

1-1-2015

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Recommended Citation

Katach, Salim (2015) "A Tenant's Procedural Due Process Right in Chronic Nuisance Ordinance Jurisdictions," *Hofstra Law Review*: Vol. 43: Iss. 3, Article 9.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol43/iss3/9>

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NOTE

A TENANT'S PROCEDURAL DUE PROCESS RIGHT IN CHRONIC NUISANCE ORDINANCE JURISDICTIONS

I. INTRODUCTION

On May 2, 2012, Lakisha Briggs, a thirty-three-year-old African American single mother, and resident of Norristown, Pennsylvania, returned to her rented home to find her ex-boyfriend, Wilbert Bennett, associating with some unknown individuals in the alleyway near her home.¹ After chasing her down the alley with a brick, Bennett followed Briggs to her home and began to beat her.² Upon receiving an anonymous call, the police arrived at the rental home, and Bennett ran into the house to hide.³ Briggs was found on the front porch of the home wearing only a bra.⁴ She did not tell the officers that Bennett had ripped her shirt off, that she was involved in an altercation,⁵ or that Bennett was in the house.⁶ After the police entered her home, they removed Bennett from the house, and both Briggs and Bennett were cited for disorderly conduct⁷ and fighting.⁸

At first, Briggs neglected to inform the police about Bennett and the altercation because she knew what might occur if the police cited her for any disorderly behavior.⁹ Despite the clear signs that she was a victim of domestic violence, the police cited Briggs anyway.¹⁰ This was Briggs's

1. Verified Second Amended Complaint ¶¶ 27, 68, *Briggs v. Borough of Norristown*, No. 2:13-cv-2191 (E.D. Pa. filed Oct. 3, 2013) [hereinafter Verified Second Amended Complaint].

2. *Id.* ¶ 69.

3. *Id.* ¶ 70.

4. *Id.* ¶ 71.

5. *Id.* ¶¶ 71-72.

6. *Id.* ¶ 72.

7. Disorderly conduct, when characterized as such by the Norristown Police Department, is included in the Norristown Chronic Nuisance Ordinance's ("CNO") definition of "disorderly behavior." BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(B) (2012).

8. Verified Second Amended Complaint, *supra* note 1, ¶ 74.

9. *Id.* ¶ 72.

10. *Id.* ¶¶ 71-72, 74.

final strike, pushing her over the three-strike nuisance threshold of Norristown's Chronic Nuisance Ordinance ("CNO").¹¹ Together with two previous incidents between Bennett and Briggs, this occurrence gave the City of Norristown the authority to begin license revocation proceedings against Briggs's landlord, Darren Sudman.¹²

On May 23, 2013, Briggs accompanied her landlord to a hearing in front of Norristown borough officials.¹³ At the hearing, the officials discussed whether Sudman's rental license should be suspended or revoked for surpassing the three-strike Norristown CNO threshold, which would thereby revoke Briggs's tenancy.¹⁴ The hearing lasted approximately thirty minutes; no official record, transcript, or minutes were kept, and no one appeared to be the designated fact finder.¹⁵ Although Briggs tried to describe the circumstances surrounding the three strikes at the hearing, she was interrupted.¹⁶ After allowing Sudman to speak briefly about the benefits of having Briggs as his tenant, the officials issued a letter decision placing Sudman's property on thirty-day probation.¹⁷ Further, the letter stated that any more violations of the Norristown CNO would result in the suspension or revocation of Sudman's rental license, thereby evicting Briggs from her home.¹⁸ Implicitly, this meant that any future calls to the police from that property would lead to Briggs' eviction.¹⁹

Norristown is one of the many cities that have adopted this type of CNO.²⁰ These ordinances have gained popularity in the more heavily

11. *Id.* ¶¶ 51-55, 58-64, 68-74 (discussing the three times police were called to Briggs' property, which were also the three strikes in violation of the CNO); BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(C)-(E).

12. BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(E) (repealed Nov. 7, 2012) (codifying a license revocation procedure upon violation of the CNO); Verified Second Amended Complaint, *supra* note 1, ¶¶ 39, 47, 51-55, 58-64, 68-74.

13. Verified Second Amended Complaint, *supra* note 1, ¶ 76.

14. NORRISTOWN, MUNICIPAL CODE § 245-3(E) (repealed Nov. 7, 2012) (providing the borough officials with the discretion to revoke a landlord's rental license revocation when the CNO is violated); Verified Second Amended Complaint, *supra* note 1, ¶¶ 75-76.

15. Verified Second Amended Complaint, *supra* note 1, ¶ 78.

16. *Id.* ¶ 80.

17. *Id.* ¶¶ 81-82, 84.

18. *Id.* ¶¶ 85-86.

19. *Id.* ¶ 86.

20. See BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-1 to -4 (2012); BEAVERTON, OR., CITY CODE ch. 5.07, §§ 5.07.005-.100 (2014); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10 (2001); MUNDELEIN, ILL., CODE OF ORDINANCES ch. 9.76, §§ 9.76.010-.070 (2000); TOWN OF PHILLIPSBURG, N.J., CODE ch. 441, §§ 441-1 to -6 (2005); PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, §§ 670.01-.07 (2007); L.A., CAL., MUNICIPAL CODE art. 2, § 12.27.1 (2009); PHX., ARIZ., MUNICIPAL CODE ch. 23, art. I, div. 2, § 23-11 (1962); SAN DIEGO, CAL., MUNICIPAL CODE ch. 1, art. 2, div. 6, §§ 12.0601-.0614 (1993); DALL. COUNTY, TEX., CODE OF ORDINANCES pt. 1, ch. 34, art. III, div. 3, §§ 34-141 to -144 (1991).

populated states.²¹ In jurisdictions that have CNOs, if police officers are contacted and report to a landlord's property more than three times in sixty days, the property is declared a chronic nuisance, and the landlord is charged the cost of the police services for additional police correspondence.²² A landlord can avoid paying these fees if she abates the nuisance.²³ Often, this means evicting the tenant.²⁴ Some CNOs expressly incentivize eviction,²⁵ while others continue to impose penalties on the landlord until she has no choice but to evict the tenant.²⁶

CNOs were created to recover the cost of excessive police services, and to encourage property owners to prevent criminal activity from occurring on their properties.²⁷ Even though the laws ultimately achieve their desired goal,²⁸ they do so at the expense of the

21. Matthew Desmond & Nicol Valdez, *Online Supplement to Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 4, 5 (2013) (finding that CNOs can be found in the more heavily populated cities like Los Angeles, California; Chicago, Illinois; Phoenix, Arizona; Philadelphia, Pennsylvania; San Diego, California; Dallas, Texas; and Detroit, Michigan).

22. See, e.g., MILWAUKEE, WIS., § 80-10-3(a-1) (stating that the chief of police can declare a property a nuisance after responding to three or more nuisance activities within a thirty-day period); *id.* § 80-10-1 (providing the chief of police with the authority to charge the owners of nuisance premises the costs associated with abating such CNO violations). The ordinances differ as to what actions constitute violations. See TOWN/VILLAGE OF EAST ROCHESTER, N.Y., CODE ch. 144, § 144-13-A(5)(a) (2009) (stating that the landlord's rental license can be revoked after three or more police responses within a twelve-month period); TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE ch. 6, pt. 6, § 6-606 (2003) (stating that a landlord is charged the police service costs after two or more police responses in a thirty-day period); PITTSBURGH, PA., § 670.02(b) (stating that the Director of Public Safety can declare a property a "Disruptive Property" after three or more on-site arrests, summonses, or citations are made within a 180-day period); SEATTLE, WASH., MUNICIPAL CODE, tit. 10, ch. 10.09, § 10.09.030-A (2009) (stating that the chief of police can declare a property a nuisance after the occurrence of three or more nuisance activities within a sixty-day period).

23. See, e.g., PITTSBURGH, PA., § 670.02(e) (pardoning a landlord from future fees as soon as as an eviction process is initiated against a tenant).

24. Memorandum from Mike Sanford, Assistant Chief, Seattle Police Dep't, to Pub. Safety and Educ. Comm. 4-5 (Feb. 9, 2011), available at http://clerk.ci.seattle.wa.us/~public/meetingrecords/2011/pse20110216_2a.pdf.

25. See, e.g., NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(F) (incentivizing the landlord to begin the eviction process so that strikes incurred during the eviction proceedings will not reflect negatively against the property); YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.06(b) (2012) (notifying the landlord that initiating the eviction process will be weighed positively by the City in determining whether to remove nuisance points against the property).

26. See, e.g., MILWAUKEE, WIS., § 80-10-6(b) (imposing fines between \$1000 and \$5000 for failure to abate the nuisance activity); BLOOMSBURG, PA., § 6-605 (imposing a fine of up to \$1000 after a landlord is convicted of owning a property where a "disorderly gathering" occurred); EAST ROCHESTER, N.Y., § 144-14 (imposing a fine of up to \$250 per CNO violation); SEATTLE, WASH., § 10.09.050 (imposing fines of up to \$500 per day until the chief of police confirms that the property is no longer a chronic nuisance property).

27. BLOOMSBURG, PA., § 6-601(A), (D), (F); MILWAUKEE, WIS., § 80-10-1.

28. See, e.g., Memorandum from Mike Sanford, *supra* note 24, at 2.

tenant's legal interests,²⁹ which are important and should not be overlooked or undermined.³⁰

As can be seen in the Briggs case, only a landlord can contest the nuisance status of her property.³¹ Flaws in CNOs do not permit a tenant who is being evicted from her residence to do the same.³² A tenant cannot contest the property's nuisance status,³³ contest any officers' citations,³⁴ or retain tenancy until she is convicted of the criminal offense.³⁵ Therefore, it is possible for the tenant to be found not guilty in the criminal case against her, and still lose her tenancy.³⁶ This is a direct breach of the tenant's Fourteenth Amendment rights.³⁷

The drafters of the Fourteenth Amendment found it essential to provide citizens with an opportunity to contest any deprivation of a liberty or property interest by the state.³⁸ The Supreme Court, when interpreting this Amendment, determined that procedural due process, at a minimum, requires notice and an opportunity to be heard.³⁹ Such an interpretation applies to each and every deprivation of a liberty or property interest.⁴⁰

29. Letter from Katherine E. Walz et al., Shriver Ctr. Dir., to Code and Regulation Comm., Rockford City Council 4-6 (Dec. 3, 2012), available at <http://povertylaw.org/sites/default/files/webfiles/Letter%20to%20Rockford%20on%20Rental%20Property%20Registration%20and%20Chronic%20Nuisance%20Ordinance.pdf> (discussing the housing rights, privacy rights, and due process rights of tenants in CNO jurisdictions).

30. See *infra* Part III.A-B.

31. See Verified Second Amended Complaint, *supra* note 1, ¶ 179 (complaining that the new and repealed CNOs do not provide the tenant with notice of the CNO violation, an opportunity to contest the chief of police's discretionary decision to characterize the incident as "disorderly behavior," or an opportunity to contest the borough's decision to enforce the ordinance against the landlord); BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-3(C)-(E) (2012) (providing only the landlord with notice and an opportunity to remedy the nuisance); PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.05(a) (2007); MILWAUKEE, WIS., §§ 80-10-2-d, -2-e, -3-c.

32. Letter from Katherine E. Walz, *supra* note 29, at 5-6 (stating that the Rockford City CNO fails to provide tenants with sufficient procedural due process in its failure to afford them "adequate notice and an opportunity to challenge the basis for the City's enforcement efforts before a neutral decision-maker").

33. See Verified Second Amended Complaint, *supra* note 1, ¶ 179.

34. See *id.*

35. See, e.g., CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.04 (2012).

36. See, e.g., *id.*

37. U.S. CONST. amend. XIV, § 1; see also Letter from Katherine E. Walz, *supra* note 29, at 5-6 (stating that the Rockford City CNO fails to provide tenants with sufficient process, considering the important housing interest at stake and potential consequences of an eviction).

38. See *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976).

39. See *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

40. See *Mullane*, 339 U.S. at 313.

Tenants in CNO jurisdictions are losing their property and liberty interests without regard for the necessary consideration of relevant factors.⁴¹ While other tenants in similar situations would receive the benefit of some sort of hearing before or after they are deprived of their interest,⁴² tenants in jurisdictions that have enacted CNOs are left with their tongues tied⁴³ and the negative stigma of “evicted” on their credit reports.⁴⁴ On their faces, these ordinances impinge upon a tenant’s constitutional right to challenge a taking of the tenant’s legal interest.⁴⁵

Part II of this Note will begin by introducing the history of CNOs and their role in overall public nuisance containment.⁴⁶ Next, this Note will look at sample CNOs, and will discuss some of the apparent differences between current ordinance structures.⁴⁷ Part III of this Note will introduce the *Mathews v. Eldridge*⁴⁸ factors that must be weighed when determining the amount of process a person must receive before her legal interest can be usurped by a state.⁴⁹ After introducing the *Mathews* factors, this Note will weigh a tenant’s interest in additional procedural safeguards against the municipality’s burden in providing these additional safeguards.⁵⁰ Finally, after concluding that additional procedural safeguards for tenants would not be too heavy a burden on municipalities, Part IV of this Note will introduce a reformed CNO, intended to provide tenants with a constitutionally sufficient amount of process, while retaining the initial intent of the CNO.⁵¹

41. See *infra* Part III.A–B.

42. See, e.g., *Colvin v. Hous. Auth.*, 71 F.3d 864, 867 (11th Cir. 1996) (per curiam).

43. See *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, ACLU, <https://www.aclu.org/womens-rights/i-am-not-nuisance-local-ordinances-punish-victims-crime> (last visited Apr. 12, 2015). It has been noted that:

Because these ordinances typically do not require that residents be told about a warning or citation, impacted people often have no opportunity to show that they were actually victims of the “nuisance conduct” and may not even know that a nuisance ordinance is at the root of their housing situation.

Id.

44. Bethy Hardeman, *How Does an Eviction Affect My Credit?*, CREDIT KARMA (Mar. 28, 2013), <https://blog.creditkarma.com/credit-101/credit-report/how-does-an-eviction-affect-my-credit>.

45. See *infra* Part II.B.

46. See *infra* Part II.A.

47. See *infra* Part II.B.

48. 424 U.S. 319 (1976).

49. See *infra* Part III.A.

50. See *infra* Part III.B.

51. See *infra* Part IV.

II. CHRONIC NUISANCE ORDINANCES

In order to understand how CNOs deny a tenant her procedural due process right, this Part will provide a brief history of their origin.⁵² CNOs are the result of a blend between the common law public nuisance doctrine and the power of the municipality to collect the cost of public services from private citizens.⁵³ Subpart A will explain the history of CNOs, from their inception in common law to their current status as civil trials against tenants who are denied their due process constitutional rights.⁵⁴ Subpart B will identify various CNOs and will discuss some of the differences between them.⁵⁵

A. History of Chronic Nuisance Ordinances

Public nuisance laws, which originated from the common law,⁵⁶ were used by the representatives of state governments to prosecute actions against individuals who unreasonably interfered with a “right common to the general public.”⁵⁷ The modern laws derive from the common law doctrine of “nuisance.”⁵⁸ The difficulty with the nuisance doctrine is that it is entirely undefined and complex.⁵⁹ It has been described as “the great grab bag, the dust bin, of the law,”⁶⁰ because nearly any interference can be described as a nuisance.⁶¹ Currently, it is used by the courts as a catch-all term to describe a defendant’s interference with a plaintiff’s interest.⁶² The doctrine has been used to describe a range of issues from alarming advertisements to a cockroach found in baked goods.⁶³

The nuisance doctrine originated in English law, and was originally used to describe a defendant’s interference with the plaintiff’s free use of her own land.⁶⁴ At the time, only a private individual whose

52. See *infra* Part II.A.

53. Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1184 (2008).

54. See *infra* Part II.A.

55. See *infra* Part II.B.

56. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 617 (5th ed. 1984).

57. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 716-17 (1992).

58. KEETON ET AL., *supra* note 56, at 617.

59. See *id.* at 616. W. Page Keeton and William Prosser have gone as far as to say, “it is incapable of any exact or comprehensive definition.” *Id.*

60. Glesner, *supra* note 57, at 716.

61. See 58 AM. JUR. 2D NUISANCES § 1 (2012).

62. See KEETON ET AL., *supra* note 56, at 617.

63. *Id.* at 616.

64. *Id.* at 617.

interests were usurped was able to sue for the loss of her right of way or damages.⁶⁵ This later became known as the doctrine of private nuisance.⁶⁶

During the thirteenth and fourteenth centuries, the nuisance doctrine was expanded to those actions that interfered with the King's real property rights, usually a public highway or watercourse.⁶⁷ There was enough of a resemblance between obstructing a private person's use of her own property and obstructing the public's use of a public highway for the latter to also constitute a nuisance.⁶⁸ These instances were later distinguished from private nuisances, and were reclassified as the doctrine of public nuisance.⁶⁹ The difference between the two doctrines was, and still is, the entity that is injured and the entity that is given the right to sue for the injury.⁷⁰ In the case of public nuisance, the remedy is reserved for the state.⁷¹ At common law, the venue for obtaining this remedy was criminal court, since "a public nuisance was always a crime, and punishable as such."⁷²

Since the public nuisance doctrine was broad, and a violation would affect a community of people, it encompassed a vast number of interferences.⁷³ Throughout the years, more and more interferences were declared a public nuisance, thereby expanding its definition.⁷⁴ Ultimately, the definition became "conduct [that] involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience."⁷⁵ Today, all jurisdictions have codified the common law doctrine of public nuisance into broad criminal statutes.⁷⁶

Originally, these laws were used to control prostitution and the sale of alcohol.⁷⁷ Today, they are used to inhibit the use of property for a variety of illegal purposes.⁷⁸ Since these laws are written so broadly, in

65. *Id.*; Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 792 (2003).

66. KEETON ET AL., *supra* note 56, at 617.

67. Gifford, *supra* note 65, at 793.

68. KEETON ET AL., *supra* note 56, at 617.

69. *Id.*

70. *Id.* at 618.

71. *Id.*

72. *Id.* at 643, 645.

73. *Id.* at 643.

74. *Id.* at 643-45.

75. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (2000).

76. KEETON ET AL., *supra* note 56, at 646.

77. Glesner, *supra* note 57, at 717.

78. *See id.*; *see also* Joseph P. Fried, *City Uses Its Anti-Nuisance Law to Try to Close Chop Shops*, N.Y. TIMES, May 6, 1984, at 41 (noting the use of nuisance law to "shut down auto-repair and salvage businesses that double as chop shops in which stolen cars are dismantled so their parts

the leasing context, they can affect the tenant who causes the nuisance, and the landlord who fails to stop the tenant from doing so.⁷⁹ For example, in Rhode Island, landlords or tenants can be held responsible for nuisance activity if they knowingly allowed such activity to occur within a tenement while it was under their control.⁸⁰ Penalties for violating the statute can range as high as a \$1000 fine or a sixty-day prison sentence for either the tenant or the landlord.⁸¹ In New York, the tenant or landlord can be guilty of a Class-B misdemeanor for “knowingly conduct[ing] or maintain[ing] any premises . . . where persons gather for purposes of engaging in unlawful conduct.”⁸² The federal “crack house statute”⁸³ has the same effect on tenants and landlords alike.⁸⁴ It criminalizes anyone who “knowingly open[s], lease[s], rent[s], use[s] or maintain[s] any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.”⁸⁵ CNOs, similar to their public nuisance statute counterparts, were created to prevent such nuisances, only without the hassle of waiting for a judicial nuisance determination.⁸⁶

A CNO derives its authority from a state’s police powers.⁸⁷ However, ordinances created under the exercise of state police power—zoning ordinances, for example—“must be exercised within constitutional limits.”⁸⁸ Ordinances are constitutional as long as they provide for adequate procedure and are reasonable.⁸⁹ Therefore, “at a minimum, an ordinance must provide for notice and an opportunity to be heard.”⁹⁰ In the following Parts, this Note will discuss the shortcomings

can be resold”); *Judge in Los Angeles Orders Street Gangs to Erase Graffiti*, N.Y. TIMES, July 24, 1982, at 28 (noting the use of nuisance law to issue a Temporary Restraining Order compelling eighty gang members to remove graffiti from walls and store fronts); *Now, Cities Hit Drug Suspects Where They Live*, N.Y. TIMES, Jan. 25, 1991, at B16 (noting the use of nuisance law to close down a hotel used by drug dealers to distribute cocaine).

79. See, e.g., N.Y. PENAL LAW § 240.45(2) (McKinney 2008); R.I. GEN. LAWS § 11-30-7 (2002); S.C. CODE ANN. § 15-43-10 (1977); TENN. CODE ANN. § 29-3-101(b) (1980); UTAH CODE ANN. § 47-1-1 (1989).

80. GEN. LAWS § 11-30-7.

81. *Id.*

82. PENAL § 240.45(2).

83. Fais, *supra* note 53, at 1185.

84. 21 U.S.C. § 856(a)(1) (2000 & Supp. 2005).

85. *Id.*

86. See, e.g., CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.01(a)–(b) (2012); LOS ANGELES, CA., MUNICIPAL CODE § 12.27.1(A).

87. *Pac. Gas & Elec. Co. v. Police Court of Sacramento*, 251 U.S. 22, 25 (1919).

88. *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977).

89. Alex Cameron, Comment, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 ST. MARY’S L.J. 619, 629 (2012).

90. *Id.*; see *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

of CNOs in meeting such a standard, and why they are, thus, unconstitutional.⁹¹

B. Examples of Chronic Nuisance Ordinances

CNOs were created to recover the cost of excessive police services, and to force landlords to take action to stop nuisances from reoccurring on their property.⁹² The majority of CNOs work in the same way. After a tenant or property owner calls the police numerous times, under any circumstances, an official—usually the chief of police in the municipality or county—will notify the property owner that further phone calls will result in either a fine for the owner or an eviction for the tenant.⁹³ However, CNOs vary, and some contain exceptions or characteristics that others lack.⁹⁴

Some CNOs require a conviction before the citation can be tallied to the ordinance's threshold.⁹⁵ Other CNOs either do not wait for the citation to turn into a conviction,⁹⁶ or do not require a citation or arrest to be made at all.⁹⁷ With regard to domestic violence disputes, some CNOs exempt such violations,⁹⁸ while others tally every instance of police contact.⁹⁹

CNOs also differ with regard to penalization.¹⁰⁰ In Pittsburgh, for example, the local CNO offers incentives to landlords for initiating the eviction process against the tenant.¹⁰¹ Another jurisdiction bars the

91. See *infra* Parts III–IV.

92. See, e.g., BEAVERTON, OR., CITY CODE ch. 5.07, §§ 5.07.010(C)–(D) (1998); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10-1 (2001); TOWN OF PHILLIPSBURG, N.J., CODE ch. 441, § 441-1(A) (2005); PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.01 (2007).

93. See, e.g., BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-3(B)–(E) (2012). Other CNOs expressly list which actions will be counted as a violation under the ordinance. See, e.g., BEAVERTON, OR., § 5.07.020(B); MILWAUKEE, WIS., § 80-10-2-c; PITTSBURGH, PA., § 670.02(a).

94. See *infra* notes 95–116 and accompanying text.

95. See, e.g., WILKES-BARRE, PA., CODE OF ORDINANCES ch. 7, art. VII, § 7-219 (2005); see also TOWN/VILLAGE OF EAST ROCHESTER, N.Y., CODE ch. 144, § 144-13(A)(5)(a) (2009) (stating that ordinance is considered violated when “at least one of [the three] public nuisance violations hav[e] resulted in a conviction by a court of competent jurisdiction”).

96. See, e.g., CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.04 (2012).

97. See, e.g., TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE, ch. 6, pt. 6, § 6-606 (2003).

98. See, e.g., TOWN OF PHILLIPSBURG, N.J., CODE ch. 441, § 441-1(B) (2005).

99. See, e.g., BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(B)(1)(b)(5) (2012).

100. See *infra* notes 101–05 and accompanying text.

101. See CITY OF PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.02(e) (2007).

landlord from renting out the property to an alternative tenant.¹⁰² While some statutes charge the landlord a hefty fine when the CNO is violated,¹⁰³ others threaten to entirely revoke a landlord's rental license,¹⁰⁴ or even sentence her to prison.¹⁰⁵

CNOs also differ with regard to the number of police calls required before a violation of the ordinance occurs.¹⁰⁶ While most CNOs expressly state the number of calls one needs to make to violate the ordinance,¹⁰⁷ some do not set a threshold, leaving the landlord and tenant wondering when the last strike will occur.¹⁰⁸ One CNO, the Nuisance Abatement Ordinance in York, Pennsylvania, determines strikes differently than most other nuisance ordinances.¹⁰⁹ According to York's CNO, every time the police are contacted regarding certain listed crimes, the property is assigned a number of points.¹¹⁰ The points are accumulated against the property until the total surpasses the CNO's point threshold.¹¹¹ However, points are removed one year after the occurrence of each violation.¹¹²

The final common difference worth noting is the detail with which offenses are detailed in the statutes, or lack thereof.¹¹³ Some CNOs lay out in great detail all of the offenses that, when committed, violate the ordinance.¹¹⁴ Others continue to use broad terminology to encompass

102. See EMILY WERTH, SHRIVER CTR., THE COST OF BEING "CRIME FREE:" LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 4 (2013), available at <http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf>.

103. See, e.g., MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10-3-e-5 (2001) (imposing fines as large as \$5000 for the landlord's failure to abate a nuisance).

104. TOWN/VILLAGE OF EAST ROCHESTER, N.Y., CODE ch. 144, § 144-13(A)(5) (2009). Before the initiation of Briggs's lawsuit, the Borough of Norristown ("Borough" or "Norristown") would revoke the landlord's rental license when the ordinance was violated three times. See BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(E) (repealed Nov. 7, 2012). After the lawsuit was initiated, the municipality amended the ordinance by removing the revocation provision, and simply imposing a hefty fine on the landlord in the event of three violations. See BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(E) (2012).

105. See CITY OF WILKES-BARRE, PA., CODE OF ORDINANCES ch. 7, art. VII, §§ 7-240(b)(1)-(3) (2005); CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.99(c) (2012).

106. See *infra* notes 107-12 and accompanying text.

107. See, e.g., MILWAUKEE, WIS., § 80-10-3-a-1; TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE ch. 6, pt. 6, § 6-607 (2003).

108. See, e.g., SAN DIEGO, CAL., MUNICIPAL CODE ch. 1, art. 2, div. 6, § 12.0602 (1993).

109. CITY OF YORK, PA., § 1751.02.

110. *Id.*

111. *Id.*

112. *Id.* § 1751.09.

113. See *infra* notes 114-16 and accompanying text.

114. See, e.g., BEAVERTON, OR., CITY CODE ch. 5.07, § 5.07.020(B) (1998); PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.02(a) (2007); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10-2 (2001).

any action a municipality would later decide to term a “public disturbance,” similar to their common law cousin.¹¹⁵ Overall, municipalities and police departments are extremely partial to such ordinances because they improve the quality of life for tenants, relieve some of the costs of police services, and encourage landlords to be more active with the conduct that occurs on their property.¹¹⁶

1. Borough of Norristown, Pennsylvania

In the Borough of Norristown (“Borough” or “Norristown”), the landlord, as the holder of the rental license, is responsible for assuring that her tenants, their family members, and their guests, do not engage in “disorderly behavior” in the residence.¹¹⁷ As seen in the *Briggs* case, the Borough may threaten to revoke a landlord’s rental license in the event that the ordinance is violated.¹¹⁸ Although the Borough has amended its ordinance to remove the revocation penalty, the amended version still fails to clarify the definition of “disorderly behavior.”¹¹⁹ Because the Norristown CNO still does not define the term adequately or expressly list the crimes that qualify,¹²⁰ Norristown landlords and tenants continue to be dumbfounded as to what conduct constitutes “disorderly behavior.”¹²¹ This confusion causes tenants and landlords to continuously question whether a police call will count as a strike.¹²² This is especially problematic because, in addition to failing to receive notice before a tenant is evicted, the tenant cannot predict when her conduct is “disorderly,” and cannot defend a citation that she has no notice of in eviction proceedings.¹²³ Additionally, like many other CNOs, this CNO calls for the chief of police’s sole decision as to whether an act is considered “disorderly behavior.”¹²⁴ This is problematic because the unreviewable decision of the chief of police can be entirely subjective

115. See TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE ch. 6, pt. 6, § 6-602 (2003) (penalizing any “conduct which otherwise disturbs, annoys, injures or endangers the health, safety or welfare of the residents of the Town of Bloomsburg”).

116. See Fais, *supra* note 53, at 1190.

117. See BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(B) (2012).

118. See BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(E) (repealed Nov. 7, 2012); Verified Second Amended Complaint, *supra* note 1, ¶ 76.

119. See NORRISTOWN, PA., §§ 245-3(B)(1)(a)–(b); Verified Second Amended Complaint, *supra* note 1, ¶ 209.

120. NORRISTOWN, PA., § 245-3(B)(1); Plaintiff’s Response in Opposition to Defendant’s Motion to Dismiss at 55-56, *Briggs v. Borough of Norristown*, No. 2:13-cv-2191 (E.D. Pa. June 3, 2013) [hereinafter Motion to Dismiss].

121. See Motion to Dismiss, *supra* note 120, at 56.

122. See *supra* note 43 and accompanying text.

123. See NORRISTOWN, PA., §§ 245-3(B)(1), (C)–(E); Verified Second Amended Complaint, *supra* note 1, ¶¶ 209-16.

124. NORRISTOWN, PA., § 245-3(C).

and unjustified.¹²⁵ This may cause innocent citizens to lose their tenancy, perhaps, because the chief of police was not too fond of them in the first place.¹²⁶

After the chief of police receives a notification of “disorderly behavior” committed on, or in relation to, the property, she is only required to provide the licensee—the landlord—with notice of the ordinance strike.¹²⁷ When the CNO is violated a second time, the chief of police must direct the landlord to submit a written report “of all action taken by the licensee since the first violation notice and actions the licensee intends to take to prevent further disorderly behavior” within ten days.¹²⁸ The licensee’s failure to submit the required report can lead to a fine of up to \$1000, if convicted by a competent court.¹²⁹ This provides an incentive for the landlord to evict a disruptive tenant in order to avoid hefty fines, no matter how much the tenant begs to remain in their homes.¹³⁰ One should also note that only the landlord receives notice and an opportunity to remedy the situation.¹³¹ The tenant, on the other hand, will not know that the chief of police considered any conduct “disorderly behavior” until later informed by the landlord, or until an eviction proceeding is initiated.¹³² Additionally, the municipality incentivizes eviction of a disruptive tenant by providing the landlord with immunity against future statutory violations by the tenant if the landlord “diligently pursue[s]” the eviction process.¹³³

Furthermore, the Norristown CNO encourages landlords to act in a manner that many would consider illegal or immoral.¹³⁴ For example, the CNO asks landlords: (1) to include terms within their leases that would allow the landlord to evict a tenant in the event of a violation of the

125. *Id.*; see *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (striking down a state statute against gang member loitering because it “affords too much discretion to the police”).

126. See Verified Second Amended Complaint, *supra* note 1, ¶ 211 (complaining that the chief of police has unlimited discretion to determine what conduct violated the CNO and, thus, could be using said discretion arbitrarily and discriminatorily).

127. NORRISTOWN, PA., § 245-3(C).

128. *Id.* § 245-3(D).

129. *Id.* §§ 245-3(D), (K)(3).

130. Fais, *supra* note 53, at 1200.

131. NORRISTOWN, PA. § 245-3(C)–(E) (stating that the licensee, namely the landlord, is the only person with the right to receive notice of the strike, and an opportunity to remedy the nuisance from future violations).

132. *Id.*; Verified Second Amended Complaint, *supra* note 1, ¶¶ 64–65.

133. NORRISTOWN, PA., § 245-3(F).

134. *Id.* § 245-3(J) (encouraging landlords to conduct criminal background checks on their prospective tenants because they could be a “nuisance”); Letter from Katherine E. Walz, *supra* note 29, at 5 (noting that the rejection of a tenant’s application because they have a criminal record for violation of a CNO will have a “disparate racial and ethnic impact because African Americans and Latinos have disproportionately more contact with the criminal justice system . . . when compared to the general population”).

CNO; and (2) to conduct background checks on prospective tenants before agreeing to lease the property to them.¹³⁵ Another ordinance demands that the landlord use a “crime-free lease” with her tenants.¹³⁶ This is an agreement that

makes criminal (and sometimes other) activity by tenants, their household members, their guests, and other specified third parties a violation of the lease that can be the basis for an eviction. . . . [Its] provisions might address (among other things): the sort of criminal or other conduct that violates the lease; where criminal or other conduct must occur in order to violate the lease; the responsibility of the tenant for conduct of third parties, regardless of the tenant’s knowledge of or ability to control that conduct; and/or the standard for proving that conduct violating the lease has occurred.¹³⁷

With a broad statutory interpretation,¹³⁸ the chief of police’s sole decision-making discretion,¹³⁹ and a limited amount of procedural safeguards,¹⁴⁰ the municipality is able to “pull the wool over the tenant’s eyes.”¹⁴¹ Tenants, like Briggs, are left to decide whether to call the police and exhaust a potential strike,¹⁴² or to handle the nuisance on their own.¹⁴³ The Norristown CNO does not provide the tenant with an opportunity to contest the officer’s determination, receive notice of the shortcomings, or assist in the prevention of future violations.¹⁴⁴

2. Seattle, Washington

In 2009, Seattle, Washington enacted its own CNO.¹⁴⁵ Although Seattle’s CNO provides tenants with notice after “nuisance activity” is committed on the property,¹⁴⁶ it has a few peculiarities that allow the municipality to take control of the problem.¹⁴⁷ After the chief of police declares the property a “Chronic Nuisance Property,” and the landlord or tenant fails to respond to the notification of the violations, “the Chief of

135. NORRISTOWN, PA., §§ 245-3(I)–(J).

136. See Werth, *supra* note 102, at 3.

137. *Id.*

138. NORRISTOWN, PA., § 245-3(B)(1)(b) (stating that any activity that could be characterized as disorderly in nature can be considered a strike).

139. See *id.* § 245-3(C).

140. See *id.* §§ 245-3(C)–(E) (proscribing procedural due process rights to the licensee only).

141. See Verified Second Amended Complaint, *supra* note 1, ¶¶ 175-80 (noting that Briggs’ legal interests are being usurped without providing her with sufficient procedural due process).

142. See *id.* ¶ 139.

143. See *id.* ¶¶ 66-67.

144. See NORRISTOWN, PA., §§ 245-3(C)–(E).

145. SEATTLE, WASH., MUNICIPAL CODE tit. 10, ch. 10.09, §§ 10.09.010–.090 (2009).

146. See *id.* §§ 10.09.010(8), .030(A).

147. See *id.* § 10.09.060.

Police may refer the matter to the City Attorney for initiation proceedings.”¹⁴⁸ The City Attorney can then “initiate an action in any court of competent jurisdiction to abate a chronic nuisance property.”¹⁴⁹ This action would result in the municipality directly evicting the tenant, as opposed to allowing the landlord and the tenant to mediate the dispute on their own.¹⁵⁰ If the landlord fails to remedy the nuisance on her own, she could face a civil penalty.¹⁵¹ If the low base penalty does not provide the landlord with an incentive to evict the tenant, larger penalties may apply, which certainly should provide encouragement.¹⁵² The ordinance also goes as far as expressly stating which evidence is admissible in court proceedings,¹⁵³ and what remedies a court may utilize,¹⁵⁴ thereby potentially bypassing the court’s typical rules of evidence.¹⁵⁵

Additionally, Seattle’s CNO contains a unique enforcement provision.¹⁵⁶ It states that in the event an innocent tenant is evicted due to the nuisance activity of her roommate, she will receive \$3300 in relocation funds.¹⁵⁷ This provision is problematic in many ways.¹⁵⁸ First, it assumes that \$3300 in funds would suffice for a complete relocation.¹⁵⁹ Second, it assumes that the innocent roommate can find living quarters elsewhere either at a rent less than or equal to her rent.¹⁶⁰ Finally, it assumes that the innocent tenant has no personal ties to the property she is currently living in and would be able to maintain her lifestyle in her new home.¹⁶¹ One can imagine a hypothetical where an innocent roommate has lived in a certain area because of communal ties.¹⁶² Forcing this person to relocate could cause her undue hardship because of lack of funding or availability of housing.¹⁶³ Additionally, it is possible that she would have to leave her job due to a long commute to

148. *See id.* § 10.09.030(D).

149. *See id.* § 10.09.060.

150. *See id.* Once the City Attorney gets involved, coming to a settlement agreement becomes increasingly more difficult. *See id.*

151. *See id.* § 10.09.080(B).

152. *See id.* §§ 10.09.050(A), .080(B) (stating the largest penalty that can be incurred is \$25,000).

153. *See id.* § 10.09.070.

154. *See id.* §§ 10.09.080–.090.

155. *See id.*

156. *See id.* § 10.09.085(A).

157. *See id.*

158. *See infra* notes 159–65 and accompanying text.

159. SEATTLE, WASH., § 10.09.085(A).

160. *Id.*; Erik Eckholm, *Victims’ Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES, Aug. 17, 2013, at A1.

161. *See* Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Procedures*, 23 HARV. C.R.-C.L. L. REV. 557, 564–65 (1988).

162. *See id.*

163. *See id.*

and from work, merely because her nuisance-prone roommate could not refrain from being disruptive.¹⁶⁴ In the direst circumstances, an innocent roommate could even end up homeless.¹⁶⁵

In Seattle, a memorandum was issued from the Assistant to the Chief of Police to the Public Safety and Education Committee, discussing the overall effect of the city's CNO in 2010.¹⁶⁶ Aside from listing all of the properties that are currently on nuisance "watch," or that will be prospectively considered a nuisance property,¹⁶⁷ the document also describes many of the issues that the city has with its CNO.¹⁶⁸ One issue is that the financial penalties that are imposed on the landlords are inadequate,¹⁶⁹ because many of the landlords are poverty stricken and do not have the means to resolve the nuisance activities.¹⁷⁰ Thus, many "property owner[s] ha[ve] little incentive to resolve the nuisance activities to avoid a fine if they are already in financial trouble."¹⁷¹ These landlords may simply continue holding on to the property until they are either forced to sell it, or vacate the home by order of the court.¹⁷² Another issue with Seattle's CNO is that it fails to notify potential buyers of the cited property about pending violations.¹⁷³ Since the ordinance leaves the landlord in charge, as opposed to placing a lien on the property,¹⁷⁴ the landlord can be considered to have remediated the nuisance by simply selling the property.¹⁷⁵ The report also indicated that a large number of landlords have simply evicted their tenants as soon as they receive notice of a citation.¹⁷⁶ This evinces that some ordinances require significant revision to be more effective and constitutional.¹⁷⁷

164. *See id.*

165. *See id.*

166. *See* Memorandum from Mike Sanford, *supra* note 24, at 1.

167. *See id.* at 3.

168. *See id.* at 4-5.

169. *See id.* at 5.

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.* This issue has been resolved under the York, Pennsylvania, ordinance by causing violations of the CNO to act as an encumbrance on the property. *See* CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.10 (2012).

176. *See* Memorandum from Mike Sanford, *supra* note 24, at 4.

177. *See id.* at 4-5; Letter from Katherine E. Walz, *supra* note 29, at 5-6 (listing a few statutory modifications that could be added to Rockford City's CNO to make it procedurally sound).

C. *Validity of Ordinances*

Although a municipality retains broad discretion in deciding what conduct constitutes a public nuisance—broadly defined as any action that is “detrimental to the health, morals, peace or general welfare of its citizens”—its regulations are still restricted by the U.S. Constitution.¹⁷⁸ Despite the municipality’s broad discretion, its ordinances must still be free from unreasonable, arbitrary, or capricious governmental action.¹⁷⁹ Therefore, when a municipality creates an ordinance that may terminate a preexisting activity, “process requirements of notice and opportunity for hearing must be satisfied.”¹⁸⁰ On their faces, many CNOs fail to provide tenants with notice and an opportunity to be heard¹⁸¹—indicating they are invalid as a matter of constitutional law.¹⁸² However, to determine whether a court will declare a certain CNO unconstitutional, we must analyze the ordinance using the applicable balancing test.¹⁸³

III. *MATHEWS V. ELDRIDGE* BALANCING WEIGHS IN FAVOR OF ADDITIONAL PROCEDURAL DUE PROCESS SAFEGUARDS FOR TENANTS IN CHRONIC NUISANCE ORDINANCE JURISDICTIONS

The U.S. Supreme Court has said: “When protected interests are implicated, the right to some kind of prior hearing is paramount.”¹⁸⁴ In *Fuentes v. Shevin*,¹⁸⁵ the Supreme Court stated that “[a]ny significant taking of property by the State is within the purview of the Due Process Clause.”¹⁸⁶ Two years earlier, the Court decided *Goldberg v. Kelly*.¹⁸⁷ In *Goldberg*, the Court addressed the issue of “whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.”¹⁸⁸ The Court

178. L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L.J. 355, 360-61 (1994).

179. *Id.*

180. *Id.*

181. *See, e.g.*, BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-3(C)–(E) (2012).

182. *Id.* (providing only the licensee with notice and an opportunity to be heard); Walker & Cottingham, *supra* note 178, at 360 (stating that notice and an opportunity for a hearing are required in order to satisfy due process); Letter from Katherine E. Walz, *supra* note 29, at 5-6.

183. *See, e.g.*, *Connecticut v. Doe*, 501 U.S. 1, 11 (1991); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26-27 (1981).

184. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

185. 407 U.S. 67 (1972).

186. *Id.* at 86.

187. 397 U.S. 254 (1970).

188. *Id.* at 255.

ultimately concluded that a person losing her public assistance rights is entitled to a pre-termination hearing because of her “brutal need”¹⁸⁹ for the funds.¹⁹⁰

The decision is better known for the detailed safeguards the Court set out in dicta rather than its holding.¹⁹¹ The Court stated that, in the event a person has the “brutal need” for the object right being usurped, the following procedural safeguards must be included in legislation to satisfy the requirements of the Fourteenth Amendment: a right to notice; an opportunity to be heard; a right to confront your accuser; a right to retain counsel; a right to an impartial judge; and a right to an opinion as to the court’s final decision.¹⁹² Although the Court set a high threshold for procedural due process, it failed to deliver a test for courts to apply when determining whether a person is entitled to these procedural rights.¹⁹³ Five years later, in *Mathews v. Eldridge*, the Court created a much-needed procedural due process test, which helped courts determine the minimum safeguards required when a citizen is being deprived of liberty or property.¹⁹⁴

Mathews has been used by many judges and legal scholars to determine the span of an individual’s due process rights in situations where a federal or state government is trying to deprive the individual of a legal interest.¹⁹⁵ In *Mathews*, the court prescribed three factors that should be weighed to determine the amount of process that a sovereign must provide to a citizen.¹⁹⁶ The court listed the factors as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional . . . procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional . . . procedural requirement would entail.¹⁹⁷

189. *Id.* at 261, 264 (applying the “brutal need” terminology to welfare recipients because welfare provides them with the means to “obtain essential food, clothing, housing, and medical care . . . termination of [such] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits”).

190. *Id.* at 261.

191. *Id.* at 267-71.

192. *Id.*

193. *Fuentes v. Shevin*, 407 U.S. 67, 101-02 (1972).

194. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

195. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *Connecticut v. Doeher*, 501 U.S. 1, 11 (1991); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981).

196. *Mathews*, 424 U.S. at 334-35.

197. *Id.* at 335.

In the CNO context, if the three factors, when considered in conjunction, weigh in favor of additional procedural safeguards, then a municipality's ordinance is unconstitutional, and the municipality is obligated to add safeguards to its codified ordinance.¹⁹⁸ When weighing a tenant's rights against the sovereign's rights, it is immediately apparent that CNOs are usurping a tenant's property and liberty rights without providing her with the necessary procedural safeguards.¹⁹⁹ The remaining Subparts of Part III will discuss the three *Mathews* factors, and provide some information about the case that established the balancing test.²⁰⁰

A. Tenants Are at Risk of Losing Liberty and Property Interests

The first factor of the *Mathews* test asks what type of interest is being usurped by the municipality's activity.²⁰¹ A tenant who does not receive notice or an opportunity to be heard may face unjust eviction, thereby putting her tenancy and her liberty at risk.²⁰² These interests constitute liberty and property interests that must be protected through procedural safeguards.²⁰³

1. Liberty Interest

The Court has determined that the liberty interest discussed in the Fourteenth Amendment is broad.²⁰⁴ Given the Court's broad definition, it is not difficult to see how tenants have a liberty interest in completing their contractual duties with their landlords.²⁰⁵ A right to liberty is not only the right to be free from "bodily restraint,"²⁰⁶ but also includes "the right of the citizen . . . to use [his faculties] in all lawful ways, to live and work where she will; to earn her livelihood by any lawful calling; [and] to pursue any lawful trade or vocation."²⁰⁷ All laws that prohibit a person

198. *See id.*

199. *See infra* Part III.B.

200. *See infra* Part III.

201. *See Mathews*, 424 U.S. at 335.

202. *See Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982); *Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

203. *See infra* Part III.A.1-2.

204. *See Roth*, 408 U.S. at 572.

205. *See id.* (defining "liberty" to include freedom from bodily restraints, and the the rights to contract, to engage in any of the common occupations of life, to acquire useful knowledge, and to worship God). Such a broad definition must include a tenant's right to contract and satisfy a contractual duty with her landlord over her tenancy. *See id.*

206. *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

207. Scherer, *supra* note 161, at 567 (internal quotations marks omitted) (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

from acting on these rights are “infringements upon his fundamental rights of liberty, which are under constitutional protection.”²⁰⁸

A very possible consequence of eviction—due to a violation of a CNO—is likely to be homelessness.²⁰⁹ The homeless are “potentially subject to the loss of their physical liberty through incarceration and institutionalization.”²¹⁰ Because they are helpless, these civilians are exposed to conditions that severely prohibit their ability to enjoy their “fundamental rights of liberty.”²¹¹ They undergo severe emotional and psychological trauma, and can also be exposed to family separation, loss of parental rights, and loss of reputation or esteem.²¹²

2. Property Interest

Many courts have recognized that a person's tenancy in land is a protected property interest.²¹³ The U.S. Supreme Court has stated that “[t]he right of a tenant to continued occupancy of his home is a traditionally recognized property right.”²¹⁴ In *Lindsey v. Normet*,²¹⁵ for example, the Court assumed that a periodic, month-to-month tenancy is a property interest meriting Fourteenth Amendment protections.²¹⁶ In *Greene v. Lindsey*,²¹⁷ the Court recognized that tenants “[had] been deprived of a significant interest in property: indeed, of the right to continued residence in their homes.”²¹⁸ In *Almota Farmers Elevator & Warehouse Co. v. United States*,²¹⁹ the Court held that lease renewals are interests that must be accounted for in condemnation proceedings.²²⁰ The protections that states afford tenants pursuant to their leases further indicates that a tenancy is a property interest.²²¹ After signing a lease, tenants are entitled to a right of possession,²²² a covenant of quiet

208. *Id.*

209. *See id.* at 568.

210. *Id.* at 567.

211. *Id.* (internal quotation marks omitted).

212. *See* Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J. L. & SOC. PROBS. 527, 546 (1991); Scherer, *supra* note 161, at 569.

213. *See, e.g.,* *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982).

214. Scherer, *supra* note 161, at 564; *see also* ROGER A. CUNNINGHAM ET AL., LAW OF PROPERTY § 6.11 (1984) (describing a tenant's property interest as “an estate in land in the strictest sense”).

215. 405 U.S. 56 (1972).

216. *See id.* at 72, 74.

217. 456 U.S. 444 (1982).

218. *Id.* at 451.

219. 409 U.S. 470 (1973).

220. *Id.* at 473-74.

221. *See* CUNNINGHAM ET AL., *supra* note 214, §§ 6.21–22, 6.30, 6.39.

222. *See id.* §§ 6.21–22.

enjoyment,²²³ an implied warranty of habitability,²²⁴ and notice requirements in certain situations.²²⁵

One legal scholar suggested that one's tenancy interest deserves additional constitutional protection when she is a member of an impoverished class.²²⁶ Another scholar noted: "While each tenant has a strong interest in maintaining her current residence, poverty magnifies the importance of protecting one's property from seizure by legal process."²²⁷ Therefore, "as the lower income housing market continues to shrink, there will be a greater need to safeguard the property interests of those currently occupying dwellings."²²⁸

Court decisions and legal articles discussing the various interests of the tenant in her tenancy²²⁹ make it clear that there is a great interest at risk when a municipality attempts to take the tenancy away without the necessary procedural safeguards.²³⁰ For some, this deprivation could lead to homelessness,²³¹ emotional turmoil,²³² and a broken family.²³³ Therefore, regardless of whether it is a property interest or a liberty interest, one thing is clear: tenancy is a right that cannot be usurped without some form of procedural protection.²³⁴

B. Tenants Under the Threat of Eviction Will Suffer Great Damage in the Event that a Decision Is Erroneously Made Against Them

The second factor of the *Mathews* test asks what the risk of erroneous deprivation is.²³⁵ What would be the consequences of a wrongful decision in favor of the municipality in eviction proceedings, and how difficult would it be to reverse such consequences?²³⁶ Since a tenant has no right to contest the property's declaration as a nuisance or a strike upon its receipt,²³⁷ she may risk losing her home before being

223. See *id.* § 6.30; ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:3 (1980 & Supp. 1989).

224. See CUNNINGHAM ET AL., *supra* note 214, § 6.39; SCHOSHINSKI, *supra* note 223, § 3:16.

225. See SCHOSHINSKI, *supra* note 223, §§ 2:9–10.

226. See Karas, *supra* note 212, at 545.

227. *Id.* (internal quotations marks omitted).

228. *Id.*

229. See *supra* Part III.A.1–2.

230. See *supra* Part III.A.1–2.

231. See *supra* notes 210–12 and accompanying text.

232. See *supra* note 212 and accompanying text.

233. See *supra* note 212 and accompanying text.

234. See *supra* Part III.A.1–2.

235. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

236. See *id.*; Letter from Katherine E. Walz, *supra* note 29, at 5–6.

237. See, e.g., BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-3(C)–(E) (2012).

convicted if the landlord refuses to appeal the property declaration, or if the landlord begins to evict her to avoid fines and incarceration.²³⁸ Therefore, there is a great chance that a tenant, who was not involved in, or convicted of, any of the citations, can be evicted without having an opportunity to contest the accusations against her.²³⁹ This risk is heightened further in CNO jurisdictions where the municipality does not require a police citation or a court decision before initiating the abatement process against a tenant.²⁴⁰ Also, there is a high risk that an erroneous decision is likely to mistakenly put an impoverished family on the streets.²⁴¹ Thus, we must also consider the many consequences that may result from a family being left homeless.²⁴²

If a tenant does not receive notice of “disruptive conduct,” she cannot take the necessary actions to change her conduct in order to keep her residence.²⁴³ Nor can the tenant contest whether her conduct truly qualifies as “disruptive,” as per the abstract term used by the CNO in her jurisdiction.²⁴⁴ She must live her life questioning which of her actions will ultimately be considered “disruptive,” or which citation was “the last straw.”²⁴⁵ Another disadvantage the tenant faces is that a landlord can submit an abatement plan against the tenant in the event she is not satisfied with the terms of the lease agreement or the tenant herself.²⁴⁶ For example, a landlord can intentionally withhold the submission of an abatement plan from the municipality because she knows that the municipality will take action to abate the nuisance on its own.²⁴⁷

238. See, e.g., CINCINNATI, OHIO, CODE OF ORDINANCES tit. VII, ch. 761, § 761-7(a) (2011); PITTSBURGH, PA., CODE OF ORDINANCES art. VII ch. 670, §§ 670.02(e), 670.05(a)–(c) (2007); CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.04 (2012). *But see* WILKES-BARRE, PA., CODE OF ORDINANCES ch. 7, art. VII, § 7-219 (2005) (requiring a citation to be successfully prosecuted or a guilty-plea entered before it could be counted as a strike).

239. See, e.g., YORK, § 1751.04; Eckholm, *supra* note 160; Letter from Katherine E. Walz, *supra* note 29, at 4.

240. See, e.g., YORK, § 1751.04.

241. Scherer, *supra* note 161, at 564-65.

242. See *supra* notes 210-13 and accompanying text.

243. See, e.g., NORRISTOWN, PA., § 245-3(C)–(E) (noting that only the licensee receives notice of a strike); Verified Second Amended Complaint, *supra* note 1, ¶¶ 209-16 (complaining that the CNO fails to provide sufficient notice as to what conduct constitutes “disorderly behavior”).

244. See, e.g., PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.05(a) (2007) (providing only the owner with notice and an opportunity to contest the strike).

245. Motion to Dismiss, *supra* note 120, at 56; see also *Epperson v. Arkansas*, 393 U.S. 97, 112 (1968) (“It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process.”).

246. See, e.g., NORRISTOWN, PA., § 245-3(D) (noting that only the person with the license permitting the property to be rented out can submit an abatement plan).

247. See SEATTLE, WASH., MUNICIPAL CODE tit. 10, ch. 10.09, § 10.09.060 (2009).

If the tenant, or her attorney, does not receive an opportunity to cross-examine the main witness, namely the officer or chief of police, eviction proceedings may be initiated against her unjustly.²⁴⁸ One can imagine a hypothetical where an officer “has it in” for a persistent code violator.²⁴⁹ Relying on a CNO, an officer could declare any of the tenant’s actions to be disruptive conduct.²⁵⁰

There is a grave risk of an erroneous decision when considering the potential for homelessness, incarceration, abuse of discretion, and the deprivation of physical liberty.²⁵¹ Therefore, to counteract these serious risks, *Mathews* demands the imposition of procedural safeguards that will decrease the possibility of erroneous deprivations.²⁵² Thus, the greater the risk a citizen would be subject to in the event of an erroneous decision, the more procedural safeguards that will be necessary to satisfy the citizen’s due process rights.²⁵³

C. *Municipalities Will Not Incur Great Fiscal and Administrative Burdens by Implementing Additional Procedural Safeguards*

The final step of the *Mathews* test is balancing the parties’ interests.²⁵⁴ The burden being imposed on the governmental body “depends on the nature of the added procedural requirement.”²⁵⁵ Therefore, we must weigh the costs and benefits of an additional procedural safeguard against its consequential burden on the municipality.²⁵⁶ This is no simple task. It requires the balancing of several factors to come to a conclusion that may create ripples throughout the traditional actions of a municipality in the nuisance abatement process.²⁵⁷

248. See NORRISTOWN, PA., §§ 245-3(C)–(E) (failing to provide the tenant with an opportunity to be heard, or an opportunity to cross-examine the chief of police); Verified Second Amended Complaint, *supra* note 1, ¶ 211 (complaining that the chief of police’s unlimited discretion to determine what conduct violates the CNO could be used to enforce the CNO arbitrarily and discriminatorily); see also *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”).

249. See *supra* note 247 and accompanying text.

250. See *supra* note 247 and accompanying text.

251. See *supra* notes 238-51 and accompanying text.

252. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

253. See *id.*

254. *Id.* at 335.

255. Cameron, *supra* note 89, at 640-41.

256. *Id.* at 640.

257. See *id.* at 641.

To start, some of a municipality's recognizable interests are "the administration of justice, the just and equitable distribution of finite financial resources, and . . . the health, safety and welfare of its citizens."²⁵⁸ Another concern is the availability of police services for a troubled civilian—one who did not fail to take action to remediate or avoid subsequent nuisances.²⁵⁹ Some of these interests are even shared with a tenant, such as achieving a fair resolution to the dispute.²⁶⁰

A municipality's main interest is how much money is being spent on properties where nuisances are chronically a problem.²⁶¹ Additional procedural safeguards would increase these costs, and increase the time it would take to abate a nuisance.²⁶² However, the *Mathews* Court stated that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."²⁶³ Therefore, the slight increase in costs is not a proper excuse for a failure to provide for the necessary procedural safeguards.²⁶⁴ A municipality's second greatest concern is expending additional police funds between the time of the additional safeguards and the inevitable eviction.²⁶⁵ It is foreseeable that police funds that would not have been expended otherwise, would be expended to provide the tenant additional procedural safeguards.²⁶⁶ These are all factors that must be balanced in the *Mathews* test.²⁶⁷

In order to best weigh a jurisdiction's potential costs in adding supplemental procedural safeguards, we must determine what safeguards should be added and whether they will overburden the jurisdiction.²⁶⁸ The *Mathews* test simply requires safeguards proportional to, and that take into account, the interest at risk and chances of error.²⁶⁹ The next Part of this Note will discuss the tenant's side of the *Mathews* balancing test and will introduce safeguards that can be added to an invalid CNO that would make it constitutionally sound.²⁷⁰

258. Scherer, *supra* note 161, at 576.

259. See, e.g., TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE ch. 6, pt. 6, § 6-601(A) (2003).

260. See Scherer, *supra* note 161, at 576.

261. See, e.g., TOWN OF PHILLIPSBURG, N.J., CODE ch. 441, § 441-1 (2005); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10-1 (2001).

262. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

263. *Id.* at 348.

264. See *id.*

265. Cf. *id.* at 347 (applying the same issue with a delay in removing one's welfare benefits, namely the cost incurred in providing benefits pending a final decision).

266. See *id.*

267. See *id.* at 335, 347.

268. See *id.* at 347; *infra* Part IV.

269. *Mathews*, 424 U.S. at 334-35.

270. See *infra* Part IV.

IV. CHRONIC NUISANCE ORDINANCE STATUTES CAN BE CONSTITUTIONALLY UPHELD WITH THE IMPLEMENTATION OF FEW PROCEDURAL SAFEGUARDS

The U.S. Supreme Court has held that “it is fundamental that, except in emergency situations . . . due process requires that, when a State seeks to terminate an interest . . . it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective.”²⁷¹ Since municipalities currently provide tenants with virtually no procedural safeguards,²⁷² their current fiscal and administrative burdens are very low.²⁷³ At this time, tenants do not receive notice of a CNO strike or notice that the property was declared a chronic nuisance.²⁷⁴ Nor do tenants receive an opportunity to be included in the abatement process, contest the property’s classification, or contest the strike.²⁷⁵ Finally, tenants do not have the opportunity to appeal the police decision on the property’s declaration, or to appeal the determination that the tenants’ conduct was “disruptive.”²⁷⁶ Therefore, they are being deprived of property without being given an opportunity to be heard.²⁷⁷ The following Subparts will list the various safeguards that would resolve the above-mentioned shortcomings, while still taking into account the relative burdens the additional safeguards will have on a municipality.²⁷⁸

A. *The Relatively Cheap Cost of Notice Makes It a Viable and Essential Procedural Safeguard*

Notice is a constitutional procedural right that must be provided to citizens whose interests are to be deprived.²⁷⁹ In *Mullane v. Hanover*,²⁸⁰ the Supreme Court held that notice must be “reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them

271. *Bell v. Burson*, 402 U.S. 535, 542 (1971) (internal quotation marks omitted).

272. *See supra* Part II.B.

273. *See, e.g.*, PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, §§ 670.03(a), .05 (2007); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10-3(c) (2001).

274. Verified Second Amended Complaint, *supra* note 1, ¶ 179; *see* BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-3(C)–(E) (2012); PITTSBURGH, PA., § 670.03(a).

275. Verified Second Amended Complaint, *supra* note 1, ¶ 179; *see* NORRISTOWN, PA., §§ 245-3(C)–E.

276. *See, e.g.*, PITTSBURGH, PA., § 670.05 (noting that only the property owner has these opportunities).

277. *See supra* Part III.A.

278. *See infra* Part IV.A–C.

279. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

280. *Id.*

an opportunity to present their objections.”²⁸¹ Therefore, one can infer from *Mullane* and *Mathews* that the greater the interest, the greater the importance of notice for the deprived party.²⁸² As mentioned above, in CNO jurisdictions, only the owner is provided with written notice regarding the chronic nuisance status of her property.²⁸³ Property owners are informed about the time and place of the disruptive conduct, the outcome of the chief of police’s declaration, and potential consequences of repeated action, and they are given an opportunity to suggest a method of remediation.²⁸⁴ A tenant, however, does not receive such notice.²⁸⁵ It is possible that the first time a tenant is notified about her disruptive behavior, or the property’s nuisance status, is at the time of her eviction proceeding.²⁸⁶ Considering the constitutional necessity of notice,²⁸⁷ and the relatively cheap cost of delivering notice,²⁸⁸ it would not be a hefty burden on a municipality to deliver a copy of the notice to the tenant’s last known place of residence.²⁸⁹ This will make the tenant aware that her conduct was declared “disruptive,” and will advise her of the conduct that cannot be repeated for the remainder of her tenancy.²⁹⁰ A court can also hold the tenant accountable for her misconduct when it can prove that she received notice that her conduct was previously declared “disruptive.”²⁹¹ Notice will also inform an innocent roommate of a cohabitant’s disruptive conduct and will make her aware

281. *Id.* at 314.

282. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Mullane*, 339 U.S. at 314.

283. *See supra* notes 275-77 and accompanying text.

284. *See* SEATTLE, WASH., MUNICIPAL CODE tit. 10, ch. 10.09, §§ 10.09.030(A)(1)–(5) (2009).

285. *See supra* note 275 and accompanying text.

286. *See, e.g.*, PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.03(a) (2007); BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(C) (2012).

287. *See Mullane*, 339 U.S. at 313.

288. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988) (“We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.”); *Cent. Trust Co. v. Jensen*, 616 N.E.2d 873, 876 (Ohio 1993) (“When a party’s address is known or easily ascertainable and the cost of notice is little more than that of a first-class stamp, the balance will almost always favor notice by mail over publication.”).

289. *See Tulsa*, 485 U.S. at 490; *Mullane*, 339 U.S. at 313; *Cent. Trust Co.*, 616 N.E.2d at 876.

290. *See* MARK S. RHODES, ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 42:24 (1987); Verified Second Amended Complaint, *supra* note 1, ¶¶ 209–16 (complaining that the CNO does not properly provide citizens with notice as to what conduct constitutes “disorderly behavior,” which could be fixed by providing the tenant with written notice of the strike as soon as the landlord receives same).

291. *Cf.* 40 AM. JUR. 2D HIGHWAYS, STREETS, AND BRIDGES § 439 (2d ed. 2008) (stating that a municipality is only accountable for personal injury damages after receipt of actual or constructive notice of a faulty sidewalk).

that she could potentially lose her place of residence.²⁹² This will provide the innocent tenant with an opportunity to discuss this issue with her roommate, or to begin searching for a new residence.²⁹³

A judge utilizing the *Mathews* test is likely to make a number of determinations: there is a serious interest at risk when evicting a tenant;²⁹⁴ a person whose interest is being usurped is entitled to some form of notice;²⁹⁵ there are great benefits to a tenant's receipt of notice; it would be a grave injustice for a tenant to not receive any notice;²⁹⁶ there is relatively no burden on a municipality to provide the tenant with notice;²⁹⁷ and a tenant would not be able to remediate a nuisance after the first or second strike without the proper notice.²⁹⁸ After considering all of the above factors, and balancing them in the *Mathews* test, a court is likely to conclude that the factors weigh in favor of the tenant, and that there is no sufficient reason for a municipality to avoid providing notice to the tenant.²⁹⁹

To incorporate the required notice to a tenant into a constitutionally valid ordinance, the law should include the following modifications, as has been done in the Seattle CNO.³⁰⁰ First, it should describe the notice requirement as follows: "After declaring conduct as 'disruptive' or declaring property to be a Chronic Nuisance, the chief of police shall provide written notice of said declarations to the persons in charge of the property."³⁰¹ Second, the statute should define "person in charge" as "an individual, group of individuals, corporation, partnership, association, club, company, business trust, joint venture, organization, or any other legal or commercial entity or the manager, lessee, agent, officer or employee of any of them."³⁰² Third, notice should be provided after each disruptive conduct strike and following the chief of police's declaration that the property is a chronic nuisance.³⁰³ Finally, notice should state the

292. See Eckholm, *supra* note 160, at A1.

293. See *id.*; cf. Verified Second Amended Complaint, *supra* note 1, ¶ 57.

294. See *supra* Part III.A.

295. See *supra* notes 280-83 and accompanying text.

296. See *supra* notes 291-94 and accompanying text.

297. See *supra* notes 289-90 and accompanying text.

298. See *supra* note 290 and accompanying text.

299. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *supra* notes 289-90 and accompanying text; *supra* Part III.A.

300. SEATTLE, WASH., MUNICIPAL CODE tit. 10, ch. 10.09, § 10.09.030A (2009).

301. *Id.*

302. SEATTLE, WASH., §§ 10.09.010(7)-(8).

303. See *supra* note 274 and accompanying text.

time and place of the disruptive conduct, the outcome of the chief of police's declaration, the potential consequences of repeated action, and an opportunity to suggest a method of remediation, as it does for the landlord.³⁰⁴ The Seattle CNO's notice requirement is ideal, because it provides tenants with sufficient notice of a strike, and a property declaration at the lowest cost to the municipality, specifically the cost of paper and a stamp.³⁰⁵ These changes will provide a tenant, as a "person in charge," with: notice of any strikes; notice of the property's classification as a chronic nuisance property; information about which conduct resulted in the strike, thereby informing them that such conduct cannot be repeated; and notice of an opportunity to suggest a method of remediation.³⁰⁶ Courts would not be able to strike down a CNO with these procedural requirements for failure to provide sufficient notice to the affected party.³⁰⁷

B. For Many Chronic Nuisance Ordinance Statutes Already in Place, Permitting a Hearing on the Merits Before the Eviction Process Begins Will Make the Statute More Cost Effective and Constitutionally Sound

In *Mathews*, the Court stated, "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"³⁰⁸ Therefore, it is not only important for a tenant to be heard, but the hearing should also come at the correct time.³⁰⁹ Currently, in CNO jurisdictions, a tenant is not provided with an opportunity to be heard until she finds herself in the midst of eviction proceedings.³¹⁰ By then, the landlord has had an opportunity to discuss remediation with the municipality.³¹¹ During this remediation process, the tenant was forced to wait until the landlord returned with the municipality's final determination.³¹² Ideally, a tenant should be able to defend himself before the eviction process begins. However, this would

304. SEATTLE, WASH., §§ 10.09.030(A)(1)–(5).

305. See *supra* notes 279-99 and accompanying text.

306. See *supra* notes 291-94, 301-04 and accompanying text.

307. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

308. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

309. See *id.*

310. See, e.g., BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, §§ 245-3(C)–(E) (2012).

311. See, e.g., NORRISTOWN, PA., §§ 245-3(D)–(E); PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.04(a) (2007).

312. See, e.g., NORRISTOWN, PA., §§ 245-3(D)–(E); PITTSBURGH, PA., § 670.04(a).

mean that either the tenant would be allowed to convey this information during the meeting between the municipality officials and the landlord,³¹³ or at an entirely separate hearing before the eviction proceeding begins.³¹⁴

The latter suggestion can be dismissed immediately because it would imply delaying an eviction proceeding, and increasing the costs of litigation.³¹⁵ A separate, newly created hearing would certainly weigh the *Mathews* scale in favor of the municipality not providing more process, considering the heavy cost burden,³¹⁶ and the fact that the tenant would still have an opportunity to plead her defenses to the judge before her residency is terminated.³¹⁷

The former suggestion would not work either. The tenant's presence at the remediation hearing would only bring her frustration.³¹⁸ This is because the entire event would be a one-sided plea.³¹⁹ Imagine the scenario if a tenant joined the meeting between the landlord and the municipality officials after violating the CNO a few times. What could a tenant possibly say that would convince the municipality officials to allow her to keep her residency? She would likely agree to anything the municipality officials suggest because she does not hold a great amount of bargaining power.³²⁰ There is also the possibility that the officials are likely to be biased against her, since, in their minds, she is a nuisance that is wasting the municipality's time and money.³²¹ No defense or explanation will give her a fair hearing with the municipality officials.³²²

With the above options declared inefficient, we are left with two potential solutions, both of which are already practiced by many of the CNO jurisdictions.³²³ The options are either to wait for the citation to turn into a conviction before the eviction process begins,³²⁴ or to entirely

313. Cf. Verified Second Amended Complaint, *supra* note 1, ¶¶ 76, 80.

314. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that a pre-termination hearing is necessary, and should be held, before a civilian loses her welfare benefits).

315. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

316. See *id.*

317. See COLLEEN K. SANSON, 44 CAUSES OF ACTION 2D 449 (2010).

318. See, e.g., Verified Second Amended Complaint, *supra* note 1, ¶¶ 76-86.

319. See *id.*

320. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079-80 (D.C. Cir. 1970). This would be similar to a "take it or leave it" situation. See *id.*

321. See, e.g., TOWN OF PHILLIPSBURG, N.J., CODE ch. 441, §§ 441-1(A)(1)-(6) (2005).

322. See Verified Second Amended Complaint, *supra* note 1, ¶¶ 76-86.

323. See *infra* notes 327-32 and accompanying text.

324. See, e.g., WILKES-BARRE, PA., CODE OF ORDINANCES ch. 7, art. VII, § 7-219 (2005); see also TOWN/VILLAGE OF EAST ROCHESTER, N.Y., CODE ch. 144, § 144-13-A(5)(a) (2009) (stating that the ordinance is considered violated when "at least one of [the three] public nuisance violations hav[e] resulted in a conviction by a court of competent jurisdiction").

forego an early hearing, simply leaving the tenant's hearing to the judge at the eviction proceedings.³²⁵ Obviously, the first option would provide a tenant with more process and would only cost the municipality time.³²⁶ The latter option may be legal, since it continues to provide the tenant with notice and an opportunity to be heard,³²⁷ but it would also cause the initiation of eviction proceedings against tenants who have not yet been convicted of a crime or of true disruptive conduct.³²⁸ Ideally, municipalities should codify the first option because it guarantees that the tenant being evicted *truly* violated the ordinance.³²⁹

A judge utilizing the *Mathews* test is likely to recognize that there is a great interest at risk,³³⁰ and that the early and unjustified initiation of eviction proceedings against an innocent tenant is likely to cost her a lot of time, money,³³¹ and mental anguish.³³² Finally, a judge is likely to balance those facts against the relatively low burden on a municipality in delaying the eviction initiation process until the tenant is convicted for all of her citations.³³³ After considering all of the above factors and balancing them using the *Mathews* test, a court is likely to conclude that the factors weigh in favor of the tenant receiving some increased process, and that there is no sufficient reason for a municipality to begin the eviction process without waiting for the three strikes to turn into convictions.³³⁴

In order to resolve this issue, a municipality can simply adopt the CNO conviction requirement statute that is already utilized by many CNO jurisdictions.³³⁵ For example, the CNO in Wilkes-Barre, Pennsylvania, provides tenants with sufficient procedural safeguards by stating: "In order for such disruptive conduct to constitute an offense under this article, a citation or criminal complaint must be issued by the

325. See, e.g., TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE ch. 6, pt. 6, § 6-606 (2003) (noting that the owner must pay for the police services upon the second strike without an opportunity to contest the strike).

326. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976); *supra* note 324 and accompanying text.

327. See *supra* note 323 and accompanying text.

328. See CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.04 (2012); *supra* note 241 and accompanying text.

329. See, e.g., WILKES-BARRE, § 7-219; see also EAST ROCHESTER, N.Y., § 144-13-A(5)(a) (stating that the ordinance is violated when one of the three CNO citations becomes a conviction).

330. See *supra* Part III.A.

331. Potential costs may include attorney fees or looking for alternative housing.

332. See Scherer, *supra* note 161, at 559-60.

333. See, e.g., WILKES-BARRE, § 7-219; see *supra* note 324 and accompanying text.

334. See *supra* notes 330, 332-34 and accompanying text.

335. See, e.g., WILKES-BARRE, § 7-219; see *supra* note 324 and accompanying text.

police and successfully prosecuted or a guilty plea entered before a district justice.”³³⁶ This addition would simply delay the initiation of eviction proceedings until the tenant’s citation is tried and upheld.³³⁷ Once the tenant is convicted of violating a CNO in a court of law, the municipality or the landlord can justifiably begin the eviction process.³³⁸ This procedure will guarantee that the tenant has the right to be heard at the proper time and place.³³⁹

*C. Providing for Judicial Review of Discretionary Decisions
Before a Neutral Decision-Maker Will Make Certain that
No Innocent Tenant Is Harmed*

Currently, the majority of CNO jurisdictions provide the chief of police with the sole right to determine what conduct is considered “disruptive”³⁴⁰ and when a property should be considered a chronic nuisance.³⁴¹ Once the chief of police determines that the property is a chronic nuisance, the abatement process begins.³⁴² Logically, this means that it is in the chief of police’s sole discretion when the abatement process begins,³⁴³ and no unbiased individual can subsequently review this determination.³⁴⁴ This is problematic because many CNOs do not describe in detail the type of conduct that can qualify as disruptive.³⁴⁵ Therefore, any conduct can be considered disruptive, in hindsight, and this can lead to the use of the CNO as a weapon.³⁴⁶ For example, it is plausible that the chief of police will declare *any* conduct of a persistently cited tenant to be disruptive if she “has it in” for her.³⁴⁷

336. WILKES-BARRE, § 7-219.

337. See *supra* notes 327-35 and accompanying text.

338. See *supra* note 329 and accompanying text.

339. See *supra* notes 309-35 and accompanying text.

340. See, e.g., BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(C) (2012).

341. See, e.g., SEATTLE, WASH., MUNICIPAL CODE tit. 10, ch. 10.09, § 10.09.030(A) (2009).

342. See, e.g., *id.* §§ 10.09.030(A)–(D).

343. See *supra* notes 341-43 and accompanying text.

344. Compare SEATTLE, WASH., § 10.09.030–.035 (failing to provide the landlord or tenant with an appeal option), with PITTSBURGH, PA., CODE OF ORDINANCES art. VII, ch. 670, § 670.05 (2007) (providing the landlord with an option to appeal the declarations).

345. Compare CITY OF YORK, PA., CODIFIED ORDINANCES pt. 17, tit. 3, art. 1751, § 1751.03 (2012); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 80, § 80-10-2(c) (2001); SEATTLE, WASH., § 10.09.010(5), and TOWN/VILLAGE OF EAST ROCHESTER, N.Y., CODE, ch. 144, § 144-2 (2009), with TOWN OF BLOOMSBURG, PA., MUNICIPAL CODE ch. 6, pt. 6, § 6-602 (2003) (penalizing any “conduct which otherwise disturbs, annoys, injures or endangers the health, safety or welfare of the residents of Bloomsburg”), and NORRISTOWN, PA., § 245-3(B).

346. See Verified Second Amended Complaint, *supra* note 1, ¶¶ 209-16; Motion to Dismiss, *supra* note 120, at 55-57; *supra* notes 60-61 and accompanying text.

347. See Verified Second Amended Complaint, *supra* note 1, ¶¶ 209-16; Motion to Dismiss, *supra* note 120, at 55-57; *supra* notes 60-61 and accompanying text.

The Supreme Court has warned the legislature about unfettered discretion of governmental parties.³⁴⁸ For example, in the category of First Amendment law, the Supreme Court has struck down multiple state ordinances that reserved sole discretion of the right to exercise speech for the hands of the chief of police.³⁴⁹ In *Saia v. New York*,³⁵⁰ the state embraced a municipal ordinance which “forb[ids] the use of sound amplification devices except with permission of the Chief of Police.”³⁵¹ If the chief did not like your viewpoint, for any reason, she could deny your right to speech, and her determination could not be appealed or reversed.³⁵² This meant that the right to be heard, and the right to First Amendment speech, was placed in the hands of one official who could decide to give permission to the views that she appreciated and deny permission to the views that she disliked.³⁵³ After declaring the ordinance to be a prior restraint on free speech,³⁵⁴ the Court noted that providing a state official with unfettered discretion invites abuse and potentially usurps a citizen’s protected First Amendment right.³⁵⁵ The same is true in CNO jurisdictions where providing the chief of police with the sole discretion as to when conduct becomes “disorderly,” or when a property is declared a chronic nuisance,³⁵⁶ invites the officer’s potential abuse and usurps a tenant’s protected liberty and property interests.³⁵⁷

Considering that courts have been able to interpret statutes and declare conduct to be a nuisance since English common law,³⁵⁸ it should not be a hefty burden on a municipality for a judge to review and modify the chief of police’s nuisance determinations. However, this review cannot come after each of the determinations in their own external

348. See, e.g., *Saia v. New York*, 334 U.S. 558, 560-62 (1948) (striking down a state municipal ordinance prohibiting the use of loudspeakers without first obtaining permission from the chief of police, who retained unfettered discretion in the permit determination).

349. See *id.*

350. 334 U.S. 558 (1948).

351. See *id.* at 558.

352. See *id.* at 562.

353. See *id.*

354. See *id.* at 559-60.

355. See *id.* at 562.

356. See, e.g., BOROUGH OF NORRISTOWN, PA., MUNICIPAL CODE ch. 245, art. I, § 245-3(C) (2012); SEATTLE, WASH., MUNICIPAL CODE tit. 10, ch. 10.09, § 10.09.030(A) (2009); see Verified Second Amended Complaint, *supra* note 1, ¶¶ 209-16; Motion to Dismiss, *supra* note 120, at 55-57; *supra* notes 60-61 and accompanying text.

357. See *supra* Part III.A.

358. See *supra* Part II.A.

hearings, because this would lead to hundreds of hearings and thousands of dollars in litigation costs.³⁵⁹ Any effort to create a new hearing as a safeguard would cause a spike in the demand for such hearings, thereby causing a delay in litigation and eviction proceedings, as well as an increase in municipal costs.³⁶⁰ Nor can the opportunity to be heard wait until the commencement of the eviction proceedings, because that could lead to the initiation of eviction proceedings against innocent, non-convicted tenants.³⁶¹ Ideally, the review by a neutral decision-maker must come at the time when the tenant is contesting her administered strike because a hearing has already been scheduled,³⁶² all of the necessary witnesses are already in court,³⁶³ and a neutral judge is capable of interpreting a statute and making the final determination.³⁶⁴ No additional municipal funds would need to be expended on an external hearing, and no innocent tenant would be placed in harm's way.

Like the aforementioned neutral decision-maker, a judge utilizing the *Mathews* test is likely to recognize that there is a great interest at risk,³⁶⁵ and that the early, unjustified initiation of eviction proceedings against an innocent tenant is likely to cost a lot of time, money, and mental anguish, all of which are irreversible.³⁶⁶ Finally, a judge is likely to weigh those facts against the fact that there is a great chance of abuse of power by the chief of police,³⁶⁷ and that there is a relatively low burden in delaying the eviction process until a neutral magistrate can determine whether the tenant's conduct was, in fact, a "disruptive" nuisance activity.³⁶⁸ After considering all of the above factors, and balancing them in the *Mathews* test, a court is likely to conclude that the factors weigh in favor of the tenant, and that there is no sufficient reason

359. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

360. See *id.*

361. See *supra* notes 329, 332-33 and accompanying text.

362. See WILKES-BARRE, PA., CODE OF ORDINANCES ch. 7, art. VII, § 7-219 (2005) (requiring that citation turn into a conviction or a guilty plea before counting it as a strike). In citation hearings in Wilkes-Barre, it is likely that the citing officer will take the stand and the tenant is given the opportunity to plead her defenses. See *id.* Upon a finding of guilty or a guilty plea, the citation is counted as a strike. *Id.* When trying the citation, the judge is best suited to decide whether the conduct constituted disruptive conduct and is worthy of a strike. See *id.*

363. See *id.*

364. See *id.* For those jurisdictions that provide a landlord with the opportunity to appeal the chief of police's declaration before the abatement process, a tenant should be able to appeal the declaration to the board without waiting for the eviction proceeding to assert her argument. *Id.*

365. See *supra* Part III.A.

366. See *supra* notes 329, 332-33 and accompanying text.

367. See *supra* notes 341-58 and accompanying text.

368. See *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976); WILKES-BARRE, § 7-219.

for a municipality to begin the eviction process without waiting for the three disruptive conduct strikes to be reviewed by a neutral decision-maker.³⁶⁹

The inclusion of the following statement can resolve the CNO judicial review issue: “The Chief of Police’s determination as to a property’s nuisance status, or conduct that is later determined to have violated this chapter, is reviewable by a court of law at the time of the citation’s hearing.”³⁷⁰ By adding such a term, a judge would be able to: hear the tenant’s defenses at the proper time; try the tenant for the strike received;³⁷¹ review whether the tenant’s conduct was *truly* disruptive; hear the tenant’s defenses; and review whether the property was justifiably declared a chronic nuisance property.³⁷²

V. CONCLUSION

Tenants do not currently receive notice of a CNO strike, or notice that the property they are inhabiting was declared a chronic nuisance.³⁷³ Nor do they receive an opportunity to be included in the abatement process, contest the property’s declaration, or contest the strike.³⁷⁴ Finally, the tenants do not have the opportunity to appeal the chief of police’s decision on the property’s classification, or to appeal the determination that the tenant’s conduct was “disruptive.”³⁷⁵ Therefore, they are being deprived of property without being given an opportunity to be heard.³⁷⁶

With the implementation of the suggested ordinance modifications, it is possible to protect tenants and municipal public funding, all at the same time.³⁷⁷ Municipalities simply must include a tenant’s right to notice³⁷⁸ and judicial review of an officer’s nuisance determination,³⁷⁹ and require a guilty finding on a tenant’s strike in order to satisfy the due

369. *Mathews*, 424 U.S. at 335; *see supra* notes 366-69 and accompanying text; *supra* Part III.A.

370. *See* WILKES-BARRE, § 7-219.

371. *See supra* Part IV.B.

372. *See supra* notes 275-372 and accompanying text.

373. *See supra* note 274 and accompanying text.

374. *See supra* note 275 and accompanying text.

375. *See supra* note 276 and accompanying text.

376. *See supra* Part III.A.

377. *See supra* Part IV.

378. *See supra* Part IV.A.

379. *See supra* Part IV.C.

process requirement.³⁸⁰ Municipalities that continue to evict or fine tenants without proper process are violating the Fourteenth Amendment, and their ordinances should be unenforceable.³⁸¹

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380. *See supra* Part IV.B.

381. *See supra* Part IV.

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