Catholic University Law Review

Volume 23
Issue 2 *Winter 1973*

Article 9

1973

Joy v. Daniels: Due Proces and Quasi-Public Housing

Barry Schwartz

Joy v. Daniels:[1] Due Process and Quasi-Public Housing

It has become axiomatic in constitutional law that a recipient of a government-dispensed benefit may not be subsequently deprived of that benefit without due process protection.[2] In the area of public housing, "the government as landlord is still the government,"[3] and conventional public housing tenants are fully protected by procedural due process. However, there are other government low-income housing programs which provide various subsidies and tax benefits to private parties willing to build and operate low-cost housing pursuant to governmental regulations. These "quasi-public" housing programs operate on the assumption that private, profit-motivated parties can build and operate housing more effectively than the bureaucracies of government. Tenants in quasi-public housing are now seeking procedural protection comparable to those afforded tenants in public housing.

The problems in defining tenants' rights in this area are twofold. First, the use of private landlords as intermediaries in providing a government benefit raises questions of state action and property entitlement. Second, the imposition of additional procedural safeguards for tenants might deter further private investment, and thus undermine congressional efforts to utilize private enterprise in meeting housing needs.

The fourth circuit has recently considered this issue. In *Joy v. Daniels*, an eviction case, the court afforded procedural due process protection to tenants in quasi-public housing. The plaintiff was the head of a household consisting of four minor children. Her "effective" monthly income[4] of $220.20 was low enough to qualify her for occupancy in a quasi-public apartment complex constructed and operated by the defendant under Sec. 221(d)(3) of the National Housing Act.[5] The applicable standard form lease provided for a term of one year, automatically renewable from month to month thereafter; the lease stipulated that either party had the power to terminate by giving thirty days' notice in advance to the other party. The

1. Civil No. 72-2479 (4th Cir. June 11, 1973) [Hereinafter cited as Joy].
2. Goldberg v. Kelly, 397 U.S. 254 (1970).
3. Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955).
4. "It consists of a welfare benefit in the amount of $122.20, plus $126.00 worth of food stamps at a cost to her of $26.00." Joy at 2, n.1.
5. *See* note 9 *infra.*

landlord gave the plaintiff thirty days' notice to vacate without stipulating the cause for eviction.[6]

The plaintiff filed an action for declaratory and injunctive relief under 42 U.S.C. § 1483 in federal district court, challenging her threatened eviction as violative of the due process clause of the fifth and fourteenth amendments. The district court held that she could properly be evicted since her tenancy had expired under the term of the lease, and that no other cause need be given for the eviction.

On appeal to the fourth circuit, the court initially decided that the defendant-landlord's actions in seeking to use state eviction procedures against a tenant in a federally funded, state approved low-income housing project provided sufficient state involvement to constitute "state action." Accordingly, the court held these facts sufficient to satisfy the "under color of" law clause of 42 U.S.C. § 1983, and federal court jurisdiction under 28 U.S.C. § 1343(3).[7]

Proceeding to the second level of its analysis—the determination of plaintiff's substantive rights—the court examined the scheme of the federal housing acts, underlying congressional policies, and various customs and regulations. Finding a protected property interest, or entitlement, in continued occupancy beyond the term of the lease, the court held the landlord's power to terminate without cause at the expiration of the lease invalid, and that he must, before eviction, give tenants a good cause notice and prove such cause exists in state court.[8]

---

6. "In its answer to the complaint the defendant alleged that the plaintiff 'maintained a slovenly and ill-kept apartment;' had destroyed window screens; failed to pay rent on time; and, used excessive electricity. The district court found that it could be inferred that these were the reasons defendant sought eviction, but that such a finding was unnecessary to decision [sic] and thus no such inference was drawn." Joy at 3, n.2.

7. "Since the pleadings do not raise the issue we need not decide if there is also 'federal question' jurisdiction on the theory the defendant is an agency of the United States. . . ." Joy at 7, n.6.

Federal jurisdiction is dependent upon a finding of state action to invoke 28 U.S.C. § 1343(3) (1970), which gives the district court jurisdiction over actions "to redress the deprivation under color of state law" of a federal constitutional right.

There are two alternative means of establishing federal jurisdiction, both seemingly inappropriate in eviction cases; 28 U.S.C. § 1361 (the Mandamus and Venue Act) (1970) permits an action seeking a writ of mandamus to compel a federal officer to perform a duty. As such, it is not applicable since eviction does not involve any actions by a federal officer; nor can jurisdiction be based on 28 U.S.C. § 1331(a) (1970) where the amount in controversy in an eviction case will not exceed $10,000. However, *see* Joy at 7, n.6:

> . . . But we note that if plaintiff's life expectancy is as much as a decade (or less) the "bargain" value of her lease would seem to have a value greater than $10,000.

8. Since the South Carolina eviction procedure was found earlier to be constitutionally adequate, Johnson v. Tamsberg, 430 F.2d 1125 (4th Cir. 1970), the court re-

I. The Legislative Background

Due to a growing dissatisfaction with the results achieved by conventional public housing programs, several major subsidized rental housing programs were initiated during the previous decade. Section 221(d)(3) of the National Housing Act[9] is a statutory scheme by which private nonprofit, limited-dividend, or cooperative sponsors of low and middle-income housing projects can apply for Federal Housing Administration (FHA) mortgage insurance and subsidies.[10] Participants are required to conform with an FHA Regulatory Agreement giving the FHA broad powers of supervision regarding the construction, occupancy, and daily operations of the project.[11] The Regulatory Agreement also covers leases: they must appear on FHA approved forms;[12] the initial lease term may be for any period between thirty days and one year;[13] and at the expiration of the initial term, the lease is automatically renewed for successive one-month periods unless either party gives advance notice of termination.[14]

Rent supplements for tenants are granted by the FHA to participating landlords pursuant to Section 101 of the Housing and Urban Development Act of 1965.[15] Under this section, the FHA approves a schedule of "basic rents" and "fair market" rents. The "basic rent" represents the minimum rent required of all tenants while the "fair market" rent represents the maximum rent that may be charged. Within these limits, tenants pay 25 percent of their income as rent while the FHA subsidizes the difference between the rents actually collected and their fair market equivalents.

---

manded the case to state court to consider the question of eviction on the merits. The court stated that:

> Landlord-tenant law is traditionally the province of the states. State judges are bound as we are by the due process clause of the fourteenth amendment.

Joy at 17-18.

9. 12 U.S.C. § 1715L(d)(3) (1971). The § 221(d)(3) program was replaced by the § 226 program. Housing and Urban Development Act of 1968, § 201(a), 12 U.S.C. § 1715Z-I (1970). However the procedures for operating under § 221(d)(3) are generally similar to those for § 236; the changes caused by the enactment of the new section are not within the scope of this note. Since most of the provisions remain the same in both sections, cites to the various provisions of the Regulatory Agreement hereinafter mentioned will conform to the new § 236 program for accuracy.

10. These subsidies can reduce the effective interest rate on a privately-financed mortgage to as little as 1%. *See* Note, *Procedural Due Process in Government Subsidized Housing*, 86 HARV. L. REV. 880, 884, n. 19 (1973) [hereinafter cited as Note, 86 HARV. L. REV. 880].

11. *See* Section 236 Regulatory Agreement ¶¶ 4(a), (e), 6(a), (c), (d), (i), 7, 9(a), (c), (e). Where provisions of the agreement are violated, the FHA may take a variety of actions under ¶ 11.

12. *Id.* ¶ 4(b).

13. *Id.*

14. Model Form of Lease, U.S. Department of Housing and Urban Development, Federal Housing Administration, FHA Form No. 3133, ¶ 4.

15. 12 U.S.C. § 1715Z-I(f) (1971).

The rent supplement program provides for additional subsidies to families with incomes too low to afford the "basic rent." Families so qualifying pay 25 percent of their income as rent, and the rent supplement funds then pay the difference up to basic rent.[16] Where rent supplements are used, local or state approval of the subsidized housing project is required.[17]

II. The Constitutional Background

Joy extends the basic premise of the due process entitlement doctrine. Procedural protection attaches where a protected property right is dispensed, not only by the government, but by a private party, *i.e.* the landlord, acting in lieu of the government. Such a result would have been impossible under the historical doctrine known as the "right-privilege" distinction[18] which effectively denied all claims founded upon a deprivation of previously provided government benefits. However, limitations in the doctrine were soon recognized,[19] and through a gradual and continuous process of judicial erosion,[20] by the late 1960's the rule was no longer constitutionally viable.[21]

Goldberg v. Kelly,[22] the landmark case in this area, and the standard by which all subsequent claims would be measured, was decided within the context of the erosion of the "right-privilege" distinction. *Goldberg* held that welfare recipients were protected by procedural due process against

16. 12 U.S.C. § 1710S(b) (1971). *See, e.g.*, in Joy, plaintiff enjoys occupancy of an apartment worth $157.00 per month at a cost to her of $48.00. FHA pays the difference, *i.e.*, $109.00 per month, directly to defendant.

17. 24 C.F.R. § 5.15(c) (1971).

18. *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245 (1965) [Hereinafter cited as Reich], a critical account of the doctrine, and Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), a statement of the erosion of the doctrine. Briefly, the doctrine held that government benefits were "privileges," in which the individual recipient had no "right" and thus no constitutionally protected interest.

19. *See* Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 123 (1926) wherein the Court held a hearing constitutionally required, before the denial of a professional license, if admission to the practice of a profession was controlled by government licensing.

20. The granting of a privilege could not be conditioned on the surrender by the recipient of constitutionally protected substantive rights. Frost & Frost Trucking Co. v. Railroad Comm'n., 271 U.S. 583, 592-99 (1926) (substantive due process); Wieman v. Updegraff, 344 U.S. 183 (1952) (association); Speiser v. Randall, 357 U.S. 513 (1958) (speech); Sherbert v. Verner, 374 U.S. 398 (1963) (religion).

21. The doctrine could not be applied to deny all procedural protection to the recipients of government benefits. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (balancing of interests necessary to decide whether a person can be excluded from employment at a public facility without a hearing); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (hearing required before expulsion from a state college).

22. 397 U.S. 254 (1970). *See also* Note, 86 HARV. L. REV. 880, 887-93 for an excellent analysis of the development of the doctrine announced in *Goldberg* and subsequent decisions.

the termination of such benefits without a prior hearing. The "right-privilege" distinction was disposed of as the Supreme Court found that qualified individuals were "entitled" to welfare benefits under the Social Security Act.[23] To determine the requisite due process procedure by which the recipients could constitutionally be deprived of their welfare benefits, the Court applied a balancing test, weighing both the private interest in avoiding the interruption of welfare benefits and the government interest in a summary procedure.[24] The Court found the post-termination evidentiary hearing (that which was required by statute) constitutionally infirm, and a prior hearing necessary. The following elements were held necessary to satisfy due process requirements:

> . . . [T]he opportunity to be heard [requires that] a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. . . . Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . And, of course, an impartial decision maker is essential.[25]

The Supreme Court, in *Goldberg* and subsequent cases,[26] prescribed the analysis of cases involving a deprivation of government benefit as a two-step process. There must first be an inquiry into whether the particular private interest alleged is a "property" interest within the meaning of the due process clause. If such a property interest exists, then a balancing test is necessary to determine what procedure is required to protect that interest.

The standards employed in the determination of whether a particular private interest is a protected property interest within the meaning of the due process clause were established in *Board of Regents v. Roth*[27] and *Perry v. Sindermann*.[28] Both cases involved the termination of employment of teachers at state universities. *Roth* held that a nontenured assistant professor at a state university which had a formal tenure system had no constitutionally protected interest in being rehired after his first one-year contract expired. The Court emphasized that

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have

23. 42 U.S.C. §§ 601-10 (1970).
24. 397 U.S. at 262-66.
25. *Id.*
26. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972), Perry v. Sindermann, 408 U.S. 593, 599-603 (1972), Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
27. 408 U.S. 564 (1972).
28. 408 U.S. 593 (1972).

> more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[29]

Pointing to the statute in *Goldberg* defining welfare eligibility as an objective source for this legitimate claim of entitlement, the Court found no equivalent source in *Roth*. In *Sindermann*, by contrast, the Court held that a professor, working under a succession of ten one-year contracts in a state university system which did not have a formal tenure system, should be given the opportunity to show that he had legitimately relied on an understanding fostered by the university administration. This understanding, that there was a *de facto* tenure system which provided for the indefinite rehiring of faculty members so long as their work was satisfactory, might have been sufficient to invoke due process. The Court stated that

> [a] person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.[30]

The Court held that if the professor could make an appropriate showing of such an understanding and his reliance thereon, the college would be required to afford him a hearing prior to a refusal to renew his contract.

III. State Action

The initial determination involved in a suit to contest eviction is whether the fourteenth amendment is applicable, *i.e.* whether the action of a defendant in seeking to evict a plaintiff-tenant can be said to be "state action."[31]

Recent case law has defined the parameters of state involvement. The mere receipt of FHA mortgage benefits by a quasi-public landlord who is thus subject to attendant FHA regulations in itself is insufficient to make that landlord an agency of the state.[32] Similarly, where a landlord has

---

29. 408 U.S. 564, 577.

30. 408 U.S. 593, 601.

31. "The fourteenth amendment does not inhibit the conduct of purely private persons in their ordinary activities. Adickes v. S.H. Kress & Co., 398 U.S. 144, 169 (1970); The Supreme Court has never attempted to fashion a precise formula of what constitutes 'state action' and the question is frequently difficult to determine. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). State action may result from administrative, regulatory, legislative, and judicial action. 407 U.S. at 179. The determination must be made on a case-by-case basis. 'Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.' *Burton*, 365 U.S. at 722." Joy at 5.

32. McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

undertaken to utilize state eviction procedures against a tenant, the fact that such laws are applied neutrally (providing a quasi-public landlord with the same right to secure the eviction of a tenant by a state court proceeding that it gives to all landlords) holds this element to fall below the requisite level of state involvement.[33] The combination of both these factors has been held insufficient to constitute "state action" although they are "relevant and material in the assessment of other evidence of state involvement."[34] Where, however, the subsidized housing is built on a site previously acquired by a local government for urban renewal purposes, and is thus subject to local as well as federal supervision, "state action" has been found.[35]

There exists an anomaly regarding this dual character of federal and state involvement. In *McQueen v. Drucker*[36] the court found state action present

> when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has . . . been circumscribed substantially more than that generally accorded [sic] an independent contractor.

This finding, purportedly based upon additional local government involvement, nevertheless seems to regard federal involvement as controlling. Thus, a literal reading of *McQueen* might support the proposition that state action will be found in any situation where there is substantial government involvement.[37]

It was within this context of applicable case law that *Joy* was decided. The defendant-landlord was a recipient of FHA mortgage benefits, and was thus subject to attendant FHA regulations. Also, he had undertaken to utilize the state eviction procedures, and he received FHA rent supplements, which, as a prerequisite to obtaining these supplements, required specific authorization from the County Council.[38] The court noted that

---

33. Wiegand v. Afton View Apartments, 473 F.2d 545 (8th Cir. 1973); *McGuane, supra* note 32 at 1190. However, in Fletcher v. Grant Villa, Civil Action No. A-71-CA-II at 2, 5 n.1 (W.D. Tex., March 17, 1971) and McQueen v. Drucker, 317 F. Supp. 1122, 1132-33 (D. Mass. 1970) (alternative holding) [hereinafter cited as McQueen] *aff'd.*, 438 F.2d 781 (1st Cir. 1971), the courts found sufficient state action in the use of state court summary procedures to evict the tenants.

34. 431 F.2d 1189, 1190. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

35. 317 F. Supp. 1122, 1133; Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 137-38 (S.D.N.Y. 1968).

36. 317 F. Supp. at 1132-33, 438 F.2d at 784-85.

37. *See* Bonner v. Park Lake Housing Dev. Fund Corp., 70 Misc. 2d 325, 329, 333 N.Y.S.2d 277, 281 (Sup. Ct. 1972), a case involving substantial local involvement wherein the above-mentioned passage is quoted with approval.

38. *See* Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972) which held that the involvement of the state (power delegated to local government) zoning power, combined with the use of state eviction procedures, constituted "state action."

the participation of the federal government in such housing projects was conditioned upon state approval, for without the state therein involved, there could be no direct federal funding through rent subsidies and indirect funding through mortgage benefits. The participation of the federal government conditioned upon state approval and the defendant's utilization of the state eviction proceedings had "so far insinuated [the state] into a position of interdependence" with defendant, that there was sufficient state involvement to constitute "state action."[39]

IV. Procedural Due Process

A. The Protected Property Interest

Protection against arbitrary eviction without notice and a prior hearing in a quasi-public housing project depends upon a finding that the tenant has a constitutionally protected interest in his continued residence therein. This determination, in turn, is dependent upon a proper application of the *Roth* and *Sindermann* criteria. Thus, under a justifiable expectation test, a tenant must have a legitimate claim of entitlement in his continued residency which, in turn, must be supported by objective rules or mutually explicit understandings. *Joy* is dispositive on this issue as the court states "we must now look to applicable statutes, governmental regulations, and the custom and understandings of public landlords in the operation of their apartments to determine if a public tenant has a 'property interest' in a tenancy beyond the term of the lease except for cause."[40]

Policy statements in the relevant funding statutes provided the first indices of a justifiable expectation. With regard to mortgage insurance benefits received by the defendant, Congress provided as its national goal "a decent home and suitable living environment for every American family."[41] The enactment of the Housing and Urban Development Act provided for a policy of improving the "living environment of urban areas."[42] Subsequent judicial construction of that act indicated that "this [policy] include[d] adequate, safe, and sanitary quarters. But it also implie[d] an atmosphere of stability, security, neighborliness, and social justice."[43] Indeed, the court found both explicit and implicit requirements prohibiting arbitrary and discriminatory government action in the enunciated congressional policies protecting the right to be free of arbitrary and discriminatory action in fed-

39. Joy at 7 *quoting Burton, supra* note 31.
40. *Id.* at 9.
41. *Id.* at 11, *quoting* 12 U.S.C. § 1701t.
42. PUB. L. No. 89-117, 79 Stat. 451 (Aug. 10, 1965).
43. Joy at 11 *quoting* McQueen, 317 F. Supp. at 1130.

erally assisted programs.[44]

Through perusal of legislative history, the *Joy* court suggested that Congress, with regard to the rent supplement program, had contemplated occupancy entitlement rather than limited leasehold terms.[45] Along the same line, the court emphasized that the tenant's expectation of a degree of permanence was bolstered by "custom":

> . . . one finds that the normal practice in subsidized housing, as in private housing, is to permit tenants to remain beyond the expiration of a lease unless a reason has arisen for eviction; termination is the exception, not the rule.[46]

The court's determination of the existence of a "property right or entitlement to continue occupancy until there exists a cause to evict other than the mere expiration of the lease"[47] was thus dependent on those elements indicating a legitimate claim based on objective understandings. By analogy, legislative policy, rules, and customs indicating such an interest were equal in degree to the entitlement of the *Goldberg* welfare recipient to continued benefits under the Social Security Act. Thus, the lease provision purporting to give the landlord power to terminate without cause after its expiration was held invalid.

The impact of the *Goldberg* ruling—that procedural due process required a hearing prior to termination of welfare benefits—was felt initially in litigation arising from public housing evictions. In *Escalera v. New York City Housing Authority*[48] and *Caulder v. Durham Housing Authority*,[49] evictions absent prior notice and a hearing at which the aggrieved tenant could contest the action were held violative of due process. Both courts noted, however, that the tenants' interest in a full evidentiary hearing to contest the eviction, coupled with the rights to present evidence and cross-examine

---

44. "No person in the United States shall, on the ground of race, color, religion, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000(d).

FHA regulations authorized under 12 U.S.C. § 1701S(f) imply a right to be free from arbitrary and discriminatory action. *See, e.g.*, 24 C.F.R. § 221.536 (1971) which provides that a landlord in a § 221(d)(3) apartment may not discriminate against any family because of children.

45. Joy at 12 *quoting* H.R. REP. No. 365, 89th Cong., 1st Sess. (1965), 1965 U.S. CODE CONG. AND AD. NEWS 2614, 2618:

> If his income increases sufficiently so that he can pay the full economic rent with 25% of his income, rent supplement payments on his behalf would cease to be made. The tenant could, however, continue to live in the project and would not be required to pay more than the full economic rent.

46. Joy at 13-14, *quoting* Note, 86 HARV. L. REV. 880, 905.

47. *Id.* at 14.

48. 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

49. 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

adverse witnesses, might be overridden by a demonstrated compelling state interest in a summary procedure. Since due process requirements were dependent on a balancing of interests, both courts were constrained in setting forth a particular minimum procedure necessary for evictions in public housing. However, a subsequent circular issued by the Department of Housing and Urban Development did establish the required minimum procedures which paralleled those specified for welfare recipients in *Goldberg*.[50] Among them were an administrative hearing before termination, an impartial decision-maker, the right to cross-examine witnesses, and the necessity of a written opinion. Inherent in this scheme is the notion that good cause is required for eviction; to imply otherwise would render the hearing requirement of little value.[51]

Once the obstacle of a state action finding was hurdled, new developments proceeded apace. In *McQueen v. Drucker*,[52] the first circuit held that evictions in retaliation for associational activities or petitions to the FHA violated the first amendment. *McQueen* and its progeny[53] depended, not on the procedural due process considerations of *Goldberg*, but on the narrower prohibition of the attachment of unconstitutional conditions to the granting of a government benefit. Such a prohibition, initially, was amenable to abuse where a landlord evicted without announcing his purpose; yet the judicial trend favoring the tenant's right to occupancy where such a result seemed just, led some courts to infer a retaliatory motive from the circumstances of a given eviction.[54] And those landlords who used the device of retaliatory evictions openly as a means to deter future organizational or other "troublemaking" activities were soon forbidden from such a tactic.[55]

Without a broader scope of tenant protection in subsidized housing, quasi-public landlords still possessed a formidable arsenal with which to defeat

---

50. U.S. Dep't. of Housing and Urban Development, Grievance Procedure in Low Rent Public Housing Projects, HUD Circular RHM 7465.9 (Feb. 22, 1971).

51. Even if the landlord were permitted to evict arbitrarily, a hearing might serve collateral purposes. Publicity generated by a hearing might deter evictions clearly based on unjust grounds. The bothersome and inefficient nature of a hearing requirement imposed on a landlord might deter evictions based on minor or frivolous reasons. *But see* McQueen, 317 F. Supp. at 1129, n.1 where the court's analysis of the statutory purpose was directed at finding a basis for imposing a good cause requirement.

52. *See* note 4 *supra*.

53. Fletcher v. Grant Villa, *supra* note 33. *Cf.* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (private landlord not permitted to evict in retaliation for reporting housing code violations, as a matter of public policy). *See* note 35 *supra*.

54. *See, e.g.*, Holt v. Richmond Redev. and Housing Authority, 266 F. Supp. 397, 400 (E.D. Va. 1966).

55. *See, e.g.*, McQueen, 317 F. Supp. at 1125-26.

the continued occupancy of "undesirable" tenants. Absent a procedural requirement, landlords might evict on the basis of a letter received from a local government listing apartments found to be overcrowded, and stating that "failure to correct these conditions will result in court action";[56] or on the basis of numerous complaints received by a landlord against a tenant's child;[57] or on the inference that a tenant "maintained a slovenly and ill-kept apartment," had destroyed window screens, failed to pay rent on time, or used excessive electricity.[58] In most cases a tenant would receive a notice to vacate, no cause being stated. It thus became evident that those in society who were to be the beneficiaries of government policy fell victim to arbitrary and discriminatory practices within those same government-subsidized projects:

> It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.[59]

The justifiable expectation test enunciated in *Roth* and *Sindermann* created the basis for a finding which would lend itself to procedural protection. Courts began to determine whether a reasonable basis for tenants to expect continued occupancy in quasi-public housing did, in fact, exist. And the considerations of Judge Wyzanski in *McQueen,* the retaliatory eviction decision, did much to strengthen the conviction that there was indeed a protected property interest, or entitlement, to an unencumbered residency in subsidized housing, at least under normal conditions.

Thelma Joy's petition failed in district court due to the expiration of her leasehold as the court upheld the validity of the no cause provision. Thus, the element of entitlement as determined by the higher court was dispositive of the issue, and the plaintiff prevailed.

B. The Hearing Requirement

The hearing requirement stems from the finding that continued occupancy in quasi-public housing, under normal circumstances, is a constitutionally

---

56. Bonner v. Park Lake Housing Dev. Fund Corp., *supra* note 37.

57. Tompkins Square Neighbors, Inc. v. Zaragoza, 68 Misc. 2d 103, 326 N.Y.S.2d 665 (New York City Civ. Ct. 1971), *modified,* 68 Misc. 2d 955, 328 N.Y.S.2d 363 (New York City Civ. Ct. 1972).

58. Joy, *supra.*

59. Joy at 12-13 *quoting* Reich, at 1245. *See also* Reich, *The New Property,* 73 YALE L.J. 733 (1964). Prof. Reich advocates the idea of entitlement as a protected right:

> The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right.

protected property interest. In determining the procedural safeguards to be imposed under a *Goldberg* balancing test, the requirements affording protection to tenants must strike a relative balance with the governmental concern in attracting private investors. The greater the burden imposed on a quasi-public landlord, the greater the likelihood that private investors would seek other investment alternatives. However, persuasive reasons exist for the provision of a full-hearing requirement. First, the deprivation is a complete termination of a governmental benefit. Second, the basis on which an eviction is adjudicated depends upon a trying of facts—readily ascertainable and suitable for the hearing format. Third, an adverse decision may cost a tenant his home and stigmatize him as a wrongdoer; without a hearing he has no recourse by which to challenge his accusers.

Various courts have dealt with the balancing dilemma in two ways. The first solution is represented by *Bonner v. Lake Park Housing Development Fund Corp.*[60] where a quasi-public landlord was required to provide only an informal opportunity for a tenant to deny or explain the charges against him. Implicit in the *Bonner* approach is the assumption that a full evidentiary hearing requirement will impose excessive social costs. Advocates of *Bonner* argue the difficulties encountered where tenants are required to testify against other tenants, and that delay in evicting a tenant might prove to be hazardous where such a tenant poses a threat to the safety and well-being of others. More significantly, they argue that a landlord is most likely unqualified to preside over an administrative tribunal, and even if he had the requisite legal background, the landlord as initial prosecutor and ultimate decision-maker violates the administrative concept of "separation of functions" rendering him unsuitable as the arbiter of tenants' rights.

The other solution, adopted by several circuits, utilizes state court eviction proceedings as a means of providing a full hearing without the imposition of the burden falling on the landlord. Summary state eviction procedures similar to those found in *Escalera* (New York) and *Caulder* (North Carolina), will not do; those courts which have adopted the state court proceedings hold, as a matter of federal law, that tenants may not be evicted without a prior proof of good cause.[61]

---

60. See note 37 *supra*. *Accord*, Tompkins Square Neighbors, Inc. v. Zaragoza, *supra* note 57.

61. In public housing cases, courts were divided as to the procedure required to satisfy due process. *Compare* Johnson v. Tamsberg, *supra* note 8 (requiring proof of good cause in a state court eviction proceeding) with Brown v. Housing Authority, 340 F. Supp. 114 (E.D. Wis. 1972) (requiring a prior administrative hearing to be administered by the housing authority). The issuance of the HUD grievance circular, see note 52 *supra*, has rendered the controversy moot; courts have interpreted the circular as requiring prior administrative hearings. Brown, *supra*; Glover v. Housing Au-

Joy follows this approach. Indeed, the fourth circuit has been instrumental in developing the factors by which a state court proceeding will be deemed to satisfy due process. Thus, in *Caulder*, under a North Carolina statute[62] which did not require good cause for eviction, the court held a prior administrative hearing constitutionally required before an eviction from public housing. In *Johnson v. Tamsburg*,[63] another public housing case, the same court held that no prior hearing was necessary where the eviction depended upon proof in state court (South Carolina) of specific facts justifying eviction. Following *Johnson*, the fourth circuit, in *Joy*, held the same South Carolina statute[64] constitutionally adequate:

> The South Carolina eviction scheme requires the landlord to prove in court his allegations, allows trial by jury. . . . That is enough.[65]

Since, under the statute, "tenants are not actually evicted until basic due process requisites are satisfied, a prior administrative hearing is not required so long as the tenant may at some stage receive a plenary judicial hearing."[66] Thus, the case was remanded to state court for a determination on the merits.[67]

Where a tenant has been evicted from a quasi-public housing project under a constitutionally inadequate eviction statute, will the courts hold the landlord responsible for the provision of a hearing, or are there any other realistic alternatives? One commentator[68] has suggested that the burden of a hearing requirement be placed directly on the FHA, rather than to rely on the landlord, or even a state court procedure. Unlike a private landlord, the FHA possesses the resources by which to develop an effective procedure. The burden of the landlord would thus be reduced to the prosecution of an eviction, the "separation of functions" problem would be eliminated, and the overall effect on private participation in the housing program would be to lessen the discouraging effects.

Conclusion

The extension of procedural due process protection to tenants in government-subsidized housing programs is significant as a judicial resolution of

---

thority, 444 F.2d 158 (5th Cir. 1971); Housing Authority v. Mosby, 53 Wis.2d 275, 192 N.W.2d 913 (1972).

62. N.C. GEN. STAT. 42-26 to 42-37 (1966, Supp. 1971).

63. 430 F.2d 1125 (4th Cir. 1970).

64. S.C. CODE ANN. 41-101 to 41-115 (1962).

65. Joy at 17.

66. *Id.*

67. See note 8 *supra*. *Accord*, Glover v. Housing Authority, 444 F.2d at 161-62, n.4; McQueen, 317 F. Supp. at 1131.

68. Note, 86 HARV. L. REV. 880, 909-10.

basic, conflicting interests. The inevitability of affording procedural protection to the beneficiaries of social policy, and the necessity of governmental reliance upon private citizens as means to achieve that policy, have produced a substantial reconciliation of interests. A quasi-public housing tenant must establish the requisite nexus between the actions of his landlord and the state in order to qualify initially for federal court protection. Whether he has a protected property interest in his residency will depend on the existence of objective rules and mutually explicit understandings. The extent of due process protection will then turn on a balancing of the relative social costs and interests involved in the extension of procedural protection.

The landlord, on the other hand, must acquiesce in the application of these legal norms. He too is a recipient of government benefits in the form of investment and tax incentives. A quasi-public landlord acting pursuant to these incentives must therefore realize that he is not excessively burdened when required only to prove his case in court.

The *Joy* approach, however, is limited to those states which have adequate eviction procedures. In their absence, courts are left, by necessity, to their own devices in formulating procedural requirements. Such an approach is unsatisfactory since solutions will invariably differ, and procedural protection will vary from state to state, raising the spectre of equal protection violations. In order to avoid piecemeal impositions of excessive burdens or minimal safeguards, the ultimate reconciliation of landlord-tenant interests will depend upon a uniform set of rules and guidelines defining the rights and duties of all parties concerned.

Barry Schwartz