WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 1975 NUMBER 4

# A CONSTITUTIONAL LIMITATION ON THE ENFORCEMENT OF JUDGMENTS—DUE PROCESS AND EXEMPTIONS

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Since the Supreme Court's decision in *Sniadach v. Family Finance Corp.*,[1] holding the Wisconsin prejudgment garnishment statute unconstitutional, courts[2] and commentators[3] have extensively considered

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1. 395 U.S. 337 (1969).

2. *E.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973); Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Jones Press, Inc. v. Motor Travel Servs., Inc., 286 Minn. 205, 173 N.W.2d 87 (1970).

3. Under just the heading of "Due Process of Law," the *Index to Legal Periodicals* contains well over 100 entries on the subject. Among the most prominent works are Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pts. 1-3), 46 S. CAL. L. REV. 1003, 47 S. CAL. L. REV. 1 (1973); Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Countryman, *The Bill of Rights and the Bill*

constitutional limitations on creditors' prejudgment remedies. Constitutional limitations on postjudgment remedies, however, have received scant attention[4] even though statutes in every state specify property

*Collector*, 15 ARIZ. L. REV. 521 (1973); Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U.L. REV. 158 (1970); Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor*, 24 CASE W. RES. L. REV. 7 (1972); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503; Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60 (1972); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The* Sniadach *Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970); Note, *Provisional Remedies and Due Process in Default—Mitchell v. W. T. Grant Co.*, 1974 WASH. U.L.Q. 653.

4. The problem has been considered by Countryman, *supra* note 3, at 543-45; Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing?*, 21 S. DAK. L. REV. 78 (1976); Kennedy, *supra* note 3, at 173-76; Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 434-38 (1973); Note, *Debtor-Creditor Relations: Oklahoma Execution Procedure: Is a Warrant Required Before Levy?*, 28 OKLA. L. REV. 864 (1975); Comment, 3 FLA. ST. U.L. REV. 626 (1975).

Only seven cases were found in which the courts gave serious consideration to the constitutionality of execution statutes: Brown v. Liberty Loan Corp., 392 F. Supp. 1023 (M.D. Fla. 1974), *noted in* Comment, *supra*; Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) (three-judge court); Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975); Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973); Taylor v. Madigan, Civil No. 443647 (Cal. Super. Ct., Aug. 21, 1974), *rev'd*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975); Mathis v. Purdy, 40 Fla. Supp. 17 (Dade County Cir. Ct. 1973); Luskey v. Steffron, Inc., — Pa. —, 336 A.2d 298 (1975). Five others have held unconstitutional the incarceration of a person without prior opportunity to be heard in connection with the enforcement of civil judgments: Abbit v. Bernier, 387 F. Supp. 57 (D. Conn. 1974) (denial of equal protection); Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970); Yoder v. County of Cumberland, 278 A.2d 379 (Me. 1971); Mills v. Howard, 109 R.I. 25, 280 A.2d 101 (1971); Randall v. Randall, 129 Vt. 432, 282 A.2d 794 (1971); *cf.* Vail v. Quinlan, 406 F. Supp. 951 (S.D.N.Y. 1976) (three-judge court). In twelve other cases the courts gave short shrift to claims that the procedures violated the due process clause: Langford v. Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973); Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969); Sackin v. Kersting, 105 Ariz. 464, 466 P.2d 758 (1970); Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837, *cert. granted sub nom.* Hanner v. DeMarcus, 389 U.S. 926 (1967), *writ dismissed as improvidently granted*, 390 U.S. 736 (1968); Wilson v. Grimes, 232 Ga. 388, 207 S.E.2d 5 (1974); Wood v. Atkinson, 231 Ga. 271, 201 S.E.2d 394 (1973), *appeal dismissed*, 416 U.S. 901 (1974); Chonowski v. Bonucci, 47 Ill. 2d 519, 267 N.E.2d 671 (1971); Credit Serv. Co. v. Linnerooth, 290 Minn. 256, 187 N.W.2d 632 (1971); Bittner v. Butts, 514 S.W.2d 556 (Mo. 1974); Hehr v. Tucker, 256 Ore. 254, 472 P.2d 797 (1970); Lenske v. Shobe, 6 Ore. App. 472, 488 P.2d 852 (1971); Milne v. Shell Oil Co., 129 Vt. 375, 278 A.2d 741 (1971). *See also* Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972), *noted in* note 53 *infra*; Montgomery Ward & Co. v. Nunez, Civil No. C277480 (Ariz. Super. Ct., filed Oct. 31, 1975), *reported in* 9 CLEARINGHOUSE REV. 561 (1975), *settled before trial* (letter from plaintiff's attorney, on file with author).

exempt from execution.[5] The rationale for exempting property is to permit the judgment debtor (and his family)[6] to maintain a minimum standard of living and continue as a productive member of society.[7] To achieve this goal, the substantive provisions of exemption laws are to be liberally construed.[8] But the procedural aspects of exemption laws may actually frustrate their policy. In addition, they may be unconstitutional. This Article will (1) examine whether, under *Sniadach* and other decisions,[9] the procedural aspects of existing statutes conform to the requirements of due process and (2) propose a postjudgment seizure statute that poses no constitutional objections and fairly accommodates the interests of debtor and creditor.[10]

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5. For a description of these statutes, see text accompanying notes 13-33 *infra*.

6. Thus exemptions generally are greater for judgment debtors who are heads of families. *See* Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 841-45 (1974).

7. "The purpose of the exemption laws is to prevent the unfortunate citizen from being deprived of the necessaries of life and to preserve for him and his family certain things reasonably necessary to enable him to earn a livelihood . . . ." Patten Package Co. v. Houser, 102 Fla. 603, 606-07, 136 So. 353, 355 (1931); *accord*, Shepard v. Findly, 204 Iowa 107, 214 N.W. 676 (1927). *See generally* Vukowich, *supra* note 6, at 782-88. Many states impose a limit on the value of property that may be claimed as exempt. *E.g.*, ALA. CODE tit. 7, § 625 (1960) (homestead, $2000); MINN. STAT. ANN. § 550.37 (13) (Supp. 1975) (wages, 75 percent).

8. Haswell v. Parsons, 15 Cal. 266 (1860) (rejecting what the court described as "a very narrow construction of the statute"); Independence Bank v. Heller, 275 Cal. App. 2d 84, 88, 79 Cal. Rptr. 868, 871 (1969) ("It is the universal rule that exemption statutes are to be liberally construed in favor of the debtor"); Shepard v. Findly, 204 Iowa 107, 111, 214 N.W. 676, 678 (1927) ("It is the general rule in this state that the exemption laws shall be liberally construed in favor of a debtor").

9. *E.g.*, Mathews v. Eldridge, 96 S. Ct. 893 (1976); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Hanner v. DeMarcus, 390 U.S. 736, 736 (1968) (Douglas, J., dissenting); Griffin v. Griffin, 327 U.S. 220 (1946).

10. No consideration will be given to the kinds or amount of property that ought to be exempt. *See* S. ENZER, R. DE BRIGARD, & F. LAZAR, SOME CONSIDERATIONS CONCERNING BANKRUPTCY REFORM 55, 210 (Institute for the Future Report R-28, 1973); D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 81 (1971); Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678 (1960); Joslin, *Debtors' Exemption Laws: Time for Modernization*, 34 IND. L.J. 355 (1959); Karlen, *Exemptions from Execution*, 22 BUS. LAW. 1167 (1967); Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445 (1960); Plumb, *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1 (1975); Rombauer, *Debtors' Exemption Statutes—Revision Ideas*, 36 WASH. L. REV. 484 (1961); Vukowich, *The Bankruptcy Commission's Proposal Regarding Bankrupts' Exemption Rights*, 63 CAL. L. REV. 1439 (1975); Vukowich, *supra* note 6; Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459 (1959).

## I. THE PROCEDURES

### A. *Execution of Judgments*

To enforce a judgment,[11] the judgment creditor obtains a writ of execution from the clerk and delivers it to the sheriff, who levies upon property of the judgment debtor. If the property is readily movable, the sheriff levies by taking possession of it. Otherwise, the sheriff levies by some form of notice, either served on the judgment debtor, attached to the property, or recorded in a public office.[12] In some states the judgment debtor has the right to specify which items of his property the sheriff should levy on.[13] After levying on the judgment debtor's property, the sheriff advertises and sells it. He applies the proceeds first to his costs and then to satisfaction of the judgment. Any balance is given to the judgment debtor.[14]

If the property is not in the possession of the judgment debtor, than typically the procedure is garnishment rather than execution.[15] The judgment creditor procures a writ of garnishment from the clerk and delivers it to the sheriff, who serves it on the person in possession of the property, the garnishee. The writ directs the garnishee to disclose any property of the judgment debtor in the garnishee's possession and any debt owed by the garnishee to the judgment debtor. It also directs the garnishee to retain the property pending further notice or to turn it over to the sheriff.[16]

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11. The states vary on when a judgment creditor may first enforce a judgment. Some require only rendition of judgment, while others require some further step. *E.g.*, CAL. CIV. PRO. CODE § 664 (Deering 1973) (entry); TEX. R. CIV. P. 627 (20 days after rendition); *see* S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 55-60 (2d ed. 1975) [hereinafter cited as RIESENFELD].

12. *E.g.*, TEX. R. CIV. P. 639; *see* RIESENFELD 166-69.

13. *E.g.*, ARIZ. REV. STAT. ANN. § 12-1562(B) (1956); MO. REV. STAT. §§ 513.095, .100 (1959); MO. R. CIV. P. 76.25; TEX. R. CIV. P. 637; UTAH R. CIV. P. 69(d); *see* Hanner v. DeMarcus, 390 U.S. 736, 737 (1968) (Douglas, J., dissenting). Most states do not confer this right on the judgment debtor.

14. In some situations third parties may be able to intervene to assert rights superior to the rights of the judgment creditor. *See* RIESENFELD 198-200, 236-37.

15. RIESENFELD 167-69, 226-27.

16. *See, e.g.*, UTAH R. CIV. P. 64D(e)(i), (h); *see* RIESENFELD 226. An alternative form of garnishment contemplates the initiation of a separate suit against the garnishee, which culminates in a judgment against the garnishee. GA. CODE ANN. §§ 46-105, -303, -405 (1974); OHIO REV. CODE ANN. § 2715.11 (Page Supp. 1974).

If the property, such as United States patents, is not subject to execution or garnishment, the judgment creditor must resort to a creditor's bill or to supplementary proceedings in aid of execution. *See* RIESENFELD 276. These actions are initiated either by

### B. *Exemptions from Execution*

The kinds of property exempt from execution vary widely from state to state. Most commonly, states exempt a homestead,[17] wages,[18] life insurance,[19] and enumerated items of tangible personalty.[20] The procedure for claiming exemptions also varies among the states, and frequently within a state, depending on the exemption claimed. Thus, in a few states a judgment debtor must file a formal declaration with the recorder of deeds to claim a homestead exemption,[21] while in other states he need only file a written claim with the sheriff or the court.[22] In still others, the judgment debtor apparently may claim exemptions by oral notice to the sheriff,[23] or is entitled to exemptions without any

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motion of the judgment creditor and notice to the person in possession of the property, *e.g.*, IND. R. TR. P. 69(E); PA. R. CIV. P. 3118, or by separate suit against the person in possession, *e.g.*, TENN. CODE ANN. § 26-601 (1955).

In connection with the enforcement of a judgment, the judgment creditor may acquire a lien on the property of the judgment debtor. For example, in the great majority of states, the judgment itself becomes a lien on the real property of the judgment debtor in the county in which the judgment is recorded or docketed. *See* RIESENFELD 94-95. In addition, the writ of execution becomes a lien on personal property of the judgment debtor either when the writ is delivered to the sheriff (with respect to all of his chattels in the county) or when the writ is levied by the sheriff (with respect to the property levied upon). *See id.* at 154-56. Liens also arise in garnishment and supplementary proceedings. *See id.* at 233, 295-96. The lien has the effect of giving the judgment creditor priority over anyone who subsequently acquires an interest in the property.

17. *E.g.*, N.Y. CIV. PRAC. LAW § 5206(a) (McKinney Supp. 1975); OHIO REV. CODE ANN. § 2329.73 (Page 1954); WASH. REV. CODE ANN. § 6.12.090 (1963).

18. *E.g.*, CAL. CIV. PRO. CODE § 690.6 (Deering Supp. 1975); ILL. ANN. STAT. ch. 62, § 73 (Smith-Hurd 1972); PA. STAT. ANN. tit. 42, § 886 (1966).

19. *E.g.*, COLO. REV. STAT. ANN. § 13-54-102(1) (1973); FLA. STAT. ANN. § 222.14 (1961); MASS. ANN. LAWS ch. 175, § 125 (1970).

20. *E.g.*, IOWA CODE ANN. § 627.6(11) (1950) (bed); ME. REV. STAT. ANN. tit. 14, § 4401(6) (Supp. 1975) (refrigerator); TEX. REV. CIV. STAT. ANN. art. 3836(a)(1) (Supp. 1975) (household furnishings). *See generally* Vukowich, *supra* note 6, at 826-29.

21. COLO. REV. STAT. ANN. § 38-41-202 (1973); N.Y. CIV. PRAC. LAW § 5206(b) (McKinney Supp. 1975); N.D. CENT. CODE §§ 47-18-18 to -20 (1960). The time for filing a declaration varies. *E.g.*, IDAHO CODE § 55-1005 (1957) (before judgment if judgment is lien on property; otherwise before levy); WASH. REV. CODE ANN. § 6.12.010 (1963) (any time before sale).

22. *E.g.*, CAL. CIV. PRO. CODE §§ 690.235, .50 (Deering Supp. 1975) (sheriff); NEB. REV. STAT. § 40-105 (1974) (application to court). Some states require a written claim for personal property exemptions. *E.g.*, CAL. CIV. PRO. CODE § 690.50 (Deering Supp. 1975); ILL. ANN. STAT. ch. 52, § 14 (Smith-Hurd Supp. 1975) (certain household furniture but only if value is less than exemption); IOWA CODE ANN. § 626.50 (1950).

23. *E.g.*, ILL. ANN. STAT. ch. 52, § 14 (Smith-Hurd Supp. 1975) (unless value exceeds exemption); NEB. REV. STAT. § 25-1556 (1964).

claim at all.[24] To obtain an exemption, the judgment debtor has the burden of proving that he is a member of the class of judgment debtors entitled to the benefit of the exemption statute and also that the property is of a type and amount that may be claimed.[25] If he fails to claim the exemption in time, he will be held to have waived it.[26] If the judgment debtor claims an exemption, the sheriff takes or retains possession of the property, at least until he determines whether the debtor and the property qualify.[27] If the judgment debtor and the judgment creditor disagree about whether the property is exempt, either may ask the court to resolve the dispute.[28] Only a few states, however, require the court to resolve this dispute within a specified time.[29] Until the court rules, the sheriff retains possession of the property.[30]

24. *E.g.*, CAL. CIV. PRO. CODE § 690(b) (Deering Supp. 1975); COLO. REV. STAT. ANN. § 5-5-105(4) (1973) (no claim need be filed for exempt wages); MICH. STAT. ANN. § 27A.6025 (Supp. 1975); N.C. GEN. STAT. § 1-376 (1969) (if debtor fails to select homestead, it shall be selected for him). The predecessor of the Michigan statute, MICH. STAT. ANN. § 27A.6025 (Supp. 1975), was construed in Vanderhorst v. Bacon, 38 Mich. 669 (1878).

25. *E.g.*, First Nat'l Bank v. Larson, 213 Iowa 468, 239 N.W. 134 (1931); CAL. CIV. PRO. CODE § 690.50(i) (Deering Supp. 1975). *But see* Noland Co. v. Linning, 132 So. 2d 802 (Fla. Ct. App. 1961). *See also* Vukowich, *supra* note 6, at 838-48.

26. *E.g.*, COLO. REV. STAT. ANN. § 13-55-107 (1973); WASH. REV. CODE ANN. § 6.16.080 (1963); *In re* Stern, 208 F. 488 (N.D. Ohio 1913) (Ohio law); Nationwide Fin. Corp. v. Wolford, 80 Nev. 502, 396 P.2d 398 (1964); Reed v. Union Bank, 70 Va. (29 Gratt.) 719, 724 (1878) (dictum). *But see* PA. R. CIV. P. 3123. For exemptions other than the homestead exemption, the judgment debtor typically need not claim the exemption at the time of levy; it suffices if he claims the exemption prior to sale. *E.g.*, IOWA CODE ANN. § 627.3 (1950) (unless required in writing by sheriff to make such claim); PA. R. CIV. P. 3142(c).

If the judgment debtor has given the judgment creditor a security interest in the asset, then as against that judgment creditor, he will be unable to claim the asset as exempt. CAL. CIV. PRO. CODE § 690.52 (Deering Supp. 1975); WASH. REV. CODE ANN. § 6.16.080 (1963). In addition, he may not be able to claim an exemption in property for which the judgment creditor has obtained judgment for the purchase price. CAL. CIV. PRO. CODE § 690.52 (Deering Supp. 1975); MICH. STAT. ANN. § 27A.6024(2) (1962). Nor may he claim an exemption against specified classes of creditors, for example, persons who have been awarded alimony or child support and federal or state governments that have obtained judgments for taxes. *See generally* Vukowich, *supra* note 6, at 852-66.

27. *E.g.*, NEB. REV. STAT. § 25-1553 to -1554 (1964); N.J. STAT. ANN. §§ 2A:17-20 to -24 (1952); N.C. GEN. STAT. § 1-378 (1969).

28. *E.g.*, CAL. CIV. PRO. CODE § 690.50(e) (Deering Supp. 1975); N.C. GEN. STAT. § 1-381 (1969).

29. CAL. CIV. PRO. CODE § 690.50(c), (e) (Deering Supp. 1975); COLO. REV. STAT. ANN. § 13-55-104 (1973). *See* GA. CODE ANN. § 51-904 (1974) (at the first term of court); N.C. GEN. STAT. § 1-381 (1969) (precedence over all other matters); ORE. REV. STAT. § 23.168 (1973) (in a summary manner).

30. *E.g.*, CAL. CIV. PRO. CODE § 690.50(h) (Deering Supp. 1975); COLO. REV. STAT.

Of the states surveyed,[31] none requires that the judgment debtor be notified before issuance of a writ of execution, and only two require notice to the debtor after issuance but before levy of the writ.[32] A few more require notice of levy, either at the time of levy or within a prescribed time thereafter,[33] but most do not require any notice to the judgment debtor.

The problem for the judgment debtor is twofold. When the process does not interfere with his possession and use of the property until after the execution sale, he may never learn that a specific asset is about to be taken to satisfy a judgment.[34] An example is execution on a homestead in states where levy on realty occurs merely by filing the writ with the recorder of deeds. Advertisement of the execution sale is designed primarily to attract potential purchasers; it is neither calculated nor likely to notify the judgment debtor. If he does not claim the exemption before the execution sale, the judgment debtor may be held to have waived it even though he never knew that his property was to be sold.[35] This taking of his property without notice and without an opportunity to prevent the taking presents the question whether the judgment debtor

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ANN. § 13-55-105 (1973). The creditor may be required to post a bond, either in this situation or to obtain execution generally, and the judgment debtor may be able to regain possession of the property upon filing a bond. *E.g.*, IOWA CODE ANN. §§ 626.54, .58 (1950).

31. Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington. These states were selected on the bases of geographic diversity and population.

32. MO. REV. STAT. § 513.445 (1959); N.Y. CIV. PRAC. LAW § 5225(a) (McKinney 1962).

33. CAL. CIV. PRO. CODE §§ 682(b), 688 (Deering Supp. 1975); COLO. REV. STAT. ANN. § 13-55-102 (1973); ILL. STAT. ANN. ch. 52, § 14, (Smith-Hurd Supp. 1975) (personal property); IOWA CODE ANN. §§ 561.5, 642.14 (1950) (homestead, garnishment); KY. REV. STAT. ANN. § 425.190 (1969) (garnishment); MASS. ANN. LAWS ch. 236, § 3 (real property), ch. 246, § 5 (trustee process) (1974); MICH. STAT. ANN. § 27A:6026 (1962) (homestead); N.Y. CIV. PRAC. LAW §§ 5206(f), 5225(b) (McKinney Supp. 1975) (homestead, garnishment); VA. CODE ANN. § 8-441 (Supp. 1975) (garnishment); WASH. REV. CODE ANN. § 7.33.320 (Supp. 1974) (garnishment); MICH. GEN. CT. R. 738.3(4)(d) (garnishment); PA. R. CIV. P. 3140 (garnishment); TEX. R. CIV. P. 637; *cf.* UTAH R. CIV. P. 64D(h) (garnishee must notify judgment debtor only if judgment creditor provides pre-addressed, stamped envelope).

34. For example, in Luskey v. Steffron, Inc., — Pa. —, 336 A.2d 298 (1975), the judgment debtor did not learn of the levy and sale until he later tried to sell the property. The property had been valued at $52,000, but was sold by the sheriff for $1,700.

35. *See* note 26 *supra.*

has been deprived of his property without due process of law. For most kinds of property, of course, levy is by seizure rather than by notice. When the property is seized by the sheriff, the judgment debtor is likely to know of the levy before the sale occurs and to have an opportunity to claim the exemption. Even if he knows of the seizure, however, he is deprived of the use of the property from the time of levy to the time the exemption is allowed. This taking, before any adjudication of whether the property may properly be taken to satisfy a judgment, also presents the constitutional issue.[36]

## II. THE CONSTITUTION

### A. Sniadach, Fuentes, *and* Mitchell—*The Prejudgment Cases Introduced*

The fourteenth amendment forbids the states to deprive any person of life, liberty, or property without due process of law.[37] Before a state deprives a person of property it must give him notice and an opportunity to present reasons why the deprivation should not occur.[38] Thus, in *Sniadach* the Supreme Court held that prejudgment garnishment of wages is a taking of property entitled to due process protection and that due process requires notice and an opportunity to be heard before the wages may be taken, even temporarily.[39] Three years later, in *Fuentes*

36. The question also arises because the judgment may not be valid, because the parties may be in disagreement whether or to what extent a judgment has been satisfied, and because a third party may have an interest in the asset seized. *See* Countryman, *supra* note 3, at 543-45; Dunham, *supra* note 4.

37. U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *See also id.* amend. V.

38. *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

39. 395 U.S. 337 (1969); *see id.* at 342 (Harlan, J., concurring). Similarly, the due process clause limits a state's power to incarcerate a person for an alleged tax liability before a judicial determination that he is liable. In Non-Resident Taxpayers Ass'n v. Murray, 347 F. Supp. 399 (E.D. Pa. 1972), *aff'd mem.*, 410 U.S. 919 (1973), a three-judge court upheld a statute permitting arrest as a means of commencing an action to collect a city income tax, but only because a local procedural rule provided that the defendant be given notice and a hearing prior to the arrest. Two other courts upheld against fifth amendment attack section 7402(a) of the Internal Revenue Code of 1954, authorizing the ex parte issuance of a writ *ne exeat republica* to restrain a defendant from leaving the country, but held that the government has the burden of showing exceptional circumstances justifying the restraint and that the defendant must be afforded a full and speedy hearing after the initial restraint. United States v. Shaheen, 445 F.2d 6 (7th Cir. 1971) (writ vacated); United States v. Robbins, 235 F. Supp. 353 (E.D. Ark. 1964) (same). In a pre-*Sniadach* case, the California Supreme Court struck down a statute permitting mesne civil arrest of an alleged debtor for concealment

*v. Shevin*,[40] the Court held unconstitutional two statutes[41] that permitted prejudgment replevin of property other than wages without prior notice and opportunity for a hearing. Emphasizing that due process must be provided even for deprivations of limited duration, the Court stated:

> 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. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.[42]

The failure of the statutes to provide for notice and an opportunity for a hearing before the deprivation of property rendered the statutes unconstitutional.

Two years after *Fuentes*, however, in *Mitchell v. W.T. Grant Co.*,[43] the Court upheld a statute[44] authorizing an ex parte procedure equivalent to replevin. In holding that it was constitutionally permissible to postpone the notice and opportunity for a hearing until after the deprivation occurred, the Court emphasized the creditor's security interest in the property, the supervision and control of the process by a judicial officer, and the promptness of judicial review of the propriety of the taking[45] Some of the Justices believed that *Mitchell* effectively overruled *Fuentes*,[46] but in 1975 the Court relied on *Sniadach* and *Fuentes* when

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of property that the creditor sought to recover. The statute failed to require that the debtor be notified of his right to apply to have the arrest order vacated or the bail reduced and failed to provide for legal assistance to those arrested. *In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968). In light of *Sniadach* and *Fuentes*, mesne arrest would be permissible without a prior hearing, if at all, only in "extraordinary" circumstances. Fuentes v. Shevin, 407 U.S. 67, 90-93 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).

40. 407 U.S. 67 (1972).

41. Act of June 27, 1967, ch. 67-254, § 28, [1967] Fla. Laws 660; PA. STAT. ANN. tit. 12, § 1821 (1967). After *Fuentes*, Florida revised its replevin statute and Pennsylvania revised its rules of civil procedure relating to replevin actions. Act of May 8, 1973, ch. 73-20, [1973] Fla. Laws 53 (codified at FLA. STAT. ANN. §§ 78.01-.21 (Supp. 1975)); PA. R. CIV. P. 1072-87, 1353, 1354 (1975).

42. 407 U.S. at 86.

43. 416 U.S. 600 (1974).

44. LA. CODE CIV. PRO. ANN. arts. 3501, 3506, 3574 (West 1961).

45. 416 U.S. at 607-10, 615-16.

46. *Id.* at 623, 634 (1974) (concurring and dissenting opinions); *see* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 609, 615-16 (1975) (concurring and dissenting opinions).

it held a garnishment of a corporate bank account to violate due process.[47] Thus, absent an extraordinary situation,[48] a debtor may not be deprived of his property until there has been some determination by a neutral government official that the deprivation is proper.[49]

### B. *Due Process After Judgment*

#### (1) *Execution and Garnishment*

These recent cases concern *prejudgment* deprivations. But inasmuch as they reject long-held views of due process in the debtor-creditor context, they suggest that yesterday's views of due process after judgment may also be rejected.[50] Yesterday's view is typified by *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*,[51] decided over fifty

47. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

48. The "extraordinary situation" exception to the requirement of prior notice was articulated in *Fuentes*. 407 U.S. at 90-93. Cases permitting prehearing seizures include the following: Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v. Mallonee, 332 U.S. 245 (1947); Phillips v. Commissioner, 283 U.S. 589 (1931); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921). *See* note 39 *supra;* text following note 143 *infra.*

49. In *Mitchell* the Court emphasized supervision of the process by a judge. This was one of the bases for distinguishing the statute challenged in North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). Justice Powell, concurring in *Di-Chem*, stated that supervision by a neutral officer other than a judge would suffice. *Id.* at 611 n.3. Justices Blackmun and Rehnquist and Chief Justice Burger expressed a similar view, *id.* at 619 (dissenting opinion), as did Justice White in Arnett v. Kennedy, 416 U.S. 134, 196-99 (1974) (concurring in part and dissenting in part).

50. Indeed, even before *Sniadach*, three Justices hinted that due process requires notice before execution of judgment. In Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837 (1967), the Arizona Supreme Court held that the constitutional issue was not properly raised, but stated that due process was not denied by a procedural rule authorizing issuance of a writ of execution without prior notice to the judgment debtor. The Supreme Court of the United States granted certiorari to consider the constitutional question, Hanner v. DeMarcus, 389 U.S. 926 (1967), but subsequently dismissed the writ as improvidently granted, 390 U.S. 736 (1968), evidently for the reason that the issue was not properly raised. *Id.* at 737-40 (Douglas, J., dissenting). Four Justices dissented from the dismissal of the writ, three of them suggesting that *Endicott* should be overruled. *Id.* at 740-42. Twice since *DeMarcus* the constitutional issue has been appealed to the Supreme Court, but each time the Court has dismissed the writ. Wood v. Atkinson, 416 U.S. 901 (1974), *dismissing appeal from* 231 Ga. 271, 201 S.E.2d 394 (1973); Moya v. DeBaca, 395 U.S. 825 (1969), *dismissing appeal from* 286 F. Supp. 606 (D.N.M. 1968). The Court's refusal to re-examine *Endicott* may be more a conclusion that the proper opportunity has not arisen than a conviction that *Endicott* still represents the correct view. *See, e.g.*, Kennedy, *supra* note 3, at 175 n.67.

51. 266 U.S. 285 (1924).

years ago. The Supreme Court there held that a statute authorizing ex parte issuance of an order garnishing a judgment debtor's wages did not violate the due process clause.

> [T]he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice."[52]

Many other courts have reached the same conclusion.[53] It is important,

52. *Id.* at 288. In the next paragraph of its opinion, the Court extended this language to garnishment. *Id.* at 289. It is not clear from the opinion whether the Court thought the notice requirement was satisfied by the initial service of process or by the rendition of judgment. State court cases decided both before and after *Endicott* have viewed the initial service of process as satisfying the notice requirement and have viewed the trial that resulted in judgment as satisfying the hearing requirement. High v. Bank of Commerce, 95 Cal. 386, 387, 30 P. 556, 557 (1892); Zimek v. Illinois Nat'l Cas. Co., 370 Ill. 572, 574-75, 19 N.E.2d 620, 622 (1939); Lenske v. Shobe, 6 Ore. App. 472, 488 P.2d 852 (1971). *But see* Hanner v. DeMarcus, 390 U.S. 736, 741-42 (1968) (Douglas, J., dissenting).

In *Endicott* the Court cited sixteen cases in support of the proposition that no further notice is necessary in connection with postjudgment execution or garnishment. All sixteen were decided by state courts, and at least three involved prejudgment garnishment. Most significantly, thirteen were decided under the applicable statutes, and only three of the sixteen expressly considered any constitutional problems. Of the three, two were from the same jurisdiction. Coffee v. Haynes, 124 Cal. 561, 57 P. 482 (1899); High v. Bank of Commerce, 95 Cal. 386, 30 P. 556 (1892). The third, Cross v. Brown, 19 R.I. 220, 33 A. 147 (1895), *aff'd*, 175 U.S. 396 (1899), concerned *prejudgment* trustee process against a nonresident and held that the court could acquire jurisdiction over the res, but did not consider whether the Constitution required notice to the principal defendant. Therefore, only the two California cases supported the Court's conclusion.

53. Coffee v. Haynes, 124 Cal. 561, 57 P. 482 (1899); High v. Bank of Commerce, 95 Cal. 386, 30 P. 556 (1892), *overruling* Bryant v. Bank of Cal., 2 Cal. Unrep. 567, 8 P. 644 (1885); District Credit Clothing, Inc. v. Square Deal Trucking Co., 163 A.2d 822 (D.C. Mun. Ct. App. 1960); Zimek v. Illinois Nat'l Cas. Co., 370 Ill. 572, 19 N.E.2d 620 (1939); Chalmette Petroleum Corp. v. Myrtle Grove Syrup Co., 175 La. 969, 144 So. 730 (1932); Edwards v. Stein, 94 N.J. Eq. 251, 119 A. 504 (Ch. 1923) (notice after levy suffices); City of Wilmington v. Sprunt, 114 N.C. 310, 19 S.E. 348 (1894); First Nat'l Bank v. Knight, 127 Okla. 20, 259 P. 565 (1927); Southern Ry. v. Williams, 141 Tenn. 46, 206 S.W. 186 (1918). For more recent cases, see cases cited in note 79 *infra*.

Only a few courts have held to the contrary. Brown v. Liberty Loan Corp., 392 F.

however, that the Court in *Endicott* did not consider any possibility that the judgment debtor might be deprived of exempt property.[54] The statute upheld in *Endicott* authorized garnishment of only ten percent of a judgment debtor's wages, and the judgment creditor sought only

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Supp. 1023 (M.D. Fla. 1974); Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972); Taylor v. Madigan, No. 443647 (Cal. Super. Ct., Aug. 21, 1974), *rev'd*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975); State Bank v. McKibben, 146 Kan. 341, 70 P.2d 1 (1937); Luskey v. Steffron, Inc., — Pa. —, 336 A.2d 298 (1975); *cf.* Mathis v. Purdy, 40 Fla. Supp. 17 (Dade County Cir. Ct. 1973) (statute may not prohibit sheriff from accepting claim of exemption before levy). In *Danaher*, the garnishment followed entry of a judgment by confession. The court held the garnishment statute unconstitutional because, when used in conjunction with judgment by confession, it permitted taking of property without any actual notice to the debtor at any time. The court's reasoning seems weak, however, since the critical defect that the court found was the lack of notice of the rendition of judgment, and this defect lies in the confession of judgment statute, not the garnishment statute. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972). In *Taylor v. Madigan*, the trial court held that after levy but before sale, the judgment debtor must be given notice of his right to claim a homestead exemption. Thus by allowing levy before notice, the court permitted interference with the debtor's right to dispose of his property. And in *McKibben*, although the Kansas court expressly stated that the Kansas and United States constitutions required notice before levy of garnishment, the court also invoked as alternative grounds the doctrine of equitable estoppel and the judgment creditor's failure to comply with the procedural requirements of the garnishment statute.

Apart from the constitutional question, the great majority of courts have construed their state statutes either as not requiring notice and hearing or as not making the requirement jurisdictional. Hexter v. Clifford, 5 Colo. 168 (1879); J.J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co., 149 Iowa 272, 128 N.W. 389 (1910); Ayres v. Campbell, 9 Iowa 213 (1859); Walker v. Creevy, 57 La. 535 (1851); Ketcham v. Grove, 115 Mich. 60, 72 N.W. 1110 (1897); Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N.W. 606 (1916); McAnaw v. Mathis, 129 Mo. 142, 31 S.W. 144 (1895); Wright v. Southern Ry., 141 N.C. 164, 53 S.E. 831 (1906); Reid v. North-Western R.R., 32 Pa. 257 (1858) (sequestration); Missouri Pac. Ry. v. Whipker, 77 Tex. 14, 13 S.W. 639 (1890); Winner v. Hoyt, 68 Wis. 278, 32 N.W. 128 (1887). *Contra*, Union Pac. Ry. v. Smersh, 22 Neb. 751, 755, 36 N.W. 139, 142 (1888) ("While the statute does not require notice to be given to the judgment debtor in cases of garnishment after judgment, yet it is obvious that such notice should be required in every case . . . ."); Harrison v. Williams, 95 Okla. 142, 218 P. 305 (1922); State Nat'l Bank v. Lowenstein, 52 Okla. 259, 155 P. 1127 (1915) (garnishment before judgment but after suit against principal defendant commenced). *See also* McKenzie v. Hill, 9 Cal. App. 78, 98 P. 55 (1908) (no need to give the judgment debtor notice of appeal by the garnishee in supplementary proceedings); Schwander v. Feeney's, 42 Del. 198, 29 A.2d 369 (Super. Ct. 1942) (either debtor must be notified of garnishment proceedings or record must show that substantive requirements of statute have been met).

54. Moreover, the appellant was the garnishee, not the judgment debtor, and was seeking only a determination that the *garnishment* statute was unconstitutional. Thus the appellant, attempting to distinguish garnishment from execution, conceded, "It is rec-

that percentage.[55] Nevertheless, *Endicott* has been cited as controlling even when a judgment debtor is deprived of arguably exempt property.[56]

In recent years, however, at least two courts have found denials of due process by statutes providing for the collection of judgments when arguably exempt property was levied on. In Florida a judgment debtor is entitled to an exemption of personal property,[57] to be selected by him and claimed by filing an affidavit with the sheriff.[58] In *Mathis v. Purdy*,[59] the judgment debtor attempted to file the affidavit before any levy on his property, but the sheriff refused to accept it, asserting that the affidavit could be filed only after the levy. The judgment debtor then filed a class action in state court to test the constitutionality of the statute on which the sheriff relied.[60] Stating that it would be a violation of due process not to permit the filing of an exemption claim before the levy, the court interpreted the statute to require the sheriff to accept affidavits of judgment debtors any time after entry of final judgment. The court did not, however, require any notice to the judgment debtor either before or after levy.

A United States District Court took this further step in *Brown v. Liberty Loan Corp.*[61] With no notice to the judgment debtor, the sheriff served a writ of garnishment on her employer.[62] A state statute exempted all wages of the head of a family residing in the state.[63] The employer informed the judgment debtor of the garnishment on the day the writ was served. That same day, the judgment debtor filed an affidavit of exemption with the county court from which the writ had issued. The following day the judgment creditor filed a counter-affidavit, denying the assertions in the debtor's affidavit.[64] After a hearing two

ognized that an ordinary execution against property is a remedial process, following entry of judgment as a matter of course, and *not requiring notice to the judgment debtor*." Brief for Appellant at 54, Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924) (emphasis added). The judgment debtor in *Endicott* never objected, at least formally, to the garnishment. Brief for Respondent at 6.

55. 266 U.S. at 286-87.

56. Langford v. Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973); Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969).

57. FLA. CONST. art. X, § 4(a)(2).

58. FLA. STAT. ANN. § 222.06 (1961).

59. 40 Fla. Supp. 17 (Dade County Cir. Ct. 1973).

60. FLA. STAT. ANN. § 222.06 (1961).

61. 392 F. Supp. 1023 (M.D. Fla. 1974).

62. *Id.* at 1026-27.

63. FLA. STAT. ANN. § 222.11 (1961).

64. 392 F. Supp. at 1027; *see* FLA. STAT. ANN. § 222.12 (1961). *See also* note 239 *infra*.

weeks later, the county court found that the judgment debtor was entitled to the exemption and therefore dissolved the writ of garnishment, permitting the judgment debtor to receive the detained wages.[65] Meanwhile, the judgment debtor had filed in federal district court a class action against the judgment creditor and the court clerk who had issued the writ, seeking damages and declaratory relief. Describing *Endicott* as a "case which is of extremely doubtful precedential value now,"[66] the district court held that due process requires notice and an opportunity for a hearing on exemption claims before a writ of garnishment is served on a judgment debtor's employer. The notice provided in the suit in which the judgment had been obtained did not satisfy this requirement. Less than two months after this opinion was rendered, the Chief Judge of the Fourth Judicial Circuit of Florida issued an administrative order prohibiting postjudgment issuance of writs of garnishment unless the judgment creditor swears that the garnishment is not of wages and gives the judgment debtor notice that he will seek the writ.[67]

The Pennsylvania Supreme Court emphasized the importance of notice in *Luskey v. Steffron, Inc.*,[68] when it held unconstitutional that state's procedures[69] for subjecting real property to satisfaction of judgments. In Pennsylvania, real property cannot be exempt from execution because the state has no homestead exemption.[70] Nevertheless, the court held that providing notice only by publication in a local newspaper and by posting handbills on the property and in the sheriff's office violated due process because the procedure failed to provide "personal notice to the owner [that his] real estate [was] the subject of a sheriff's sale."[71]

65. 392 F. Supp. at 1027. Under FLA. STAT. ANN. § 77.06(1) (Supp. 1975), a writ of garnishment reaches debts owed any time between the date of service on the garnishee and the date the garnishee files his answer to the writ. In *Brown*, since the employer filed an answer to the writ the day after the writ was served, the amount of wages affected was only $7.50.

66. Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1036 (M.D. Fla. 1974).

67. Administrative Order for the Fourth Judicial Circuit of Florida, January 10, 1975.

68. — Pa. —, 336 A.2d 298 (1975).

69. PA. R. CIV. P. 3129 (1975).

70. Even in a state with a homestead exemption, the judgment debtor in *Luskey* probably would not have been entitled to an exemption. Homestead exemptions may be claimed only if the property is used as the debtor's residence. In *Luskey*, the debtor evidently did not live on the property. *See* — Pa. at —, 336 A.2d at 298.

71. *Id.* at —, 336 A.2d at 299.

In contrast, a California court of appeals in *Raigoza v. Sperl*[72] rejected a constitutional attack on a statute[73] authorizing postjudgment garnishment of wages. The court stated that it was irrelevant that the claimed exemption was for wages and denied that *Sniadach* created a special rule for wages.[74] It found no denial of due process in the statute's failure to afford the judgment debtor an opportunity to claim exemptions before his salary or other property was taken by levy.[75] At about the same time the California court was deciding *Raigoza*, a similar case was before a three-judge federal court in Tennessee, where a statute provided for a personal property exemption and authorized a judgment debtor to file a petition to claim the exemption.[76] In *Langford v. Tennessee*,[77] a judgment creditor levied on a car, which the judgment debtor then claimed as exempt. The sheriff released the car to the debtor, who subsequently sought declaratory and injunctive relief. In a conclusory opinion, relying on *Endicott* and rejecting the applicability of *Sniadach* and *Fuentes*, the court held that the execution statutes did not deny due process "simply because they allow levy of execution after judgment but without providing for a prior hearing to determine whether the property to be levied upon is exempt under other statutory provisions."[78] In similarly short, conclusory opinions, several other courts have rejected constitutional attacks on execution statutes.[79]

72. 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973).

73. CAL. CIV. PRO. CODE § 690.6 (Deering 1973), *as amended*, CAL. CIV. PRO. CODE § 690.6 (Deering Supp. 1975).

74. 34 Cal. App. 3d at 565-66, 110 Cal. Rptr. at 300. *But see* Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1032-34 (M.D. Fla. 1974).

75. The California Court of Appeals reached similar conclusions in two other cases. In Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975), the court upheld garnishment without notice on exempt disability pension and AFDC payments. In Taylor v. Madigan, No. 443647 (Cal. Super. Ct. Aug. 21, 1974), a California superior court held unconstitutional that state's statutes authorizing execution sales of real property that may be claimed exempt as homesteads. The court enjoined the sheriff from selling any realty pursuant to a writ of execution unless the judgment debtor is first served with notice that he may be able to claim a homestead exemption and that he must file his claim within the next twenty days. The court of appeals reversed. 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975). Meanwhile, the legislature amended the execution statutes to require such a notice to the judgment debtor at the time a writ of execution on his house is served upon him. CAL. CIV. PRO. CODE § 682(b) (Deering Supp. 1975).

76. TENN. STAT. ANN. §§ 26-201 (Supp. 1975).

77. 356 F. Supp. 1163 (W.D. Tenn. 1973) (three-judge court).

78. *Id.* at 1164; *accord*, Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) (three-judge court).

79. Katz v. Ke Nam Kim, 379 F. Supp. 65 (D. Hawaii 1974); Moya v. DeBaca,

(2) *Other Postjudgment Situations*

Most courts that have considered the question in recent years have held notice and hearing not to be constitutionally required before a judgment debtor's property may be taken to satisfy a judgment. Their reasoning has two components: the Supreme Court expressly rejected the requirement in *Endicott*; and *Endicott* is not overruled by *Sniadach* and other prejudgment cases. This reasoning fails to take sufficient account of the development of due process in the last fifty years, when prior notice and hearing have been held necessary in other proceedings to enforce judgments. For example, notice and hearing are required before a judgment debtor can be imprisoned for failing to appear at a disclosure hearing[80] or for failing to make payments ordered in divorce proceedings.[81] These cases, however, concerned deprivation

286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969); Sackin v. Kersting, 105 Ariz. 464, 466 P.2d 758 (1970); Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837 (1967), *cert. granted sub nom.* Hanner v. DeMarcus, 389 U.S. 926 (1967), *writ of cert. dismissed as improvidently granted*, 390 U.S. 736 (1968); Wilson v. Grimes, 232 Ga. 388, 207 S.E.2d 5 (1974); Wood v. Atkinson, 231 Ga. 271, 201 S.E.2d 394 (1973), *appeal dismissed*, 416 U.S. 901 (1974); Chonowski v. Bonucci, 47 Ill. 2d 510, 267 N.E.2d 671 (1971); Credit Serv. Co. v. Linnerooth, 290 Minn. 256, 187 N.W.2d 632 (1971); Bittner v. Butts, 514 S.W.2d 556 (Mo. 1974); Hehr v. Tucker, 256 Ore. 254, 472 P.2d 797 (1970); Lenske v. Shobe, 6 Ore. App. 472, 488 P.2d 852 (1971); Milne v. Shell Oil Co., 129 Vt. 375, 278 A.2d 741 (1971).

80. Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970) (three-judge court). In Vail v. Quinlan, 406 F. Supp. 951, 959-60 (S.D.N.Y. 1976), a three-judge court held that the notice must be clear and complete, including a "stark warning that failure to appear [at the contempt hearing] may result in contempt of court and imprisonment."

Shortly before *Endicott*, the New Mexico Supreme Court held that a statutory requirement that notice be given a judgment debtor before he could be compelled to attend disclosure proceedings was jurisdictional in nature. Hammond v. District Court, 30 N.M. 130, 228 P. 758 (1924). The reason for the court's conclusion was that new issues were to be determined in the disclosure proceedings. *Id.* at 136, 228 P. at 760. In State v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965), the court stated that since the statute involved in *Hammond* had been replaced by a rule of civil procedure that made supplementary proceedings part of the original proceedings, no notice was required. In 1927 the New Jersey Court of Errors and Appeals held that *Endicott* was dispositive on the question whether notice was required before a creditor could obtain ex parte an order compelling the judgment debtor to appear at disclosure hearings and restraining him from disposing of his assets. Commercial Nat'l Trust & Sav. Bank v. Hamilton, 101 N.J. Eq. 249, 137 A. 403 (Ct. Err. & App. 1927). *But cf.* Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) (notice and hearing required before property of shareholder may be taken to satisfy judgment against corporation).

81. Yoder v. County of Cumberland, 278 A.2d 379 (Me. 1971); Mills v. Howard, 109 R.I. 125, 280 A.2d 101 (1971); Randall v. Randall, 129 Vt. 432, 282 A.2d 794 (1971).

of liberty rather than property,[82] so the development that has occurred in connection with taking a person's property to satisfy an alimony or support decree may be more persuasive on the constitutional question.

Under New York law an alimony decree could not be enforced by execution until a court ordered the decree docketed as a judgment for a specific amount of accrued alimony. Upon motion to docket a decree, the other party could obtain a retroactive modification on specified grounds.[83] In *Griffin v. Griffin*,[84] a New York supreme court granted plaintiff's ex parte motion for judgment for accrued alimony installments. The United States Supreme Court held that this judgment violated due process because the defendant spouse was entitled to notice and an opportunity for a hearing before entry of a judgment that would cut off his right to a retroactive modification of the decree. Due process was not satisfied by defendant's ability to set aside or otherwise collaterally attack the judgment after it was rendered.[85] In blunting the force of *Endicott*, the Court stated:

> While it is undoubtedly true that the [original] decree . . . gave petitioner notice at the time of its entry that further proceedings might be taken . . . , we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the [original] decree did not.[86]

On similar facts, state courts have reached the same result,[87] and the rationale of these cases casts doubt on the continued vitality of *Endicott*.

82. For a general discussion of liberty and property interests entitled to due process protection, see Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 543-59 (1975).

83. *See* Griffin v. Griffin, 327 U.S. 220, 227 (1946).

84. 327 U.S. 220 (1946).

85. *Id.* at 230-32.

86. *Id.* at 229 (footnote omitted). The Court did not, however, specifically discuss or cite *Endicott*.

87. Reichert v. Appel, 74 So. 2d 674 (Fla. 1954); Wilson v. Wilson, 143 Me. 113, 56 A.2d 453 (1947); Gillespie v. Gillespie, 186 Misc. 845, 62 N.Y.S.2d 271 (Sup. Ct. 1946); Perry v. Perry, 51 Wash. 2d 358, 318 P.2d 968 (1957). Because the court retains jurisdiction from the earlier proceedings, however, the notice need not be by personal service. Sewell v. Trimble, 172 F.2d 27 (D.C. Cir. 1948); Rice v. Rice, 213 Ark. 981, 214 S.W.2d 235 (1948); Darden v. Darden, 144 A.2d 697 (D.C. Mun. Ct. App. 1958); Franklin v. Bonner, 201 Iowa 516, 207 N.W. 778 (1926) (pre-*Griffin* case); Ageloff v. Ageloff, 207 Misc. 804, 140 N.Y.S.2d 424 (Sup. Ct. 1955); Perry v. Perry, *supra*.

If the decree is not modifiable retroactively with respect to installments that have already accrued, then on the authority of *Endicott* no notice is required before rendition of a judgment for accrued installments. Jenner v. Jenner, 138 Colo. 149, 330 P.2d 544

(3) *Motions*

In *Endicott* the Supreme Court stated that notice before issuance of a writ of execution is not necessary because the process is merely supplementary to the judgment and because the judgment debtor is presumed to know that the judgment creditor will take steps to enforce the judgment.[88] Other courts, both before and after *Endicott*, also have relied on this reasoning to conclude that further notice is not necessary.[89] But even if collection procedures are part of the effort

(1958); Burke v. Burke, 127 Colo. 257, 255 P.2d 740 (1953); Wood v. Atkinson, 231 Ga. 271, 201 S.E.2d 394 (1973), *appeal dismissed*, 416 U.S. 901 (1974); *see* Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837 (1967), *cert. granted sub nom.* Hanner v. DeMarcus, 389 U.S. 926 (1967), *writ of cert. dismissed as improvidently granted*, 390 U.S. 736 (1968) (no notice of levy to collect fee awarded to special master in divorce proceedings); *cf.* Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) (three-judge court) (no constitutional requirement that a person previously ordered to pay alimony be given notice before his wages are garnished to satisfy accrued installments).

Similarly, it has been held that once a proper judgment for arrears has been entered, there is no right to notice before issuance of a writ of execution to enforce the judgment, even though issuance of the writ of execution is discretionary with the court. Strudwick v. Strudwick, 110 N.Y.S.2d 839 (Sup. Ct. 1952). The rationale of *Griffin* would seem to require that the defendant be given an opportunity to influence the court's exercise of discretion on the question whether to authorize issuance of a writ of execution. *See* DiPietro v. Lavigne, 98 N.H. 294, 99 A.2d 413 (1953) (even though court has discretion to deny motion for new trial, it cannot do so without affording movant an opportunity to be heard in behalf of his motion).

88. 266 U.S. at 288-89, *quoted in* text accompanying note 52 *supra*.

89. In Zimek v. Illinois Nat'l Cas. Co., 370 Ill. 572, 574-75, 19 N.E.2d 620, 622 (1939), the court stated:

> The garnishment process is remedial in nature, designed to reach property belonging to the judgment debtor after ordinary execution has failed. . . . It is not a distinct and separate suit, but an additional step in the original action for judgment. . . . So long as [the judgment debtor] was personally served with process or entered his appearance in the damage suit, he is not entitled to notice of garnishment, which is in aid of that suit. His knowledge of the principal action against him is sufficient warning that his adversary may be expected to take all available steps to obtain satisfaction of any judgment rendered. We, therefore, hold that the due process requirements in garnishment proceedings are satisfied by proper notice to the principal debtor of the original suit brought by the creditor.

In High v. Bank of Commerce, 95 Cal. 386, 387, 30 P. 556, 557 (1892), after stating that an original action is pending until the judgment is satisfied, the court stated:

> So far as the judgment debtor is concerned, he cannot complain; he is a party to the judgment, and is fully aware of the legal effect of it, viz., that what his debtors owe him can be applied, by proper proceedings in the action which is still pending, to the satisfaction of his judgment debts; and due process of law has been had to make him aware of that fact.

*See also* Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973); Schwander v. Feeney's, 42 Del. 198, 29 A.2d 369 (Super. Ct. 1942); Ayres v. Campbell, 9 Iowa

to enforce a claim and the debtor knows or should know that after judgment the creditor will take steps to enforce the claim, further notice still may be constitutionally compelled. In contexts other than the enforcement of judgments, a litigant is entitled to notice after original service in the action even though no new and separate proceedings are involved and even though he knows or should know that the other party may seek additional relief. Thus, in avoiding an order granting an ex parte motion to set aside a prior court order, a Florida court stated:

> No rule is more firmly founded in the jurisprudence of this state than that it is a denial of due process of law to hold a hearing on a motion without notice to the parties involved in an adversary proceeding and to enter an order on the motion without first giving the parties affected notice and an opportunity to be heard before a party's rights are taken away.[90]

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213 (1859); Ketcham v. Kent Circuit Judge, 115 Mich. 60, 72 N.W. 1110 (1897) (prejudgment garnishment); Commercial Nat'l Trust & Sav. Bank v. Hamilton, 101 N.J. Eq. 249, 137 A. 403 (Ct. Err. & App. 1927); City of Wilmington v. Sprunt, 114 N.C. 310, 19 S.E. 348 (1894); First Nat'l Bank v. Knight, 127 Okla. 20, 259 P. 565 (1927).

This reasoning has also been invoked by several state courts that, without considering any constitutional issue, decided the applicable state statutes did not require notice. *E.g.*, Hexter v. Clifford, 5 Colo. 168 (1879); Wipperman Mercantile Co. v. Jacobson, 133 Minn. 326, 158 N.W. 606 (1916); Wright v. Railroad, 141 N.C. 164, 53 S.E. 831 (1906); Reid v. North-Western R.R., 32 Pa. 257 (1858); Winner v. Hoyt, 68 Wis. 278, 32 N.W. 128 (1887). *But cf.* Missouri Pac. Ry. v. Whipsker, 77 Tex. 14, 13 S.W. 639 (1890) (since notice to principal defendant not required, if garnishee fails to assert principal defendant's exemption, garnishee is liable to principal defendant).

In recent years a number of courts have held notice unnecessary, reasoning that *Sniadach*, or its rationale, applies only to prejudgment remedies. Langford v. Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973); Sackin v. Kersting, 105 Ariz. 464, 466 P.2d 758 (1970); Wilson v. Grimes, 232 Ga. 388, 207 S.E.2d 5 (1974); Chonowski v. Bonucci, 47 Ill. 2d 519, 267 N.E.2d 671 (1971) (other judgment creditors not entitled to notice); Credit Serv. Co. v. Linnerooth, 290 Minn. 256, 187 N.W.2d 632 (1971); Hehr v. Tucker, 256 Ore. 254, 472 P.2d 797 (1970); Lenske v. Shobe, 6 Ore. App. 472, 488 P.2d 852 (1971); Milne v. Shell Oil Co., 129 Vt. 375, 278 A.2d 741 (1971).

90. Prunty v. State *ex rel.* Williams, 226 So. 2d 448, 450 (Fla. Ct. App. 1969). Another court required notice of an amendment to a complaint when the amendment stated a new cause of action. Chapman v. Chapman, 284 App. Div. 504, 132 N.Y.S.2d 707 (1954). In holding that notice of a new trial date must be given, the court in Laird v. Rinckey, 371 Mich. 96, 98, 123 N.W.2d 243, 244 (1963), stated, "It is hardly necessary to buttress with citations the settled rule of law that due process requires notice so that opportunity is afforded to attend and present a claim or defense." Many courts require that notice be given of motions for additional relief. *See, e.g.*, Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co., 114 F.2d 946 (8th Cir. 1940) (motion for default judgment); McClintock v. Serv-Us Bakers, 103 Ariz. 72, 436 P.2d 891 (1968) (same); Phoenix Metals Corp. v. Roth, 79 Ariz. 106, 284 P.2d 645 (1955) (same); Brooker v. Smith, 101 So. 2d 607 (Fla. Ct. App. 1958) (motion to sever issues

And although the court in a divorce proceeding typically retains jurisdiction of the case even after the court renders a decree,[91] no modification of the decree will be upheld unless the parties are afforded prior notice and an opportunity to be heard.[92]

(4) *A Synthesis*

The element common to these situations in which the courts have required notice is the existence in the subsequent proceedings of a question that could not have been raised in the earlier proceedings. For example, a Maine statute authorized execution against the body of a person who failed to pay a spouse's attorneys fees as ordered in a divorce proceeding.[93] In *Yoder v. County of Cumberland*,[94] the Supreme Court of Maine first construed the statute as precluding incarceration if the person were unable to pay and then held the statute unconstitutional, stating:

> These circumstances—honest indigency constituting inability to pay—are *new facts* which are material to the right of the person . . . to remain out of jail regardless of the existence, and non-payment, of his civil obligation to pay money. Furthermore, these new facts—the honest lack of property and consequent inability to pay—are without necessary logical relationship to the adjudication of the existence, and imposition, of the obligation to pay in the first instance.
>
> It is irrelevant, therefore, that a capias execution follows prior adjudication of the *existence* of the obligation to pay money. Since the *failure to pay* the obligation requires further adjudication as to new facts before the body of the debtor can be legally available, in the ultimo, to be subjected to incarceration for the benefit of the "creditor," procedural due process—absent compelling special circumstances—requires that the

and stay proceedings on issues not severed); DiPietro v. Lavigne, 98 N.H. 294, 99 A.2d 413 (1954) (motion for new trial following granting of other party's motion for nonsuit). *But see* Gray v. Hall, 203 Cal. 306, 318, 265 P. 246, 253 (1928) ("The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction, and is not notice of the time when jurisdiction, already completely vested, will be exercised").

91. *E.g.*, IOWA CODE ANN. § 598.21 (Supp. 1975).

92. Moore v. Lee, 72 So. 2d 280 (Fla. 1954); Franklin v. Bonner, 201 Iowa 516, 207 N.W. 778 (1926); Huger v. Huger, 313 Mich. 158, 20 N.W.2d 848 (1945); Wansley v. Schmidt, 186 So. 2d 462 (Miss. 1966); Fernbaugh v. Clark, 236 Mo. App. 1200, 163 S.W.2d 999 (1942); Gitch v. Wright, 61 Utah 175, 211 P. 705 (1922).

93. Act of Dec. 1, 1959, ch. 317, § 300, [1959] Me. Laws 477, *as amended*, ME. REV. STAT. ANN. tit. 19 § 722 (Supp. 1975).

94. 278 A.2d 379 (1971).

"debtor" be given a hearing as to these new facts before he can be deprived of his liberty.[95]

This element, a new question of law or fact, is equally present when a judgment creditor seeks to subject specific assets of the judgment debtor to satisfaction of the judgment. Among the exemption-related questions in issue when a debtor seeks to defend against a taking of his property to satisfy a judgment are (1) whether the property is of a kind not subject to enforcement process, for example, wages;[96] (2) whether a portion of the property is exempt from process;[97] (3) whether the debtor has had an opportunity to specify which of his property should be taken to satisfy the judgment, if the statute gives him that right;[98] and (4) whether the debtor has had an opportunity to select property he wishes to protect under a blanket exemption statute.[99] The existence of these questions, which the judgment debtor

95. *Id.* at 386-87 (footnote omitted) (emphasis in original). The plaintiff attempted to distinguish *Sniadach* because the instant proceeding was postjudgment, while *Sniadach* was prejudgment. The court rejected this argument as untenable because the issues relevant to incarceration were not in issue in the proceedings that resulted in the judgment. *Id. See also In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954) (notice and hearing required before attorney can be disbarred by reason of his conviction of a crime, when minimum elements of the crime did not necessarily involve moral turpitude); *In re* Diesen, 173 Minn. 297, 215 N.W. 427 (1927) (same).

96. *E.g.*, TEX. CONST. art. 16, § 28; FLA. STAT. ANN. § 222.11 (1961); PA. STAT. ANN. tit. 42, § 886 (1966). *See* Edwards v. Stein, 94 N.J. Eq. 251, 119 A. 504 (Ch. 1923) (judgment debtor entitled to notice of levy so that he can show that the property was not subject to levy) (due process not considered); State Nat'l Bank v. Lowenstein, 52 Okla. 259, 155 P. 1127 (1915) (prejudgment garnishment). In Union Pac. Ry. v. Smersh, 22 Neb. 751, 755, 36 N.W. 139, 142 (1888), the court stated:

> While the statute does not require notice to be given to the judgment debtor in cases of garnishment after judgment, yet it is obvious that such notice should be required in every case, and courts have undoubted authority to require such notice to be given. Otherwise it would be possible for a garnishee to answer, pay the amount owing by him to the debtor into court, and the court apply the same to the payment of the debt without the judgment debtor having any notice whatever.

97. *E.g.*, IOWA CODE ANN. § 561.2 (1950) (urban homestead not to exceed ½ acre, rural homestead not to exceed 40 acres); N.Y. CIV. PRAC. LAW § 5206(a) (McKinney Supp. 1975) (homestead not to exceed $2000 in value); ORE. REV. STAT. § 23.160(1)(f) (1973) (household furnishing not to exceed $400).

98. *See* note 13 *supra.*

99. *E.g.*, ILL. ANN. STAT. ch. 52, § 13(c) (Smith-Hurd Supp. 1975) (not to exceed $700); OHIO REV. CODE ANN. § 2329.81 (Page 1954) ($500). *See* Mathis v. Purdy, 40 Fla. Supp. 17 (Dade County Cir. Ct. 1973). If the judgment debtor does not receive notice of levy, not only will he have no opportunity to raise these questions, but he may also lose his right to be present at the execution sale or to have a receiver appointed to protect his interests. *See* Edwards v. Stein, 94 N.J. Eq. 251, 119 A. 504 (Ch. 1923). Or the debtor may ultimately lose his right to redeem the property after it is sold in

has had no opportunity to raise, casts doubt on the applicability of *Endicott* when a judgment debtor is deprived of arguably exempt property. In *Endicott* the property seized could not possibly have been claimed as exempt, and neither the briefs of the parties nor the opinion of the Court mentioned the possibility that any other new questions might be raised in subsequent proceedings.[100] The existence of questions that could not have been litigated in the original proceedings has caused three Justices to observe:[101]

> The *Endicott* rationale that a party who has litigated a case and had a judgment taken against him is deemed, for purposes of due process, to be on notice of further proceedings in the same action was rejected in *Griffin v. Griffin*. . . .
>
> . . . .
>
> Does not *Griffin* point the way to the demands of due process in the instant case? . . . Is there any more reason to accept in this case the *Endicott* fiction of constructive notice because of knowledge of the underlying judgment than there was in *Griffin*?[102]

## III. Due Process and Exemptions

### A. *Existence of a Property Interest*

As a first step in the constitutional analysis, it must be determined whether there is a deprivation of a constitutionally protected property interest. The few courts that have considered the constitutionality of exemption statutes have assumed that exempt property is entitled to

execution of judgment. *See* Hanner v. DeMarcus, 390 U.S. 736, 736 (1968) (Douglas, J., dissenting). For protection of these rights, however, the judgment debtor needs notice only before the execution sale, not before the levy.

100. For example, the debtor might wish to contest the creditor's affidavit in support of the writ of garnishment. *See* Dunham, *supra* note 4, at 85 n.38. More generally, other questions that might be raised for the first time include whether the judgment debtor has already satisfied the judgment, in whole or in part, and whether the amount claimed as "costs" (if costs are awarded by the court but not specified as to amount) is correct. The existence of questions like these, coupled with the deprivation of property entitled to due process protection, *see* text accompanying notes 105-38 *infra*, may require notice and an opportunity for a hearing before any property is taken in satisfaction of judgment.

101. Hanner v. DeMarcus, 390 U.S. 736, 741-42 (1968) (Douglas, J., dissenting), *noted in* note 50 *supra*.

102. This existence of new questions was one of the reasons that prior notice and hearing were required in Brown v. Liberty Loan Corp., 392 F. Supp. 1023 (M.D. Fla. 1974). *But see* Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973) (existence of new questions not sufficient to require prior notice and hearing).

the protections of due process.[103] No court has reasoned that after judgment the debtor no longer has any interest in his property. Rather, the focus has been on whether due process requires anything beyond the notice and hearing that judgment debtor received when his liability was determined and reduced to judgment.[104] This focus is correct. The effect of an exemption statute is to confer on a judgment debtor an immunity with respect to the specified property and to prevent any of his judgment creditors[105] from seizing the property. When a statute provides that all non-exempt property is subject to execution, the clear implication is that exempt property is not subject to execution;[106] in

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103. Brown v. Liberty Loan Corp., 392 F. Supp. 1023 (M.D. Fla. 1974); Langford v. Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973); Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972); Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969); Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975); Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973); Mathis v. Purdy, 40 Fla. Supp. 17 (Dade County Cir. Ct. 1973); Wilson v. Grimes, 232 Ga. 388, 207 S.E.2d 5 (1974). *See* Hanner v. DeMarcus, 390 U.S. 736, 736 (1968) (Douglas, J., dissenting). *But see* Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975).

The cases also recognize that there is a "taking," though they disagree on whether it is the levy or the subsequent sale that constitutes the taking. *Compare* Raigoza v. Sperl, 34 Cal. App. 3d 560, 567, 110 Cal. Rptr. 296, 301 (1973) ("Without doubt, a levy of execution involves a 'taking' in the sense that the debtor is deprived of an interest in something of value against his will"), *with* Wood v. Atkinson, 231 Ga. 271, 271-72, 201 S.E.2d 394, 395 (1973), *appeal dismissed*, 416 U.S. 901 (1974):

> The mere issuance and recording of an execution in the general execution docket is not a "taking" of the property of the defendant in execution. The defendant in execution is in no way deprived of the possession or use of his property. Before a "taking" pursuant to the execution can be effected, it is necessary that there be a levy pursuant to the execution and a sale by the levying officer.

104. *E.g.*, Raigoza v. Sperl, 34 Cal. App. 3d 560, 567-68, 110 Cal. Rptr. 296, 301 (1973):

> To characterize levies of execution as a "taking" is nonproductive. . . . The focus . . . must be on the "process" and here the question is simple: Is it consistent with due process to require the judgment debtor to apply for and prove the right to an exemption after seizure, rather than to insist that the creditor prove in a pre-seizure hearing that arguably exempt property is subject to levy?

105. Except those who have security interests in the specific asset or who fall into some other favored class. *See* note 26 *supra*.

106. *E.g.*, CAL. CIV. PRO. CODE § 688(a) (Deering Supp. 1975):

> All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property levied upon under attachment in the action, are subject to execution.

*See also id.* § 690(b): "Whenever it is specifically provided . . . that the filing of a claim of exemption is not required, the property so mentioned . . . shall not be subject to levy of attachment or execution in any manner."

other words, a judgment creditor is disabled from subjecting exempt property to satisfaction of his judgment. And when a judgment debtor's asset is seized, even if only until it is determined that he is entitled to the immunity, the debtor is deprived of existing interests in his asset—he loses his rights to possess, use, and transfer clear title. *Sniadach* and subsequent cases[107] leave no doubt that these interests in property are entitled to the protections of due process.

It might be argued, however, that the proper focus is the exemption rather than the asset, and that the threshold question is whether the exemption statutes confer on a judgment debtor anything that may properly be described as "property" within the meaning of the fourteenth amendment. One of the limitations on the concept of property is that a person may lose his interests in an asset to satisfy a judgment that has been rendered against him. The exemption statutes provide an exception to this limitation by conferring on a judgment debtor the right to retain possession even as against a judgment creditor, and this right may well be a property interest entitled to the protections of due process.

The term used to describe an interest created by statutory grant and protected by due process is "entitlement."[108] Whether an interest constitutes an entitlement and, if so, whether the statute governing termination of the interest complies with due process are questions that have been before the Supreme Court over a dozen times in recent years.[109] The Court has held that such governmental grants as mone-

107. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); *see id.* at 342 (Harlan, J., concurring); Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1031 (M.D. Fla. 1974). Moreover, even in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), in which the Court upheld a Louisiana prejudgment seizure statute, the Court did not deny that the debtor's interest in the property was entitled to due process protection.

108. *See* cases cited note 109 *infra*. The concept of entitlement has replaced the analysis based on whether the interest is a right or a privilege. Goldberg v. Kelly, 397 U.S. 254 (1970); *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89.

109. *E.g.*, Mathews v. Eldridge, 96 S. Ct. 893 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Fusari v. Steinberg, 419 U.S. 379 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Dillard v. Industrial Comm'n, 416 U.S. 783 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Ortwein v. Schwab, 410 U.S. 656 (1973); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Torres v. New York State Dep't of Labor, 405 U.S. 949 (1972);

tary payments,[110] employment,[111] parole from prison,[112] education,[113] and drivers' licenses[114] are entitlements and therefore cannot be taken without some procedural safeguards. Although the Court has not attempted to define "entitlement," two common characteristics of entitlements are that the interest must be *presently enjoyed* and that deprivation of the interest must inflict *grievous loss* on the person deprived of it.

The present enjoyment requirement was first invoked in dictum to distinguish between taking away a right and refusing to grant the right in the first place.[115] A few years later it was used to distinguish two employment contract cases in which the results were held to depend on whether, under the contracts of employment, the employees had a right to renewal or a mere expectation of renewal.[116] In the exemption context, it might be argued that a judgment debtor has no present enjoyment of an exemption before the time the sheriff or the court determines the asset to be exempt. The essence of an exemption, however, is the debtor's right to continued possession and use of an asset already in his possession.[117] Thus the interest of a judgment debtor in exempt property is distinguishable from the interest of a government employee in renewal of employment that is, by its terms, for a limited period. Although the employee may be enjoying the benefit of employment at the time the employment is not renewed, he has neither an assurance of renewal of the benefit nor a right to renewal

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Richardson v. Wright, 405 U.S. 208 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wyman v. James, 400 U.S. 309 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

110. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); *see* Mathews v. Eldridge, 96 S. Ct. 893, 901-02 (1976).

111. *E.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 408 U.S. 593 (1972).

112. Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (good time credit to reduce period of incarceration).

113. Goss v. Lopez, 419 U.S. 565 (1975).

114. Bell v. Burson, 402 U.S. 535 (1971).

115. *Id.*; *accord*, Menechino v. Oswald, 430 F.2d 403, 408-09 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (distinguishing between revocation of parole and release on parole). *But see* United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974), *noted in* 1974 WASH. U.L.Q. 752.

116. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972) (companion cases).

117. Or, with respect to wages, the right to acquire possession of them in accordance with his contract of employment.

of it.[118] A judgment debtor, on the other hand, does have a statutory right to retain the asset.[119] Consequently, he is in present enjoyment of his interest.[120]

The factor of grievous loss has been recited in several opinions,[121]

118. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Court characterized the employee's interest in renewal of his employment as "an abstract need or desire for it."

119. An alternative construction of the exemption statutes is that the judgment debtor has this assurance and this right only if he successfully claims the exemption. *See* Taylor v. Madigan, 53 Cal. App. 3d 943, 966, 126 Cal. Rptr. 376, 391 (1975). Under this construction, the delay necessary for determining whether the statutory requirements are satisfied is implicit in the need for successfully claiming the exemption. The judgment debtor, then, could not be deprived of any entitlement before his exemption claim is allowed. This construction of the judgment debtor's interest is justified, however, only if the procedural aspects of the exemption statute may be considered to define the interest. The Supreme Court has rejected this approach. *See* text accompanying and following notes 127-38 *infra.*

120. Moreover, at least one federal court appears to have limited the requirement of present enjoyment. United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). Earlier, in Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), the Second Circuit had held that denial of parole without notice and a hearing did not violate due process because the prisoner was not presently enjoying liberty. Then in Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court held that a person already on parole had an interest in liberty entitled to due process protection. In *Johnson*, the Second Circuit stated that after *Morrissey*,

> [p]arole was thenceforth to be treated as a "conditional liberty," representing an "interest" entitled to due process protection. A prisoner's interest in prospective parole, or "conditional entitlement," must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration.

500 F.2d at 928. The court in *Johnson* did not expressly renounce the present enjoyment requirement, and it would be hard to conclude that in *Morrissey* the Supreme Court abandoned the requirement, since the Court used the concept of present enjoyment in subsequent cases. *E.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972) (companion cases). Perhaps the Second Circuit contemplates a special rule for the return of an entitlement to a person who previously has been deprived of it. Or perhaps the court contemplates a special rule for entitlements in the nature of liberty, which would not apply to entitlements in the nature of property. *See generally* Van Alstyne, *supra* note 108; Comment, *supra* note 108.

121. Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970) (brutal need); Torres v. New York State Dep't of Labor, 321 F. Supp. 432, 436-37 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968, *adhered to on remand*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd mem.*, 405 U.S. 949 (1972). In *Morrissey*, the Court stated: "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" 408 U.S. at 481, *quoting* Goldberg v. Kelly, 397 U.S. 254, 263 (1970). Recently, in upholding a statute that permitted ex parte suspension of workmen's compensation benefits because the employee could get automatic judicial enforcement of the original award, the Court stated that if

but it probably is not an essential characteristic. A majority of the Supreme Court has stated that the proper inquiry is the nature of the interest, not its weight, and that so long as the deprivation is not de minimis, the extent of the loss is irrelevant to the question whether the interest being taken is "property."[122] The other members of the Court, while contending that the standard of grievous loss applies to interests conferred by the state, have stated that the lesser standard of de minimis loss applies to property disputes between private parties.[123] Admittedly, exemptions are benefits conferred by the state.[124] But a dispute over a creditor's ability to reach a specific asset of a debtor seems more a property dispute between private parties than a termination of a state-conferred benefit like employment, welfare benefits, or a license. The deprivation in the exemption context is the loss of the use of the asset pending a determination of the debtor's claim of exemption. This is the very sort of deprivation that the Court in *Sniadach* subjected to the requirements of due process, as Justice Harlan's concurring opinion makes clear.[125] And even if grievous loss is a requirement, the purpose of exemptions—providing a judgment debtor and his family with a minimum standard of living—suggests that the legislature has concluded that deprivation of exempt assets would inflict grievous loss on the judgment debtor and his family.[126] Thus the interest of the judgment debtor has the characteristics of present enjoyment and grievous loss.

An argument against finding an entitlement is that since the state need not grant exemptions at all, it may therefore grant exemptions

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the employee could actually get an automatic and immediate judgment, thereby rendering the suspension of benefits nugatory, then any injury to the employee would be de minimis and not "constitutionally significant." Dillard v. Industrial Comm'n, 416 U.S. 783, 794 (1974).

122. Goss v. Lopez, 419 U.S. 565, 575-76 (1975).

123. *Id.* at 588 n.5 (Powell, J., dissenting).

124. As, indeed, are all other property interests recognized and protected by statute or judicial decision.

125. Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969); *see* Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1031 (M.D. Fla. 1974).

126. Of course, the courts may not be bound by this legislative determination and may inquire into the severity of the loss in each case. *Compare* Vukowich, *supra* note 6, at 824, 827-28 (some exemption statutes preserve property for the debtor that is not essential to maintaining a minimum standard of living), *with* Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1032 (M.D. Fla. 1974) (garnishment of even nonexempt portion of wages may cause grievous injury). *See also* Mathews v. Eldridge, 96 S. Ct. 893, 910 (1976) (Brennan, J., dissenting).

upon the reasonable condition that the judgment debtor apply for and prove that he is entitled to them.[127] Under this argument, since the judgment debtor has no entitlement until he successfully claims an exemption, due process is not denied if an asset is taken before that time. Central to this argument is the view that the procedural aspects of the statute conferring the benefit define the interest of the judgment debtor.[128] The basis for this view is *Board of Regents v. Roth*,[129] in which the Court held that state law, rather than the Constitution, defined a property interest.[130] In *Roth* the interest was government employment. Because neither the employment contract, the state statute, nor state policy contained any promise to renew the employment, the Court held that the failure to renew the employment was not a deprivation of a property interest entitled to due process protection. But *Roth* concerned substantive aspects of the statute, and in subsequent cases the Supreme Court has refused to extend *Roth* to permit

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127. None of the entitlement cases concerns litigation over a refusal to grant a governmental benefit when there was no request for the benefit. Rather, the cases concern either a termination of existing benefits or a refusal to approve a request for benefits. *E.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

One judge who found no due process problem did believe that an exemption statute denied equal protection of the laws. Moya v. DeBaca, 286 F. Supp. 606, 613-14 (D.N.M. 1968) (dissenting opinion), *appeal dismissed*, 395 U.S. 825 (1969). Citing a "veritable obstacle course" for a debtor to overcome to gain his exemptions, he found discrimination against debtors:

> The precise discrimination, as I see it, occurs in favoring and protecting creditor interests, as against debtor interests in an arbitrary and unreasonable manner in the light of expressed legislative and judicial purposes to the contrary, and at exhorbitant [*sic*] social and financial cost to both the wage earner and the community. . . .
>
> A valid law cannot give something . . . and then in effect take it away by making its attainment difficult or unreasonable. Courts cannot, in the performance of their duties, tolerate contradictions and paradoxes in the law. When such differences exist between purpose and result of law, the evident fruition is public disrespect for law and order. The Constitution, and especially the Fourteenth Amendment, is the axe to hew down such incongruities.

*Id.* at 614. *Contra*, Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975). *See also* Abbit v. Bernier, 387 F. Supp. 57 (D. Conn. 1974) (incarceration of debtor before opportunity to show indigency denies equal protection).

128. This argument was apparently adopted by the courts in Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975), and Raigoza v. Sperl, 34 Cal. App. 3d 560, 567, 110 Cal. Rptr. 296, 301 (1973), but rejected by the court in Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1037 (M.D. Fla. 1974).

129. 408 U.S. 564 (1972).

130. *Id.* at 577-78.

the interest to be defined by the *procedural* aspects of the legislation creating it.

In *Arnett v. Kennedy*,[131] the petitioner had been employed by the government under a contract that permitted discharge only for cause. The applicable regulations provided for thirty days notice before discharge and an opportunity for the employee to respond to the charges, but did not provide for an evidentiary hearing until after discharge. In a five-to-four decision, the Court held this procedure complied with due process. The case is important to the exemption problem primarily for the differing ways the Justices determined whether the employee had an interest entitled to constitutional protection. Three Justices believed that procedural aspects of the statute and regulations could properly define the property interest of the employee.[132] Since the regulations provided the procedural mechanism by which a determination of discharge for cause could be made, the employee's property interest was qualified by these procedural limitations. "[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, [the recipient] must take the bitter with the sweet."[133] Therefore, because the employee's property interest was limited by the possibility of termination, he was not deprived of "property." In the context of exemptions, this analysis could lead to the conclusion that the judgment debtor's interest is not entitled to due process protection, since the statute prescribes how the judgment debtor will obtain the benefit of the exemption.

The other six Justices, however, firmly rejected this method of determining whether the interest is entitled to due process protection. They stated that the statute and regulations permitting discharge only for cause created an entitlement that constituted "property" and that while state law may define the substance of the interest, the Constitution mandates the procedure by which that interest may be terminated. These six Justices differed with each other, though, on the question whether the regulations afforded due process for the deprivation of the property.[134]

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131. 416 U.S. 134 (1974).

132. *Id.* at 151-54 (Rehnquist & Stewart, JJ., Burger, C.J.).

133. *Id.* at 153-54.

134. Two Justices believed that the procedures complied with due process. *Id.* at 164, 167-71 (Powell & Blackmun, JJ., concurring). Of the four dissenting Justices, one

The following year, in *Goss v. Lopez*,[135] students suspended from public schools challenged the suspensions on the ground that they did not receive notice and a hearing before the suspensions. Again a minority of the Court, this time four Justices, took the position that the interest of the students was defined by the state statutes that not only conferred the benefit of free education, but also limited this benefit by giving school administrators the right to suspend students for disciplinary reasons.[136] The other five Justices disagreed: the right to public education is an interest entitled to due process protection and is not defined by the possibility that the right might be summarily suspended.[137] Thus suspension of the students without any opportunity to them to explain their conduct violated due process.[138]

As a result of *Arnett* and *Goss*, the interest of the judgment debtor is not to be defined by the procedural aspects of the statute creating exemptions. Therefore, even if the proper focus is the exemption rather than the asset, the judgment debtor's interest in his assets, as conferred by the exemption statutes, is "property" within the meaning of the fourteenth amendment.

### B. *Notice and Hearing*

The judgment debtor's interest in his exempt property is entitled to the protections of due process, but what are those protections in the

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thought that, although a full hearing before termination was not compelled, the pre-termination hearing provided by the statutes in question was deficient because it did not provide for determination by an impartial party. *Id.* at 171, 196-99 (White, J., concurring in part and dissenting in part). The other three Justices stated that a full hearing should precede termination. *Id.* at 206, 217-27 (Marshall, Douglas & Brennan, JJ., dissenting).

135. 419 U.S. 565 (1975).

136. *Id.* at 584, 586-87 (Powell, Blackmun & Rehnquist, JJ., Burger, C.J., dissenting). Of the three Justices who expressed the view in *Arnett* that the procedural aspects of the statute could properly define the property interest, only two (Chief Justice Burger and Justice Rehnquist) expressed this view in *Goss*. On the other hand, two who rejected this view in *Arnett* dissented in *Goss* (Justices Powell and Blackmun). These were the two Justices who concurred in the result in *Arnett* because they believed that, although the statute created an entitlement, the procedure for terminating that entitlement comported with due process. Justice Stewart appears to have abandoned the position that the property interest is defined by the procedural aspects of the statute.

137. 419 U.S. at 573-74.

138. If allowing an exemption is viewed as the initial grant of a benefit, *Arnett* and *Goss*, which both dealt with the termination of existing government benefits, might be distinguished from the exemption case. This distinction, however, is merely a repetition of the present enjoyment requirement discussed earlier. *See* text accompanying notes 115-20 *supra*.

context of exemptions?[139] The Supreme Court has stated repeatedly that the process required by the Constitution depends on a balancing of all the relevant interests.[140] "[T]he interpretation and application of the Due Process Clause are intensely practical matters . . . ."[141] At a minimum, due process requires notice and an opportunity for a hearing,[142] but the timing of the notice, as well as the nature of the hearing, depend upon an appropriate accommodation of the competing interests.[143]

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139. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due"). In the exemption context, the court in Raigoza v. Sperl, 34 Cal. App. 3d 560, 568, 110 Cal. Rptr. 296, 301 (1973), stated the question as "[i]s it consistent with due process to require the judgment debtor to apply for and prove the right to an exemption after seizure, rather than to insist that the creditor prove in a pre-seizure hearing that arguably exempt property is subject to levy?" The court thus combined two issues—the timing of the hearing and the burden of proof at the hearing—into one.

140. *E.g.*, Goss v. Lopez, 419 U.S. 565, 579 (1975); Wolff v. McDonnell, 418 U.S. 539, 556, 560-63 (1974); Fuentes v. Shevin, 407 U.S. 67, 82, 90 n.21 (1972); Goldberg v. Kelly, 397 U.S. 254, 261-71 (1970).

141. Goss v. Lopez, 419 U.S. 565, 578 (1975).

142. *Id.* at 579; Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168-69 (1951) (Frankfurter, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Both requirements must be met. A statute authorizing notice but denying any opportunity for a hearing has been held to deny due process. Windsor v. McVeigh, 93 U.S. (3 Otto) 274, 277-78 (1876):

> [N]otice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made . . . . A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.

*Accord*, McVeigh v. United States, 78 U.S. (11 Wall.) 259 (1870).

Even a temporary taking of property must be accompanied by notice and an opportunity for a hearing. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *But cf.* Dillard v. Industrial Comm'n, 416 U.S. 783 (1974) (an action of the industrial commission in suspending unemployment compensation that is immediately and automatically reversible in the state courts causes no constitutionally significant injury).

143. Goss v. Lopez, 419 U.S. 565, 579 (1975), *citing* Morrissey v. Brewer, 408 U.S. 471 (1972), Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). Thus, in some situations the courts have upheld statutes that afford a hearing only after the taking has occurred. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972) (incarceration for violation of conditions of parole); United States v. Shaheen, 445 F.2d 6 (7th Cir. 1971) (temporary writ of *ne exeat republica*); Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) (three-judge court) (garnishment of wages to provide alimony); Torres v. New York State Dep't of Labor, 321 F. Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968, *adhered to on remand*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd mem.*, 405 U.S. 949 (1972); United States v. Robbins, 235 F. Supp. 353 (E.D. Ark. 1964) (temporary *ne exeat republica*

In *Fuentes* the debtor's interest in the property included the rights of possession and use, and these interests were held sufficient to require notice before deprivation. Absent an extraordinary situation that would justify seizure before a hearing, the necessary accommodation of competing interests was to occur only with respect to the nature, not the timing, of the hearing. In *Mitchell*, however, the accommodation of competing interests occurred with respect to the timing of the hearing. Of course, determining whether the situation is extraordinary —a determination necessitated by the approach in *Fuentes*—also entails a balancing of the competing interests,[144] but the criteria recited in *Fuentes* differ from those in *Mitchell*.[145]

(1) Fuentes

In the context of exemptions, the *Fuentes* approach suggests that the judgment debtor must be given an opportunity for a hearing before his property is seized. The judgment debtor has an interest entitled to due process protection, and the situation probably does not qualify as an "extraordinary situation," as that term was used by the Court in *Fuentes*. Three elements are common to extraordinary situations: (1) seizure is "directly necessary to secure an important governmental or general public interest," (2) there is "a special need for very prompt action," and (3) the person initiating the seizure is a government offi-

will issue on ex parte showing of probable cause); Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973); Taylor v. Madigan, No. 443647 (Cal. Super. Ct., Aug. 21, 1974) (levy, but no sale, prior to notice), *rev'd*, 53 Cal. App. 3d 493, 126 Cal. Rptr. 376 (1975); Wood v. Atkinson, 231 Ga. 271, 201 S.E.2d 394 (1973), *appeal dismissed*, 416 U.S. 901 (1974); Edwards v. Stein, 94 N.J. Eq. 251, 119 A. 504 (Ch. 1923); cases cited notes 143-46 *infra*. *Contra*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Griffin v. Griffin, 327 U.S. 220 (1946); Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); Brown v. Liberty Loan Corp., 392 F. Supp. 1023 (M.D. Fla. 1974); Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972); Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970); Yoder v. County of Cumberland, 278 A.2d 379 (Me. 1971); Mills v. Howard, 109 R.I. 125, 280 A.2d 101 (1971).

144. Note, *Provisional Remedies and Due Process in Default—Mitchell v. W.T. Grant Co., supra* note 3, at 662.

145. It is not clear which approach the Court will use in the future. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-80 (1974) (decided two days after *Mitchell*). Consequently, the exemption problem will be analyzed under both approaches. *See also* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

cial responsible for determining that the seizure is justified.[146] In *Fuentes* the Court rejected the notion that collection of a debt constitutes a sufficiently important interest.[147] Although collection of a judgment may be more of an "important governmental interest" than collection of a debt, it is not the sort of governmental interest involved in cases upholding prehearing seizures to protect large numbers of persons against, for example, misbranded drugs,[148] impure food,[149] or a bank failure.[150] On the other hand, to the extent that seizure to obtain quasi-in-rem jurisdiction constitutes an extraordinary situation,[151] it is arguable that seizure to enforce a judgment does, too. In light of long-arm statutes and expanded notions of jurisdiction, however, it may be questioned whether seizure to obtain quasi-in-rem jurisdiction continues to serve an important governmental interest that cannot otherwise be served.[152]

With respect to the need for prompt action as a justification for prehearing seizure, the Court suggested that the statute must at least limit seizure to instances in which the creditor makes a showing of immediate danger of disposition by the debtor.[153] The execution statutes have no such limitation. Finally, the person initiating the seizure is the judgment creditor, not a government official. To the extent that the sheriff exercises the power of refusing to seize property he determines is exempt, there may be "effective state control"[154] over the seizure.[155]

146. Fuentes v. Shevin, 407 U.S. 67, 91 (1972). The Court also described these situations as "truly unusual." *Id.* at 90.

147. *Id.* at 92-93 & n.29.

148. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

149. North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

150. Fahey v. Mallonee, 332 U.S. 245 (1947).

151. Ownbey v. Morgan, 256 U.S. 94 (1921).

152. *See* Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The* Sniadach *Case and Its Implications for Related Areas of the Law, supra* note 3, at 1003-04; Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023, 1031-36 (1973). *But see* Fuentes v. Shevin, 407 U.S. 67, 91 n.23 (1972) (dictum) (securing jurisdiction is "clearly a most basic and important public interest"); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3rd Cir. 1976) (sufficient government interest but insufficient procedural safeguards for protection of defendant's interests); Long v. Levinson, 374 F. Supp. 615 (S.D. Iowa 1974) (constitutional); U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1020-23 (D. Del. 1972) (constitutional).

153. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).

154. *Id.*

155. *But cf.* CAL. CIV. PRO. CODE § 690.50 (Deering Supp. 1975) (apparently withdrawing the power from the sheriff). If the judgment creditor objects to the judgment

In some states, however, the sheriff acts at the direction of the judgment creditor, and the purported protection for the judgment debtor against execution on exempt property is a bond posted by the judgment creditor.[156] In this situation there is no effective state control over the seizure.[157] Since execution of judgment is not an extraordinary situation, the approach in *Fuentes* leads to the conclusion that the opportunity for a hearing must precede the seizure of a judgment debtor's property.

(2) Mitchell

To determine whether the *Mitchell* approach leads to the same conclusion, the interests of the judgment creditor, the judgment debtor, and the state must each be examined. The judgment creditor's interest is obtaining prompt satisfaction of his judgment at minimum expense. He has been wronged by the judgment debtor and has already been put to the effort and expense of obtaining judgment. A notice requirement may cause delay or added expense and certainly increases the risk that the judgment debtor may conceal or dispose of the specified asset. Any delay would be in addition to the delay already caused by statutory requirements that the execution sale be advertised for a specified period.[158] But if the debtor claims no exemption, the delay need be only a few days, too short a period to be of much significance to the creditor. If the debtor does claim an exemption, the delay still need be no longer than two weeks.[159] In light of the rationale for most

debtor's claim of exemption, subsection (h) requires the sheriff to retain possession of the asset until the court resolves the dispute.

156. *See* Fuentes v. Shevin, 407 U.S. 67, 83-84 (1972) (due process requires more than a bond). The requirement of a bond provides little protection for the judgment debtor. *See* text accompanying notes 180-82 *infra*.

157. There may not be effective state control even if the sheriff is supposed to refuse a levy when an exemption is claimed. In Smith v. Pueblo Mercantile & Credit Ass'n, 82 Colo. 364, 260 P. 109 (1927), a creditor procured a writ of attachment, which the sheriff levied on the debtor's car. The debtor claimed the car as exempt, but when the creditor furnished a bond, the sheriff refused to release the car. The court held the sheriff liable, stating that he was not entitled to retain an asset until a debtor establishes judicially that it is exempt. Although the sheriff's conduct was held to be improper, the facts of the case suggest that, if the judgment creditor posts a bond, the sheriff may not see any reason to make an impartial determination whether the asset is exempt.

158. *E.g.*, IOWA CODE ANN. § 626.74 (1950) (realty: 4 weeks; personalty: 3 weeks); PA. R. CIV. P. 3128-29 (realty: 3 weeks; personalty: 6 days). *See also* IND. R. TR. P. 69(A) (no sale until 6 months after lien arises).

159. Assuming, of course, that the statute gives docket preference to disputes over exemptions.

exemptions—that the exempt property is necessary for the judgment debtor's maintenance of a minimum standard of living— the creditor's need for the proceeds from the arguably exempt property is usually less immediate than the debtor's need for the use of the property. So long as the creditor is assured that the property will be available later if it is determined to be nonexempt, his principal interest is protected.

Nor should the increase in costs weigh substantially in the balance. The Supreme Court has stated that mere expense does not justify dispensing with the requirement of a prior hearing.[160] In any event, the expense is not likely to be large. Since the notice need not be formal service of process, but rather any means reasonably calculated to inform,[161] the expense might consist of nothing more than the cost of a printed form and postage. At first glance it might be thought that the tandem requirement of affording the judgment debtor an opportunity for a hearing would substantially increase the costs of execution. Since the judgment debtor may obtain a postlevy hearing under existing statutes, however, requiring an opportunity for a hearing before levy would increase costs only if pre-levy hearings cost more than postlevy hearings or if the requirement increased the instances in which there were hearings on the issue of exemptions. There is no reason for pre-levy hearings to cost more than postlevy hearings. There may be an increase in the number of hearings, but not all of the resulting increase in costs is relevant. Frequently, the judgment creditor should reasonably be able to predict that the judgment debtor will prevail and abandon his levy before the hearing. The increase in costs caused by the failure of judgment creditors to abandon foreseeably futile efforts is not a legitimate factor in the balance.

In some cases the judgment creditor will not be able to predict the outcome of the hearing. Only the increase in cost attributable to these

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160. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972):

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

*See* Bell v. Burson, 402 U.S. 535, 540 (1971): "[A]dditional expense occasioned by the expanded hearing [is not] sufficient to withstand the constitutional requirement."

161. Compare the cases holding that the notice required before modification of divorce decrees need not be by personal service, note 82 *supra*. *See* Dunham, *supra* note 4, at 99-101.

cases needs to be justified. The magnitude of the costs in these cases must be considered in light of (1) the number of instances in which the judgment creditor defeats the judgment debtor's claim of exemption; (2) the number of instances in which the judgment debtor obtains an exemption in spite of an objection by the judgment creditor; and (3) the number of instances in which, as a result of the requirement, the judgment debtor obtains an exemption without any objection by the judgment creditor. Only if the first category is sufficiently greater than the sum of the other two could it be said that the direct costs of a hearing requirement might not be justified.[162]

Although the delay and the expense caused by providing notice and an opportunity for a hearing are probably not substantial, the increase in risk to the judgment creditor that he may never levy on the property subject to execution is not so easily disposed of. This risk, recited by the Court in *Endicott*,[163] is substantial because of the temptation for a judgment debtor to protect his property. The risk of concealment or disposition was not sufficient to induce the Court to uphold the prejudgment seizure in *Fuentes*.[164] In *Mitchell*, on the other hand, the risk of disappearance of the property and also the risk of depreciation in the value of the property were considered important.[165] The prob-

162. And only then should the judgment creditor's expense in defeating an exemption claim be considered. Another undesirable cost would occur if the existence of a hearing requirement deterred judgment creditors from executing on nonexempt property. *Cf.* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (requiring a hearing before discharge may deter warranted discharges).

For an economic and legal analysis of the need for notice and hearing for prejudgment remedies, see Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

163. 266 U.S. at 290. The Court was referring to *Ketcham v. Kent Circuit Judge*, 115 Mich. 60, 63, 72 N.W. 1110, 1111-12 (1897), a prejudgment garnishment case, in which the Michigan court stated, "the very advantage sought by the writ would possibly be of no avail, as a disposition could be made of the fund or property before service could be had."

164. Nor was it sufficient in *Di-Chem* or *Sniadach*, though *Sniadach* might be distinguished on the ground that a debtor is not as likely to quit his job to disable his creditors from locating leviable property as he is to conceal or dispose of his other assets. Referring to *Sniadach*, however, Justice White later stated that "while it was true that the inability to garnish wages could leave the creditor uncompensated, if the defendant proved judgment proof, this was a risk the creditor assumed at the outset by being unsecured." Arnett v. Kennedy, 416 U.S. 134, 193 (1974) (concurring in part and dissenting in part). The same is true of postjudgment garnishment or execution, but only with respect to judgments based on breach of contract and not judgments obtained to redress other wrongs.

165. In the exemption context, the factor of depreciation may be insignificant be-

lem in the exemption context, however, is distinguishable from the problem in *Mitchell*. In *Mitchell* the debtor had expressly given the creditor a security interest in the specific asset the creditor sought to seize, whereas in the exemption context, the judgment creditor has no prior interest in the specific asset.[166] Still, the risk of disappearance may be greater after judgment than before, and the judgment creditor's interest in preventing concealment or disposition of assets subject to execution is a legitimate and substantial factor in determining the requirements of due process.

The judgment debtor's interests include enjoyment of the rights of possession and use that the state has decided he should have even though a judgment has been rendered against him. Because exemptions are intended to permit a judgment debtor to retain assets necessary for the maintenance of a minimum standard of living, the deprivation of certain assets that may be claimed as exempt is likely to have a very disruptive effect on the life of the debtor and those persons dependent upon him.[167] Of course, some items declared exempt are likely to be more necessary to subsistence than others, and the actual necessity of a given exemption probably varies from person to person.[168] In addition to his interest in consuming exempt assets, the

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cause the time necessary for determining whether the asset is exempt need not be long. In the context of prejudgment seizures, on the other hand, the time necessary for determining whether the creditor is entitled to judgment on the underlying claim is substantial.

166. *See* Comment, *Justice White's Chemistry: The Mitchellization of* Fuentes, 50 WASH. L. REV. 901, 908-13 (1975). If the judgment creditor has a security interest in the asset he seeks to levy on, the judgment debtor would not be able to claim an exemption in that asset. *See* note 26 *supra*.

The judgment creditor may have a judgment or execution lien on the asset. *See* note 16 *supra*. In most states no lien on personalty arises before levy. Thus at the time of levy, the judgment creditor has no property interest in the asset. *See* note 213 *infra*.

167. *See* Vukowich, *supra* note 6, at 817 (wages), 826 (household furnishings), 829 (automobiles). Deprivation of some exempt assets, such as insurance, will not have a disruptive effect on the daily life of the judgment debtor. In Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972), the court held a prejudgment attachment statute unconstitutional and stated that even if attachment were justified by extraordinary circumstances, it would still be impermissible to attach assets necessary to enable the defendant "to live, to work, to support his family or to litigate the pending action." *Id.* at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726.

168. In *Mitchell* the impact of taking a stove and a stereo was thought insufficient to require a hearing before the seizure. The impact on the debtor was outweighed, in the Court's balance, by the potential impact on the creditor and by the procedural safeguards for the debtor in the statute being considered. 416 U.S. at 610. The impact

judgment debtor has an interest in using some exempt assets, such as tools of trade or an automobile, to produce additional assets.[169] The judgment debtor also has an interest in being able to encumber his property, perhaps to acquire additional exempt property, and an interest in being able to dispose of his property, for example, to replace items that wear out. Neither the power to dispose nor the power to encumber, however, is essential to the purpose of the exemption statutes. Since there is a substantial risk that the exercise of these powers will result in the creditor's never being able to obtain satisfaction, the judgment debtor's interests in being able to encumber and dispose are not entitled to much weight.[170] Finally, the judgment debtor has an interest in preventing an erroneous taking in the first place.[171]

For the most part, the interests of the state coincide with the interests of the debtor and the creditor. Thus, the state's interests include

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on the judgment creditor has been discussed above. *See* text accompanying notes 158-66 *supra*. The sufficiency of the procedural protections is discussed in the text accompanying notes 174-82 *infra*. *See also* Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (severity of the impact on the debtor relevant to the nature of the hearing but not the timing of the hearing).

169. *See* Vukowich, note 6 *supra*, at 786.

170. Accordingly, courts should reject any claim of denial of due process in connection with the lien on realty that arises in most states when a judgment is docketed. *See* note 16 *supra*. Under a balancing approach, this interference with the judgment debtor's property rights—limiting only his power to convey clear title—is justified. *See* Note, *Procedural Due Process—The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 B.U.L. REV. 41, 64 (1973); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The* Sniadach *Case and Its Implications for Related Areas of the Law*, *supra* note 3, at 1000. *Compare In re* Northwest Homes of Chehalis, Inc., 526 F.2d 505 (9th Cir. 1975) (prejudgment attachment of realty, insufficient interference with debtor's rights to constitute deprivation of property), Central Security Nat'l Bank v. Royal Homes, Inc. 371 F. Supp. 476 (E.D. Mich. 1974) (same), *and* Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971) (same), *with* Terranova v. Avco Fin. Servs., 396 F. Supp. 1402 (D. Vt. 1975) (three-judge court) (prejudgment attachment of realty, unconstitutional), Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., 365 F. Supp. 1299, 1304-06 (D. Mass. 1973) (same), *and* Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085, 1090 (D. Me. 1973) (three-judge court) ("In light of the principles of due process enunciated in *Fuentes*, it cannot be said that the right of an owner of real estate to alienate his property is not a 'significant property interest,' the deprivation of which is within the Fourteenth Amendment's protection"). *See also* Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974) (three-judge court) (mechanics' lien statute constitutional); Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973) (three-judge court), *aff'd mem.*, 417 U.S. 901 (1974) (mechanics' lien statute does not entail a sufficient deprivation to require prior notice and hearing).

171. *See* Goss v. Lopez, 419 U.S. 565, 583 (1975) (a prior hearing is a "meaningful hedge against erroneous action").

enforcement of judgments,[172] maintenance of the integrity of the judicial process by preventing dispositions that frustrate judicial decisions, and provision to judgment debtors of the means to subsist and to continue being productive members of society.[173] Beyond these, the state has the additional interest of minimizing the burden on its courts and other agencies.

Thus the principal interests to be accommodated are the collection of judgments by judgment creditors and the maintenance of a minimum standard of living by judgment debtors. *Mitchell* suggests that for an accommodation of these interests to permit seizure without prior notice, the statute must contain safeguards to minimize both the risk and the impact of an erroneous seizure.[174] The statute upheld in *Mitchell* provided for issuance of the process only by a judge and only if the specific facts justifying the seizure clearly appeared in the creditor's request. The statute also provided for prompt review by a judge, with the burden of proof on the creditor, and required a bond by the creditor. Execution and exemption statutes do not contain these or other sufficient safeguards.

First, the execution and exemption process is not under the control of a judge. The sheriff, who is in control, may not have the power, or may not exercise the power, to refuse the judgment creditor's direction to levy on property that the judgment debtor claims as exempt.[175] If the sheriff is under the direction of the judgment creditor, he is not a neutral government official. Nor does the seizure depend upon a clear showing of specific facts, including the nonexempt nature of the property,[176] that justify the seizure. Second, few statutes require prompt

172. The state's interest includes avoiding the possibility that the procedures would deter judgment creditors from attempting to procure levy on nonexempt property. *See* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (prior evidentiary hearing may deter warranted discharge from employment).

173. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (welfare payments provide the means for daily subsistence and guard against societal malaise).

174. 416 U.S. at 608, 610, 616-18. Justice White, who wrote the Court's opinion in *Mitchell*, foreshadowed the Court's approach in Arnett v. Kennedy, 416 U.S. 134, 188-89 (1974) (concurring in part and dissenting in part). In that case Justice White described the situations in which prehearing seizures have been upheld as having two factors in common: first, a preseizure hearing might defeat the legitimate interest of the party opposing a prior hearing, and second, the statutory procedure is designed to minimize the chances of an erroneous taking and provides for compensation in the event of error.

175. *See* notes 155-57 *supra.*

176. *See* note 209 *infra.*

review by a judge, and none places the burden of proof on the judgment creditor. Third, not all states require the judgment creditor to furnish a bond. Moreover, the requirement of a bond does not effectively minimize either the risk or the impact of an erroneous levy. As the Supreme Court stated in *Fuentes*, the requirement of a bond is not a satisfactory answer to a due process claim because the requirement tests only the strength of the creditor's belief in the merits of his action;[177] it does not effectively deter the creditor from erroneously determining that he is likely to succeed on the merits.[178] Nor did the existence of bond and counterbond provisions prevent the Court from holding the Georgia garnishment statute unconstitutional in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[179] In addition, a bond may not compensate the judgment debtor even if the judgment creditor's determination is erroneous. If the judgment debtor must file an exemption claim, that is, if the asset is not automatically exempt, then the initial seizure may not be wrongful under the statute. If the seizure is not wrongful, the bond provides no relief for the judgment debtor. And even if the levy is wrongful under the statute, the judgment debtor acquires only a claim against the surety. He still has to establish the monetary loss caused by the deprivation of the use of the asset and must convince the surety to pay or must incur the burden of litigation with the surety.[180] Fourth, although the risk of error may be reduced by giving the judgment debtor the power to specify the order in which his property should be levied on, this protection is not sufficient. Statutes giving the debtor the power of selection do not disable the sheriff, if he cannot readily locate the judgment debtor at the

177. Fuentes v. Shevin, 407 U.S. 67, 83-84 (1972); *cf.* Arnett v. Kennedy, 416 U.S. 134, 169, 189-90 (1974) (Powell, J., concurring, and White, J., concurring in part and dissenting in part). If the creditor is willing to gamble on the possibility that the debtor will not object to the taking, a bond requirement does not test even the strength of the creditor's belief in his claim. *See* Fuentes v. Shevin, *supra* at 83 n.13.

178. *See* Goss v. Lopez, 419 U.S. 565, 583 (1975) (prior notice and informal hearing provide a "meaningful hedge against erroneous action"); Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting) (possibility of error too great); Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (possibility of honest error or irritable misjudgment); Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1033 (M.D. Fla. 1974). The existence of a cause of action for wrongful execution does not eliminate the need for prior notice and hearing. *See* Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972); Brown v. Liberty Loan Corp., *supra* at 1033.

179. 419 U.S. 601, 608-09 (1975).

180. *See* Note, *Provisional Remedies and Due Process in Default—Mitchell v. W.T. Grant Co.*, *supra* note 3, at 677-80.

time of levy, from levying on whatever property he can find.[181] And finally, the risk of execution on exempt property is increased by the power of the judgment debtor to waive his exemptions by not claiming them. If the judgment debtor may waive an exemption by not claiming it, then the creditor has no incentive to refrain from directing the sheriff to levy on property that the debtor must affirmatively claim as exempt. For all the above reasons, the execution and exemption procedures are ineffective to minimize the risk and the impact of an erroneous seizure, and the *Mitchell* analysis thus leads to the conclusion that existing statutes have not made a permissible accommodation of the competing interests.[182]

(3) Mathews v. Eldridge

The recent decision in *Mathews v. Eldridge*[183] does not affect this conclusion that existing execution statutes are unconstitutional. In *Mathews* a recipient of disability payments under the Social Security Act[184] challenged the procedures for terminating those payments. Before terminating disability benefits, the agency[185] must inform the recipient of its tentative decision and provide him with a summary of the evidence upon which that decision is based.[186] The agency must also permit him to review the evidence in his file, respond in writing to the proposed decision, and present additional evidence.[187] Holding that

181. *See* Dickinson v. Comstock, 199 S.W. 863 (Tex. Ct. Civ. App. 1917) (evidence would support finding that sheriff exercised due diligence).

182. With respect to the timing of hearings, the Court has stated:

> Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. . . . Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.

Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931). *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-99 (1950). The last sentence of this passage means that before postponement of a hearing is constitutionally permissible, there must be sufficient governmental (or perhaps creditor) interests to make the situation "extraordinary." *See* Fuentes v. Shevin, 407 U.S. 67, 90-93 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). *See also* Note, *Provisional Remedies and Due Process in Default—Mitchell v. W.T. Grant Co., supra* note 3, at 662-63.

183. 96 S. Ct. 898 (1976).

184. 42 U.S.C. § 423 (1970).

185. State and federal agencies jointly administer the program. *See* 96 S. Ct. at 903-05.

186. *Id.* at 904.

187. *Id.; cf.* Arnett v. Kennedy, 416 U.S. 134, 143-44 (1974) (30 days notice and

these procedures satisfy due process, the Court refused to require a full evidentiary hearing before termination of the benefits. *Mathews* provides no support for the constitutionality of execution statutes, however, because the statutory procedures for enforcing judgments are so readily distinguishable: they do not require notice that levy is about to occur, and the judgment debtor does not have any opportunity to prevent the levy. Instead, the judgment debtor may attack the deprivation only after it has occurred.

Although *Mathews* provides no support for the constitutionality of existing execution statutes, it may be suggestive of the minimum procedures necessary to satisfy due process. The Court observed that only in *Goldberg v. Kelly*[188] had it required an evidentiary hearing before a temporary deprivation of property.[189] *Goldberg*, however, was distinguished because it concerned welfare assistance available only to persons "on the very margin of subsistence."[190] The Court viewed termination of welfare benefits as imposing greater hardship than termination of disability payments because welfare benefits are provided only to those who demonstrate financial need.[191] Disability payments, on the other hand, are provided regardless of need, and a recipient of disability payments may have other sources of income, such as earnings of other family members, workmen's compensation or tort claims awards, savings, insurance, or pensions.[192] In addition, the Court noted, a person deprived of disability payments may become eligible for other forms of public assistance, such as state and local welfare and federal food stamps.[193] Consequently, "the disabled worker's need is likely to be less than that of a welfare recipient."[194]

In the context of enforcement of judgments, the significance of the Court's attempt to distinguish disability benefits from welfare benefits is unclear. The Court could conclude that exemptions are more analogous to disability payments than to welfare payments. First, in some states, exemptions enable a person to enjoy a standard of living higher

opportunity to respond orally or in writing before termination of government employment).

188. 397 U.S. 254 (1970).
189. 96 S. Ct. at 902, 905.
190. *Id.* at 905.
191. *Id.* at 905-06.
192. *Id.*
193. *Id.* at 906.
194. *Id.*

than mere subsistence, and a deprivation of some exemptions might not drive the debtor below a subsistence level. In other states, however, exemptions do not provide even subsistence.[195] The Court thus might make distinctions based on a determination whether a given exemption is necessary for subsistence.[196] Second, like the recipient of disability assistance, a judgment debtor deprived of all the property in his possession may still have a residual means of support, for example, wages. The existence of a continuing source of support might distinguish a judgment debtor from a welfare recipient whose benefits have been terminated. Of course, if the judgment is not satisfied out of assets then in the possession of the debtor, the creditor may look to property acquired in the future, except to the extent it is exempt. The difficulty with a distinction based on the existence of a residual means of support is that the problem in the context of exemptions is precisely the deprivation of this residuum.

On the other hand, the Court could easily conclude that exemptions are more analogous to welfare assistance than to disability payments. Granted, eligibility for exemptions may not depend on financial need,[197] but since all nonexempt property may be taken, exempt property constitutes the minimum quantum of assets not available to creditors. Inasmuch as exemptions are designed to permit the judgment debtor's continued subsistence, they serve the same purpose as welfare. Persons deprived of all their property may be eligible for welfare assistance, but exemptions are designed to keep persons *off* the welfare rolls.[198] This line of reasoning, then, suggests that with respect to procedural due process, exemptions should be treated like welfare benefits.

In addition to the impact of the deprivation, the Court in *Mathews* considered the risk of error under the existing procedures and the in-

195. *See, e.g.*, Karlen, *supra* note 10, at 1169.

196. *But see* Fuentes v. Shevin, 407 U.S. 67, 88-90 & nn.20-21 (1972) (necessity may be relevant to the form of hearing, but does not affect the need for some kind of hearing before even a temporary deprivation).

197. *But cf.* N.Y. CIV. PRAC. LAW § 5205(a)(5) (McKinney 1963) (furniture exempt only if necessary for the debtor and family). *See generally* Vukowich, *supra* note 6, at 845-48.

198. Southwest State Bank v. Quinn, 198 Kan. 359, 363, 424 P.2d 620, 624 (1967):

> The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges.

*See* sources cited in Vukowich, *supra* note 6, at 786 n.38.

terest of the government in avoiding new procedural burdens.[199] Again distinguishing *Goldberg*, the Court described the decision to terminate disability payments as "a more sharply focused and easily documented decision than the typical determination of welfare entitlement."[200] Since credibility of witnesses, according to the Court, was not a factor in most disability cases,[201] the Court held that the statute's procedural protections satisfied due process even though they afforded an opportunity to respond only in writing.[202] In *Mitchell*, too, the Court looked to the suitability of deciding the matter on documentary evidence.[203] *Mathews* and *Mitchell* may imply that when the deprivation depends on an easily documented fact about which persons might disagree but would not lie, a full evidentiary hearing may be postponed until after the deprivation.[204]

Nevertheless, it may be necessary to provide *some* opportunity to respond before the deprivation occurs.[205] In *Mathews* the issue was only

199. 96 S. Ct. at 907-09. The Court's approach was consistent with its approach in *Mitchell* of determining whether the statute made a permissible accommodation of the competing interests. In *Mitchell* the competing interests were those of debtor and creditor; in *Mathews*, of recipient and government (as grantor of benefits). The additional burden of the new procedural safeguards was a factor in both cases. In *Mathews* this burden would fall entirely on the government, because it was both the adverse party and the decisionmaker. In *Mitchell*, on the other hand, this burden would be split between the creditor, as adverse party, and the government, as decisionmaker. The Court's focus in *Mathews* was primarily on the additional cost to be imposed on the government as adverse party, rather than as decisionmaker. *See* 96 S. Ct. at 909:

> Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

In the context of exemptions, the focus would be, as in *Mitchell*, on the creditor rather than the government. For a discussion of whether the additional cost to the judgment creditor justifies dispensing with prior notice and hearing, see text accompanying notes 160-62 *supra*.

200. 96 S. Ct. at 907.

201. *Id.*

202. *Id.* at 908-10.

203. 416 U.S. at 609-10, 617-18. *See* Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1281 (1975).

204. An additional factor in *Mathews* was the presence of an administrative agency:

> In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals.

96 S. Ct. at 909, *citing* Arnett v. Kennedy, 416 U.S. 134, 202 (1974) (White, J., concurring in part and dissenting in part).

205. *See* Friendly, note 203 *supra*.

the nature of the prior hearing, not the necessity of a prior hearing of some kind, whether written or oral. The impact of the deprivation on the recipient and the risk of error under existing procedures were considered in connection with the nature of the hearing. This approach is consistent with the idea, present in *Fuentes*,[206] that these factors are relevant to the nature, but not the timing, of the hearing. In *Arnett v. Kennedy*[207] the Court upheld procedures for terminating government employment, even though they did not provide for a full evidentiary hearing before termination. But as in *Mathews*, the procedures in *Arnett* did provide for notice and some opportunity to respond before the deprivation.

*Mathews* and *Arnett* thus stand for the proposition that if a prior hearing is constitutionally compelled, it need not be a full evidentiary hearing. They do not, however, resolve the question whether a prior hearing is necessary in the context of exemptions. Nor does *Mitchell*. Since the statute upheld in *Mitchell* did not provide for any notice or an opportunity for any kind of presentation by the debtor before his property was taken, an execution statute *might* be constitutional if it (1) minimizes the risk of initial error by permitting levy only after a determination by a neutral decisionmaker[208] based on an allegation of specific facts justifying levy on specified property;[209] (2) minimizes the impact of the deprivation by providing for prompt judicial review[210]

206. 407 U.S. at 83-84, 88-90 & n.21.

207. 416 U.S. 134 (1974), *discussed in* text accompanying notes 131-34 *supra*. The procedures upheld in *Arnett* required 30 days notice of a proposed termination and provided an opportunity for the employee to respond orally and in writing before termination.

208. For discussion of whether the neutral decisionmaker must be a judge, see note 49 *supra*. Even if the decisionmaker need not be a judge, the sheriff probably does not qualify as neutral. *See* text accompanying notes 154-57 *supra*. In *Mathews* the decisionmaker was a neutral, expert administrative agency. *See* 96 S. Ct. at 909-10. The decisionmaker thus was not an adverse party (like a judgment creditor), or one under the control of an adverse party (like a sheriff), or one who acts without exercising his judgment (like a court clerk). *See also* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 619 (1975) (Blackmun, J., dissenting) ("so long as the court officer is not an agent of the creditor").

209. A question exists whether the specific facts that would have to be established would include the nonexempt nature of the property. According to *Mitchell*, the preseizure inquiry may properly be limited to determining who is entitled to possession pending resolution of the underlying dispute. 416 U.S. 600, 607 (1974). But the Court also referred to a requirement that the creditor establish the probability that he will succeed on the merits. *Id.* at 609. Consequently, the judgment creditor should have to establish the probability that the property he seeks to reach is not exempt.

210. In *Mathews* the Court noted the "torpidity of [the] administrative review process," 96 S. Ct. at 906, but concluded that due process was satisfied by prior notice

(perhaps with the burden of proof on the judgment creditor);[211] and (3) protects the judgment debtor against loss in the event the taking was wrongful (by requiring the judgment creditor to furnish a bond).[212]

Even a statute with these procedural safeguards, however, might not suffice. In *Mitchell*, the creditor's purchase money security interest gave him an interest in the debtor's property; this duality of interest is not present in the context of execution on arguably exempt property.[213] Thus, because the facts in the exemption context are readily

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and hearing before an administrative agency. *Id.* at 909-70. In *Mitchell* there was no prior notice or hearing. Thus it may be that when there is no notice before the deprivation, the review must be prompt; when there is notice and an opportunity for a hearing before the deprivation, the review need not be so prompt.

211. *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130 (3d Cir. 1976); Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648-49 (S.D.N.Y. 1974) (three-judge court), *remanded with directions to abstain sub nom.* Carey v. Sugar, 96 S. Ct. 1208 (1976).

212. Compare the statute in *Mathews*, which provides that if the termination of disability benefits is wrongful, the recipient is entitled to retroactive payments. 96 S. Ct. at 905, *citing* 42 U.S.C. § 404 (1970). It may also be necessary to provide that the judgment debtor may regain possession of the property if he posts a counterbond. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 612 (1975) (Powell, J., concurring):

> Since the garnished assets may bear no relation to the controversy giving rise to the alleged debt, the State also should provide the debtor an opportunity to free those assets by posting adequate security in their place.

For reasons why a creditor's bond does not adequately protect the debtor, see text accompanying notes 178-81 *supra*.

213. See Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 649 (S.D.N.Y. 1974) (three-judge court), *remanded with directions to abstain sub nom.* Carey v. Sugar, 96 S. Ct. 1208 (1976).

In most states a successful plaintiff acquires a judgment lien on the judgment debtor's realty. In three states he also acquires a judgment lien on personalty, but in the other states he does not acquire a lien on personalty until some time at or after he obtains a writ of execution. *See* RIESENFELD, *supra* note 11, at 94-95, 155; note 16 *supra*. These liens do not create the same duality of interest that a consensual security interest creates. A security interest gives a creditor rights in property he would not otherwise have—he has a lien to determine his priority as against other creditors and he has a right to take the property before he obtains judgment against the debtor. *See* UNIFORM COMMERCIAL CODE § 9-503, *held constitutional in* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974). A judgment or execution lien, on the other hand, does not enable the creditor to reach property he would not otherwise be able to subject to satisfaction of his judgment; nor does it accelerate the time when he can reach the property, although it does fix his priority as against other creditors. The creation of a judicial lien probably is not a sufficient deprivation to trigger the requirements of prior notice and hearing. *See* note 170 *supra*. But to say that the existence of the lien justifies depriving the judgment debtor of possession is to indulge in a bootstrap argument.

distinguishable from those in recent Supreme Court cases, it is unclear whether due process requires notice and an opportunity for a hearing before a judgment debtor may be deprived of arguably exempt property.[214] It is clear, however, that existing statutes, which do not provide for any notice or hearing before levy, do not meet current standards of due process.

## IV. A PROPOSAL

The foregoing analysis suggests that the hearing should be provided before the debtor is deprived of the use of the property. The principal interests to be considered are the judgment creditor's interest in not letting the property disappear and the judgment debtor's interest in not being deprived of the use of the property before a determination that he is not entitled to retain it. It is perfectly possible to accommodate both of these interests. Exemption procedures that fail to do so are unwise,[215] if not unconstitutional, and states should replace them with procedures that do accommodate both interests.

A person's rights of ownership include the rights to possession, use, and alienation. The principal interests of both parties could be satisfied by permitting the debtor to have relatively free possession and use of the asset but restricting his power to transfer it. A state could protect both interests by revising its execution statutes to provide that levy is to be made by serving notice on the judgment debtor,[216] rather than by seizing the asset, and that one of the incidents of levy is an injunction against the judgment debtor's secreting or disposing[217] of the asset levied upon.[218] For violation of this injunction, the debtor would be

214. For an analysis concluding that prior notice is not necessary, see Dunham, *supra* note 4 (but notice is necessary before final disposition of the property).

215. *See* Moya v. DeBaca, 286 F. Supp. 606, 613-14 (D.N.M. 1968) (dissenting opinion), *appeal dismissed*, 395 U.S. 825 (1969).

216. It would not be necessary to obtain personal service. *See* note 82 *supra*. If personal service cannot be made on the judgment debtor, levy could be made by leaving the notice with someone else at the debtor's principal place of residence or by sending the notice by certified or registered mail. *Cf.* N.Y. CIV. PRAC. LAW § 308(2) (McKinney Supp. 1975) (service of process by leaving process at defendant's place of residence and mailing copy to defendant).

217. The injunction against disposition would prohibit converting the asset into property that qualifies for an exemption. *See* CAL. CIV. PRO. CODE § 690.7 (Deering 1973) (exempting $1000 deposited in a savings and loan institution).

218. An alternative approach would be to provide for levy by notice, as above, but provide for an ex parte injunction only if the judgment creditor requests it. *Cf.* Law

subject to punishment for contempt. The effect of levy by notice instead of seizure would be to permit the judgment debtor to continue using the asset. The effect of the injunction would be to ensure that the asset is available to satisfy the judgment if the asset is not exempt. For most judgment debtors, the order not to conceal or dispose of the asset probably would suffice. For the others, incarceration for the contempt probably would result in *pro tanto* satisfaction of the judgment: if the judgment debtor has concealed the asset or has given or sold it to a friend or relative, he will almost always produce it to obtain his release from jail; if he has sold it to a stranger, he will produce the proceeds unless he no longer has them.[219]

If a judgment debtor violates the injunction, the judgment creditor the state would have the additional burden of the contempt proceedings. This burden might be substantial,[220] but it might not—the only issues in the contempt proceedings would be whether the judgment debtor had possession of the asset at the time of levy, whether he failed to turn it over to the sheriff upon demand, and whether there is any

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of Aug. 4, 1972, ch. 550, §§ 9-11, [1972] Cal. Stat. 944-45 (repealed 1974) (upon ex parte application of creditor establishing prima facie case for issuance of writ of attachment, court would issue to debtor both notice of hearing and temporary restraining order).

Most existing statutes provide that the judgment and the levy of a writ of execution give rise to liens in favor of the judgment creditor. *See* note 16 *supra.* A lien tends to protect the judgment creditor against a subsequent disposition by the judgment debtor. But unless the sheriff has seized the asset, a lien is inadequate because the debtor might still dispose of or secrete the property in such a way that the creditor is unable to locate it. The existence of disclosure proceedings may not be sufficient to enable the creditor to locate the property. For example, in State *ex rel.* Howard v. Allison, 431 S.W.2d 233 (Mo. Ct. App. 1968), the court upheld a judgment debtor's refusal to answer questions at the disclosure proceedings on grounds of self-incrimination. The incrimination might be with respect to statutes that make fraudulent conveyances or income tax evasion criminal offenses.

For discussion of the constitutionality of injunctions obtained ex parte, see Rendleman, *supra* note 82, at 584-89; Rendleman, *Toward Due Process in Injunction Procedure,* 1973 U. ILL. L.F. 221.

219. It is, of course, possible that the judgment debtor would sell the asset for less than its fair market value, in which event turning over the proceeds would not be the same as turning over the asset. On the other hand, even when the sheriff obtains and sells property, the proceeds at the sheriff's sale are not likely to be the fair market value of the property. Of course, there is no necessary relationship between the amount the judgment debtor might receive for his contemptuous sale and the amount the sheriff would receive at the execution sale.

220. *See* Vail v. Quinlan, 406 F. Supp. 951, 959 n.19, 960 (S.D.N.Y. 1976) (three-judge court) (before incarceration, judgment debtor who failed to appear at contempt hearing must be brought before a judge and, if indigent, provided counsel).

excuse (such as destruction of the asset) for his failure to turn it over.[221] Since the great majority of judgment debtors presumably would obey the injunction, the burden of contempt proceedings should not be a factor in any significant percentage of cases.

Notice is already the method of levying on certain kinds of property, most notably realty.[222] There is, of course, no concern that the judgment debtor will conceal real property. But he may dispose of it, and some statutes minimize this risk by authorizing an appropriate entry in the title records.[223] A state could take a similar approach for any other kind of property for which there is a recording system, for example, automobiles in those states that have a filing system instead of a title certificate system. But even if the judgment debtor could not officially transfer the title, he might still be able to find a person willing to buy the car.[224] Consequently, if levy by notation in the central records is adopted for any personal property, the judgment debtor should be served with the proposed notice of levy and its accompanying injunction.

For property that is covered by a certificate of title, such as automobiles in most states, levy could consist of seizing the title certificate rather than the asset and ordering the judgment debtor not to conceal or dispose of the asset. To compel surrender of the certificate, the statute could authorize the sheriff to take and retain possession of the asset itself until he receives the certificate, at which time the judgment debtor would regain possession. If reasonable demand for the certificate, made personally on the judgment debtor, precedes seizure of the asset, this approach is not objectionable. But if seizure is permitted, for example, when the judgment debtor is not at home or when he is unable to procure the certificate, then there is a taking, albeit of short duration, before any opportunity for a hearing.[225]

221. There would be some risk that the judgment debtor will falsely claim that the asset has been stolen or destroyed. Although some persons might be willing to commit perjury, the execution statutes should not be constructed on the assumption of perjury.

222. *See, e.g.*, CAL. CIV. PRO. CODE § 688(b) (Deering Supp. 1975):

> To levy upon any property . . . which is subject to execution but for which a method of levy . . . is not provided, the levying officer shall serve upon the person in possession of such property . . . (1) a copy of the writ of execution and (2) a notice that such property . . . is levied upon in pursuance of such writ.

223. *E.g.*, ILL. ANN. STAT. ch. 77, § 1 (Smith-Hurd Supp. 1975) (judgment lien from time copy of judgment is filed with recorder of deeds in county where land is located).

224. For example, there might arise a black market in such cars.

225. An alternative to levy by notice that might be thought to meet both the due

The statutes should also specify the procedure for determining whether the judgment debtor is entitled to claim the asset as exempt. An opportunity for some form of hearing is necessary, but the hearing could be either automatic or only at the request of the parties. If a hearing were required in every case, the statutes could require the writ of execution to state the date on which the hearing would occur. An automatic hearing is probably undesirable, however, because of the difficulty in coordinating the actions of the clerk and the sheriff. The hearing should occur shortly after levy, but when the clerk issues the writ, no one knows how soon the sheriff will be able to effect levy. Of course, it would be possible to provide for a hearing, say, ten days after the levy[226] and to require the sheriff immediately after levy to return the writ to the clerk, who would place the matter on the court's docket. Nevertheless, even if it is possible to work out the mechanics for making the hearing follow the levy automatically, it is unwise to do so. Many debtors will not take advantage of the hearing: some will not be entitled to claim the property as exempt, and others will not wish to claim an exemption even if available.[227] Setting the matter down for a hearing in these cases would be wasteful for the court and also for the creditor, who would probably have an attorney present at the hearing. On the other side of the coin, when the judgment debtor does

process and the policy problems presented by existing statutes is to provide notice in the judgment itself. *Cf.* CAL. CIV. PRO. CODE § 412.20 (Deering Supp. 1975) (initial summons contains warning that wages, money, or property may be taken). Indeed, *Endicott* may be read as holding that the *judgment* provides the judgment debtor with the necessary notice. If so, then arguably all that is necessary is to revise the statutes providing for notice of the judgment to provide also notice that the judgment creditor may procure seizure of the judgment debtor's assets, that the debtor may be entitled to specified exemptions, and that the debtor may continue in undisturbed possession by filing a claim with the sheriff. *Cf.* Phillips v. Bartolomie, 46 Cal. App. 3d 346, 354, 121 Cal. Rptr. 56, 62 (1975). Even if constitutional, however, this approach is unwise. The judgment creditor is under no obligation to enforce his judgment immediately. It is likely, therefore, that some assets claimed as exempt at the time judgment is rendered would be worn out and replaced before the judgment creditor seeks to enforce his judgment. The judgment debtor would be obliged to file new claims of exemption, over a twenty-year period in some states, every time he replaced or acquired an exempt asset. Moreover, this alternative would impose on the sheriff a substantial burden of record keeping.

226. *Cf.* Law of March 14, 1973, ch. 8, § 2, [1973] Cal. Stat. 15-16 (repealed 1974) (hearing 10-30 days after issuance of writ of attachment).

227. If, for example, the statute exempted $400 worth of household furnishings, a judgment debtor might not claim his television as exempt so that he could instead protect his refrigerator (or vice versa). *Cf.* Fuentes v. Shevin, 407 U.S. 67, 92-93 n.29 (1972).

claim the asset to be exempt, some creditors will acquiesce in the debtor's claim of exemption, making an automatic hearing wasteful for the court and the judgment debtor.

Consequently, the statute should provide for a hearing only if the parties request it. At the time of levy, the judgment debtor should be informed that he may be entitled to claim exemptions, which should be listed in the writ of execution,[228] and that he must claim them within a specified period of time after the date of levy.[229] If he fails to claim them within that time, the sheriff would take possession of the asset and proceed to advertise and sell it.[230] If the debtor does file a claim of exemption, the judgment creditor would have a specified period in which to file an objection to the claim.[231] If the creditor fails to file an objection within the specified time, the sheriff would notify the judgment debtor that the levy has been abandoned and that he no longer is subject to the order not to dispose of the property. If the creditor does file a timely objection, he should be required to request the court to schedule a hearing to determine if the judgment debtor is entitled to the claimed exemption.[232] The court's attention, then, would be brought to the matter only when the debtor claims an exemption and the creditor objects to the claim. To minimize the delay for the creditor and the restraint on the debtor's power to dispose of the property, the hearing should be held shortly after the creditor objects.[233]

A notice of levy containing the above requirements might be as follows:

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228. *Cf.* Mo. R. Civ. P. 76.08 (before levy sheriff shall inform judgment debtor of statutory exemptions).

229. A reasonably short period, such as seven to ten days, should suffice.

230. Failure to claim an exemption within the specified period should not constitute a waiver of the exemption. It should, however, waive the judgment debtor's right to retain the asset until the exemption is allowed. Since he has been given notice, there is no objection to this taking. *But see* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (possibility that the standard for waiver of constitutional rights in civil cases is the same as in criminal cases—voluntary, knowing and intelligently made).

231. An even shorter period, such as five to seven days after the debtor files his claim, is appropriate because the judgment creditor has an opportunity to assess the situation before procuring levy.

232. Since the positions of the parties are fixed by the time the creditor files his objection, the creditor should be required to seek the hearing very promptly, say within three days after notifying the sheriff of his objection to the debtor's claim.

233. Thus, a requirement that the court schedule the hearing for 15-30 days from the date of the creditor's request would be reasonable. The debtor, of course, should be provided with notice of the hearing.

To satisfy a judgment duly rendered against you on (date) in favor of (judgment creditor) in the amount of (amount of judgment), I hereby levy on the following property:

(description of property levied upon)

DO NOT CONCEAL, DAMAGE, OR DISPOSE OF THIS PROPERTY IN ANY WAY

DO NOT USE THIS PROPERTY AS COLLATERAL IN CONNECTION WITH ANY EXTENSION OF CREDIT

You may be entitled to claim this property as exempt from execution if it falls within one or more of the following categories of property:

(list of all exempt property)

If you do not claim this property as exempt, the sheriff or his deputy will return to take it.

If you wish to claim this property as exempt, you must complete and return the attached "Claim of Exemption" form on or before (date ten days after date of levy). If (judgment creditor) wishes to contest your claim of exemption, he must do so within seven days after your claim of exemption is returned to the sheriff, and you will be notified of the date on which a hearing will be held to determine whether you are entitled to keep the property as exempt.

**IF YOU CONCEAL, DAMAGE, ENCUMBER, OR DISPOSE OF THIS PROPERTY, YOU WILL BE SUBJECT TO PUNISHMENT FOR CONTEMPT OF COURT, INCLUDING A FINE AND/OR IMPRISONMENT**[234]

234. Compare the position taken by a committee of the National Conference of Commissioners on Uniform State Laws. *Uniform Exemptions Act* §§ 8(a), (b) (Tent. Draft No. 5, April 1, 1976), exempts household furnishings and appliances, clothing, tools of the trade, and several other kinds of property, up to stated maximum values. Sections 8(c), (d) require notice to a judgment debtor before a judgment creditor may obtain levy on property of the kind enumerated in §§ 8(a), (b). The judgment creditor first must apply to the court for an order informing the judgment debtor that the creditor seeks levy. The creditor's application must state that he has reason to believe that the debtor has nonexempt property of the kind listed above, must identify the property, and must set forth the "facts constituting the basis for his belief that the property is not ex-

At the hearing[235] the burden of asserting that the property is exempt might be placed on the judgment debtor, or alternatively, the burden of asserting that the property is subject to execution might be placed on the judgment creditor. Similarly, the risk of nonpersuasion might be placed on either party. In *Raigoza v. Sperl*, the court stated: "It is eminently reasonable to place the burden of applying for and proving that the [property is] exempt on the debtor . . . . Surely he is in a better position to prove [that he is entitled to an exemption] than the creditor is to disprove it."[236] The court in *Brown v. Liberty Loan*

empt." *Id.* § 8(c)(i). If the court grants the judgment creditor's request, the court informs the judgment debtor of the creditor's claimed right to levy, gives him up to 15 days to object, and enjoins him from "removing, encumbering, damaging, or disposing of any property of the kind listed" above. *Id.* § 8(d). If the judgment debtor objects to levy and claims the property to be exempt, the judgment creditor may contest the claim of exemption, and the court will resolve the dispute. *Id.* §§ 8(f), 14(e).

For all property other than the kinds listed in §§ 8(a), (b), the Act requires no prior notice of levy. *Id.* § 14(a). Instead, within three days *after* levy, the judgment creditor must give notice of the levy and of the judgment debtor's right to claim exemptions. *Id.* §§ 14(c), 15.

235. Ultimately, the judgment debtor must be afforded a full adversary hearing on the question whether the property is exempt. But the state could, if it wished, provide an expedited initial hearing to determine if there is a probability that the judgment creditor will prevail, in which case the judgment debtor should not be allowed to continue in possession of the asset pending final resolution of the controversy. On numerous occasions, courts have indicated approval of temporary deprivations resulting from hearings that did not entail the full panoply of due process rights. *E.g.*, Mathews v. Eldridge, 96 S. Ct. 893 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974) (notice and opportunity to present evidence before deprivation of prisoner's good time credit, but no right to counsel or cross examination); Arnett v. Kennedy, 416 U.S. 134 (1974) (notice and opportunity to state objections, but no formal hearing before discharge from employment); Bell v. Burson, 402 U.S. 535 (1971) (hearing to determine whether there is reasonable possibility of judgment against licensee before driver's license can be suspended for failure to have insurance or post bond); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (hearing to establish at least probable validity of underlying claim before prejudgment garnishment of wages); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974) (parole board must give reasons for denial of parole, but prisoner has no right of counsel or cross examination at the parole hearing); Torres v. New York State Dep't of Labor, 321 F. Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968, *adhered to on remand*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd mem.*, 405 U.S. 949 (1972) (notice and opportunity to object before suspension of unemployment compensation, but no hearing). The expedited hearing could be conducted by a judge or possibly by some other officer of the court. *See* note 49 *supra*. This approach would add another layer of decision to the process, which would probably increase the costs and delay the ultimate decision. Since it is in the interest of both parties to resolve the dispute as soon as possible, no very useful purpose is served by providing both an expedited probable cause hearing and then a full hearing shortly thereafter.

236. Raigoza v. Sperl, 34 Cal. App. 3d 560, 568, 110 Cal. Rptr. 296, 302 (1973)

*Corp.*, however, disagreed: "The *Raigoza* court seems to have impermissibly shifted the burden of proof from the 'taker' to the one whose property is to be taken."[237] Since allocation of the burden of proof probably is not a constitutional problem in this context,[238] the legislature has the freedom to select the view of either *Raigoza* or *Brown*.

Arguably the statute should contain some sanction to deter judgment debtors from making unfounded claims of exemption and to deter judgment creditors from making unfounded objections to exemption claims.[239] The court's power to tax costs on the losing party may have this deterrent effect. Any further sanction, however, should be carefully circumscribed to prevent overdeterrence—for example, deterring judgment creditors from seeking levy in the first place or deterring judgment debtors from claiming lawful exemptions. Probably the sanction should be no more than giving the court the power to award attor-

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(footnote omitted); *accord*, Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975).

237. Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1038 (M.D. Fla. 1974). In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the statute upheld by the Court placed the burden of proof on the creditor. In Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648 (S.D.N.Y. 1974) (three-judge court), *remanded with directions to abstain sub nom.* Carey v. Sugar, 96 S. Ct. 1208 (1976), one of the reasons the court held the New York attachment statute unconstitutional was that the statute placed the burden of proof on the debtor. *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130 (3d Cir. 1976). In two concurring opinions, Justice Powell has stated that one of the features of a constitutional prejudgment seizure statute would be the allocation of the burden of proof to the creditor. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 611-12 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 625 (1974). Eighty years ago, the Supreme Court of Maine referred to

> the fundamental juristic principle of procedure . . . that the claimant, not the defendant, shall resort to judicial process; that he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof.

Wood v. City of Auburn, 87 Me. 287, 293, 32 A. 906, 908 (1895).

238. *Compare* Central R.R. v. Pennsylvania, 370 U.S. 607, 613 (1962) *with* Speiser v. Randall, 357 U.S. 513 (1958) *and* Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929).

239. In Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1033 (M.D. Fla. 1974), the court suggested that a judgment creditor may object to the judgment debtor's claim of exemption even though the creditor knows the debtor qualifies for it under the statute. Indeed, the opinion as originally issued contained the following sentence:

> In this regard, it should be noted that counsel for defendant Liberty Loan candidly admitted that agents of Liberty Loan may well have had knowledge that the named plaintiff was the head of a household and therefore that she was entitled to an exemption under *Fla. Stat.* § 222.12 when the motion for garnishment was filed.

Civil No. 73-631, at 11 (Nov. 25, 1974). The opinion as finally amended, however, omitted this sentence. 392 F. Supp. at 1032.

neys fees to the prevailing party if it appears to the court that the claim or objection of the other party was not asserted in good faith.

Existing legislation governing executions and exemptions unduly favors the judgment creditor's interest at the expense of the interest of the judgment debtor. It also presents serious constitutional questions. This proposal satisfies due process of law, and it also effectuates the legislative policy of preserving exempt property for the judgment debtor. Above all, it achieves these objectives without sacrificing the judgment creditor's interest in obtaining satisfaction of his judgment.