

DOES THE ROOF HAVE TO CAVE IN?: THE
LANDLORD/TENANT POWER
RELATIONSHIP AND THE
INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS

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INTRODUCTION

The independent tort of intentional infliction of emotional distress provides damages where a defendant has engaged in conduct that is extreme and outrageous, and where the plaintiff has suffered a severe emotional reaction.¹ Every state has recognized the tort, although it is considered to be evolving.² However, emotional distress damages have been applied sparingly in the landlord/tenant context. This Article examines the limitations of intentional infliction of emotional distress as it applies to tenant-claimants, arguing that the current doctrine reinforces the landlord's power over the tenant and proposing that the doctrine be extended to hold that all breaches of landlord duty are per se intentional inflictions of emotional distress.

Part I analyzes the power relationship between landlord and tenant. Part II examines the current doctrine of intentional infliction of emotional distress and explores the limitations of its conduct and reaction requirements, and their role in the landlord/tenant power relationship. Part III compares the current doctrine of intentional infliction of emotional distress with other doctrines that apply per se rules or require status harm for allowing damages. In Part IV, I propose that the tort of intentional infliction of emotional distress should occur per se whenever a landlord breaches a duty owed to a tenant within certain guidelines determined by the power relationship.

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¹ Restatement (Second) of Torts § 46 (1965).

² W. Keeton, D. Dobbs, R. Keeton, & D. Owens, *Prosser and Keeton on the Law of Torts* 55 (5th ed. 1984) [hereinafter *Prosser and Keeton*].

I. THE LANDLORD/TENANT POWER RELATIONSHIP

The landlord/tenant power relationship has no ultimate basis. Rather, it is an amalgam of different, but interrelated factors. Picture them arrayed in a circle; each affecting the ones before, behind, and across, with no starting point. Some of these factors may seem like accidental circumstances (such as the exact configuration of the housing market) and others more like historical/political circumstances (such as the allocation of property in society). However, the power relationship is no less harmful, nor should it be taken less seriously, because it is composed partly of "accidental" circumstances. The accidental circumstances should be given as much attention as the societal ones because they are inextricably bound together.

A. *Factors of the Landlord/Tenant Power Relationship*

Characteristics that often differentiate the landlord/tenant relationship from other relationships between service provider and consumer are its length and intensity. With landlords and tenants, the relationship does not end when the parties sign the contract and deliver the goods. The monetary and service relationship continues to exist throughout the tenant's stay. However, no one characteristic like length or intensity will account for the particular dynamics of the landlord/tenant relationship. There are other ongoing money/service relationships that have completely different power configurations such as the housecleaner/employer relationship. Most would agree that the housecleaner, the service provider, occupies the lower position in the power relationship.

The configuration of the housing market is another important factor in analyzing the landlord/tenant power relationship. We commonly consider a "tight" housing market as one where it is very difficult to find an apartment. A low vacancy rate often defines a particular market as tight. However, any market with a vacancy rate larger than zero would not be considered tight by the prospective renter who is ready and willing to pay the market rent. Indeed, the market rent is determined by the combination of the vacancy rate and what people are willing to pay. As the supply of available apartments decreases and demand increases, the rent will rise to the level that as many people as there are apartments are willing to pay. The person unwilling to pay the increased price will not bid on the apartment. She will experience the market as tight. The person willing to pay the increased price, but unhappy about it, will also experience the market as tight, but not as devastatingly so. Thus, vacancy rate is highly, but not solely, relevant in defining market tightness. Both low vacancy

rate and increasing market rents are symptoms of a high demand for a limited supply of units.

1. Responses to the Market

People will respond differently to a particular market-rent level. *A* may be happy and willing to pay; *B* may be unhappy but willing to pay; *C* may be both unhappy and unwilling to pay; and *D* may be unable to pay—the rent would consume such a large portion of income that other important purchases such as food and clothing could not be made. The more *B*'s, *C*'s, and *D*'s there are in a given market, then the more likely it is that the public perceives the market as tight. While a large presence of such renters is more likely to occur when the vacancy rate is low and market rents are high, the perception of the tight market depends more on the relationship of the renting populace to the market; whether they are *A*'s or *B*'s, *C*'s and *D*'s.

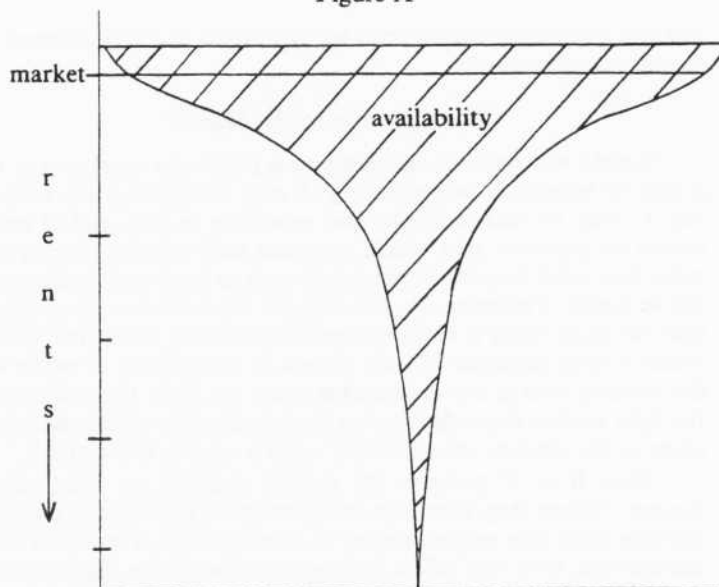
How *B* or *C* perceive the market depends on many circumstances. Where they have been living before is particularly important. Moving from one major market to another with a lower or higher market-rent level can affect their perception of the tightness of the new market.³ It is also true that the market for housing in any particular area is not uniform. We imagine that the unwilling and unhappy person (and, we hope, the unable person) will eventually find an apartment in the same city, at a price that she is at least willing (and able) to pay because, it turns out, apartments are available at a range of rents. I would argue, however, that their availability tapers off so that the lower the rent, the shorter the supply. How dramatically the supply tapers off depends on the market's peculiarities. To see how it might look, see Figure A.

2. Minimarkets

Apartments renting below the market level can be considered "submarket" apartments. Without empirical data, it is impossible to tell how many submarket apartments there are at any level, since, in a perfect market, they should not be available at all. At any time, numerous submarket units may be occupied and would not count as available apartments. As they empty, these submarket units will be drawn up into the market. That they empty very rarely and do not turn market all at once is reflected by the taper of the curve.

³ For instance, moving to Boston (commonly regarded as tight) from New York (even tighter), the tenant might not perceive the Boston housing market as tight. However, someone moving from Miami would perceive the Boston market as tight (leaving aside corresponding income changes that might occur with changing housing markets).

Figure A



The existence of "minimarkets" may be one reason for the existence of submarket units. Housing in a city like Boston is not a single commodity with a single market, but a mix of different markets. Nonetheless, these separate markets can be understood as a single market since they affect each other. For instance, there is a market for luxury apartments that is separate from, but related to, the "regular" market, so that the market rents for luxury apartments bear some connection to rents for "regular" apartments. There is a similar minimarket for poverty-level apartments. This market is not located in any one place, nor distinguished by any particular feature like dilapidation (though many low income apartments are dilapidated). In Boston, for instance, the poverty minimarket would be spread throughout the city in pockets; include new and old construction; be influenced by the effects of rent control and public housing; and be undesirable, if only by folk wisdom, to upper income renters. It is unstable because it is prey to the "regular" market; at any moment the folk wisdom can change and the unit, or pocket of units, can become desirable to those normally renting only in the "regular" market. What was once a poverty minimarket unit would then rent at regular or near-market rates. The true market rent is what the yuppies will pay, but, until the yuppies come, the poverty minimarket

does function like a market unto itself, albeit a catastrophically shrinking one.

The low income person living in a poverty minimarket apartment (or someone in an apartment in whatever other intermediary minimarket there may be) who would consider moving to a new apartment is like the person from another city with lower market rents. She would be unhappy, and most likely unwilling if she were able, to pay the available market rents that are considerably higher than the rent she is leaving behind. To her, the housing market looks very tight. She may also be *D*, unable to pay any other rents, so that a move would be out of the question. This perception of the market as extremely uninviting will cause *B*, *C*, and *D* to avoid it when they can, and to prefer what rental security they may have in their current apartment. This behavior will lead to fewer vacancies and a lower vacancy rate which helps fuel the perception of a tight market.

B. *Relationship #1*

The landlord of a poverty minimarket apartment has a much more rosy outlook. Because she⁴ is charging minimarket rents, she can rent with ease. She also has the prospect of someday renting at regular market rates, or selling to a developer. I call the relationship between such a landlord and a low income tenant *relationship #1*. I also assume that the landlord is of a higher socioeconomic class and does not live in the building.

In *relationship #1*, the factors combining to heighten a tenant's desire/need to stay in a particular unit (including her perception of the market) only increase the landlord's *indifference* to that tenant staying in that unit. The landlord has no reason to please or appease the tenant, but the tenant has every reason to please or appease the landlord. Moreover, the landlord may find it in her interest to do the opposite. Since tenants are a dime-a-dozen, a landlord may seek to displease a tenant whom she finds objectionable, hoping that a better one will come along or intending to rent at regular market rates.

⁴ I have chosen to use the word "landlord" as a generic term and "she" as a generic pronoun applied to landlords, as well as to tenants and all other actors; a choice that I feel needs explanation and justification. While I fully realize that most landlords are male, and that most tenants, at least in the relationships that I am considering, are female and that gender is an important aspect to this power relationship, see *infra* notes 108-11 and accompanying text, I do not feel it is necessary or desirable to reflect that reality by the use of appropriate pronouns. I do not believe that "she," used generically in such a circumstance, obfuscates reality or masks a sexism that is all too present. Rather, "she," used generically, is unexpected enough that each time it is used the reader is forced to experience and evaluate the conflict between her assumptions of gender and the pronoun she reads and hears so that gendered relationships and roles are actually exposed rather than taken for granted.

Other characteristics also make the relationship unequal. For instance, while the tenant has only one landlord, the landlord most likely has many tenants. This imbalance has the potential to make the tenant both psychologically and practically more dependent on the landlord than the landlord is on the tenant. The more tenants there are, the less the effect on the landlord of one tenant withholding rent. The effect of the absence of maintenance on the tenant, however, will be constant. At the same time, the tenant's personal attachment to the physical unit as her home and her place in the neighborhood is likely to be much greater than the landlord's attachment to the physical unit.

Another characteristic of the power component in *relationship #1* appears to be the landlord's greater ability to affect the tenant's life than the other way around. However, this greater ability is not based on anything inherent in the relationship, even as it is molded by the configuration of the housing market in *relationship #1*. It is instead determined by other factors, themselves partially affected by the housing market, arrayed in a circle.⁵ Here are various actions that tenants and landlords can conceivably take to affect the lives of their counterparts:

Tenants

1. Withhold rent.
2. Move.
3. Organize a rent strike or other activity of a tenants' union.
4. Get legal advice or sue prior to eviction.
5. Harass the landlord by phone.
6. Damage the landlord's property, i.e., the building in which the tenant lives.
7. Picket the landlord's home.
8. Cut utility lines to the landlord's home.
9. Terrorize the landlord's family.
10. Kill the landlord.

Landlords

1. Withhold heat.
2. Start an eviction action.
3. Delay in making repairs.
4. Refuse to make repairs when asked.
5. Allow severe deterioration and catastrophic damage.
6. Harass the tenant by phone.
7. Terrorize the tenant's family.
8. Burn the building in which the tenant lives.

⁵ See *supra* Part IA.

9. Organize landlords in the city to blackball the tenant and members of the tenants' union.
10. Picket the tenant's entranceway.
11. Kill the tenant.

Detailed like this, they don't look so different.⁶ But the point is that the difference in the ability to affect the other's life does not exist as a basic fact; the simple "ability" between landlords and tenants arises from the same degree of imagination and nerve as between any two people. What really matters is what activities are more likely to occur and why. The "why" depends on the factors in the circle. For instance, a number of things are true: (1) not all the activities have the same effect; (2) some activities seem more outlandish than others; and (3) the landlords' activities that seem less outlandish and more likely to occur tend to have a greater effect than the more likely tenants' activities. Although I tried to pick roughly equal and corresponding activities for both landlord and tenant, fewer of the landlords' activities seem outlandish. Of course, what seems outlandish to us is influenced by our perception of how landlords and tenants in *relationship #1* interact. Just as the configuration of the housing market can incline a tenant to avoid displeasing her landlord, it also will affect her perception of outlandish actions.

The distinction between what are considered acts and omissions is part of what makes the landlord's acts seem, if not reasonable, then at least expected. To cause a disruption in the landlord's life equivalent to the disruption a landlord would cause by simply "omitting" to fix a leaking ceiling would require positive action on the tenant's part.⁷ One certainly can argue that such a distinction should be meaningless. Landlord's omissions should be regarded as positive harms and tenants should feel empowered to picket landlords.⁸

It is difficult to predict how a particular factor, standing alone, affects the power relationship. Rather, it is important to assess it in light of other factors. For instance, the number of tenants per land-

⁶ The same sort of array could be set out for the housecleaner/employer counter-example. For instance, a housecleaner could not come to work, or refuse specific tasks, develop a disastrous roach infestation by sprinkling sugar in all the corners of the kitchen, or put itching powder in the laundry. The employer could fire the housecleaner, refuse to pay the housecleaner's salary, spread bad stories about the housecleaner to other potential employers, sabotage the housecleaner's work, or harass the housecleaner and her family at home.

⁷ Possible equivalent tenant actions can range from splashing the landlord with water as she leaves her office to picketing her house.

⁸ My proposal for emotional distress doctrine (aiming to attach itself to the circle and affecting all the other factors) addresses this issue, in that such landlord omissions would be regarded as harmful, positive inflictions of power. See *infra* notes 112-28 and accompanying text.

lord and the tenant's attachment to the unit are factors giving the landlord power over the tenant. However, the size of the tenant body and its psychological fervor can lead to collective action with a strength of conviction totally unavailable to the landlord. Nevertheless, other factors intervene with the "strength-in-numbers" factor, so that tenant strength, though possible, is less expected. These include: market factors; the market system's ideology for the allocation of shelter; the role of law and legal representation; the attitudes of third parties including government officials regarding property rights, which may or may not conform to actual legal rights; societal attitudes toward and expectations of low income tenants; and the presence or absence of community empowerment for the particular tenant.

State housing laws, both statutory and common law, form another ingredient in the power relationship. While these laws empower both landlords and tenants and some recent developments have favored landlords, many recent reforms have been concerned with granting rights to tenants. These laws conceivably enter the landlord's and tenant's calculation. Rent withholding is a more potent weapon when it is upheld in court, and conditions of disrepair become a shield when used to prevent an eviction. It should also be realized, however, that the existence of "pro-tenant" laws does not guarantee any effect on the power relationship. For instance, the tenant's rights in Massachusetts are generous by many standards, but, without legal representation and enforcement, they can be meaningless. Further, a landlord may ignore tenants' rights, even when the tenants are represented and even if the landlord later ends up paying for his disregard.

Landlords are able to maintain the power relationship in this manner partly because of the delayed enforcement of tenants' rights until after the fact. For instance, when a landlord withholds heat, a tenant may withhold rent. However, the landlord's actions may affect the tenant more than the tenant's actions affect the landlord. The landlord also may still assert to the tenant that she, the landlord, is owed the rent and has the right to evict the tenant. A legal representative may aid the tenant by assuring her of ultimate vindication, but that does not undo the damage that has already occurred, although it may help prospectively alter the power relationship.⁹ Similarly, collective action, such as tenant and rent strikes, can help the tenant gain power, both through strength in numbers and the psychological empowerment that such activities create.

⁹ For further discussion of this change in the power relationship, see *infra* note 128 and accompanying text.

On the other scale are weights that favor landlords, such as the deference given to them by various government officials, including housing inspectors and court clerks. In fact, it is more likely that (1) landlords intimidate tenants into paying rent increases more often than rent strikes succeed in keeping rents low and maintenance high; (2) residences deteriorate due to landlord negligence more often than they are destroyed by tenant vindictiveness; and (3) vandalism is more often a result of the landlord's failure to provide security than the tenant's desire to deface the landlord's property. While sheer ability may be equal, the net effect of all factors in the circle nevertheless leads to a power imbalance in *relationship #1* with landlords having the upper hand.¹⁰

C. Relationship #2

The balance can change when the socioeconomic status of landlord and tenant (along with the flexibility of each in the housing market) changes. What I will call *relationship #2* is made up of a low income tenant and a relatively low income landlord.¹¹ The landlord's means exceed the tenant's by little more than the amount of the downpayment on the building. The landlord lives in the building with one or two other tenant units; the rental money either pays the mortgage or leaves a negative balance which the landlord pays very much like rent.

In this relationship, the landlord depends much more substantially on rental payments than does the landlord in *relationship #1*.

¹⁰ The realization that the circle of factors includes the possibility for the exercise of tenant power is a cause for optimism. It means that there is always the potential for tenants to transform their situation, though it does not ignore the fact that the disempowering obstacles throughout the circle are great.

¹¹ There exist relationships 3 through infinity, with varying power dynamics. These include: the speculator landlord and upper income tenants; the middle class landlord and upper income tenants; the one landlord-one tenant situation in a condominium; and so on. Analyzing all of these could be detailed and interesting. However, I have focused on the two primary landlord/tenant relationships experienced by low income people and placed them in the context of a perceived-to-be tight housing market because I believe that these relationships and this context are pervasive, and illustrate most clearly the parameters of the landlord/tenant power dynamic and its harms. Another low income relationship that I have not addressed is the tenant cooperative, where tenants own their own building. Although we might hope that power dynamics in this situation would be more diffuse, it is naive to expect that imbalance of power would not exist simply because the relationship involves all tenants. As in many collective activities, power can coalesce, depending on the cooperative's structure. See generally D. Kirkpatrick, *Limiting the Equity in Housing Cooperatives: Choices and Tradeoffs*, 11 *Econ. Dev. & L. Center Rep.* 1 (1981) (discussing the social and financial ramifications of various configurations of limited equity tenant cooperatives). One of the hopes for tenant cooperatives is that because the power is more evenly spread, and, ideally, all tenants in the cooperative are expected to care the same about the conditions, breaches are less likely to occur.

Missed rental payments or even temporary vacancy will sharply affect the ability of a *relationship #2* landlord to make her monthly mortgage payment, since any other source of income is small. A failure to make mortgage payments threatens the landlord's ability to keep her home. Thus, she will have a greater interest in ensuring rent flow and in establishing long term tenancies than did the *relationship #1* landlord. Finally, the smaller number of tenants from whom she is receiving rent (one or two families) will make each one more valuable to her.

Because of her greater interest, the landlord is more likely to provide maintenance to satisfy the tenant, forestalling any interruption in rental income. At the same time, those services common to the building will be of concern to her as well.¹² And the landlord in *relationship #2* is less likely to take drastic or retaliatory action affecting the premises, not only because the particular unit represents a greater proportion of her life savings, but because it is attached to her own home.

On the other hand, there is a real possibility that a landlord with restricted means and with an overwhelming mortgage will find it financially burdensome to provide adequate maintenance. Such a landlord can assuage her tenants only by assuring them that her apartment is in as bad shape as theirs. Additionally, this landlord owns the house and therefore has the potential to be in the right poverty minimarket pocket at the right time to sell the building at great profit. Such a sale might result in the displacement of the current tenants. Further, a court may find such a landlord sympathetic.

At the same time, the tenant is affected by many of the same factors as in *relationship #1*, because her socioeconomic status has not changed in *relationship #2*. Her perception of the housing market is the same; the threat of vacating is a nonoption.¹³ Her attachment to her home is just as great and her vulnerability to defects remains the same. While proximity will affect both parties, possibly deterring them from actions that would make life in the same small building intolerable, arguably the tenant's most potent weapon of rent withholding is rendered less effective in a situation where rental income is needed for maintenance.

In *relationship #2*, the landlord would still view a vacancy with much less anxiety than a tenant would view a move or eviction, although a *relationship #2* landlord would be more troubled by a vacancy than a *relationship #1* landlord. While the weights change

¹² For instance, when utilities are common the threat of substantial interruption is smaller.

¹³ See *supra* Part IA.

in this relationship, the balance still favors the landlord. Even though her power is less than that of the *relationship #1* landlord, it is still ample.

D. Summary

Here, I have analyzed and described the power relationship between the landlord and tenant. I have not yet indicated why that relationship is harmful, or how the relationship becomes more harmful when the landlord breaches a duty. I address these issues in Part IV, but first I outline the requirements of the tort of intentional infliction of emotional distress and their limitations, contrast that tort with other torts, and contrast its application in the landlord/tenant context with its application in other contexts.

II. THE REQUIREMENTS OF THE TORT AND THEIR LIMITATIONS

The tort of intentional infliction of emotional distress can be divided into two aspects: the actor's (landlord's) conduct and the victim's (tenant's) reaction. Each aspect has rather stringent requirements. Conduct must be "extreme and outrageous" and reaction must be "severe."¹⁴ These requirements eliminate a range of conduct from compensation, including landlord actions like breaching the warranty of habitability and those actions which, though deemed extreme and outrageous, do not elicit a specific reaction from the tenant. This exclusion defines those uncompensated activities, which have come to seem nonextreme simply because they are so common, as appropriate. Interpretations of the "severe" reaction requirement also define appropriate behavior. By creating a compensable response to a landlord's extreme and outrageous conduct and by defining what that conduct shall be, the courts shape the nature of the landlord/tenant relationship and reinforce the power dynamic.

A. Extreme and Outrageous Conduct

In the landlord/tenant context the features distinguishing extreme and outrageous conduct vary. It is easier to define extreme and outrageous conduct by what it is not. It has been held not to consist of: fraudulently inducing a tenant to sign a lease;¹⁵ allowing conditions of disrepair such as leaks, infestation, and lack of heat to continue;¹⁶ and merely violating the warranty of habitability without

¹⁴ Restatement (Second) of Torts, *supra* note 1, § 46 comments d & j.

¹⁵ *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 222 N.W.2d 671 (1974).

¹⁶ *Century Apartments, Inc. v. Yalkowsky*, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (1980).

further extreme and outrageous action.¹⁷ However, in *Simon v. Solomon*,¹⁸ the Supreme Judicial Court of Massachusetts upheld an award of emotional distress damages for conduct that consisted of negligently allowing conditions of disrepair to continue. As a result, water and sewage flooded the plaintiff's apartment on thirty occasions in four years.¹⁹ The court upheld the jury's finding that the landlord had "displayed, over a long and repetitious course, such a pattern of indifference that its conduct was outrageous 'beyond all possible bounds of decency.'"²⁰ The court held that the landlord "knew or should have known that emotional distress was the likely result of his conduct," and thus he was liable for the reckless infliction of emotional distress.²¹

One type of landlord/tenant case in which it is more likely that courts will find extreme and outrageous conduct is the self-help eviction. In *Brewer v. Erwin*,²² the landlord, after having started demolition of the building, padlocked the tenant's apartment without pursuing a legal eviction and spoke abusively and threateningly to the tenant and her friends.²³ The court found that there was sufficient evidence to go to the jury on the theory that the defendant's conduct "went beyond the outer limits of what a reasonable person in plaintiff's position should be expected to tolerate."²⁴ Note, however, that it is only when conduct was "beyond the outer limits" that the court allowed compensation.

The cases and the comments in the Restatement indicate a frustration with mere language to convey exactly how bad compensable conduct must be. Phrases such as "beyond all bounds of decency," "utterly intolerable in a civilized community," and "beyond the level

¹⁷ See, e.g., *Stoiber v. Honeychuck*, 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980).

¹⁸ 385 Mass. 91, 431 N.E.2d 556 (1982).

¹⁹ *Id.* at 93, 431 N.E.2d at 560.

²⁰ *Id.* at 97, 431 N.E.2d at 562 (quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145, 355 N.E.2d 315, 319 (1976)).

²¹ *Id.* at 95, 431 N.E.2d at 561. In *Simon*, the level of conduct was found to rise to such a level that damages were awarded for reckless, rather than negligent, infliction of emotional distress. There are very few cases in the landlord/tenant context for negligent infliction.

In a recent Massachusetts case, *Haddad v. Gonzalez*, Summary Process No. 26788, slip op. (Boston Hous. Ct. Jan 6, 1988), the court awarded substantial emotional distress damages to a tenant who lived in an apartment with severe housing code violations, including lack of heat, for a nine-month period. The very conduct that gave rise to the breach of warranty of habitability also was found to constitute intentional infliction of emotional distress. *Id.* at 12.

²² 287 Or. 435, 600 P.2d 398 (1979).

²³ *Id.* at 458-59, 600 P.2d at 412.

²⁴ *Id.* Also, in *Newby v. Alto Riviera Apartments*, the landlord attempted to frighten the tenant into vacating her apartment, threatening her with bodily harm. 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976).

of offensive conduct that a person should be expected to endure under contemporary societal standards,"²⁵ are strung one after another in an attempt to conjure up a universally understandable definition. Phrases like "civilized community" and "societal standards" are used much like the formulas of traditional storytellers to elicit from a community steeped in the tradition of the narrative a uniform response that would otherwise require extensive, thick description.²⁶ These phrases also assume a status quo relationship that is to be preserved. The Restatement and selected cases do find abuse of a position of authority to be one factor making up extreme and outrageous conduct.²⁷ But of the many harmful activities that can occur within the context of a power relationship, the courts define only the very worst as "abuse."

B. Severe Reaction

Once conduct is found extreme and outrageous, the victim must also suffer a severe reaction to recover damages. As with extreme and outrageous conduct, the courts have attempted to define "severe" and thus have eliminated from compensation a range of reactions as well as a range of conduct. The reaction requirement helps define the power imbalance by allowing compensation only when a tenant shows an inability to take care of her children, go to work, or take care of herself.

The requirement that physical symptoms be present to indicate a severe reaction has been eased in many states.²⁸ However, a connection to the physicality requirement remains. On one level, there is the metaphorical connection; the response must be an "extreme disabling" one even where no physical symptoms need be manifested.²⁹ But on another level, the psychiatric aspects of the modern reaction requirement are most similar to the physical requirement.

The cases emphasize immediate, diagnosable reaction. One example is *Country Escrow Service v. Janes*,³⁰ where the wrongful evic-

²⁵ *Janes v. Country Escrow Servs.*, 135 Ariz. 231, 660 P.2d 482 (1982); *Leardi v. Brown*, 394 Mass. 151, 474 N.E.2d 1094 (1985); *Century Apartments, Inc. v. Yalkowsky*, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (1980).

²⁶ See generally A. Lord, *The Singer of Tales* 30-67 (1960) (analyzing the use of formulas in traditional narrative from ancient Greece, modern Yugoslavia, and other cultures).

²⁷ Restatement (Second) of Torts, supra note 1, § 46; see, e.g., *Fitzpatrick v. Robbins*, 51 Or. App. 597, 626 P.2d 910 (1981).

²⁸ But see *Farmor v. Irmco Corp.*, 73 Ill. App. 3d 851, 392 N.E.2d 591 (1979); *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. 1984) (en banc); *Rittenhouse Regency Affiliates v. Passen*, 333 Pa. Super. 613, 482 A.2d 1042 (1984).

²⁹ *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 309, 222 N.W.2d 671, 677 (1974).

³⁰ 121 Ariz. 511, 591 P.2d 999 (1979).

tion of the tenants was held not to constitute the intentional infliction of emotional distress. The focus of the questioning, and of the court, was whether additional conduct occurred that would give rise to a personal, immediate reaction;³¹ for instance, whether upon discovering the padlocked front door, the tenant also was yelled at by the landlord or agent.³² Further, many jurisdictions seem to require, in practice, the expert testimony of a psychiatrist, or at least evidence that one has sought out treatment by a psychiatrist, before damages for emotional distress are awarded.³³

The comments to the Restatement emphasize that not just any psychiatric symptoms will do: they can constitute emotional distress only if they are "so severe that no reasonable man could be expected to endure it."³⁴ As if they were physical symptoms, "[t]he intensity and the duration of the distress are factors to be considered in determining its severity."³⁵ From this modern psychiatric perspective, the typical compensable reaction portrayed by the cases is an isolated, individual one in which powerlessness is maintained and exhibited.

For example, in *Simon v. Solomon*,³⁶ where an award of emotional distress damages was upheld, the reaction fits the pattern. After hearing psychiatrist's expert testimony, the court found that "[t]he recurrent water and sewage left [the tenant] 'withdrawn,' 'depressed,' and 'ashamed,' unable to work or to care for her children. She began to spend much of her time in a darkened bedroom, crying . . ."³⁷ This image of the powerless, isolated tenant is the expected reaction to

³¹ *Id.* at 513, 591 P.2d at 1001.

³² *Id.*

³³ The situation in the tort of battery is parallel. While, in battery, there has always been a requirement of physical impact, the compensable reaction to that impact need not be physical. Prosser and Keeton, *supra* note 2, at 36. Nevertheless, *Jones v. Fisher*, 42 Wis. 2d 209, 166 N.W.2d 175 (1969), shows the harm done in battery as temporal and diagnosable, though psychological. In *Jones*, the employer forcibly removed the dental plate of the plaintiff. But the court found that in this instance,

[s]he was without her teeth for, at the most, an hour. Understandably she could suffer humiliation and shame during this period. Conceivably she could continue to suffer these emotions for some time thereafter, but her symptoms were all subjective and not supported by any medical testimony nor any other corroborating evidence.

Id. at 216, 166 N.W.2d at 179. We will see in Part III that the modern emphasis on physical-like psychological symptoms in both emotional distress and battery is actually a departure from an earlier tradition of status harm that involved neither physical nor psychiatric symptoms. See *infra* notes 44-111 and accompanying text.

³⁴ Restatement (Second) Torts, *supra* note 1, § 46 comment j.

³⁵ *Id.*

³⁶ 385 Mass. 91, 431 N.E.2d 556 (1982).

³⁷ *Id.* at 95, 431 N.E.2d at 560.

a situation of landlord abuse.³⁸

Professors Joseph L. Sax and Fred J. Hiestand criticized the reaction requirement in an attempt to establish the conduct-based tort of "slumlordism," or the maintenance of slum dwellings.³⁹ They noted that because of the "severe" reaction requirement, modern tort law often compensates the bizarre incident rather than one that is part of a pattern of social injustice:

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.⁴⁰

They cite studies indicating that people adapt to ongoing horrible situations, from slum housing to Korean prisoner-of-war camps, by normalizing the situation and *not* exhibiting "severe" reaction symptoms.⁴¹

A low income tenant experiences the exercise of power over her on a daily basis; these experiences will occur in the welfare office, at her place of employment, and in a hundred other interactions, as well as in her housing. Not only must she numb herself to the conditions in her apartment, but also to a panoply of power relationships which allow her to be subject to the conditions of disrepair, the missed welfare payment, or the racial slur. She learns to conserve her emotional resources, reacting less severely than, for instance, a middle-class person who is rarely subjected to such indignities.

The severe reaction requirement does not take into account cultural differences in what is considered proper expression of emotion.⁴² The understanding of the courts is based on cultural norms (what the "reasonable man" cannot withstand) which do not include everybody. Advocates may discover that a client is unwilling to go over, in detail, the emotional responses generated by a situation in which power has been wielded over her. There is a particular problem when the explanation must be made to someone of a different culture, race, or class, whether it is the advocate herself, the psychiatrist who will provide

³⁸ *Id.* But see *Farnor v. Irmco Corp.*, 73 Ill. App. 3d 851, 857, 392 N.E.2d 591, 596 (1979) (tenant's ability to show up for work partly prevented her being compensated for emotional distress).

³⁹ Sax & Hiestand, *Slumlordism as a Tort*, 65 Mich. L. Rev. 869, 881-83 (1967).

⁴⁰ *Id.* at 882.

⁴¹ *Id.* at 882-83.

⁴² Most of the ideas in this paragraph and the preceding one arise out of conversations with Jeanne Charn and have also been augmented by a conversation with Dr. Stuart Clayman. Telephone interview with Dr. Stuart Clayman (June 12, 1987).

expert testimony, the judge, or the juror. Presenting evidence of emotional distress entails reliving or even recreating a sense of powerlessness. Not only must the tenant describe her humiliation and despair, but the adequacy of her distress must be ruled upon by the judge or jury.

It is important to view these reactions, or nonreactions, in the context of the power relationship, at least for *relationship #1*. Not only the deplorable housing conditions, but the relationships giving rise to these conditions, and the pattern of breaching the precarious trust built into a power relationship, have a numbing effect over time. This desensitization is a problem not only because it prevents the tenant from receiving compensation for emotional distress, but because it exacts an emotional toll.⁴³ It also aids the landlord in continuing to perform those acts which allow her to have a greater effect on the tenant's life than the tenant can have on the landlord's life.⁴⁴

Another possible tenant reaction, one which challenges the landlord's power, also prevents compensation. This is the channeling of emotion into anger, organizing, and collective action, such as the formation of tenants' unions. By applying the reaction requirement only to the isolated individual, and by judging distress on an absolute scale of severity, the court puts no premium on finding strength, either in oneself or through community. The law does not encourage the tenant's participation in the types of activities that may alter the power dynamic, and that, at the same time, require considerable energy and emotion.

C. Summary

The reaction requirement is intimately related to the conduct requirement: the role of the power relationship unites them.⁴⁵ By inval-

⁴³ Dr. Stuart Clayman, a Boston area psychologist who has examined and testified on behalf of tenants seeking emotional distress damages, believes that emotional distress can be cumulative and that a number of distressing experiences can increase the helplessness which he views as a major component of the reaction to severe emotional distress. Telephone interview with Dr. Stuart Clayman, *supra* note 42.

⁴⁴ In *Haddad v. Gonzalez*, Summary Process No. 26788, slip op. (Boston Hous. Ct. Jan. 6, 1988), the court did not appear to rely so heavily on a severe reaction requirement, and, indeed, some of the problems raised here concerning the reaction requirement and other aspects of emotional distress were apparently presented at trial. While following typical emotional distress rhetoric (the tenant was said to feel "angry, alone, helpless and withdrawn"), the court focused more on the conditions of her apartment, particularly the lack of heat, and concluded, "it is evident that the average person including Gonzalez [the tenant] would experience severe emotional distress as a result of the experiences of Ms. Gonzalez in Mr. Haddad's property." *Id.* at 11.

⁴⁵ Professors Sax and Hiestand do not recognize power itself as a problem in their analysis of the deficiencies of the "severe" reaction requirement, though they do identify its effects. See

idating conduct only at the fringe, courts define an acceptable relationship. The reaction requirement further defines this relationship ironically by both compensable and noncompensable reactions. Reactions that are compensated, and certified as appropriate, include fear, disempowerment, and isolation. At the same time, these reactions are part of what makes it seem as if the landlord can do more to affect the tenants' lives than the other way around.⁴⁶ By not compensating the very real response of numbing oneself to the surroundings, the doctrine allows the landlord to continue those actions causing a numbing effect. We have a "Catch-22": tenants can only be compensated for activity that undermines their ability and power to function in their everyday lives,⁴⁷ but to survive, they must remain resilient in the face of debilitating conditions.

III. EMOTIONAL DISTRESS DOCTRINE: PARALLELS AND CONTRADICTIONS

My proposal for emotional distress doctrine in the landlord/

Sax & Hiestand, *supra* note 39, at 881-89. They are also unable to recognize its workings on the conduct side of the equation. They are perfectly willing to leave intact the extreme and outrageous requirement of the tort, so long as the maintenance of the slum dwelling is found to constitute extreme and outrageous conduct. See *id.* Since they are largely concerned not with the landlord/tenant relationship, but with cleaning up the conditions of slum dwellings, they are willing to define away large areas of landlord misconduct. *Id.* at 889-91. They believe that "[s]etting 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." *Id.* at 906. They propose that the courts look to local housing codes for help only in "delineating the outer limits of wrongful conduct," and not the full range of misconduct contained in the codes. *Id.* at 907.

While Professors Sax and Hiestand have laid important groundwork in the reform of emotional distress doctrine, their work is incomplete because they do not view the landlord/tenant relationship as one in which power operates, nor do they view the conduct and reaction requirements of the tort of intentional infliction of emotional distress together as integrated factors in that power relationship.

⁴⁶ See *supra* Part I.

⁴⁷ The double effect of defining the reaction requirement by what is included and what is excluded can be seen as analogous to the law's effect in another area of power relationships—the law of self-defense for women who have killed battering husbands or lovers. As one commentator points out, the requirements of the law of self-defense prevent real life considerations, such as abuse over time, and the differentials of strength and size of a woman and her husband or lover from being taken into account in determinations, so that many women are denied the defense. E. Schneider, *Equal Rights to Trial For Women: Sex Bias in the Law of Self-Defense*, 15 *Harv. C.R.-C.L. L. Rev.* 623, 637 (1980). These requirements and this denial might encourage abuse to continue. At the same time, women are more often excused under the law because of mental deficiency. This attitude also might inform the ongoing power relationship between men and women that gives rise to the abuse in the first place. While in the self-defense area, two legal avenues are part of an overall pattern of sex bias, in the emotional distress area, the exclusion of compensation based on one behavior and the inclusion of another behavior also form part of an overall pattern that encourages the existing power dynamics.

tenant context has two components. First, it eliminates a reaction requirement by positing a per se rule for certain actions and circumstances. Second, it greatly expands the conduct requirement and recognizes status harm as compensable.⁴⁸ These elements represent a significant departure from the modern landlord/tenant emotional distress cases which, for the most part, view the alleged infliction of emotional distress apart from the parties' social roles and the social context. These cases also have specific reaction requirements calling for the proof of actual damages. But, there are torts which couple a per se rule for damages and a recognition of status harm.

A. Defamation

1. Generally

At common law, libel was actionable without the plaintiff having to plead or prove any demonstrable damage; it was presumed from the libel's occurrence. The same was true of slander, if it fell into one of four categories of slanderous statements (otherwise, the claimant had to prove special damages).⁴⁹ While *Gertz v. Robert Welch, Inc.*⁵⁰ held that this libel standard conflicted with freedom of the press unless the libel was made with actual malice, the per se rule survived for the four categories of slander.

If the action is for libel or slander per se, then the damages for injury to reputation or for emotional distress do not need to be specially proved.⁵¹ For injury to reputation, at common law, damages were awarded for harm normally resulting from such a defamation;⁵² and for emotional distress which "normally results."⁵³ In effect, the court has little control over jury awards.⁵⁴ It has been recognized that the harm is often "subtle and indirect," eluding actual proof.⁵⁵

⁴⁸ See *infra* notes 112-28 and accompanying text.

⁴⁹ Prosser and Keeton, *supra* note 2, at 785-88.

⁵⁰ 418 U.S. 323 (1974).

⁵¹ In defamation, emotional distress can be an element of damages, although not an independent element.

⁵² Restatement (Second) of Torts, *supra* note 1, § 621 (1977). In *Gertz*, 418 U.S. at 349-50, the Court did not invalidate the per se rule, but narrowed its application, finding that the danger to the constitutional guarantee of freedom of the press was weightier. No such countervailing factor has been found in the area of slander, nor could any exist in emotional distress in the landlord/tenant context. Indeed, in the libel cases, the Court has made a policy decision to move away from the per se standard, while I argue that courts should make a similar policy determination in landlord/tenant emotional distress cases, only going the other way.

⁵³ Restatement (Second) of Torts, *supra* note 1, § 623 comment b (1977).

⁵⁴ *Id.* § 621 comment a.

⁵⁵ *Dalton v. Meister*, 52 Wis. 2d 173, 179, 188 N.W.2d 494, 497 (1971), cert. denied, 405 U.S. 934 (1972).

2. Parallels to Emotional Distress

This seemingly unrelated area of the law does provide some helpful parallels bolstering a suggestion that a per se rule replace the reaction requirement in landlord/tenant emotional distress. Just as per se defamation is limited to categories of tortious activity, per se emotional distress would apply only in the landlord/tenant context,⁵⁶ and would restrict the award by the relationship's power dynamic.

Defamation and intentional infliction of emotional distress are similar in that they both belong to the category of intangible torts; conduct does not involve physical impact and the harm compensated ultimately is not a physical one, although physical evidence of the intangible harm may be required.⁵⁷ In fact, emotional distress is an element of damages (though not an independent element) in libel or slander. However, the law has treated the two areas differently.

The Restatement observes that courts have been slow to recognize emotional distress because of its intangible nature, fearing fictitious or trivial claims and the "difficulty of setting up any satisfactory boundaries to liability."⁵⁸ The Restatement comments suggest that this reluctance motivates both the severity standard of the reaction requirement⁵⁹ and the extreme and outrageous conduct requirement.⁶⁰ On the other hand, the same rationale justifies the per se rule of damages in defamation, where the harm is the impairment of one's reputation: "[t]he impairment of one's relations does interfere in a variety of unpredictable and unknowable ways with the enjoyment of life."⁶¹ In *Dalton v. Meister*, the court held that the per se rule was necessary because "[i]n many cases the harm wrought by defamation is so subtle and indirect it is difficult of monetary proof."⁶²

These approaches suggest that there are at least two possible solutions to the problems raised by unknowable and unquantifiable damages: one is to restrict the award to only those situations in which quantifiable damages can be proved, and another is to establish a per se rule and allow damages once a specific situation, but not the damage itself, has been identified and proved. The latter is certainly the

⁵⁶ That is for the purposes of this Article. There may be other contexts not at issue here where a per se rule also would be desirable.

⁵⁷ The damages that can be specifically quantified, economic harm in defamation or actual medical bills in emotional distress, are always available if pled as special damages in addition to the general damages available under a per se rule.

⁵⁸ Restatement (Second) of Torts, supra note 1, § 46 comment b.

⁵⁹ Id. comment j.

⁶⁰ Id. comment d.

⁶¹ Prosser and Keeton, supra note 2, at 843.

⁶² 52 Wis. 2d 173, 179, 188 N.W.2d 494, 497 (1971), cert. denied, 405 U.S. 934 (1972).

more generous approach for plaintiffs; "[the] presumption of general damage to reputation from a defamatory publication that is actionable per se affords little control by the court over the jury in assessing the amount of damages."⁶³ Each solution suggests a different understanding of the problems raised by indeterminable damages: the restrictive solution employed in modern emotional distress doctrine suggests that potential overcompensation is the problem while the per se solution suggests that undercompensation is the problem.

Nothing inherent in the torts appears to render one intangible harm more susceptible to the danger of overcompensation. How injury to reputation, and its accompanying emotional distress, is quantified is no more easily answered than how the experience of emotional distress itself is quantified. It is the difficulty in quantifying injury to reputation that is used to justify the application of the per se rule in defamation.⁶⁴ The actual amount of over- or undercompensation that would occur in an "ordinary" damages regime in each instance is equivalent. What is not equivalent is the fear of over- or undercompensation. If overcompensation is feared, then it will be because the compensation itself will be seen as less desirable than if undercompensation is feared. Thus, it is necessary to examine why compensation for defamation is seen as more desirable than compensation for emotional distress—to discover why the law perceives differences between these intangible harms, despite the fact that their intangibilities seem identical.

B. *Public v. Private Contexts*

Judicial unwillingness to grant damages for intentional infliction of emotional distress is not uniform. Even within emotional distress, damages are granted more frequently in contexts normally seen as public, while compensation is less likely in contexts seen as private.

1. Defamation Context

The distinguishing feature of defamation that may account for its different treatment is that it is regarded as public. The presence of a third party to whom the remarks are conveyed is considered essential, and the harm done is to reputation.

Prosser contrasted defamation and emotional distress: "Derogatory words and insults directed to the plaintiff himself may afford ground for an action for the intentional infliction of mental suffering,

⁶³ Restatement (Second) of Torts, *supra* note 1, § 621, comment a (1977).

⁶⁴ See *supra* notes 51-55 and accompanying text.

but unless they are communicated to another the action cannot be one for defamation, no matter how harrowing they may be to the feelings."⁶⁵ There is no defamation if an insult is not communicated. However, if such insults are communicated, then they may afford a basis for recovery. Prosser summarized: "Defamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings against him."⁶⁶

Absent the third party, such derogations are regarded lightly. The Restatement section on emotional distress best illustrates this attitude: "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene in every case where someone's feelings are hurt."⁶⁷ The third party apparently has the ability to transform the trivial into the significant; precisely because one's feelings should be kept private, the revelation of an insult to a third party seems like such an affront and so desirable of compensation. In fact, the Restatement language considering intentional infliction of emotional distress reveals an almost stoical ethic concerning the importance of keeping one's personal problems to oneself, and of not conflating the private with the public: "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."⁶⁸ It's as though keeping one's own indignities from the public law is as important as not publishing insulting remarks about another.

Of course, the petty indignity rhetoric describes those cases where no damages were awarded under current emotional distress doctrine. However, the situations where courts grant compensation are seen as the extreme equivalent, someone's feelings are hurt severely. Prosser observed the extension, stating the basis for the extreme and outrageous conduct requirement: "There are, however, special situations of extreme misconduct in which recovery is allowed."⁶⁹ These are cases such as *Simon*,⁷⁰ where the degree of pri-

⁶⁵ W. Prosser, *Handbook on the Law of Torts* 737 (4th ed. 1971).

⁶⁶ *Id.* at 739.

⁶⁷ Restatement (Second) of Torts, *supra* note 1, § 46, comment d.

⁶⁸ *Id.*

⁶⁹ Prosser and Keeton, *supra* note 2, at 60.

⁷⁰ 385 Mass. 91, 431 N.E.2d 556 (1982).

vate grief rose high enough to cause concern, even in a regime much more likely to award damages for public wrongs.

2. Employment Context

Emotional distress, although theoretically experienced alone, actually occurs in many public arenas. One of the most prominent is the employment context where damages for emotional distress are granted with relative frequency, despite the strict conduct and reaction requirements.

Two Massachusetts cases, taken together, illustrate this tendency. *Agis v. Howard Johnson Co.*⁷¹ established that physical injury was not necessary for a plaintiff to prove damage from the intentional infliction of emotional distress. *Agis* involved an employer who attempted to solve a theft by laying off employees alphabetically in the hope that the culprit would confess. The plaintiff, whose name began with "A," was laid off first.⁷² While the court rejected the bodily harm requirement,⁷³ it ratified the Restatement standards regarding extreme and outrageous conduct and severe reaction.⁷⁴ Since the court merely held that a cause of action existed, we cannot generalize from *Agis* the range of conduct and reaction required in the employment context.

However, *Harrison v. Loyal Protective Life Insurance Co.*⁷⁵ interpreted *Agis* as endorsing a more lenient reaction requirement than appears in the landlord/tenant cases such as *Simon v. Solomon*⁷⁶ and *Wolfberg v. Hunter*.⁷⁷ In *Harrison*, the court held that a cause of action for emotional distress, caused by an employer's threats, survived the victim's death. The court used *Agis* to support the proposition that difficulty in proof should not prevent damages from being awarded.⁷⁸ While in *Agis* this difficulty was created by the lack of identifiable bodily harm, in *Harrison*, the *Agis* rationale was extended to apply to the absence of a living plaintiff who could testify directly about his reaction. The *Harrison* court used *Agis* to support what amounts to a negation of the reaction requirement in upholding the viability of a survivor action:

In general a plaintiff has to show what the defendant has done or

⁷¹ 371 Mass. 140, 355 N.E.2d 315 (1976).

⁷² *Id.* at 141, 355 N.E.2d at 317.

⁷³ *Id.*

⁷⁴ *Id.* at 145, 355 N.E.2d at 319.

⁷⁵ 379 Mass. 212, 396 N.E. 2d 987 (1979).

⁷⁶ 385 Mass. 91, 431 N.E.2d 556 (1982).

⁷⁷ 385 Mass. 390, 432 N.E.2d 467 (1982).

⁷⁸ *Harrison*, 379 Mass. at 217, 396 N.E.2d at 990.

said to him and the trier of fact must then decide if the actions or words of the defendant would have caused severe emotional distress in a reasonable person As for determining the effect of the defendant's actions or words, in most cases no extraordinary confusion should be caused by the death of either party because "[f]rom their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct."⁷⁹

An implicit per se rule could be seen lurking throughout the employment cases.

3. The Landlord/Tenant Context

In the landlord/tenant context, where emotional distress is less frequently compensated, the description of the reaction deemed severe enough to justify damages often emphasizes private anguish in the private domain.⁸⁰ Such description identifies all possible landlord/tenant emotional distress as private and asserts that compensation is appropriate only in the most severe instances.

But not all private grief, no matter how severe the expression, would be compensated. Compensation depends on context. For instance, it is extremely unlikely that a court would compensate the emotional distress that lovers inflict upon one another; the context of love would be seen as too private. Indeed, the landlord/tenant context has what can be seen as both private and public dimensions. Compensation does occur, though not as frequently as in the more public employment context. On the one hand, landlord/tenant law involves the most stereotypically private arena, the home. On the other hand, the relationship involves an arms-length transaction. The public nature of landlord/tenant law has been noted often in the line of cases establishing the warranty of habitability, beginning with *Javins v. First National Realty Corp.*⁸¹ The *Javins* court observed that "the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society"⁸²

However, the public/private distinction loses all meaning in the landlord/tenant context, in the same way that the distinction between emotional distress and defamation loses meaning.⁸³ In my analysis of

⁷⁹ Id. at 217-18, 396 N.E.2d at 991 (quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144, 355 N.E.2d 315, 318 (1976)) (citation omitted).

⁸⁰ See, e.g., *Simon*, 385 Mass. at 93, 431 N.E.2d at 560.

⁸¹ 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

⁸² Id. at 1079.

⁸³ See *supra* notes 57-64 and accompanying text.

the power dynamic in the landlord/tenant relationship, two factors that played important roles were the configuration of the housing market (which would be considered public) and the tenant's attachment to the apartment (which would fit the image of the private home).⁸⁴ What I showed in that analysis was that these and other factors were part of the circle of factors and none could be relied on without resort to the others. In this way, the public is intertwined with the private, since the public aspect has no meaning apart from the private aspect and vice versa.

This recognition leads us to a more sophisticated understanding, not only of the power dynamic in the landlord/tenant relationship, but also of the human experience in housing. While the privacy of one's own home is a value well worth guarding, its invasion, for instance, through disrepair, extends outside of the individual home to include not only the perpetrator of the disrepair but also the community that experiences inadequate maintenance on a regular basis. Ideally, the home involves more than what is contained within the four walls; it also includes the neighborhood. Indeed, the community organizing around issues of housing often gathers much of its strength from its publicizing of the "private" issues that people have in common. At the same time, the landlord, whose role may or may not seem particularly private to her (depending on whether this is a landlord in *relationship #1* or *#2*), can be forced by such organizing to understand the personal *and* community effects of her decisions.⁸⁵ What we then view in the landlord/tenant context is the potential for status harm.

C. *Status Harm*

One of the reasons that defamation, or indeed the presence of a third party, seems so public in comparison to emotional distress, is related to the concept of status harm. The primary element of damages in defamation is injury to reputation,⁸⁶ and reputation can mean how one is perceived by the society in which one lives or how effective one can be in that society—both elements that make up power. A loss of that societal power is the compensable damage. Indeed, the plaintiff's socioeconomic class plays a role. Defamation plaintiffs are by and large of high socioeconomic status since they must have estab-

⁸⁴ See *supra* Part IA.

⁸⁵ See Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 614, 653 (1988) (discussing a social relations approach to property).

⁸⁶ Prosser and Keeton, *supra* note 2, at 60.

lished a reputation which is in jeopardy. It is perhaps easier for courts to see the defamation plaintiff's injury as a harm to status.

Status harm is recognized in those areas that seem public, or conversely, we often view as public those areas that have by historical accident come to include status harm. The division of social experience into public and private and the association of status harm with only one of those areas is unnecessarily restrictive. It would seem better to undertake a political analysis, like power dynamics, to figure out whether the recognition of status harm is appropriate in a particular context.

In fact, status harm is applied in many areas of doctrine often with a nonarticulated political analysis, but its application is incomplete and haphazard. The results often reflect an attitude toward damages and reactions that suggests "implicit per se-ness" if not a per se rule itself, because where status harm has been found, compensation has been deemed desirable.

1. Early Landlord/Tenant Cases

Such applications actually occurred, though perhaps not as we might expect, in a number of early emotional distress cases involving landlords and tenants. These early cases recognized a landlord's ability to affect the societal position of the tenant, but they sought to maintain the accepted power relationships and stratification of society. *Wyatt v. Adair*⁸⁷ is a startling illustration of the early cases that took into greater account social issues surrounding the infliction of mental distress, but with the goal of preserving the social structure. *Wyatt*, decided in 1926 in Alabama, is notable for freely granting emotional distress damages at a time when the doctrine was uncertain. Indeed, the decision followed a period when courts seldom recognized mental or emotional distress damages in landlord/tenant law. It is also notable for its unabashedly racist character and assumptions, remaining at once one of the most generous applications of emotional distress doctrine in the landlord/tenant context and one of the most noxious.

In *Wyatt*, the tenant and his landlord agreed in the lease that the landlord would not rent rooms to blacks in the tenant's building.⁸⁸ The landlord did rent rooms to blacks, allegedly breaching the covenant. In addition to upholding the findings of breach of the lease covenant, constructive eviction, and breach of quiet enjoyment, the court allowed damages for mental anguish or mental distress. The case

⁸⁷ 215 Ala. 363, 110 So. 801 (1926).

⁸⁸ *Id.* at 365, 110 So. at 802.

turned on the fact that the building had a common bathroom; thus damages were imposed for the landlord's acts that "consisted in such disregard of the rights of the tenant as knowingly rendered his contacts unbearable by reason of humiliation of himself and his family."⁸⁹

Two surprising elements occurred in the conduct and reaction found in *Wyatt*. First, the very breach of the contract was the conduct giving rise to the damages: "In the nature of the case, mental anguish was a direct consequence of the wrong or breach of covenant complained of."⁹⁰ Constructive eviction was also a result of the same breach of contract. Second, the court discussed no *documentable* reactions. The important reactions considered were "embarrassment" and "humiliation," but their existence was assumed. The court also found that "one element of mental pain necessary [was] the position in which [the plaintiff and] his family were placed by the act of the defendant."⁹¹

The few other landlord/tenant cases involving emotional distress from this period also viewed harm in terms of humiliation and the tenant's social position. In *Ivey v. Davis*,⁹² where the landlord tore the front steps off the tenant's house, the "inconvenience, humiliation and embarrassment" alleged to be suffered by the tenant were sufficient to state a cause of action for damages for mental suffering.⁹³ In *Moyer v. Gordon*,⁹⁴ the court held that the jury was properly instructed to take into account damages for "mental anguish or suffering, for injury to [the tenant's] pride and social position and for the sense of shame and humiliation at having his wife and family turned out of their home into the public street."⁹⁵

The drop in social position and humiliation can be understood as a loss of power for the tenants in their community and society. These early cases recognized a landlord's ability to create a loss of power for the tenant. How the tenant later reacted to this loss of power was not the relevant concern; the harm was located in the act of humiliation itself.

While these early cases demonstrate a more sophisticated understanding of the sociological aspects of the landlord/tenant relationship, their goal was not to change the power imbalances, but to maintain them. Certainly, imbedded in *Wyatt* was the desire to pre-

⁸⁹ Id. at 366, 110 So. at 804.

⁹⁰ Id.

⁹¹ Id.

⁹² 81 Ga. App. 598, 59 S.E.2d 256 (1950).

⁹³ Id. at 600, 59 S.E.2d at 258.

⁹⁴ 113 Ind. 282, 14 N.E. 476 (1887).

⁹⁵ Id. at 284, 14 N.E. at 478.

serve the social status of blacks and whites. In the other cases, where the tenants are basically of the same socioeconomic status as the landlord, the concerns were class-based as well.⁹⁶

The modern defamation cases also recognize the ability of tortious acts to affect one's power in society in many subtle and indirect ways with, again, the purpose of maintaining the current power dynamics. The plaintiffs often have considerable power. The goal of the litigation and compensation is to return claimants to the position from which they have fallen.

2. Fair Housing Cases

Race is an important area in which status harm has rightly been applied as courts have begun to accept that racial discrimination is a compensable harm to status. A line of modern housing-related cases, those concerning fair housing violations brought under the Civil Rights Act of 1866⁹⁷ and title VIII of the Civil Rights Act of 1968,⁹⁸ recognize the ability of a landlord to have a humiliating effect on a tenant. Indeed, since the fair housing laws deal specifically with race discrimination, they also recognize the importance of the larger societal distribution of power that provides the context for the landlord/tenant relationship. Typically, these cases involve the refusal by a landlord to rent to the plaintiff. While these cases do not consider the ongoing relationship between landlord and tenant, they often do find emotional distress damages, almost per se.

The issue in *Shaw v. Cassar*⁹⁹ was a hybrid between the common landlord/tenant cases (here, wrongful eviction) and the fair housing cases. The court found that the wrongful eviction was based on race discrimination.¹⁰⁰ In this case, in an ironically vindicating parallel with *Wyatt*, the emotional distress damages that arose from the wrongful eviction also were based on "embarrassment" and "humiliation" and, as in *Moyer*, they were considered part of the same tort.¹⁰¹ The amount of damages awarded (\$10,000 compensatory) was not

⁹⁶ Battery offers a similar example. While assault has always required a threatening gesture and the apprehension of imminent harm, see *State v. Daniel*, 136 N.C. 571, 48 S.E. 544 (1904), battery, though requiring physical impact, initially encompassed injuries to dignity such as spitting in the face. See, e.g., *Alcorn v. Mitchell*, 63 Ill. 553 (1872). Courts awarded damages in these instances without a showing of physical harm. As in the early emotional distress cases, humiliation played an important role in the early battery cases.

⁹⁷ Ch. 31, 14 Stat. 27 (1866).

⁹⁸ 42 U.S.C. §§ 3601-3631 (1982).

⁹⁹ 558 F. Supp. 303 (E.D. Mich. 1983).

¹⁰⁰ *Id.* at 314.

¹⁰¹ *Id.* at 315.

based on a reaction requirement,¹⁰² nor was there a description of any reaction, except for the experience of the discrimination. The court based recovery on a harm to status.

This status harm, and its connection to an "implicit per se" reaction requirement, is more clearly articulated in an earlier fair housing case: "Humiliation can be inferred from the circumstances as well as established by the testimony. [The plaintiff] was subjected to a racial indignity which is one of the relics of slavery 42 U.S.C. § 1982 was enacted to eradicate."¹⁰³ In *Davis v. Mansards*,¹⁰⁴ even a tester for the Northern Indiana Open Housing Center was awarded damages for humiliation and emotional distress, in addition to the damages awarded the primary plaintiff. The court supported this award by concluding, "[i]n 1984, no one should have to toughen themselves to racial discrimination—a tester has no reason to expect mistreatment at the hands of ostensibly fairminded businesspeople."¹⁰⁵

An interesting characteristic of the fair housing cases is that they often concern luxury apartments,¹⁰⁶ which operate in a different market than the *relationship #1* market. The landlords in luxury markets typically recruit tenants because the rents are at the top of the market, but, in these cases, do not recruit and, in fact, discourage black applicants.¹⁰⁷ In these situations the power dynamic should be meaningless, according to the dictates of the housing market; but it is nonetheless exerted because of racism. The rationale of these cases would therefore be hard to apply directly to situations where the market actually reinforces racism, or justifies racist results, such as in gentrification, or in the breach of duties within the power dynamic of the landlord/tenant *relationship #1*.

Courts have applied the rationale of the fair housing cases to sex discrimination. *Chomicki v. Wittekind*,¹⁰⁸ a case of sexual harassment and discrimination in the landlord/tenant context, followed *Seaton v. Sky Realty Co.*,¹⁰⁹ holding that in addition to the testimony offered by the plaintiff about her reaction, "her emotional distress could be reasonably inferred from the fact that she had been treated as a sexual chattel by her landlord and forced to relocate in the middle of winter

¹⁰² *Id.*

¹⁰³ *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974).

¹⁰⁴ 597 F. Supp. 334 (N.D. Ind. 1984).

¹⁰⁵ *Id.* at 347.

¹⁰⁶ *Id.* at 337 (apartment described in brochure as combining "old world elegance and luxuries"); *Shaw*, 558 F. Supp. at 305 (apartment located in "highly desirable residential neighborhood").

¹⁰⁷ *Davis*, 597 F. Supp. at 345.

¹⁰⁸ 128 Wis. 2d 188, 381 N.W.2d 561 (1985).

¹⁰⁹ 491 F.2d 634 (7th Cir. 1974).

along with her young children."¹¹⁰ The action was one of discrimination, not of intentional infliction of emotional distress, although emotional distress damages were found to flow from the discrimination. Indeed, the court specifically acknowledged that the requirements for the intentional infliction of emotional distress, had it been claimed, would have been much more stringent.¹¹¹ The case clearly recognized the power of the landlord in his sexual advances. However, its holding is narrow enough, within the sexual harassment context, that it cannot be applied easily to a host of other landlord/tenant situations where power is also wielded. Indeed, the male/female power dynamic that gives rise to the harassment in this case often reinforces the landlord/tenant power dynamic in many cases where the harms are not so explicit. It is necessary for courts to understand the range of status harm that occurs in breaches in those landlord/tenant relationships where there is a power dynamic. The courts only need to apply a *per se* rule with the relative ease displayed in other contexts where they have found it desirable, on account of social, political, or other concerns.

IV. A PER SE RULE FOR THE INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS WITHIN A LANDLORD/TENANT POWER RELATIONSHIP

I propose that the tort of intentional infliction of emotional distress be found to occur *per se* whenever a landlord breaches a legal duty that she owes to a tenant within the following guidelines:

(1) Courts should apply this *per se* rule when the landlord/tenant relationship complies with *relationship #1*—when the tenant is low income and the landlord is not low income. The landlord's income status would be a question of fact; actual income, whether the landlord lived in the building, and how many units or buildings the landlord owned, all would be relevant.

(2) In *relationship #2*, where the landlord and the tenant have similar incomes and the landlord lives in the building with one or two tenants, courts should award emotional distress damages after an assessment of the context in which the breach occurred. If courts determine that the breach occurred in the context of a significant power relationship running from landlord to tenant, then they should find intentional infliction of emotional distress.

(3) Emotional distress damages in the variety of other land-

¹¹⁰ 128 Wis. 2d at 202, 381 N.W.2d at 567.

¹¹¹ *Id.* at 201, 381 N.W.2d at 556.

lord/tenant relationships will likewise depend on whether a court finds a power relationship.¹¹² The amount of damages, as in libel law, will be determined by jury.

In light of this proposal, it is necessary to explain why harm occurs at the conjunction of the breach of duties and the existence of a power relationship.

A. *Identifying the Harm Context*

It is difficult, especially when one is not in the power relationship, to identify what is harmful about it. Indeed, the question of what is harm in even the most direct torts, like battery, is rarely answered, except by analogy to other "known" harms. However, the idea that power can create a "harm context," or make an action tortious because of that power context is not unfamiliar to current emotional distress doctrine. What the current doctrine does not recognize, however, is the extent or nature of the landlord/tenant power relationship and at what point actions should be considered harmful, in light of that power context.

The Restatement considers "abuse of authority" as a factor in determining whether extreme and outrageous conduct has occurred: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or the power to affect his interests."¹¹³ The susceptibility of the victim is another factor: "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."¹¹⁴ Together, these two comments suggest that, on an idiosyncratic basis, power and powerlessness can create a "harm context" for the tort of emotional distress. However, the Restatement recognizes this harm context only at the outer edges of power and powerlessness. We are cautioned that the abuse of authority still must be "extreme,"¹¹⁵ and susceptibility alone is insufficient to establish the tort without "major outrage."¹¹⁶

In *Fitzpatrick v. Robbins*,¹¹⁷ a court applied such considerations where a landlord harassed elderly tenants. The court held that con-

¹¹² For a brief description of other possible landlord/tenant relationships, see *supra* note 11.

¹¹³ Restatement (Second) of Torts, *supra* note 1, § 46, comment e.

¹¹⁴ *Id.* comment f.

¹¹⁵ *Id.* comment e.

¹¹⁶ *Id.* comment f.

¹¹⁷ 51 Or. App. 597, 626 P.2d 910, petition denied, 634 P.2d 1346 (1981).

duct had to be "deliberately aimed at harassing and distressing [the tenants] and exceed the level of offensive conduct that a person should be expected to endure under contemporary societal standards."¹¹⁸ The court considered two factors in meeting this fairly stringent standard: that the landlords "were in a position of authority with respect to [the tenants] and could affect their interest in the quiet enjoyment of their leasehold,"¹¹⁹ and the tenants' "age and visible disabilities, which the jury might have found rendered them particularly susceptible to threats of eviction, particularly in conjunction with the scarcity of comparable accommodations in the vicinity."¹²⁰

Such a "harm context" exists in all landlord/tenant relationships that fall into the parameters of *relationship #1*, not just in those instances when a landlord "abuses" her authority or when a tenant has "peculiar susceptibilities." In the Restatement's language: because of the various factors in *relationship #1* that create the power dynamic, the relationship by definition involves an abuse of landlord authority and a peculiar susceptibility on the part of the tenant, precisely because of the power dynamic. Of course, the Restatement language appears to miss the mark in this application. The rhetoric of abuse and peculiar susceptibility is inadequate and wrongly focuses attention on those isolated instances that have somehow been singled out. This rhetoric ignores the possibility that power can be pervasively demeaning and abusive, and that an entire class of people can be susceptible to its degradations, without anything being wrong or peculiar about them.

B. Identifying the Harm

So far, I have discussed only the harm context, not the harm itself. To track the Restatement's rhetoric and to refer to the entire landlord/tenant relationship as one of abuse and susceptibility is not to say that the entire relationship should be considered tortious any more than the Restatement considers mere abuse and susceptibility tortious, in and of themselves.¹²¹ The Restatement constantly emphasizes that something above and beyond abuse and susceptibility is necessary.¹²² Although the Restatement excludes vast areas of conduct that would be actionable under my proposal, its distinctions do provide an analogy.

¹¹⁸ Id. at 602, 626 P.2d at 913.

¹¹⁹ Id.

¹²⁰ Id. at 603, 626 P.2d at 913.

¹²¹ Restatement (Second) of Torts, *supra* note 1, § 46 comment e.

¹²² Id.

The Restatement attempts to distinguish truly outrageous conduct which causes a severe reaction from "mere" insults which cause hurt feelings.¹²³ This distinction is irrational in light of the tortious conduct recompensed under defamation law.¹²⁴ But insofar as the Restatement attempts to evoke an image of a harm context that is not the harm itself, my proposal is analogous and can be seen to fit into the Restatement's structure. The power relationship corresponds to the insult phase, becoming tortious only when something more is done. Of course, the language of insult and hurt feelings, like the language of abuse of authority and susceptibility, reflects an expectation of isolated instances, while recognizing the power relationship involves recognizing a pervasive harm context.

Under my proposal, the landlord's breach of a legally created duty owed the tenant would be the extra action that causes harm within the harm context and that would be tortious. Part II defined a number of the limitations in the current doctrine of emotional distress, and argued that the doctrine does not take into account a number of responses and reactions by tenants that do not involve the isolated, psychiatric reaction recognized by the courts. These responses included the numbing effect experienced by many low income tenants and community anger. These responses to a loss of power are of a much greater variety than the courts have understood, and different people find many different ways of adapting or not adapting to what might be called a power crisis.¹²⁵ That these different ways are hard to identify is not a reason to deny compensation any more than the subtleties of loss of reputation are a reason to deny compensation in defamation cases. Each of these different responses to a power crisis bears a sizable emotional cost to the tenant, even when the end result is that the tenant is empowered.

C. *Changes in the Power Relationship*

The landlord's breach of a legally created duty like the warranty of habitability creates a power crisis. The laws regulating the relationship between landlord and tenant do not address the power relationship. In fact, as under current emotional distress doctrine, these laws often prune and maintain the power relationship. Nonetheless, they provide a stable context in which the parties to the relationship may structure their dealings with one another and in which the tenant may develop strategies to contain her continuing sense of affront.

¹²³ *Id.* comment d.

¹²⁴ See *supra* Part III.

¹²⁵ See *supra* notes 28-44 and accompanying text.

This structure includes the duties that each owes to the other. The breach of one of these duties by the one with the upper hand upsets the stability of the relationship and creates a power crisis.

My point, however, is not to recreate a reaction requirement or to justify the extension of the tort based on a new understanding of individual responses to emotional distress. If the courts recognized a greater variety of responses, then that would be a step in the right direction, but it is more important that they understand this variety in the larger social context. First, it is necessary to realize that there is a pervasive power imbalance in many landlord/tenant relationships. This power imbalance creates a context in which the power crises, with their attendant costs, occur when landlords breach duties. We must then decide if it is desirable to award emotional distress damages when such breaches occur, not simply because emotional costs occur (for the Restatement correctly points out that emotional trauma occurs in all sorts of areas and we cannot compensate for all of it¹²⁶), but because we think it is wrong for such costs to occur in this context. Ultimately, a policy decision is required that is similar to the one implicit in the *per se* rule in defamation. That decision depends on how we feel about landlords having power over their tenants and whether we want to expand or contract that power. From this perspective, many "slippery slope" arguments dissipate. It is not the case, for instance, that a recognition of the complexity and variety of responses will require us to look for and compensate the complexity and variety of responses in every area, only in those where we feel it is necessary and desirable to do so.

Because the tortious activity is, by definition, already a legal wrong for which there is a remedy, it could be argued that also making such action the intentional infliction of emotional distress would be redundant. But it is precisely because such existing remedies contemplate a breach among equals that they are insufficient. It is not atypical for one action to spawn more than one tort, particularly in the arena of emotional distress.¹²⁷

One could also imagine, instead of following the example of defa-

¹²⁶ Restatement (Second) of Torts, *supra* note 1, § 46 comment d.

¹²⁷ For example, in the landlord/tenant context, emotional distress has been found where the landlord has physically removed the tenant's possessions from the apartment without resort to law. *Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398 (1979). In these cases, damages are available, often under statute, for wrongful eviction as well as for emotional distress. Further, landlord/tenant law provides more than one remedy for the same action. In Massachusetts, for instance, damages under the Consumer Protection Act, Mass. Gen. Laws Ann. ch. 93A, §§ 1-11 (West 1984 & Supp. 1988), add to damages available for the breach of warranty of habitability.

mation where the amount of damages is subject to the jury's discretion, a more precise method of awarding damages based on the degree of the power relationship (creating a scale of power differential and gauging the award of damages by reference to this scale). Such a measure would present problems. Because the landlord/tenant power relationship depends on a varying circle of factors, it would be hopelessly difficult to create a quantitative scale of "size" for the power differential. It is because of this difficulty (analogous to the harm to reputation difficulty in libel law), combined with the understanding that power relationships are highly prevalent in the context of *relationship #1*, that I propose a *per se* rule.

Further, there are a number of factors in the circle that diminish the power differential and that we want to encourage. Indeed, the proposed award of emotional distress damages is designed to be such a factor. Other factors that would give more power to the tenant include the formation of tenant unions and the availability of legal representation. If we were to diminish the award based on the presence of these factors, then many of the same problems that exist in emotional distress law as it is currently applied would be replicated; the isolated, disempowered tenant would represent the ideal for compensation.

The factor of legal representation illustrates this problem most clearly. It is the experience of many tenant representatives practicing in Boston Housing Court that without legal representation very few tenants have their claims redressed adequately; many are defaulted without ever putting forward their claims.¹²⁸ These tenants may be experiencing the greatest power differential, but if they are unable to put forward their claims, then they have no chance for recovery. If the only tenants in a position to claim emotional distress damages are those already empowered by legal representation, then they should not be penalized for being represented.

Indeed, the presence of an attorney complicates the power relationship. The relationship that a tenant's representative has with the landlord may have a very different character than the relationship the tenant has with the landlord. In fact, the power dynamic may run the other way, with the tenant's attorney having more power over the landlord, especially if she is making use of rarely exercised tenant's rights and serving the landlord with frequent repair orders and contempt complaints when repairs are not made. An analysis of the attorney/landlord relationship can be made similar to that of the

¹²⁸ I base this observation on my own experience at the Legal Services Center, Jamaica Plain, Massachusetts and on conversations with the staff members there.

landlord/tenant relationship. While each may have a similar ability to affect one another's lives, because of the other factors in the circle, the landlord may feel more beleaguered by the attorney than the attorney feels by the landlord. Among the factors which contribute to this sense are society's image of the law as a potent threat, and the structure of the delivery of legal service. But, no matter how committed to the client she may be, the attorney is doing her "job," not living her life, while the landlord may not have a similarly limited sense of her role.

Although it can't be said that such a power dynamic has no effect on the relationship between the landlord and the tenant, it should be looked at apart from that relationship and not counted in assessing the power dynamic that exists between landlord and tenant. Instead, representation should be looked at along with a number of other measures, including the proposal for awards of emotional distress damages, as a means for somewhat equalizing the landlord/tenant power relationship.

CONCLUSION

While it has undergone changes through the years, the doctrine of emotional distress has largely served in the landlord/tenant context to reinforce existing power relationships, making it more likely that a landlord will take action to affect the tenant's life than vice versa. While earlier emotional distress law displayed a sophisticated attitude toward the social context of the tort and the ways in which a landlord might affect the social position of the tenant, it used that awareness to maintain the existing and inequitable power relationships. The modern cases abandon this societal view, concentrating on the observable and diagnosable, whether physical or psychiatric, reaction of the individual. Through their isolated perspective, these cases maintain society's stratification.

Per se compensation for emotional distress in the landlord/tenant area, when the landlord breaches a duty, is necessary not only to recognize existing power differentials and the social context in which the tort occurs, but also to challenge those power differentials. The proposal would attach itself to the circle of factors affecting the power relationship and function, like tenants' unions and other measures, to decrease the power differential. It would lessen the power imbalance, not only by redistributing money, but also by altering the parties' expectations and the definition of appropriate conduct.

Without a systemic overhaul of the allocation of housing, it is not possible to define the very existence of a landlord/tenant *relationship*

#1 (low income tenant/high income landlord) as a tortious exercise of power. Arguably, every personal contact between even the most caring and conscientious landlord and a low income tenant might create a compensable exercise of power. A proposal such as mine may continue to define a core power relationship as acceptable, but it pulls the margins closer to the center, decreasing protected landlord behavior. Since I do not believe that there is a center that can be completely covered, totally obliterating the power dynamic (even in the most egalitarian of arrangements), playing with the margins can indeed be a useful endeavor.

We can work to make the opportunities for power more evenly distributed, so that the exercise of power is fluid and fluctuating. In housing, this might occur when relationships such as cooperatives, or arrangements yet to be imagined, allow tenants as a group to control the maintenance of their apartment buildings as well as the units themselves. In the meantime, because power can be shifted, though not obliterated, measures that alter the relationship between landlord and tenant, such as the proposed *per se* rule, can have mighty effects.