# ASSUMING THE RISK OF DEATH: IMPLICATIONS OF THE OLIVIA BROWN CASE

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## I. INTRODUCTION

In July 2013, Olivia Brown, a 23-year-old college student, was in front of her home at Lincoln Houses, a public housing development in East Harlem, New York, when she was shot and killed by a known trespasser, Michele "Mohawk" Graham. Olivia's mother, Crystal Brown, sued New York City Housing Authority (NYCHA), the federal government entity that oversees all of the public housing in New York City, for not providing the necessary security measures at the public housing development. NYCHA's legal response was that Olivia had assumed the risk of death simply due to her presence at the public housing development. Specifically, NYCHA's answer, which laid out its legal defenses, stated, "all the risks, hazards and dangers were open, obvious[,] and apparent to [Brown] and said risks, hazards[,] and dangers were openly and voluntarily assumed by [Brown]."[1] The claim that Olivia was responsible for her own death because she lived in the public housing development has far reaching implications. As Crystal Brown, Olivia's mother, summed up in her public response, "I can't believe they're saying she's responsible for her murder. Everybody has a right to be safe in their home. Why wasn't my daughter safe? Because we're poor and live in public housing?"[2]

The legal defense that NYCHA is relying on, the open and obvious legal defense, has a long history in property law. It has traditionally been used by landlords when someone was hurt on the landlord's property by an obvious hazard over which the landlord had no control.[3] . It is an attempt by a landlord to avoid their responsibility and shift accountability onto the tenant for the crimes that occur on the property. The application of this rule to Olivia's case would suggest that her tenancy at public housing—an involuntary attribute of her poverty—was so obviously dangerous that she, and not her landlord, bore



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1. Defendant's Answer, Crystal Brown v. New York City Housing Authority, No. 160251/2014 (NY Sup. Ct. 2015).

2. Julia Marsh et al., *City: Murder Victim Should Have Known Risks of Public Housing*, N.Y. POST (Sept. 19 2015), http://nypost.com/2015/09/19/city-murder-victim-should-have-known-risks-of-public-housing.

3. *See, e.g.*, Lederman v. Pac. Indus., 939 F. Supp. 619, 624–25 (N.D. Ill. 1996), *aff'd*, 119 F.3d 551 (7th Cir. 1997); Neff v. Coleco Indus., Inc., 760 F. Supp. 864, 867–68 (D. Kan. 1991), *aff'd*, 961 F.2d 220 (10th Cir. 1992); Bucheleres v. Chi. Park Dist., 171 Ill. 2d 435, 439–40 (Ill. 1996); Scifres v. Kraft, 916 S.W.2d 779 (Ky. Ct. App. 1996); Mallard v. Hoffinger Indus., 564 N.W.2d 74, 76 (Mich. Ct. App. 1997).

any risk that arose from living in such a dangerous environment. Such application creates a double standard in human rights for public housing tenants by proposing that their lives do not require the same level of protection and security afforded to other New York City residents, and are thus subjected to a different, and less stringent legal standard. This paper explores these implications, and finds that the open and obvious legal defense should never be used to blame the poor for their poverty.

## II. THE DEVELOPMENT OF THE OPEN AND OBVIOUS DEFENSE

Assumption of risk is a commonly misunderstood legal principle that has various meanings.[4] The legal principle is often applied without recognition of these differences, leading to great confusion.[5]

The idea that landlords owe no duty to their tenants derives from the political power landowners enjoyed until early in the twentieth century.[6] The general principle of assumption of risk is that "[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[7] The origins of the assumption of risk may be traced to the Industrial Revolution, arising initially in the context of the master-servant relationship.[8] As Justice Black explained:

> Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of the Industrial Revolution to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.[9]

Over the years the legal principle spread to nearly every area of negligence law and "reflects the individualism of the common law."[10] There are various types of analyses when invoking the assumption of risk, which are laid out in the Restatement of Torts Section 496.[11] The Restatement Section 496 provides that "[t]he basis of the assumption of risk is the plaintiff's consent to accept the risk and look out for himself, [and thus] he will not be found . . . to assume any risk unless he has knowledge of its existence."[12] Thus, according to the Restatement Section 496, liability under the assumption of the risk doctrine depends upon the

4. Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP., MEDIA & ENT. L.J, 583, 583 (2002) (citing Rini v. Oaklawn Jockey Club, 861 F.2d 502, 504-05 (8th Cir. 1988)); W.P. KEETON, D. DOBBS, R.E. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 68, at 480 (5th ed. 1984) (assumption of risk "has been surrounded by much confusion"); Mansfield, *Informed Choice in the Law of Torts,* 22 LA. L. REV. 17, 17 (1961) (assumption of risk "more difficult to understand and apply than almost any other [doctrine] in the law of torts").

5. Drago, *supra* note 4, at 583.

6. *See* FOWLER V. HARPER ET AL., 5 THE LAW OF TORTS § 27.1 at. 131–32 (2d ed. 1986).

7. Restatement (Second) of Torts § 496A (Am. Law Inst. 1965).

8. *See Rini*, 861 F.2d at 504–05.

9. *See* Tiller v. Atlantic C. L. R. Co., 318 U.S. 54, 58–59, 63 (U.S. 1943).

10. Rutter v. Northeastern Beaver County School Dist., 437 A.2d 1198, 1206 (Pa. 1981).

11. *Rini*, 861 F.2d at 506–08.

12. *Id.*

plaintiff's knowledge. If the plaintiff did not have the complete knowledge of the potential hazards of the activity, then the assumption of the risk defense cannot apply.[13] Because this defense requires a fact-intensive, subjective analysis, specifically a determination on whether the plaintiff actually knew of the risk involved, it began to lose popularity with employers and landlords who were seeking the summary judgment at the commencement of the case without having to go to trial.

In order to bypass this subjective analysis, landlords began to rely on the open and obvious defense. The difference between the open and obvious defense and the assumption of risk defense is that whereas the assumption of the risk defense requires a subjective analysis, the open and obvious defense relies on an objective inquiry.[14]

Section 343A(1) of the Restatement (Second) of Torts, which lays out the elements of the open and obvious defense, states that "[the] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the landlord should anticipate the harm despite such knowledge or obviousness*."[15] This is an important distinction: if the landlord anticipates the harm, the defense does not apply. Section 343A continues by stating that "in determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated."[16]

For purposes of the Olivia Brown case, comment a(2) of Section 343A is useful in unpacking the analysis of whether the possessor should anticipate the harm by emphasizing that "a public utility, government, or government agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not."[17] Comment C specifically states that this standard should be applied to activities that "may involve a risk which is known or obvious to those who enter [the] land . . . because the risk is inherent in the nature of the activity itself."[18]

Rather than operating as a complete defense, the open and obvious doctrine has been described in terms of the landlords' scope of duty for any person who enters their property.[19] Under its theory, a plaintiff who freely accepts a known risk "commensurately negates any duty on the part of the defendant to safeguard him or her from the risk."[20] As a result, a person who enters onto the landlord's property may be held to have consented to those injury-prone risks

13. *See* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1123 (La. 1988); Restatement (Second) of Torts, s*upra* note 7, § 496 cmt. b.

14. Restatement (Second) of Torts, s*upra* note 7, § 343A cmt. b.

15. *Id*. at § 343A(1) (emphasis added).

16. *Id.*

17. *Id*. at cmt. a(2).

18. Greg Sobo, *Look Before you Leap*, SYRACUSE L. REV. 175, 199 (1998) (citing Restatement (Second) of Torts, s*upra* note 7, § 343A at cmt. c (1963)).

19. Morgan v. State, 90 N.Y.2d 471, 485 (N.Y. 1997).

20. Custodi v. Town of Amherst, 20 N.Y.3d 83, 87 (N.Y. 2012).

that are "known, apparent or reasonably foreseeable."[21] The duty owed in these situations is "a duty to exercise care to make the conditions as safe as they appear to be."[22] On the other hand, a person who enters the landlord's property is not deemed to have assumed any risks resulting from the reckless or intentional conduct of others or risks that are concealed or unreasonably enhanced.[23]

## III. THE CURRENT STATE OF THE OPEN AND OBVIOUS DEFENSE IN NEW YORK

In New York, the assumption of risk defense can no longer be invoked except for sporting injuries that take place at designated venues.[24] Instead, the open and obvious defense is commonly invoked by landlords in negligence claims against them.

Under New York law, a landowner must exercise reasonable care to maintain its premises in a safe condition in view of the circumstances, accounting for the possibility of injury to others, the seriousness of such injury, and the burden of avoiding such risk.[25] A landowner may be held liable to a plaintiff for the harm suffered, even where the plaintiff engages in a voluntary activity, if the landowner (1) had actual or constructive knowledge that injurious conduct was likely to occur or recur, and (2) failed to control that conduct despite the opportunity to do so.[26]

As Chief Judge Cardozo wrote, "[t]he risk reasonably to be perceived defines the duty to be obeyed."[27] This is especially relevant in Olivia Brown's case because NYCHA stated that it was reasonable to perceive the risk of living at public housing, yet is using this reasonably perceivable risk to try to avoid the duty it owes to its tenants.

New York courts have held that evidence that a dangerous condition is open and obvious cannot relieve the landowner of their duty. The court in *Cupo v. Karfunkel* rightly stated that a landowner cannot be relieved of their duty when the condition is so openly and obviously dangerous, finding that "indeed, to do so would lead to the absurd result that landowners would be least likely to be held liable for failing to protect persons using their property from foreseeable injuries where the hazards were the most blatant."[28] Proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the landowner's failure to maintain the property in a safe

21. Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 657 (N.Y. 1989).

22. Turcotte v. Fell, 68 N.Y.2d 432, 439 (N.Y. 1986).

23. *See* Custodi, 20 N.Y.3d at 88.

24. *See id.* at 89 (explaining that "As a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreational activities, or athletic and recreational pursuits that take place at designated venues").

25. *See* Basso v. Miller, 40 N.Y.2d 233, 241 (N.Y. 1976) (stating the holding from Smith v. Arbaugh's Rest. Inc., 469 F.2d 97, 100 (D.C. Cir. 1972)).

26. Ginsburg v. City of Ithaca, 5. F. Supp. 3d 243, 250 (N.D.N.Y. 2014) (citing Lloyd v. Alpha Phi Alpha Fraternity, No. 96-CV-348, 1999 WL 47153, at *4 (N.D.N.Y. Jan. 26, 1999).

27. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344 (N.Y. 1928) (citing Warren A. Seavey, *Negligence— Subjective or Objective*?, 41 HARV. L. REV. 1, 6 (1927); Boronkay v. Robinson & Carpenter, 247 N.Y. 365 (N.Y. 1928)).

28. Cupo v. Karfunkel, 767 N.Y.S.2d 40, 43 (N.Y. App. Div. 2003).

condition, but is relevant to the issue of the plaintiff's comparative negligence.[29] Accordingly, a landlord can be found liable even when the allegedly dangerous condition is open and obvious.[30] Instead, courts analyze the open and obvious nature of an allegedly dangerous condition to discuss the comparative fault of the plaintiff, rather than using it to preclude liability against the landowner.[31]

Courts in the Third Department in New York have held that the landowner's general duty to maintain its premises in a reasonably safe condition encompasses "a duty to warn of potential dangerous conditions existing thereon."[32] Furthermore, courts have held that a landlord owes a duty to warn and protect when the landowner has reason to expect a person would find it necessary to encounter the danger on their property, even for an open hazard that the person may be aware of.[33]

In an important New York case regarding the open and obvious defense, *Nallan v. Helmsley – Spear*, the court found that:

> an obligation on the part of the building's owner and manager to take reasonable steps to minimize the foreseeable danger to those unwary souls who might venture onto the premises is recognized by our law, as but a natural corollary to the landowner's common-law duty to make the public areas of his property reasonably safe for those who might enter.[34]

The Court continued by quoting the Restatement:

> A possessor of land who holds it open to the public is subject to liability to members of the public while they are upon the land for physical harm caused by the intentionally harmful acts of third persons and by the failure of the possessor to exercise reasonable care to '(a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it' (Restatement, Torts 2d, s 344)[35]

For a negligence claim under New York law, if the defendant has either created the dangerous condition or has received reports or complaints from others about the condition, the defendant is held to be aware of the condition.[36]

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29. *Id.* (citing MacDonald v. City of Schenectady, 761 N.Y.S.2d 752 (N.Y. App. Div. 2003)).

30. *See id.* (noting that the court will no longer follow its old common-law negligence approach where liability would "not attach when the allegedly dangerous condition [was] open and obvious" (citing Sandler v. Patel, 733 N.Y.S.2d 131, 132 (N.Y. App. Div. 2001)); Bojovic v. N.Y. City Hous. Auth., 726 N.Y.S.2d 444, 445–46 (N.Y. App. Div. 2001).

31. *See id.* (holding that "the open and obvious nature of a condition is relevant to the issue of the plaintiff's comparative negligence).

32. Michalski v. Home Depot, Inc., 225 F.3d 113, 117 (2d Cir. 2000) (citing Thornhill v. Toys "R" Us Nytex, Inc., 583 N.Y.S.2d 644, 645 (N.Y. Div. App. 1992)).

33. *Id.* at 118. (citing Stern v. Ofori-Okai, 668 N.Y.S.2d 68 (N.Y. App. Div. 1998); Comeau v. Wray, 659 N.Y.S.2d 347 (N.Y. App. Div. 1997)).

34. Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 518 (N.Y. 1980) (citing Kilmer v. White, 254 N.Y. 64 (N.Y. 1930); Junkermann v. Tilyou Realty Co., 213 N.Y. 404 (N.Y. 1915); WILLIAM L. PROSSER, LAW OF TORTS, 403–08 (4th ed. 1978); Restatement (Second) of Torts, *supra* note 7, §§ 359–60)).

35. Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, at 519.

36. Nussbaum v. Metro-North Commuter R.R., 994 F.Supp.2d 483, 495 (S.D.N.Y. 2014) (citing Buskey v. Boston Mkt. Corp., No. 04 CV 2193(SJ), 2006 WL 2527826, at *6 (E.D.N.Y. Aug. 14, 2006)).

Under New York law, in order to recover damages for an alleged breach of a landowner's duty to maintain the landowner's property in a reasonably safe condition in view of all the circumstances, a plaintiff must first demonstrate that the landlord either 1) created the hazardous condition which precipitated the injury, or 2) had actual or constructive notice of such condition, and that the the landlord's negligence was a proximate cause of the injuries.[37]

## IV. IMPLICATIONS

### A. Using Illegality as a Defense

The idea that a landlord can use the landlord's own negligence of not maintaining the properties in a safe manner as a defense against their tenants and the surrounding neighborhood is contrary to the law and common sense. The result would be completely riding of the landlords' accountability for the very purpose of their role: to ensure their properties are safe and up to housing code. By stating that their property is too dangerous, that the conditions are so deplorable that by simply being present the tenant assumes the risk of death, flies in the face of reason and the law.

NYCHA's misguided use of the open and obvious defense exposes their guilt, since they are admitting that they knew the public housing development was openly and obviously dangerous. This demonstrates their knowledge and appreciation of the dangerous condition, which is exactly what would make the open and obvious defense inapplicable to them. When analyzing the elements of the open and obvious defense, comment b of the Restatement of Torts states that:

> "the word 'known' denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated."[38]

Therefore, NYCHA should be barred from using its own illegality as a defense in the Olivia Brown case. By claiming that Lincoln Houses is so openly and obviously dangerous that just by being present on the development Ms. Brown assumed the risk of death, NYCHA is in fact admitting its culpability in not maintaining the property in a safe and legal manner.

### B. Shifting the Landlord's Responsibility onto the Tenants and Public

Shifting the burden of what should be the landlord's responsibility onto the tenants and surrounding community runs parallel to the common occurrence of blaming the victim for the crime. One need not look further than sexual and domestic violence crimes to see that those with power often try to interpret the law to their benefit in order to escape accountability.[39] This occurs on an

37. Naughright v. Weiss, 826 F.Supp.2d 676, 692 (S.D.N.Y. 2011) (citing Boderick v. Ry. Mgmt. Co., Inc., 897 N.Y.S.2d 1 (N.Y. App. Div. 2009)).

38. Restatement (Second) of Torts, s*upra* note 7, § 343A cmt. b.

39. Michelle J. Anderson, *Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 104 (2002) (illustrating three relevant studies from 1982 to 1995

individual level such as with powerful people or professional athletes who avoid prosecution,[40] in immediate environments surrounding the victim such as gender-based violence at home or in the workplace,[41] or on a much larger, systematic level with corporations, governments, and international financial institutions not being held liable for human rights abuses.[42] Unfortunately the victims are often left with little recourse, especially if they are poor.

### C. Blaming the poor for their poverty

Blaming the poor for their poverty is nothing new. It has been a strategy of the United States government for decades to create the perception of the population who rely on public assistance, to make people feel that their tax money is going to people who do not deserve social services, and thus blame the victims of the system rather than the system itself.[43]

Stereotypes based on the underlying idea that the poor deserve their poverty are widespread, as are stereotypes that the poor have voluntarily assumed their poverty and consequences due to their own actions or inactions.[44] For conservatives, this is the basis of cutting social service programs.[45] Instead,

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wherein mock jurors voiced bias against victims whose sexual histories reveal "promiscuity" and in turn viewed the violence committed against them as less serious); Bloch v. Ribar, 156 F.3d 673, 685 (1998); Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law*, 33 S. ILL. U. L.J. 181 (2009); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L.REV. 1013 (1991).

40. Bethany P. Withers, *Without Consequence: When Professional Athletes Are Violent Off the Field*, 6 HARV. J. SPORTS & ENT. L. 373 (2015).

41. Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61 (2008); Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworkers*, 20 AM. U.J. GENDER SOC. POL'Y & L. 871 (2012).

42. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013); Susan Farbstein, et al, *The Alien Tort Statute and Corporate Liability*, 160 U. PA. L. REV. 99, 99 (2011); see also Ron A. Ghatan, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1276 (analyzing the Second Circuit's majority opinion in Kiobel); Matthew E. Danforth, *Corporate Civil Liability under the Alien Tort Statute: Exploring its Possibility and Jurisdictional Limitations*, 44 CORNELL INT'L L.J. 659 at 668-71 (giving a more in depth analysis and description of the majority opinion).

43. Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL'Y 5 (1996); Michael Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare,* 237 (1989) ("by individualizing poverty, many American social scientists have aided the mystification of its origins and obscured its politics. In much American social science, poverty remains profoundly apolitical. Discussions of how to influence the level of social benefits along a fairly narrow band of possibilities pass for political discussion. About the real politics of poverty, American social science remains largely silent");
Valentina Stackl, *District Court Rules World Bank Can't be Sued*, EARTHRIGHTS INT'L PRESS RELEASE, (Mar. 28, 2016), http://www.earthrights.org/media/district-court-rules-world-bank-cant-be-sued (citing Jam v. International Finance Corporation, No. 1:15-cv-00612 ("a federal district court in Washington, D.C., ruled… that the International Finance Corporation (IFC), the private lending arm of the World Bank Group, has absolute immunity and thus cannot be sued in the United States.").

44. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003).

45. Aya Gruber, *Rape, Feminism, and the War on Crime,* 84 WASH. L. REV. 581 (2009) (quoting Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 803 (2003) (observing that "in the 1970s, amidst global economic changes that confounded standard Keynesian policy prescriptions and amidst a white backlash against

the conservatives argue that it is the recipients' responsibility to pull themselves out of poverty and if they cannot, they should assume whatever risks follow.

One example of this blaming ideology came under the Reagan administration.[46] "As President, [Reagan] often displayed his ignorance or indifference to the plight of the poor. Reagan once commented he could not understand why there were so many unemployed when the 'Jobs' section of the newspaper was full of listings."[47]

NYCHA's use of the open and obvious defense fits right within this ideology; the poor victim is to blame because the public housing development is inherently dangerous, and the poor should therefore assume the risk of death due to their unfortunate economic situation. It is an attempt by a government agency to avoid responsibility and shift the burden onto the victim for the crimes being committed against them.

### D. Double Human Rights Standards for NYCHA Residents

One of the most troubling implications of this shift of burden is that it contributes to the human rights double standard that NYCHA residents must endure. Human rights are universal in that they are the fundamental rights that every human is entitled to. The right to life is the most fundamental of human rights. It is a right that appears in human rights treaties around the world.[48] However, the poor do not enjoy the right to life in the same way as the wealthy. The right to life can be guaranteed only when other human rights are respected and achieved, such as the right to health, opportunity, home, safety, etc. In our capitalist system, many from the socio-economically underprivileged class are denied access to adequate education and medical treatment. This means that the poor unfortunately often do not enjoy these rights to the same extent as the wealthy. When a health issue arises, if a person does not have health insurance they will suffer while the wealthy can pay for the best health services. The same is true with the rights to safety, home, and family. The ultimate outcome is a human rights double standard.

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government support for racial equality, a well-funded neoliberal movement coalesced to position efficiency more firmly against equity").

46. *Id*. quoting from Ronald W. Reagan, President of the United States, Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut, www.reagan.utexas.edu/archives/speeches/publicpapers.html, (June 20, 1984) ("individual wrongdoing, [liberals] told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow. . . it was society, not the individual, that was at fault when an act of violence or a crime was committed. Somehow, it wasn't the wrongdoer but all of us who were to blame. Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 819 (2005) (noting the "hegemonic reign of neo-liberalism over American politics of the past several decades").

47. Teddy Ky-Nam Miller, *The Unmet Promises of Care Not Cash*, 5 HASTINGS RACE & POVERTY L. J. 171, 179 (2008).

48. *See* African Charter on Human and Peoples' Rights art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 23, 1986); International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; Am. Convention on Human Rights, art. 4; Charter of Fundamental Rights of the European Union art. 2, 2010 O.J. C 83/02.

Residents in public housing live there because they are unable to afford market rate housing. They are often the poorest residents in a city, either working minimum wage jobs or surviving off of public assistance. NYCHA residents are legally classified as low-income. Unfortunately this poverty translates into double standards with regards to their rights. Even more obvious than seeing how the lack of wealth creates fewer opportunities to achieve the same standard of human rights as the wealthy, NYCHA residents in fact must operate within a completely different and bureaucratic legal housing system. NYCHA is a federal agency which requires its residents to use its own, internal system to demand and maintain their rights.[49] This internal system and its devastating effects lead NYCHA residents to face a double human right standard in their health and safety by living in a poorly funded entity.[50]

Now, with NYCHA's attempt to hide behind the open and obvious legal defense in the Olivia Brown case, NYCHA is expanding this double standard to include the right to life. Telling a tenant that there is no accountability for their death on the developments, that the government will not accept responsibility for maintaining a safe environment, and that the tenant themselves should assume the risk of death due to where they live is taking away the tenant's right to life and creating an extremely troubling precedent. Furthermore, such an argument is permitting the landlord and NYCHA not to provide sufficient security measures to prevent crimes but to avoid their liabilities.

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49. One of the biggest differences for NYCHA tenants is that they must use an internal system to get repairs done in their apartments. Instead of calling '311' like every other resident of New York City, NYCHA tenants must complain to the management at their specific development site who issue a ticket, normally for a very distant future date, sometimes up to a year. Often on the date of the ticket, the tenant waits at home all day to then get a note on their door that the repairman came but no one was home. This is incredibly frustrating for tenants, who sometimes wait at home all day, after already waiting an extensive amount of time for their repairs to be acknowledged and addressed. Another common practice is for NYCHA to come, but not fix the conditions properly. One of the most common repair issues is mold caused by old leaking roofs. NYCHA is notorious for painting over mold so that it continues to return. Due to this, many NYCHA tenants live in apartments with dangerous and unsafe conditions that affect their health and safety, and the health and safety of their entire families.

50. Unlike other police patrols where the officers can stay in their cars, the layout of NYCHA developments require "vertical patrols" where the officers must enter the buildings. There is no set guidelines about patrolling with their guns already drawn ("We leave that decision as to when to take a firearm out to the discretion of the officer," NYPD Commissioner Bill Bratton stated at a press conference on Nov. 21, 2014), which has already translated to the NYPD shooting two unarmed men, Akai Gurley and Timothy Sansbury. In addition to the police potentially patrolling with their guns out, the repair issues in NYCHA also add to the safety concerns. Both Akai Gurley and Timothy Sansbury were shot due to broken light bulbs in the stairwells so the police could not see properly. Additionally the elevator was broken in Gurely's case which was why he was taking the stairwell to begin with. Without proper security and repairs, NYCHA residents are exposed to a variety of issues, all of which affect their human rights. Health problems, especially asthma due to the excessive mold throughout the developments, are common. Without proper health, either for the parents or children who miss school, it is much more difficult to maintain a stable job. This affects the tenant's ability to earn a living and gain self-empowerment and financial stability. Without proper health, tenants cannot enjoy the same right to a family life. Ill health results in missing out on normal family activities for both parents and their children. The lack of security also causes excessive stress among NYCHA tenants, again causing a variety of health-related issues.

## V. CONCLUSION

In conclusion, the open and obvious legal defense should not be applicable in any case where a landlord is blaming a victim for the landlord's own negligence, such as the Olivia Brown case. It should never be used in situations where the landlord is openly acknowledging that they have not maintained their properties to housing code standards, and are instead turning around and using these housing code violations against the tenants and communities who are already suffering. Doing so is exactly contrary to the goals for which premises liability law was designed. Furthermore, it advances an already appalling double standard in human rights for public housing tenants, and excuses NYCHA from maintaining safe public housing developments. Most troubling, it is a clear message from NYCHA that low-income public housing residents should assume the risk of death when they are home and it is their burden to carry since they cannot afford to live anywhere else.