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Municipal Utility Service as a Property Right: Pre-Termination Notice to Tenants Not Required: Sterling v. Village of Maywood

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MUNICIPAL UTILITY SERVICE AS A PROPERTY RIGHT: PRE-TERMINATION NOTICE TO TENANTS NOT REQUIRED: *STERLING V. VILLAGE OF MAYWOOD*

The Seventh Circuit, in its recent decision *Sterling v. Village of Maywood*,[1] addressed the issue of what rights a municipal utility must afford a tenant-consumer prior to the termination of utility service[2] when the termination is requested by the tenant's landlord.[3] The court held that tenants have no constitutional due process rights to notice and a hearing prior to termination based solely on their status as the "actual user" of the utility. The court reasoned that a tenant must be able to exhibit a property interest in the service before the due process clause of the fourteenth amendment can be invoked to require notice.

The *Sterling* court was confronted with two important, yet competing interests. Many tenants pay for their utilities through their landlord[4] rather than maintain a contract directly with the utility. Consequently, they have difficulty proving a legitimate property interest in the service. A decision denying due process protection to tenants makes them vulnerable to sudden and possibly arbitrary terminations. Conversely, municipal utilities, if required to furnish notice and hearings to tenants prior to all terminations requested by landlord-account holders, would be burdened by additional paperwork and operating costs.[5]

The purpose of this Note is to examine the Seventh Circuit's analysis of this due process issue. It will advance the view that the decision was poorly

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1. 579 F.2d 1350 (7th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).

2. Although not explicitly stated by the court, the decision will presumably apply by extension to utilities other than water service. The Illinois Commerce Commission defines utility service as "gas, electric, water or sanitary sewer service. . . ." Ill. Commerce Comm'n, General Order 172, at 2 (1979), *reprinted in* 1 Ill. Reg. 105, 114 (1979).

3. The court's concern was not specifically limited to landlord requests. The concept is that requests for termination of service by the party in whose name the utility service is registered should be honored. 579 F.2d at 1354. When the tenant is not the customer of record, often it is the landlord who pays the bills.

4. *See* Chicago Residential Space Heating Market, People's Natural Gas Marketing Dept., Table II, at 6 (1977). According to this private utility report, some 536,000 dwelling units received space heating service while only 39,670 accounts were billed. These figures reflect the number of master meters used by landlords to distribute heat to tenants. In Illinois there are 1,318 municipally controlled water supplies. Data Book Records, Illinois Environmental Protection Agency (1979). There are 41 municipal electric utilities with total revenues of $78,584,000 and 66 municipal gas works with 42,768 on-line customers. American Public Power Association Annual Publication 44 (1978) and American Public Gas Annual Publication 29-34 (1978).

5. 579 F.2d at 1354 n.10. The court states: "[W]e should note that our decision has the incidental effect of saving municipal utilities the potentially onerous burden of investigating and providing some form of notice and opportunity for a hearing in regard to every request for termination of service."

reasoned at critical points which will operate to deny tenants the advance notice necessary to make safe, alternative arrangements for utility service. Further, it will be argued that this decision contradicts the current trend found in court decisions and legislative action in favor of protecting the interests of utility users.

FACTS AND PROCEDURAL HISTORY

The plaintiff, mother of four minor children, resided in the Village of Maywood, Illinois. The defendants were the Village itself[6] and three administrative employees. The plaintiff's complaint alleged[7] that she secured an oral lease to rent a single-family dwelling unit and, pursuant to her understanding of the lease, moved into the apartment. The landlord, however, disagreed with the plaintiff's understanding of the lease, made an unsuccessful attempt to evict her, and finally requested that the Village Water Department terminate service to the premises. Four days later, with no notice to plaintiff, the service was terminated.[8] Immediately after termination, the plaintiff went to the Village Hall in an effort to secure reinstatement of service, offering a deposit and promising to pay for future service in her name. The defendants denied her request for reinstatement.[9]

The plaintiff sought a declaratory judgment and damages in her action against the private defendants and the Village, alleging that the original termination and the subsequent refusal to reinstate service were violations of 42 U.S.C. § 1983,[10] and the due process and equal protection clauses of the fourteenth amendment.[11] The district court rejected the entire claim, characterizing the issue as "essentially a landlord-tenant problem."[12] The

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6. The Seventh Circuit applied Monell v. Dept. of Social Services, 436 U.S. 658 (1978), in allowing an action against a municipality under 42 U.S.C. § 1983. 579 F.2d at 1356.

7. The district court dismissed plaintiff's complaint for failure to state a cause of action; therefore, the circuit court viewed the plaintiff's allegations as true. Ricci v. Chicago Mercantile Exchange, 447 F.2d 713, 715 (7th Cir. 1971), *aff'd*, 409 U.S. 289 (1973).

8. 579 F.2d at 1352.

9. 579 F.2d at 1352. *See* notes 39, 40, and accompanying text *infra*.

10. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

11. The fourteenth amendment of the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

12. Sterling v. Village of Maywood, No. 76C-2991 (N.D. Ill. April 15, 1977).

court of appeals remanded the equal protection question[13] but affirmed dismissal of plaintiff's due process claim.[14]

CONSTITUTIONAL BACKGROUND OF THE DUE PROCESS ARGUMENT

As plaintiff's due process claim was brought under section 1983, she was required to demonstrate that state action deprived her of a property right of constitutional proportions without due process of law.[15] Her claim that utility service was a property right was based on an entitlement theory: although a municipality had no obligation to provide water service, once it chose to do so "a user ha[d] a legitimate claim of entitlement to continued service absent cause for termination . . . ."[16]

This entitlement theory was based on United States Supreme Court cases which considered the issue of procedural due process rights owed to a recipient of government benefits prior to the termination of those benefits. Four major cases which analyzed this due process issue need to be reviewed in order to fully understand the evolution of the so-called "entitlement doctrine"[17] and to determine how the *Sterling* decision relates to this evolution.

Historically, a "unitary analysis"[18] has been applied to due process claims of this type. For example, in *Goldberg v. Kelley*,[19] the Court assumed that the recipient of a benefit was entitled to some kind of due process protection before the benefit could be retracted. Therefore, the only issue presented in *Goldberg* was the extent of the process "due."[20]

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13. 579 F.2d at 1355. The defendant municipality applied for certiorari to the United States Supreme Court. The question presented was:

> Whether a municipality, which has properly terminated water service to a building, may refuse to restore such service at the request of a tenant of that building until the prior unpaid debt for water service is paid?

See Petitioner's Brief for Certiorari at 2, Village of Maywood v. Sterling, No. 78-929 (Feb. 21, 1979). Certiorari was denied. 440 U.S. 913 (1979).

14. 579 F.2d at 1355

15. Adickes v. Kress & Co., 398 U.S. 144, 150 (1970). The *Sterling* court recognized that the action of the Maywood Water Department constituted state action. 579 F.2d at 1353 n.6.

16. Brief for Appellant at 3, *quoting* Koger v. Guarino, 412 F. Supp. 1375, 1386 (E.D. Pa. 1976), *aff'd without opinion*, 549 F.2d 795 (3d Cir. 1977).

17. The term "entitlement" was first used in Goldberg v. Kelley, 397 U.S. 254 (1970), to emphasize the extent of the plaintiff's interest in the government benefit. The term "entitlement doctrine" is generally used by commentators. *See, e.g.*, Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89, 97-98 [hereinafter *Entitlement* Comment].

18. Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 261-62.

19. 397 U.S. 254 (1970). The Court held that welfare recipients were protected by the due process clause from termination of their benefits without a prior hearing.

20. Thus, in *Goldberg*, it was found that the "brutal need" of a destitute welfare recipient for continuing support while a dispute over eligibility was being resolved far outweighed the government's interest in protecting public funds. *Id.* at 261, *quoting* Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968).

Board of Regents v. Roth[21] and its companion case, *Perry v. Sindermann*,[22] altered this analysis by challenging the assumption that some measure of due process protection was always owed the recipient.[23] Extreme emphasis was placed on the definition of the concepts "liberty and property." Before arguing the equities of a due process claim, a plaintiff had to demonstrate that he or she was being deprived of one of these interests.[24] The *Roth* Court, defining the limits of protectable property rights, announced two principles: i) an abstract expectation of a benefit is not a property interest[25] and ii) in determining whether an asserted interest is mere expectation or more, the court must look to independent, objective sources such as state law and express contracts between the state and the individual.[26] The *Sindermann* holding added a third source—implied contracts inferred from the "unwritten common law" of the state agency involved.[27]

These two decisions tended to enlarge the traditional notion of property by including within their definition[28] entitlements to government benefits. Both decisions, however, simultaneously stressed that, at least where government employment was concerned, the extent of any entitlement was al-

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21. 408 U.S. 564 (1972). In *Roth*, a college professor's teaching contract was terminated allegedly without due process. The court determined that Roth's contract rights were explicitly determined by the statute, providing that renewal of his contract could be denied without any hearing. *Id.* at 566-67. Thus, the state had created no objective expectation of entitlement to future employment and therefore plaintiff had no due process rights.

22. 408 U.S. 593 (1972). In *Sindermann*, a college professor's teaching contract was also terminated allegedly without due process. The court determined that the "de facto" tenure system of the university created a reasonable expectation of continued employment; therefore, due process was required to protect the professor's "entitlement." *Id.* at 599-603.

23. Justice Stewart, the author of both opinions, asserted that the range of interests protected was not infinite—the due process clause was activated *only* when life, liberty, or property was at stake. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

24. The significance of the definitional emphasis formulated by the court is vividly illustrated by the outcome of the two cases. Despite similar factual situations, Roth failed in his due process claim while Sindermann succeeded. Under the old "unitary analysis" the two claims would have been decided identically. *See* Note, *Democratic Due Process: Administrative Procedure After Bishop v. Wood*, 1977 DUKE L.J. 453.

25. In the most widely quoted language of the decision, the court held: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 568 (1972).

26. *Id.* at 577. Justice Stewart admonished that property rights were not created by the constitution; they were created and their "dimensions defined" by existing rules and understandings.

27. Perry v. Sindermann, 408 U.S. 593, 602 (1972).

28. The decisions were originally heralded as having abolished the traditional "right-privilege" doctrine, which held that government benefits were privileges to which an individual could claim no rights. *See generally* E. GELLHORN, ADMINISTRATIVE LAW 652 (1974); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). However, in light of the more recent, restrictive Supreme Court decisions, *Roth* and *Sindermann* were clearly less expansive than first construed.

ways determined by the applicable state law.[29] Clearly, the entitlement doctrine as enunciated was a "two-edged sword" in that a state or state agency could create protectable property rights by granting entitlements and *also*, by express intent, deny entitlements, thus preventing the establishment of protected interests.[30]

Two years after *Roth*, the second edge of the unsheathed entitlement sword was made more visible in *Arnett v. Kennedy*.[31] In effect, the Court held that a public employee was entitled to only those procedural protections which are expressly granted by the relevant statutes. The *Arnett* plurality established that "[w]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[32] The recipient of a government benefit agrees to take the bitter—the abbreviated procedures for retraction of the benefit—with the sweet—the enjoyment of the benefit prior to termination.[33]

The entitlement doctrine was made even more bitter-sweet by the most recent benefit-deprivation case, *Bishop v. Wood*.[34] Justice Stevens, writing for the Court, began by reiterating the notion from *Roth* and *Sindermann*

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29. Thus, the court in *Sindermann* found that while petitioner had alleged "rules and understandings" sufficient to establish an entitlement, state law that explicitly withheld tenure from professors like Sindermann would have defeated his claim. Perry v. Sindermann, 408 U.S. 593, 602 n.7 (1972).

30. The term "two-edged sword" was used in *Entitlement* Comment, *supra* note 17, at 97. Other commentators speak of a statute in terms of its "positive" and "negative" utility. Positive utility indicates that the statute creates an entitlement while negative utility indicates express denial of property interests. *See* Note, *Constitutional Law—Due Process—Property Interest—Government Employment—State Law Defines Limitations of Entitlement*, 1977 Wis. L. Rev. 575.

31. 416 U.S. 134 (1974). In *Arnett*, a career civil servant who was fired for accusing his superior of bribing a community action organization, denied having made the accusation and waived his right to a pre-termination hearing conducted by his superior. He asserted the right to have a hearing before a disinterested and impartial hearing examiner. Reversing the decision of the three judge district court in favor of the employee, the Court held that the petitioner was not entitled to a pre-termination due process hearing. *Id.* at 163.

The Court was split, with the plurality opinion written by Justice Rehnquist holding that the only procedures available to Arnett were those given to him by the controlling personnel statute. The plurality opinion became the majority's view in Bishop v. Wood, 426 U.S. 341 (1976). *See* Note, *Democratic Due Process: Administrative Procedure After Bishop v. Wood*, 1977 DUKE L.J. 453, 460.

32. Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974).

33. This analysis is analogous to the fee simple determinable in real property. A grantor can reserve the right to retake the property upon the happening of a specified event. Similarly, the government can create property interests subject to defeasance. The conditions for defeasance are accepted by virtue of accepting the property interest. *See Entitlement* Comment, *supra* note 17, at 109 n.81.

34. 426 U.S. 341 (1976). In *Bishop*, a policeman was fired in accordance with the applicable municipal ordinance which required only written notice of reasons for termination. He was not given an opportunity to respond to the charges of his superior officer. The plaintiff asserted that the due process clause mandated a hearing prior to termination.

that a property interest could be created by ordinance or implied contract.[35] He then followed the approach taken by Justice Rehnquist in *Arnett* and examined the city ordinance to determine the dimensions of the property interest Bishop had in his position as a municipal employee. The Court held that since Bishop was specifically denied the right to a hearing by the relevant municipal ordinance, he was entitled to no further procedural protection under the due process clause of the constitution.[36]

Thus, as enunciated, the entitlement doctrine has effectively granted state and local legislative bodies the power to define property rights and to determine the procedural protection to be afforded them.[37] Federal courts, concomitantly, have become reluctant to find property rights absent a clear expression of intent on the part of those bodies.[38] Significantly, it was against this background of judicial reluctance that the *Sterling* due process claim was considered.

THE *STERLING* COURT'S ANALYSIS

Before the Seventh Circuit's due process analysis is considered, it must be noted that the court was faced with two distinct issues. In addition to the due process claim arising from the original termination, the plaintiff's suit alleged a subsequent equal protection violation when the defendant Village discriminatorily refused to reinstate service.[39] On this claim, the court held for the plaintiff.[40] The court's equal protection analysis, although significant, is not germane to this discussion of due process rights because it dealt with a utility user's rights *after* the initial, sudden termination.

The Seventh Circuit's main analytical concern relevant to the due process issue was whether plaintiff's role as a tenant water-user created a constitutionally protected property interest in continued water service.[41] The court utilized the *Roth* analysis of property and examined whether a state statute or an express or implied contract was operating in the plaintiff's favor. First, the court maintained that the plaintiff could not point to an ordinance or state law which purported to provide her with a legitimate claim of entitle-

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35. *Id.* at 344.

36. *Id.* at 347.

37. *See* Note, *A Constitutional Interest in Public Employment: The Last Hurrah?—Bishop v. Wood*, 26 DEPAUL L. REV. 631, 647 (1977).

38. *Id.* at 641 n.48.

39. Plaintiff argued that the Water Department's refusal to reinstate service was based on the landlord's failure to pay outstanding bills. Therefore, the utility was unfairly classifying applicants for service into two categories: those whose service address is encumbered with a landlord's prior debt and those whose address is not so encumbered. Brief for Plaintiff at 20.

40. The court, accepting the holdings of Davis v. Weir, 497 F.2d 139 (5th Cir. 1974) and Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684 (6th Cir. 1976), *aff'd*, 429 U.S. 1090 (1978), found that the refusal to reinstate was part of a collection scheme that had no rational relationship to the legitimate government purpose of collecting unpaid bills. 579 F.2d at 1355.

41. 579 F.2d at 1353.

ment. The only clearly applicable statute was the Village of Maywood municipal utility ordinance.[42] The pertinent sections examined by the court indicated that since service could not be provided free, fees had to be charged. In addition, to effectuate this limited provision of service, formal applications had to be filed by anyone desiring service.[43] The court reasoned that the language of these sections granted a clear entitlement only to those who had completed the required applications. Clearly, only Sterling's landlord fulfilled this statutory requirement. Therefore, the court stressed, the plaintiff could not assert that the ordinance supported her claim of entitlement to service because the ordinance "in fact . . . preclud[ed] such a claim."[44]

The court next asserted that the plaintiff had no contractual rights on which to base her claim.[45] The court noted that Sterling's landlord was the applicant for water service and therefore any express contractual interest in the water service belonged exclusively to him. This fact was of primary importance in the Seventh Circuit's analysis of the entire problem. On the basis of the contract, the court made an analytical differentiation between the landlord as a "customer" of the utility and the tenant as a "user" of utility service.[46] The court used this differentiation to distinguish nearly all of the cases cited by the plaintiff supporting a utility user's constitutionally protected property interest in continued service.[47] The plaintiffs in those cases, the court stressed, were the customers of record with the utility and, therefore, the cases could not aid Sterling's claim.[48]

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42. Maywood, Ill., Ordinance CO-68-13 (Oct. 24, 1968).

43. The preamble provided: "[I]t is necessary that the Village charge the inhabitants thereof for the use thereof and the services supplied by such waterworks . . . ." *Id.* at 1. Section 32.1 provided: "Any householder, property owner, or other person desiring water service . . . shall make application therefor . . . ." *Id.* at 2.

44. 579 F.2d at 1354.

45. *Id.*

46. *Id.* at 1353 n.7.

47. Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684, 687 (6th Cir. 1976), *aff'd*, 429 U.S. 1090 (1978) (shut-off notice from a utility must provide customer with information needed to prevent threatened termination of service); Palmer v. Columbia Gas Inc., 479 F.2d 153, 170 (6th Cir. 1973) (notice and hearing to customers of gas utility must indicate procedure for contesting disputed bill); Condosta v. Vermont Elec. Coop., Inc., 400 F. Supp. 358, 365 (D. Vt. 1975) (non-payment of disputed bill resulted in termination of service without notice); Donnelly v. City of Eureka, 399 F. Supp. 64, 67 (D. Kan. 1975) (ordinance that allowed customer's water service to be terminated for failure to pay garbage bill held unconstitutional); Limuel v. S. Union Gas Co., 378 F. Supp. 964, 965 (W.D. Tex. 1974) (gas service terminated without notice for non-payment of disputed bill by customer); Hattel v. Pub. Serv. Co., 350 F. Supp. 240, 241 (D. Colo. 1972) (tenant, who paid bill directly to the utility and allowed arrearage to accumulate, moved to a new house where service was terminated); Bronson v. Consol. Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972) (customer paid portion of disputed bill and service was terminated without notice or hearing); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 719 (D. Kan. 1972) (gas utility customers must receive pretermination hearing).

48. 579 F.2d at 1354. The court distinguished, on the facts, two circuit court cases which had purportedly held that a utility-user has a property interest in service regardless of contractual privity. The first, Koger v. Guarino, 549 F.2d 795 (3d Cir. 1977), was a class action with

Finally, the court maintained that the plaintiff did not claim that an implied or de facto understanding existed between her and the Village and, thus, no implied contractual relationship existed as in *Perry v. Sindermann*.[49] Having exhausted the sources of entitlement outlined by the *Roth* decision, the court concluded that Sterling had no property interest in continued service. Accordingly, it affirmed the district court's dismissal of the due process claim for failure to state a cause of action.

CRITICISM OF THE COURT'S ANALYSIS

Certain difficulties are encountered in understanding the *Sterling* court's analysis of the due process claim. The primary problem is its lack of analytical depth. Part of the significance of the case, other than the practical impact it may have on tenants,[50] is that as an extension of *Arnett*[51] and *Bishop*,[52] it applied the entitlement doctrine to a benefit other than government employment.[53] A full analysis of plaintiff's due process claim, which the Seventh Circuit itself stated was one of first impression,[54] seemed to be in order. The balance of this Note will focus on the court's treatment of the entitlement question with respect to the ordinance, the express and implied contract theories, and the customer-user distinction.

THE ORDINANCE

The court briefly stated that no provision of the Maywood utility ordinance operated to bestow a property right on the plaintiff.[55] The court's conclusion presumably was based on the traditional entitlement analysis which mandates that a statute set out the conditions under which a benefit

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two subclasses consisting of: 1) all customers of the City of Philadelphia Water Department and 2) customers whose water service to their residence had been terminated or denied because of delinquent bills owed by the owner of the premises. *Id.* at 799. The district court held that water "users" have a claim of entitlement. Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976). The circuit court affirmed without an opinion; therefore, the *Sterling* court was not persuaded by the holding. 579 F.2d at 1353.

In the second, Davis v. Weir, 497 F.2d 139 (5th Cir. 1974), the Fifth Circuit, affirming a district court ruling, held that an Atlanta city ordinance which allowed for termination without notice to the actual consumer was constitutionally infirm. *Id.* at 141. The defendant municipality, however, conceded on appeal that notice was required and so the *Sterling* court was not persuaded. 579 F.2d at 1354.

49. 579 F.2d at 1354.

50. *See* note 4 *supra*.

51. 416 U.S. 134 (1977). *See* note 31 *supra*.

52. 426 U.S. 341 (1976). *See* note 34 *supra*.

53. *See* Note, *Democratic Due Process: Administrative Procedure After Bishop v. Wood*, 1977 DUKE L.J. 453, 461 (author posits that the effect of *Bishop* on entitlements other than public employment is a significant question which was left unanswered; although in his view, a negative response would result).

54. 579 F.2d at 1354. The court maintained that "[n]o court of appeals has discussed this entitlement issue."

55. 579 F.2d at 1354. *See* notes 43-45 and accompanying text *supra*.

must be granted.[56] This type of entitlement was found in *Goldberg*, where standards of eligibility were specifically prescribed.[57]

Clearly, the utility ordinance had a clause indicating that the benefit be granted to those who completed the formal application for service.[58] Therefore, the court was correct in asserting that this section of the ordinance created a *Goldberg*-type entitlement in the plaintiff's landlord. It could be argued, however, that the interest created by the section was an entitlement to service of a prospective nature. By the terms of the ordinance, any person with application in hand could demand that water service be initiated in his or her home. But, contrary to the implications of the Seventh Circuit's brief analysis, this ordinance section did not necessarily deny a property interest to a plaintiff who was *already* receiving service as a utility consumer. A section of the ordinance, discussing the status of third parties not in privity with the utility, was either overlooked or ignored by the court. This section provided that both the owner of the premises and the user of the service were liable for water bills.[59] Clearly, this language did not deny a property interest to users.

Unfortunately, the ordinance did not explicitly state that tenant-users had a legitimate claim of entitlement to continued service.[60] The *Arnett* and *Bishop* decisions made it clear that unless a property-type entitlement was clearly expressed in the statute or ordinance defining the terms of the benefit, courts were not likely to find a protectable interest.[61] Therefore, although a logical argument can be made that the ordinance was not intended to foreclose due process rights for water users, it must be admitted that *Arnett* and *Bishop* tend to deny plaintiff relief.

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56. *See generally Entitlement* Comment, *supra* note 17. This type of statute is the edge of the entitlement sword with positive utility.

57. The welfare recipients in Goldberg v. Kelley, 397 U.S. 254 (1970), had an entitlement claim to welfare payments that was grounded in the definition of eligibility presented in the statute. Even though the recipients had not shown that they were in fact within the statutory terms of eligibility, the Court held they had a right to a hearing at which they might attempt to do so. *Id.* at 262-66.

58. Maywood, Ill., Ordinance CO-68-13, § 32.1 (Oct. 24, 1968). *See* note 43 *supra*. This is the very essence of the court's equal protection holding. Once the application is completed, the ordinance dictates that service be tendered. Any refusal to tender on grounds not rationally related to a legitimate government purpose is a violation of plaintiff's equal protection rights. 579 F.2d at 1355. *See* note 39 *supra*.

59. The section in question provides:

> The owner of the premises, the occupant thereof and the user of the service shall be jointly and severally liable to pay for the service on such premises and the service is furnished the premises by the Village only upon the condition that the owner of the premises, occupant and user are jointly and severally liable therefor.

Maywood, Ill., Ordinance CO-68-13, § 32.3 (Oct. 24, 1968). This language suggests that it was the intent of the Village to make tenant-users bound parties to a joint and several contract.

60. *See* note 59 *supra*. The Ordinance does not mention third parties in any context other than the one cited in note 59.

61. *See* Note, *Return to the Privilege-Right Doctrine in Public Employment*, 28 LAB. L.J. 361, 366 (1977); Note, *HUD Preemption of Local Rent Control Ordinances—Tenants Entitled to*

IMPLIED CONTRACT

The court's analysis of plaintiff's implied contractual rights was as brief as its ordinance analysis. The court concluded, in one sentence, that since plaintiff made no claim that there was a de facto understanding between her and the Village, no implied right existed.[62] The Seventh Circuit, in concluding that plaintiff's complaint did not allege a de facto understanding, ignored the allegations of the complaint that specified actions of the Water Department that could have indicated to Sterling that service would not be terminated.[63] Those actions included a visit from a meter-reader who assured her a shut-off could be avoided if she were to become the customer of record,[64] a mailing of a bill to the "occupant" of the premises which indicated payment was not due for two full weeks,[65] and a request in the same bill that she visit the Water Department to change the records and insure that service would not be terminated.[66] All of these actions indicated that termination was not imminent. Nevertheless, the court was not persuaded that these actions could have led the plaintiff to reasonably believe that only her failure to comply with these requirements would result in termination of service.

Significantly, the *Sindermann* Court held that:

> [P]roperty interests subject to procedural due process protections are not limited by a few rigid, technical forms . . . . Explicit contractual provisions may be supplemented by other agreements implied from the promisors' words and conduct in light of the surrounding circumstances.[67]

Stated another way, the Court held that an objective expectation of entitlement could be created by the unwritten "common law" of the state agency involved. Despite its broad wording, the rationale is still good law.[68] Arguably, the actions of the municipal Water Department as set forth in the pleadings indicated that the plaintiff had a justified objective expectation of entitlement to continued water service. The Seventh Circuit, however, never addressed this question because the plaintiff did not specifically plead that such an expectation existed.[69] Since the court declined to even con-

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Due Process Rights, 30 RUTGERS L. REV. 1025, 1041 (1977); Note, *Constitutional Law—Due Process—Property Interest—Government Employment—State Law Defines Limitation of Entitlement*, 1977 WIS. L. REV. 575, 597.

62. 579 F.2d at 1354. *See* note 39 and accompanying text *supra*.

63. Plaintiff's Second Amended Complaint at 3-4.

64. *Id.* (Friday afternoon, 8/6/76).

65. *Id.* (Saturday morning, 8/7/76).

66. *Id.*

67. Perry v. Sindermann, 408 U.S. at 601, *quoting* Board of Regents v. Roth, 408 U.S. 564 (1972).

68. Bishop v. Wood, 426 U.S. 341 (1976). Justice Stevens, for example, noted that a property interest in employment can "of course" be created by an implied contract. *Id.* at 341.

69. At this juncture a procedural issue becomes relevant. The Supreme Court in Conley v. Gibson, 355 U.S. 41 (1957), held that a complaint should not be dismissed for failure to state a

sider whether these actions created an entitlement vis-a-vis the *Sindermann* rationale, the decision will have little impact on future cases which are factually similar but differently pled. [70]

THE CUSTOMER-USER DISTINCTION

The cornerstone of the *Sterling* court's analysis was the plaintiff's lack of a service contract with the Water Department. As noted previously, the court drew a clear distinction between a utility "user" and a utility "customer." [71] This distinction has been recognized by other authorities. For example, the Illinois Commerce Commission recently defined a customer as "a person who has agreed with a utility to pay for gas, electric, water, or sanitary sewer service," while a "user" was defined as a person who received such service. [72] Similarly, in *Jackson v. Metropolitan Edison*, [73] Justices Brennan and Marshall, in dissenting opinions, questioned whether tenant-utility users could claim a property interest in electrical service without status as contracting parties. [74] Therefore, the Seventh Circuit's emphasis appears to be well-founded.

The existence or non-existence of an express contract, however, does not conclusively determine whether there is an entitlement to service. [75] For example, during the pendency of the *Sterling* appeal, the Supreme Court

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cause of action unless it appears, beyond a doubt, that the plaintiff cannot prove a set of facts in support of the claim entitling him to relief. *Id.* at 46-47. Although Plaintiff's complaint did not specifically plead that a de facto understanding existed, it alleged certain actions of the Water Department from which it could be *construed* that a de facto understanding existed. *See* notes 63-66 *supra*. Arguably, under the Federal Rules of Civil Procedure, the pleadings serve the functions of giving general notice and ushering in discovery procedure. F. JAMES, CIVIL PROCEDURE 159 (2d ed. 1977). Therefore, perhaps the trial court dismissed the action prematurely.

70. Sterling had within her grasp facts that could have proved that a de facto understanding was in operation which guaranteed that service would not be terminated. The Village, in its answer to the complaint, *denied* that it was the routine practice of the Water Department to terminate a tenants' utility service upon the unilateral request of the landlord. Answer to Amended Complaint at 14. Indeed, the utility manager stated clearly that it was the policy of the Water Department to give pre-termination notice to all inhabitants of the Village whether they are "users" or "consumers." Defendant's Answers to Interrogatories at 3. The Seventh Circuit did not consider this information, their factual inquiry being restricted to the complaint because of the dismissal for failure to state a cause of action.

71. *See* note 47 and accompanying text *supra*.

72. Ill. Commerce Commission, Gen. Order 172, at 1 (1979), *reprinted in* 1 Ill. Reg. 105, 114 (1979). *See also* Note, *Protecting the Consumer in Utility Service Terminations*, 21 ST. L.U.L.J. 452, 469 (1977), where the author states: "[W]here the utility service is in the name of a landlord and the actual user of the service is a tenant . . . there appears to be a problem in finding a property interest in the utility user. . . ."

73. 419 U.S. 360 (1973). The *Jackson* Court held that action by a private utility did not constitute state action.

74. *Id.* at 364-66.

75. Clearly, this is the lesson of the *Arnett* and *Bishop* cases where the property right was denied or severely limited by the terms of the contract. *See* notes 32-37 *supra*.

decided in *Memphis Light, Gas & Water Division v. Craft*[76] that a customer with a contract had a protectable property interest in continued service from a municipal utility and some procedure for resolving billing disputes prior to termination was required.[77] The property interest, however, was created by operation of applicable state law which required public utilities in Tennessee to provide service "without discrimination and without denial except for good and sufficient cause."[78] The Court held that since the utility could terminate only for "cause," respondents had a legitimate claim of entitlement within the protection of the due process clause.[79] The thrust of the Court's analysis was that the state law requirements created the entitlement; the contract itself played a minor role in the decision.

A careful examination of the cases cited by Sterling to support the proposition that a user has a property right in utility service, reveals that past courts have found entitlements to service for a variety of reasons unrelated to contractual interests.[80] The Seventh Circuit's conclusion that none of these cases aided the plaintiff's cause, because of the existence of an express contract, assumed that the entitlement in those cases was based solely on that contract. This assumption was inaccurate.

Moreover, it must be stressed that two other circuit courts have found a property interest without any express contractual privity between the user and the utility.[81] The Seventh Circuit avoided confronting the policy reasons behind these decisions by agreeing they were correctly decided on their merits, yet distinguishing them from *Sterling* on the basis of their facts. Therefore, the cases were not considered controlling.[82] In those decisions

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76. 436 U.S. 1 (1978).

77. *Id.* at 15.

78. *Id.* at 11.

79. *Id.* at 12.

80. Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 687 (6th Cir. 1976), *aff'd*, 429 U.S. 1090 (1978) (entitlement based on uncritical acceptance of previous court holdings); Palmer v. Columbia Gas, Inc., 479 F.2d 153, 160 n.12 (6th Cir. 1973) (entitlement based on utility service as specialized type of property which presents distinct problems); Condosta v. Vt. Elec. Coop., Inc., 400 F. Supp. 358, 365 (D. Vt. 1975) (entitlement based on reliance theory which contends that utility service is vital to day-to-day existence); Donnelly v. City of Eureka, 399 F. Supp. 64, 67 (D. Kan. 1975) (when municipality is sole source of water service, service is an entitlement); Limuel v. S. Union Gas Co., 378 F. Supp. 964, 965 (W.D. Tex. 1974) (policy of state and city fostered legitimate reliance and therefore service is an entitlement); Bronson v. Consol. Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972) (entitlement based on reliance theory, which states that utility service is as vital as a welfare check (reference is to Goldberg v. Kelley, 397 U.S. 254 (1970)); Hattell v. Pub. Serv. Co., 350 F. Supp. 240 (D. Colo. 1972) (entitlement based, in part, on the "general welfare" clause of the Preamble to the United States Constitution); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 719 (D. Kan. 1972) (utility service is a basic civil right once extended by the utility).

81. *See* note 48 *supra*.

82. 579 F.2d at 1355 n.12. The court insisted that the decisions were not decided wrongly on their merits but were unpersuasive nonetheless.

the termination was the result of a landlord arrearage, whereas in the *Sterling* case, the termination was requested by the landlord.

The analytical difference between these two situations, however, is not immediately clear. Any protection given a tenant when the landlord is in arrears is based on the assumption that, since the tenant has no control over the landlord's failure to pay for utilities, he or she should not be penalized.[83] It would seem logical then to conlude that when a landlord requests termination, as in an attempt at constructive eviction[84] of a disliked tenant, the tenant has an equal lack of control. A strong argument may be made that whatever public policy concerns motivated the recognition of tenant's rights in one situation should also apply to the other.[85]

The real distinction between the two situations is one of administrative burden. The *Sterling* court feared that a decision extending due process rights would require that all routine requests for termination be investigated, rather than just those terminations resulting from the landlord's failure to pay the bill.[86] Therefore, when the *Sterling* court distinguished the other decisions on factual grounds, it was merely justifying its judgment that the denial of due process to tenants was an equal trade-off to the lessening of a paperwork burden on utilities.

This trade-off runs counter to the current trend of public policy concerning the rights of utility users to receive notice prior to termination of utility service. The most complete and compelling statement of these rights is contained in *Memphis Light, Gas & Water Division v. Craft*.[87] The Supreme Court, after determining that the plaintiff utility customer had a property interest in water service, balanced the private interest against the fiscal and administrative burdens that procedural protections would entail and held that notice and a hearing were required prior to termination.[88] Within this context the court described water service as "a necessity of modern life . . . discontinuance of which for even short periods of time may threaten health and safety."[89] Because of the essential nature of the services involved, the

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83. This appears to be the rationale behind the Davis v. Weir, 497 F.2d 139 (5th Cir. 1974) and Koger v. Guarino, 549 F.2d 795 (3d Cir. 1977) holdings. *See* note 48 *supra*.

84. Termination of electricity, gas, water or heat by a landlord as a "self-help" measure to oust a tenant and circumvent prescribed procedures is probably a violation of the Forcible Entry and Detainer Act. ILL. REV. STAT. ch. 57, §§ 1-22 (1977). *See* S. Mansfield, *Lock-Outs and Property Detention*. TENANTS RIGHTS, ch. 5 (Ill. Inst. of Continuing Legal Educ. 1978).

85. *See* Note, *Protecting the Consumer in Utility Service Terminations*, 21 ST.L.U.L.J. 452, 480 (1977), where author argues "[w]here the user of a utility is not the actual consumer of record, fairness demands that the actual user of the utility services receive notice of a proposed disconnection of that service."

86. 579 F.2d at 1354 n.10. In light of the Water Department's insistence that notice is given to all tenants anyway (*see* note 70 *supra*), this fear is clearly unfounded.

87. 436 U.S. 1 (1978).

88. *Id.* at 15.

89. *Id.* at 18.

Court held that post termination remedies were too susceptible of delay to adequately safeguard the plaintiff's health and safety.[90]

Recent Illinois legislation, exhibiting the same concern for notice to tenants prior to termination of service,[91] amended a prior statute which allowed a tenant/lessee to pay any utility bills the landlord had failed to pay and deduct that amount from any rent owed.[92] The new amendment extended further protection to tenants by providing that a utility cannot terminate service for non-payment by the landlord until the tenant has had a minimum of five days' notice.[93] The purpose of this legislation was to postpone immediate termination and to provide the tenant time to make adequate alternative arrangements.[94] Similarly, the Illinois Commerce Commission, in a recently promulgated rule, established a five-day notice requirement to tenants.[95] The rule, however, is not binding on municipal utilities.[96]

CONCLUSION

The Seventh Circuit's reasoning in *Sterling* was clearly dominated by the present reluctance of courts to find a property interest in government benefits through the entitlement doctrine.[97] A more incisive analysis and consistent application of the *Memphis Light* decision and recent legislative ac-

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90. The Court determined that even though service "may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation." *Id.* at 20.

91. Landlord and Tenant—Utility Service Terminations, P.A. 80-1453, §§ 1-6, 1978 Ill. Legis. Serv. 1207 (West) (to be codified as ILL. ANN. STAT. ch. 80, §§ 62-66 (Smith-Hurd)).

92. "An Act to permit lessers to receive a rent credit for paying certain lessor's obligations." ILL. REV. STAT. ch. 80, § 62 (1977). This Act helped tenants avoid constructive evictions by giving them the right to pay the utility bills when the landlord refused. Problems arose, of course, when the tenant did not know that the landlord was refusing to pay the bills.

93. Landlord and Tenant—Utility Service Terminations, P.A. 80-1453, § 3, 1978. Ill. Legis. Serv. 1207 (West) (to be codified as ILL. ANN. STAT. ch. 80, § 64 (Smith-Hurd)). This provision solved the tenant's problem of constructive eviction by giving him notice that the landlord was refusing to pay the bills.

94. *Id.*

95. Ill. Commerce Comm'n, Gen. Order 172 (1979).

Discontinuance of Service to Accounts Affecting Master Metered Apartment Buildings

> Within three business days after a notice of discontinuance of a master metered utility service is sent to a customer of a utility for a master metered apartment building, a notice as described herein must be mailed, delivered or posted in a public and conspicuous place in or around the building(s) affected by the proposed discontinuance of service by the utility providing the affected master metered service. The notice of discontinuance of service to this customer must inform him/her that his/her lessees or tenants are being notified of the pending discontinuance of service via the mailing, delivering or posting of the aforementioned notice.

96. ILL. REV. STAT. ch. 111 2/3, § 32.1. The Commission promulgates rules for public utilities only.

97. It has been noted that the entitlement doctrine has obviated constitutional analysis totally. The decision as to which interests *should* be protected has been relegated to the legislative intent of the agency that has granted the benefit. *See* notes 37-38 *supra*.

tion, however, could clearly have lead to a different result: one acceptable under due process analysis.

It must be acknowledged that the facts of the *Sterling* case presented the court with a very close question. It is clear that the Maywood municipal ordinance did not grant plaintiff a clear entitlement. It is equally clear that the plaintiff did not have any express contractual rights. The implied contract issue was not fully considered but, given the equivocal nature of the ordinance toward plaintiff's rights and *Sindermann's* emphasis that even entitlements based on implied contracts are to be defined by the applicable statute, it is not altogether clear whether the plaintiff could have argued successfully on an implied contract basis.

It cannot be denied, however, that the Seventh Circuit's wooden application of the entitlement doctrine to the *Sterling* situation has created a serious problem of cross-purposes. The Supreme Court has held on one hand that termination of essential services for even a short period of time threatens the public's health and safety. The Illinois legislature has also passed progressive legislation protecting utility consumers' rights when threatened with certain terminations they cannot control.[98] On the other hand, the Seventh Circuit, following the traditional analysis, has denied the simple due process rights of notice and a hearing to tenants. The definition of "property"[99] within the entitlement doctrine, as applied here, justified inconsistent protection of fundamental human needs.

As a remedy to the plaintiff, the *Sterling* court, in the second half of its split decision, required municipal utilities to restore service to a tenant-user who becomes the customer of record.[100] This "remedy" falls far short of the notice requirements recognized by other authorities as necessary to protect utility users from sudden and dangerous terminations.

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98. *See* notes 92-94 *supra*.

99. One commentator has stated: "While 'property rights' under American law enjoy a reputation for permanency, they are in fact more highly relative and more sensitive to changing economic factors and social opinions than most other legal concepts." J. CRIBBET, W. FRITZ & C. JOHNSON, PROPERTY xviii (3d ed. 1972).

100. Many poor tenants can barely afford the deposits necessary to apply for service. *See* Ill. Commerce Comm'n, Gen. Order 172, at 4 (1979), which will allow utilities to require as much as 1/6 of the estimated annual charges for gas and electric service and as much as 1/3 of the estimated annual charge for water as a deposit.