NO BETTER INSTRUMENT: THE NECESSITY OF NOTICE AND AN OPPORTUNITY TO BE HEARD AND THE DUE PROCESS DEFICIENCIES OF NUISANCE ABATEMENT LAW IN NEW YORK CITY

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"[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[1]

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1 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring).

INTRODUCTION

In the mid-1970s, Times Square in New York City—once the illustrious capital of theatre and culture—had fallen into shambles.[2] The romance of the "Great White Way" had been replaced by the filth of a deluge of sex shops and "massage parlors"[3] that catered to the whims of the thriving midtown illegal sex trade.[4] Dismayed at midtown Manhattan's state of affairs, described by the *Village Voice* as an "after-hours animal kingdom,"[5] the New York City Council drafted a civil law as a solution to this criminal problem.[6] In July of 1977, the Nuisance Abatement Law[7] was passed by the City Council and signed by Mayor Abraham Beame, in hopes of restoring the Times Square area to its

2 Peter J. O'Connor, *The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses in the Mid-Town Area*, 46 FORDHAM L. REV. 57, 57 (1977).

3 A typical euphemism for brothels. *Id.* at 58.

4 *Id.* at 57–59.

5 *Id.* at 57 (quoting Sarris, *Notes on Porn and Other Portents of Spring*, VILLAGE VOICE, May 30, 1977, at 51).

6 *Id.* at 58–59.

7 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, §§ 7-701 to 7-712 (2013).

former glory.[8] This section of the New York City Code allows for in rem actions[9] against premises where there is an ongoing public nuisance that poses a danger to the surrounding community.[10] These actions include a Temporary Restraining Order (TRO)[11] and a Temporary Closing Order (TCO),[12] which can be granted where the Corporation Counsel[13] makes an ex parte[14] showing of an ongoing public nuisance.[15]

Now, in 2016, the 42nd Street storefronts that were once populated by peep shows and porn shops have been replaced by Sephora, Starbucks, Applebee's, and the like, catering to tourists and families rather than "junkies" and "johns."[16] Use of the Nuisance Abatement Law has changed as well. Initially contemplated to target commercial establishments, this law is now being applied to residences throughout the five boroughs.[17] The newly expansive breadth of the Nuisance Abatement Law invites an inquiry into its constitutionality, especially in the case of the TCO provision.[18] Because a Closing Order can be issued as a result of an ex parte proceeding, there are due process implications; by issuing a TRO and a TCO, a court deprives a resident of his home.[19]

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8 O'Connor, *supra* note 2, at 57–59.

9 Coming from the Latin term for "against a thing," in rem actions "involv[e] or determin[e] the status of a thing [(real or personal property)], and therefore the rights of persons generally with respect to that thing." *In rem*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10 ADMINISTRATIVE §§ 7-701 to 7-712. Nuisance as defined by the statute covers a broad range of offenses and violations, including prostitution, drug offenses, obscenity, operation of an unlicensed business, violations of the alcoholic beverage control law, and zoning violations. Generally, the statute requires either two or three offenses on the premises for a location to be defined as a nuisance. *Id.* § 7-703.

11 *Id.* § 7-710.

12 *Id.* § 7-709.

13 The Corporation Counsel is the legal representative for New York City in all affirmative and defensive civil litigation, including Nuisance Abatement Law actions. *See About the Law Department*, N.Y.C. L. DEP'T, http://www.nyc.gov/html/law/html/about/about.shtml (last visited Dec. 24, 2015).

14 An ex parte action is decided by a judge where not all of the parties to the controversy are required to be present. Ex parte seizures and determinations are not uncontroversial. For example, in *McGrath*, Justice Frankfurter expressed his discomfort with such actions, stating that "[t]he heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

15 ADMINISTRATIVE § 7-709.

16 *Shopping in Times Square*, TIMES SQUARE, http://www.timessquarenyc.org/shopping/index.aspx#.VBNF5WSwI68 (last visited Jan. 13, 2015).

17 Don Ryan & Jim Estrin, *Now, Cities Hit Drug Suspects Where They Live*, N.Y. TIMES, (Jan. 25, 1991), http://www.nytimes.com/1991/01/25/news/now-cities-hit-drug-suspects-where-they-live.html (discussing changes in the application of the Nuisance Abatement Law and the questionable constitutionality of such an application).

18 *See* discussion *infra* Part III.

19 ADMINISTRATIVE §§ 7-709, 7-710.

However, the U.S. Supreme Court has held that the right to due process protections in proceedings regarding one's home are of paramount importance.[20]

Even innocent tenants are often unable to access their homes, compounding the due process problems for those individuals.[21] Such was the case for Devon Walsh, a quiet personal chef who lived alone on East 22nd Street in Manhattan in 2001.[22] One evening, Ms. Walsh hurried home to feed her cats when she discovered her apartment had been locked and sealed pursuant to the Temporary Closing Order provision of the Nuisance Abatement Law.[23] In attempting to close an actual house of prostitution in the apartment downstairs, New York City's Corporation Counsel prepared a closing order, which included both the apartment where the prostitution activities allegedly occurred and Ms. Walsh's apartment.[24] Her apartment had been incorrectly designated as a place of prostitution, but once a TCO was signed by a judge, her home was invaded and sealed by the New York City Police Department.[25]

Ms. Walsh discovered her apartment in shambles; the front door and bathroom door had been broken down and the entrance to her apartment had been sealed with police tape and papers declaring her home to be a house of prostitution.[26] Luckily for Ms. Walsh, she was able to contact the attorney who prepared the order and was allowed back into her apartment that night.[27] Most tenants are not so lucky. Typically, under the Nuisance Abatement Law and the terms of a TCO, most tenants would not be allowed back into their apartments until a scheduled hearing three days after the TCO was executed.[28] Despite her luck in regaining access to her apartment, Ms. Walsh still suffered inconvenience, embarrassment, and an invasion of her privacy and security.[29]

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20 United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993) (finding the right to maintain control of one's home "is a private interest of historic and continuing importance"); *see also* Connecticut v. Doehr, 501 U.S. 1 (1991) (holding the risks of error associated with ex parte deprivation of one's home are "substantial").

21 *See generally* Scott Duffield Levy, Note, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 550–59 (2008).

22 Walsh v. City of New York, 29 F. App'x 662 (2d Cir. 2002); *see also* Greg B. Smith, *City's Goof Has Chef Boiling*, N.Y. DAILY NEWS (July 5, 1999, 12:00 AM), http://www.nydailynews.com/archives/news/city-goof-chef-boiling-article-1.841624.

23 *Walsh*, 29 F. App'x at 664–65; Smith, *supra* note 22.

24 *Walsh*, 29 F. App'x at 664.

25 *Id.* at 664–65.

26 *Id.* at 665.

27 *Id.*

28 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-701 (2013).

29 *Walsh*, 29 F. App'x at 664–65; Smith, *supra* note 22.

As Ms. Walsh's story illustrates, the Nuisance Abatement Law is overbroad and does not provide sufficient protections to crucially important private property interests, namely, one's home. For this reason, this Note will argue that it is facially unconstitutional. Compounding this problem are issues with the law as applied, which is discussed in Part II. In order to address these due process issues, courts can and should apply the criteria articulated by the Supreme Court in *Mathews v. Eldridge*[30] to determine whether or not there has been an infringement of a tenant or owner's due process rights when they are deprived of property in a nuisance abatement case. This test weighs (1) the private interest at stake, (2) the government's interest (the urgency of abating the nuisance at issue), and (3) the risk of erroneous deprivation.[31] If this test is properly applied, only egregious cases with substantial evidentiary support will meet the high burden of outweighing the compelling private interest of protecting one's residence from erroneous deprivation. As this Note will explore in detail, only truly extraordinary circumstances outweigh the private interest of protecting one's home from improper invasion and justify a lack of notice and opportunity to be heard prior to deprivation. Because the typical nuisance abatement case does not rise to that level of exigency, this Note will argue that the TCO provision of the Nuisance Abatement Law is deficiently overbroad, and it allows for unconstitutional temporary deprivations.

Part I of this Note will describe the legislative history of the Nuisance Abatement Law and its essential provisions. It will also outline the Supreme Court's due process jurisprudence with regard to ex parte deprivations. Part II will address problematic elements of the Nuisance Abatement Law in contemporary practice. It will also examine the TCO provision of the Nuisance Abatement Law through the lens of the *Mathews* factors. Finally, Part III will examine the application of the three-pronged *Mathews* test to the injunctive relief provisions of the Nuisance Abatement Law in the scope of an actual nuisance abatement case. This Note then concludes that the law is facially unconstitutional because it is overbroad and because it insufficiently protects crucially important private interests.

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30 424 U.S. 319 (1976).

31 *Id.* at 335. The third prong of the *Mathews* test is particularly crucial when analyzing the Nuisance Abatement Law. As Ms. Walsh's case illustrates, where the risk of erroneous deprivation is high, innocent tenants can find themselves literally locked out of their homes. *See Walsh*, 29 F. App'x at 664–65. Sloppy or imprecise police work only compounds this risk; for example, in *Walsh*, the affiant officer, upon whose word the TCO was granted, "wasn't 100 percent sure" that the alleged house of prostitution included Ms. Walsh's apartment. Despite the uncertainty, the Corporation Counsel decided to bring the case without investigating further to ensure that no innocent tenants would be harmed. *Id.*

I. BACKGROUND

A. *Nuisance Abatement Law's Legislative History, Current Practice, and Key Elements*

1. Legislative History

In the summer of 1976, the Mayor's Midtown Citizens Committee released a report detailing the negative economic impacts of sex related businesses on the midtown area.[32] The report found that sex related businesses were "not compatible" with non-sex related businesses and that the former drove out the latter.[33] More sex related businesses then filled those vacancies left by non-sex related businesses, undermining the midtown economy.[34] In response, representatives of the Mayor's office requested a draft of the Nuisance Abatement Law to crack down on these businesses and the associated illegal activity.[35] Within a year, the bill passed the New York City Council and the Mayor signed it into law.[36] Advocates of the statute describe it as the "civil compliment" to criminal law.[37] Proponents additionally argue that this statute allows the City to "strip the criminal of the monetary rewards of his illicit lifestyle" and the "riches and glamour provided by a life of crime."[38]

Section 7-701 of the Nuisance Abatement Law describes the statutory intent of this chapter of the New York City Administrative Code.[39] The language lists categories of offenses applicable to a nuisance abatement action.[40] It is important to note that the very first sentence of

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32 O'Connor, *supra* note 2, at 57–58.

33 *Id.*

34 *Id.* at 57.

35 *Id.* at 58

36 *Id.* at 58–59. Peter O'Connor, a Fordham Law professor and consultant to the Midtown Enforcement Project and New York City Mayor's office at the time of the drafting of the statute, described the purpose of the statute as follows: "In drafting the Nuisance Abatement Law the author had *only one goal in mind*: the creation of an effective civil remedy for the elimination of illegal sex oriented businesses within a procedural framework protective of our cherished constitutional rights." *Id.* at 78 (emphasis added).

37 *See, e.g.*, Mary F. Donovan & Donna M. Russo, *The Nuisance Abatement Law: The Civil Complement to Criminal Enforcement*, *in* 164 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES: CRIMINAL LAW AND URBAN PROBLEMS 89, 91 (Practising L. Inst., 2012).

38 *Id.*

39 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-701 (2013).

40 *Id.* § 7-703. This section, entitled "Public nuisance defined," describes the exact qualifications required for a commercial space or residence to be considered a "public nuisance" as a matter of law. *Id.* For example, in the case of drug related criminal offenses, the statute states that

the statute refers to the "operation of certain *commercial* establishments."[41] Though the Nuisance Abatement Law is increasingly applied against residences,[42] the statute was initially intended to address commercial storefronts, arguably a less weighty private interest than a home. The facial insufficiencies of the statute may be attributable to the fact that the statute was initially intended only for commercial use, and did not threaten deprivation of one's home. While deprivation of any property interest implicates a due process consideration, a dispossession of one's shelter is particularly draconian. If the initial drafters of the statute had contemplated such outcomes, greater procedural protections may have been put in place.

2. The Statute in Practice

The Nuisance Abatement Law empowers New York City's Corporation Counsel "to commence an action for a permanent injunction," or action for civil penalties, or both, where there is a showing of a public nuisance.[43] The Corporation Counsel brings this action in rem against the building by block, lot, and street address, and against the person conducting the alleged nuisance.[44] Affixing the summons to the door of the premises in question and mailing a copy of the summons to one of the owners can satisfy service of process.[45]

Prior to the grant or denial of a permanent injunction, the Corporation Counsel may make a motion for a preliminary injunction and a temporary closing order.[46] These orders are ex parte, for which no notice to a named or interested parties is required.[47] If a judge signs the

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> [a]ny building, erection or place, including one- or two-family dwellings, wherein, within the period of one year prior to the commencement of an action under this chapter, there have occurred three or more violations of one or any combination of the provisions of article two hundred twenty, two hundred twenty-one or two hundred twenty-five of the penal law

qualifies as a public nuisance. *Id.* § 7-703(g). Two hundred twenty concerns "Controlled Substances Offenses." N.Y. PENAL LAW art. 220 (McKinney 2008); Two hundred twenty-one concerns "Offenses Involving Marihuana." *Id.* art. 221; Two hundred twenty-five concerns "Gambling Offenses." *Id.* art. 225.

41 ADMINISTRATIVE § 7-701 (emphasis added).

42 See Don Ryan & Jim Estrin, *Now, Cities Hit Drug Suspects Where They Live*, N.Y. TIMES, (Jan. 25, 1991), http://www.nytimes.com/1991/01/25/news/now-cities-hit-drug-suspects-where-they-live.html.

43 Donovan & Russo, *supra* note 37, at 93.

44 *Id.* at 94.

45 *Id.*

46 ADMINISTRATIVE §§ 7-707, 7-709.

47 *Id.*

order, then a return date for a hearing is set for three days later.[48] At this point, the subject premises must be vacated and closed to all occupants and owners.[49] After the hearing, the court will take up to an additional three days to render a decision on the motion.[50] Practically, this means that where the premises in question is a residence, tenants and owners—regardless of fault or connection to the alleged nuisance—could be deprived of their right of possession for up to six days prior to a hearing.

In order for the Corporation Counsel to meet the evidentiary burden required to obtain a TRO or TCO, she must show an ongoing nuisance by "clear and convincing evidence."[51] This evidentiary standard is a higher burden than the "preponderance of the evidence" standard that is typical in the civil law context.[52] The United States Supreme Court has offered guidance to courts as to the weight of this standard, holding that the clear and convincing standard requires a high level of certainty.[53] Moreover, the clear and convincing standard operates "as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory."[54] In New York courts, this standard is applied in cases where significant rights and liberties are at stake, such as termination of parental rights,[55] civil commitment,[56] and the interpretation of living

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48 *Id.* § 7-709(a) ("[T]he court shall direct the holding of a hearing for the preliminary injunction at the earliest possible time but in no event later than three business days from the granting of such order . . . .").

49 Donovan & Russo, *supra* note 37, at 95.

50 ADMINISTRATIVE § 7-709(a).

51 *Id.* § 7-707(a) ("A temporary closing order may be granted pending a hearing for a preliminary injunction where it appears by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted . . . ."); *id.* § 7-709(a) ("If, on a motion for a preliminary injunction pursuant to section 7-707 of this subchapter, the Corporation Counsel shall show by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted and that the public health, safety or welfare immediately requires a temporary closing order, a temporary order closing such part of the building, erection or place wherein the public nuisance is being conducted, maintained or permitted may be granted without notice, pending order of the court granting or refusing the preliminary injunction and until further order of the court.").

52 Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1394 (1991).

53 Santosky v. Kramer, 455 U.S. 745, 769 (1982) ("[S]uch a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.").

54 George Backer Mgmt. Corp. v. Acme Quilting Co., 385 N.E.2d 1062, 1066 (N.Y. 1978) (quoting Southard v. Curley, 31 N.E. 330 (N.Y. 1892)).

55 *See, e.g.*, *In re* Suzanne N.Y., 427 N.E.2d 1187 (N.Y. 1981) (finding that the state agency failed to show by "clear and convincing evidence" that a mother's mental illness would prevent her from caring for her child).

wills.[57] In discussing the choice of this evidentiary standard, Peter O'Connor, who participated in the drafting of the statute,[58] notes the need for reasonable satisfaction of the court in finding the existence of the nuisance, and that such nuisance "sufficiently threatens the public health, safety, or welfare of the community" enough to warrant ex parte intervention that has the potential to infringe on a constitutionally protected property right.[59]

In order to issue a TCO, the court must also be convinced that there is a public nuisance being conducted that "immediately requires" abatement via a closing order.[60] Given this immediacy requirement, judges may adjust the TCO to avoid being over inclusive. In *People v. MacBeth Realty Co.*, decided shortly after the enactment of the Nuisance Abatement Law in New York, the appellate division modified a TCO as applied to a single-room-occupancy hotel.[61] After a showing by clear and convincing evidence of prostitution activity in several rooms of the hotel, the court refused to allow the order to be applied to all of the rooms of the hotel, citing "unjust hardship on such tenants" who have no connection to the nuisance at issue.[62] Thus, the implication of a necessary urgency may be used by judges to mitigate harm to individuals who are blameless but risk at least temporary displacement. However, the statute does not define "immediately requires," and courts have split on whether a showing of a nuisance as defined by statute in and of itself is sufficient to "immediately require" an injunction.[63] In the City's motion papers, it argued that a prima facie showing that illegal

56 *See, e.g.*, *In re* K.L., 806 N.E.2d 480 (N.Y. 2004) (applying the "clear and convincing" standard to determine whether a mentally ill individual qualified for assisted outpatient treatment).

57 *See, e.g.*, *In re* Christopher, 675 N.Y.S.2d 807, 808 (Sup. Ct. 1998) (applying the "clear and convincing" standard in determining whether it was an elderly patient's wishes to discontinue use of a feeding tube, prolonging the patient's life, and stating that "[t]he Court of Appeals selected this standard because it impresses the fact finder with the importance of the decision and it forbids relief whenever the evidence is loose, equivocal or contradictory").

58 *See* O'Connor, *supra* note 2, at 58–59.

59 *See id.* at 71 n.77 ("[T]he court must be reasonably satisfied that the alleged nuisance exists, that its continued existence sufficiently threatens the public health, safety, or welfare of the community so as to warrant an immediate, ex parte interference with the property rights of the persons involved in the nuisance.").

60 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-709(a) (2013).

61 People v. Macbeth Realty Co., 406 N.Y.S.2d 298 (App. Div. 1978); *cf.* City of New York v. Castro, 559 N.Y.S.2d 508, 509–10 (App. Div. 1990) (holding that the affidavits of six police officers who personally witnessed illegal gambling within the exact premises in question was sufficient to sustain a TCO under the requirements of the Nuisance Abatement Law).

62 *See Macbeth Realty*, 406 N.Y.S.2d at 298.

63 *Compare* City of New York v. Narod Realty Corp., 471 N.Y.S.2d 757, 759 (Sup. Ct. 1983) (holding that "a prima facie showing of violation of such laws is sufficient to warrant injunctive relief without a showing of special damages or irreparable harm to the public"), *with* City of New York v. W. Winds Convertibles Int'l, Inc., 837 N.Y.S.2d 555 (Sup. Ct. 2007) (denying injunctive relief because the City failed to demonstrate the necessary immediacy).

activity had occurred within the premises was, on its own, sufficient to entitle the municipality to a preliminary injunction.[64] While an immediacy requirement would help to justify the ex parte action, it is unclear if the immediacy requirement in the Nuisance Abatement Law has any meaning.

Furthermore, unlike other injunctive actions in New York, courts have found that a motion pursuant to the Nuisance Abatement Law may not require the application of New York Civil Practice Law and Rules (CPLR) section 6301.[65] This rule, interpreted by courts as a three-prong test, requires (1) a likelihood of success on the merits, (2) likelihood of injury to the plaintiff if injunctive relief is not granted, and (3) a balancing of the equities in favor of the plaintiff.[66] Oddly, this test is not applied in the context of many nuisance abatement actions.[67] Judges assessing the City's Orders to Show Cause are constrained by the requirements of the statute, but not by any external tests for injunctive relief.[68] This leaves the grant or denial of a TRO or TCO to the judicial discretion of individual lower court judges,[69] often yielding quite varied and unpredictable results.[70]

B. *The Civil Remedy for a Criminal Problem*

Civil in rem actions, like the actions contemplated in the Nuisance Abatement Law, require an inference of "legal fiction," identifying the

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64 Affirmation of Vikrant Pawar para. 22, City of New York v. 864 42nd Street, No. 15925/08 (N.Y. Sup. Ct. June 3, 2008) (No. 15925/08) (on file with author) ("Since injunctive relief is specifically authorized by statute, the plaintiff need only show that the statutory conditions [(the showing of nuisance)] have been satisfied.").

65 N.Y. C.P.L.R. 6301 (MCKINNEY 2011); *see also Castro*, 559 N.Y.S.2d 508; City of New York v. Bilynn Realty Corp., 499 N.Y.S.2d 1011 (App. Div. 1986). This is actually an issue of some debate. *See* discussion *infra* Part II.A.2.

66 *See, e.g.*, Kurlandski v. Kim, 975 N.Y.S.2d 98, 100 (App. Div. 2013) ("To establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the plaintiff's favor.").

67 *See Castro*, 559 N.Y.S.2d 508; *Bilynn Realty Corp.*, 499 N.Y.S.2d at 1013; *see also* Affirmation of Vikrant Pawar para. 25, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author) ("On a motion for injunctive relief pursuant to the Nuisance Abatement law, the three-pronged test for injunctive relief set forth in C.P.L.R. Section 6301 does not apply."); Affirmation of Vikrant Pawar, *supra* note 64, at para. 22.

68 *See* N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, §§ 7-701 to 7-722 (2013). Nowhere in the Nuisance Abatement Law is any further injunctive relief standard specified. Under section 7-707, the injunctive relief "may be granted . . . where it appears by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted." *Id.* § 7-707.

69 New York Supreme Courts are the lowest level of courts in the state.

70 *See* discussion *infra* Part II.A.4.

property in question as the guilty party.[71] Proponents of such civil actions argue that these types of remedies make it easier to pinpoint crime-ridden areas and to avoid the difficulties implicit in criminal law.[72] Civil and criminal law involve the application of different standards, goals, and rights.[73] In criminal proceedings, the defendant is entitled to the full protections of the Fourth, Fifth, Sixth, and Eighth Amendments.[74] Some of these protections are inapplicable in the civil context, such as the right to a trial by jury or to a speedy trial.[75] Additionally, in the criminal context, the accused is entitled to legal counsel as a matter of law.[76] In the civil context, a defendant who cannot afford legal counsel will be forced to proceed pro se.[77] Advocates of the Nuisance Abatement Law argue that by placing the action in a civil context, these constitutional protections for the accused no longer present a hurdle to efficiency.[78]

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71 Cheh, *supra* note 52, at 1340–41; *see also* Ryan & Estrin, *supra* note 17 ("[M]any civil liberties experts argue that the laws are based on a legal fiction. They assert that people, not buildings, are the real targets of the law and that the tactic is effective precisely because it takes a shortcut around civil rights. For a building to be declared a nuisance and its tenants evicted, the authorities need not convict anybody; they need only demonstrate that there is compelling evidence—for example, arrests and community complaints—that the property is a public nuisance.").

72 William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 452–55 (1995). William Bratton, the former and current (in 2016) New York City Police Commissioner, argued that the benefits of nuisance abatement actions include the ability to shut down a suspected crime scene without regard for the civil liberty concerns required by individual arrests. *Id.*

73 Cheh, *supra* note 52, at 1359–60, 1369.

74 *Id.* at 1369.

75 *Id.*

76 *Id.* at 1329.

77 *Id.* at 1360. A pro se litigant is one who represents himself in court without the assistance of legal counsel.

78 *See, e.g.*, Bratton, *supra* note 72, at 453–54 (arguing that one merit of the Nuisance Abatement Law is that an action under it does not have to be predicated on arrests or convictions); *see also* O'Connor, *supra* note 2, at 63–67. Peter O'Connor, a drafter of the Nuisance Abatement Law, offers an example of the broadened scope of this civil action: A police officer visits a "massage parlor" where a masseuse offers him sexual services. *Id.* At this point, the police officer would only have probable cause to arrest the masseuse in question, when, in reality, it is likely that many more people are involved in prostitution activities in this establishment. *Id.* at 63. Even if that particular masseuse were convicted of prostitution, the massage parlor could easily operate without her by replacing her with another prostitute. *Id.* at 64. In this way, O'Connor argues, the criminal law methods of shutting down nuisances are inefficient and ineffective. *Id.* at 64–65. Alternatively, a civil, *in rem* proceeding allows the City to bring an action against the premises where the illegal conduct occurs. *Id.* at 65–66. The hypothetical massage parlor would be shut down in response to several documented instances of solicitation, regardless of whether or not there have been criminal convictions of individual prostitutes or pimps. *Id.* Additionally, the closing order is necessary to ensure the abatement of such a nuisance. *Id.* at 66–67. A temporary restraining order, on its own, would only prohibit activity that is already illegal. O'Connor is skeptical that this would serve to actually restrain such conduct, offering that

However, detractors of such actions view them as a mechanism to sidestep the civil liberties of those involved.[79] Since the City brings these actions in the civil arena, rather than in the criminal context, no conviction is necessary.[80] The burden of proof is reduced, and the accused are not entitled to the same procedural protections.[81]

C. Mathews v. Eldridge *and the Origin of the* Mathews *Test*

The test articulated in *Mathews v. Eldridge*[82] governs a great deal of modern procedural due process[83]. The requirements of procedural due process can be an imprecise inquiry, but they rely on an emphasis of fairness to the parties.[84] The issue addressed in *Mathews* was whether the Due Process Clause of the Fifth Amendment required an opportunity to be heard prior to the termination of social security disability benefits.[85] George Eldridge was initially awarded social security disability benefits in 1968, but four years later, despite Eldridge's claim that his condition had not improved, the state agency administering his benefits decided to terminate his award.[86] Eldridge then brought a constitutional challenge to the administrative procedures, arguing that his due process rights were violated because he did not have an opportunity to be heard prior to the deprivation of his benefits.[87]

In determining just how much process was due, the Court identified three factors to be considered: (1) the private interest affected by official action; (2) the risk of erroneous deprivation and the likely value of substituted or additional procedural safeguards; and (3) the government's interest, including the additional expense of additional or alternate procedures.[88] Writing for the majority, Justice Powell found

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> [t]here is little reason to believe that the entrepreneur of a house of prostitution will obey a temporary court order to cease and desist when he has already disregarded Penal Law prohibitions against his criminal activities and when the pain of contempt is but a miniscule item balanced against the profits of his illegal business.

Id. at 66.

79 *See, e.g.*, Cheh, *supra* note 52, at 1392–1404.

80 *Id.*

81 *Id.*

82 424 U.S. 319 (1976).

83 Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!:" Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 7 (2005).

84 *Id.* at 14–15.

85 *Mathews*, 424 U.S. at 323.

86 *Id.* at 323–24.

87 *Id.* at 324–25.

88 *Id.* at 334–35.

that determining the dictates of due process is an inexact science; it is one that is "flexible," and one that requires an inquiry into the facts of the particular situation.[89]

Commenters have suggested that the *Mathews* test has undergone an evolution from a framework to ensure equity and fairness to an outcome-determinative test.[90] This comes with a criticism that decision-making using the *Mathews* factors is imprecise because literal weight cannot be measured when it comes to factors such as a state's interest or an individual's liberty interest.[91] However, advocates of the test, while recognizing these failings, emphasize *Mathews* as an adequate and useful tool for judges to calculate a fair result.[92] Thus, the factors articulated in *Mathews* remain a dominating force in procedural due process law.[93]

D. *Due Process and the Constitutionality of the Seizures of Real Property*

The Supreme Court has routinely held that, absent emergency circumstances, the Due Process Clause of the Fifth[94] and Fourteenth[95] Amendments of the Constitution require an opportunity to be heard prior to the deprivation of property.[96] That is to say, ex parte seizures of

89 *Id.* at 334 ("These decisions underscore the truism that '"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961))).

90 *See, e.g.*, Lawson et al., *supra* note 83, at 21–23 ("Critics have, with considerable justification, roundly attacked the Mathews framework's efficacy as a decisionmaking tool. . . . The process by which Mathews was transformed from a device for facilitating discussion into an outcome-determinative test is to some extent understandable[,] . . . but it is also regrettable.").

91 *Id.* at 22 (discussing the failings of a focus on "weighted" factors which, in the words of one critic, are "a useful approach for dealing with bananas, leaves something to be desired where factors such as those in Mathews are concerned" (quoting Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984))).

92 *See, e.g.*, *id.* at 23 (arguing that the *Mathews* test "would fail in that task if the factors that it identified were wildly inappropriate to the ultimate inquiry, which they clearly are not. It would also fail in that task if the factors themselves were so vague that they could not serve as a tool for communication. We do not see that problem either").

93 *Id.* at 4–7.

94 U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

95 U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

96 *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–55 (1993) (holding that ex parte temporary deprivations of the home are unconstitutional in the absence of extraordinarily exigent circumstances); Connecticut v. Doehr, 501 U.S. 1, 12 (1991) (finding that even temporary encumbrances on property rights, such as an attachment, still warrant due process protection); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679–80 (1974)

property are constitutionally precarious and invite an inquiry as to how much process is due.[97] The Supreme Court cases tracking this inquiry are outlined in the Sections that follow.

1. *Fuentes v. Shevin*

In 1972, the Court was confronted with the question of whether state replevin statutes,[98] which did not allow for a pre-deprivation hearing, violated the Due Process Clause of the Fourteenth Amendment.[99] In *Fuentes v. Shevin*, the plaintiff had purchased several household appliances on credit, which were seized by her creditor due to the operation of the replevin statute. Ms. Fuentes, the plaintiff, had no opportunity to be heard prior to her property being seized.[100]

In assessing this problem, the Court found the fundamental issue to be whether or not Ms. Fuentes had the opportunity to be heard "at a meaningful time."[101] The Court held that notice and a hearing must be granted prior to the deprivation in order to comport with the requirements of due process.[102]

The opinion also carved out a slight exception to the constitutional necessity of a pre-deprivation hearing. In "extraordinary situations," notice may be postponed, but three conditions must be met:[103] Firstly, the seizure must be "directly necessary" to secure an important governmental or public interest.[104] Secondly, there must be "a special need for very prompt action."[105] Thirdly, the governmental official

(holding that because a yacht could sail away, the state's interest in securing it was strong enough to justify ex parte seizure); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (holding that notice and an opportunity to be heard must come at a "meaningful time" in order to comport with the requirements of due process).

97 *See* cases cited *supra* note 96 (differing levels of due process are required for ex parte seizures).

98 A replevin statute is "[a]n action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it." *Replevin*, BLACK'S LAW DICTIONARY (10th ed. 2014). Margarita Fuentes, named plaintiff in *Fuentes v. Shevin*, had purchased a gas stove and service plan and a stereo on credit from Firestone Tire and Rubber Company. With less than half of her balance remaining, a dispute arose between Ms. Fuentes and Firestone regarding the service of her stove. She declined to make any further payments. Firestone then filed an action in small claims court, and pursuant to a state replevin statute, a sheriff seized her stove and stereo. *Fuentes*, 407 U.S. at 70–71.

99 *Fuentes*, 407 U.S. at 80.

100 *Id.* at 70–71.

101 *Id.* at 80.

102 *Id.* at 81. This right attaches to interests protected by the Fourteenth Amendment, and chattels, like those at issue, were within that protection. *Id.* at 84.

103 *Id.* at 90–91.

104 *Id.* at 91.

105 *Id.*

instituting the seizure must be responsible for determining "that it was necessary and justified in the particular instance."[106]

Under this holding, even temporary deprivations of property, such as what happened to Ms. Fuentes, are unconstitutional absent the abovementioned extraordinary circumstances.[107] At issue was the deprivation prior to the opportunity to be heard.[108] The nature of such extraordinary situations justifying deprivation without prior notice is explained in later Supreme Court decisions, beginning with *Calero-Toledo v. Pearson Yacht Leasing*.[109]

2. *Calero-Toledo v. Pearson Yacht Leasing Co.*

Two years after *Fuentes*, the Supreme Court clarified the exceptions to the requirement of a pre-deprivation hearing.[110] In *Calero-Toledo*, a pleasure yacht on which marijuana had been found was seized pursuant to a Puerto Rican statute.[111] The plaintiff challenged the statutory scheme on due process grounds.[112]

The Court found that this set of facts was just the kind of circumstance contemplated by the exception discussed in *Fuentes*.[113] Central to the holding was the fact that the property at issue was a yacht, which meant that it could easily be removed from the state's jurisdiction.[114] In essence, the fact that a yacht could literally sail away justified seizure prior to notice.[115] However, there were members of the court who were not convinced that even this situation was exigent enough to warrant ex parte deprivation.[116]

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106 *Id.*

107 *See id.* at 90–91.

108 *Id.* at 80.

109 416 U.S. 663 (1974).

110 *Id.*

111 *Id.* at 665–68.

112 *Id.* at 668.

113 *Id.* at 678–79.

114 *Id.* at 679 (expressing concern that the yacht could be "removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given").

115 *See id.*

116 *Id.* at 691 (Douglas, J., dissenting in part) (calling into question the urgency of the circumstances in this case and taking issue with the designation of this set of facts as an "exigent circumstance" justifying a pre-deprivation seizure). In *Fuentes*, the Court listed circumstances such as seized poisoned food, dangerous drugs, or the failure of a bank as justification for failure of pre-seizure notice. *See* Fuentes v. Shevin, 407 U.S. 67, 91–92 (1972). Justice Douglas found that a small amount of marijuana was simply not comparable to the scenarios listed in *Fuentes*. *Calero-Toledo*, 416 U.S. at 691–93 (Douglas, J., dissenting in part). He argued that these circumstances were not within the scope of those exceptions and that the bar should in fact be higher when due process rights are at stake. *Id.* at 692–94.

3. *Connecticut v. Doehr*

In 1991, the Supreme Court specifically addressed ex parte deprivations of the home in *Connecticut v. Doehr*.[117] That case concerned a Connecticut statute, which authorized prejudgment attachment of real estate absent notice or a hearing, or a showing of extraordinary circumstances.[118] Such attachment does not completely or permanently deprive a property owner of their property rights, but does have many effects that can impair such rights.[119] The Court found that "even the temporary or partial impairments to property rights . . . are sufficient to merit due process protection."[120]

In assessing whether the property owner's due process rights had been infringed, the court applied the test articulated in *Mathews v. Eldridge*[121] to determine the amount of process due.[122] This test requires a court to balance three factors: (1) the private interest that will be affected by the state's action; (2) the risk of erroneous deprivation; and (3) the government's interest, including any burdens that additional or substitute requirements would entail.[123] Relying on *Fuentes*, the Court assessed the private interest and found that temporary deprivations were still afforded due process protection.[124]

Next, the Court examined the second prong of the test and found the "risk of erroneous deprivation" was to be quite high.[125] The contested procedure only required a "skeletal affidavit" in support of the deprivation.[126] The Court found that this was insufficient to protect the property owner's due process rights.[127]

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117 501 U.S. 1 (1991).

118 *Id.* at 4.

119 *Id.* at 11 ("[A]ttachment . . . clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.").

120 *Id.* at 12.

121 424 U.S. 319 (1976).

122 *Doehr*, 501 U.S. at 10–12.

123 *Id.* at 10. The Court actually substituted the claimant's interest for the government's interest, somewhat modifying the *Mathews* test from its original form. *See id.* at 10–11, 16.

124 *Id.* at 15 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972))).

125 *Id.*

126 *Id.* at 14. This is somewhat analogous to the procedures in the Nuisance Abatement Law, in which the City makes a showing of nuisance via an affidavit. N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-708 (2013). Since the City is a party to the action, the affidavit is arguably "one-sided."

127 *Doehr*, 501 U.S. at 14. In fact, the Court found that such an affidavit was likely to be "one-sided, self-serving, and conclusory," making the possibility of an impartial assessment by a judge unrealistic. *Id.* ("It is self-evident that the judge could make no realistic assessment

Finally, the Court found that the interests in favor of ex parte attachment were too minimal to justify such an attachment.[128] In striking down the Connecticut statute, the Court looked at other states' attachment provisions and found that almost all states required either a preattachment hearing or some sort of "extraordinary circumstance" in order to justify the absence of such a hearing.[129] The Court opined that the mere existence of an exigency requirement in an attachment statute does not necessarily shield such a statute from "constitutional attack."[130] However, the Court found that due process requires, at the very least, a preattachment hearing or exigency requirement.[131]

4. *United States v. James Daniel Good Real Property*

The Supreme Court again addressed the context of the home in *United States v. James Daniel Good Real Property*.[132] James Daniel Good pled guilty to a drug charge in connection with a large quantity of marijuana found in his home.[133] He was subsequently sentenced to jail time and probation.[134] Four and a half years later, the United States filed an in rem action seeking to seize Good's home.[135] After an ex parte

concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions.").

128 *Id.* at 16.

129 *Id.* at 17–18. ("Twenty-seven States, as well as the District of Columbia, permit attachments only when some extraordinary circumstance is present. In such cases, preattachment hearings are not required but postattachment hearings are provided. Ten States permit attachment without the presence of such factors but require prewrit hearings unless one of those factors is shown. Six States limit attachments to extraordinary circumstance cases, but the writ will not issue prior to a hearing unless there is a showing of some even more compelling condition. Three States always require a preattachment hearing. Only Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interests. Even those States permit *ex parte* deprivations only in certain types of cases: Rhode Island does so only when the claim is equitable; Connecticut and Washington do so only when real estate is to be attached, and even Washington requires a bond." (footnote omitted)).

130 *Id.* at 18 ("We do not mean to imply that any given exigency requirement protects an attachment from constitutional attack. Nor do we suggest that the statutory measures we have surveyed are necessarily free of due process problems . . . . We do believe . . . that the procedures of almost all the States confirm . . . [that] failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstance, clearly falls short of the demands of due process.").

131 *Id.*

132 510 U.S. 43 (1993).

133 *Id.* at 46.

134 *Id.*

135 *Id.* at 47.

proceeding, a warrant authorizing the seizure of the property was issued, and consequently the property was seized.[136]

As in *Doehr*, the Court returned to the *Mathews* three-pronged inquiry. In this assessment, the Court reinforced the importance of the home as a constitutionally protected interest.[137] As a result, the first prong of the *Mathews* test, the private interest affected, is an especially substantial consideration. In fact, the Court found this consideration more pressing than the deprivations in *Fuentes* or in *Doehr*.[138] The second prong, the risk of erroneous deprivation, was also inappropriately high, as the practice of ex parte deprivation creates an "unacceptable risk of error."[139] The Court recognized that an ex parte proceeding offered no protection to the innocent owner and that, under the statute, the government was not even required to offer evidence of any potential claimant defenses, making the fairness of the proceeding quite dubious.[140] Finally, the Court measured the government's interest, which it found to be insufficiently pressing to justify ex parte action.[141] The Court considered only the interest in seizing the property prior to the hearing date, rather than the government's general interest in seizing the property.[142] The government had other means of protecting its interests than ex parte seizure, and requiring pre-seizure notice and hearing would not be an administrative burden.[143] Ultimately, the Court held that for these reasons, the statute was unconstitutional as Good's due process rights had been violated.[144]

After the preceding line of cases, the Supreme Court has made several things clear. Firstly, deprivation of property without notice and

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136 *Id.* At the time of the seizure, Good had rented the property to tenants who resided in the home. The Government allowed the tenants to stay in the home but dictated that rent be paid to the U.S. Marshal. *Id.*

137 *Id.* at 53–54. ("Good's right to maintain control over his *home*, and to be free from governmental interference, is a private interest of historic and continuing importance . . . ." (emphasis added)).

138 *Id.* at 54. *Fuentes* concerned household appliances and *Doehr* concerned a prejudgment attachment of a home. *Id.*

139 *Id.* at 55. The Court also considered the origins of in rem seizures. *Id.* at 57–58. ("This rule had its origins in the Court's early admiralty cases, which involved the forfeiture of vessels and other movable personal property."). The Court noted that the traditional rule is justified because of the necessity to fix and preserve jurisdiction in the maritime context. In such a case, the appropriate forum or jurisdiction is established by the Court's act of taking control over the vessel or property in question. The suit can then be initiated once the appropriate forum is established. *Id.*

140 *Id.* at 55–56.

141 *Id.* at 56.

142 *Id.* Distinguishing this case from *Calero-Toledo*, the Court noted that real property cannot abscond like moveable property, and that governmental objectives can be attained without infringing upon the property owner's due process rights. *Id.* at 57.

143 *Id.* at 59.

144 *Id.* at 62.

an opportunity to be heard requires an extraordinary circumstance.[145] Secondly, even temporary deprivation must comport with the dictates of due process.[146] Finally, a home is an especially significant private interest, requiring due process protections.[147] These holdings combine to support a conclusion that the Court recognizes the significant risks of ex parte deprivation, and, absent extraordinary circumstances, the Court requires notice in order for deprivation of property to comport with due process.[148]

II. ANALYSIS

A. *Problems and Inconsistencies in Contemporary Application of the Nuisance Abatement Law*

1. Immediacy Problems

a. Justification, Generally

Ex parte seizures and deprivations of property are justified where the government's interest is extraordinary and there is a substantial need for prompt action.[149] As in *Calero-Toledo*, where the property in question (a yacht)—and all the evidence onboard—could easily sail away, the government's need to act promptly to secure important interests sometimes outweighs due process concerns and validates ex parte action.[150] The Nuisance Abatement Law's immediacy requirement serves to ensure that such a need is present within an action under the statute. However, this requirement may not always be met, and certain logical inconsistencies plague precedent on the subject, as discussed in the Sections that follow. While these problems reflect errors in application, they further compound the constitutional deficiencies of the ex parte provisions of the Nuisance Abatement Law.

b. Mootness

Logically, it would seem that in the case of an offending tenant causing a nuisance, if that tenant were evicted or otherwise excluded from the apartment, this would significantly weaken the City's case,

145 Fuentes v. Shevin, 407 U.S. 67, 90–91 (1972).

146 *Id.* at 86; *see also* Connecticut v. Doehr, 501 U.S. 1, 12 (1991).

147 *See James Daniel Good*, 510 U.S. 43; *Doehr*, 501 U.S. 1.

148 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 616 (4th ed. 2011).

149 *Fuentes*, 407 U.S. at 90–92.

150 *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679–80 (1974).

rendering moot any nuisance abatement action that follows.[151] In such a scenario, the nuisance has likely already been abated by the time the City moves via an Order to Show Cause (OSC) for an injunction. However, the courts have not always found such arguments availing and have, in fact, granted OCSs and proceeded with nuisance abatement actions where precisely such scenarios have occurred.[152]

In *City of New York v. 924 Columbus Associates*, Swete's Variety, Inc., a retail store, sold drugs to undercover police officers on five occasions.[153] Subsequently, the City brought an action against the premises pursuant to sections 7-706(a), 7-707, and 7-709 of the Nuisance Abatement Law.[154] The TCO was granted and the premises were closed.[155] Three to four months later, while the closure was still in effect, the landlord re-let the premises to a different tenant. The landlord then submitted an affidavit to that effect,[156] claiming that there was no longer any illegal activity occurring on the premises.[157] The lower court agreed and vacated the closing order.[158]

On appeal to the First Department of the Appellate Division, that court found that the landlord's statements in his affidavit were conclusory and did not sufficiently establish that the nuisance had been abated.[159] It reasoned that just because the previous tenant had left the premises did not necessarily mean that the illegal activity had ceased.[160]

Since *924 Columbus Associates*, City attorneys have argued, and courts have found, that the absence, exclusion, or eviction of a tenant who caused the nuisance in question does not render the nuisance

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151 This is not to say that the eviction of one tenant necessarily always abates the nuisance. For example, an apartment could house some sort of criminal enterprise with multiple actors. However, where the action is predicated on the criminal activity of an individual, when that individual is no longer residing within the apartment, the basis for that action no longer exists.

152 City of New York v. P'ship 91, 716 N.Y.S.2d 659 (App. Div. 2000) (reversing the lower court's denial of the City's application for preliminary injunction, finding "[t]he mere fact that the landlord may be 'back in possession,' as defendants' brief states, does not alone establish that the previous illegality has abated"); City of New York v. Mor, 690 N.Y.S.2d 33 (App. Div. 1999) (finding that the nuisance had not necessarily been abated based upon the eviction of a commercial tenant); City of New York v. 924 Columbus Assocs., 640 N.Y.S.2d 497 (App. Div. 1996) (declining to find sufficient evidence of abatement, even where the landlord had re-let the subject premises).

153 *924 Columbus Assocs.*, 640 N.Y.S.2d at 498.

154 *Id.*

155 *Id.* at 498–99.

156 Pursuant to Administrative Code § 7-712, which provides that, "if the defendant shows by affidavit and such other proof as may be submitted that the public nuisance within the scope of this subchapter has been abated" then a temporary closing order should be vacated. N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-712 (2013).

157 *924 Columbus Assocs.*, 640 N.Y.S.2d at 499.

158 *Id.*

159 *Id.*

160 *Id.*

moot.[161] This interpretation of the statute is problematic because it fails to meet the immediacy requirement within the Nuisance Abatement Law and that which justifies ex parte deprivation.[162] Where the government's interest is not immediate, ex parte deprivation does not comport with due process.[163] Such immediacy logically dissipates where the problem tenant is excluded from the premises. Therefore, if a nuisance-causing tenant has been removed from the equation, it arguably violates due process to continue with such an ex parte action.

c. Timing Between Last Recorded Violation and the Action

Another issue plaguing the immediacy requirement in practice is timing. OCSs are sometimes filed months after the incidents for which the actions are brought.[164] In a recent Brooklyn case, the Corporation Counsel waited five and a half months to file.[165] In that particular case, all the incidents at issue occurred within one week in April of 2014.[166] The City did not bring the action until late September.[167] Under facts like these, the immediacy issue becomes clear: if the City can wait almost six months to move for a TRO and a TCO, is it possible that the "public health, safety, or welfare" *immediately* requires government intervention? Long delays may imply that the government's interest in such action is not great enough to justify an ex parte deprivation or to comport with the dictates of due process.

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161 *See, e.g.*, City of New York v. P'ship 91, 716 N.Y.S.2d 659 (App. Div. 2000); City of New York v. Mor, 690 N.Y.S.2d 33 (App. Div. 1999).

162 It is important to note that while *924 Columbus Associates* did not involve an ex parte deprivation in relevant part (it involved a closing order issued after a hearing), the City often cites this case and its progeny in support of the proposition that a nuisance has not necessarily been abated. *See, e.g.*, Affirmation of Vikrant Pawar paras. 25, 27, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author); *see also* Affirmation of Vikrant Pawar paras. 25, 26, City of New York v. 864 42nd St., No. 15925/08 (N.Y. Sup. Ct. June 3, 2008) (No. 15925/08) (on file with author).

163 *See, e.g.*, Verified Complaint para. 11, City of New York v. 296 Sutter Ave., No. 13990/14 (N.Y. Sup. Ct. Sept. 29, 2014) (No. 13990/14) (on file with author) (showing that the City waited five and a half months before filing its complaint); Verified Complaint, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author) (showing that the City waited almost five months before filing its complaint); Verified Complaint para. 10, City of New York v. 4420 003 Ave., No. 24355/08 (N.Y. Sup. Ct. Aug. 26, 2008) (No. 24355/08) (on file with author) (showing that the City waited three months before filing its complaint).

164 *See, e.g.*, Order to Show Cause, *296 Sutter Ave.*, No. 13990/14.

165 *See id.*

166 *See* Verified Complaint paras. 7–12, *296 Sutter Ave.*, No. 13990/14.

167 *See* Order to Show Cause, *296 Sutter Ave.*, No. 13990/14.

2. Confusion Regarding Precedent and the Necessity of the C.P.L.R. Injunctive Relief Standard

In the application of the Nuisance Abatement Law, there is significant confusion as to whether or not to apply the C.P.L.R. standard for injunctive relief.[168] The three-pronged inquiry consists of: (1) the likelihood of success on the merits, (2) the likelihood of irreparable injury, and (3) the balancing of the equities.[169] In support of their motions for a TCO or TRO via an OCS, the Corporation Counsel often cites *City of New York v. Bilynn Realty*[170] for the proposition that C.P.L.R. section 6301 does not apply in actions pursuant to the Nuisance Abatement Law.[171] However confidently this premise is stated within the City's arguments, it is not entirely accepted. In *City of New York v. 330 Continental*, the lower court held that this was not the case.[172] There, the court found that the City had in fact truncated the relevant language in *Bilynn* in order to imply that C.P.L.R. section 6301 was universally inapplicable to the Nuisance Abatement Law.[173] In assessing *Bilynn*, the *330 Continental* court pointed out that the *Bilynn* court balanced the equities and still held the City to its burden of proving the likelihood of success on the merits.[174] The substance of *Bilynn* was simply that the irreparable injury prong of the test could be presumed based upon the existence of an unremedied public nuisance.[175] The First Department of the Appellate Division later affirmed this interpretation, strengthening its precedential value.[176] While the City has argued that the C.P.L.R. test is inapplicable to

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168 N.Y. C.P.L.R. 6301 (McKinney 2010).

169 *Id.*; *see also* City of New York v. 330 Cont'l LLC, 873 N.Y.S.2d 9, 12 (App. Div. 2009) ("To be entitled to a preliminary injunction, the City was required to demonstrate a likelihood of ultimate success on the merits, irreparable injury in the absence of provisional relief, and a balancing of the equities in its favor.").

170 499 N.Y.S.2d 1011 (App. Div. 1986).

171 *See* Affirmation of Vikrant Pawar para. 25, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author) ("On a motion for injunctive relief pursuant to the Nuisance Abatement law, the three-pronged test for injunctive relief set forth in C.P.L.R. Section 6301 does not apply."); *see also* Affirmation of Vikrant Pawar para. 25, City of New York v. 864 42nd St., No. 15925/08 (N.Y. Sup. Ct. June 3, 2008) (No. 15925/08) (on file with author).

172 City of New York v. 330 Cont'l LLC, 845 N.Y.S.2d 705 (Sup. Ct. 2007), *vacated in part on other grounds*, 873 N.Y.S.2d 9 (App. Div. 2009).

173 *Id.* at 712 (finding that "[t]he City's reliance on *City of New York v. Bilynn Realty* is misplaced," and when reading *Bilynn* to stand for the proposition that the test for injunctive relief is inapplicable to the Nuisance Abatement Law is to take portions of the opinion "out of context").

174 *Id.* ("When *Bilynn Realty* is viewed in its full context, the City has the burden of establishing a likelihood of success . . . and a balancing of the equities.").

175 *Id.*

176 *330 Cont'l*, 873 N.Y.S.2d 9.

Nuisance Abatement Law cases, it is routinely applied to such cases by New York courts.[177] Uncertainty as to whether this test is to be applied only further obscures an already problematic statute, and it inhibits judicial clarity. Therefore, in the absence of judicial consensus, the need to apply federal constitutional due process principles is much more pressing. Because the C.P.L.R standard is not consistently applied, there is no check on the statute's ability to deprive owners and tenants of their property rights based on any kind of equitable principal.

3. The Innocent Tenant Problem

A TCO is an especially radical action, requiring eviction of all individuals within the entire subject premises.[178] When the premises at issue is not a commercial establishment, but a home, this can have collateral effects on those who live there, whether or not they are connected with the nuisance in question. New York courts have previously used their equitable powers to take steps to avoid such effects on innocent tenants, in one case even modifying a TCO where there was a clear showing of an ongoing public nuisance.[179]

In the context of narcotics-based eviction, New York courts have taken great pains to ensure that tenants who have no knowledge of the drug activities at issue are not rendered homeless through no fault of their own.[180] In so called "bawdy-house" cases,[181] where tenants evicted

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177 *See, e.g.*, City of New York v. Love Shack, 729 N.Y.S.2d 37, 40 (App. Div. 2001) ("Here, plaintiffs have demonstrated the likelihood of prevailing, the irreparable injury is based upon the harm to the general public if the nuisance is not immediately abated, and the equities are clearly in plaintiffs' favor . . . ." (citation omitted)); City of New York v. W. Winds Convertibles Int'l, Inc., 837 N.Y.S.2d 555, 559 (Sup. Ct. 2007) ("Generally, '[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.'" (quoting Nobu Next Door, LLC v. Fine Arts Hous., Inc., 883 N.E.2d 191 (N.Y. 2005))); City of New York v. Scandals, 678 N.Y.S.2d 876, 880 (Sup. Ct. 1998) ("In my view, the City has also met the standard for preliminary injunctive relief under CPLR 6301.").

178 *See* Donovan & Russo, *supra* note 37, at 95.

179 *See* People v. Macbeth Realty Co., 406 N.Y.S.2d 298 (App. Div. 1978).

180 *See, e.g.*, Second Farms Neighborhood HDFC v. Lessington, 932 N.Y.S.2d 763 (Table), 763 (App. Div. 2011) (refusing to upset a long-term tenancy because there was insufficient evidence "that the tenant knew or should have known of" illegal drug activity within the apartment); 855-79 LLC v. Salas, 837 N.Y.S.2d 631 (App. Div. 2007) (applying equitable principles and refusing to evict an elderly woman on the basis of illegal drug activity by her grandson); N.Y.C. Hous. Auth. v. Lipscomb-Arroyo, 866 N.Y.S.2d 93 (Table) (Civ. Ct. 2008) ("Speculation cannot replace admissible evidence to deprive some one of her/his home. Those who are 'innocent tenants' have not been evicted under New York State law where there exists no evidence that they knew of the illegal activity or should have known."); N.Y.C. Hous. Auth. v. Grillasca, 852 N.Y.S.2d 610 (Civ. Ct. 2007) (holding that the City housing authority failed to show customary or habitual drug sales and therefore refused to disturb the tenancy); 1895

on the basis of illegal activity within the home, courts have held that tenants must have knowledge of an offending activity in order to evict them on the grounds of such activity.[182] In this way, New York courts have sought to mitigate the negative collateral effects on innocent tenants in their pursuit of narcotics enforcement aims.[183]

By rendering tenants homeless, the City's nuisance abatement actions can victimize the very people they strive to protect. In practice, these innocent tenants are often senior citizens, tenants with infants, and the disabled.[184] A temporary closing order is to be issued if nuisance constitutes a threat to "the public health, safety or welfare" of the surrounding community.[185] However, members of this community are also arguably harmed if their building or apartment is closed and they are left homeless, even for a temporary period. The risks associated with harm to innocent tenants should also be assessed as part of the "private interest" at issue in the context of applying the *Mathews* test.[186]

At the very least, being locked out of one's home for three to six days is inconvenient. However, in the case of tenants who have nowhere else to go, a TCO could mean temporary homelessness, potentially yielding catastrophic results. The New York City Department of Homeless Services provides temporary shelter assistance, but the process for accessing a bed requires proof of eligibility and adherence to a complex rubric of policies and responsibilities.[187] Homeless individuals across the country have chosen to sleep on the streets rather than in shelters due to health and safety concerns within the shelters.[188] This choice comes with its own host of problems, as various activities incident to homelessness have been increasingly prohibited and criminalized.[189] While three to six days may be a short measure of time

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Grand Concourse Assocs. v. Ramos, 685 N.Y.S.2d 580 (Civ. Ct. 1998) (holding that personal consumption of cocaine by the tenant's husband was an insufficient basis for eviction).

181 *See, e.g.*, Bayram v. City of Binghamton, 899 N.Y.S.2d 566, 570 (Sup. Ct. 2010).

182 *See, e.g.*, *Lipscomb-Arroyo*, 866 N.Y.S.2d at 93.

183 Lloyd Realty Corp. v. Albino, 552 N.Y.S.2d 1008, 1011 (Civ. Ct. 1990) ("This Court does not find that the eviction of a senior citizen who has no knowledge nor involvement of the illegal drug activity conducted in her apartment will further serve the purpose of the narcotics eviction program.").

184 Levy, *supra* note 21, at 550.

185 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-709 (2013).

186 *See* discussion *infra* Part III.

187 *Families with Children: Applying for Temporary Housing Assistance*, N.Y.C. DEP'T OF HOMELESS SERVICES, http://www1.nyc.gov/site/dhs/shelter/families/families-with-children-applying.page (last visited Jan. 22, 2016).

188 *Why Some Homeless Choose the Streets Over Shelters*, NPR (Dec. 6, 2012, 2:04 PM), http://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters.

189 *See generally* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2011), http://www.nlchp.org/Criminalizing_Crisis. Additionally, those who are on the Supplemental Nutrition Assistance

in terms of the court's calendar, such a span of time without shelter can be devastating, especially with no warning.

4. Inconsistent Judicial Action

Furthermore, in practice, the Nuisance Abatement Law has yielded inconsistent judicial action in the granting or denial of TROs and TCOs in the residential context. Perhaps recognizing the due process perils of an ex parte seizure of a home, judges have at times crossed out the closing order portion of the nuisance abatement OCS.[190] The effect of the remaining order would be to restrain tenants "[f]rom removing or in any other manner interfering with furniture, fixtures and movable property used in conducting, maintaining or permitting the nuisance complained of" and from continuing to conduct the nuisance at issue.[191]

Judges have also independently remedied the due process concern by staying the closing order until after the hearing.[192] This action actually alleviates the constitutional concerns regarding ex parte deprivation by ensuring that owners and tenants have the opportunity to be heard prior to the issuance of a TRO or TCO. However, judges also routinely grant TROs and TCOs in full without objection or opposition.[193]

Program (SNAP) or food stamps are unable to purchase hot food options using public assistance funds. As a result, the loss of a home means a loss of the ability to prepare hot food, and food choices become increasingly limited. *What Can I Buy?*, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, http://www.fns.usda.gov/snap/mobile/benefits/what-can-i-buy.html (last visited Oct. 23, 2015). Seeking shelter on a cold night can also be a criminal offense, yielding arrests for trespassing. Horrifically, this criminalization of homelessness has led to death in at least one case. Jerome Murdough, a fifty-six-year-old homeless veteran, died in prison in 2014. After being arrested for "trespassing" when he took shelter in a New York City public housing complex's stairwell, Mr. Murdough died of dehydration in an overheated prison cell on Riker's Island. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 34 (2014), http://nlchp.org/documents/No_Safe_Place.

190 *See, e.g.*, Order to Show Cause para. 1, City of New York v. 296 Sutter Ave., No. 13990/14 (N.Y. Sup. Ct. Sept. 29, 2014) (No. 13990/14) (on file with author); Order to Show Cause para. 1, City of New York v. 1580 President St., No. 13992/14 (N.Y. Sup. Ct. Sept. 29, 2014) (No. 13992/14) (on file with author); Order to Show Cause para. 1, City of New York v. 707 Kingsborough 7 Walk, No. 16765/13 (N.Y. Sup. Ct. Sept. 17, 2013) (No. 16765/13) (on file with author).

191 *See, e.g.*, Order to Show Cause para. 2, *1580 President St.*, No. 13992/14

192 *See, e.g.*, Order to Show Cause at 2–3, *707 Kingsborough 7 Walk*, No. 10240/14; Order to Show Cause at 2–3, City of New York v. 995 E. Parkway, No. 2632/09 (N.Y. Sup. Ct. Feb. 3, 2009) (No. 2632/09) (on file with author); Order to Show Cause at 2–3, City of New York v. 115 Lenox Rd., No. 19705/08 (N.Y. Sup. Ct. July 8, 2008) (No. 19705/08) (on file with author).

193 *See, e.g.*, Order to Show Cause, City of New York v. 864 42nd St., No. 15925/08 (N.Y. Sup. Ct. June 3, 2008) (No. 15925/08) (on file with author); Memorandum, City of New York v. 39-41 Crescent St., No. 24004/02 (N.Y. Sup. Ct. June 15, 2005) (No. 24004/02) (on file with author).

This variety of procedural outcomes in relatively similar circumstances demonstrates a lack of consistently applied judicial standards in the application of the TRO and TCO provisions of the Nuisance Abatement Law. As mentioned previously, it is not even clear if the C.P.L.R. standard for injunctive relief is applicable.[194] As a result, owners, tenants, and other interested parties are subject to the whims of a lower court judge who may or may not have considered the additional due process complications caused by closing one's home prior to an opportunity to be heard.

B. *Application of the* Mathews *Factors to the Nuisance Abatement Law's Temporary Closing Order Provision*

As this Note has explained, many problems plague the Nuisance Abatement Law, especially its ex parte provisions. These problems include (1) insufficient immediacy to justify government action,[195] (2) insufficient weight afforded to the private interests at issue, and (3) harm to innocent tenants.[196] In combination, these problems reflect a deficiency in due process protections. Absent "extraordinary situations," due process requires notice and an opportunity to be heard prior to the seizure or deprivation of property.[197] In order to determine how much process is due, New York City courts should apply the test articulated in *Mathews v. Eldridge*[198] to the Nuisance Abatement Law. As outlined below, this test will provide greater judicial clarity and ensure due process protections for tenants and landlords.

Because the *Mathews* test is such a dominating force in due process jurisprudence,[199] it seems rational to apply it to New York City's Nuisance Abatement Law, where due process concerns are at issue. The three prongs of the *Mathews* test—the private interest affected by official action; the risk of erroneous deprivation of that interest, as well as probable value of additional safeguards; and the government's interest, including the administrative burden of that additional procedural requirements would impose[200]—provides a helpful guide in determining

194 *See supra* Part II.A.2.

195 While the Nuisance Abatement Law states that a nuisance must "immediately require" abatement in order for an injunction to be granted, immediacy is not defined, and Courts as well as the New York City Corporation Counsel often find that a mere showing of the statutory elements of nuisance is sufficient to demonstrate the requisite immediacy. *See supra* Part I.A.2.

196 *See supra* Part II.

197 Fuentes v. Shevin, 407 U.S. 67, 90 (1972).

198 424 U.S. 319 (1976).

199 Lawson et al., *supra* note 83, at 7.

200 *Mathews*, 424 U.S. at 334–35.

how much process is due, and whether the TCO provision survives constitutional scrutiny.

The first factor, the private interest, is crucially important, especially in the case of a closure of a residence. At stake is often the "security and privacy of the home and those who take shelter within it."[201] Property rights are an important component of individual freedom and cannot be blithely seized.[202] The Supreme Court's assessment of the importance of a residence within the due process equation is clear: the home is a critically important private interest entitled to due process protections.[203] In other contexts, the United States Congress and the New York State Legislature have recognized that the home is entitled to special protections, and, to that effect, have codified homestead exceptions in penal law, bankruptcy proceedings, and the satisfaction of money judgments.[204] In addition to the property rights themselves, the outcomes for tenants and owners of any measure of deprivation can be catastrophic. Few occupants are able to gain reentry like Ms. Walsh,[205] and could be forced to spend up to six nights on the street.[206]

The second factor, the risk of erroneous deprivation, is very high. While the statute requires "clear and convincing evidence" of illegal activity in order to justify the granting of a TCO,[207] this evidence may be insufficient to tell the whole story.[208] As was the case in *James Daniel Good*, the Corporation Counsel is not required to offer any evidence

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201 United States v. James Daniel Good Real Prop., 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it.").

202 *Id.*

203 *Id.* at 53–54 ("[An individual's] right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance . . . .").

204 N.Y. PENAL LAW § 35.15 (McKinney 2009) (providing a "castle exception" in the context of self-defense, which is an exception to a rule that requires a defendant to retreat rather than use deadly force, and providing that there is no requirement to retreat from one's own home); 11 U.S.C. § 522 (2012) (providing protections for the home in the context of a bankruptcy); N.Y. C.P.L.R. 5206 (McKinney 2011) (providing that homesteads are exempt from the application to the satisfaction of a money judgment).

205 *See supra* notes 22–29 and accompanying text.

206 *See supra* notes 48–50 and accompanying text.

207 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-707(a) (2013).

208 Routinely, such evidence is demonstrated by a police officer's affidavit, and the affirmation of the attorney bringing the action. *See, e.g.*, Affirmation of Vikrant Pawar, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author); Affidavit of Police Officer Douglas Corso, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author). Arguably, the affidavit and affirmation represent the same type of "one-sided, self-serving, and conclusory" affidavit found objectionable in *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991).

regarding innocent ownership or other potential claimant defenses.[209] In fact, non-owner tenants are unnamed, and are not formal parties to the suit.[210] Under the current statute, the Corporation Counsel has the power to deprive tenants of their homes without ascertaining who they are, let alone individual innocence or guilt.[211] An opportunity to be heard would afford the kind of additional safeguards contemplated by this prong of the *Mathews* test. Such an adversarial hearing would ensure that the judge is able to adjudicate with the kind of neutrality that is essential to governmental decision-making, particularly where the stakes are so high.[212] Furthermore, a post-seizure opportunity to be heard does not cure the harms of a temporary deprivation that is made in error. As it is impossible to give a tenant recompense for three to six days of, at best, inconvenience or, at worst, homelessness, such a hearing is, in the language of *Fuentes*, not "at a meaningful time."[213]

The third factor, the government's interest and burden of additional safeguards, must be assessed not in terms of the interest generally in abating nuisances, but the interest in immediate action prior to a hearing. As expressed in the *Fuentes* line of cases, ex parte seizures must be justified by a pressing need for prompt action.[214] Given the extended length of time between recorded violations and the bringing of an action in a typical nuisance abatement case, such a pressing need is arguably not present.[215]

In *James Daniel Good*, the Court looked to alternative methods to achieve the government's ends prior to a hearing, such as search and arrest warrants and restraining orders.[216] Both of these suggested alternatives are, of course, already available to the Corporation Counsel and the New York City Police Department. The City is free to exercise either or both of these alternatives in order to ensure that any further illegal activity is forestalled, and such action would not create any significant administrative burden. Additionally, per the current requirements of the Nuisance Abatement Law, a hearing in which both parties are present is already required.[217] Administratively, allowing

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209 United States v. James Daniel Good Real Prop., 510 U.S. 43, 55 (1993); *see also* N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, §§ 7-701 to 7-712 (2013).

210 *See, e.g.*, cases cited *supra* note 192.

211 *See* ADMINISTRATIVE § 7-711(e).

212 *See James Daniel Good*, 510 U.S. at 55 ("The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking.").

213 Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

214 *See* case cited *supra* note 96.

215 *See* discussion *supra* Part II.A.2.

216 *James Daniel Good*, 510 U.S. at 58–59.

217 ADMINISTRATIVE § 7-709(a) ("Upon granting a temporary closing order, the court shall direct the holding of a hearing for the preliminary injunction at the earliest possible time but in

both parties to be heard prior to deprivation makes little difference. However, this difference allows the statute to comport with due process principles, and to ensure tenants, owners, and affected parties are afforded the necessary process that is due. As with the statute at issue in *James Daniel Good*, any harm resulting from delaying the hearing until both parties are able to be heard pales in comparison to the potential harm that befalls innocent tenants faced with erroneous deprivation of access to their homes.[218]

After analysis of the Nuisance Abatement Law's TCO provision via the *Mathews* test, it appears that in its current form, the statute does not comport with constitutional due process principles. However, the necessary changes are not drastic. This Note proposes that the TCO provision of the Nuisance Abatement Law be eliminated to ensure that due process rights for tenants and owners are protected. Such a measure would do away with the three day period between closure and the opportunity to be heard, and give Nuisance Abatement Law proceedings the necessary fairness required by the Due Process Clause of the Constitution.

III. PROPOSAL

Given its aggressive use of ex parte deprivation, the constitutionality of the TCO provision of the Nuisance Abatement Law should be assessed using the *Mathews* factors. The result of this inquiry should find that the TCO provision is unconstitutional. The elimination of the TCO provision would not only remedy constitutional deficiencies, but would also help to prevent erroneous deprivation caused by problems in the law's application.

A. *Application of the* Mathews *Factors to a Recent Brooklyn OSC*

Perhaps the best illustration of the usefulness of the *Mathews* test would be its application to the facts of an actual New York City OSC. The following analysis outlines both areas where facial deficiencies lead to unconstitutional deprivation and areas where problems in application exacerbate an already problematic statute. In both areas, the elimination of the TCO provision would remedy the constitutional deficiencies.

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no event later than three business days from the granting of such order; a decision on the motion for a preliminary injunction shall be rendered by the court within three business days after the conclusion of the hearing.").

218 *James Daniel Good*, 510 U.S. at 59.

In December of 2009, an undercover officer made controlled buys of small amounts of crack cocaine on two occasions at an apartment in Brooklyn.[219] On January 2, 2010, a search warrant was executed on the apartment.[220] Drugs and drug paraphernalia were found and two individuals were arrested.[221] Almost five months later, on April 28, 2010, the New York City Corporation Counsel filed an OCS asking for a TRO and a TCO based on these incidents.[222] As evidence, the City supplied the affidavit of the undercover officer who was involved in the controlled buys and the affidavit of the police officer who was involved in the execution of the search warrant.[223]

The private interests, as discussed previously, were significant. Court documents filed at a later date revealed that at least the owner and a tenant were affected.[224] Their due process rights were implicated in any ex parte action taken which deprived them of any property rights, however temporary the deprivation may have been.

The government's interests were not trivial in this matter. Clearly, the government had an interest in halting drug activity within its jurisdiction. However, it may not have been sufficiently weighty to overcome the private interests at issue. In assessing this interest and its weight in the *Mathews* calculus, several factors should be important. First, the Nuisance Abatement Law dictates that a nuisance must "immediately" require abatement,[225] and such immediacy must be assessed in light of the facts presented by the City in their OSC. Because the two controlled buys took place in December of 2009, and the OSC was filed almost five months later,[226] such a long wait did not seem to indicate an immediate or urgent need, nor did it imply that an additional wait time, in order to allow for notice to the defendants, would have dramatically harmed the City's position. Additionally, the execution of the search warrant resulted in the arrest of two individuals.[227] It is possible, perhaps even likely, that the criminal justice system had already abated this nuisance via the prosecution of these individuals. Finally, the number of documented drug incidents and the amount of drugs involved should also have been considered. Here, the City only cited three instances of documented drug activity (the

219 Affirmation of Vikrant Pawar para. 9, City of New York v. 181 Rockaway Parkway, No. 10584-10 (N.Y. Sup. Ct. Apr. 28, 2010) (No. 10584-10) (on file with author).

220 *Id.* at para. 11.

221 *Id.*

222 *Id.* at para. 3.

223 Affidavit of Police Officer Douglas Corso, *181 Rockaway Parkway*, No. 10584-10.

224 Stipulation, *181 Rockaway Parkway*, No. 10584-10.

225 N.Y.C., N.Y., ADMINISTRATIVE CODE, tit. 7, ch. 7, § 7-709 (2013).

226 *See supra* notes 219–22 and accompanying text.

227 Affirmation of Vikrant Pawar para. 11, *181 Rockaway Parkway*, No. 10584-10.

statutory minimum to establish nuisance),[228] and less than $100 worth of crack cocaine sold.[229] In combination, the lack of immediacy, the history of arrests, and the amount of drugs sold diminished the weight of the government's interests within the balancing of the *Mathews* factors.

The third prong of the *Mathews* test is the risk of erroneous deprivation, which will likely retread many of the same facts as the second factor, but for different reasons. The five month gap in time between the last documented drug incident and the filing of the Nuisance Abatement Law action is relevant here because circumstances can certainly change within a large span of time. While there may have been "clear and convincing" evidence that a nuisance was occurring in January, at the time of the execution of the search warrant, this may no longer accurately have reflected the state of affairs in late April when the City decided to file suit.[230] If there was a chance of such a change in circumstances, there was a risk that there was no longer a nuisance to be abated and the deprivation would have been erroneous. Also relevant is the arrest history. Once again, the fact that the nuisance may have been abated via the operation of the penal law presented a similar risk. If in fact the nuisance had been abated, a deprivation would have been erroneous.

In balancing all of the above-mentioned *Mathews* factors, it is likely that a prudent judge would have declined to grant the City's request for a TRO and a TCO in this case. In weighing the three factors, it appears that the private interests outweighed the government's interests, and that the risk of erroneous deprivation was too high. However, the actual judge in this case, without applying the *Mathews* test or any other articulated test, signed the OSC, granting both the TRO and the TCO.[231] As a result, the tenant was enjoined from the use of his apartment from

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228 ADMINISTRATIVE CODE § 7-703(g) (Nuisance Abatement Law defines "nuisance" as, in the context of a drug related nuisance, "[a]ny building, erection or place, including one- or two-family dwellings, wherein, within the period of one year prior to the commencement of an action under this chapter, there have occurred three or more violations of one or any combination of the provisions of article two hundred twenty, two hundred twenty-one or two hundred twenty-five of the penal law").

229 Affirmation of Vikrant Pawar para. 9, *181 Rockaway Parkway*, No. 10584-10.

230 Recall in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 54 (1993), the Supreme Court held unconstitutional the seizure of the defendant's property four and a half years after his arrest and conviction for a drug related offense. This is also a consideration in the current application of Nuisance Abatement Law. *See* City of New York v. W. Winds Convertibles Int'l, Inc., 837 N.Y.S.2d 555, 559 (Sup. Ct. 2007) ("The failure to act, or significant delay in doing so, must likewise be assessed by a court in determining the 'immediacy' required for extraordinary judicial action.").

231 Order to Show Cause paras. 1–4, *181 Rockaway Parkway*, No. 10584-10.

April 29, 2010 to May 3, 2010, at which time he was finally granted a hearing.[232]

In this Brooklyn case, a judge allowed two affidavits demonstrating minor drug activity—months before the filing date—to supersede the due process rights of tenants and owners of the premises in question. In *Fuentes*, Justice Stewart suggested several cases excusing the necessity of a predeprivation hearing, including to meet the needs of a national war effort, to prevent economic disaster, or to prevent the public dissemination of misbranded drugs or contaminated food.[233] Here, the City's actions were simply out of scope. No such catastrophe or extraordinary circumstances were implicated in the typical nuisance abatement case. The case described above illustrates the lack of necessary immediacy and compelling government interest required to overcome a crucially important private interest: the right to a hearing prior to the deprivation of one's property.

The case was ultimately settled by a stipulation in which the tenant agreed to cease any drug activity within the apartment, and to move out at a later date.[234] This outcome could certainly have come about without any ex parte deprivation of the tenant's property. The judge could have, like many other judges,[235] delayed any TCO until such time as the affected parties were afforded notice and an opportunity to be heard. Here, there would have been no administrative burden to allow a hearing prior to any deprivation. A TRO that allowed the tenant to continue to reside in his apartment until he had an opportunity to be heard would not likely have affected the ultimate result.

However, it is unclear what the benefit of bringing such an action would be. Once it is clear that a nuisance is likely abated, City resources spent on bringing actions under the Nuisance Abatement Law are redundant and inefficient. Perhaps the application of the *Mathews* test, and the elimination of the TCO provision (and the resulting increased fairness to owners and tenants), would make residential actions under the Nuisance Abatement Law a much rarer practice.

B. *Counterarguments and the Broken Windows Theory*

Advocates of the Nuisance Abatement Law would likely oppose the elimination of the TCO provision. New York City Police Commissioner Bill Bratton—arguably the statute's most important enthusiast—may

232 *Id.*

233 Fuentes v. Shevin, 407 U.S. 67, 91–92 (1972).

234 Stipulation, *181 Rockaway Parkway*, No. 10584-10.

235 *See supra* Part II.A.4.

find that stripping the TCO provision would render the statute toothless because the police would lose the "element of surprise," which can be helpful in securing any illegal goods or evidence that may be present within the premises closed by a nuisance abatement action.[236] Bratton and other commenters have hailed civil remedies grounded in the "theoretical underpinnings" of the "Broken Windows" or "order maintenance" theory.[237] Such remedies allow crime prevention to be tied to physical spaces in which crime occurs, and provide legal mechanisms for the city to exercise control over those spaces.[238] Intuitively, this kind of a remedy could be appealing. If the city is able to take swift action to stop crime *where it happens* and to close down criminal activity immediately, communities may be safer and more secure. Community safety is, of course, a crucially important governmental interest worthy of vigorous pursuit.

However, while the TCO remedy may be "tough on crime," it is also tough on the civil liberties of those who inhabit spaces that the city seeks to control. While the "element of surprise" may make the Nuisance Abatement Law more convenient, convenience cannot trump constitutionality. The Constitution requires notice and an opportunity to be heard—absent extraordinary circumstances.[239] When TCOs are routinely granted as a typical exercise of the statute, the circumstances upon which their justification is based tend to look less and less extraordinary.

Furthermore, notice and an opportunity to be heard for interested parties in a nuisance abatement action would not make any of the statute's goals unmanageable. Should the police want to, in Bratton's words, "sweep down on a location and close it without warning" in order to collect or preserve evidence,[240] they can get a search warrant to

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236 Bratton, *supra* note 72, at 453 ("The ex parte nature of the proceeding is particularly useful because it gives the police the element of surprise. By executing these temporary and preliminary orders, the police can sweep down on a location and close it without warning, seizing illegal goods and records of illegal activity that may further criminal prosecutions."). Bratton goes on to conclude that due process concerns are alleviated by a hearing three days after the initial deprivation. *Id.*

237 *See* Levy, *supra* note 21, at 547–48 (explaining the origin of the "Broken Windows" theory of policing and social control, which emphasizes a crackdown on low-level "quality of life" crimes in order to prevent the creation of conditions that foster serious criminality, which enables "state control and regulation [to] penetrate[] deeper into the everyday lives of poor people"); *see also* Bratton, *supra* note 72, at 448 (describing the metaphor upon which "Broken Windows" is based, which is in essence that a broken window that is not quickly repaired becomes a target for further criminal activity, and according to Bratton, to leave low-level offenses unremedied puts entire communities at risk for further serious criminality and a diminished sense of security); Donovan & Russo, *supra* note 37, at 91.

238 Levy, *supra* note 21, at 548.

239 *See generally* discussion *supra* Part II.

240 Bratton, *supra* note 72, at 453.

do just that. After a hearing, a nuisance abatement action may still ultimately close the premises of an illegal business or evict a problematic tenant. However, in the absence of the TCO provision, there are not lingering due process concerns threatening unconstitutional deprivation or homelessness for innocent tenants.

Such a remedy may be, in fact, better for all community members. As Ms. Walsh's case demonstrates, proximity to illegal activity can put a tenant at risk for erroneous deprivation.[241] To allow a TCO provision to stand would add yet another risk to life in crime-ridden communities. Striking down the TCO provision, either judicially or via legislative action, would remedy constitutional concerns as well as reduce the risk of erroneous deprivations and its potentially disastrous collateral effects.

CONCLUSION

When TCOs are granted without the requisite immediacy, and tenants and owners do not have notice and an opportunity to be heard, due process rights are violated. This statutory framework cannot be used to sidestep the burdens of criminal law in a civil context. In order to comport with the requirements of due process, private interests of individuals must be respected and protected. To achieve this, New York courts should apply the *Mathews v. Eldridge* test to the Nuisance Abatement Law, and, once applied, find that the TCO fails to comport with federal constitutional due process principles. Absent the TCO, the Nuisance Abatement Law may still operate as a tool to protect communities from damaging nuisances, but without trampling on the civil liberties of individuals. The resulting outcomes will be fairer, more accurate, and more respectful of owners' and tenants' due process rights.

241 *See supra* notes 22–29 and accompanying text.