public authorities view their function as "obtaining compliance, not in fining landlords."<sup>11</sup> Moreover, even where penal sanctions are exacted—and they have traditionally been ridiculously mild<sup>12</sup>—the proceeds

9. N.Y. MULT. DWELL. LAW § 309.

10. Happily, there has been some movement toward tenant initiated remedies, but public action is still the overwhelmingly dominant factor in enforcement. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1289 (1966).

11. Note, *Administration and Enforcement of the Philadelphia Housing Code*, 106 U. PA. L. REV. 437, 449 (1958).

12. Gribetz & Grad, *supra* note 10, at 1276; Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 278 (1966); Comment, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 820-21 (1965). In 1965 in New York City the average fine per case was \$13.96. N.Y. Times, April 15, 1966, p. 36, col. 5. See also LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, ADMINISTRATIVE CONSOLIDATION OF HOUSING ENFORCEMENT AGENCIES OF THE CITY OF NEW YORK, A PRELIMINARY REPORT PREPARED AS PART OF A STUDY OF HOUSING MAINTENANCE STANDARDS AND ENFORCEMENT 18, 39. (Dec. 31, 1964).

go into the public coffers; ordinarily not a penny goes to the tenant who has been subjected to living in indecent housing during all the time that the wrong went unremedied. While it is perhaps understandable that public officials look toward the future, it would hardly be surprising to discover that the tenants involved are dismayed to learn that the landlord who has deprived them of the benefits to which the law entitles them is not viewed as having thereby committed a wrong for which substantial redress may be had.<sup>13</sup> Although it has been customary to treat Negro claims for reparations as little more than political rhetoric,<sup>14</sup> it may be very wise indeed to attend seriously to the just claims which may, in particular instances, underlie such demands.

Not only does failure to recognize a right to damages unjustly trivialize past conduct, but it also ignores a factor so central to the problems of poverty and civil rights that its nonrecognition by the current legal structure can only be described as shocking. This element is the retributive instinct, a fact of life which has emphatically shown its ugly side in the excesses of Watts and Harlem. The question is not whether to recognize the legitimacy of that emotion;<sup>15</sup> but rather whether we are to meet it in the streets or in the courts. However outsiders may evaluate the owner of a rat-infested, filthy, or dilapidated building, it cannot be gainsaid that, to the tenant who lives therein, such a landlord is the embodiment of everything unjust in society.<sup>16</sup> Unless and until we stop treating such owners as objects of sympathetic concern, and begin to treat them as persons who have

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13. The New York Rent Abatement Law (N.Y. MULT. DWELL. LAW § 302-a) is a step in the right direction insofar as it wholly cancels, rather than merely delays pending repairs, the obligation to pay rent during the continuance of certain rent impairing violations. Unfortunately, it refuses to go beyond a mere loss of bargain notion in its view of the significance of the harm done to the tenant, and is thus painfully reminiscent of the inadequacy of auto warranties which limited the manufacturer's responsibility for defects to the cost of replacing defective parts. *E.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

14. N.Y. Times, Aug. 2, 1966, p. 12, col. 3; N.Y. Times, Aug. 4, 1966, p. 30, col. 5.

15. See Schoenfeld, *In Defense of Retribution in the Law*, 35 PSYCHOANALYTIC Q. 108 (1966); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

16. It is instructive to compare the generous attitude taken by the Association of the Bar of the City of New York, which found "that deterioration in housing is seldom the result of wilful action by the owner," SPECIAL COMMITTEE ON HOUSING AND URBAN DEVELOPMENT, MEMORANDUM IN SUPPORT OF PROPOSED AMENDMENTS TO MULTIPLE DWELLING LAW PROVIDING FOR ABATEMENTS OF RENT TO TENANTS AFFECTED BY FIRE HAZARDS OR CONDITIONS DANGEROUS TO LIFE, HEALTH OR SAFETY, WHICH REMAIN UNCORRECTED FOR SIX MONTHS AFTER NOTICE 2 (Dec. 19, 1963), with the rather remarkable "confessions" of a slumlord, appearing in a recent popular magazine: "The slumlord must subscribe to a predatory code or go under . . . . The good guy, the mildly greedy, humanoid slumlord, can't last. . . . To be a good investor, he must learn to reduce people to cash values . . . ." Dahl, *A White Slumlord Confesses*, *Esquire*, July 1966, p. 92, 94.

a large and long-overdue debt to pay, there is little reason to hope that their social creditors—the potential initiators of violence—will feel that justice has been done.

3. Another matter little considered in the present law, although obviously central to the realities of enforcement, is the undeniable fact that the deplorable conditions of slum housing are attributable in significant part to the tenants themselves. This fact inevitably undermines rigorous enforcement,<sup>17</sup> and leads to that form of paternalism which views all tenants as non-culpable victims of an unfeeling social system.<sup>18</sup> While the question of the culpable tenant presents the nice philosophical problem whether the tenant is irresponsible because the landlord exploits him or whether the landlord is himself the victim of problem tenants, that dilemma need not be faced. Instead, we must impose rigorous standards on the landlord at the same time that, and only to the extent that, we give the slum tenant a genuine incentive to maintain the property he rents. Again the issue is paternalism: To enforce the codes for the benefit of all tenants, whether or not they do the right things themselves, is to view the tenant as an object to be acted upon and not as a potentially responsible and self-reliant citizen. In this perspective, the proposal to be urged herein—that there be recognized a private tort action for the awarding of substantial damages to the tenant who is not himself culpable—may very well promote precisely that incentive to self-help and self-reliance which is so central to the poverty problem.<sup>19</sup> In short, what is needed is not help, but incentive; not paternalism, but opportunity.

4. Finally, and ironically, traditional code enforcement principles tend to be self-defeating because they are largely built upon an erroneous economic premise. The essential assumption of code enforcement must be that the private owner of low-cost substandard housing can be compelled to rehabilitate and still serve the same or similarly

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17. Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 319 (1965); Comment, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 810, 811, 823, 859 (1965).

18. For example, in one case in New York, the Rent Commission granted a rent reduction for failure of a landlord to repair a refrigerator deliberately damaged by the tenant. *150 Holding Corp. v. Temporary State Housing Rent Comm'n*, N.Y.L.J., Dec. 14, 1955, p. 7, cited in SPECIAL COMMITTEE ON HOUSING AND URBAN DEVELOPMENT, *supra* note 16, at 3. Even to the extent that tenants are held responsible in law for their conduct, enforcement of such responsibility has been largely illusory. Comment, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 810-11 (1965).

19. The point has often been made that "[a] slum is not merely an area of decrepit buildings. It is a social fact . . . . Where the slum becomes truly pernicious is when it becomes the environment of the culture of poverty, a spiritual and personal reality for its inhabitants as well as an area of dilapidation." HARRINGTON, *THE OTHER AMERICA* 140-41 (1962); see notes 140-48 *infra*.

situated low-income tenants. All the evidence, however, points to the unlikelihood of any such result where major rehabilitation is required. The failure of the private unsubsidized market to provide new housing for the poor,<sup>20</sup> the marked increase of rents after rehabilitation,<sup>21</sup> the drop in real estate values in the face of serious code enforcement,<sup>22</sup> all suggest what has by now become widely recognized: Standard housing for the poor, adequately maintained, is simply not a sufficiently profitable business to attract investors. Thus a vigorously pursued program of code enforcement is unlikely to have any long-term effect except to contract the already inadequate supply of low-cost housing. For this reason, code enforcement has traditionally degenerated into a watered down program in which the landlord's ability to survive economically becomes the critical issue.<sup>23</sup> The result, predictably, is a tendency to negotiate the tenant's rights away with the hope that sooner or later an adequately financed rent-subsidy or public-housing program<sup>24</sup> will eliminate the slums. In consequence, a vicious circle of non-action is created.<sup>25</sup>

What is needed is a prolonged program of economic pressure which strikes, and strikes hard, at the slumlord. For the reasons

20. *Hearings on H.R. 9751 Before the Subcommittee on Housing of House Committee on Banking and Currency*, 88th Cong., 2d Sess. 575 (1964); LASCH, *BREAKING THE BUILDING BLOCKADE 176-77* (1946); MEYERSON, TERRETT & WHEATON, *HOUSING, PEOPLE AND CITIES* 294 (1962); WEAVER, *DILEMMAS OF URBAN AMERICA* 79 (1965); WEAVER, *THE URBAN COMPLEX* 16 (1964).

21. MILLSPAUGH & BRECKENFELD, *THE HUMAN SIDE OF URBAN RENEWAL* 108 (1960); NASH, *RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES* 124-28 (1959); STERNLIEB, *THE TENEMENT LANDLORD* 183 (1966); *N.Y. Times*, Aug. 22, 1966, p. 38, col. 4.

22. Nash, *op. cit. supra* note 21, at 111.

23. An excellent example of official attitudes is provided in Steven Roberts' article in the *N.Y. Times*, Sept. 6, 1966, p. 43, col. 3. Gribetz & Grad, *supra* note 10, at 1270-72, report cases in which criminal convictions for housing violations have been reversed on grounds of economic hardship for the landlord. See Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180, 186 (1963).

24. The Housing and Home Finance Administration (HHFA) explained the failure of public housing in a very genteel way: "Through a combination of circumstances, however, it has not been possible consistently to push this program with the vigor that it demands. Some years prior to the advent of this Administration, activity in this important area virtually halted." HHFA 18TH ANN. REP. 2 (1964). Another writer, somewhat more pungently, said that, when it came to public housing, "Congressmen tended to think small . . ." Seligman, *The Enduring Slums*, in *THE EXPLODING METROPOLIS* 121 (eds. of Fortune 1958). Whether the grandiose hopes of the war on poverty will significantly alter the pattern of congressional thinking remains to be seen. At the moment, the prospect is for a penurious Ninetieth Congress.

25. This is not to deny that code enforcement, rent strikes, or tenants' unions are useful. It is simply to suggest that their successful functioning is limited to relatively small jobs of repair or maintenance, where the landlord's economic viability is not seriously affected. But this article is concerned with seriously deteriorated housing, and it is in this context that our comments about the inadequacy of code enforcement, rent strikes, and the like, are made.

indicated above, only tenants themselves can be expected to prosecute such a program effectively. The tenants can undertake such a program only when the law invests them both with an incentive to act and with some hope that their action will not only break the economic stranglehold of the slumlords, but will also produce some financial reward to ease the transitional problems of potential evictions and higher rents.

We believe that recognition of a substantial civil damage action—one which holds that the slumlord who illegally maintains his premises in indecent conditions commits an actionable tort—may be a key to the slum housing dilemma. It must seem ironic that the traditional tort action, so much maligned for its wastefulness, delay, and cumbrousness, may be needed to supercede public enforcement, but we think that a tort remedy is precisely what is required.

## I. A REMEDY TO FIT THE WRONG

### A. *The Intentional Infliction Tort*

It is hardly a novel proposition today that, where one imposes upon another a serious indignity to advance the actor's own economic purposes, an action for damages may lie. The brilliant work of Judge Magruder,<sup>26</sup> Dean Prosser<sup>27</sup> and others in developing the action for intentional infliction of emotional harm has made that once radical assertion a commonplace. Their great contribution consisted of recognizing the need for a general tort category to redress conduct "regarded as atrocious, and utterly intolerable in a civilized community"<sup>28</sup>—a need that arose because of the technical limitations of such traditional torts as battery, trespass, and false imprisonment.

That the intentional infliction tort has gone a long way toward fulfilling the need no one would deny. As it has developed, however, the tort leaves a most serious and disturbing gap in the law. To understand what that gap is and how it relates to the subject at issue here, it is necessary to examine briefly the present content of the tort.

Under the definition contained in the *Restatement of Torts*, liability arises only when one intentionally engages in "extreme and outrageous conduct" and that conduct "causes severe emotional distress to another . . ."<sup>29</sup> The requirement that severe distress be

26. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

27. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

28. RESTATEMENT (SECOND) OF TORTS § 46, comment *d* at 73 (1965).

29. *Id.* § 46.



present as an element of the wrong is central to our concern here, and it is most important to understand the reasons for its inclusion. These reasons are twofold: First, of course, is the view that disturbance of the plaintiff's emotional tranquillity is itself the essence of the wrong. In light of the problems which the tort was designed to meet, such as the harassing bill collector or cruel practical joker, this was a perfectly appropriate notion; the essence of these defendants' conduct was precisely that they were attempting to infringe the plaintiff's emotional well-being in order to serve their own purposes.

The second reason for the requirement of emotional distress was a more technical and practical one. Since the term "outrage" had little ascertainable content, it was understandably feared that actions might be brought to redress even the most trivial social abrasions, such as the harangues of a rude waiter or insolent taxi driver. To require the presence of severe mental distress would assure that recovery was permitted only for serious infringements, that is, those infringements likely to result (and which in fact do result) in serious emotional harm. Thus, whether conduct would be deemed outrageous would turn on whether the conduct would lead to "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."<sup>30</sup> In testing the severity of these reactions, "the intensity and the duration of the duress are factors to be considered,"<sup>31</sup> as is the fact that "normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe."<sup>32</sup>

That these tests provide a rational means for excluding relatively trivial conduct is clear enough. Whether they provide adequate scope to make actionable all the forms of outrageous conduct which the tort law ought to cover is, however, quite a different question; and since the intentional infliction category is the sole generic tort designed to cover extreme and outrageous conduct deemed "intolerable in a civilized community,"<sup>33</sup> it is a question of considerable importance.

The notion that the only outrageous conduct for which the tort law ought to provide a remedy is that which is designed to and does produce severe emotional harm—in the sense that the *Restatement* defines such harm—is by no means clear, for such a notion implies

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30. *Id.* comment *j* at 77.

31. *Ibid.*

32. *Id.* comment *k* at 78.

33. *Id.* comment *d* at 73.

that the only interest worth protecting is that form of emotional well-being represented by an absence of such symptoms as fright, shock, grief and shame in their severe and disabling forms. The propriety of this view may be tested by looking at some analogues in constitutional law which also deal with outrageous conduct.

### B. *Constitutional Analogies*

It is remarkable how closely the definition of outrage adopted by the *Torts Restatement*—conduct which “go[es] beyond all possible bounds of decency . . . and [is] utterly intolerable in a civilized community”<sup>34</sup>—echoes the language used in the constitutional cases. In his opinion in *Irvine v. California*,<sup>35</sup> for example, Mr. Justice Frankfurter urged that the proper test was whether the conduct at issue was such as to “offend civilized standards of decency and fairness,”<sup>36</sup> recalling that, in *Rochin v. California*,<sup>37</sup> the Court had held the question to be whether the wrong was of such gravity as to “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .”<sup>38</sup> While the context in which the Court has put the question changes, ranging from definitions of liberty,<sup>39</sup> to asking whether the victim is subjected to “a hardship so acute and shocking that our polity will not endure it,”<sup>40</sup> to attempts to identify those basic but penumbral values that emanate from the specific terms of constitutional prohibitions,<sup>41</sup> it is the same essential inquiry.<sup>42</sup> And it is precisely the inquiry which the *Restatement of Torts* formulates: When does conduct reach the point that we will say it is intolerable in a civilized society?<sup>43</sup>

34. *Ibid.*

35. 347 U.S. 128 (1954).

36. *Id.* at 144 (dissenting opinion).

37. 342 U.S. 165 (1952).

38. *Id.* at 169.

39. E.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

40. *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

41. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

42. This is not to suggest that the conflict within the Court over the proper method of dealing with these questions is trivial from the point of view of proper constitutional analysis. It is only meant to show that constitutional law has struggled with the same basic question, in the context of outrageous conduct by government, and that, as we shall see, it has never found it necessary to validate claims of infliction of outrage by looking to the extent or presence of emotional upset on the part of the victim.

43. It is notable that in these constitutional cases the courts find themselves using the same sort of vituperative epithets so common in the intentional infliction tort cases. For example, in a recent electronic eavesdropping case, the New York courts termed the challenged action “reprehensible and offensive,” “atrocious and inexcusable,” “repulsive and repugnant.” *Lanza v. New York*, 370 U.S. 139, 149 (1962) (memorandum opinion of Mr. Chief Justice Warren).

The parallel between the constitutional and tort tests is to be expected, for, as has often been noted, many of the civil wrongs synthesized into the intentional infliction genre are close counterparts of constitutional rights.<sup>44</sup> The ordinary trespass has its constitutional incarnation in the search and seizure cases,<sup>45</sup> and the broader right of privacy, of which trespass is but one form, has been an underlying notion in such unconventional search and seizure cases as those involving eavesdropping,<sup>46</sup> as well as in cases based upon intrusive commercialism on public transportation,<sup>47</sup> or attempts to compel organizations to reveal their membership lists.<sup>48</sup> The constitutional concepts involved in the freedom of travel cases,<sup>49</sup> as well as in the prohibition against involuntary servitude,<sup>50</sup> are intellectual companions of the tort of false imprisonment.

It is hardly surprising that there is a similarity and a very substantial overlap between that area of law designed to define and provide protection for fundamental human rights against government infringements and that area designed to protect the individual against private conduct deemed intolerable in a civilized society. What is surprising, however, is that the tort principle, utterly unlike its constitutional counterpart, has been viewed as requiring the victim to suffer severe emotional distress as an indispensable prerequisite to recovery.<sup>51</sup> No such requirement has ever been thought to be necessary for the recovery of damages in the parallel constitutional situations, and, indeed, any such demand there would seem fatuous. For reasons which are obvious and well known, civil damage

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44. *E.g.*, GREGORY & KALVEN, CASES AND MATERIALS ON TORTS 822-23, 898 (1959); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392 (1960).

45. *Silverman v. United States*, 365 U.S. 505 (1961).

46. *Lanza v. New York*, 370 U.S. 139, 143 (1962).

47. *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952).

48. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *cf.* *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

49. *E.g.*, *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958).

50. U.S. CONST. amend. XIII; see *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966).

51. Perhaps one could argue that the parallel is imperfect because the sort of conduct under discussion here, though similar in content in both the tort and constitutional context, is much more dangerous when carried on by the state than by private persons. We would not dispute such an assertion, but it is most difficult to conclude that the difference is so great that it goes to the very essence of the wrong, with private infringements being significant only insofar as they impose substantial disturbances of emotional tranquillity and governmental infringements standing by themselves as infringements of liberty which need no such proof for their validation. If evidence were needed of the dubiety of any such attempted distinction, one might turn to the decline of the state action concept, where every effort has been bent to bring essentially private action within the aegis of constitutional enforcement. *E.g.*, *United States v. Guest*, 383 U.S. 745, 755-56 (1966); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A similar development has taken place in the use of the authority to regulate commerce among the states. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964).

actions against officials for violation of constitutional rights have been relatively infrequent,<sup>52</sup> but there are sufficient examples to make the point clear. In *Lane v. Wilson*,<sup>53</sup> for example, a plaintiff who had been deprived of his right to vote sued and recovered \$5,000 for infringement of that right. There was nothing in that case to suggest that plaintiff's claim rested upon a demand to be compensated for severe emotional distress, in the medical sense in which the *Restatement* seems to use that term, or for economic loss. It was enough that he had inexcusably been deprived of a fundamental liberty, and substantial damages were thought appropriate to redress that deprivation; in such circumstances, the gravity of the deprivation has never been thought to be measured by the immediate psychic impact upon the victim. Indeed, two hundred and fifty years ago, long before courts dreamed of speaking in terms of severe emotional distress, substantial damages were granted to individuals whose fundamental social rights had been infringed. As Chief Justice Holt put it, "If such an action [against one denying a vote] comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right."<sup>54</sup>

It is not less serious to deprive one of the right to vote because that deprivation fails to induce fright, shock, or similar responses. In the same sense, it seems always to have been assumed that, for invasions of privacy in the form of unlawful searches, a substantial damage action would lie, not merely for severe emotional damage or for economic loss, but as a monetary attempt to redress the loss of liberty thus sustained. Surely it would be surprising to learn that the Justices who relegated the petitioner in *Wolf v. Colorado*<sup>55</sup> to a common law damage action (however unrealistic that may have been when one considers the prospect of recovery against police officers) thought that his right to vindication should depend upon the presence of severe emotional distress or pecuniary loss, rather than upon the loss of his liberty. Nor is it likely that the award of £300 granted in the landmark case of *Entick v. Carrington*,<sup>56</sup> where officers rifled the papers of one suspected of publishing seditious libels, was meant

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52. *Mapp v. Ohio*, 367 U.S. 643, 652-53, 670 (1961); cf. *Monroe v. Pape*, 365 U.S. 167 (1961).

53. 307 U.S. 268 (1939).

54. *Ashby v. White*, 2 Ld. Raym. 938, 958, 92 Eng. Rep. 126, 138-39 (K.B. 1702).

55. 338 U.S. 25, 30 (1949).

56. 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (K.B. 1765). Professor Westin has recently suggested that substantial liquidated damages be recoverable as a remedy for unauthorized surveillance. Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1205, 1229 (1966).

to redress that plaintiff's nervous response or to compensate him for the cost of replacing the pamphlets taken.

Even more familiar today than the foregoing examples are those cases in which substantial damages are allowed for deprivations of the right to be free from racial discrimination. It shocks no one to see a Negro recover for being denied service at a place of public accommodation, or for being victimized through violation of a fair housing law,<sup>57</sup> although by their very ordinariness, such acts are hardly likely to cause severe emotional distress.<sup>58</sup> Of course, recovery in cases of the sort mentioned above ordinarily turns upon a statute granting a right to substantial civil damages, but, for our purposes, it is irrelevant whether the source of the right is in a statute or in the common law, as the identical results in the American (statutory) and English (common law) voting rights cases demonstrate. The point is that we consider it perfectly appropriate for one who has been deprived of a fundamental liberty, whatever the observable emotional impact on him, to recover substantial damages.

Seen in this perspective, it becomes increasingly clear that the intentional infliction tort, for all its undeniable virtue, has oversynthesized the traditional torts in focusing so exclusively on severe emotional harm. While many invasions of fundamental liberties are of course likely to lead to serious emotional and physical injury of the kind contemplated by the *Restatement*,<sup>59</sup> it is equally true that a good deal of outrageous conduct may not, and often will not, have such results.<sup>60</sup> The mere absence of such results, however, should hardly lead us to conclude that no serious wrong has been done to the victim.

### C. *Implications of the Traditional Tort Law*

The idea implicit in these comments—that it would be more appropriate to view tort law as protecting substantive liberties, rather than merely as protecting emotional tranquillity in the conventional sense—was in fact very much the position of the traditional tort law. It is only the modern intentional infliction concept which, while

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57. *E.g.*, N.Y. CIV. RIGHTS LAW §§ 40, 41.

58. As a recent newspaper article put it: "Despite the laws banning discrimination in public accommodations, Negro travelers know they can expect snubs, insults and outright rebuffs at restaurants, resorts and motels from Dixie as far north as Wisconsin." *Snubs and Rebuffs Still Spoil Vacation Travel for Many U.S. Negroes*, *Wall Street Journal*, July 26, 1966, p. 1, col. 1. See also *N.Y. Times*, Oct. 23, 1966, p. XX-I, col. 5.

59. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Monroe v. Pape*, 365 U.S. 167 (1961).

60. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (racial discrimination); *Lane v. Wilson*, 307 U.S. 268 (1939) (interference with voting rights).

properly rounding out the technical inadequacies of such old torts as trespass and battery, has unfortunately tended to submerge the substantive liberty point by excessive concentration on emotional well-being. For example, in the old offensive battery cases, where there was no great physical injury but merely an affront to the plaintiff's dignity, the courts were quite ready to grant substantial damages without worrying about severe emotional distress; they assumed that the libertarian interest in freedom of the physical person from indignant affronts was sufficient to permit the awarding of large damages, however the loss might have been manifested upon the victim.<sup>61</sup> Similarly, recovery for false imprisonment traditionally required no proof of conventional damage beyond the fact of restraint on one's liberty.<sup>62</sup> The list could easily be expanded, but the lesson should be clear enough. In asking whether the tort of outrage has been committed, and whether substantial damages ought to be allowed, it is time to cease looking merely for emotional distress and instead to ask whether the defendant's conduct infringes a substantive human interest of sufficient import that no civilized society ought to tolerate it.

D. *Nature of the Injury: The Inadequacy  
of Tort Law Perspectives*

The excessive concern with ascertainable evidence of emotional harm manifested in the present law bespeaks more than a theoretical error. By confusing the oft-present consequences of wrongs with the substantive essence of the wrong, the law produces a narrowness of outlook which creates a serious hiatus in the substantive coverage of tort remedies.

Even in the most cursory examination of the wrongs for which the intentional infliction tort has given a remedy, one cannot help but be struck by the fact that this tort whose function is phrased in the broadest terms—compensation for those wrongs so outrageous that they must be deemed intolerable in a civilized society—has in fact occupied itself substantially with isolated, occasional, and bizarre occurrences, leaving virtually untouched the fundamental social issues of the day. We find recovery for the acts of the cruel prankster, the overbearing mortician, the oppressive bill collector, and even the rude shopkeeper, but no significant body of law has been developed to deal with such evils as slum housing, racial

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61. *E.g.*, *Alcorn v. Mitchell*, 63 Ill. 553 (1872).

62. PROSSER, *TORTS* § 12, at 55 (3d ed. 1964).

injustice, and economic exploitation. The man who tricks a crazy little old lady into believing that she has discovered the pot of gold at the end of the rainbow receives the profound attention of the court,<sup>63</sup> but the thousands of landlords who daily subject their tenants to life in rat and garbage infested tenements, with no heat in the winter and no ventilation in the summer, seem to have been completely ignored.

To be sure, the reasons for this peculiar allocation of legal resources are many and complex, but clearly one of the most important is the determined focusing of attention upon the overt and dramatic consequences, called severe mental distress, sustained by the victim of unjustified intentional acts. It is easy enough to understand why a legal test that looks for fright, shock, and horror as necessary elements of the wrong will find itself dealing with bizarre, extraordinary, and unexpected acts; these are the very types of acts which evoke extraordinary and bizarre reactions by their victims. Conversely, such standards, useful as they are in filtering out everyday trivialities, fail to recognize that the tragic essence of fundamental social injustices is precisely that they are commonplace. One hardly expects the slum tenant to wake up one morning and experience profound shock, grief, and horror because his halls are filled with garbage and his apartment infested with rats. The indecency of his condition inheres in the fact that the outrage to which he is being subjected has become an ingrained part of his life, and an accepted fact of life to the surrounding community.

Ironically, considerable evidence suggests that the readily observable consequences of many of the most grievous wrongs are almost precisely the opposite of those which the intentional infliction tort characterizes as evidence of outrage. A large body of literature dealing with such subjects as racial discrimination, Japanese relocation, brainwashing, and long-term incarceration indicates the inadequacy of a law which fails to take sufficient account of the complexities, varieties, and cumulative effects which can result from seriously outrageous conduct. For example, the tremendous pressures on one in a detestable situation to adapt to his environment and to seek to normalize his situation as a matter of self-defense and survival<sup>64</sup> are apparently not taken into account in our present

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63. *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920).

64. This is what Robert Weaver calls "conditioning to a submerged status." *WEAVER, THE URBAN COMPLEX* 30 (1964); see *BROOM & KITSUSE, THE MANAGED CASUALTY, THE JAPANESE AMERICAN FAMILY IN WORLD WAR II* (1956); *SCHORR, SLUMS AND SOCIAL INSECURITY* 12 (U.S. Dep't H.E.W., Social Security Admin., Div. of Research and Statistics Research Report No. 1, 1963); *U.S. CIVIL AFFAIRS TRAINING PROGRAM OF THE*

law dealing with outrageous conduct. Similarly, the significance of imposed personality modifications, with all their intricate meaning,<sup>65</sup> seems to be ignored.

The contrast between the kinds of damage that can occur and the much more limited view of damage evidenced in the current tort law is strikingly illustrated by a study of the effects of intentionally imposed chronic stress on Korean War prisoners:

It was difficult to maintain close group ties if one was competing with others for the essentials of life, and if one spent one's resting time in overcrowded huts . . . Lines of authority often broke down, and with this, group cohesion and morale suffered . . . In this situation goals became increasingly short-run. . . .

What happened to the men under these conditions? During the one to two week marches they became increasingly apathetic . . . [S]ome men became so apathetic that they ceased to care about their bodily needs. They retreated further into themselves, refused to eat even what little food was available, refused to get any exercise, and eventually lay down as if waiting to die. The reports were emphatic concerning the lucidity and sanity of these men. They seemed willing to accept the prospect of death rather than to continue fighting a severely frustrating and depriving environment.

Two things seemed to save a man who was close to such "apathy" [from] death: Getting him on his feet and doing something, no matter how trivial, or getting him angry or concerned about some present or future problem . . . In one case . . . "therapy" consisted of kicking the man until he was mad enough to get up and fight.<sup>66</sup>

While the prisoners' situation was of course considerably more severe and exacerbated than one would ordinarily encounter in a tort case, it presents a telescoped, but nonetheless highly revealing, view of the kinds of symptoms which tend to be engendered over the long run by deplorable and seemingly inescapable living conditions.<sup>67</sup> Such examples are most instructive in suggesting how

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SCHOOL FOR OVERSEAS ADMINISTRATION, INDIVIDUAL AND MASS BEHAVIOR IN EXTREME SITUATIONS (1944).

65. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1959); FRANKL, *MAN'S SEARCH FOR MEANING* (1963); LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* (1961); SCHEIN, SCHNEIER & BARKER, *COERCIVE PERSUASION* (1961) (Studies of Brainwashing in China). "[S]lums breed a hopelessness in peoples' hearts." MILLSPAUGH & BRECKENFELD, *op. cit. supra* note 21, at ix.

66. Schein, *Reaction Patterns to Severe, Chronic Stress in American Army Prisoners of War of the Chinese*, *J. Soc. Issues*, vol. 13, no. 3, p. 21, 22-23 (1957).

67. Speaking of the concentration camp as "a special and highly perverted instance of human slavery," Stanley Elkins sees parallels between the way Nazi concentration camps changed the personalities of the prisoners who survived and the way in which slavery in the American South altered the personalities of Negroes brought from Africa and shaped the character of the Negroes born here. ELKINS, *op. cit. supra* note 65, at 103-39. Perhaps a useful parallel can also be drawn between the effects on the per-



lamentably naive and short-sighted the tort law has been in its view of what constitutes legally remediable damage.<sup>68</sup>

The example also demonstrates how much more enlightened the interpreters of the constitutional law have been in analogous situations; their willingness, as indicated above,<sup>69</sup> to recognize grievous social injustices as remediable wrongs, without searching for specific types of medical trauma, represents an awareness of the long-term and cumulative consequences of oppression, which consequences are capable of no precise and clearly observable delineation in traditional legal terms. This is to say that the accumulated evidence of the effects of social injustice, as presented by psychiatrists and sociologists in clinical form, has long been understood and accepted by the Court, though in a different form. When it talks about conduct so shocking that the polity cannot endure it, or about civilized standards of decency and fairness, it is doing no more than observing from an historical and political science perspective the cumulative destructive effects of outrageous conduct on the society and its individual victims—precisely analogous to what the psychiatrists observe in such clinical contexts as that of the Korean War prisoners. In condemning

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sonalities of concentration camp inmates and of slum inhabitants; both groups manifest obvious "emotional distress" through the widespread symptom of apathy. Compare SILBERMAN, *CRISIS IN BLACK AND WHITE* 46, 71, 120 (1964), with FRANKL, *op. cit. supra* note 65, at 35.

68. The quantity of studies dealing with the adverse effects of bad housing is quite overwhelming. One hardly knows what to say of the evidence. The animal studies are fascinating and provocative, but hardly conclusive. *E.g.*, SCHORR, *op. cit. supra* note 64; Calhoun, *Population Density and Social Pathology*, in *THE URBAN CONDITION* 33 (Duhl ed. 1963). The correlation studies, comparing the situation of those within and without slum housing, are likewise revealing, but insofar as they tend to suggest that slums alone are the critical factor in social pathology, one must view them as naive. Many such studies are discussed and cited in Wilner & Walkley, *Effects of Housing on Health and Performance*, in *THE URBAN CONDITION supra* at 215. Certainly improving the housing of those in the culture of poverty will not, alone, bring to an end the disabilities which that culture promotes; no more than remedying nutritional deficiencies in a concentration camp would terminate the ills of that culture of disorientation. Nonetheless, that the conditions of indecent housing, and the pattern of exploitation of which it is a part, contribute significantly to the making of that culture of poverty and to the violent misbehavior which it produces is the conclusion of virtually every observer. See notes 4, 19, 20, 21 *supra*, and notes 86, 93, 113, 125, 126, 140, 141, 147, 186 *infra passim*. To be sure, no one can produce proof of this in the sense that one can prove, in a battery case, that A broke B's leg, just as no one can prove the virtues of democracy, free speech, or disinterested judges, but, as Mr. Justice Frankfurter once said: "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949). One author, briefly noting the possibilities for an action such as we propose, asked, "Has the time not come for the Bar and Bench to accept that the situations described by James Baldwin, Michael Harrington, Kenneth Clark and others are also cases of "personal injury . . . for which damages should be recoverable?" Joost, *Rent Strike—New Legal Weapon?*, *Trial*, June-July 1966, p. 48.

69. See notes 34-60 *supra* and accompanying text.

and granting relief against involuntary servitude, for example, one can talk in terms of an invasion of liberty, noting the historically observable consequences of such treatment; to this observation one may give the name "deprivation of basic liberty," or "conduct intolerable in a civilized society." Much the same conclusion might be reached by a study of psychological or sociological evidence. The approach used is not critical; what is critical is that some approach be used which makes it possible to come to terms with the realities of social justice. In respect to this critical reality the tort law, as presently formulated, fails.

The limited perspective of the tort law may be demonstrated not only by reference to constitutional and psychological analogies, but also by contrast to even such conventional examples as antitrust law. In that area, it has long been understood that anticompetitive behavior, the dramatic results of which are manifested largely in cumulative effects on the economic structure of the society, reaches that ultimately destructive point only through intermediate and often intangible effects on particular victims.<sup>70</sup> Consequently, the treble damage action is a remedy uniquely responsive to the peculiar problems created when unlawful conduct is doing damage far more serious than overtly appears at a given time. Such a remedy not only permits recovery in amounts beyond those capable of traditional legal proof, but it also has two other important effects. First, permitting the recovery of very large damages implies a recognition that the challenged conduct has an importance far beyond that which it might seem to have if one attended only to presently observable consequences. In this respect, the treble damage action serves to resolve the dilemma created by the fact that the real importance of the conduct might become apparent too late, that is, after the cumulative effects of the defendant's and others' acts had brought about the very results which the law is designed to prevent.<sup>71</sup> Moreover, by granting treble recovery to private persons, the antitrust law recognizes that, though certain wrongs are in one sense violations of the interest of the public at large, they are also wrongs which impinge quite seriously upon individuals in the society; that adequate redress can never be given merely by public remedies; and that very sub-

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70. Some critics of the Court's approach in antitrust cases are upset precisely because the breadth of analysis utilized in the constitutional area seems to have been carried over to the merger cases. Handler, *Atonality and Abstraction in Modern Antitrust Law*, 52 A.B.A.J. 621, 623-24 (1966). If this is the "New Gestalt" (*id.* at 623) so be it; we need more of it.

71. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 301 (1964); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221-22 (1938).

stantial compensation is due those individuals who are the immediate victims of the conduct under attack.<sup>72</sup>

The relevance of these developments to the slum housing situation should be clear. As we have already observed, the difficulty slum tenants have in establishing traditional kinds of damage is considerable. Yet, rather than viewing such difficulties as an indication that nothing bad is happening, as the tort law is prone to do, those concerned with antitrust law have expanded their horizons so as to take account of unconventional forms of damage.<sup>73</sup> Perhaps the best example of this is the current concern over conglomerate mergers, where it is now widely conceded that a large company's acquisition of a firm in a competitive small-company industry is likely to have a variety of inhibiting effects on the market, among them raising psychological barriers to potential entrants and stifling the behavior of incumbents who must now operate in the shadow of a giant.<sup>74</sup> At any intermediate point, such effects are likely to be manifested in rather limited ways on any individual competitor, and at any stage will probably be very difficult to reduce to traditional modes of proof. While the extent to which damages will be given in recognition of such effects has not yet been conclusively settled, there is some judicial inclination to view the very consummation of an illegal merger as an injury to the plaintiff's business for which a treble damage action could be appropriate.<sup>75</sup> In taking such a view, the

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72. Though the treble damage action is built upon a multiplier of actual damage in the conventional sense, this does not convert the principle underlying it to a conventional damage notion, but merely embodies the convenient fact that anticompetitive behavior, unlike voting discrimination or slumlordism, does have some immediate economic consequences which provide a plausible basis for quantifying the wrong. Only the multiplier effect is of interest here, and that is a quite arbitrary one insofar as ordinary damage theory is concerned. It might just as well be double damages, as some statutes provide, or some fixed sum—such as \$2,000—set as remedial damages, which is to be given to the victim of the wrongful conduct. *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). See also *N.Y. Times*, July 17, 1966, p. 56, col. 7 (treble damages sought for tenants in rent control law violation cases).

73. In *Continental Can*, the Court said that where a merger is "inherently suspect, elaborate proof" of the traditional kind "may be dispensed with" so that the courts can reach conduct that affects not only "existing competition but that which is sufficiently probable and imminent." *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964).

74. See Zimmerman, *The Federal Trade Commission and Mergers*, 64 COLUM. L. REV. 500, 512-19 (1964); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1362-86 (1965). Similarly, the Court has taken account of the probability that any significant merger is relevant not only for "its intrinsic effect on competition," but because it has a tendency toward "triggering other mergers." *United States v. Continental Can Co.*, 378 U.S. 441, 464 (1964).

75. *Highland Supply Co. v. Reynolds Metal Corp.*, 245 F. Supp. 510, 513-14 (E.D. Mo. 1965); cf. *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521 (S.D.N.Y. 1965). Other courts have taken a much narrower view of the right to damages. *Highland Supply Co. v. Reynolds Metal Co.*, 327 F.2d 725 (8th Cir. 1964); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964).

courts would bring themselves into alignment with the position traditionally taken as to the appropriateness of damages for the violation of human liberties.

Moreover, the antitrust law has firmly recognized another factor most relevant to the situation of the slum landlord. It is that defendant's immediate conduct cannot be isolated from its larger social significance. Thus, though a slum landlord would undoubtedly recoil from any attempt to link his conduct to ghetto riots,<sup>76</sup> the antitrust law teaches that such associations are highly relevant. For example, it has been held that it is not a defense in a merger case that the single act under attack does not itself show the imminence of monopoly; it is held irrelevant that "accretions of power are individually . . . minute."<sup>77</sup> Nor, as the Court made clear in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,<sup>78</sup> is anticompetitive conduct to be immunized from a treble damage remedy "merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."<sup>79</sup> Individual acts must be tested, not in isolation, but by whether in the aggregate they tend to create a monopoly. The fact that other independent actors are promoting that tendency by their independent conduct—far from being a defense—is a factor enhancing liability.<sup>80</sup> This is an approach well worth keeping in mind when a slum landlord's culpability is tested against the background of a market plagued by poverty, shortages, the artificial restrictions of racial discrimination, and the presence of other independent exploiters of the poor.

The courts' ability in the area of economic regulation to see the importance of granting substantial and more than conventionally provable damages, to recognize the cumulative significance of seemingly fragmentary behavior, and to do so in a form which "use[s] private self-interest as a means of enforcement, . . . arm[ing] injured persons with private means to retribution . . .,"<sup>81</sup> provides a model which the tort law would do well to emulate.

#### E. *The Need for a Vindictory Element in the Law*

There is yet another sense in which the intentional infliction tort inadequately implements a vital function of the legal system, and

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76. The responsibility of the landlord as an individual, as distinguished from the responsibility of the society at large for slum conditions, will be discussed at text accompanying notes 87-92 *infra*.

77. *Brown Shoe Co. v. United States*, 370 U.S. 294, 333-34 (1962). See also *United States v. Continental Can Co.*, 378 U.S. 441, 461, 465 (1964).

78. 359 U.S. 207 (1959).

79. *Id.* at 213.

80. *Brown Shoe Co. v. United States*, 370 U.S. 294, 345 (1962).

81. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947).

again it is a sense in which the present generic tort has seemingly eliminated a fundamental principle which was well known to the traditional law. This is the role of the tort law in providing the prospect of monetary redress for the victim of an outrageous indignity in order to channel the instinct for retribution into acceptable channels.<sup>82</sup> Here again the social need for redress cannot properly be measured by the presence or absence of "severe emotional distress," a point often recognized by traditional authorities. In the famous old case of *Alcorn v. Mitchell*,<sup>83</sup> for example, where an award of \$1,000 was given after a disappointed litigant spit in the eye of his opponent, there was no evidence that the plaintiff was seeking recovery for any of the medical injuries ordinarily comprehended within the meaning of severe emotional distress, nor did the court treat the case as involving any such injury. Its language in this regard is most instructive:

The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquillity may be preserved by saving the necessity of resort to personal violence as the only means of redress.<sup>84</sup>

In one sense, to be sure, *Alcorn* could be viewed as consistent with the *Restatement* test of mental distress, for one of the *Restatement's* articulated symptoms is "anger." Moreover, in the context of the immediate physical confrontation, the anger may have been observably intense. But *Alcorn* is notable not in the sense that it can be made to conform to the present test, but rather in that its rationale goes beyond that test, suggesting that an action should lie for outrageous conduct likely to lead to violent reprisal. In many instances, of course, there will be no observable intense anger, but the ultimate prospect of violence in retribution may exist in far more socially significant ways than it did in *Alcorn v. Mitchell*.

This point was well stated by Jerome Hall in his discussion of the function of some traditional torts which have conceptually been subsumed within the intentional infliction genre:

[M]ost of these [torts] are intentional aggressions which usually imply moral culpability, and almost always stimulate resentment. . . . In

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82. For example, the function of defamation actions in preventing violence has long been recognized. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 64 n.6 (1966). Our point is not that intentional infliction cases contain no element of retribution, but rather that they refuse to recognize that the need to provide retribution alone—even where there is no conventional severe distress—is sufficient to give rise to a cause of action.

83. 63 Ill. 553 (1872).

84. *Id.* at 554.

this type of harm the law of torts frequently functions as a punitive apparatus—the “fine” going to the injured victim of the aggression. . . .

The civil judgment is an authoritative vindication of the injured person's rights. Besides he is here not dependent on the public authorities for prosecution, and remains master of the proceedings.<sup>85</sup>

The relevance of these observations to the situation of the slum tenant need hardly be proved to anyone who has followed the recent happenings in Harlem, Watts, Chicago, and elsewhere around the nation. As one observer of slum life put it, the objects of slum injustice develop “at each turn, symptoms of anxiety, despair, rage and, finally, socially troublesome behavior, which means that all those feelings come to their boiling point.”<sup>86</sup> It hardly seems excessive to observe that *Alcorn v. Mitchell* has begot progeny of frankensteinian proportions to which the law must respond.

## II. ELEMENTS OF THE WRONG

The preceding section discussed in general the propriety of allowing a substantial civil damage action to be brought by a slum tenant subjected to living in indecent housing. Nothing has yet been said of what, precisely, is meant by “subjection,” or what is comprehended within the term “indecent.” Thus the scope of the landlord's responsibility as an individually culpable wrongdoer, and the substance of the wrong for which relief ought to be granted, remain to be discussed.

### A. *The Culpable Landlord*

Decent housing as a primary goal of society has been so long and vigorously urged by Presidents,<sup>87</sup> the Congress,<sup>88</sup> distinguished citizens,<sup>89</sup> and local legislatures<sup>90</sup> as to be beyond dispute. To make

85. Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 977 (1943).

86. Coles, *Our Streets of Violence*, The New Republic, Sept. 5, 1964, p. 19, 21. See also N.Y. Times, May 22, 1966, p. 70, col. 3.

87. 110 Cong. Rec. 114, 1103 (1964) (President Johnson); 107 Cong. Rec. 3641-42 (1961) (President Kennedy); 100 Cong. Rec. 737 (1954) (President Eisenhower); 95 Cong. Rec. 74, 144 (1949) (President Truman).

88. 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1964) (“the goal of a decent home and a suitable living environment for every American family”).

89. “The goal of a decent home for every American family is an accepted national objective.” Weaver (then Administrator, U.S. Housing and Home Finance Agency), *Foreword to HOUSING AND HOME FINANCE AGENCY, OUR NONWHITE POPULATION* iii (1963). See also A REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS, RECOMMENDATIONS ON GOVERNMENT HOUSING POLICIES AND PROGRAMS 256-57 (U.S. Gov't Print. Office, Dec. 1953); *Report of the President's Commission on National Goals*, in GOALS FOR AMERICANS 1, 13 (1960); Wurster, *Framework for an Urban Society*, in *id.* at 225, 235 (1960).

90. *E.g.*, N.Y. Sess. Laws 1962, ch. 997, § 1.

unexcused interference with the attainment of that goal a wrong remediable at law would seem to be precisely the objective the law ought to be pursuing.

As the following pages should make clear, nothing herein is meant to suggest that the mere failure of society to realize some national goal with respect to a given individual should give that individual a tort action. Though adequate medical care for all might be an important national goal, the refusal by a doctor to accept as a patient one too poor to pay his fees would not be tortious; to allow an action in such a case would be to impose the cost of a broad social failure on a single individual. We propose nothing of the sort; our much more limited proposal is that one who undertakes to perform a service for his own economic benefit, but who performs it in a way both inconsistent with those standards which represent minimum social goals as to decent treatment and in a manner that itself is violative of the law, under circumstances where the victim had no meaningful alternative but to deal with him, commits a tort for which substantial damages ought to lie.

There is, to be sure, a sense in which the slum landlord is the product, rather than the creator, of the problem in which he is involved. That there is poverty, which creates the demand for very low-cost housing, is not his fault; that it is difficult, if not impossible, to maintain such housing in acceptable condition and still make an adequate profit is likewise not a matter of his making; so too, the failure of Congress to make available public housing or rent subsidies in sufficient amounts to mitigate the problem is hardly something for which he can be held individually responsible.

These are social problems for which only the community as a whole bears responsibility. But no one seeks to impose liability upon the landlord for the mere presence of these conditions. He becomes culpable, and thus responsible as an individual, only when he capitalizes upon these social ills as the means to earn his livelihood. In this sense he stands in the same position as one who employs children in a factory or mine; the fact that conditions may exist which create a market for child labor hardly excuses the conduct of one who affirmatively utilizes those conditions to make his way in the world. The seller of narcotics or other illicit goods is not thought less culpable merely because he caters to a condition not of his creation, or because the transaction is compelled by the exigencies of human weakness and suffering rather than by any physical act of force on his part. Nor can it diminish his responsibility that his own economic survival depends upon giving as little as he does for the

price he exacts. One would not dream of permitting a pharmaceutical firm to sell impure and adulterated drugs at low prices merely because that was all they could afford to provide to the market of the poor. Nor would we permit a doctor to give inadequate treatment, or a lawyer inadequate representation, to the poor simply because their fees could not economically justify more ample services. Our universal answer to such people is that they may stand aside and do nothing if they wish, but if they undertake to provide services for their own economic benefit, they must serve adequately or be deemed wrongdoers in law. That society at large has failed in making needed service available at prices all could afford is no excuse for them as individuals.

There is, without question, the paradox that the government, by failing to act, effectively creates the market for the defendant's services at the same time that it declares unlawful through housing codes the very conditions which may make the business of providing such services profitable. It is in this sense true that the defendant is providing a needed service. It is also true that, by making the slum housing business much less attractive, the prospect of substantial damages would, in the short run, tend to contract an already overcrowded market, and thus seemingly disadvantage the very people whom the action is designed to help. Indeed, it is this very logic which has so often undermined rigorous enforcement of the housing codes, engendering fear that unless a "realistic" position were taken toward the landlord, more harm than good might result from the enforcement of the law.<sup>91</sup>

This is the paradox which has created the present slum housing dilemma. Landlords are insulated from effective law enforcement in order to avert an intensification of the low-cost housing shortage; yet this very insulation not only perpetuates the indecent conditions of the slums, but also prevents the creation of the intense pressure needed for legislative action by preserving the status quo in its more or less stable (albeit deplorable) condition. At some point we must admit that if we want this circle to be broken, some action substantially more vigorous than the utterance of pieties and the enactment of inadequately financed legislation must be taken. It would be difficult to find a less unjust means of breaking that circle than by reallocating some money from slum landlords to their

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91. NASH, *RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES* 103 (1959); Comment, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 802 (1965); Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180, 186 (1963); N.Y. Times, Sept. 6, 1966, p. 43, col. 3.



tenants through a procedure whereby the tenants themselves have the authority to initiate and prosecute the suits.<sup>92</sup>

Those who propose action against slum landlords are often met with the argument that the owners of these properties are not evildoers, but simply businessmen in a high-risk market who must, as a matter of economic survival, take rather rigorous measures. From this, it is often urged that those who attack "slumlords" are simply tugging an emotional string and are oblivious to objective economic facts. We hope to avoid these charges by making our position perfectly explicit: We do not characterize the slum landlord as a conscious or willing evildoer; we agree that he is probably doing precisely what a rational profit-seeking businessman in his circumstances would feel required to do. We simply say that if it is true that slum ownership is a business which requires the maintenance of such indecent conditions, then this is a business which needs to be eliminated. Moreover, let us not be deluded by the landlord's continued emphasis on the economic pressures which the slum housing business imposes on one who is in it; let us recognize that what we are condemning him for is going into (or staying in) such a business. Nothing forced him into buying a slum, except his own profit expectations. If he inherited such properties or found himself a landlord in a deteriorating neighborhood, nothing forced him to stay except his willingness to subordinate the life of his tenants to the prospect of some economic loss. As long as a landlord is willing to see his tenants' children bitten by rats in the night rather than take his losses and get out of the business—and that is the choice which our potential defendants have made—we see no need to wonder whether an injustice would be done in characterizing them as tortfeasors.<sup>93</sup>

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92. For a discussion of what can be expected to happen to the market as a result of some successful damage actions, and why we think the results to be anticipated need not be feared, see text accompanying notes 211-13 *infra*.

93. It is not without relevance that observers quite uniformly find the slum housing business to be a quite profitable one. THE FUTURE OF CITIES AND URBAN REDEVELOPMENT 13, 19 (Woodbury ed. 1953); ILLINOIS GENERAL ASSEMBLY, REPORT OF THE COMMITTEE OF THE HOUSE OF REPRESENTATIVES ON SLUM HOUSING AND RENT GOUGING 3-4 (1965); LASCH, BREAKING THE BUILDING BLOCKADE 16 (1946); MILLSPAUGH & BRECKENFELD, THE HUMAN SIDE OF URBAN RENEWAL 230 (1960); SCHORR, *op. cit. supra* note 64, at 93-94; STERNLIEB, THE TENEMENT LANDLORD 76-88, 95-96, 106, 119 (1966); Seligman, *The Enduring Slums*, in THE EXPLODING METROPOLIS 120 (eds. of Fortune 1958). To be sure, quite another story is told by landlords, KLEIN, LET IN THE SUN 141-68 (1964), but on examination one sees that the landlords ordinarily measure profitability only by contrasting income and expenses over a given period, failing to consider that slum housing is often an investment where the real profits may be made through sales which take advantage of such tax devices as depreciation. ILLINOIS GENERAL ASSEMBLY, *supra* at 2; Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 320 n.83 (1965); *cf.* STERNLIEB, *op. cit. supra* at 101-02. Alternatively, the management of the slum dwelling may be a holding

## B. Imposition by the Landlord: Absence of Free Choice

### 1. The Claim That the Tenant Should Allocate More Money to Housing

The slum landlord should not be permitted the defense that his renting of indecent housing is simply an ordinary market transaction, voluntarily and knowingly entered into by the tenant. Though most Americans enjoy incomes permitting considerable consumer choice in the housing market, those who comprise the slum-housing population are overwhelmingly the very poor,<sup>94</sup> those at or near the subsistence level.<sup>95</sup> For these persons, the range of choice is exceedingly

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operation through which the owner keeps his head above water while he waits for land values to rise and bring him his profit. Dahl, *A White Slumlord Confesses*, Esquire, July 1966, p. 92, 112. STERNLIEB, *op. cit. supra* at 119, found that slum properties are sometimes part of a falling real estate market, but this simply intensifies the pressure for rental profits, generally through reduced maintenance. Moreover, it is not a cause for sympathy that some buyers of slum properties, through lack of experience or through ignorance, find themselves losing money; like the small speculator in the stock market who finds himself overwhelmed by bigger sharks, the losing slum owner may simply be the victim of his own greed. The potential defendants in these cases are not those who invest in limited dividend low-cost housing enterprises, seeking a very modest return on their money, NASH, *op. cit. supra* note 91, at 114-24, but rather they are those who seek, and often get, large profits. SCHORR, *op. cit. supra* at 94; Seligman, *supra* at 120. While it may be true that many slum owners are themselves "little fellows" rather than tycoons with thousands of properties, STERNLIEB, *op. cit. supra* at 118, this hardly seems a basis for sympathetic treatment. It is a common and unfortunate fact that the dirtiest work of exploitation is frequently left to small-timers, with the owners of great capital able to make satisfactory profits in more respectable investments. This simply proves that one with a million dollars can invest in bonds and make a comfortable living clipping coupons, while the fellow with a few thousand dollars must get his hands dirty if he wants to produce a satisfactory income from his capital. But it is well to remember that not all small investors find themselves compelled to get rich quickly, and it remains to be shown why those who have such desires ought to be permitted to fulfill them at the expense of the poorest people in society.

94. ABRAMS, *THE CITY IS THE FRONTIER* 26 (1965); SCHORR, *op. cit. supra* note 64, at 98; TEMPORARY STATE COMMISSION ON LOW INCOME HOUSING, *A REVIEW AND APPRAISAL OF NEW YORK STATE'S LOW INCOME HOUSING PROGRAM* 37-38 (1963).

95. The President's Council of Economic Advisors originally defined the "poor" as "those who are not now maintaining a decent standard of living" and set the poverty line for a family of four at \$3,000. H. COMM. ON EDUC. AND LABOR, 88TH CONG., 2D. SESS., *POVERTY IN THE UNITED STATES* 3 (Comm. Print 1964). The Social Security Administration found \$3,100 necessary for a non-farm family of four to live decently on an "economy-plan" budget and \$3,980 for the same family on a "low-cost" budget. Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 Soc. Sec. BULL. 3, 10 (1965). The Bureau of Statistics of the United States Department of Labor has not yet published a minimum or subsistence budget, but it plans to do so soon. See note 99 *infra*. Higher estimates than these have been given by respected authorities, including the widely cited budget prepared by the Community Council of Greater New York which found that a typical four-person household in 1963 required \$6,268 for an "adequate" living standard. THE COMMUNITY COUNCIL OF GREATER NEW YORK, *A FAMILY BUDGET STANDARD* 58 (1963). Even the Community Council's criteria have been described as yielding a "low estimate of the cost of living." MORGAN, DAVID, COHEN & BRAZER, *INCOME AND WELFARE IN THE UNITED*

narrow. Having allocated a reasonable sum to housing, further outlays for shelter can be made only by reducing below the subsistence level their allocation for food, clothing, medical care, and other personal necessities.

The dilemma for such families is best illustrated by a specific example. The Philadelphia subsistence budget<sup>96</sup> developed by the Pennsylvania Department of Public Welfare—a budget which is typical of those in use in other major metropolitan areas—shows that an average family of four needs an annual income of \$3,168 to “maintain a minimum standard of health and decency.”<sup>97</sup> Of this, only \$68 per month (\$816 per year or 25.7 per cent of total income) can be allotted as an “approximate maximum”<sup>98</sup> for rent; excluding fuel and utilities, without depriving the family of other basic requirements. Any slum tenant with such an income and paying this maximum toward rent has only a Hobson’s choice: He can remain in indecent housing and suffer the consequences, or he can overallocate to rent and deprive his family of other necessities of life. To say that a tenant who has made a rational allocation—paying the maximum rent he can reasonably afford, but no more—should be denied his action because he did not exercise that theoretical choice to underallocate to other necessities is to drain any meaning from the idea of “choice.” To have a choice is to have tenable alternatives; the subsistence-income tenant who takes what he can get for the maximum rent that he can afford is exercising about as much free choice as the customer who acquiesces in the terms of a utility or common carrier’s service contract.

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STATES 189 (1962). A \$3,000 budget allows a family of four a daily expenditure of only \$.70 per person for food and \$1.40 for all other needs including rent, clothes, medical care, etc. Yet, according to the 1960 census, about 34.5 million people subsisted at incomes below this minimum poverty line. Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 422 n.44 (1966); Miller, *Who Are the Poor?*, 200 THE NATION 609 (1965). See also David, *Welfare, Income, and Budget Needs*, 41 REV. OF ECON. AND STATISTICS 393-99 (1959); N.Y. Times, Oct. 4, 1966, p. 12, col. 5.

96. These budgets, used to determine state allowances for public assistance, represent the considered judgment of individual state research councils as to the minimum cost for decent living for various family compositions. Each budget works out in scrupulous detail the differing needs for families, taking into consideration factors of family size and location, ages and sex of members, and any individual disabilities.

97. PENNSYLVANIA DEP’T OF PUBLIC WELFARE, PUBLIC ASSISTANCE ALLOWANCES COMPARED WITH THE COST OF LIVING AT MINIMUM STANDARD OF HEALTH AND DECENCY 7 (1965). Pennsylvania figures for both housing and the cost of living are used simply for illustrative purposes. Budget estimates from other areas differ somewhat.

98. “Approximate maximum” costs are those which are exceeded by only 5% of the actual payments for shelter. PENNSYLVANIA DEP’T OF PUBLIC WELFARE, *op. cit. supra* note 97, at 1. If the cost of fuel and utilities is included in housing costs, as it is in the Housing and Home Finance Agency estimate of what low-income families can pay for rent, see note 103 *infra*, then the rent-income ratio for the Pennsylvania family of four at subsistence is 32 per cent, instead of 25.7 per cent. *Id.* at 17.

If, in the case of a person with a subsistence income, a court is going to consider a landlord's assertion that there is no imposition because the tenant is free to adjust upward his allocation to shelter, it must take notice of the facts in the real world. An appropriate way to do so would be to look to the subsistence budget promulgated by the local welfare agency or some similar reliable entity.<sup>99</sup> Where the tenant is already expending the appropriate maximum for shelter, any argument designed to exculpate the landlord on the ground that the tenant has "chosen" to spend as little as he has on rent should be denied, and the action should be permitted to go forward.<sup>100</sup> On the other hand, where it can be determined on the basis of such budget studies that the tenant is significantly under-allocating to rent, the landlord should be permitted to prevail.<sup>101</sup>

Obviously, not many prospective plaintiffs will have incomes precisely at the subsistence level. A number will be below the standard and some will be slightly above it.<sup>102</sup> Calculating the maxi-

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99. The Bureau of Labor Statistics, U.S. Dep't of Labor, is currently planning to issue a minimum budget for the major metropolitan areas. Letter from Mrs. Helen H. Lamale to Joseph L. Sax, Dec. 13, 1966.

100. In advancing this suggestion, we are perfectly aware that neither the subsistence line nor the internal allocations of income suggested in such studies are without imperfections. Not only do judgments differ as to appropriate averages, but the needs of different families also will differ depending on quite individual circumstances—such as the provision of services gratis by friends or relatives—which are not taken into account by the budget studies despite the fact that in many ways such studies are quite sophisticated. The question, however, is not whether there is a perfect standard, but whether in the absence of perfection there is a workable standard. We are convinced that there is. The alternative is either to let every tenant recover, regardless of the fact that he may have underallocated to shelter, or to let no tenants recover, thus totally ignoring the essence of the economic problems of the very poor—the fact that they live at a subsistence level. Since it is the landlord defendant who would raise the issue of choice, it would seem only proper that he acquiesce in the use of some standard which makes it possible to deal rationally with that issue.

101. In some circumstances there may be a very uneven price progression in housing costs, so that, while minimum decent housing costs significantly more than the tenant can afford, housing at the next step down the ladder in quality is available at somewhat less than he can maximally afford. KLEIN, *LET IN THE SUN* 34 (1964); STERNLIEB, *THE TENEMENT LANDLORD* 70 (1966). Such a tenant may thus be paying less than he can afford for his present housing, not because he prefers to underallocate to rent, but because any meaningful improvement in his situation would require more than he can afford. We would permit such a tenant an action, but only if he could show that decent housing was not available to him even if he were willing to allocate all he could afford.

102. As income rises significantly above the subsistence level, a family develops sufficient discretionary buying power to acquire true consumer choice. We need not be concerned about drawing the precise income line at which this qualitative change occurs, since the number of families who have true consumer choice and still live in seriously substandard housing is almost nil. Thus, as a practical matter, we are concerned only with those slightly above the subsistence level, and the test to be proposed for them may confidently be applied to all those plaintiffs in indecent housing. The possibility that someday a plaintiff will appear with a \$30,000 income but living in seriously deteriorated housing, can be dealt with when it arises. See note 165 *infra*.

mum appropriate rent for them requires a very simple adjustment. Starting with the maximum appropriate rent for a subsistence family in plaintiff's position, one merely need add or subtract a proper percentage for each dollar of incremental income above or below the subsistence line.<sup>103</sup>

## 2. *The Claim That the Tenant Could Have Made a Better Bargain*

The slum landlord also should derive no benefit from the citation of official housing census figures to the effect that better housing is available at prices low-income tenants can afford.<sup>104</sup> Rather than evidencing the presence of a real choice for the plaintiff and either unconcern about or a positive preference for indecent housing, such figures demonstrate the treachery of bare statistics. While a good many tenants with incomes as low as those in the worst housing live in standard dwellings, close examination reveals that they are principally small, elderly, white families, many of whom live in rooming houses and pay a high proportion of their income for rent so as to secure decent housing.<sup>105</sup> For the poor working family that is large—where non-shelter requirements consequently consume a much greater portion of income—there is a grave housing shortage,<sup>106</sup>

103. Although 20% of income is generally viewed as an appropriate allocation to shelter, HHFA, 18th ANN. REP. 19-20 (1964); SCHORR, *op. cit. supra* note 64, at 100-01. In fact many poor families pay considerably more. ABRAMS, *op. cit. supra* note 94, at 42. There is now some official basis for adopting a 25% figure. H.R. REP. No. 365, 89th Cong., 1st Sess. 5 (1965). Either figure could properly be adopted for use here. One way of implementing the adjustment using the 20% figure would be to add or subtract twenty cents for each incremental dollar. For example, assume that the subsistence income for a family of plaintiff's size and composition were \$3,000, and that the appropriate annual rent were \$750. If plaintiff's income were \$2,500, his appropriate rent would be \$750, less 20% of the \$500 by which his income falls below subsistence, or \$650; if his income were \$3,500, his appropriate rent would be \$800.

Another acceptable means of making this adjustment is to use the median rent-income ratio for families in the plaintiff's income range. Thus, on the same facts as above, if the median family with an income between \$2,000 and \$3,000 pays 23% of its income for shelter, the appropriate rental allocation for a plaintiff with \$2,500 income would be \$750 minus 23% of \$500. The appropriate rental for a family with \$3,500 would be \$750 plus 23% of \$500.

104. In Philadelphia, for example, 28% of all households have incomes below \$4,000, yet about three-fourths of these households live in standard dwellings. GREENBERG, CHARACTERISTICS OF LOW INCOME AND BADLY HOUSED HOUSEHOLDS IN THE PHILADELPHIA REGION 3 (Working Paper No. 8, Phila. Housing Ass'n Policy Comm., 1964). See also FISHER, TWENTY YEARS OF PUBLIC HOUSING 220-22 (1959).

105. GREENBERG, *op. cit. supra* note 104, at 4-5; NATIONAL CONF. ON LAW AND POVERTY, REPORT ON LAW AND POVERTY IN THE UNITED STATES 13 (June 23-25, 1965).

106. GREENBERG, *op. cit. supra* note 104, at 4; NATIONAL CONF. ON LAW AND POVERTY, *op. cit. supra* note 105, at 13 n.37. STERNLIEB, THE TENEMENT LANDLORD 88-93 (1966), reports a very high slum vacancy rate in Newark, but does not identify the size of units involved. He finds also that this has not forced rents down.

where, in addition, the family is non-white, the problem is further intensified.<sup>107</sup> In Philadelphia, for example, "[if] no household paid more than 20 per cent of its income for rent, there would be a gap of 66,000 between the number of extremely low-income households and the number of standard low-rent units in the region's housing stock."<sup>108</sup> Hence, the mere presence of some standard low-cost units hardly suggests that those who live in substandard housing prefer it; rather, the statistics simply indicate that a low-income tenant's opportunity to procure decent housing is contingent on his family's size, composition, and race. In short, the relatively good housing situation for little old white ladies living on their pensions does not present a choice that can be exercised by a Negro family with a working father and a number of growing children.

Even in those situations where better quality housing is physically available in other areas of a city, the problem is a good deal more complex than the statistics would make it seem. For unless we are to assume that low-income tenants prefer crowded rat-infested dwellings to decent housing—which is less than likely—the reason for the slum tenant's failure to move to better housing is no help to the landlord. For example, a seeming preference to remain in the slums may be due to "neighborhood attachment." The preservation of ties which people have to their neighborhood, family, and friends are now understood to be as essential to the checking of urban blight as is the improvement of physical facilities themselves. As one authority astutely observed:

Unslumming hinges, paradoxically, on the retention of a very considerable part of a slum population within a slum. It hinges on whether a considerable number of the residents and businessmen of a slum find it both desirable and practical to make and carry out their own plans right there, or whether they must virtually all move elsewhere.<sup>109</sup>

Congress has recently recognized the significance of such factors, and has modified the urban renewal process with an important emphasis

107. NATIONAL CONF. ON LAW AND POVERTY, *op. cit. supra* note 105, at 13 n.37; NEW YORK CITY RENT AND REHABILITATION ADMINISTRATION, PEOPLE, HOUSING AND RENT CONTROL IN NEW YORK CITY 7, 90, 94 (1964); SCHORR, *op. cit. supra* note 64, at 81-82.

108. GREENBERG, *op. cit. supra* note 104, at 4.

109. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 272 (1961). See also ABRAMS, FORBIDDEN NEIGHBORS 262-63 (1955); CONNECTICUT ADVISORY COMM'N, U.S. COMM'N ON CIVIL RIGHTS, REPORT 26 (1963); FOOTE, ABU-LUGHOD, FOLEY & WINNICK, HOUSING CHOICES AND HOUSING CONSTRAINTS 123 (1960); GLAZER & McENTIRE, STUDIES IN HOUSING AND MINORITY GROUPS 165 (1960); G. & E. GRIER, EQUALITY AND BEYOND 36 (1966); HARRINGTON, THE OTHER AMERICA 144 (1962); Fried, *Grieving for a Lost Home*, in THE URBAN CONDITION 151 (Duhl. ed. 1963).

on conservation and rehabilitation.<sup>110</sup> It would be unfortunate indeed for the courts to make a tenant's claim turn on his willingness to repudiate the very values that the rest of government is now striving to preserve.

Even more obvious than "neighborhood attachment" is the restriction on mobility imposed by racial discrimination which substantially confines non-whites—who bulk large in the ranks of the poor<sup>111</sup>—to the ghettos where the worst housing is concentrated.<sup>112</sup> Language problems and consumer ignorance also work to restrict the mobility of poor people.<sup>113</sup> These are factors which negate the seeming ability of the poor to go elsewhere and participate in that great satistical bounty of decent housing. What a cruel hoax it would be to deny a remedy on the theory that such theoretically available better housing proves the slum tenant's freely expressed preference for his dilapidated cold water flat.

To the extent that a landlord might be able to show the availability of some better apartments not subject to any of the foregoing objections—that is, apartments of equal spaciousness within the neighborhood and with no racial impediments to their availability—such evidence, rather than serving as a defense, would seem to intensify his culpability. For he would thereby demonstrate that he was giving even less housing for the money than were his competitors. Insofar as such conditions exist, they would appear to prove precisely the opposite of what the landlord is trying to show, which is that he is simply operating in a free market situation. Such market imperfections suggest that shortages are so intense that the equalizing effects of competition have broken down, that he is taking advantage of ignorance produced by widespread lack of market information due to an absence of advertising, or that he is taking advantage of ignor-

110. H.R. REP. No. 365, 89th Cong., 1st Sess. 15, 27 (1965); Stein, *The Housing Act of 1964: Urban Renewal*, 11 N.Y.L.F. 1, 12-13 (1965); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 803 (1965); Comment, *Conservation and Rehabilitation of Housing: An Idea Approaches Adolescence*, 63 MICH. L. REV. 892 (1965); Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180 (1963).

111. ABRAMS, *op. cit. supra* note 94, at 26; HARRINGTON, *op. cit. supra* note 109, at 61-81; HOUSING AND HOME FINANCE AGENCY, *OUR NONWHITE POPULATION* 36-37 (1963); NATIONAL CONF. ON LAW AND POVERTY, *op. cit. supra* note 105, at 20; NEW YORK CITY RENT AND REHABILITATION ADMINISTRATION, *op. cit. supra* note 107, at 95.

112. FOOTE, ABU-LUGHOD, FOLEY & WINNICK, *op. cit. supra* note 109, at 126; GOLDBLATT, NEW YORK CITY COMMISSION ON HUMAN RIGHTS, *THE COST AND QUALITY OF HOUSING IN WHITE AND NEGRO AREAS OF NEW YORK CITY* 3 (1960); MENDELSON, *DISCRIMINATION* 115-16 (1962); Weaver, *Major Factors in Urban Planning*, in *THE URBAN CONDITION* 102-03 (Duhl. ed. 1963).

113. CAPLOVITZ, *THE POOR PAY MORE* 49 n.1 (1963); PRESIDENT'S COMM. ON CONSUMER INTEREST, *THE MOST FOR THEIR MONEY* 7 (1965); Richards, *Consumer Practices of the Poor*, in *LOW INCOME LIFE STYLES* 74 (Irelan ed. 1966).

ance or language barriers common to the immigrant groups that so heavily populate slum areas.<sup>114</sup> Whatever the specific explanation in a given case, these factors show precisely what the tenant needs to show to make his case: that his situation is not the product of any informed market choice among available alternatives.

Finally, it must be noted that the essentially monopolistic situation is not abated by any rush into this lucrative market of new entrants who would, by increasing the supply, reduce severe shortages and thus either force prices down or push quality up. For, unlike a classical situation of excess demand, this market is a tightly restricted one. The poverty of the consumers imposes quite low ceilings on the rents which can be paid. Thus entry to the market is limited to those who can afford to provide additional housing for the low-cost market at a capital outlay small enough to permit the potential rentals to be profitable. But it is precisely the gap between the costs of building or buying housing for the poor and the potential return on such investment that has prevented the building of new private housing for the poor<sup>115</sup> and, along with racial restrictions and existing shortages in moderate-income housing, has made the filtration process—the conversion of older, moderately-priced housing into low-cost housing—extremely slow and utterly inadequate.<sup>116</sup> These facts, added to the unwillingness of legislatures thus far to fill the gap with enough public housing, have continued to assure the ability of the slum landlord to impose indecent housing on the poor on a take-it-or-leave-it basis.

### 3. *The Absence of a Desire To Do Harm as a Defense*

Another formal sense in which the slum dwelling situation differs from the usual case is that here the landlord has no intent—in the sense of desire—to harm the plaintiff. His only interest is an economic one, and the damage incurred by the plaintiff may be viewed by him not only as undesired, but also as unfortunate and regrettable. The *Restatement*, on its face, would seem to give some credence to this distinction, for its definition of the intentional infliction tort requires the defendant to have intended that emotional harm be the consequence of his act.<sup>117</sup> The illustrative

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114. GLAZER & McENTIRE, *op. cit. supra* note 109, at 168.

115. See notes 20 & 110 *supra*.

116. HHFA, 16TH ANN. REP. 18 (1962); MEYERSON, TERRETT & WHEATON, HOUSING PEOPLE AND CITIES 10 (1962); WEAVER, THE URBAN COMPLEX 50-51 (1964).

117. "The rule . . . creates liability only where the actor intends to invade the interest in freedom from severe emotional distress." RESTATEMENT (SECOND) OF TORTS § 47 comment a at 80 (1965).



example is that of a defendant who shoots at the plaintiff's dog in order to terminate its annoying barking.<sup>118</sup> It is said that no action would lie on these facts. Apparently the point is that it would have been a much more serious and outrageous act if the defendant's purpose had been to torment the plaintiff, whom he knew to be deeply attached to the dog.<sup>119</sup>

Such a distinction merely suggests that a desire to inflict pain on the plaintiff may make an act much more culpable than it would have been absent that motive. But the example hardly proves that an act cannot be outrageous in the absence of such a motive. For example, if a foster parent were to starve his ward simply in order to save money, without having any enmity at all toward the child thus abused, we think it would be readily agreed that the act was outrageous. Or, to take an example closer to that of the *Restatement*, if, with perfect good will toward all concerned, one were to murder a neighbor's child in order to quell nocturnal crying which disturbed his sleep, it would hardly be thought odd to characterize the act as outrageous.<sup>120</sup> Though it would no doubt be worse to have starved or murdered the hypothetical child for purely sadistic reasons, it seems not at all unreasonable to suggest that an economic motivation is quite monstrous enough to earn the epithet "outrageous."

#### 4. *The "But For" Test as a Defense*

The problem of causation, although implicitly considered already, perhaps deserves another word. Because there are always a variety of sellers in the market, the landlord may very well seek to play the old "but for" game. Since housing is essential, and since the low-cost housing offered by all sellers may be essentially the same, it might be argued that, "but for" the landlord's act, the tenant would have found himself in deplorable housing anyway. While we would be pleased to see such a claim made since it would aid the monopolistic, captive market analysis made above, it does not help the landlord even in the causation context. It is, of course, settled beyond cavil in

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118. *Ibid.*

119. See *id.* § 46 comment *f*, illus. 11, at 76.

120. The precise position of the *Restatement* as to such a case is unclear; it may be willing to impose liability where the defendant can be held to know that serious harm of a kind which he did not intend is likely to occur. *Id.* § 46 comment *l*. If this is what is meant, and if the *Restatement* is not merely adopting the view that one who murders a husband in the presence of the wife also wants to hurt the wife, then the *Restatement* position is consistent with that urged here insofar as the question of desire to do harm to the plaintiff is concerned. Insofar as the *Restatement* requires the nature of the harm to be "severe mental distress," as indicated earlier, we believe that such a limited view must be revised.

the law of torts that where two defendants each act upon the plaintiff simultaneously, causing him injury, neither may exculpate himself by urging that, "but for" his act, the injury would have come about anyway.<sup>121</sup> The obvious reason for such a rule is that otherwise each wrongdoer would be able to point the finger of blame at the other, with the absurd result that each would go free and the plaintiff, who suffers under the fortuity that he was twice wronged, would go without remedy. *A fortiori*, where the defendant was the sole cause, the analysis is equally applicable.

### III. THE PROBLEM OF THE CULPABLE TENANT

*Slum landlords are the evil that produce the ghetto.*

—A Harlem Tenant.<sup>122</sup>

*There's really no such thing as a slum landlord—only slum tenants.*

—A Chicago Landlord.<sup>123</sup>

These statements indicate more than naked self-interest on the part of landlords who rent, and tenants who inhabit, slum housing. Outside observers too have subscribed to these Manichaeic positions which attribute the etiology of slums solely to landlords or to the poor. Those who blame the poor for their own plight are perhaps compelled to do so for the reason explained by Nathan Straus:

I know that the people who live in the slums are human beings like my own mother, father, brothers, sisters, like my own children. Since this is the case, it is unbearable to me that they should be forced to live in unhealthful and disease-breeding surroundings. The idea is revolting, and doubly so because I am a part of the society which tolerates these conditions. The sense of guilt which I would feel were I to admit that the misery of these human beings is a responsibility of mine would be more than I could endure. . . . Rather it must be the responsibility of the families who live in these bad surroundings. Yes, that is the solution of my own inner conflict.<sup>124</sup>

Conversely, those who put all blame upon the landlords may be influenced by a view of the poor as "The Proletariat" who have a class morality and can do no wrong.<sup>125</sup>

Tragically, there is truth to both positions, for poverty is a culture

121. PROSSER, *TORTS* § 41, at 242-45 (3d ed. 1964). This sort of defense has also been rejected in pollution cases. *E.g.*, *People ex rel. Stream Control Comm'n v. Port Huron*, 305 Mich. 153, 157, 9 N.W.2d 41, 43 (1943).

122. Sign at a demonstration protesting housing conditions in East Harlem. N.Y. Times, May 31, 1964, p. 45, col. 4.

123. Satter, *West Side Story*, *The New Republic*, July 2, 1966, p. 15, 16.

124. STRAUS, *THE SEVEN MYTHS OF HOUSING* 146 (1944).

125. Moynihan, *Three Problems in Combatting Poverty*, in *POVERTY IN AMERICA* 41, 50 (Gordon ed. 1965).

that perpetuates itself.<sup>126</sup> The slum landlords contribute to the existence of poverty, but the poor themselves are also both a cause and an effect of poverty. Consequently, any practical solution to the problem must come to grips with both of these facts. Proposals to help correct indecent housing should not "ask of the poor that they get up and act just like everyone else in the society" any more than one should "demand of cripples that they run races."<sup>127</sup> But neither should courts treat the poor paternalistically, thereby conferring upon them an additional status of inferiority. Instead, a showing of responsibility must be required of slum tenants and at the same time some incentive must be provided for the assumption of that responsibility. The following comments are designed to articulate standards, within the context of the civil damage action, to meet this need.

First, one must be careful to note that, while slum dwellings with television antennae on the roofs, automatic washers and dryers inside, and automobiles outside may indicate an irresponsible tenant, they may also indicate a budget-minded tenant who finds installment payments on the washer and dryer cheaper than regular visits to the laundromat;<sup>128</sup> or a responsible parent who desires to supervise her children while doing household tasks and thus provides them with inexpensive and popular entertainment in the form of television.<sup>129</sup> An automobile may represent a quite rational investment for one who lives far from his job and lacks adequate public transportation. Other seemingly needless possessions may point to a tenant who was the victim of an unscrupulous merchant,<sup>130</sup> or may represent a form of "compensatory consumption,"<sup>131</sup> fulfilling a need which does not even exist for other groups in the society. Thus Millsbaugh describes the popularity of large colorful automobiles as

a symptom of the slum dwellers desire for escape. "Staying at home, you're always reminded of the conditions you live in," said [a Baltimore housing inspector], "so you have an automobile to drive around to another part of town. Even if you merely go to visit friends in another slum, it isn't yours."<sup>132</sup>

The very poor live in a milieu that is in many ways as far removed from us as is the agrarian society of eighteenth century America, and

126. HARRINGTON, *op. cit. supra* note 109, at 141; Lewis, *The Culture of Poverty*, Scientific American, Oct. 1966, p. 19, 21.

127. HARRINGTON, *op. cit. supra* note 109, at 138.

128. CAPLOVITZ, *THE POOR PAY MORE* 38 (1963); Richards, *supra* note 113, at 71.

129. CAPLOVITZ, *THE POOR PAY MORE* 37 (1963).

130. *Id.* at 16, 25, 29; MILLSBAUGH & BRECKENFELD, *op. cit. supra* note 93, at 9-11; N.Y. Times, Aug. 20, 1966, p. 1, col. 8.

131. CAPLOVITZ, *THE POOR PAY MORE* 13 (1963).

132. MILLSBAUGH & BRECKENFELD, *op. cit. supra* note 93, at 24.

just as the law has, in recognition of the change from eighteenth century society, modified its concept of such things as the "reasonable man,"<sup>133</sup> so we in this context must recognize that "what is objective reason on one [environment] is unreason . . . on another."<sup>134</sup>

This point is rather forcefully demonstrated in a recent study supported by the National Institute of Mental Health.<sup>135</sup> A mother who kept her children home from school was found not to be unconcerned about education or truancy, but rather to be embarrassed to send the children to school hungry at a time when there was no food in the house.<sup>136</sup> One researcher concluded:

[M]any seemingly clear cases of child neglect were actually a means of independence training. Some mothers, [it was found,] seem to withhold affection not because they reject their children but because they want to train the children away from dependency on them. They have to get each child "out of the way" as soon as possible in order to go on to the next child.<sup>137</sup>

A jobless husband, discouraged after unsuccessfully making the rounds, stole a radio to get some money. He was arrested and placed on probation, but he said that he would steal again if he was faced with the same circumstances. "Then his voice trailed off in anger: 'You have to do something . . . I mean, when you're home and your child asks for a piece of bread, and you [can't] give it to him . . .'"<sup>138</sup>

The television set or automobile is thus no more an obvious sign of irresponsibility than it is a symbol of virtue or reason. To identify and evaluate the meaning of consumer behavior in each particular instance is a perfectly hopeless task, but for the purpose of devising a workable judicial rule there would seem to be a sensible way out of the dilemma. Where a tenant's expenditures are such that he is paying less for shelter than is reasonable for his family as determined by the rent-income ratio,<sup>139</sup> we would allow the landlord a defense to the action, however rational the under-allocation may be

133. PROSSER, *TORTS* § 33, at 170 (3d ed. 1964).

134. BARAN, *THE POLITICAL ECONOMY OF GROWTH* 29 (1957). Thus, as Brecht's St. Joan said, it may be "[n]ot the wickedness of the poor have you shown me, but the poverty of the poor." *Saint Joan of the Stockyards*, in *SEVEN PLAYS OF BERTOLD BRECHT* 178 (Bentley ed. 1961). See also *LOW INCOME LIFE STYLES* (Irelan ed. 1966); *N.Y. Times*, Sept. 4, 1966, p. E-5, col. 1-3.

135. *POVERTY'S CHILDREN, A STUDY BY COMMUNICATING RESEARCH ON THE URBAN POOR*, sponsored by THE HEALTH AND WELFARE COUNCIL OF THE NATIONAL CAPITAL AREA (1966).

136. *Id.* at 11.

137. *Id.* at 17.

138. *Id.* at 15.

139. For an explanation of how this figure is calculated, see notes 94-103 *supra* and accompanying text.

from the tenant's point of view. On the other hand, where the maximum, or more, is being expended on shelter, we would hold the landlord liable, however irrational other expenditures might seem, on the ground that, as to the landlord, the tenant is acting rationally. The fact that a tenant may be depriving his family of food to indulge his passion for the racetrack ought not to affect the landlord's obligations any more than would the fact that the tenant might beat his wife or fall asleep on the job. Only where tenant conduct goes to the ability of the landlord to fulfill his specific obligation may such a defense properly be raised.

The foregoing proposal for synthesizing economic relations between tenant conduct and landlord defenses suggests in addition an appropriate solution for those situations where it is urged that the deteriorated condition of slum housing should be attributed to the tenants, rather than to the landlord. Where the conditions upon which a finding of indecency is predicated are attributable to tenant conduct, rather than merely to landlord neglect, we believe a defense should be available. For example, if, despite the landlord's effort to make repairs in the plumbing, tenants continue to misuse the facilities, causing repeated breakdowns after such repairs, we would not hold a landlord liable for finally giving up the effort. Similarly, if, despite the supplying of adequate refuse collection facilities, tenants continue to throw garbage in hallways and alleys, we would exculpate the landlord. On the other hand, where the landlord can point to no such mitigating circumstances, the action should lie.

Technically, this is what the law has always been, even in the context of code enforcement. But, in fact, the presence of tenant wrongdoing has either been ignored or has served to dilute the rigor with which the codes have been enforced. We propose that the question of tenant culpability be taken very seriously indeed, although we are perfectly aware that such an approach is more easily proposed than implemented. Not only are there difficult problems of proof to be apprehended, but the presence of many tenants who have experienced little else but slum conditions, and the mores which those conditions create, suggests an organizational challenge of considerable proportions.

We nonetheless urge that the challenge be undertaken, not because of any desire to make the tenant's opportunity to recover more difficult, but out of conviction that essentially it is not help, but self-help (made meaningful by opportunity), that is needed. The traditional neighborhood improvement program, initiated from the outside, has often failed not because it did not result in some physical

improvement, but because it was carried out without effecting any internal changes in the people involved.<sup>140</sup> Paternalism of this sort, presupposing the inadequacy of its beneficiaries, perpetuates the very inequality sought to be overcome.<sup>141</sup> Thus it is that one reads of the effect of welfare programs:

Escape from poverty is not easy for American children raised in families accustomed to living on relief. A recent sample study of AFDC [Aid to Families with Dependent Children] recipients found that more than 40 percent of the parents were themselves raised in homes where public assistance had been received.<sup>142</sup>

In place of an image of inferiority externally imposed upon the poor which then becomes self-fulfilling, the poor themselves must "undertake social action that redefines them as potentially worthwhile and individually more powerful."<sup>143</sup> This requires not only that the poor be organized, but that the process of organization, if it is to transform the "strength of the poor into the power of the poor,"<sup>144</sup> must come from the poor themselves.<sup>145</sup>

This notion, that the potential for self-reliance has meaning only if it is at some point transformed into power, into action which affects the lives of those involved, is what ties the overall social problem into the legal remedy sought here. For, just as welfare dispensed as a dole from without is itself insufficient, so mere intellectual or spiritual changes in self-image alone are meaningless unless at some point they come to fruition in the form of results responsive to the needs of the tenants.<sup>146</sup> The proposed civil damage action thus not only demands much from slum inhabitants, but also holds out to them the concrete promise of measurable social betterment because it aims "at the

140. Haagstrom, *The Power of the Poor*, in *POVERTY IN AMERICA* 315, 325 (Feiman, Kornbluh & Haber eds. 1965).

141. *Id.* at 326; ALINSKY, *REVELLIE FOR RADICALS* 68 (1946); Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 *CALIF. L. REV.* 370, 384 (1966).

142. H. COMM. ON EDUC. AND LABOR, 88TH CONG., 2D SESS., *POVERTY IN THE UNITED STATES* 15 (Comm. Print 1964).

143. Haagstrom, *supra* note 140, at 332.

144. Reisman, *Low Income Culture: The Strengths of the Poor*, 26 *J. OF MARRIAGE AND THE FAMILY* 417 (1964).

145. Haagstrom, *supra* note 140, at 332. Lest it be thought that we are disregarding our own advice by telling the poor what they need, we abjure all claim to originality and point, as an example, to the definition of Black Power given by its proponents: Control by the affected group over that upon which they are dependent. *N.Y. Times*, Aug. 5, 1966, p. 10, cols. 2-8; Sanders, *The Language of Watts*, 201 *THE NATION* 490-93 (1965).

146. Coles, *The Poor Don't Want To Be Middle Class*, in *CALIF. STATE DEP'T OF SOCIAL WELFARE, SELECTIVE READING SERIES No. 7*, at 8 (1965); Haagstrom, *supra* note 140, at 332.

destruction of slums, their causes and effects;"<sup>147</sup> it is an appropriate remedy because its "goal [is] genuine self-help, not merely self-improvement."<sup>148</sup>

#### IV. SETTING THE STANDARD

Setting the standard of unlawful conduct requires the identification of those housing conditions so at odds with our concept of the essential decencies of life that we believe no American ought to be subjected to them at the hands of another. Naturally there are no absolutely fixed stars in this constellation. Many writers have noted that, in different places and at different times, the notions of minimal decencies have been widely divergent;<sup>149</sup> thus it may be pointed out not only that in some places people live with placidity, if not enthusiastic fervor, in thatch huts, but also that even in the United States indoor plumbing is rather a recent innovation. While this is indisputable, the lesson which is meant to be drawn therefrom is unclear. It is equally true that the abolition of human slavery is a relatively modern innovation, here as elsewhere, but today we would hardly need the thirteenth amendment to persuade us that involuntary servitude is an outrage intolerable in our present society. The question is not whether our standards have timelessness and universality, but simply what our standards are. We are hardly less capable of asking ourselves what the outer limits on landlord conduct should be than we are of asking that question with respect to bill collectors, undertakers, policemen, or voting registrars.

While we have neither the benefits of a written constitution nor the usual historical precedents to guide us, we are by no means left wholly at large. Fortunately, the widespread adoption of housing codes by American cities<sup>150</sup> provides an excellent starting point in formulating a standard. Their identification of various housing conditions as unacceptable and illegal serves us both in the sense that it puts any landlord on notice of the kind of conduct which may be challenged, and in that it represents a legislative judgment as to the points at which economic preservation of the landlord is deemed to be outweighed by concern for the living conditions of the tenant. At the same time, the housing codes quite clearly bring together a great

147. Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, in *POVERTY IN AMERICA* 457, 462 (Ferman, Kornbluh & Haber eds. 1965).

148. *Ibid.*

149. *E.g.*, BANFIELD & GRODZINS, *GOVERNMENT AND HOUSING IN METROPOLITAN AREAS* 78 (1958); FISHER, *20 YEARS OF PUBLIC HOUSING* 29-31, 52-53 (1959).

150. *27 MUNICIPAL YEAR BOOK* 318-28 (1960); Comment, *Enforcement of Municipal Housing Codes*, 78 *HARV. L. REV.* 801, 803 (1965).

variety of violations of widely differing importance, including not only the very grave wrongs but also a good many quite minor infractions.<sup>151</sup> While it would be a serious mistake to treat every violation of the housing codes as a tort for which substantial damages ought to lie, the housing codes do serve the important function of delineating the outer limits of wrongful conduct. Thus it may be said, as a first step, that no act which is not a violation of the housing code may be tortious.

This first step circumscribes the scope of our inquiry. The second step requires selecting from the codes those violations which are of sufficient gravity that failure to comply with them can be viewed as outrageous and thus tortious. At this point, too, we have considerable guidance; for a great number of studies of housing conditions, from the Census surveys to investigations by governmental agencies, private institutions, and individuals, despite their divergences on many issues, are quite consistent in identifying those basic conditions which reduce a dwelling to the level of indecency. These conditions are:

1. *Structural Dilapidation*: This is usually understood to include substantial openings, decay, listing, or sagging in foundations, walls, ceilings, stairways, halls, and floors of such a nature as to present a serious danger of injury or exposure. It also covers structures which by their nature are unfit for human habitation, such as huts or shacks made of scrap, with dirt floors or without foundations.<sup>152</sup>

2. *Absence or Inadequacy of Basic Facilities*: This means the absence of hot and cold running water, flush toilet, and bath or shower within each unit for the exclusive use of the occupants thereof.<sup>153</sup> It includes, notwithstanding the presence of such facilities and basic heating, cooking, and electrical apparatus, the maintenance of these facilities and devices in a condition such that they cannot be

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151. In addition to the customary provisions requiring the presence of basic facilities such as toilets, plumbing, and heating, one may find a requirement that apartment elevators contain a sign stating the rated carrying capacity, or that bathrooms must be accessible from any sleeping room without passing through any other sleeping room. Such typical variety is illustrated by the NEW YORK STATE MODEL HOUSING CODE §§ A-207-2b, A-513b (Division of Housing and Community Renewal 1960).

152. NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS' MODEL MINIMUM HOUSING STANDARDS ORDINANCE § 12-606 (1962) [hereinafter cited as NIMLO HOUSING ORDINANCE]; SIEGEL & BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION 98 (1953); U.S. CENSUS OF HOUSING 1960, vol. 1, *States and Small Areas, Part 6* XXI-XXII.

153. NIMLO HOUSING ORDINANCE § 12-603; NEW YORK CITY RENT AND REHABILITATION ADMINISTRATION, *op. cit. supra* note 107, at 29; SCHORR, SLUMS AND SOCIAL INSECURITY 31, 123 (U.S. Dep't H.E.W., Social Security Admin., Div. of Research and Statistics Research Report No. 1, 1963); SIEGEL & BROOKS, *op. cit. supra* note 152, at 19. In some circumstances, the sharing of a bathroom by tenants in quite small units may be permissible. *E.g.*, CHICAGO MUNICIPAL CODE §§ 78-13.1, 4.



depended upon to give adequate service on a regular basis.<sup>154</sup> A heating plant or plumbing facility which is so old or deteriorated that it is incessantly breaking down, leaving the tenants without service for substantial or frequent periods, would exemplify such an inadequacy.

3. *Absence of Rudimentary Sanitary Services*: This means principally infestation of vermin or rodents, accumulation of filth in common areas, or failure to provide adequate facilities for the disposal of trash and garbage.<sup>155</sup>

4. *Severe Crowding*: Overcrowding is usually measured in mathematical terms, on the basis either of persons per room,<sup>156</sup> or of cubic feet of air and floor space per individual.<sup>157</sup> While these standards are undoubtedly useful in general, they ought not to be employed with unbending rigor. Obviously a room-person ratio is less than fully helpful unless the size and nature of the rooms are taken into account. Similarly, a space-person ratio would undoubtedly be subject to some marginal diminution as family size increases; a six-person family probably does not need fifty per cent more space than does a four-person family in order to be equally uncrowded. Underlying each of these tests is an attempt to determine both the limits of healthful and sanitary living and the minimum amenities of privacy. Thus, in addition to the numerical criteria, it would be relevant to determine whether bathroom and kitchen facilities are contained within the same room, whether there are sleeping quarters for adults separate from those for children, and whether there is some room in the dwelling not required as a sleeping room which permits opportunity for privacy and study.

One further comment is required as to the problem of overcrowding. Conceivably a defendant landlord would argue that overcrowding, unlike failure to provide services, does not represent a profit-motivated imposition in that he may have a fixed price for a given apartment and is indifferent whether that apartment is occupied by two or twenty people. Indeed, he may urge that he would rather have it occupied by a smaller family, for crowding is undesirable to him in that it puts further strain on his building's facilities without producing any additional rental income. Such a defense suggests its own rebuttal: If rents are not determined by

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154. *Ibid.*

155. NIMLO HOUSING ORDINANCE § 12-603; N.Y. Times, July 19, 1966, p. 1, col. 2.

156. NEW YORK CITY RENT AND REHABILITATION ADMINISTRATION, *op. cit. supra* note 107, at 6; SCHORR, *op. cit. supra* note 153, at 122-23.

157. Wall, *Developments in Municipal Housing Codes*, 42 PUBLIC MANAGEMENT 107-08 (1960); see, e.g., CHICAGO MUNICIPAL CODE § 78-16.1; NIMLO HOUSING ORDINANCE §§ 12-604, -605; NEW YORK STATE MODEL HOUSING CODE § A-203; SIEGEL & BROOKS, *op. cit. supra* note 152, at 19.

density of occupation, why do slum landlords rent very small apartments to very large families? The answer is that this is the only market, by and large, which they can serve. Small low-income families do not face anything like the critical shortage facing the large poor family;<sup>158</sup> the small family can frequently satisfy its housing needs in standard, or only mildly substandard, dwellings.<sup>159</sup> That they do not provide the principal market for seriously substandard housing is demonstrated by the extremely high correlation between severely run-down housing and severe overcrowding.<sup>160</sup> Thus, for the owner of very bad housing, the choice is between vacancies and overcrowding. Because he chooses to acquiesce in overcrowding, his decision is profit motivated just as surely as is his failure to make necessary repairs.<sup>161</sup> To note that he faces the prospect of vacancies does not, however, suggest that he also faces a situation of excess supply which would diminish his essentially monopolistic position, the relevance of which was discussed above;<sup>162</sup> for, although he may operate principally in the limited large-family low-income market, the supply of housing for this restricted group is critically short. Consequently the slum landlord who permits overcrowding may fairly be viewed as just as culpable, in the sense of making a profit-motivated decision which is imposed upon consumers in an intense shortage situation, as is the landlord who refuses to install or repair basic facilities.

While the four basic wrongs just delineated should be viewed as neither exhaustive nor precisely descriptive, they are at least as sufficient as the tests used in determining the reasonableness of detention in a false imprisonment case,<sup>163</sup> or the outrageousness of a bill collector's tactics.<sup>164</sup> Moreover, the individual standards are mutually

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158. COMMUNITY RENEWAL PROGRAM, CITY OF NEW YORK, NEW YORK'S RENEWAL STRATEGY/1965, at 36 (1965).

159. GREENBERG, CHARACTERISTICS OF LOW INCOME AND BADLY HOUSED HOUSEHOLDS IN THE PHILADELPHIA REGION 6 (Working Paper No. 8, Phila. Housing Ass'n Policy Comm., May 1964).

160. GLAZER & McENTIRE, STUDIES IN HOUSING AND MINORITY GROUPS 158-59 (1960); MEYERSON, TERRETT & WHEATON, HOUSING, PEOPLE AND CITIES 58 (1962); NEW YORK CITY SUBCOMMITTEE ON HOUSING STATISTICS, MAYOR'S HOUSING EXECUTIVE COMMITTEE, HOUSING STATISTICS HANDBOOK 35 (Oct. 1964); SCHORR, *op. cit. supra* note 153, at 85-86.

161. GLAZER & McENTIRE, *op. cit. supra* note 160, at 168, 173. Though codes may impose responsibility for overcrowding on both landlords and tenants, *e.g.*, CHICAGO MUNICIPAL CODE §§ 78-13, -16, where tenant overcrowding is the involuntary product of economic necessity, *cf.* notes 94-116 *supra* and accompanying text, no legal disability ought to follow for the tenant. Conversely, a landlord defense may be available where the tenant is subletting to strangers for a profit.

162. See notes 104-15 *supra* and accompanying text.

163. PROSSER, TORTS § 22, at 124 (3d ed. 1964).

164. *Id.* § 11, at 49-50.

reinforcing because dilapidated buildings will also generally be those without rudimentary facilities or services. In this sense, too, the cases may be expected to resemble the bill collector situation, where it is the cumulative impact of a variety of undesirable practices taken together that persuades a court that an actionable wrong has occurred.<sup>165</sup>

Moreover, we can be reasonably confident that truly deplorable housing will be sufficiently shocking to the sensibilities of judges and juries that they will recognize indecency when they see it,<sup>166</sup> and that, in the words of the *Restatement*, "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"<sup>167</sup> Such confidence is enhanced by the word pictures so often given by those who write about the slums. Of the many such examples available, perhaps a single illustration will suffice to indicate the impact to be expected on the average member of the community:

In this six-story building, converted into furnished rooms, filth prevails throughout—filled garbage cans without covers line the hallways with the surplus refuse spilling over; roaches and rats abound; broken flooring, plumbing, windows, lighting fixtures and plaster are observable throughout . . . . One community kitchen is used by seven families. Twelve toilets are intermittently in service on six floors . . . . This is the abode of thirty families and 105 children . . . .<sup>168</sup>

It is for subjection to such conditions that relief is sought. Of course, as has been made clear,<sup>169</sup> it is only the imposition of these conditions by the landlord which is to be redressed, and an appropriate showing of non-culpability by the plaintiff tenants will be required. Moreover, there is no desire to reach the merely inadvertent landlord whose facilities are out of repair but who has not had adequate notice or a proper opportunity to respond to complaints. While notice, actual or constructive knowledge, and opportunity are thus all elements of the wrong, it seems appropriate to let the precise nature

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165. *E.g.*, *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954) (persistent course of harrassment by bill collector). Occasionally a building will lack one very vital facility. Nonetheless, unless the building as a whole is one in which living conditions are indecent as one commonly uses that term in describing the more egregious slum conditions, no cause of action should be recognized. For example, tenants of a middle income apartment house which lacks a fire escape, though it is otherwise quite a pleasant place to live, would not be able to sue under this proposal.

166. See the concurring opinion of Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

167. *RESTATEMENT (SECOND) OF TORTS* § 46, comment *d* at 73 (1965).

168. SCHORR, *op. cit. supra* note 153, at 123-24.

169. See sections II & III *supra*.

of the proof which is required of these elements be resolved within the factual situation of a given case.

#### V. MEASURING THE WRONG: WHEN THE CAUSE OF ACTION ARISES AND THE QUESTION OF DAMAGES

Because the kind of conduct at issue here produces consequences which are both long-term and difficult to discern, and which reveal their meaning only in a milieu which contains many actors and many victims, the cause of action cannot be said to arise when the wrongful conduct is completed, as it would in the conventional case. Rather, as in the constitutional or antitrust merger cases, it is the initial act which sets the law in motion. Only in this way can the wrong be remedied before the very thing which the law seeks to prevent has occurred. Thus it is the act of renting or of maintaining indecent housing which gives rise to the right of redress.<sup>170</sup>

Lest it be thought that this approach unjustifiably opens the way for people to buy themselves a lawsuit for the price of a month's rent, let it be remembered who the potential plaintiffs in such lawsuits are: They are people who are expending the maximum feasible portion of their income on rent and who still find themselves living in deplorably bad housing. They are thus the very poor who, for all the reasons discussed earlier, are simply the takers of what they can get. The whole point of this article is that, where all they can get is indecent housing, they are entitled to get a lawsuit along with it.<sup>171</sup>

Nor should it be a cause for concern that a particular individual could conceivably be a plaintiff in more than one lawsuit against various defendants who have been his landlords at different times. While this is hardly likely to be a problem of significant proportion in light of the organizational demands imposed by our view of the tenant culpability defense,<sup>172</sup> the possibility of multiple lawsuits, far from being an obstacle, is perfectly consistent with the underlying theory of this article. For, as the earlier discussion shows, it is the

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170. This is not intended to contravene the earlier statements that tenant recovery depends upon a showing of adequate knowledge and notice, and that recovery may be had only when the tenants have not caused the harm. To get to this stage will sometimes require the passage of a period of time after the start of the tenancy. The only point sought to be made here is that the arising of the cause of action should not depend upon the plaintiff's ability to demonstrate the presence of traditional tort type damage. This is merely to put in a technical context the point made in section II *supra*.

171. The Supreme Court has before it this term a related issue. In *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1966), *cert. granted*, 384 U.S. 938 (1966), the question is whether persons on a civil rights pilgrimage who invite and endure arrest, are barred from subsequently maintaining a Civil Rights Act damage action. See also *West Park Ave., Inc. v. Ocean Township*, 48 N.J. 122, 224 A.2d 1 (1966).

172. See text accompanying notes 139-48 *supra*.

parallel conduct of landlords in the market available to the tenant which makes the slum-housing problem so serious; it is the totality of conduct of all the enterprisers which puts the tenant in his unfortunate position, just as in the antitrust or racial discrimination context it is the pattern of conduct in the industry or community which comprises the total fabric of wrongfulness. Each landlord who, when given the chance, imposes intolerable living conditions contributes something to the gravity of the damage inflicted on his tenant. Therefore, the fact that a tenant could bring suits against more than one landlord would expedite the remedying of the totality of wrongfulness which operates against the tenant.

This is simply another way of saying that one should not view the right to be free from subjection to indecent housing as a monolithic right which can be infringed but once by a single person; it is rather a right to be free of such treatment by all potential violators, and the magnitude of potential damage is as large as the class of potential violators. That inchoate right in all its multiplicity is infringed as often as the wrongful practices occur. Such an approach is most commonly found in the racial discrimination area, where civil damages are recoverable for each violation of a public accommodation law. It is perfectly possible for an individual to seek service at various times in various restaurants or hotels and to recover damages for each refusal.<sup>173</sup> Because the degree of harmfulness of discrimination is proportional to the prevalence of discriminatory conduct in the community, each instance is viewed as a separate wrong to be remedied separately. The right is not exhausted by a single act of exclusion.

Moreover, it must be remembered that the damages to be recovered in such a case, as in the ordinary intentional infliction litigation, contain substantial deterrent, as well as punitive and vindictory, elements. From this perspective, attention is properly focused on the fact that various defendants, each of whom needs to be reminded forcibly that his conduct will not be tolerated, are being given the sort of treatment they deserve. That one plaintiff may reap the economic benefits of this educational lesson to the landlords need not deter us here any more than it does in any of the various situations where punitive damages are granted or where the promotion of justice is entrusted to private vindicators of the public interest.<sup>174</sup> The theoretical prospect that multiple suits would lead to the vast enrichment of certain former slum tenants is sufficiently remote that it need hardly worry us. Such fears are perhaps best likened to the

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173. *E.g.*, N.Y. CIV. RIGHTS LAW § 41.

174. *E.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545-56 (1943).

complaint that "discrimination in reverse" is permitting the Negroes to take over the country, but none of whose proponents has yet yearned to become a Negro and get in on the great bonanza.

As to the measure of damages, it is of course clear that here—as in a voting rights case—there is no economic interest as such at stake. Since the damages serve a significant deterrent and punitive function, it might be appropriate to follow the rule of *Alcorn v. Mitchell*,<sup>175</sup> where the court, in affirming an award of \$1,000, looked at the wealth of the defendant and asked whether the damages granted would make clear to the defendant that gratifying his malignant instincts was a painfully costly enterprise. Another possibility, and one more attuned to the remedial aspects of the case, would be to grant the plaintiff some multiple of the amount needed to purchase standard housing for his family for a year. Since the gravamen of defendant's wrong is subjection of the plaintiff to the disabilities attendant upon living in substandard housing, it would seem just to require the defendant to enable the plaintiff to obtain the benefits of standard housing for some period of time, perhaps five years. This approach has a further appeal: Since the prospect of contracting the low-cost housing supply has been a serious impediment to effective code enforcement, nothing could be more appropriate than to have the guilty landlord himself mitigate this problem.<sup>176</sup> During this period, it must be expected that legislatures, spurred by judicial recognition of the tort action proposed herein, will move to ameliorate the problem.

#### VI. THE SIGNIFICANCE OF TRADITIONAL LANDLORD AND TENANT LAW

Although the antiquated law of landlord and tenant still imposes a number of disabilities on lessees in both contract and tort actions,<sup>177</sup> fortunately none of these disabilities operates as an impediment to

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175. 63 Ill. 553 (1872).

176. The fact that many slum buildings are held in corporate form with quite limited assets should not—but probably will—be an obstacle to reaching the controlling stockholders in the damage action proposed here. *Walkovsky v. Carlton*, 35 U.S.L. Week 2330-31 (N.Y. 1966). Compare *BAKER & CARY, CASES ON CORPORATIONS* 375-76 (3d ed. 1959); *LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS* 77-90 (1936). New York has made an attempt to mitigate this problem by statute. See *N.Y. Times*, May 18, 1966, p. 36, col. 4. Perhaps, though, corporate ownership is less widespread than has commonly been supposed. *STERNLIEB, THE TENEMENT LANDLORD* 121-22 (1966).

177. *PROSSER, TORTS* § 63, at 411-13 (3d ed. 1964); *RESTATEMENT (SECOND) OF TORTS* §§ 355-56 (1965); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 310-11 (1965). A recent discussion of the problem from a contract perspective is Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); see also *LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, LEGAL REMEDIES IN HOUSING CODE ENFORCEMENT IN NEW YORK CITY* 127-81 (1965).

the action proposed herein. Even where the old tort rules still apply, relieving the landlord of any duty in regard to the condition of the leased premises, there are exceptions for those parts of the premises over which the lessor retains control.<sup>178</sup> The usual examples given to describe these exceptions, such as common stairways, roofs, yards, walls, foundation, heating, lighting, or plumbing,<sup>179</sup> include virtually all the facilities that are going to be in issue in any of the cases envisioned here. Moreover, many courts are now committed to the principle that, where a tort action is premised upon violation of a housing code, the duty legislatively imposed upon the landlord abrogates any no-duty defense which the landlord might have had at common law.<sup>180</sup> These cases are also most useful in that they dispel any claims that the statutory remedy is to be treated as the exclusive means of redress for conduct which constitutes a violation of the housing codes.<sup>181</sup>

A lease with a clause exculpating the landlord from tort liability also would be of no avail to the defendant. Though such clauses are generally valid in negligence cases, exculpation from liability for intentional torts is prohibited.<sup>182</sup> In addition, there are now a number of statutes rendering such clauses void,<sup>183</sup> as well as common law rules voiding contracts in contravention of statutory duties.<sup>184</sup> Moreover, it should be clear, on the basis of the previous discussion, that an exculpatory clause in a slum lease would be a most appropriate situation for the application of the general doctrine invalidating such provisions when contained in adhesion contracts dealing with necessary services.<sup>185</sup>

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178. RESTATEMENT (SECOND) OF TORTS §§ 360, 361 (1965).

179. *Ibid.*

180. PROSSER, TORTS § 63, at 413 n.25 (3d ed. 1964). See also *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943 (D.C. Cir. 1960); *Hanna v. Lederman*, 223 Cal. App. 2d 786, 36 Cal. Rptr. 150 (1963); *McNally v. Ward*, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); *Saracino v. Capital Properties Associates*, 50 N.J. Super. 81, 141 A.2d 71 (Super. Ct. 1958); *Altz v. Lieberson*, 233 N.Y. 16, 134 N.E. 703 (1922).

181. It is not urged here that the statute creates the plaintiff's right; rather, the statutory standards are mere guidelines for the right which should be recognized at common law. The cases simply stand for the proposition that the presence of a statutory remedy does not pre-empt a common law action. *Odom v. East Ave. Corp.*, 178 Misc. 363, 34 N.Y.S.2d 312 (Sup. Ct. 1942).

182. *Kuzniak v. Brookchester*, 33 N.J. Super. 575, 111 A.2d 425 (Super. Ct. 1955); 6A CORBIN, CONTRACTS § 1472, at 596-97, 601-02 (1962).

183. *E.g.*, CAL. CIV. CODE § 1668; ILL. REV. STAT. ch. 80, § 15a (1966); N.Y. GEN. OBLIGATIONS LAW § 5-321; see *Hanna v. Lederman*, 223 Cal. App. 2d 786, 36 Cal. Rptr. 150 (1963); *Boyd v. Smith*, 372 Pa. 306, 94 A.2d 44 (1953).

184. *Schoshinski*, *supra* note 177, at 537-38.

185. Comment, *Contractual Exculpation From Tort Liability in California—The "True Rule" Steps Forward*, 52 CALIF. L. REV. 350 (1964). On the same principle, the notorious Bond-For-Deed arrangements, by which the landlord seeks to shift the statutory burden by a form of "sale," is ripe for some judicial reordering. See ILLINOIS GENERAL ASSEMBLY, REPORT OF THE COMMITTEE OF THE HOUSE OF REPRESENTATIVES ON SLUM HOUSING AND RENT GOUGING 3 (1965).

## VII. THE FUNCTION AND FUTURE OF THE PROPOSED ACTION

One of the few things about which every observer of the slum housing situation agrees is that present enforcement techniques have been a failure.<sup>186</sup> The combination of bureaucratic overlapping and understaffing, the use of procedural delays to the advantage of recalcitrant landlords, and the lack of militancy by both administrative and judicial officials, have all worked against the achieving of significant change.<sup>187</sup> The more routine proposals for reform—such as administrative consolidation<sup>188</sup> or the enlargement of fines<sup>189</sup>—are not without their usefulness, but one can hardly bring himself to believe that yet another round of legislative manipulation of the old strategies is going to induce needed changes while the same actors, with the same attitudes, remain to implement the high hopes which are reflected in each such new proposal.

The more imaginative new ideas—such as the rent strike,<sup>190</sup> the tenants' union,<sup>191</sup> receivership in its various forms,<sup>192</sup> and rent abatement<sup>193</sup> or withholding<sup>194</sup>—are all relatively untested, and thus less amenable to pessimism. Nonetheless, as indicated earlier, because they all share the common assumption that the landlord can be whipped into line by the exertion of financial pressure, their prospects for success raise some serious questions.

Insofar as these schemes deny the landlord the funds which would ordinarily be used for repairs, they are in a sense self-defeating, and

186. E.g., Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 276-79 (1966); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 314-23 (1965); Comment, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 826, 830, 859 (1965); Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180 (1963). Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966), defend past achievements more than most commentators, but their study too is ultimately a history of failure.

187. See authorities cited *supra* note 186.

188. E.g., LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, *ADMINISTRATIVE CONSOLIDATION OF HOUSING ENFORCEMENT AGENCIES OF THE CITY OF NEW YORK* (Dec. 31, 1964); Detroit Free Press, Aug. 17, 1966, p. 3, col. 3; N.Y. Times, June 15, 1966, p. 44, col. 3.

189. E.g., LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, *op. cit. supra* note 187, at 67-86; Gribetz & Grad, *supra* note 186.

190. See Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304 (1965).

191. Hillman, *Tenant Unions in the Common Law*, unpublished paper prepared for the Conference on the Landlord-Tenant Relationship, University of Chicago Law School, Nov. 1966.

192. See Gribetz, *New York City's Receivership Law*, 21 J. HOUSING 297 (1964); Levi, *supra* note 186; Detroit Free Press, Aug. 17, 1966, p. 1, col. 1. The receivership program in New York City has just been "scuttled" by the administration. N.Y. Times, Jan. 14, 1967, p. 33, col. 8.

193. N.Y. MULT. DWELL. LAW § 302a.

194. N.Y. REAL PROP. ACTIONS LAW § 755; N.Y. SOC. WELFARE LAW § 143b; Pa. Laws 1965, Act No. 534, PA. STAT. ANN. tit. 35, § 1700-1.



thus tend to intensify the very problem they are designed to solve.<sup>195</sup> The hope, of course, is that the expenditure of money for needed repairs will be less costly to the landlord than the abandonment of his rents.<sup>196</sup> Where this is the case and the tenants seek only relatively minor repairs or maintenance, the tenants' union or rent strike can be effective. However, the focus of our concern is the seriously deteriorated building, because it is there that the problems are most intense. With such properties, the landlord is able to succeed economically only if he can "milk" the property, taking his rents while he lets the building deteriorate and stays a step ahead of code enforcement sanctions.<sup>197</sup> Unless a landlord can afford to effect the repairs demanded and still make an acceptable profit, the hoped for economic incentive cannot operate, and the rational decision for him will be to abandon the building or sell it at a greatly depressed price to one who can afford to make enough repairs to get rents reinstated and still make a profit on the operation.

Where the cost of adequate repairs exceeds the prospect of continuing profits, the tenants are the losers when abandonment occurs. Even where there is a sale at a diminished price, the prospects do not seem to be much better. Those who buy in such situations are necessarily the most speculative of speculators, and their success often turns on their political abilities rather than on their ability to provide real services to the tenants. Thus, they are likely to make only the minimum improvements which are required to get rents reinstated.<sup>198</sup> Another technique of evasion involves a sale by a small operator to an owner of many properties. The buyer begins to rehabilitate one property, putting his others on a list for future improvement, thus making a showing of good faith.<sup>199</sup> In this manner, he may induce sympathetic treatment by public authorities on the

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195. One of the new rent abatement laws obviates this aspect of the problem by permitting rents to be deposited in court and utilized for repairs. N.Y. REAL PROP. ACTIONS LAW § 771.

196. Another problem is raised by the ability of the landlord to take reprisals, in the form of eviction, or to outlast the tenants by legal delays which favor him. As to the latter problem, see the six month waiting provision in N.Y. MULT. DWELL. LAW § 302a. There are some legal restrictions on evictions. *E.g.*, ILL. REV. STAT. ch. 80, § 71 (1966); MASS. GEN. LAWS ANN. ch. 239, § 9 (1956); N.Y. Real Prop. Actions Law § 756. See also *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965); *Schoshinski*, *supra* note 177, at 541-52.

197. *E.g.*, KLEIN, LET IN THE SUN (1963); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 321 n.83 (1965); Dahl, *A White Slumlord Confesses*, Esquire, July 1966, p. 92.

198. ILLINOIS GENERAL ASSEMBLY, *supra* note 185, at 5. See also N.Y. Times, Sept. 6, 1966, p. 43, col. 3.

199. NASH, RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES 111-12 (1959). Such buyers have been known to make some improvements, however. MEYERSON, TERRETT & WHEATON, HOUSING, PEOPLE AND CITIES 190 (1962).

ground that he is doing the best he can, since it is obvious that he cannot do everything at once. To the extent that such schemes produce only minimal work or indefinite delay, the momentum of enforcement diminishes and the tenant is essentially back in his old position. If these schemes are to be foiled, it can only be by the most pertinacious and rigorous enforcement by public officials, which is the one thing we have never had.

Receivership proposals are designed to eliminate one aspect of the problem just discussed by taking the decision whether to repair out of the hands of the landlord and putting it into those of a public official. While this is in one sense an improvement, a moment's reflection will reveal that a fundamental difficulty is intensified rather than solved by such an arrangement. As the proponents of receivership schemes recognize, in order to effect a substantial amount of repair, it is frequently necessary to apply not only that portion of the rents which represents the owner's profit, but in addition at least that amount which would have gone to a mortgagee in the form of monthly payments of principal and interest.<sup>200</sup> To do this, it is necessary to subordinate the mortgagee's claim to that of the receiver, thus imposing on the mortgagee the same financial pressures which are put on the landlord. Moreover, this financial loss is likely to persist for a very long time.<sup>201</sup> Although this development has been said to be desirable in the sense that it broadens the responsibility for slum housing,<sup>202</sup> it seems rather that it might have the opposite effect. For such a scheme makes the financial community the involuntary ally of the slum landlord. Since a basic impediment to effective code enforcement has always been reached at the point where the landlord's economic interest was truly jeopardized, it is difficult to understand how enforcement is going to be aided by enlarging the investor class thus threatened. The more likely result is an increase of political pressure against code enforcement. Perhaps the financial community has a hidden altruism yet to be revealed, but one can hardly be blamed for having his doubts.<sup>203</sup>

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200. Levi, *supra* note 186, at 280.

201. Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 321 (1965).

202. Levi, *supra* note 186, at 280.

203. While it is true that the receivership law has been upheld in New York, so that a mortgagee's lien on rents, but only rents, is subordinated to the receiver, in the Matter of Dep't of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964), the real question is not what the courts do in upholding or rejecting the constitutionality of such laws, but how extensively public officials will utilize their legal power in the many thousands of cases in which the receivership law might be applicable. See note 208 *infra*.

One suggestion which has been made, perhaps partly in recognition of these disabilities, is that rehabilitation money should be loaned for use by receivers.<sup>204</sup> However, by now it is eminently clear that ordinary commercial loans to rehabilitate very low-cost housing are not acceptable investments; the inadequate rent base which has prevented new private low-cost housing from being built presents substantially the same problem with respect to rehabilitation.<sup>205</sup> Even to the extent that rehabilitation can be cheaper than new building,<sup>206</sup> any substantial new investment will lead to considerable rent increases,<sup>207</sup> the result of which will be to drive out the people for whom the program is designed. And unless rents are raised there will be no source from which the loan can be repaid.

Loans for rehabilitation could be privately obtained only if the result were the ousting of the existing tenants, which we do not want, or if the lender's claims were to be given priority over the claims of the landlord and present mortgagee, which priorities would lead to the problem discussed above. Thus, any such loans must come from public funds as a subsidy, and it must be a subsidy of very substantial proportions in order to do the job in the magnitude which is needed. But, if we could have the amount of money we need, we could have already met the problem at issue through public housing, rent subsidies, or some other such program. It is precisely the unwillingness of legislatures to make the huge expenditures required to bring great masses of deteriorated housing up to standard by replacement or rehabilitation that has left us, a generation after the institution of the public housing program, in the deplorable state that presently exists. It is most difficult to see why any mere change of format is going to set the stage for that economic reallocation which thirty years of continued misery has not brought about. Some confirmation of the doubts raised above is provided by the fact that New York City reportedly has already "scuttled the receivership program" as a failure.<sup>208</sup>

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204. Levi, *supra* note 186, at 280.

205. Note 20 *supra*; N.Y. Times, Sept. 6, 1966, p. 43, cols. 3-4.

206. The Wall Street Journal, May 20, 1966, p. 1, col. 1.

207. This is the unvarying pattern. MILLSAUGH & BRECKENFELD, *THE HUMAN SIDE OF URBAN RENEWAL* 108, 110 (1960); NASH, *op. cit. supra* note 199, at 94, 186-87. Unless rents are controlled, there is no way to prevent the landlord from raising them, and if rents are held down on the theory that the landlord should absorb the loss out of his "excessive" profits, we are back to the same economic pressures discussed above. It must be remembered that while slum profits may be excessive in relation to other investments, it is undoubtedly the prospect of a larger than usual return which induces investment in such problem properties. Thus the reduction of slum housing profits to a level equal to that available in high grade stocks or bonds would surely produce a very severe market crisis.

208. N.Y. Times, Jan. 14, 1967, p. 33, col. 8.

Nonetheless, the receivership programs are most intriguing in one respect. Quite clearly underlying such proposals is a recognition that, for an extremely long time, neither the landlord nor his financiers are going to be able to recover a profit on their investment. Indeed, it seems reasonable to assume that a truly large-scale receivership program would shatter the market in slum properties beyond recovery. Inherent in the receivership idea, then, is a most fundamental point, which lies at the very heart of this article. It is simply this: Providing adequate housing for very low-income people is not a business which can offer investors the kind of profit which so arduous an enterprise must entail. While this is not the sort of conclusion which can be rigorously demonstrated, it is one which inevitably must be drawn from the history described in this article: The failure of private investors to build new housing for the poor, the consistent inadequacy of code enforcement, and the rise in rentals attendant upon major rehabilitation, all indicate that it is economics—and not lack of good faith or good laws—which has been the primary obstacle.<sup>209</sup> The present status of receiverships is eloquent confirmation of this fact. For the great majority of buildings taken over will either “never pay for themselves . . . [or] do so only over a long period of time.”<sup>210</sup> Thus any widespread use of the receivership becomes an indirect form of public subsidy, with taxpayers financing the rehabilitation of seriously deteriorated buildings. Far from showing that decent housing can be provided by the private market, receiverships demonstrate exactly the opposite. It is time that we recognized the significance of all this evidence, rather than continuing our dalliance with the thought that if only enough economic pressure is brought to bear, landlords will fall into line, buildings will be improved, tenants will be happy, and owners will continue to make a reasonable profit.

This means that we must put the initiative in the tenants, who are most immune to the political pressure that a genuine program will necessarily generate; it means that we must look to the courts to deal the death blow, for they are the institution in society most receptive to such claims;<sup>211</sup> and we must do all this in a way that imposes the least dislocation on the tenants and produces the most effective pressure on the legislatures to respond to the need thus manifested.

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209. What evidence we have is inevitably indirect or informal. N.Y. Times, Oct. 3, 1966, p. 46, col. 5.

210. Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 321 n.83 (1965).

211. The recent willingness of the New York Court of Appeals to uphold the constitutionality of the subordination provision of their receivership law is indicative. See note 203 *supra*.

Of course no such severe prospect can be painless. But it is hoped that the proposal urged in this article can mitigate the pain and at the same time have a greater hope of success than others which have thus far been advanced. Our reasons for so thinking are several. First, the placing of the decision to go forward in the tenant class should itself mitigate the moral problem of imposing on another the risk of serious sacrifice. Second, such a proposal should be self-strengthening in the sense that once one decides for himself to take a great step he readies himself psychologically for the physical sacrifices which that step involves. We see this most dramatically in the revolutionary who, having made the decision to seize his freedom, endures unblinkingly what to any other person would be the most unbearable suffering.<sup>212</sup> Since the proposed cause of action emphasizes very significantly the need for tenant non-culpability, we may assume that the initiation of such actions will require considerable community organizing<sup>213</sup> and the development of a group *esprit* which will promote readiness to endure, for the interim, the necessary sacrifices. Third, the prospect of recovering substantial civil damages should itself provide both an incentive which has thus far been largely lacking and a softening of the consequences to be anticipated from intensifying pressure upon the existing inadequate housing supply.

Finally, the prosecution of a successful civil damage action, as we propose it, will not be easy, and it is not likely that a vast number of landlords will be attacked simultaneously or will be successfully sued in a very brief period. Thus it is to be hoped that the slum-housing market can be brought to its knees relatively gradually, so that the legislatures may have some time to act before a great many landlords are immediately threatened. Because of this, it may be

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212. FANON, *THE WRETCHED OF THE EARTH* (1962). The success achieved in organizing tenant unions provides some hopeful evidence that the job can be done. See the *Wall Street Journal*, Nov. 16, 1966, p. 1, col. 1. Mr. Gilbert Cornfield, a Chicago lawyer, has also reported that, once tenants committed themselves to a tenant union, experience showed that they moved ahead undeterred by fears of eviction or other retaliatory action by landlords. Conference on the Landlord-Tenant Relationship, University of Chicago Law School, Nov. 17, 1966. Nonetheless, we are acutely aware of the difficulties presented by a program in which anticipated benefits are rather remote and in which a great deal of legal service will be required. See Comment, *Federal Aids for Enforcement of Housing Codes*, 40 N.Y.U.L. REV. 948 (1965). Hopefully some will see that the ultimate benefits to be derived from such a legal breakthrough are worth considerable sacrifice and effort.

213. The likelihood is that civil rights and community organizations will play an active role in developing awareness of the possibilities and demands of instituting such an action. Insofar as they are representative of the community, and insofar as their ability to succeed turns upon effective mobilization of the community, the decision to go forward will be representative rather than uniquely individual.

anticipated that the process of breakdown will be mitigated by the entry of speculators who, hoping the worst will not happen, will to some extent buoy up the market before the worst does in fact happen.

### *Conclusion*

We do not desire to back away from the charge that in many ways ours is a radical proposal. In a certain sense we are asking the courts to recognize a new tort or at the least a very much altered form of a traditional tort. Moreover, we are asking them to implement a policy decision of primary significance in society, one that will ultimately cost a great deal of money and may require the putting aside, at least temporarily, of other important matters.

Of course there are those who will ask: Is this a proper function of the judiciary? In turning, finally, to this question, it ought to be noted that this would not be the first time that courts have created new rights which have had a major impact on society. In tort law alone, significant judicial innovations with respect to privacy, privity, products liability, and, indeed, the intentional infliction tort itself, come immediately to mind.

Perhaps, however, the question can properly be answered only with another question. If there are laws on the books (as there are in plenitude) and if we all agree that they state a basic and desirable social goal, are the courts fulfilling their proper role only so long as those laws remain ineffective? Only so long as their decisions cannot achieve great results? Only so long as they do not endanger important interests in society? If the "proper" role of the courts is thus limited, the courts are not a truly co-equal branch of government. No one is asking them to contravene standards which the legislatures have adopted, and which executive branch officials have time and again asserted; they are only being asked to enforce those standards. If the legislatures have not meant what they have said, let the courts make them end the verbal mythology of decent housing; and if the legislatures have meant what they have said, let them get busy and implement their principles.

This is hardly a revolutionary suggestion; the development of civil rights law during the last dozen years has illustrated precisely the type of judicial attitude required to implement the proposals put forth in this article. The Supreme Court in effect said to Congress: You put the idea of equality among the races in the law and we are going to recognize it; it may be that to enforce our orders you will have to call out troops, but, by George, we are telling you to put up

or back down. This is judicial integrity, and it is exactly what is needed now in the housing area.

It is time to recognize as a general principle what has so often been made clear in specific instances: Because the courts are the branch of government least responsive to immediate pressures, they have the greatest flexibility and opportunity, and thereby the greatest responsibility, to safeguard and vindicate the legitimate rights of minorities. Certainly the United States Supreme Court has recognized this, although it has put its assertion of equality as a branch of government—its activism—under the constitutional cloak. To rely upon the Constitution may have been perfectly sensible as a matter of judicial politics, but no one could for a minute believe that the Court in many civil rights, criminal procedure, or loyal-security cases did only what the Constitution or the statutes compelled it to do. It did, within the limits of the law, what those sources *permitted* it to do. And it was justified in so acting because no other branch of government could reasonably have been expected to provide the needed leadership. Judicial leadership is needed once again.