

Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects

The congressionally announced policy underlying the public housing program is to provide "decent, safe and sanitary dwellings for families of low income."¹ Beyond this goal of physically adequate shelter, it is suggested that public housing should contribute to a sense of community and stability often missing in urban low-income neighborhoods. Reality, however, has wandered far from these ideals. While housing projects represent, for those families who get in, a physical improvement over the tenements replaced, the cost of walls with fewer rats and stairways that do not collapse has frequently been unwelcome, unnecessary intrusions into the personal lives of tenants.² Public housing authorities tend to treat residents not as the reason for their existence, but as a threat to the peace and quiet of their high-rise towers.³

The authorities, though the villains of this piece, deserve sympathy as much as condemnation for their role. The problems facing them provoke a free-handed manner of regimenting and, when necessary, ousting tenants. Unlike most other welfare agencies, housing authorities are burdened with the operation of a large business enterprise.

1. The quoted words are excerpted from the long title of the United States Housing Act of 1937, ch. 896, 50 Stat. 888.

2. Professor Reich mentions some particularly glaring examples of an officious welfare officialdom. Welfare agencies have attempted to control the sexual morality, personal hygiene and living habits, and family size, among other aspects of recipients' lives. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *Searching Homes of Public Assistance Recipients*, 37 SOC. SERV. REV. 328 (1964). See also Reich, *The New Property*, 73 YALE L.J. 733, 758-62 (1964).

3. The poor record of some public housing authorities in dealing with their tenants has finally attracted the official attention of HUD. In a circular dated February 7, 1967, on the subject of "Termination of Tenancy in Low-Rent Projects," [hereinafter cited as Circular 2-7-67], the Assistant Secretary for Renewal and Housing Assistance informed local authorities that "within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects." The Circular went on to require that the authorities adopt somewhat fairer procedures. See p. 993 *infra*.

For varying degrees of criticism of public housing project management, see H. Salisbury, *The Shook-Up Generation*, in URBAN RENEWAL: PEOPLE, POLITICS, AND PLANNING 431-33 (J. Bellush & M. Hausknecht eds. 1967); A. SCHORR, SLUMS AND SOCIAL INSECURITY 110-19 (1963); Bauer, *The Dreary Deadlock of Public Housing*, ARCHITECTURAL FORUM, May 1957, at 140; Dunham & Grundstein, *Impact of a Confusion of Social Objectives on Public Housing: A Preliminary Analysis*, 12 MARRIAGE & FAM. LIVING 103 (1955); Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966); Glazer, *Housing Problems and Housing Policies*, PUB. INTEREST, Spring 1967, at 21; Harrington, *Slums Old and New*, 30 COMMENTARY 118 (1960); Mulvihill, *Problems in the Management of Public Housing*, 35 TEMP. L.Q. 163 (1962).

Not unnaturally, project managers may come to think of their duties in terms of the project's physical plant, employees, and finances. Federally-assisted housing authorities, which must justify unbudgeted deficits to the Housing Assistance Administration,⁴ have added reason to dislike tenants who waste heat and water, damage premises or become delinquent in their rent. The continuous and energetic political assault on public housing has also played its part. Anxious for the program's future, housing authority officials have imposed numerous restrictions upon tenants to avoid the least appearance of harboring rowdies, derelicts, prostitutes, or subversives.⁵

Inside the project, the manager has a difficult time with many of his tenants. As public housing has been increasingly opened to the lowest income groups within society—the permanently poor—its population of so-called problem families has grown.⁶ These families—large, without regular income, often fatherless, ignorant of the fundamentals of sanitation and housekeeping—are costly to the project and tarnish its image in the community.⁷ They drive or frighten away more prosperous tenants, depriving public housing of stabler occupants.⁸ Unable to pay much rent in the first place, problem families are the most frequent rent defaulters.

Caught between this crossfire, public housing authorities sometimes lay too hasty and heavy a hand on project residents.⁹ Unreasonable or unnecessary restrictions are imposed; sensible regulations are applied in wooden, senseless fashion. A Chicago project evicted tenants for organizing "quarter parties" where food and drinks were sold on the

4. Housing Assistance Administration, Department of Housing and Urban Development, Low-Rent Management Manual § 2 (May 1966).

5. See Dunham & Grundstein, *supra* note 3, at 106-09. See also Bauer, *supra* note 3, at 141-42. It was not always so. In public housing's infancy, when it was populated by the Depression's submerged middle class, project management was an informal and friendly thing. Rent collections were made by "rent girls"—young social workers and students who used the occasion to visit with the tenants, learn their problems, offer help and advice. The war soon came, however, and public housing was employed to house defense workers and, later, returning veterans. When housing projects were rededicated to the low-income groups in 1949, the program had changed. Projects were larger, more impersonal; so was management. The war had bureaucratized it. Tenants were now members of the truly poor, and class difference—sometimes racial differences, too—hindered understanding between them and the project staff. The rent girls had disappeared along with the other personal touches, with the sympathy of project managers for tenant's political organizations and similar expressions of community spirit, and, most sad perhaps, with the enthusiasm both tenants and management had once shared for public housing. Salisbury, *supra* note 3, at 431; A. SCHORR, *supra* note 3, at 110; Friedman, *supra* note 3, at 650-53.

6. A. SCHORR, *supra* note 3, at 112.

7. Friedman, *supra* note 3, at 653.

8. Mulvihill, *supra* note 3, at 179.

9. Dunham & Grundstein, *supra* note 3, at 109. Usually, public housing tenant leases impose two to five times the number of restrictions found in ordinary leases; they are also enforced more strictly. See also A. SCHORR, *supra* note 3, at 112.

premises at nominal prices.¹⁰ In New Orleans a housing authority permitted a blind tenant to keep his seeing-eye dog only after a protracted wrangle.¹¹ Many authorities do not allow tenants to conduct any type of business in their units, though encouragement of entrepreneurial activities among the poor is supposedly part of the anti-poverty plan.¹² Residents often cannot host overnight guests,¹³ a galling reminder to them not to make themselves too much at home in public housing.¹⁴

Many tenants whose leases are terminated have not violated a particular rule, but by their conduct have made themselves "undesirable" occupants. This all-purpose rubric lends itself easily to abuse. A project manager in New York City evicted the families of teenage gang members as a matter of course.¹⁵ With similar Draconian logic, a housing authority terminated the lease of a woman because her adult son was an addict, though he did not live with his mother and apparently made no trouble when he visited her.¹⁶ Having an illegitimate child commonly marks the tenant as an undesirable.¹⁷ Housing authorities have also drawn the bounds of desirability to exclude political activists. A resident of a North Carolina project received a notice to vacate within twenty-four hours after she was elected president of a tenant union organization.¹⁸

Over-eager efforts to reform tenants, head off trouble, and keep the project quiet and peaceful injure not only the tenants who are expelled for no good reason, but also the tenants who remain and, consequently, the entire public housing program. The injury to the evicted tenant and his family is plain enough. Suddenly ejected from one home with little or no time to find another, they suffer materially and emotionally. Loss of sanctuary and familiar surroundings, coupled with a feeling of helplessness against the dispossessor, make an eviction

10. Friedman, *supra* note 3, at 665.

11. *Id.*

12. Glazer, *supra* note 3, at 36.

13. *Id.*

14. See generally Hollingshead & Rogler, *Attitudes Toward Slums and Public Housing in Puerto Rico*, in *THE URBAN CONDITION* 229, 240 (L. Duhl ed. 1963).

15. Salisbury, *supra* note 3, at 433.

16. *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958).

17. For a lengthy, critical discussion of the anti-bastardy regulations in public housing projects, see Rosen, *Tenants' Rights in Public Housing*, in *HOUSING FOR THE POOR: RIGHTS & REMEDIES* 154, 227-42 (N.Y.U. School of Law Project on Social Welfare, Supp. No. 1 1967). This article also contains an excellent, though somewhat over-detailed catalogue of horrors drawn from cases involving termination of project residents' leases.

18. *Housing Authority v. Thorpe*, 267 N.C. 431, 148 S.E.2d 290 (1966), *vacated and remanded*, 386 U.S. 670 (1967) (per curiam). The authority contended that the election was not the reason for the termination, though it gave no other. See also *Cummings v. Weinfeld*, 177 Misc. 129, 30 N.Y.S.2d 36 (Sup. Ct. 1940), where a tenant of a quasi-public limited-dividend housing development was evicted when he attempted to organize a tenants' union.

—especially an unjust one—a painful, sometimes traumatic experience.¹⁹ In relocating, the ousted tenant usually finds that he must pay more rent for less housing—frequently for substandard housing.²⁰ The role of public housing and other urban renewal projects in reducing the supply of low-income shelter and thus forcing rents up adds a rueful touch of irony to the family's plight.²¹ Finally, terminating a lease on grounds of undesirability marks the tenant a troublemaker and may effectively bar his admission to other public housing.

Because serious injury attends eviction from public housing, the threat of termination is a dangerous weapon. Used carelessly, it can create a hostile, bitter atmosphere in a housing project.²² Tenants, made to feel insecure, begin to distrust each other as well as project officials.²³ Any sense of community within the project atrophies; families keep to their units or form small antagonistic cliques.²⁴ Development of community life suffers further from housing authorities' thinly-masked opposition to tenant organizations and those who attempt to form them.²⁵

Many tenants deeply resent the reality they discover behind the pleasant facade of public housing: they feel that it has been necessary to surrender their independence and integrity in order to obtain a de-

19. Studies of low-income families displaced by urban renewal suggest that the emotional injury can be grave. One sociologist found that a forced change of residence caused long periods of depression in at least forty per cent of the families forced out of Boston's West End. Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in *URBAN RENEWAL: THE RECORD & THE CONTROVERSY* 359 (J. Wilson ed. 1966). Since the lower economic classes seem to have a greater need for external stability and geographic identity in their lives, the shock of displacement is more severe to most of them than it would be to middle class families. *Id.* 365-66.

20. A survey of urban renewal relocation in forty-one cities revealed that eighty per cent of displacees paid higher rents in their new homes, though one- to two-thirds of them ended up in sub-standard dwellings. A. SCHORR, *supra* note 3, at 63. In 26 cities which provided little or no assistance in relocation, seventy per cent of the displaced families moved into sub-standard housing, while in the 15 cities where such assistance was offered, only half that proportion did not find adequate new shelter. *Id.* 66. The U.S. Housing & Home Finance Agency, now assimilated into HUD, responded to critical studies with one of its own, showing that almost all displacees relocated in respectable housing and at only a small increase in rent. U.S. Housing & Home Finance Agency, *The Housing of Relocated Families: Summary of a Census Bureau Survey*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 341-45 (J. Wilson ed. 1966). One student of the pathology of urban renewal, however, saw obvious statistical juggling in the HHFA report. Hartman, *A Comment on the HHFA Study of Relocation*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 353-58 (J. Wilson ed. 1966).

21. 42 U.S.C. § 1410(a) (Supp. 1967) provides that federally assisted local housing authorities must agree to eliminate—either by demolition or improvement—one substandard unit of housing for every public housing unit constructed after March 1, 1949.

22. See, *supra* note 3, Bauer at 246-47, Glazer at 35, Dunham & Grundstein at 110-11.

23. See Dunham & Grundstein, *supra* note 3, at 108; Hollingshead & Rogler, *supra* note 14, at 241.

24. See, e.g., Harrington, *supra* note 3, at 122-23.

25. Said one observer-critic of public housing in New York City: "Their [the project residents'] community structure has been turned into social mush by stupidity and bureaucracy." Salisbury, *supra* note 3, at 432. See also cases cited note 18 *supra*.

cent place to live.²⁶ The type of tenant desperately needed in public housing—the more prosperous, stable, and ambitious—will not accept the regimentation that evokes discontent in present residents.²⁷ Restrictive management policy thus exacerbates the problem-family problem rather than solving it. In short, public housing authorities have thrown the baby out and kept the bathwater.

Particularly because the nature of the problems faced by public housing authorities encourages project managers to oust “undesirable” tenants whenever this will serve convenience and tranquillity, the need for some effective review of and check upon such evictions is strong.²⁸ However, neither housing authorities nor courts have afforded public housing residents a meaningful review of lease termina-

26. In San Juan, researchers discovered that inhabitants of the worst slums under the American flag were generally more satisfied with their shanties than their former neighbors were with modern, well-equipped public housing units. Hollingshead & Rogler, *supra* note 14, at 238-39. In fact, less than a third of project residents—compared with two-thirds of the slum-dwellers—liked their shelter. Similar discontent is manifest in mainland projects. See, e.g., A. SCHORR, *supra* note 3, at 112. One intensive comparison of the attitudes of public housing residents with those of slum families draws the opposite, and happier, conclusion. See generally D. WILNER, HOUSING ENVIRONMENT AND FAMILY LIFE (1962). Part of the study sought to measure differences between the two groups in intra-family activity, friendly contacts with neighbors, participation in neighborhood activities, and feelings of security and optimism. Although the results tend to confirm the author's hypothesis that the move into public housing strengthens family and community ties and improves personal outlooks on life, *id.* 248, they are equivocal and subject to doubt on several grounds. First, the authors neglect to describe the management of the project and the study does not attempt to fathom tenant feeling toward the housing authority or its staff. Secondly, thirty-five families who moved out of the project during the study were “set aside,” thus biasing the results toward more satisfied tenants. *Id.* 50. Thirdly, only wives and female heads of household were interviewed, and arguably women would be more grateful for the physical facilities of the unit and less resentful toward a sometimes autocratic management. Finally, even if the findings are taken as accurate, they show unequivocal improvement in the social lives of project residents at only one point: additional daytime contact with neighbors. *Id.* 164. The question left unanswered by the author is why public housing has achieved no more success in generating the social benefits that his hypotheses suggest should flow from the program.

27. Few of those eligible for public housing actually apply, and those that do are generally “problem” families. See, *supra* note 3, Bauer at 246 and Glazer at 36. A 1957 study, conducted by the Public Housing Administration (predecessor to HUD's Housing Assistance Administration) discovered that eighty-five per cent of the residents who moved out of public housing voluntarily did so because they were dissatisfied. PUBLIC HOUSING ADMINISTRATION, HOUSING & HOME FINANCE AGENCY, MOBILITY AND MOTIVATIONS 26 (1958). In some projects, more than ten per cent of those leaving by choice named project management as the primary cause of dissatisfaction. *Id.* Charges leveled against management by these tenants included disrespect for residents' privacy, imposition of unnecessary and bothersome rules, arbitrary and overly-severe enforcement, and plain discourtesy. *Id.* 56-58. The authors of the study concluded from this data that public housing managers required “ability and training of an unusual order”—though, as they explained it, the special skill was only that of treating tenants fairly and reasonably. *Id.* 59.

28. On one occasion, administrative review of denials of admission to New York City public housing projects for reasons of undesirability resulted in reversals in over one-third of the cases. A. SCHORR, *supra* note 3, at 114. In 1957, the Public Housing Administration estimated moveouts from public housing at 115,000—of which 18,000, or sixteen per cent, were removed as undesirable tenants. PHA, MOBILITY AND MOTIVATION, *supra* note 27, at 6, 15. If one-third of these removals were unnecessary, then 6,000 families (or well over 25,000 persons) lost their homes unjustly.

tions. The refusal to review has not been defended as an administrative necessity; instead, the authorities have justified non-review with specious analogies whose shallow logic courts have accepted with only an occasional dissent.

The procedures ordinarily followed by public housing authorities seem designed to leave the tenant little opportunity to argue that termination of his lease is unjust or unreasonable. Public housing occupants hold leases only from month to month,²⁹ and under state laws either party may terminate such tenancies simply by giving advance notice to the other.³⁰ Typically, the housing project manager notifies the tenant that he must leave by the month's end; if the tenant remains, he is evicted by summary process. Few housing authorities provide a stage where the tenant's side of the matter is heard and the termination reconsidered.

Where administrative review exists, it has usually proven defective. The New York City Housing Authority has for several years had a board to which tenants could appeal a notice to leave.³¹ However, the board often fails to give the tenant an adequately detailed description of his supposed transgressions in advance of the hearing, and he cannot plan an effective defense. At the hearing, the tenant has no opportunity to confront his accusers or to learn the sources of the board's information. While the tenant can bring counsel with him, no advisor is provided for him.³²

Recognizing the need for some semblance of fairness in terminations, the Department of Housing and Urban Development (HUD) recently instructed managers of federally assisted housing projects to inform tenants why their leases were being terminated and to hear any reply or explanation the tenants wished to make.³³ While signaling an encouraging shift in HUD's attitude toward evictions,³⁴ the instructions

29. HUD recommends, but does not require, that local authorities adopt the month-to-month lease to facilitate necessary evictions. HOUSING ASSISTANCE ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, Pt. IV, § 1, ¶ 6d, at 8 (1966). The advice seems to have been appreciated and followed everywhere. See Friedman, *supra* note 3, at 660.

30. 1 AMERICAN LAW OF PROPERTY § 3.90 (A. Casner ed. 1952); 1 H. TIFFANY, REAL PROPERTY §§ 172-73 (1939).

31. New York City Housing Authority Res. 62-9-683.

32. For a fuller description and critique of the New York City review procedure, see Rosen, *supra* note 17, at 217-23.

33. Circular 2-7-67, *supra* note 3.

34. In 1954, after one court had permitted a tenant to challenge the constitutionality of a regulation whose violation the authority had alleged as grounds for the termination, the Public Housing Authority advised local authorities to plead simply termination by notice and to remove any provisions from lease forms which might suggest something other than a month-to-month tenancy. PHA Circular 7-28-54 (1954).

on their face require only a closet conference between the project manager and the tenant. This informal procedure falls far short of an actual review: the tenant is not assured an opportunity to cross-examine the manager and his staff, advance notice of the conduct charged against him, or right to counsel.³⁵ Moreover, the manager as "prosecutor" is a questionable choice for impartial arbitrator.

Public housing tenants who hoped to obtain judicial review of a termination by refusing to leave, thereby forcing the authority to seek a court order, have been consistently disappointed. Rather than reviewing the authority's grounds for the termination or remanding the matter for an impartial administrative hearing, courts have usually treated the housing authority as an ordinary landlord, who can have a tenant evicted merely by showing that he is holding over after the lease has been terminated.³⁶ Analogizing public housing authorities to private landlords is an appealingly neat solution: the court has only to read the lease and rubberstamp the authority's decision. Few opinions have bothered to probe the rationale further. Most courts uncritically conclude that since the public housing tenant signed a "lease" and paid "rent," the authority is for him a "landlord," nothing more.³⁷ Where courts have wished to bolster their opinions, they have cited ambiguous statutory provisions which purportedly show a legislative

35. How little HUD has actually done becomes plain when Circular 2-7-67, *supra* note 3, is contrasted with steps taken to rid public housing of racial discrimination. As a cure for the latter evil, a complete set of review procedures was instituted within federal administrative agencies to handle complaints of discrimination by local, federally assisted housing projects. Where necessary, complaints were investigated and a hearing held. 24 C.F.R. §§ 1.1-12, 1500.7 (1967). By comparison, compliance with the new termination procedures is enforced only through periodic audits of local authority records and occasional visits to the authorities by HUD regional officials. Letter from Frank L. Willingham, Acting House Counsel, Housing Assistance Administration, Department of Housing and Urban Development, January 8, 1968, on file in the *Yale Law Journal* office.

36. See, e.g., *Chicago Housing Authority v. Ivory*, 341 Ill. App. 282, 93 N.E.2d 386 (1950) (abstract) (authority need show only that due notice to terminate was given tenant in order to recover possession); *New York City Housing Authority v. Russ*, 134 N.Y.S.2d 812 (1954) (authority need only allege expiration of term of lease and unlawful holding over in action for summary process); *Housing Authority v. Thorpe*, 267 N.C. 431, 148 S.E.2d 290 (1966) (per curiam) (authority's reasons for terminating lease immaterial; lease was terminated in accordance with its express provisions for notice and after date of termination tenant was wrongfully holding over).

37. Most opinions suggest no other basis for their conclusions, involving as they do a straightforward application of ordinary landlord-tenant law. E.g., cases cited note 36 *supra*. Even the dissent in *New York City Housing Authority v. Russ*, 134 N.Y.S.2d 812, 814 (1954) assumes that the authority is to be treated like any other landlord. *Id.* at 816.

In one case, the presumed identity between housing authorities and landlords worked to an authority's disadvantage. The court held that it was not immune from a tort action where the project manager had entered a tenant's unit, removed his personal effects, and locked him out. Since the authority's functions were, to the court's mind, merely proprietorial and not governmental, the authority was stripped of its sovereign dignity and made to stand as naked as any private landlord faced with a wrongful eviction complaint. *Muses v. Housing Authority*, 83 Cal. App. 2d 489, 189 P.2d 305 (1948).

intent to grant housing authorities the prerogatives of private lessors. Usually, however, the quoted provisions are merely broad enabling clauses, creating the authorities and empowering them to operate housing projects.³⁸ Nowhere has Congress or a state legislature expressly provided that landlord-tenant law govern evictions from public housing projects.

Several courts have thought that three provisions contained in federal housing legislation of the late 'forties evidenced a congressional intent that local authorities be treated like ordinary landlords, where state laws permitted.³⁹ The provisions, two of which are no longer operative, read to the effect that any federally assisted housing authority

shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations operated by it where [the] action or proceeding [was] authorized by the statute or regulation under which such accommodations [were] administered. . . .⁴⁰

But nothing in this language suggests that Congress empowered local authorities to terminate leases without good cause or a hearing. At most, these provisions only left state statutes granting such powers unimpaired.

Moreover, a brief glance at the statutory complex containing the three sections destroys the plausibility of interpreting them to grant housing authorities untrammelled discretion, or even to ratify such a grant by a state legislature. All three were part of the nationwide system of rent controls imposed by Congress in 1947.⁴¹ Under the controls, no landlord could obtain an eviction order, except upon a few narrowly specified grounds, notwithstanding that the tenant's lease had expired.⁴² If this limitation had applied to public housing projects,

38. *E.g.*, *Walton v. City of Phoenix*, 69 Ariz. 26, 208 P.2d 309 (1949). The court thought that ARIZ. CODE ANN. § 16-1604 (1939), which authorized municipalities to acquire and lease housing projects, covered the question of intent nicely, after being stretched by reading into it a host of implied powers. *Id.* at 30-31, 208 P.2d at 311.

39. 42 U.S.C. § 1404a (1964); 42 U.S.C. § 1413a (1964); and Act of June 30, 1947, ch. 163, tit. II, § 209(b), 61 Stat. 200-01. *See* *Walton v. City of Phoenix*, 69 Ariz. 26, 29, 208 P.2d 309, 310 (1949) (citing 42 U.S.C. § 1413a and Section 209(b) of the Housing and Rent Act of 1947); *Columbus Met. Housing Authority v. Simpson*, 85 Ohio App. 73, 75, 85 N.E.2d 560, 561 (1949) (citing Section 209(b) of the Housing and Rent Act); *Municipal Housing Authority v. Walck*, 277 A.D. 791, 97 N.Y.S.2d 488 (1950) (citing 42 U.S.C. § 1404a, Section 209(b) of the Housing and Rent Act, and N.Y. PUBLIC HOUSING LAWS § 37.1 (McKinney 1955)).

40. 42 U.S.C. § 1404a (1964). In one case, the terms in the lease were held to be a "regulation under which such accommodations were administered" and which authorized the authority to maintain the eviction action. *Columbus Met. Housing Authority v. Simpson*, 85 Ohio App. 73, 75, 85 N.E.2d 560, 561 (1949).

41. Act of June 30, 1947, ch. 163, 61 Stat. 193.

42. Act of June 30, 1947, ch. 163, tit. II, § 209(a), 61 Stat. 200-01.

local authorities could not have removed occupants whose incomes were too high to meet eligibility requirements. There is no reason to suppose that Congress intended anything more than preservation of the power to evict excess-income tenants when it exempted public housing authorities from the controls. Two of the provisions, which prohibit authorities from considering certain veterans' benefits in determining a tenant's income,⁴³ plainly indicate a congressional concern with the maintenance of income eligibility standards. The third provision permitted eviction only after the housing authority had found that the tenant would suffer no hardship⁴⁴—solicitude plainly meant for tenants whose only offense was prosperity.⁴⁵

Rather than offering strained misreadings of legislative intent, courts should consider whether the landlord analogy is really appropriate. In their position vis-à-vis tenants, the private and the public landlord differ in a crucial respect. The private landlord looks to his leased property for income. He wants the greatest possible profit; consequently, he will set rents as high and keep costs as low as the rental market and tenement laws permit. Conversely, the tenant seeks the lowest rent he can get and would have the landlord spend lavishly on upkeep. Leases represent a compromise of these opposing interests. A short-term lease, in this context, has the advantage of freeing either landlord or tenant to withdraw from or renegotiate the relationship whenever the market for housing changes.⁴⁶

Public housing authorities do not hold housing projects for profit and so have no need for such broad freedom to terminate their relationship with project residents. The authorities' only legitimate interest in their property is in its usefulness as a tool of national and

43. 42 U.S.C. § 1404a (1964); Housing and Rent Act of 1947, ch. 163, tit. II, § 209(b), 61 Stat. 201.

44. 42 U.S.C. § 1413a (1964). The similarity in the language of the three provisions, as well as their common historical and statutory context, requires that they be construed *in pari materia*.

45. Section 209(a) of the Housing and Rent Act, note 42 *supra*, permitted landlords to evict a tenant who violated statutory obligations of tenancy, committed a nuisance on the premises, or used accommodations for immoral or illegal purposes. Thus, public housing authorities needed no special exemption to remove residents who were damaging the project or endangering and disturbing neighbors. The exemption, therefore, must have been aimed at excess-income tenants.

Of course, the effect of 209(b) was to excuse public housing authorities from any strictures imposed upon their powers to terminate by Section 209(a). Yet this hardly supports the inference that Congress intended authorities to be treated like a private landlord—in fact, it reflects Congressional recognition that public housing authorities are very different things from ordinary landlords. While Section 209(b) did allow the authorities to have tenants evicted on grounds not enumerated in Section 209(a), it did not empower them—expressly or implicitly—to terminate leases for any or no reason.

46. See note 48 *infra*.

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state housing policies. This interest cannot justify the removal of a public housing tenant, unless he is able to obtain adequate housing elsewhere, or unless his conduct becomes dangerous, destructive, or harmful to others in the project.⁴⁷ The public landlord, in short, does not require the broad discretion of a private landlord. Housing authorities who claim such discretion deceive themselves about the nature of their problems. Courts which accept the validity of these claims substitute glib analogy for analysis.⁴⁸

Some courts, either recognizing the frailty of the landlord analogy or searching for an even handier hook on which to hang a curt dismissal of the tenant's arguments, have invoked the privilege doctrine—baldly stated, that the government may impose any condition on the bestowal of its benefits and withdraw them for any or no reason.⁴⁹ Like the landlord analogy, the privilege doctrine and its relevance to public housing has not been examined in the opinions. Most often, the courts simply assert that since no one has a right to enter public housing, no one has a right to remain in it.⁵⁰

However sharp the distinction between privilege and right once was, it has in recent years been much eroded and the privilege doctrine can now hardly be so casually relied upon. Confronted with concrete examples of the injury that deprivation of "non-rights" has caused, the Supreme Court has held that the government is not always free to re-

47. See p. 992 *supra*.

48. See, e.g., *Walton v. City of Phoenix*, 69 Ariz. 26, 208 P.2d 309 (1949), in which the court assumed that the housing authority could not preserve and maintain its property unless it was as free to act at any other landlord. *Id.* at 30, 208 P.2d at 312. Since common law rules, as well as their statutory codifications, reflect the inherent dichotomy of interests between ordinary landlord and tenant, applying these rules automatically to the public housing situation, where the dichotomy is missing, extends them beyond the boundaries of their rationale. *Cessante ratione legis, cessat et ipsa lex*.

49. The doctrine's most oft-cited articulation is found in some dicta which Justice Brandeis threw into the Court's opinion in *Lynch v. United States*, 292 U.S. 571 (1934), without bothering to qualify it for the benefit of a literal-minded posterity:

Pensions, compensation, allowances and privileges are gratuities. They involve no agreement of parties, and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.

Id. at 577. The doctrine was not applied in *Lynch*, the Court holding that the benefits there—War Risk Insurance payments—were contractual.

For a survey of the privilege doctrine and its gradual, but uneven erosion, see 1 K. DAVIS, ADMINISTRATIVE LAW §§ 7.11-12. See also pp. 998-1000 *infra*.

50. See *Municipal Housing Authority v. Walck*, 277 App. Div. 791, 97 N.Y.S.2d 488 (1950) (tenants had no right to remain in possession); cf. *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1954). The court in *Blackman* held that, while the tenants had no right to stay, the authority had no right to evict them for failing to sign a loyalty oath which failed to distinguish between knowing and innocent membership in subversive organizations. 122 N.E.2d at 524. In stating that the tenants lacked any right to continued occupancy, however, the court at least suggested that their lease might be terminated for many other equally senseless reasons—or for no stated reason at all.

voke benefits. Public employment,⁵¹ occupational licenses,⁵² and at times security clearances⁵³ have thus come within or very near the pale of rudimentary due process. One federal circuit has added attendance at a state university to the list,⁵⁴ and state courts have also protected interests in such benefits as unemployment compensation⁵⁵ against termination without hearing or justification. The effect of these decisions is to turn the privilege doctrine on its head: the question is no longer whether the tenant has a right to remain, but whether the housing authority has the power to expel him without cause or fair proceedings.⁵⁶

51. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

52. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

53. *Greene v. McElroy*, 360 U.S. 474 (1959); *Homer v. Richmond*, 292 F.2d 719 (D.C. Cir. 1961); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955). In all of these cases, security clearance was necessary if the claimant was to pursue his chosen vocation *within* the private sector—Greene was an aeronautical engineer, Homer was a radio officer, and Parker a seaman in the merchant marine. The courts were much influenced, in holding that some procedural safeguards had to be respected before the clearance could be revoked, by the fact that the Government's action in effect endangered the appellants' livelihoods.

54. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

55. *Syrek v. California Unemployment Ins. App. Bd.*, 2 Cal. Rptr. 40 (Ct. App.), *aff'd*, 54 Cal. 2d 519, 7 Cal. Rptr. 97, 354 P.2d 625 (1960) (adopting opinion below).

56. Three distinct, though interwoven strands run through these decisions. Each ties the requirements of due process—notice, a fair hearing, and a decision based on the hearing and guided by rational rules and principles—to the practical realities of the case. Rather than resting on easy analogies, the analysis used in these decisions tests the government's action by the harm it has caused, the nature of the inhibitions it places on individual behavior, and the likelihood that the procedures followed have produced reasonable and fair results. The principle that due process standards apply whenever the government's actions threaten substantial harm to private citizens was plainly stated in *Konigsberg v. State Bar*, 353 U.S. 252 (1957). California had denied *Konigsberg* admission to the bar after he refused to answer questions about his past political beliefs. The Court held that mere refusal to answer the questions did not constitute sufficient evidence of disloyalty and that the state, by acting on this evidence alone, had deprived *Konigsberg* of "the right to practice law" without due process. *Id.* at 262. Justice Black, writing for the Court, did not think it necessary to trace the pedigree of this right any farther than to the injury denial of admission caused:

The Committee's action prevents [*Konigsberg*] from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

Id. at 257-58; *accord*, *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

The idea that injury defines interest also explains the tendency of courts to treat benefits as rights when the beneficiary has greatly relied on their receipt, while regarding them as mere privileges when little has been staked on obtaining them. Compare *Greene v. McElroy*, 360 U.S. 474, 496 (1959) with *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895-96 (1961). Both cases involve civilians who lost non-governmental positions after an official revoked their security clearance. The best justification for the opposite results reached by the Court lies in the difference between harm done a short-order cook, who lost only the opportunity to work in one particular place, and that suffered by an aeronautical engineer, who was effectively barred from pursuing his chosen vocation. See also *Thompson v. Gleason*, 317 F.2d 901, 906 (D.C. Cir. 1962) (quære); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.) *cert. denied*, 368 U.S. 930 (1961).

Reliance operates here as a convenient measure of the amount of harm necessary to

A few courts have called arbitrary terminations an exercise of public housing authorities' administrative discretion and upheld them without mentioning either landlord-tenant law or the privilege doctrine.⁵⁷ These decisions started from the right premise, and the right labels, only to reach the wrong conclusion. Public housing authorities are primarily administrative agencies of the government,⁵⁸ but from this it hardly follows that courts owe unhesitating deference to their judgments. Rather, since their landlord functions are incidental to the administration of national and state laws, not the converse, courts should look beyond the terms of "leases" to the statutory standards

raise a privilege to a right. Since the harm suffered by recipients whose benefits have been terminated usually results from steps they have taken in expectation of continued receipt, reliance may be a reasonable as well as manageable line of demarcation. Where detrimental reliance is present, moreover, courts should pay it heed, because it is frequently a requisite of obtaining benefits. A family moving into public housing must give up its old home, leave a familiar neighborhood, and rearrange consumption and living patterns. If the family is later expelled from the housing project, its members will probably find that the government's generous hand has only made their situation worse.

Serious economic injury has not been the sole factor identifiable in decisions bringing benefits within the protection of the due process clause. Cases have also turned on the degree of arbitrariness in the injurious action. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Court held that a public school teacher was denied due process when the state fired him for refusing to take an all-inclusive loyalty oath:

We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.

Id. at 192. While *Wieman* is a precedent of uncertain vitality, state courts have occasionally upset particularly capricious denial of benefits, invoking either the *Wieman* principle, as in *Peters v. New York City Housing Authority*, 9 Misc. 2d 942, 128 N.Y.S.2d 224 (Sup. Ct. 1953), *rev'd on other grounds*, 307 N.Y. 519, 121 N.E. 529 (1954), or one derived from the concept of equal protection. See *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955). In addition, the theory that the government denies equal protection when it excludes an applicant for irrelevant or discriminatory reasons has gained a foothold in at least one federal circuit. *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964).

Finally, courts have enjoined officials from employing termination to punish activities enjoying constitutional protection. In the past decade the Supreme Court has gradually accepted the idea that dispensation of government favors cannot be manipulated to inhibit the expression of ideas, *Speiser v. Randall*, 357 U.S. 513 (1948), to penalize an exercise of the right against self-incrimination, *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956), or to burden unnecessarily the practice of religious faith, *Sherbert v. Verner*, 374 U.S. 398 (1963). Narrowly taken, the proposition that the government cannot sanction the exercise of a constitutional right by revoking benefits is only an exception to the privilege doctrine. But one federal court has already caused the exception to swallow the rule by holding that "the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process." *Dixon v. Alabama State Bd. of Educ.*, *supra* at 156.

57. *Columbus Met. Housing Authority v. Stires*, 34 Ohio App. 331, 84 N.E.2d 296 (1949) (court will not inquire into method by which authority makes determination, required by 42 U.S.C. § 1413a (1964), that the evicted tenant would suffer no hardship); *Smalls v. White Plains Housing Authority*, 34 Misc. 2d 949, 230 N.Y.S.2d 106 (Sup. Ct. 1962) (termination power is legislative and administrative in nature).

58. See N.Y. PUB. HOUSING LAW, § 2 (McKinney Supp. 1967). Public housing authorities are created by statute, funded from public coffers, granted exemption from state and local taxes and appointed by political officials.

See also *O'Keefe v. Dunn*, 89 N.J. Super. 383, 395, 215 A.2d 66, 73 (1965), *aff'd mem.*, 47 N.J. 210, 219 A.2d 872 (1966), (public housing authority is simultaneously an agency of municipal, state and federal governments).

which bind the administrator and to the constitutional standards which the government must respect whenever and through whomever it acts.⁵⁹

Since public housing authorities are creatures of legislatures, national and state, any discretion they have must derive from the statutes which have created them and endowed them with defined powers.⁶⁰ The discretion may be granted in express language, or implied by intentional omissions of statutory criteria to govern the authorities in the use of these powers. However, where precise standards have been supplied by the legislature, the authority cannot assert a discretion to ignore them. Moreover, even where standards are lacking, the authority is not exempt from constitutional prescriptions.⁶¹

In fact, public housing officials do have statutory standards which limit their power to terminate tenant leases. Although these criteria are largely embedded in expressions of legislative policies and cannot be readily extracted in crystal-cut form, they have been clearly and repeatedly stated in federal and state statutes:

It is hereby declared that . . . these [slum] conditions require that provision be made for the investment of public and private funds . . . in low rent housing, . . . the gradual demolition of existing insanitary and unsafe housing and the construction of new housing facilities, . . . in accord with proper standards of sanitation and safety and at a cost which will permit monthly rentals which persons of low income can afford to pay. . . .⁶²

While the public housing program is an exercise of the federal spending power and the state police power, and therefore aimed broadly at the improvement of the public welfare, safety, health and morals,⁶³ the statutes do not purport to accomplish these ends by any means other

59. *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955):

The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law.

Mr. Justice Douglas later quoted this excerpt with evident approval. *Thorpe v. Housing Authority*, 386 U.S. 670, 678 (1967) (concurring opinion). The point was also made by a state court. *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956).

60. Some state constitutions authorize the creation of public housing authorities. *E.g.*, CALIF. CONST., art. XXXIV, §§ 1-2 (West 1954); N.Y. CONST., art. 18, § 1. But it is still the legislature which brings the authorities into existence and determines what powers they shall exercise. *E.g.*, CALIF. HEALTH & SAFETY CODE §§ 34240, 34310-12 (West 1967); N.Y. PUB. HOUSING LAW, § 30 (McKinney 1955).

61. Even if the public housing laws left the authorities complete discretion to terminate leases, they could not do so for clearly improper and irrelevant reasons, for this would abuse their discretion. *See* Justice Musmanno's dissenting opinion in *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 579, 102 A.2d 331, 337 (1954); *cf.* 1 K. DAVIS, ADMINISTRATIVE LAW § 5.03, at 298 (1958).

62. N.Y. PUB. HOUSING LAW § 2 (McKinney Supp. 1967). *See also* 42 U.S.C. § 1401 (1964).

63. *See, e.g.*, statutes cited note 62 *supra*.

than providing decent shelter for those who need but cannot afford it. The results of allowing project officials to turn occupants out at whim illustrate the dangers of using public housing as an all-purpose, blunt instrument of social reform.⁶⁴ To prevent such misuse and abuse of the program, housing authorities and courts alike should limit eviction to cases where an actual threat to the project or those within it exists, rather than use it broadly against the very problem that public housing was created to solve, not by denying shelter, but by providing it.

The problem of assuring effective review of lease terminations falls into two parts: when the tenant receives a hearing, and what form that hearing takes. If the privilege doctrine is truly moribund in this context, the tenant has a constitutional right to a fair hearing before eviction becomes final.⁶⁵ Present practice ostensibly meets this minimum requirement: since the tenant can be formally evicted only by judicial process, he receives—at least in theory—a “full judicial hearing.” Yet while such eviction actions might satisfy constitutional procedural requirements, they have rarely proved the occasion of an effective review of the housing authority’s action. The form of a summary proceeding has too often misled courts into treating eviction from public housing as no different from private landlord-tenant disputes. For this reason, judicial review through other routes might be desirable. Public housing tenants have sometimes sought review by bringing suits to enjoin the housing authority from seeking eviction⁶⁶ or to have terminations declared void.⁶⁷ The available opinions suggest that such tactics encourage courts to treat the problem as one of agency review rather than landlord-tenant relations.⁶⁸ By seizing the

64. See p. 992 *supra*. Part of the cost of such a shortsighted policy can be easily quantified. In 1957, a government study estimated the expense to a housing project of a turnover—one family moving out and another moving in—to be about \$100. PHA, MOBILITY AND MOTIVATIONS, *supra* note 27, at 5. That year over 18,000 families were removed from public housing as undesirable tenants—costing the program over one and a half million dollars in turnover expenses alone. *Id.* 15. Given the expansion of public housing and inflation, the present annual cost of turnovers due to eviction and termination may be twice that.

65. *Nickey v. Mississippi*, 292 U.S. 393 (1934). See also K. DAVIS, ADMINISTRATIVE LAW § 7.10, at 448-49 and n.7 (1958).

66. *E.g.*, *Brand v. Chicago Housing Authority*, 120 F.2d 786 (7th Cir. 1941); *Wolfe v. United States Housing Authority*, 36 F. Supp. 580 (W.D.N.Y. 1940); *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955); *Smalls v. White Plains Housing Authority*, 34 Misc. 2d 949, 230 N.Y.S.2d 106 (Sup. Ct. 1962).

67. *E.g.*, *Austin v. New York City Housing Authority*, 49 Misc. 2d 206, 267 N.Y.S.2d 309 (Sup. Ct. 1966), *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955).

68. Compare *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955); *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958); and *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955) with *Chicago Housing Authority v. Ivory*, 341 Ill. App. 282, 93 N.E.2d 386 (1950) (abstract); *Columbus Met. Housing Authority v. Simpson*,

initiative from the authority, the plaintiffs can push the critical issues to the fore. Most important, bringing an action for injunction or declaratory judgment against the authority leapfrogs the case over the sub-baseline courts which handle summary proceedings and into tribunals that are usually of higher caliber and broader vision.⁶⁹ The litigation is more costly and complicated than defending an action for summary proceeding, but it offers the hope of strong precedents to awaken lower courts.

For the same reasons, review in federal courts is an even more appealing prospect. Under the Administrative Procedure Act (APA), anyone "adversely affected" by the actions of a federal agency is entitled to review of those actions in court, unless a statute commits the action to the agency's sole discretion or otherwise precludes judicial intervention.⁷⁰ Section I of the APA defines federal agency circularly to include "each authority of the Government of the United States."⁷¹ Since federally assisted public housing authorities in effect exercise the national government's spending power to administer a national housing program, they might be considered agencies of the United States despite the contractual form through which federal power flows into them.⁷² To this extent, the APA may further undermine the conclusion that terminations are beyond the scrutiny of the courts. Unhappily, however, the Act does not confer additional jurisdiction on federal courts, and federal jurisdiction over public housing cases must be invoked under some other provision.⁷³

85 Ohio App. 73, 85 N.E.2d 560 (1949); *and* *Municipal Housing Authority v. Walck*, 277 App. Div. 791, 97 N.Y.S.2d 488 (1950) (mem.).

69. In New York, an action to have an administrative determination declared void is brought in the state supreme court special term. N.Y. CIV. PRAC. L. & R., § 7804 (McKinney 1963). Summary proceedings, on the other hand, can be maintained in any city, police, or justice of the peace court. N.Y. REAL. PROP. ACTIONS & PROCEEDINGS LAW § 701 (McKinney Supp. 1967). *See also* N.J. STAT. ANN. § 2A:6-34(b) (Supp. 1967) and Wis. STAT. ANN. §§ 269.56 (1957), 299.01(1) (Supp. 1967).

70. Administrative Procedure Act § 10(a), 5 U.S.C. § 1009 (1965).

71. Administrative Procedure Act § 2(a), 5 U.S.C. § 1001 (1965).

72. *See* note 58 *supra*; *cf.* *Kam Koon Wan v. Black Ltd.*, 188 F.2d 558 (9th Cir. 1951), suggesting that whenever the federal government puts its authority and power behind someone, it has created an agent.

73. *See Blackmar v. Guerre*, 342 U.S. 512 (1952) (APA authorizes review only in courts of competent jurisdiction and does not create jurisdiction in federal district courts over actions brought against officers of federal government); *Richfield Oil Corp. v. United States*, 207 F.2d 864 (9th Cir. 1953) (alternative holding).

In *Merge v. Sharott*, 341 F.2d 989 (3d Cir. 1965), two businessmen, suing for a redetermination of relocation expenses incurred when they were forced to move their plant from an urban renewal area, were allowed to include the local urban redevelopment authority as defendant in an action which the court seemed to think was brought under Section 10 of the APA. No one raised the multifold problems of definition and jurisdiction and the court—majority and dissent alike—let it pass almost unnoticed. The majority thought that it mattered little whether the local URA was properly a defendant, since they felt

The most promising source of federal jurisdiction seems to be Section 1343 of the Judicial Code, which grants district courts original jurisdiction over any civil action, regardless of amount, to redress the deprivation of constitutional rights under color of state law.⁷⁴ A Fifth Circuit decision has already held that Section 1343 opens the federal courthouse door to an applicant denied a liquor license by a state agency without fair procedures or ascertainable standards.⁷⁵ While federal courts cannot sit as a board of review for every eviction from public housing without changing radically the relation between state and federal governments, they can properly intervene to establish precedents where housing authorities terminate leases for insufficient cause or improper reasons and where state courts have not afforded tenants any effective review.⁷⁶

Despite its attractions as a device to establish precedent, judicial review *de novo*—even in state courts—cannot practicably be demanded for every lease termination. If decisions to evict are to be reviewed effectively, fair hearings administered by the housing authority are a desirable, perhaps necessary alternative. A housing authority should be better able to review the factual situation carefully than are understaffed municipal courts with their overloaded dockets.⁷⁷ In ad-

the claim was really against the federal agency. *Id.* at 995. The two dissenting judges argued that the action could only lay against the URA, but never came near the jurisdictional question because they contended that a previous action in the state court barred the present litigation in any event. *Id.* at 998. Perhaps the court already had jurisdiction under the federal question provision, Section 1331 of the Judicial Code, since the plaintiff's claim against the local URA—an agency whose relation to the federal government is analogous to that of a public housing authority—rested on a provision in the Housing Act of 1949. In that case, the APA could have applied to the URA only insofar as to make its determination reviewable by a court. This would accord with the suggestion in the text that the public housing authority is a federal agency for the purposes of the APA and also with the view that section 10 of the APA did no more than codify the courts' common law powers to review administrative determinations. See 3 K. DAVIS, ADMINISTRATIVE LAW § 23.02, 4 *id.* § 28.08 (1958). The confused opinion in *Merge v. Sharott* does not support this hypothesis—in fact, it does not support any hypothesis—but this seems the easiest way to explain the result.

74. 28 U.S.C. § 1343(3) (1964).

75. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). When coupled with 42 U.S.C. § 1983 (1964) which grounds a cause of action against anyone depriving a citizen of the United States, or a person within its jurisdiction, of any right, privilege, or immunity secured by the federal Constitution and laws. See also *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967).

76. Cf. *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964) (federal court cannot determine whether plaintiff was entitled to a state liquor license, but it can decide whether state agency's procedures denied due process and equal protection).

Of course, if state courts are willing to give conscientious review, there is no deprivation of constitutional rights to bring Section 1343 into operation, and, consequently, no federal jurisdiction. Moreover, where defects in the housing authority's procedures offensive to due process can be safely left to the state judiciary to repair, federal courts should abstain from the fray. 3 K. DAVIS, ADMINISTRATIVE LAW §§ 23.18, 23.20 (1958), describing federal courts' equitable discretion to abstain from reviewing actions of state agencies.

77. Professor Davis points out that one of the difficulties with judicial review *de novo* is that courts may not have the resources to conduct a good one very often. 1 K. DAVIS,

dition to sheer efficiency, other considerations argue for review closer to the original decision. The availability of a remedy within the walls of the project might reduce the tenants' mistrust of management. And, since reversal of their decisions would come at the hands of direct superiors, administrative review might serve as a stronger deterrent to overzealous project managers.⁷⁸

If housing authorities fail to initiate review themselves, the decision for administrative review must be made at other levels. Under the Housing Act of 1937 and its many amendments, HUD has ample authority to establish a review process within federally assisted housing authorities. Section 15(4) of the Act empowers HUD to insert in the annual subsidy contracts with local authorities "such other covenants, conditions, or provisions as it may deem necessary in order to insure the low-rent character of the housing project involved. . . ."⁷⁹ The terms of their contracts further bind the local authorities to respect periodic instructions from HUD, such as those found in the *Management Manual* and in circular directives.⁸⁰ To date, however, HUD's use of its power to impose fair procedures upon the authorities has been all too sparing.⁸¹ Like the housing authorities themselves, the federal department seems to await a signal from the courts that reform is in order.

If the decision for administrative review is made, at whatever level, courts must still give careful attention to the form of review provided.⁸² At least four conditions should be met if the hearing is to be "fair and impartial." First, the tenant must have reasonably detailed notice of the grounds for his eviction prior to the hearing.⁸³ Second, he should be confronted with the evidence and witnesses against him and allowed to explain or challenge it.⁸⁴ Third, while the appoint-

ADMINISTRATIVE LAW § 7.10, at 451. Thus public housing tenants might end up with a hasty look-see only a little better than the shrug they now get.

78. This is not to say that courts should never review lease terminations de novo. Judicial efforts to lead a reluctant authority to a procedure in accord with due process through a series of remands and instructions could take some time. Where public housing officials appear to be deliberately dragging their feet, review de novo should be given to spare the tenant and his family prolonged uncertainty and additional litigation. Taking the matter completely out of the authority's hands might also prompt it to speedier reform.

79. 42 U.S.C. § 1415(4) (1964). Section 1415 further provides that the Secretary may increase the interest rate on federal loans to the local authority, demand immediate payment of the unpaid principle of these loans, and cease annual subsidies where a "substantial" breach of the covenants in the contract has occurred. 42 U.S.C. § 1415(1)-(3) (1964).

80. See HOUSING ASSISTANCE ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOW-RENT MANAGEMENT MANUAL, § 0 (preface) (May 1966).

81. Note 35 *supra*.

82. See *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961); 1 K. DAVIS, ADMINISTRATIVE LAW § 7.02 (1958).

83. *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963).

84. *Greene v. McElroy*, 360 U.S. 474 (1959). The decision did not require actual con-

ment of legally qualified counsel is probably impractical, the tenant should be allowed to retain counsel or, if he cannot obtain one, be permitted to bring to the hearing an advisor who understands such quasi-legal rites.⁸⁵ Fourth, there should be some separation of the adjudicatory and prosecutorial roles; the official urging eviction should not sit to judge its propriety as well.⁸⁶

If these conditions are met and the tenant has been accorded an adequate opportunity to be heard before the housing authority, a court reviewing the decision, whether in an eviction proceeding or in a suit brought by the tenant need not recover the ground with the same thoroughness.⁸⁷ In accordance with the standards conventionally applied in judicial review of administrative action, the court need only determine whether the authority's decision is supported by substantial evidence and whether the regulations applied by the authority are consistent with the policies underlying public housing and any statutory standards specifically set for the authority.⁸⁸ Of course,

frontation with informants, but this probably reflects judicial caution in the extra-sensitive area of national security and foreign espionage. See, e.g., *Homer v. Richmond*, 292 F.2d 719, 724 (D.C. Cir. 1961). In *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961), the court suggested that confrontation was highly desirable in a hearing that might lead to expulsion from a state university, though it did not think due process required one at all times.

85. Public housing tenants are of a class often unfamiliar with their rights and unskilled in asserting them; unless they have some assistance, all the other safeguards will probably degenerate into mere form. Cahn & Cahn, *The War on Poverty*, 73 YALE L.J. 1317, 1334-52 (1964). See also Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1252-53 (1965); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

86. Even layman's psychology would conclude that the member of the project staff who initiated the termination proceeding, gathered the evidence against the tenant, and urged removal could hardly give fair weight to the tenant's arguments or fail to favor termination if he were permitted to sit on the reviewing panel. This observation is plainly reflected in Section 5 of the APA. 5 U.S.C. § 1004 (1964).

Cf. In re Murchison, 349 U.S. 133 (1955), which reversed a conviction of criminal contempt where the allegedly offending conduct had taken place in the sole presence of the judge who adjudged it contemptuous:

Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. *Id.* at 136. The standard in non-criminal proceedings presumably would be less strict. But where strong bias is almost unavoidable, even a casual standard of fairness requires some corrective.

87. Due process does not demand two complete hearings. See *Jordan v. United Ins. Co. of Am.*, 289 F.2d 778, 783 (D.C. Cir. 1961); *cf. First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965).

88. A few courts have recognized the duty to measure project regulations against the purposes of the program and strike those found clearly wanting. In *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), the Wisconsin Supreme Court found that a regulation requiring all of the tenants to sign loyalty oaths bore no relation to the needs of the housing program and duly voided it:

Counsel for the defendant Authority have failed to point out to this court how the occupation of any units of a federally aided housing project by tenants who may be member of a subversive organization threatens the successful operation of such housing projects.

Id. at 287, 70 N.W.2d at 615. A New York court quashed a termination notice because

courts may slide along in their accustomed rut and simply rubber-stamp the decision to terminate. Indeed, the presence of a hearing below might render courts less eager than they have been to review the reasonableness of the decision to terminate a tenant's lease.⁸⁹ But this should not be the case. The existence of a hearing below ought to alert courts to the fact that they are reviewing not the decision of a private landlord entitled to pursue his private interests, but the action of a governmental agency entrusted with implementation of important national policy.

"to evict tenants from a public housing project on the sole ground that their adult son is a drug addict exceeds any reasonable requirement for the peaceful occupancy of the project and for the preservation of property." *Sanders v. Cruise*, 10 Misc. 2d 533, 537, 173 N.Y.S.2d 871, 875 (Sup. Ct. 1958). Over the years, however, such flashes of reason on the question have been erratic and brief.

For a brief digest of judicial holdings that agencies cannot go beyond the policies put to them by Congress, see L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 267-68 (1965).

89. *E.g.*, *Austin v. New York City Housing Authority*, 49 Misc. 2d 206, 267 N.Y.S.2d 309 (Sup. Ct. 1966), where the court gave no reasoning other than the fact that the authority had given the tenant a hearing below to explain a conclusion that the authority's actions were not arbitrary.