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Destruction of Community

I. INTRODUCTION

Community is an elusive concept. Although it plays a big role in the lives of most people, it usually receives little attention. Until it is somehow threatened, the community is often taken for granted. This Article asks the questions of what is wrong with destruction of community and what the law should do about it.

By "community" I mean a feeling, or a complex of feelings and beliefs, that has been described as "not feeling lost"¹ and as enjoying an "established position in the world."² Community is "a feeling for the public identity of people, a web of public respect and trust, and a resource in time of personal or neighborhood need."³ Much of what makes up community is simply "many many little public sidewalk contacts . . . stopping by the bar for a beer . . . [m]ost of it is ostensibly utterly trivial but the sum is not trivial at all."⁴ The common denominator of community is the psyche—the recognition that one's social and physical environment is related to thought, feeling, and behavior.

"Destruction of community," although not a common term, has become a common experience. Several American communities, urban and rural, have experienced it recently as a result of either urban renewal projects or environmental disasters. Two urban renewal projects have received widespread attention. Poletown, an ethnic neighborhood in Detroit, has been demolished to make room for a new General Motors industrial plant.⁵ In New York City's Times Square, many buildings and "blue light" businesses will be demolished so that luxury hotels and shopping centers can be built in their place.⁶ Many American cit-

1. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 489 (1981).

2. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1113 (1981).

3. J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 56 (1961).

4. *Id.*

5. See *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 657-59, 304 N.W.2d 455, 470-71 (1981) (Ryan, J., dissenting).

6. See Pope, *Sanitizing Times Square*, MACLEANS, Sept. 3, 1984, at 6-7.

ies have undertaken development programs over the last twenty years,⁷ whether in the name of urban renewal, reindustrialization, or co-op conversion. The common result has been that people within a community have lost their neighbors, homes, schools, churches, and businesses, and have ended up scattered about the city and surrounding areas. Of course, the buildings themselves might be sold at market prices, but does the market price account for the value of the community to its members?

The affect of environmental disasters on communities raises additional issues. Environmental disasters may create a health risk or cause injury to members of the community. For example, in 1978 it was discovered that residents of Love Canal, a small community in Niagara Falls, New York, were living atop a forgotten toxic waste dump that was emitting dangerous fumes and fluids into their homes and neighborhood.⁸ The state health department declared a public health emergency and recommended that children under two years of age and pregnant women leave the area immediately. The Governor of New York offered to buy the homes of the most severely affected residents for their "fair market value."⁹ Other American communities have also been uprooted by environmental catastrophes. Examples include dioxin contamination in Times Beach, Missouri,¹⁰ radiation emissions at Three Mile Island in Harrisburg, Pennsylvania,¹¹ and underground fires in Centralia, Pennsylvania.¹²

Section II of this Article attempts to identify community and describe what it is that is being destroyed by urban renewal programs and environmental disasters. Section III outlines the limited judicial response to destruction of community claims, the legal obstacles to recognition of these as tort claims, and how these obstacles can be overcome.

7. See J. Jacobs, *supra* note 3; C. HARTMAN, D. KEATING & R. LeGATES, *DISPLACEMENT HOW TO FIGHT IT* (1981).

8. See M. BROWN, *LAYING WASTE* (1979).

9. *Id.* at 28-35.

10. See, e.g., N.Y. Times, Jan. 3, 1983, at I12, col. 6.

11. See, e.g., *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 768-69 (1983).

12. See, e.g., N.Y. Times, Mar. 7, 1983, at I18, col. 1.

II. WHAT IS DESTRUCTION OF COMMUNITY?

The most extensive examination of the destruction of community to date was done by sociologist Dr. Kai Erikson in 1976.¹³ Erikson's study documents the impact of a massive 1972 flood on the community of Buffalo Creek, West Virginia. The flood left 125 people dead and 4,000 of the some 5,000 community members homeless.¹⁴ Such a destructive event is certain to devastate a small community. Erikson detected here a devastation even beyond the "normal" human adaptation to disaster, a trauma he saw as "immobilizing recovery efforts and lending a degree of permanence to what might otherwise have been a transitional state of shock."¹⁵

Erikson's analysis rests on a differentiation between individual and collective trauma. Individual trauma is caused by a sudden blow to the individual psyche which often results in withdrawal and feelings of numbness, fear, vulnerability, and loneliness.¹⁶ Collective trauma, which may result in similar feelings and behaviors, is a blow to the "basic tissues of social life."¹⁷ Erikson contends that individual trauma is reversible, but only if the individual's community is intact to function as a support.

Erikson reports that one year after the Buffalo Creek flood, 570 of its 615 survivors were suffering from identifiable emotional disorders. He describes in detail the results of psychological interviews of the survivors. From his review of these interviews, Erikson identified five elements of collective trauma: (1) morale and morality; (2) disorientation; (3) loss of connection; (4) illness and identity; and (5) illusion of safety.¹⁸

The lack of morale was shown by a widespread apathy that ranged from decreased household maintenance¹⁹ to a diminished desire for sex.²⁰ The disorientation was described by one survivor:

13. K. ERIKSON, *EVERYTHING IN ITS PATH* (1976). Erikson uses the term "communality" to underscore the point that people are not referring to particular village territories when they lament the loss of community but to the network of relationships that make up the general human surround. *Id.* at 187.

14. *Id.* at 40.

15. *Id.* at 185.

16. *Id.* at 154.

17. *Id.* at 191.

18. *Id.* at 204.

19. *Id.* at 219-22.

20. *Id.*

"We don't have a neighborhood anymore. We're just strange people in a strange place. I feel our lives have been completely turned inside out by what has happened."²¹ The loss of connection was expressed in reports documenting increased difficulty in maintaining friendship, family, and marital relationships. As one community member explained, "it seems like the caring part of our lives is over."²² In terms of illness, Erikson reported an increase in symptoms "that do not appear anywhere in traditional medical textbooks,"²³ such as "bad nerves." As for safety, Erikson found the concerns of children to be particularly revealing of the community's illusion that they could never again feel secure. One mother spoke of her child: "On the morning the dam broke, he kept asking his daddy, 'Are we going to die too?' He saw the bodies of some of the people. Now every time it rains he asks us, 'Are we going to get drowned now?'"²⁴

Dr. Erikson also conducted a study of the psychological impact on the residents of Three Mile Island resulting from the 1979 nuclear accident there.²⁵ Erikson detected patterns in the psychological interviews of Three Mile Island residents similar to those found for the flood victims. He connected the individual trauma of the fear of radiation release with the collective trauma of the breakdown of "social processes upon which people depend for security and health."²⁶ This breakdown, resulting from the constant fear of radiation and its long term effects, was aggravated by the distrust of the doctors, government officials, and "in general the great majority of those who have been entrusted with the welfare of the public."²⁷ The interviews indicate that the multidimensional threat to community values and security caused by the radiation release ranged from a pronounced fear for the community's unborn to a fear of formerly routine day to day activities

21. *Id.* at 211.

22. *Id.* at 227.

23. *Id.* at 230.

24. *Id.* at 236-37.

25. Memorandum from K. Erikson to A. Kanner (April 21, 1984) (Discusses the author's conclusions upon reviewing the interviews of 26 of the plaintiffs in the Three Mile Island litigation) (available from Buffalo Law Review, 605 O'Brian Hall, State University of New York at Buffalo, Buffalo, N.Y. 14260).

26. *Id.* at 1.

27. *Id.* at 12.

such as hanging the wash out to dry and picking apples.²⁸

Erikson suggests that in these cases, disaster syndrome, formerly viewed as an acute and reversible problem, has taken on a long-lasting, irreversible character. Arguably, the health hazards of the Three Mile Island radiation contamination are prolonged and irreversible, but the same cannot be said of the Buffalo Creek flood. Psychologist Anthony Wallace's essay on "cultural identification,"²⁹ which builds on his disaster syndrome research, posits an explanation of why the disaster effects continue even when the disaster is long gone. Wallace developed a theory of cultural identification which suggests that "many persons will suffer any degree of private loss, even death of self and family, before permitting loss of identification with their culture."³⁰ According to Wallace, a person's identification with culture is made up of the individual's perception of "natural objects, elements of material culture, and human bodies."³¹ He calls all of this the "adult maze,"³² and finds that it serves as a "secure foundation for more intricate and more conscious behaviors."³³

The identification of the individual with his culture can be disrupted under various conditions. One condition of disruption is *sudden physical destruction* of the maze itself, or of a part of it. Another condition of disruption is the *introduction of systematic changes in the maze* by substitution rather than destruction, such that the individual is no longer able to employ his way in obtaining rewards.³⁴

Wallace's theory of disruption of cultural identification can serve as a conceptual explanation of Erikson's observations at Buffalo Creek and Three Mile Island. I suggest that it was the *systemic changes*, resulting at Three Mile Island from fear of one's own environment and at Buffalo Creek from the hopelessness of rebuilding the community, that have perpetuated the destruction of these communities.³⁵

28. *Id.* at 4-5.

29. Wallace, *Mazeway Disintegration: The Individual's Perception of Socio-Cultural Disorganization*, 16 HUMAN ORG. 23 (1957).

30. *Id.* at 24.

31. *Id.* at 25.

32. The analogy is to the "way" a laboratory animal learns to satisfy its many wants. *Id.* at 24.

33. *Id.* at 25.

34. *Id.* at 24 (emphasis added).

35. Consider also the May 13, 1985 bombing and ensuing fire at the MOVE house in

Community has also been the subject of study in the urban planning field. Ironically, it took a non-conformist urban planner to "discover" the value and role of community in the urban setting. Jane Jacobs developed a theory of community in her 1961 study of the safety, health, and desirability of urban neighborhoods.³⁶ This theory has gained acceptance recently among historic preservationists who view physical surroundings in the larger perspective of community needs.³⁷ Jacobs' study of the North End in Boston illustrates her theory on the value of a neighborhood community in the urban setting. She notes that orthodox urban planning viewed the North End as follows:

This is an old, low-rent area merging into the heavy industry of the waterfront, and it is officially considered Boston's worst slum and civil shame. It embodies attributes which all enlightened people know are evil because so many wise men have said they are evil. Not only is the North End bumped right up against industry, but worse still it has all kinds of working places and commerce mingled in the greatest complexity with its residences. It has the highest concentration of dwelling units, on the land that is used for dwelling units, of any part of Boston, and indeed one of the highest concentrations to be found in any American city. It has little parkland. Children play in the streets. Instead of super-blocks, or even decently large blocks, it has very small blocks; in planning parlance it is 'badly cut up with wasteful streets.' Its buildings are old. Everything conceivable is presumably wrong

a West Philadelphia neighborhood which lead to the deaths of eleven people in the house, the destruction of 61 homes, and the displacement of 250 residents. The Philadelphia Inquirer, Oct. 28, 1985, 1-C, col. 1. Testimony of residents of the neighborhood demonstrates that the psychological impact of the fire and events leading up to it were similar to the impact Dr. Erikson identified at Buffalo Creek and Three Mile Island. The testimony of Mr. Clifford Bond, block captain on the block of the MOVE fire, demonstrates these impacts.

[I]t's my belief that the traumatic shock, and this is documented, is still alive amongst the people in that neighborhood, not only Osage [Avenue] but also in the community [I] have to revert back to the traumatic shock position I'm trying to take. A day after a bomb and your house is destroyed, I would prefer you send psychologists instead of city workers. I have nothing against city workers but I think it was important for someone to come in there and begin to heal mentally. . . . So to me that's an avenue that you really have to deal with because there's still a lot of emotional sickness that no one is alluding to

Hearings Before the Philadelphia Special Investigation Commission 6, 18, 24 (Oct. 9, 1985) (testimony of Mr. Clifford Bond, a block captain for the neighborhood that contained the MOVE house) (available from the Buffalo Law Review, 605 O'Brian Hall, State University of New York at Buffalo, Buffalo, N.Y. 14260).

36. J. JACOBS, *supra* note 3.

37. See Rose, *supra* note 1, at 411.

with the North End.³⁸

Orthodox urban planners could not explain why the North End had the lowest delinquency, disease, and infant mortality rates in the city, as well as relatively inexpensive rents and safe streets. Jacobs proposes that this was a result of a public trust developed through the security of knowing one's neighbors and local merchants, and through reliance on one another for simple day to day tasks such as watching the kids play in the street.³⁹

The concept of community is also developing a meaning within the legal profession. Judges and legal scholars have described community in terms strikingly similar to the psychological terminology of Erikson and Wallace. Justice Ryan of the Michigan Supreme Court, dissenting in *Poletown Neighborhood Council v. City of Detroit*,⁴⁰ described the displacement of Poletown residents as follows:

[T]he city chose . . . to carve a 'green field' out of an urban setting which ultimately required sweeping away a tightly-knit residential enclave of first- and second- generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives.⁴¹

Professor Michelman argues that the loss suffered by the Poletown residents amounts to an unconstitutional deprivation.⁴² Unlike the dissenting judges in the Poletown case, however, Michelman was not primarily concerned with the use of eminent domain to buy up the property. His concern was for the destruction of community as an unconstitutional deprivation. Michelman argues that the loss of their community unconstitutionally deprived Poletown residents of their right to participate in the political process. He relies first on John Ely's development of constitutional interpretation that requires judges to supply content to nonspecific language of the Constitution by reinforcing the concept of participation in the political process.⁴³ He then expands on this concept by arguing that community is an essential element of

38. J. JACOBS, *supra* note 3, at 8.

39. *Id.* at 11.

40. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

41. *Id.* at 658, 304 N.W.2d at 470 (Ryan, J., dissenting).

42. Michelman, *supra* note 2.

43. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

the self-determination and self-expression of competent social and political life.⁴⁴ He concludes that community is property worthy of constitutional protection.⁴⁵ This notion, although unconventional legal theory, is neither recent nor original. Some 150 years ago, Alexis de Tocqueville observed that community had a primary role in overcoming "isolation and rootlessness that leave individuals no support against overbearing majority."⁴⁶

III. LEGAL RESPONSE TO DESTRUCTION OF COMMUNITY

Destruction of community has come before courts as a cause of action under statutory and constitutional law, and both have been rejected. Displaced residents of Poletown and residents of Three Mile Island each brought destruction of community as a statutory claim. In *Metropolitan Edison v. People Against Nuclear Energy*,⁴⁷ Three Mile Island residents petitioned the court in an attempt to require the Nuclear Regulatory Commission, pursuant to their National Environmental Policy Act (NEPA)⁴⁸ responsibilities, to consider potential harm to the "stability, cohesiveness, and well-being of the neighboring communities"⁴⁹ in evaluating the impact of starting up the number one reactor at Three Mile Island (TMI #1). In *Poletown Neighborhood Council v. City of Detroit*,⁵⁰ residents employed an analogous state statute, the Michigan Environmental Protection Act (MEPA),⁵¹ to complain that the scheduled reindustrialization of their neighborhood violated the Act because it would have "a major adverse impact on the adjoining social and cultural environment which is known as Poletown."⁵² Poletown residents also attempted to block the reindustrialization project with a state constitutional claim, which indirectly raised destruction of community issues. They alleged that the city's use

44. Michelman, *supra* note 2, at 1112.

45. *Id.* at 1112-13.

46. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1898). See also R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINELLER AND M. TIPTON, *HABITS OF THE HEART* 39 (1985); Rose, *supra* note 1, at 494.

47. 460 U.S. 766 (1983).

48. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982).

49. *Metropolitan Edison*, 460 U.S. at 769 (1983).

50. 410 Mich. 616, 304 N.W.2d 455 (1981).

51. Michigan Environmental Protection Act, MICH. COMP. LAWS §§ 691.1201-691.1207 (1968 & Supp. 1986).

52. *Poletown*, 410 Mich. at 635, 304 N.W.2d at 460.

of eminent domain to condemn one private party's property to convey it to another in an attempt to bolster the economy by creating jobs was an unconstitutional application of the Michigan Economic Development Corporations Act.⁵³

The statutory NEPA claim brought by the Three Mile Island residents, People Against Nuclear Energy (PANE), alleged that both severe psychological damage and community harm would result from the TMI #1 start-up. The claims were inexorably linked. The psychological damage claim stated:

Renewed operation of [TMI-1] would cause severe psychological distress to PANE's members and other persons living in the vicinity of the reactor. The accident at [TMI-2] has already impaired the health and sense of well being of these individuals, as evidenced by their feelings of increased anxiety, tension and fear, a sense of helplessness and such physical disorders as skin rashes, aggravated ulcers, and skeletal and muscular problems. Such manifestations of psychological distress have been seen in the aftermath of other disasters. The possibility that [TMI-1] will reopen severely aggravates these problems. As long as this possibility exists, PANE's members and other persons living in the communities around the plant will be unable to resolve and recover from the trauma which they have suffered. Operation of [TMI-1] would be a constant reminder of the terror which they felt during the accident, and of the possibility that it will happen again. The distress caused by this ever present specter of disaster makes it impossible . . . to operate [TMI-1] without endangering the public health and safety.⁵⁴

The community harm claim relied on the above and further stated:

Renewed operation of TMI 1 would cause severe harm to the stability, cohesiveness and well being of the communities in the vicinity of the reactor. Community institutions have already been weakened as a result of a loss of citizen confidence in the ability of these institutions to function properly and in a helpful manner during a crisis. The potential for a reoccurrence of the accident will further stress the community infrastructure, causing increased loss of confidence and a breakdown of the social and political order The perception, created by the accident, that the communities near Three Mile Island are undesirable locations for business and industry, or for the establishment of law or medical practice, or homes compounds the damage to the viability of the communities.⁵⁵

The statutory claim was upheld by a plurality in the circuit

53. *Id.* at 631, 304 N.W.2d at 458.

54. *Metropolitan Edison*, 460 U.S. at 769 n.2.

55. *Id.* at 770 n.2.

court,⁵⁶ but rejected unanimously on appeal to the Supreme Court. The Court articulated four reasons for dismissing PANE's claim. The first reason relied on traditional tort analysis; the Court deemed the psychological harm too remote: "[T]he causal chain is too attenuated."⁵⁷ The second reason was that PANE's claim went only to the risk of an accident and not to an effect on the physical environment: "A risk is, by definition unrealized in the physical world."⁵⁸ The third reason the Court used in dismissing the claim was its finding that the claim was better suited to the political process than to the NEPA forum.⁵⁹ The Court briefly noted its fourth reason as the difficulty of differentiating between genuine claims of psychological health damage and claims based on disagreement with a democratically adopted policy.⁶⁰

The Michigan Supreme Court rejected the Poletown residents' statutory claim on the basis of a straight plain meaning construction of MEPA. The court found that MEPA was intended to protect the air, water, and other natural resources from pollution, impairment, or destruction: "[T]he term 'natural resources' does not encompass a 'social and cultural environment [community].'"⁶¹ The Poletown residents' constitutional claim was rejected because the taking of their property was determined to comply with the requirement that the condemnation be for a public use or purpose. The court deemed the purpose of a revitalized economic base achieved through increased employment to meet this requirement, regardless of the incidental benefit to General Motors.⁶²

Although neither *Metropolitan Edison* nor *Poletown* concerned a tort action, the majority decisions of each court suggest the obstacles to destruction of community suits under tort law. The dissenting opinions of Michigan Justices Fitzgerald and Ryan in

56. *People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n*, 678 F.2d 222 (D.C. Cir. 1981).

57. *Metropolitan Edison*, 460 U.S. at 744.

58. *Id.* at 775.

59. *Id.* at 777.

60. *Id.* at 778.

61. *Poletown*, 410 Mich. at 635, 304 N.W.2d at 460.

62. "There is no dispute about the law. All agree that the condemnation for a public purpose is permitted. All agree that condemnation for a private use or purpose is forbidden." *Id.* at 632, 304 N.W.2d at 458.

Poletown are illustrative of the flaws in the Supreme Court majority's reasoning in *Metropolitan Edison*. Relying on these dissents and on Professor Rosenberg's scholarly critique of the tort system's treatment of mass exposure problems,⁶³ I will suggest an analysis supportive of destruction of community as a cause of action in tort.⁶⁴

To briefly review, the four obstacles to a tort action for destruction of community raised by the *Metropolitan Edison* Court were (1) remoteness; (2) risk as insufficient harm; (3) deference to the political process; and (4) genuineness of such intangible claims. The *Metropolitan Edison* Court's finding of remoteness in this case suggests that the claimants could not have shown the start-up of the reactor to be the proximate cause of the psychological or community harm. But tort doctrine on emotional distress and psychological harm has been extended in other cases to cover harms considerably less deleterious than that alleged in *Metropolitan Edison* and in *Poletown*. In *Molien v. Kaiser Foundation Hospitals*,⁶⁵ for example, the Supreme Court of California found the emotional distress caused to a husband by an erroneous syphilis diagnosis of his wife to be actionable.

As will appear, in the light of contemporary knowledge we conclude that emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress; the refusal to recognize a cause of action for negligently inflicted injury in the absence of some physical consequence is therefore an anachronism.⁶⁶

When able to assure itself of the genuineness of a claim, courts have disposed of the traditional requirements of accompanying physical or visual contact to support a claim of emotional distress. The Supreme Court of Hawaii, for example, found that a ten-year-old boy could recover for the emotional harm resulting from his grandmother's death even where he experienced no physical contact.⁶⁷ The same court found that a claim for emotional harm to children resulting from loss of the family dog due to the defendant's negligence was sufficient even though the plain-

63. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

64. See *infra* notes 67-82 and accompanying text.

65. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

66. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

67. *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974).

tiffs neither witnessed the event nor presented medical proof or expert testimony to substantiate their claim.⁶⁸ The New Jersey Superior Court has also found the witness requirement to be unnecessary.⁶⁹ These cases are extensions of the California Supreme Court's *Dillon v. Legg*⁷⁰ "zone of danger" requirements, which a destruction of community claim could easily meet. A Poletown resident being forced out of her home and seeing it knocked down, and a Three Mile Island resident subjected to the risk of radiation exposure are certainly "near the scene of the accident [and subjected to] a direct emotional impact."⁷¹

Metropolitan Edison also suggests that proof only of risk rather than actual harm is an obstacle to finding a tort for destruction of community. Professor Rosenberg proposes that tort law must view risk as injury if this system is to achieve its goals of compensation, deterrence, and corrective justice in dealing with mass exposure torts.⁷² Although Rosenberg's analysis is limited to toxic torts, the harm alleged in both *Metropolitan Edison* and *Poletown* share the essential characteristic of this type of mass exposure tort where many victims experience a similar hazard or risk resulting from the same source. Rosenberg argues that the risk of this injury is itself a harm that imposes actual losses on all individuals in the exposed population. In this sense, "all excess-risk victims tangibly and immediately experience the devaluation of their entitlements."⁷³ Arguably, both the *Metropolitan Edison* and *Poletown* plaintiffs could allege such a loss. If the tort system fails to redress this loss, the market may view it as an externality,⁷⁴ though in reality it falls on the victim's shoulders and allows the offender a free ride.

Because the worth of community is undervalued by both the market and the political system, the legitimacy of deference to the political process by courts is undermined. Both the *Metropolitan Edison* Court and the *Poletown* court express deference to legisla-

68. *Campbell v. Animal Quarantine Station Etc.*, 63 Hawaii 557, 632 P.2d 1066 (1981).

69. *Mercado v. Transport of New Jersey*, 176 N.J. Super. 234, 422 A.2d 800 (N.J. Super. Ct. Law Div. 1980).

70. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

71. *Id.* at 740, 441 P.2d at 920-21, 69 Cal. Rptr. at 80.

72. Rosenberg, *supra* note 63.

73. *Id.* at 885.

74. B. COMMONER, *THE CLOSING CIRCLE* 251 (1971).

tive judgments concerning the respective issues of each case. The *Poletown* dissenters were particularly concerned that in a power struggle between General Motors and the city of Detroit on one side, and the Poletown residents on the other, the representational guarantees of the political system would be suspect: "Condemnation places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry."⁷⁵ More specifically, the court questioned the public interest justification for the condemnation: "the fundamental consideration governing the location of the new facility was the corporation's enlightened self interest as a private, profit-making enterprise."⁷⁶

In addition to the power imbalance between corporate or government entities and citizen groups noted by the *Poletown* dissenters, a more subtle political obstacle to recognizing destruction of community as a tort is suggested by Judge Wilkey's dissent to the circuit court opinion in the *Metropolitan Edison* case: "I do not believe that Congress intended NEPA to encompass an effort which not only varies from individual to individual, but which is also entirely subjective."⁷⁷ Wilkey's "personalization" of the harm, however, tends to minimize its importance. Catherine MacKinnon's writing on the effect of "personalizing" the impact of sexual harassment on women underscores the danger of Wilkey's point of view.

[Personalization] is usually used as if it conclusively renders legal remedies unavailable, as if to the extent an occurrence can be described as personal the person has no legal rights. . . . One function of [personalization] . . . is to individuate, devalue, pathologize and isolate women's reactions to an experience which is common and shared, practically without variation, by countless women.⁷⁸

MacKinnon suggests that the development of the term "sexual harassment" was important to recognition of the wrong—in Professor Kerr's words, "naming is the antithesis of private feel-

75. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 640, 304 N.W. 2d 455, 463 (1981) (Fitzgerald, J., dissenting).

76. *Id.* at 649, 304 N.W.2d at 466 (Ryan, J., dissenting).

77. *People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n*, 678 F.2d 222, 241 (D.C. Cir. 1981).

78. C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 84, 87 (1979).

ing."⁷⁹ Destruction of community has not yet received name recognition. I think this is largely due to the undervaluation of the worth of community in middle and working class neighborhoods by the market and the political process. The value of community simply cannot be expressed in market terms.

It is obvious from their conduct that the Poletowners cannot be made whole by monetary just compensation. After all, an eminent domain taking of their homes and neighborhood, to be accompanied by compensation payments, is exactly what they are resisting. In these circumstances, we can easily see that property may represent more than money because it may represent things that money itself can't buy—place, position, relationship, roots, community, solidarity, status—yes, and security too⁸⁰

Economic value also has a disproportionately large impact on urban and environmental planners and legislative policy makers. Their analyses, which often amount to nothing more than strict cost-benefit analyses, fail to appropriately weigh the nonmarket value of community. "To 'be neighborly' is not a quality you can carry with you in a new situation like negotiable emotional currency. . . ."⁸¹ Because the political process has come to rely more on cost-benefit analyses, it too undervalues the worth of community.

The final objection to the destruction of community tort claim raised by the *Metropolitan Edison* Court was the concern for the fabrication of claims. In view of recent developments in tort doctrine, however, this concern is unwarranted. Tort doctrine as expressed by state courts has clearly rejected arbitrary standards for the genuineness of claims. "The California Supreme Court in *Dillon v. Legg* [citation omitted] similarly did not believe the possibility of fraudulent assertions in isolated cases justified a wholesale rejection of the class of claims in which the probability arose."⁸²

79. Lecture by Virginia Kerr, Assistant Professor of Law, University of Pennsylvania, in Philadelphia (Fall, 1984).

80. Michelman, *supra* note 2, at 1112.

81. K. ERIKSON, *supra* note 13, at 191.

82. *Leong v. Takasaki*, 55 Hawaii 398, 407-08, 520 P.2d 758, 764 (1974); *see also* *Molien v. Kaiser Found'n Hospitals*, 27 Cal. 3d 916, 926, 616 P.2d 813, 818, 167 Cal. Rptr. 831, 836 (1980).

IV. CONCLUSION

A review of the legal standards for tort law demonstrates that psychological harm resulting from destruction of community should be recognized as a tort. As with other torts, plaintiffs would still have to meet the burdens of proof showing duty, breach of duty, direct or proximate cause, and damage. While legal truisms such as "[t]he law does not, and doubtless should not impose a general duty of care to avoid causing mental distress,"⁸³ and "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them"⁸⁴ have rhetorical value, they are not applicable to the events of physical or psychological injury caused to a person living in her own home or neighborhood. Our society unquestionably imposes a duty on all not to commit such an injury. That the breach of this duty can result in true harm is amply demonstrated by the work of Dr. Erikson, if not by common sense based on human experience. Money damages are a grossly incomplete remedy for the tort of destruction of community. The primary remedy should be injunction. The legal maxim that there should only be an injunction where there exists no remedy at law⁸⁵ is precisely the support needed for the issuance of injunctions in these cases. Where a community is destroyed, there is no real remedy, legal or otherwise.

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83. *Wallace v. Shoreham Hotel Corp.*, 49 A.2d 81 (D.C. 1947).

84. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

85. Note, *Developments in the Law — Injunctions*, 78 HARV. L. REV. 996, 997 (1965).

