NOTE

PROVISIONAL REMEDIES AND DUE PROCESS IN DEFAULT—MITCHELL v. W. T. GRANT CO.

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I. INTRODUCTION

Louisiana law permits prejudgment summary seizure and sequestration[1] of goods bought by a defaulting vendee under an installment

1. LA. CODE CIV. PRO. ANN. art. 3571 (West 1961) provides:

payment contract.[2] In an ex parte proceeding, the vendor must post a bond and file a petition and supporting affidavit alleging specific facts relating to the default.[3] The action is taken without prior notice to the debtor.[4] In Orleans Parish, a writ of sequestration will issue only upon application to a city court judge.[5]

Respondent W. T. Grant Company filed its petition based on petitioner's deficient payments for certain consumer goods. Instead of pursuing his statutory remedies of posting a release bond[6] or requesting a postseizure hearing,[7] petitioner moved to dissolve the writ on the

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When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

Sequestration has been defined as

a mesne process by which a writ is issued at the commencement of or pending an action, enabling the claimant to have property in the possession of the defendant or a third person taken into legal custody until after judgment so that the property may be delivered to the party adjudged to be entitled to it, where the defendant has the power to place the claimant in a disadvantageous position and the claim is against the particular property.

Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 TUL. L. REV. 1, 4 (1963).

2. There is no "conditional sale" under Louisiana law. Title to property under an installment contract passes to the vendee. Morelock v. Morgan & Bird Gravel Co., 174 La. 658, 141 So. 368 (1932). The vendor retains a "privilege" in the chattels that can be defeated by the vendee's subsequent resale. *See generally* Note, *Civil Law—Vendor's Privilege*, 4 TUL. L. REV. 239 (1929).

3. LA. CODE CIV. PRO. ANN. art. 3501 (West 1961) provides:

A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

4. For this reason sequestration is considered a "harsh" process, and the procedure must be followed strictly. Hancock Bank v. Alexander, 256 La. 643, 237 So. 2d 669 (1970); Harrison v. Atlas Signcrafts Co., 200 So. 173 (La. Ct. App. 1941). Sequestration cannot be used when other less harsh remedies are available. Mathe v. Mathe, 177 La. 579, 148 So. 884 (1933) (dictum).

5. In all other parishes the order for sequestration is signed by the clerk of the court. LA. CODE CIV. PRO. ANN. art. 281 (West 1960).

6. LA. CODE CIV. PRO. ANN. art. 3507 (West 1961); *see* notes 144-71 *infra* and accompanying text.

7. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

In the postseizure hearing, defendant need only point out a defect in the plaintiff's prima facie case (evidenced by the petition and affidavit). This shifts the burden of proof to the plaintiff. Victory Elec. Works v. Maryland Cas. Co., 140 So. 2d 182 (La. Ct. App. 1962). If defendant is successful in his motion, the court may allow damages for the wrongful seizure and attorney's fees. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

ground that the sequestration procedure deprived him of his property without due process of law, in violation of the fourteenth amendment.[8] The motion was denied by the trial court, as was a motion to review to the state court of appeals.[9] The Louisiana Supreme Court granted review and affirmed the trial court's decision.[10] On writ of certiorari, the Supreme Court affirmed and held that the Louisiana sequestration procedure in Orleans Parish did not operate as a taking of the debtor's property without due process of law.[11]

The Supreme Court's reasoning and decision in *Mitchell v. W. T. Grant Co.* significantly departed from the prior law determining the constitutional restrictions upon the exercise of creditors' summary remedies.[12] In *Fuentes v. Shevin*[13] the Court struck down the replevin[14] statutes of Pennsylvania[15] and Florida,[16] which provided for repossession of a defaulting debtor's property on an ex parte application by the creditor to the clerk of the court.[17] The Court stated that the creditor's interest in expediting the claim and preserving the property did not justify disturbing the debtor's continued use and possession.[18]

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8. U.S. CONST. amend. XIV, § 1: "[N]or shall any state deprive any person of . . . property, without due process of law . . . ."

9. *See* W.T. Grant Co. v. Mitchell, 263 La. 627, 631, 269 So. 2d 186, 187 (1972).

10. W.T. Grant Co. v. Mitchell, 263 La. 627, 269 So. 2d 186 (1972). The court held for Grant on two grounds: (1) that the Supreme Court carved out an exception to its holding in Fuentes v. Shevin, 407 U.S. 67 (1972), when it stated: "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." *Id.* at 93; and (2) that a purchaser who acquires goods subject to a vendor's privilege is presumed to know the legal implications of his possession and the potential loss of possession upon his default. W.T. Grant Co. v. Mitchell, 263 La. 627, 640-41, 269 So. 2d 186, 191 (1972).

11. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). The Court did not comment upon the alternative ground of the lower court's holding, the presumed knowledge of the purchaser. *See* note 10 *supra.*

12. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment wage garnishment). *But cf.* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975), *discussed at* notes 485-512 *infra* and accompanying text.

13. 407 U.S. 67 (1972).

14. Historically, replevin was used to recover property wrongfully taken (*e.g.*, by a landlord's agents). Eventually, replevin evolved into a procedure to seize property wrongfully detained. *See generally* J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN §§ 19-23 (2d ed. 1900); Countryman, *The Bill of Rights and the Bill Collector,* 15 ARIZ. L. REV. 521, 545-46 (1973).

15. PA. STAT. ANN. tit. 12, § 1821 (1967); PA. R. CIV. P. 1073-87 (1974).

16. Ch. 67-254, § 28, [1967] Fla. Laws 661.

17. Fuentes v. Shevin, 407 U.S. 67, 73-78 (1972).

18. *Id.* at 90 n.22.

That the debtor might receive a postseizure hearing[19] and damages for mistaken repossession[20] were not mitigating factors. Before any "significant property interest"[21] could be disturbed, the debtor was entitled to a hearing on the probable validity of the creditor's claim.[22] The creditor's interests in the property were largely ignored in the Court's formulation of the due process standard that the Pennsylvania and Florida statutes failed to meet: "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."[23]

Justice White, dissenting, viewed the problem before the Court as one of substantive law and not procedural rights.[24] He felt that both the creditor and debtor had interests in the property and that the contract between them should govern the prejudgment disposition of the property;[25] that is, if the debtor does not make the stipulated payments, his right to possession should terminate.[26] Justice White also implied that replevin is a commercially reasonable practice. He pointed out that self-help repossession available under the Uniform Commercial Code[27] (UCC) affords fewer procedural safeguards than statutory replevin, but is nonetheless sanctioned by those with expertise in commercial law. Justice White concluded:

> The procedure that the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years.... I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provi-

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19. *Id.* at 80.

20. *Id.* at 82, *quoting* Stanley v. Illinois, 405 U.S. 645, 647 (1972): "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *See also* Griffin v. Griffin, 327 U.S. 220, 232 (1946).

21. 407 U.S. at 86, *quoting* Boddie v. Connecticut, 401 U.S. 371, 379 (1971). That the debtors in *Fuentes* did not have title under their conditional sales contracts was irrelevant. 407 U.S. at 86.

22. 407 U.S. at 97, *quoting* Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

23. 407 U.S. at 90 n.22.

24. *Id.* at 99-103 (White, J., dissenting).

25. *Id.* at 99.

26. *Id.* at 100.

27. UNIFORM COMMERCIAL CODE § 9-503 [hereinafter cited as UCC].

sions that contemplate precisely what has happened in these cases.[28]

The majority's due process analysis was, to Justice White, "no more than ideological tinkering with state law."[29]

In *Mitchell*, Justice White amplified concepts expressed in his *Fuentes* dissent; joined by Justices Powell (concurring) and Rehnquist, the *Fuentes* dissent became the *Mitchell* majority.[30] Declining to follow the due process concepts set forth in *Fuentes*, the Court purported to adopt a balance-of-interests analysis. In a secured consumer transaction, the buyer in possession no doubt "owns" the goods, but the ownership interest is defeasible on default. According to state law, the seller also has a current, real, and substantial interest in the same property.[31] Thus, the impact of Louisiana procedure on the rights of both parties had to be considered in order to resolve what process was due.

First, according to the majority, the creditor's interest under the contract entitles him to either payment of the purchase price or immediate possession. If the consumer maintains possession and use of the goods pending final judgment, the security may depreciate, leaving the seller unprotected. Unlike the seller who posts bond, a consumer whose possession is wrongful does not stand ready to make his opponent whole.[32]

Secondly, the Court stressed that if the debtor were permitted to maintain use and possession, the creditor would run the risk that the debtor would destroy, conceal, or transfer the goods. Further, Louisiana law provides that the creditor's lien (known as a "vendor's privilege") "expires if the buyer transfers possession."[33] Thus, pre-

28. 407 U.S. at 103. *But see* Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974) (self-help provisions of UCC unconstitutional).

29. 407 U.S. at 102.

30. The *Fuentes* majority and the *Mitchell* dissent consisted of Justices Stewart, Douglas, Brennan, and Marshall. *Compare* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), *with* Fuentes v. Shevin, 407 U.S. 67 (1972), *and* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975).

31. The interest of the seller was said to be "measured by the unpaid balance of the purchase price." 416 U.S. at 604. The debtor's interest likewise was measured in dollars-and-cents terms. *Id.*; *see* text accompanying notes 253-54 *infra*.

In *Fuentes*, Justice White had noted that early in a transaction the seller often has "more at stake than the buyer, at least in monetary terms." 407 U.S. at 99. *See* Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60, 98 (1972).

32. 416 U.S. at 608.

33. *Id.* at 609. For a discussion of expiration of the creditor's lien see text accompanying note 301 *infra*.

seizure notice and hearing would permit a bad faith debtor to transfer the goods and cause the creditor to lose his privilege.

Thirdly, in the opinion of the majority, due process does not guarantee the consumer's possession and use of the goods until all issues are finally determined judicially. To the contrary, the issues in a preliminary action for possession pending trial may properly be limited to determining that a lien exists, that the consumer is in possession, and that he has defaulted.[34] If the seller proves, ex parte, these three "ordinarily uncomplicated matters that lend themselves to documentary proof,"[35] he has established sufficient probability of ultimate success on the merits to warrant a temporary bonded sequestration of the collateral. The nature of these issues and the potential damage award available minimize the danger that the writ will be wrongfully issued by the judge.[36]

Having accounted for the creditor's interests and risks, Justice White stated the equation as follows:

> [W]e remain unconvinced that the impact on the debtor of deprivation of the household goods here in question overrides his inability to make the creditor whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing are supplied, and the low risk of a wrongful determination of possession through the procedures now employed.[37]

The impact on the consumer was further eased, according to the Court, by the Louisiana provision that gives him an early opportunity to put the creditor to his proof and by the nonimpairment of the consumer's basic source of income "pending the hearing on possession."[38] Louisiana was not required by due process to be blind to creditor interests, and, considered as a whole, the state's sequestration procedure was held to be a constitutional accommodation of interests.[39]

One commentator has suggested that the *Fuentes* Court gave short shrift to the interests of creditors:

> It is time that the Court ceased due process balancing simply by assigning appropriately pejorative labels to the [creditors' interests] and

34. 416 U.S. at 607.

35. *Id.* at 609.

36. The Court placed substantial emphasis on the role of the judge in the Louisiana scheme. *See id.* at 606, 609-10, 620 n.14.

37. *Id.* at 610.

38. *Id.*

39. *Id.*

instead engaged in a serious attempt to measure the costs and benefits.[40]

Even a cursory reading of the *Mitchell* opinion compels the conclusion that the debtor's interests were there given equally casual consideration. Although the majority took pains to limit its holding,[41] it is clear that its decision made assumptions about the realities of consumer credit that must be more fully examined. This Note will address the propositions on which the result in *Mitchell* rests and will suggest considerations that should be taken into account. First, the Court's due process analysis will be discussed and compared with that in *Fuentes*. Next, the procedural safeguards found adequate in *Mitchell* will be examined. Then will follow an analysis of the various interests at stake in allowing provisional remedies—the debtor's, the creditor's, and the state's. Next, the effect of narrowing the issues cognizable in an attack upon a writ of seizure will be discussed. The Note will conclude with an attempt to assess the impact of *Mitchell* and subsequent cases on prior law.

II. Due Process Analysis

The fourteenth amendment guarantee of procedural due process curbs the arbitrary exercise of governmental power to deprive a person of his property.[42] At a minimum, due process requires notice and a hearing at a meaningful time before a final adjudication of rights.[43] The guarantee, however, is flexible[44]—it protects substantive rights and

40. White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 Wis. L. Rev. 503, 511.

41. In a footnote, the majority stated that its holding was limited to the constitutionality of the Louisiana sequestration procedure. 416 U.S. at 618-19 n.13. Louisiana is the only state that has not adopted the Uniform Commercial Code.

42. Dent v. West Virginia, 129 U.S. 114, 124 (1889). *See also* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); West Ohio Gas Co. v. Public Util. Comm'n, 294 U.S. 63 (1935); Southern Ry. v. Virginia *ex rel.* Shirley, 290 U.S. 190 (1933); Glidden v. Harrington, 189 U.S. 255 (1903).

43. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). *See also* Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div., 312 U.S. 126 (1941); United States v. Illinois Cent. R.R., 291 U.S. 457 (1934); Londoner v. City & County of Denver, 210 U.S. 373 (1908).

44. Arnett v. Kennedy, 416 U.S. 134, 155 (1974):

> The types of "liberty" and "property" protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.

See Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *But see* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1975): "We are no more

guarantees only a full and fair procedure, not any particular type of procedure.[45] Upon a balance of the interests involved,[46] notice must be reasonable, and a hearing must be as full and fair as the circumstances dictate.[47] The threshold of due process rises as individual interests become more fundamental[48] and falls when the governmental interest is paramount. In "extraordinary situations"[49] the governmental interest may be sufficiently crucial to obviate the need for notice and hearing prior to the deprivation of an individual's property.

The majority opinion in *Mitchell* purported to be based on a balance-

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inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause."

45. The form of procedure must be "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "The formality and procedural prerequisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 401 U.S. 371, 378 (1971). *See also* Arnett v. Kennedy, 416 U.S. 134, 187 (1974) (White, J., concurring in part and dissenting in part); Inland Empire Dist. Council v. Millis, 325 U.S. 697, 710 (1945); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 350-51 (1938).

46. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring):

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of the hurt complained of and the good accomplished—these are some of the considerations that must enter into the judicial judgment.

See also Hannah v. Larche, 363 U.S. 420, 442 (1960).

47. *See* cases cited note 43 *supra.*

48. Certain practices have been characterized as "unconscionable," and they require a notice and hearing before the deprivation, even when the taking would be only temporary. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin of consumer goods); Bell v. Burson, 402 U.S. 535 (1971) (loss of driver's license by uninsured motorist after accident and before determination of fault); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare income without notice); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages). *See generally* Arnett v. Kennedy, 416 U.S. 134, 191-92 (1974) (White, J., concurring in part and dissenting in part).

49. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of vessel used to transport controlled substance); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (removal of misbranded products from interstate commerce); Fahey v. Mallonee, 332 U.S. 245 (1947) (appointment of conservator for failing savings and loan institution); Phillips v. Commissioner, 283 U.S. 589 (1931) (tax assessment of shareholder distributions received in liquidation); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (bank superintendent's tax assessment of shareholders of failed bank); Ownbey v. Morgan, 256 U.S. 94 (1921) (prejudgment attachment to secure in personam jurisdiction); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of adulterated food).

of-interests test.[50] A true balancing would have involved a consideration of the costs and benefits to each party, with and without a hearing prior to the interim taking of property.[51] As this Note will demonstrate, the Court did not engage in a complete balancing.[52] In part, this was due to the Court's "narrowed issue" approach[53] and its failure to advert fully to the debtor's interests in the property.[54] The Court's failure to balance completely may also be attributable to its reinterpretation of the case law upon which *Fuentes* was based, especially those cases involving "extraordinary situations."

The "extraordinary situations" category of due process cases was developed in *Fuentes*[55] to account for those instances in which due process was not violated by a seizure of property in the absence of notice and a hearing.[56] Requirements for an "extraordinary situation" were three: (1) the seizure was necessary to secure an important governmental or general public interest; (2) there was a special need for

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50. 416 U.S. 600, 604 (1974).

51. A basic premise of due process analysis is that the procedural guarantees must remain flexible.

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, 442 (1960). *See also* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

52. *See* notes 172-407 *infra* and accompanying text.

53. *See* notes 408-69 *infra* and accompanying text.

54. *See* notes 172-263 *infra* and accompanying text.

55. 407 U.S. at 90-93. *See also* Bell v. Burson, 402 U.S. 535, 542 (1971) ("emergency situations"); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) ("extraordinary situations"); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969) ("extraordinary situations").

56. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v. Mallonee, 332 U.S. 245 (1947); Inland Empire Dist. Council v. Millis, 325 U.S. 697 (1945); Bowles v. Willingham, 321 U.S. 508 (1944); Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div., 312 U.S. 126 (1941); United States v. Illinois Cent. R.R., 291 U.S. 457 (1934); 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); Stoehr v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Londoner v. City & County of Denver, 210 U.S. 373 (1908); Security Trust & Safety Vault Co. v. City of Lexington, 203 U.S. 323 (1906); Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).

prompt action; and (3) the state kept strict control over the summary proceedings.[57] In *Fuentes* the Court characterized these situations as "truly unusual."[58] Characterizing a particular fact situation as "extraordinary" appears to be a shorthand form of balancing of interests: a situation is "extraordinary" when the government's interest clearly outweighs that of the party seeking a prior hearing.

Justice White's opinion in *Mitchell* inverted the analysis in *Fuentes*, converting the extraordinary to the usual. Quoting a case that *Fuentes* had characterized as an "extraordinary situation,"[59] *Mitchell* established the following as the "usual rule":

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.[60]

The original source of this quotation, however, continued as follows: "Delay in the judicial determination of property rights is not uncommon where it is *essential that governmentdl needs be immediately satisfied.*"[61]

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57. 407 U.S. at 91.

58. *Id.* at 90.

59. Phillips v. Commissioner, 283 U.S. 589 (1931). *Compare* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974), *with* Fuentes v. Shevin, 407 U.S. 67, 91-92 & n.24 (1972).

60. Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931), *quoted in* 416 U.S. at 611.

61. 283 U.S. at 597 (emphasis added). It thus appears that *Phillips* involved an "extraordinary situation" and did not represent the "usual rule."

Justice White's invocation of "only property rights" is also interesting. In Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972), Justice Stewart stated:

> Such difficulties [of delineation] indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

It would be facile to say that Justice White's reliance on a personal and property rights distinction is crucial to the *Mitchell* opinion. But this distinction could be one of the practical considerations underlying the Court's treatment of "competing interests." On the other hand, it is clear that the absence of a distinction between personal and property rights was quite germane to the resolution of the issues in *Fuentes*. *See* 407 U.S. at 90 n.22. Where Justice White saw only a commercial transaction in which the debtor "has either defaulted or he has not," *id.* at 100, Justice Stewart saw a right endangered by deprivation without due process, *id.* at 86.

Justice White's majority opinion in Stanley v. Illinois, 405 U.S. 645 (1972), further

As an example of the "usual rule" Justice White discussed *Ewing v. Mytinger & Casselberry, Inc.*,[62] which involved the multiple seizure of misbranded drugs without notice or a hearing. Though the "usual rule" was upheld,[63] the Court in *Mytinger & Casselberry* recognized the context of the rule:

> One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control.[64]

The *Fuentes* Court had focused on the "protection of public health" and had confined *Mytinger & Casselberry* to its extraordinary circumstances.[65]

The next attack on the reasoning of *Fuentes* was Justice White's distinguishing of *Sniadach v. Family Finance Corp.*[66] He pointed out that *Sniadach* involved wage garnishment, a practice which drives "a wage-

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illuminates this problem. There an Illinois statute created a presumption that the father of an illegitimate child was not fit as a parent and could be deprived of custody, without notice or a hearing, after the mother died. Relying on Bell v. Burson, 402 U.S. 535 (1971), and Goldberg v. Kelly, 397 U.S. 254 (1970), Justice White held that this violated due process. The majority set forth a complete balancing of interests and concluded:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

405 U.S. at 656 (footnote omitted). The *Fuentes* majority relied on *Stanley* as one of the cases that set forth the general rule that barred the taking of property without a prior hearing. 407 U.S. at 82. Given Justice White's opinion in *Mitchell*, it is safe to say that possession of consumer goods is not a "fragile value of a vulnerable citizenry."

In North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975), *discussed at* notes 485-512 *infra* and accompanying text, Justice White did not reiterate the "usual rule" purported to govern the deprivation of property rights. *Cf.* 43 U.S.L.W. at 4195 (Powell, J., concurring).

62. 339 U.S. 594 (1950); *see* 416 U.S. at 612.

63. 339 U.S. at 600, *citing* Phillips v. Commissioner, 283 U.S. 589 (1931).

64. 339 U.S. at 599-600.

65. 407 U.S. at 92. Justice Douglas, the author of the *Mytinger & Casselberry* opinion, also put the case in the category of "extraordinary situations." *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).

66. 395 U.S. 337 (1969).

earning family to the wall."[67] This limitation (*i.e.* that wages are a special kind of property) had been specifically rejected in *Fuentes*.[68]

The *Mitchell* Court's final step of analysis was a detailed distinguishing of *Fuentes* itself. First, the Court pointed out that in Louisiana "bare conclusory claims" are not sufficient to cause a writ of sequestration to issue.[69] Moreover, the specific facts to be alleged in the petition must pass muster before a judge rather than a clerk of the court.[70] Factually, this appears to be a matter of degree.[71] Constitutionally, the procedure in Louisiana is on equal footing with those struck down in *Fuentes*. In each, the procedure is ex parte. In each, the facts tested are the *creditor's* facts. In each, all that is tested is the creditor's belief in the facts, not the probable truth. *Fuentes*, however, had emphasized that the probable validity of the claim is to be aired in an ad-

67. 416 U.S. at 614, *quoting* Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969).

68. 407 U.S. at 88: "This reading of *Sniadach* . . . reflects the premise that [it] marked a radical departure from established principles of procedural due process. [It] did not."

Justice White's reading of *Sniadach* and also of Goldberg v. Kelly, 397 U.S. 254 (1970), is fully discussed in his concurring and dissenting opinion in Arnett v. Kennedy, 416 U.S. 134, 190-93 (1974). According to Justice White, *Sniadach* and *Goldberg* called for a preseizure hearing for two reasons: (1) there would be a substantial risk that the deprivation might be wrongful (that is, if the deprivation was to turn on the "fault" of the party claiming the hearing and this "fault" issue would be foreclosed without an adversarial hearing, then the deprivation would be wrongful); and (2) there would be a great impact on the party claiming the hearing if the property were lost (that is, loss of wages or termination of welfare benefits). *Id.*

The "usual rule" of a hearing at some time before final adjudication was, in Justice White's view, based on different considerations: (1) there would be a great risk in leaving the party claiming the hearing in possession of the property (*e.g.*, contaminated food may find its way into commerce, *see* North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908)); (2) the legitimate interest of the party opposing the hearing would be destroyed if the hearing were granted (*e.g.*, a person in possession of alleged enemy property may conceal or destroy it, *see* Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921)); (3) the party claiming the hearing would not be in a position to make the other party whole, whereas the other party would be able to compensate the claiming party (*e.g.*, a taxpayer might waste or conceal assets when the Commissioner has levied a jeopardy assessment, *see* Phillips v. Commissioner, 283 U.S. 589 (1931)). 416 U.S. at 188-89. Of course, Justice White did not indicate that the cases supporting the above considerations might otherwise be characterized as "extraordinary situations." In the recent case of North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975), Justice White did not pursue his reasoning as developed in *Fuentes, Arnett,* and *Mitchell*. *See* notes 485-512 *infra* and accompanying text.

69. 416 U.S. at 616.

70. *Id. But cf.* note 5 *supra* and accompanying text.

71. *See* note 100 *infra* and accompanying text.

versary context.[72]

Secondly, the *Mitchell* Court stressed that the debtor is protected, after the fact, by a hearing and the creditor's duty to make him whole in the event of a wrongful deprivation.[73] *Fuentes* recognized a similar postseizure provision in the Florida replevin statute, and considered it relevant to the due process issue, but explicitly stated that postseizure reparations by the creditor did not compensate for the unconstitutional taking.[74]

Finally, the Court pointed out a defect shared by the statutes struck down in *Fuentes* and the Georgia statute struck down in *Bell v. Burson*[75] but not present in *Mitchell*.[76] In *Fuentes* statutory replevin was a remedy for "wrongful detention" of property. The majority in *Fuentes* felt that this issue of "fault" could not be properly determined in an ex parte proceeding.[77] Justice White stated that the Louisiana sequestration statutes were not based on this broad "fault" standard; hence the possibility of the mistaken taking of property was minimized.[78]

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72. 407 U.S. at 83 (footnote omitted):

> To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.

73. 416 U.S. at 617-18.

74. 407 U.S. at 81-82:

> At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

75. 402 U.S. 535 (1971). The statute in *Bell* provided for a summary suspension of an uninsured motorist's license when the driver was in an accident. The presuspension hearing did not consider fault or responsibility for the accident. The statute was held unconstitutional in that it significantly involved the issue of liability, but compelled suspension of the driver's license without any showing of probability that the driver was in fact responsible.

> It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended [is not a hearing "appropriate to the nature of the case"].

Id. at 542, *quoting* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

76. 416 U.S. at 616-18.

77. 407 U.S. at 83 & n.13.

78. 416 U.S. at 618.

The creditor in Louisiana, however, need only show that it is within the debtor's power to remove or otherwise dispose of the property.[79] Justice White's analysis fails to consider the fact that a lower standard of proof works the same deprivation in Louisiana as in Florida and Pennsylvania. Instead of having to allege any circumstance that would cause a creditor to feel insecure about the debtor's possession of collateral, the creditor need only allege that the debtor is in possession of the goods.[80] Any person in possession of personalty undoubtedly has the "power" to dispose of the goods. While the Louisiana proceeding is not based on a "fault" standard, this surely should not tip the balance in favor of the creditor.

The Court in *Fuentes* recognized that there "may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods" and thus come within the "extraordinary situations" exception.[81] Louisiana's "power to dispose" standard clearly does not meet this criterion.[82]

In attempting to cut back on the broad holding of *Fuentes*, the Court in *Mitchell* simply rejected the precedential basis and reasoning of *Fuentes*. The due process analysis introduced in *Mitchell* and its relation to precedent are confusing. Two days after *Mitchell* was decided, the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*[83] upheld a Puerto Rico statute that provided for summary seizure of vessels used to transport contraband.[84] Justice Brennan, a dissenter in *Mitchell*, joined by seven members of the Court, held that the statute was constitutional on the basis of the *Fuentes* "extraordinary situations" exception.[85] In a terse concurring opinion, Justice White said:

> I add, however, that the presence of important public interests which permits dispensing with a preseizure hearing in the instant case, is only one of the situations in which no prior hearing is required.[86]

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79. LA. CODE CIV. PRO. ANN. art. 3571 (West 1961).

80. A prior version of Louisiana's sequestration statute required the creditor to show reasonable grounds to fear that the debtor might dispose of the property. *See id.*, Comment (a); Johnson, *supra* note 1, at 15; notes 91-122 *infra* and accompanying text.

81. 407 U.S. at 93; *cf.* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1975).

82. 416 U.S. at 629-30 n.1 (Stewart, J., dissenting).

83. 416 U.S. 663 (1974).

84. P.R. LAWS ANN. tit. 24, §§ 2512(a)(4), (b) (Supp. 1974); *id.* tit. 34, § 1722 (1971).

85. 416 U.S. at 676-78.

86. *Id.* at 691 (White, J., concurring), *citing* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), *and* Arnett v. Kennedy, 416 U.S. 134 (1974).

This statement does little to clear up the confusion.

A conclusion to be drawn from Justice White's analysis is that the necessity for a prior hearing will depend on how the majority of the Court views the magnitude of the aggrieved party's claim. In both *Fuentes* and *Mitchell*, Justice White was convinced that no great hardship to the debtor resulted from the deprivation.[87] On the one hand, consideration of the merits in competing claims is the basis of the balancing-of-interests test. On the other hand, the competing claims must be characterized fully: an *assumption* that no great hardship to one party results from a certain procedure does not produce complete balancing. As Justice White admitted in his *Fuentes* dissent:

> In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved.[88]

The balancing process cannot function fairly if the Court does not weigh practical considerations other than those which it chooses to perceive.[89] As Justice Marshall has pointed out:

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87. *Compare* 407 U.S. at 99-100 (White, J., dissenting), *with* 416 U.S. at 610.

88. 407 U.S. at 100.

89. It can be argued that Justice White would uphold the statutes in *Fuentes* on the ground that they were reasonable exercises of the states' power to define property rights. This attitude is implicit in his characterization of the majority's opinion as "ideological tinkering with state law." 407 U.S. at 102. This is reminiscent of Justice Black's dissent in Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-51 (1969):

> The arguments [made by the Court] would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be.

Id. at 345. This type of argument is best directed against those substantive due process decisions in which the Court invalidated state economic regulations. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

Mitchell and *Fuentes*, however, were not substantive due process cases. In neither case was prejudgment repossession attacked on the basis of the substance of the statute. In both, rather, the issues were confined to the constitutionality of the procedures embodied in repossession. Justice White's "ideological tinkering" characterization was perhaps directed at the majority's statement that procedural due process protected the debtor from "substantively unfair" deprivations. 407 U.S. at 81. The requirement of a prior hearing curbs only procedurally unfair takings. Only the substance of the taking involves a consideration of what defenses the debtor should be allowed to raise to defeat the seizure. *See* notes 408-69 *infra* and accompanying text. *Fuentes* can be read without regard to the "substantively unfair" language because the Court specifically left the form of the prior hearing to the state legislature. 407 U.S. at 87 & n.18. Justice White's comments about "ideological tinkering" may, then, be misdirected.

> It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.[90]

III. PROCEDURAL SAFEGUARDS

In deciding whether a challenged procedure meets the requirements of due process, courts are inevitably faced with the two interrelated questions of timing and form. The Supreme Court's treatment of the two questions in *Fuentes* and *Mitchell* provides a casebook example of legal process: if two issues are crucial to a holding, the result may be radically different depending on which issue is emphasized and which is deemphasized. In *Fuentes* the Court stressed the due process

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On its face, *Mitchell* is a procedural due process case. *Mitchell* can also be read, however, as upholding the Louisiana statutes as a reasonable exercise of legislative power. The test, one of substantive due process, is whether "[a] regulation . . . is reasonable in relation to its subject and is adopted in the interests of the community . . . ." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). Justice White's deference to the Louisiana legislature indicates that he may have been using this test. *See* 416 U.S. at 607.

Procedural due process is decided under a different test. Under the balance-of-interests formula, the Court is required to look at the accommodation of interests a legislature has made to see if the balance struck was proper. *See* notes 42-49 *supra* and accompanying text. The Court must necessarily look at legislative facts. If a legislature has not given adequate consideration to one party's interest, it would be incumbent upon the Court to do so. In other words, the Court could not rest on the legislature's judgment alone. The difference between substantive and procedural due process is that in the former the Court defers to the legislative judgment, and in the latter the competing interests before the legislature are balanced by the Court. *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955), *with* Stanley v. Illinois, 405 U.S. 645 (1972).

It is here that Justice White's "perceptions of the practical considerations" enter. If the Court would happen to have the same perceptions as the legislature, and the legislature had not taken into account all interests of the parties, then a statute would be upheld solely on the basis of reasonableness. Balancing of interests, however, would seem to call for a de novo consideration of legislative facts, clear of preconceived perceptions. *See* Bartkus v. Illinois, 359 U.S. 121, 127-28 (1959) (emphasizing that the Court balance relevant and conflicting factors in disinterested and detached manner).

There is language in North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1975), that indicates that Justice White is still relying on his "perceptions of the practical considerations":

> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error.

90. United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

importance of timing.[91] Factual complexity and statutory procedural safeguards short of preseizure notice and hearing were merely relevant to the form that the hearing should take.[92] In contrast, the *Mitchell* Court withdrew from the premise that the timing of procedural safeguards is crucial and relied instead on the premise that the form and apparent quality of the safeguards provided by Louisiana's sequestration procedure protect the debtor's interests sufficiently to comport with due process. Louisiana sequestration procedures appeared—at least on the surface—to provide better debtor protection than the typical statutes invalidated in *Fuentes*. Whether these distinctions, relied on in *Mitchell*, are meaningful or merely formal is open to question.

A. *Grounds for Seizure*

At common law, the remedies of replevin and detinue were available to regain specific property tortiously taken or detained.[93] When replevin was transplanted to the United States, it became available to remedy "any form of unlawful detention, whether or not the property was tortiously taken in the first instance."[94] As used today in the secured credit context, replevin has lost all flavor of its roots in tort,[95] except as a matter of form. Thus, in most states, in order to obtain a writ of replevin,[96] the plaintiff must submit an affidavit stating "in conclusory fashion"[97] that the property is wrongfully detained.[98] In addition, the plaintiff generally must allege ownership and right to possession.[99]

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91. "The primary question . . . is whether these state statutes are constitutionally defective in failing to provide for hearings 'at a meaningful time.'" 407 U.S. at 80.

92. 407 U.S. at 82-84, 87 n.18, 97 & n.33; *see* 416 U.S. at 629-34 (Stewart, J., dissenting).

93. *See* J. COBBEY, *supra* note 14, §§ 51-83; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 367-69 (5th ed. 1956); Countryman, *supra* note 14, at 545-46.

94. Countryman, *supra* note 14, at 546.

95. *See* 66 AM. JUR. 2D *Replevin* §§ 1-3 (1973); Annot., 151 A.L.R. 519 (1944); *cf.* Sheppard Fed. Credit Union v. Palmer, 408 F.2d 1369, 1373 (5th Cir. 1969); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 19 (4th ed. 1971).

96. Affidavit requirements for the prejudgment writ of seizure should be distinguished from pleading requirements, if any, for the underlying replevin action.

97. Fuentes v. Shevin, 407 U.S. 67, 74 (1972).

98. *See, e.g.*, CAL. CIV. PRO. CODE § 512.010 (Deering Supp. 1974) (claim and delivery); MO. REV. STAT. § 533.010(2) (1969) (replevin).

99. *See generally* 1 CCH SECURED TRANSACTIONS GUIDE ¶ 32, at 1351-93 (1973); 21 AM. JUR. PL. & PR. FORMS *Replevin* Forms 291-99 (1972). Some states require that plaintiff allege specific facts to support ownership and right to possession. *See, e.g.*, UTAH R. CIV. P. 64B.

In apparent contrast to the factual paucity usually permitted in the application for a writ of replevin,[100] Louisiana provides that a sequestration writ shall issue only when the requisite grounds "clearly appear from specific facts shown by the [verified] petition . . . ."[101] The grounds for sequestration are unexceptional in that plaintiff must allege "ownership or right to possession . . . or a mortgage, lien, or privilege . . . ."[102] What is noteworthy is the lack of substance in the requirement that the property sought to be sequestered be "within the power of the defendant to conceal, dispose of, or waste . . . or remove . . . from the parish . . . ."[103]

The Court in *Mitchell* placed heavy emphasis on the premise that "bare conclusionary claims . . . will not suffice under the Louisiana statute."[104] As opposed to the facts necessary to establish wrongful detention under a "broad 'fault' standard,"[105] the facts relevant to sequestration were said to be "narrowly confined"[106] to those necessary to establish "default, the existence of a lien, and possession of the debtor . . . ."[107] Moreover, these same facts were thought to be particularly suited to ex parte documentary proof.[108] It is submitted that this rationale assumes away substantial problems faced in *Fuentes*, reads other parts of *Fuentes* with license, and ignores some practical realities in the issuance of writs of sequestration.

Fuentes clearly contemplated that the defendant should have an opportunity before the seizure to controvert plaintiff's claims by interposing facts tending to show that the seizure would be substantively unfair or mistaken.[109] By assuming the propriety of narrowly confined issues, the *Mitchell* Court truncated the set of facts that might tend to show that a prejudgment seizure would be substantively unfair. The only

100. For an example of how little factual material may successfully support a writ of replevin, see App. at 32-40, Fuentes v. Shevin, 407 U.S. 67 (1972).

101. LA. CODE CIV. PRO. ANN. art. 3501 (West 1961). *See generally* Johnson, *supra* note 1, at 16.

102. LA. CODE CIV. PRO. ANN. art. 3571 (West 1961).

103. *Id.*; *see* Miears v. District Court, 519 P.2d 485, 488 (Okla. 1974); text accompanying note 349 *infra*.

104. 416 U.S. at 616; *see* 407 U.S. at 73; North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975).

105. 416 U.S. at 617.

106. *Id.*; *see* notes 408-69 *infra* and accompanying text.

107. 416 U.S. at 607.

108. *Id.* at 617-18.

109. *See* 407 U.S. at 81, 87.

remaining facts relevant to seizure are those that might show that it would be mistaken; it was these facts the Court considered particularly suited to ex parte proof based on the allegations in plaintiff's application.[110]

According to the Court in *Mitchell,* there was a distinction even more basic. Citing the "wrongful detention" language of replevin statutes, the Court inferred the existence of a fault standard and remarked that "in *Fuentes* this fault standard . . . was thought ill-suited for preliminary *ex parte* determination."[111] As a characteristic that distinguishes the grounds on which the remedies rest, the finding of a fault standard in replevin and none in sequestration is insupportable. Although historically replevin sounded in tort,[112] its tortious fault standard no longer exists in the secured credit context, unless the possibility of debtor misconduct of a more morally delinquent[113] nature than mere contractual default be considered. If fault in the tort sense of antisocial conduct is to be inferred from the term "wrongful detention," it is equally present in Louisiana's grounds for sequestration, which are concerned with whether it is within the debtor's power to "conceal, dispose of, or waste . . . or remove the property . . . ."[114] If, however, the Court meant "fault standard" in the sense of breach of contract, any distinction vanishes, for both replevin and sequestration are based on the creditor's right to possession on account of the debtor's default. The *Mitchell* Court's reading of *Fuentes* as concerned with a fault standard lent false support to the Court's view that the narrowly confined issues in sequestration are simpler than those in replevin and thus more suitable for ex parte determination. In *Fuentes* the Court had said that the simplicity of the issues "certainly cannot undercut the right to a prior hearing of some kind."[115]

The clear implication of the majority opinion in *Mitchell* is that the facts that must be alleged in the petition and affidavit for sequestration may make out a case sufficiently more convincing than that shown by the typical replevin affidavit to render an adversary hearing unnecessary. Although the requirement that "the grounds . . . for the issu-

110. *See* 416 U.S. at 607, 617-18.

111. *Id.* at 617.

112. *See* note 93 *supra* and accompanying text.

113. W. PROSSER, *supra* note 95, § 4, at 18-19.

114. LA. CODE CIV. PRO. ANN. art. 3571 (West 1961); *see* notes 291-344 *infra* and accompanying text (discussion of debtor misconduct).

115. 407 U.S. at 87 n.18.

ance of the writ clearly appear from specific facts shown by the petition"[116] would, in the abstract, provide for a more convincing showing than a statute requiring bare conclusory assertions of right, it may legitimately be asked whether there are significant and essential distinctions in practice.

The framers of the Louisiana scheme apparently envisioned that the application for sequestration should contain facts adequate to make out a prima facie case in the underlying debt action.[117] A survey of the cases that have reached the appellate courts suggests, however, that creditors have been successful in obtaining writs of sequestration based on allegations hardly less conclusory than those usually sufficient for a writ of replevin.[118] In *Mitchell* the creditor's successful application consisted of a petition and affidavit that merely alleged an amount past due and owing on a stove, refrigerator, and washing machine and prayed for a writ of sequestration in recognition of the vendor's lien; contract forms were attached.[119] One questions whether such an application contains facts sufficiently illuminating to support a constitutional

116. LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

117. *Id.*, Comment (a) states that "[t]he petition for a writ . . . of sequestration must contain allegations to support the principal cause of action as well as the provisional remedy." *See id.* form 348 (West 1963) (H. McMahon, Coordinator and Reporter, Louisiana Code of Civil Procedure, co-author); *cf.* Hancock Bank v. Alexander, 256 La. 643, 652-53, 237 So. 2d 669, 672 (1970). *See also* 22 AM. JUR. PL. & PR. FORMS *Sequestration* Forms 1, 3 (1973).

118. Thus, in Hancock Bank v. Alexander, 227 So. 2d 183 (La. Ct. App. 1969), *rev'd on other grounds*, 256 La. 643, 237 So. 2d 669 (1970),

> the sole allegation of the plaintiff bank's petition upon which the writ of sequestration was sought [and issued] was that it was within the power of the defendants to sell, dispose of, waste, or remove the property during the pendency of the action.

Id. at 186 (footnote omitted); *see* Wright v. Hughes, 254 So. 2d 293 (La. Ct. App. 1971); *cf.* Terzia v. Grand Leader, 176 La. 151, 145 So. 363 (1933); Interstate Trust & Banking Co. v. Hebert, 7 La. App. 428 (1927).

In Young v. Guess & Swanson, 115 La. 230, 38 So. 975 (1905), under the narrower, stricter requirements of the old Code of Practice of 1870, the Louisiana Supreme Court, in dissolving an existing sequestration, responded to an affidavit alleging that defendant was about to make away with the collateral (a sawmill!) as follows:

> To sustain an affidavit . . . at least one fact or some slight circumstances should be proven. . . . If we were to sustain [this sequestration], then on every claim secured by vendor's privilege upon affidavit the writ might issue. The defendant would be, as to the cause for sequestration, left without any defense whatever.

Id. at 231, 38 So. at 976. *See* LA. CODE PRAC. arts. 275-76 (1870); LA. CODE CIV. PRO. ANN. art. 3571, Comment (a) (West 1961); Johnson, *supra* note 1, at 2-3.

119. Brief for Petitioner at 3, Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

distinction.[120]

The *Fuentes* Court remarked that conclusory allegations "test no more than the strength of the applicant's own belief in his rights."[121] It seems clear that a Louisiana creditor with a colorable, but wrongful, claim of default against his debtor can meet the requirements of the sequestration statute.[122] Since the same creditor, as plaintiff, cannot be expected to allege facts tending to defeat his claim to possession, the conclusion that seizure without notice or hearing is safer in Louisiana than in the general replevin jurisdiction is questionable.

B. *Judicial Control*

The Court in *Mitchell* relied heavily on the role of the judge[123] in the Louisiana scheme as a means to distinguish the statutes at issue in *Fuentes*[124] and to support the proposition that Louisiana's procedural safeguards minimize the risk of wrongful seizure. The debtor "was not at the unsupervised mercy of the creditor and court functionaries" because, it was said, "Louisiana law provides for judicial control of the process from beginning to end."[125] In *Arnett v. Kennedy*, Justice White reiterated the premise that summary action should not be taken without prior notice and hearing unless authorized by a judge in a manner that minimizes the possibilities of wrongful seizure.[126]

Even if it is assumed that a judge rigorously evaluates the materials presented by the creditor in application for a writ of seizure, the result is still a "secret, one-sided determination of facts decisive of rights."[127]

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120. No statement of the debtor's account was attached, nor were other facts alleged that tended to prove default. *Id.*; *see* 416 U.S. at 630-32 (dissenting opinion).

121. 407 U.S. at 83.

122. 416 U.S. at 632 (dissenting opinion).

123. The majority opinion contains at least thirteen references to "judge" or "judicial control" in this context. *See* 416 U.S. at 601-20.

124. *Id.* at 615:

> Because carried out without notice or opportunity for hearing and without judicial participation, [seizures under the Pennsylvania and Florida statutes were] held violative of the Due Process Clause.

125. *Id.* at 616 (footnote omitted). It should be noted, as the Court was careful to do, that Orleans Parish is the only Louisiana jurisdiction in which the court clerk may not issue writs of sequestration. *See* LA. CODE CIV. PRO. ANN. arts. 281-83 (West 1960). In one footnote, the Court limited its holding to the constitutionality of the Louisiana procedure, 416 U.S. at 618-19 n.13, and in another, the Court further limited its holding by stating that "[t]he validity of procedures obtaining in areas outside Orleans Parish is not at issue." *Id.* at 606 n.5.

126. 416 U.S. 134, 191 (1974) (White, J., concurring in part and dissenting in part).

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

That the allegations are evaluated by a judge rather than a court clerk makes them no less conclusory and no more illuminating of the ultimate issues to be decided in a trial on the merits.[128] In all probability, the great majority of sequestration applications submitted for judicial approval consist of pro forma allegations contained in preprinted forms based on preprinted petitions.[129] The reply of the *Mitchell* dissent that the judge "can . . . do no more than ascertain the formal sufficiency of the plaintiff's allegations" seems unanswerable.[130]

Probably because issuance of process for provisional remedies by a judge, rather than a court clerk, has been a relatively rare procedure in the United States, there apparently has been no formal study of the extent and rigor of judicial participation in the decision to issue writs. The analogous area of judicial participation in the issuance of criminal arrest or search warrants, however, has been the subject of greater judicial and academic scrutiny.[131] While the cases have regularly emphasized the importance of preissuance intervention in the arrest warrant process by neutral and detached magistrates[132] "to assure a reliable finding of probable cause" that will "protect the public from arbitrary and unlawful police intrusions,"[133] there are strong indications that

128. *See* text accompanying notes 108-10 *supra.*

129. *See* note 117 *supra.*

130. 416 U.S. at 632. This is not surprising in view of the propensity of large commercial creditors to file suits *en masse. See* text accompanying note 276 *infra.* It has been suggested that some courts process application papers by rubber stamp. *See, e.g.,* Hobbs, *Mitchell v. W. T. Grant Co.: The 1974 Revised Edition of Consumer Due Process,* 8 CLEARINGHOUSE REV. 182, 184 (1974).

131. *See, e.g.,* Shadwick v. City of Tampa, 407 U.S. 345 (1972); Aguilar v. Texas, 378 U.S. 108 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Giordenello v. United States, 357 U.S. 480 (1958); Johnson v. United States, 333 U.S. 10 (1948); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 15-50 (1965); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 45-63 (1969); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions,* 63 MICH. L. REV. 987 (1965).

132. Shadwick v. City of Tampa, 407 U.S. 345 (1972); Giordenello v. United States, 357 U.S. 480, 485-88 (1958); *cf.* Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971) (search warrant); Aguilar v. Texas, 378 U.S. 108, 111, 115 (1964) (same); Johnson v. United States, 333 U.S. 10, 13-14 (1948) (same). Although the Supreme Court has stated that it prefers judicial intervention, Wong Sun v. United States, 371 U.S. 471, 481-82 (1963), in *Shadwick* the Court held that a municipal court clerk who was "removed from prosecutor or police and . . . subject to the supervision of the municipal court judge," 407 U.S. at 351, could issue arrest warrants for violations of municipal ordinances.

133. 1972 WASH. U.L.Q. 777, 780. Also of primary concern is the insulation of the warrant decision from the judgment of the prosecutor, an "officer engaged in the often

judicial intervention has not performed its intended function. Based on the American Bar Foundation's *Survey of the Administration of Criminal Justice in the United States*, Professor Miller observes:

> [T]he formal law in each state provides in varying degree for judicial intervention in the warrant process, which could serve as a limitation on the powers of the prosecutor. However, magistrates vested with power to so control prosecutors have not exercised the power.
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> . . . .
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> . . . At most, the judge cursorily scans the warrant before signing; frequently he signs without examining the contents at all. Obviously, whatever the reasons, it is clear that magistrates do not exercise any real control over the issuance of warrants, and the effective decision is made by the prosecutor.
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> . . . .
>
> In short . . . there is virtually no judicial inquiry into the existence of probable cause for the issuance of arrest warrants. And this is true despite the variety of formal schemes for the allocation of this function.[134]

It might be expected that the issuance of arrest warrants would be more closely supervised than the issuance of civil process. Even if civil and criminal process are administered with equal degrees of rigor, however, Justice White's conclusion that "Louisiana law provides for judicial con-

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competitive enterprise of ferreting out crime." Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971), *quoting* Johnson v. United States, 333 U.S. 10, 13-14 (1948) (Jackson, J.).

The language used by the Justices in discussing the judicial control issue in civil cases sometimes appears to arise from the fourth amendment cases. *Compare* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1975) (White, J.) ("probable cause"), *and id.* at 4195 (Powell, J., concurring) ("neutral officer"), *with* Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (Powell, J.) ("issuing magistrate must . . . be neutral and detached, and . . . capable of determining whether probable cause exists").

134. F. MILLER, *supra* note 131, at 52-54 (footnotes omitted); *see* LaFave & Remington, *supra* note 131, at 991-92:

> Judicial participation in law enforcement decisions is not very meaningful in practice. The judicial officer is usually not consulted in advance, and, when he is, his participation is largely perfunctory.

Cf. Aguilar v. Texas, 378 U.S. 108, 111 (1964). The situation with regard to search warrants is less clear. *Compare* L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 119 (1967) ("Generally magistrates give more attention to requests for search warrants than they do to requests for arrest warrants"), *and id.* ("With rare exceptions, magistrates do read and carefully consider the evidence presented . . . [for] a search warrant"), *with id.* at 120 ("[T]he trial judiciary . . . does not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exist grounds for a search").

trol of the process from beginning to end"[135] does not inspire much confidence.

Inquiry into the case law of Louisiana lends little support to the proposition that participation of the judge minimizes the risk of issuance of a wrongful writ in that state. Cases cited by the *Mitchell* majority support no more than the conclusion that the Louisiana courts will dissolve a sequestration writ that is issued upon a formally insufficient petition or affidavits.[136] Moreover, the Louisiana sources strongly imply that the issuing judge may have little or no discretion to refuse to order sequestration if the application is formally sufficient.[137] Nor do the statutes appear to contemplate any great degree of rigor, for they permit the judge to sign an order in chambers, or during vacation, or even before the petition is filed.[138] It seems fair to say that the judicial par-

135. 416 U.S. at 616.

136. Wright v. Hughes, 254 So. 2d 293 (La. Ct. App. 1971); Hancock Bank v. Alexander, 227 So. 2d 183 (La. Ct. App. 1969), *rev'd on other grounds*, 256 La. 643, 237 So. 2d 669 (1970); *see* 416 U.S. at 616-17 n.12. In *Wright*, plaintiff-lessor failed to specify his reasons for believing his lessee would remove property subject to his lessor's privilege under LA. CODE CIV. PRO. ANN. art. 3572 (West 1961). 254 So. 2d at 296-97. In *Hancock*, the plaintiff failed to allege a mortgage or privilege. 227 So. 2d at 186-87. *See* 416 U.S. at 633 n.4 (dissenting opinion); note 118 *supra*.

137. Notwithstanding the Court's characterization of the case, 416 U.S. at 616-17 n.12, in Leon Zion Mercantile Co. v. Pierce, 163 La. 477, 112 So. 371 (1927), the Supreme Court of Louisiana said:

> It was the mandatory duty of the judge to sign the order when presented to him with proper affidavit and bond, and his refusal to do so cannot be justified on the ground that the petition for the writ had not been filed by the clerk of his court.

Id. at 479, 112 So. at 371. The defendant judge, against whom mandamus was granted, had refused to sign a sequestration order on the grounds that the petition had not been filed with the court clerk and that costs for the writ had not been shown to have been paid. *Id.* at 479, 112 So. at 371; *see* Comment, *The Writ of Sequestration in Louisiana*, 5 LA. L. REV. 102, 105 n.27 (1942). One commentator, cited by the *Mitchell* Court, equivocates but nevertheless states: "If the court finds that the nature of the claim and the amount thereof, if any, and the grounds relied upon . . . are clearly set forth . . . *it should sign* the order . . . ." Johnson, *supra* note 1, at 20 (emphasis added).

Sequestration under article 3571 should not be confused with sequestration under article 3573. Under the procedure of article 3573, traditionally called "judicial" sequestration, both parties are in court, the judge clearly may exercise discretion in granting or refusing to order seizure, and mandamus does not lie. *See* Trahan Drilling Contractors, Inc. v. Sterling, 335 F.2d 65 (5th Cir. 1964); State *ex rel.* Knighton v. Derryberry, 188 La. 412, 177 So. 256 (1937). Sequestration under what is now article 3571 has been known traditionally as "legal" or "conventional" sequestration. *See* Comment, *supra* at 102 & n.7. No case has been found contrary to the implication of *Zion* that mandamus *will* lie to compel *legal* sequestration. *Compare* LA. CODE PRAC. arts. 273-75 (1870), *with* LA. CODE CIV. PRO. ANN. arts. 3571, 3573 (West 1961).

138. LA. CODE CIV. PRO. ANN. arts. 194(2), 196(1) (West 1960); *id.* art. 3502

ticipation according to Louisiana practice, approved in *Mitchell*, affords the debtor substantially less protection against the wrongful issuance of a writ than do the prior notice and opportunity to be heard mandated by *Fuentes*.[139]

Justice White's reliance on the safeguard afforded the debtor by judicial participation[140] does not appear to be joined by other members of the Court. In *Mitchell*, Justices Douglas and Marshall joined in the dissenting opinion in which Justice Stewart said that "the fact that the official who signs the writ . . . is a judge instead of a court clerk is of no constitutional significance."[141] In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, Justice Powell said that he was "not in accord with the Court's suggestion that the Due Process Clause might require that a *judicial* officer issue the writ of garnishment."[142] In the same case, Justice Blackmun, joined by Justice Rehnquist and the Chief Justice, voiced his opinion that "[t]he clerk-judge distinction, relied on by the Court, surely is of little significance so long as the court officer is not an agent of the creditor."[143] Were this issue to be isolated, it seems doubtful that Justice White's distinction would prevail.

C. *Bonding*

The Louisiana Code, following the typical pattern,[144] requires that

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(West 1961).

In one case, a writ of sequestration was dissolved on appeal because the issuing judge apparently had failed to give the papers an inspection sufficiently rigorous to detect that no signatures appeared on the sequestration bond. Time Fin. Co. v. Johnson, 161 So. 2d 392 (La. Ct. App. 1964).

139. *See* 407 U.S. at 90-93; Geisinger v. Voss, 352 F. Supp. 104, 110 (E.D. Wis. 1972); Shaffer v. Holbrook, 346 F. Supp. 762 (S.D.W. Va. 1972); *cf.* Roscoe v. Butler, 367 F. Supp. 574 (D. Md. 1973); U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972). *But cf.* Highley Hill, Inc. v. Knight, 360 F. Supp. 203 (D. Mass. 1973).

140. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1974), *discussed at* notes 485-512 *infra* and accompanying text; Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Arnett v. Kennedy, 416 U.S. 134, 191 (1974) (White, J., concurring in part and dissenting in part) ("In *Fuentes* . . . the risk of wrongful deprivations was unnecessarily increased by allowing a clerk, rather than a judge, to pass on the creditor's claim"); notes 123-24 *supra*.

141. 416 U.S. at 632.

142. 43 U.S.L.W. 4192, 4195 n.3 (U.S. Jan. 22, 1975) (concurring opinion) (emphasis original).

143. *Id.* at 4198 (dissenting opinion); *cf.* Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (search warrant issued by state attorney general, "who was actively in charge of the investigation and later was to be chief prosecutor at the trial," held invalid).

144. *See, e.g.*, CAL. CIV. PRO. CODE § 515.010 (Deering Supp. 1974) (bond); *id.* §

the applicant for a writ of sequestration execute a bond "to protect the defendant against any damage resulting from a wrongful issuance . . . ."[145] Conversely, the debtor may, if he acts within ten days of the seizure,[146] recover the property by posting a release bond for payment of "any judgment which may be rendered against him."[147] Theoretically, bonding requirements are a procedural safeguard that protects the interests of both parties. As is often the case, however, theory comports imperfectly with reality.

In addition to providing a fund from which the debtor may recover damages, the expense of executing a surety bond is said to deter creditors from instituting meritless, vexatious seizure actions.[148] Although creditors are loathe to throw good money after bad, the considerable proportion of consumer suits ending in default judgments no doubt makes the risk more attractive.[149] If the creditor is prepared to incur filing and attorney fees necessary to institute a suit, it is difficult to see how the expenditure of an extra $10 for an easily obtained $1000

515.020 (counterbond); COLO. REV. STAT. ANN. § 104(e) (1963) (bond); *id.* § 104(j) (counterbond); MO. REV. STAT. §§ 533.030, .270 (1969) (bond); *id.* §§ 533.040, .310 (counterbond); VA. CODE ANN. § 8-587 (1957) (bond); *id.* § 8-588 (Supp. 1974) (counterbond); statutes cited note 356 *infra*. *See generally* 66 AM. JUR. 2D *Replevin* §§ 64-66 (1973) (bond); *id.* §§ 72-73 (counterbond).

145. LA. CODE CIV. PRO. ANN. art. 3574 (West 1961). *See also id.* art. 3501. In Louisiana, the amount of plaintiff's bond is determined by the court. *Id.* art. 3574. Outside Louisiana the typical statute requires that plaintiff post bond equal to double the value of the property. *See, e.g.*, statutes cited note 144 *supra*. In *Mitchell*, the plaintiff's bond was set at $1125; the claimed unpaid balance was $574.17. 416 U.S. at 601. *See* Johnson, *supra* note 1, at 17-19; Comment, *supra* note 137, at 105.

146. LA. CODE CIV. PRO. ANN. art. 3576 (West 1961). For examples of provisions in other states see statutes cited note 144 *supra*.

147. LA. CODE CIV. PRO. ANN. art. 3507 (West 1961). The next article of the Louisiana Code provides that the defendant must post a bond equal to the lesser of 125% of the value of the property seized or 125% of the amount of the plaintiff's claim. *Id.* art. 3508; *see* Johnson, *supra* note 1, at 24-25. In *Mitchell*, the debtor posted no bond.

Outside Louisiana, bond amount requirements are variously stated, *e.g.*, equal to plaintiff's undertaking, double the value of the property, equal to plaintiff's claim. *See, e.g.*, statutes cited note 144 *supra*.

Defendant's release bond is also called a redelivery bond, a forthcoming bond, or a counterbond. *See* RESTATEMENT OF SECURITY § 199 (1941). *See generally* 10 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 6065 (1943) [hereinafter cited as APPLEMAN].

148. *See* Fuentes v. Shevin, 407 U.S. 67, 100-01 (1972) (White, J., dissenting); Oregon v. Lytle, 180 La. 646, 157 So. 377 (1934); RESTATEMENT OF SECURITY § 197 (1941); A. STEARNS, THE LAW OF SURETYSHIP §§ 10.1, .31 (5th ed. 1951) [hereinafter cited as STEARNS]; Johnson, *supra* note 1, at 17; Brief for General Motors Acceptance Corp., *et al.*, as Amici Curiae at 24, Fuentes v. Shevin, 407 U.S. 67 (1972).

149. *See* White, *supra* note 40, at 529. *See also* text accompanying note 271 *infra*.

surety bond would have any significant deterrent effect.[150]

Likewise, the question of how well the surety bond indemnifies the debtor against the consequences of an improper seizure is not free from doubt. The surety bond is a written contract in which the surety and the plaintiff-creditor become obligated to the defendant-debtor.[151] The standard bond conditions provide that the creditor will prosecute the action diligently, restore the property seized, or its money value, if the court determines that the seizure was wrongful, and pay damages occasioned by a wrongful seizure.[152] The debtor may not recover on the bond until a final judgment, appellate or otherwise, is rendered against the creditor.[153] An obvious result of this scheme is that bonding provides no protection for the debtor who disputes the amount of the claim rather than the existence of the debt.[154] Less obvious, but perhaps of equal consequence, is that even if the debtor defeats the creditor's action, he necessarily obtains nothing but a right of action on the bond.[155] If the surety company balks, recovery on the bond

150. Professor Johnson's study incorporates data that indicate that the average legal and court costs of seizing collateral are on the order of $250 and $370 respectively in Louisiana and California. Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82, 98 (1973). Professor White argues that these estimates may be too high; he suggests, however, that $60-80 is probably the absolute minimum for "assembly line" operations. White, *supra* note 40, at 518. Neither appears to consider bond costs sufficiently significant to include them in his calculations.

The $10 hypothetical premium is based on the 1% replevin bond rate standard in St. Louis, Missouri, in July 1974. If the principal is "substantial," for example W.T. Grant Co., no collateral is required. Interview with Anonymous Bonding Agent of a Large St. Louis Insurance Company, in St. Louis, Mo., July 1974. The 1% rate appears to be standard nationwide. *See* Alexander, *Wrongful Attachment Damages Must Be Fixed in the Original Suit*, 4 U.S.F.L. REV. 38, 40 (1969).

151. RESTATEMENT OF SECURITY §§ 82-83 (1941); *see* Kenney, *A Dissertation on Fidelity and Surety Law*, 479 INS. L.J. 763 (1962). On judicial bonds generally, see 10 APPLEMAN 43-44; 11 *id.* at 46; 66 AM. JUR. 2D *Replevin* §§ 130-59 (1973); 70 AM. JUR. 2D *Sequestration* §§ 22, 32, 35-36 (1973); STEARNS §§ 10.1-.54.

152. 10 APPLEMAN § 6062; STEARNS § 10.32, at 403.

153. *See* 10 APPLEMAN § 6062, at 347 (and cases cited); STEARNS § 10.34 (and cases cited); Alexander, *supra* note 150, at 40-41.

154. *See* Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1266 (1970).

155. This is true except in the apparently unusual situation in which the court renders judgment against both the plaintiff and his surety; res judicata merges the bond action in the original judgment. *See* Dykstra v. Hartford Accident & Indem. Co., 228 Wis. 269, 280 N.W. 324 (1938); RESTATEMENT OF JUDGMENTS § 47 (1942). Judgment against the surety is unusual because sureties are generally considered to be parties to the original action only for limited purposes. *See, e.g.*, Lindsey v. Williams, 228 S.W.2d 243 (Tex. Civ. App. 1950); STEARNS § 10.35, at 406.

may require extensive, separate litigation. Although the doctrine of collateral estoppel prevents relitigation of matters adjudicated in the original suit,[156] there may remain several issues and defenses to be resolved in the action on the bond. Probably the most important issue often left unresolved is the measurement of defendant's damages.[157] Failure to establish the damages in the original action is an open invitation to litigation, delay, frustration, and expense, sufficient, in the words of one commentator, to render "[m]eaningful relief . . . [a] mere illusion."[158] If damages are assessed in the original action, the amount of recovery on the bond is fixed;[159] nevertheless, enough issues remain for resolution in the bond action to permit delay and uncertainty to engender compromise.[160] Since the bargaining power inherent in the right to exemplary damages is generally not available in an action on the bond,[161] compromise will almost certainly mean that the debtor will come away from his experience poorer than he began.[162]

156. *See* 11 APPLEMAN § 6320; RESTATEMENT OF JUDGMENTS §§ 68, 70 (1942); STEARNS § 10.35.

157. *See* 10 APPLEMAN § 6064; 11 *id.* § 6323; STEARNS § 10.36, at 407 (defendant entitled to full compensation for his loss).

158. Alexander, *supra* note 150, at 39, states: "Bonds do not 'insure' payment to the injured defendant. Meaningful relief is often mere illusion. That is because recovery on the bond requires extensive litigation." The author further states that "[b]ond litigation is a complex field; one may assume bonding companies will use any available technicality to increase the burdens on the claimant." *Id.* at 41. For consideration of the issues which may be litigated in the bond action, see STEARNS § 10.37. *See also* 11 APPLEMAN §§ 6791-809; Alexander, *supra* note 150, at 41-42.

Under LA. CODE CIV. PRO. ANN. art. 3506 (West 1961), the defendant may assert his damage claim on motion to dissolve, by reconventional demand on the merits, or by separate action. *See* cases cited *id.* nn.41-51. The defendant will have an action for damages, however, only if the plaintiff is unable to show the existence of grounds for the seizure, *id.* arts. 3501, 3571; no action lies if plaintiff "merely" fails to prove the underlying cause of action. *See* General Motors Acceptance Corp. v. Sneed, 167 La. 432, 119 So. 417 (1928); Johnson, *supra* note 1, at 27-28.

159. *See* 11 APPLEMAN § 6320, at 18; STEARNS § 10.35, at 406.

160. Alexander, *supra* note 150, at 42:

> There is nothing wrong with compromise, of course. . . . But it should not have to happen here. The legal rules we use now give but little relief; recovery should not be further whittled down by pressured settlements.

The author suggests a reform procedure in which the surety's liability and damages for wrongful attachment would be fixed, and judgment would be rendered, in the original suit and proceedings ancillary thereto. *Id.* at 42-45.

161. *See* 11 APPLEMAN § 6361, at 86; RESTATEMENT OF SECURITY § 198 (1941); STEARNS § 10.35, at 406.

162. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 619 (1974) (White, J.) (emphasis added): "[T]he prevailing party is protected against *all* loss."

In *Fuentes*, Firestone argued as follows:

> [T]he plaintiff in replevin must "insure" defendant against any damage which

Although the Louisiana release bond procedure was carefully pointed out in *Mitchell*,[163] and was undoubtedly a factor in the decision, the Court refrained from emphasizing it heavily as a procedural safeguard in favor of the debtor. The Court did observe that, absent a release bond, "[t]he debtor, unlike the creditor, does not stand ready to make the opposing party whole . . . ."[164] On the creditor's side, it can be argued that the debtor's ability to recover the property quickly by posting bond makes the deprivation so temporary as to be de minimis.[165] Unlike the *Mitchell* Court, the Court in *Fuentes* rejected this rationale, reasoning that the return of one piece of property (the consumer goods) in exchange for the surrender of another (the cost of a release bond) remains a deprivation nonetheless.[166] In this instance, theory comports with reality. Although the Court noted Fuentes' data showing that no release bonds were posted in the 442 cases of prejudgment replevin in Dade County, Florida, in 1969,[167] it did not explain that this was so because bonding agents require liquid collateral from poor and lower-middle-income debtors in an amount equal to the face amount of the bond.[168] While a release bond may provide reasonable protection pendente lite for a corporate debtor able to obtain a surety

might result from wrongful replevy, in order to secure the writ. He thus binds himself to stand for any such damage. The fact that plaintiff's replevin bonds are relatively inexpensive is eloquent testimony to the fact that plaintiffs do not use the procedure frivolously.

Brief for Appellee Firestone Tire & Rubber Co. at 46-47, Fuentes v. Shevin, 407 U.S. 67 (1972).

163. *See* 416 U.S. at 608.

164. *Id.*

165. *See* Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor*, 24 CASE W. RES. L. REV. 7, 31 (1972); *cf.* Brief for Appellee Firestone Tire & Rubber Co. at 45, Fuentes v. Shevin, 407 U.S. 67 (1972); Williams, *supra* note 31, at 95.

166. 407 U.S. at 84-85; *cf.* Note, *Attachment and Garnishment*, 68 MICH. L. REV. 968, 1007 (1970).

167. 407 U.S. at 84 n.14.

168. *See* App. at 4-6, Fuentes v. Shevin, 407 U.S. 67 (1972). The terms for "anti-replevin" bonds in St. Louis, Missouri, are as follows: 2% premium (compare 1% premium for "substantial creditors," note 150 *supra*); if the applicant's net worth is greater than ten times the amount of the bond, no liquid collateral may be necessary; but if not, liquid collateral in the form of a cashier's check in an amount varying from 50% to 100% of the amount of the bond may be required. Interview with Anonymous Bonding Agent of a Large St. Louis Insurance Company, in St. Louis, Mo., July 1974 (agent did not remember ever signing release bond on behalf of consumer). Alexander, *supra* note 150, at 40, reports a 1% premium with liquid collateral in the face amount of the bond. To discuss availability of surety bonds to low-income debtors is folly. *See* Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 982 (1972).

bond on the same terms as a "substantial creditor,"[169] the terms on which surety bonds are available to most consumers make this procedural safeguard unavailable in reality. It is unlikely, moreover, that most debtors even know that the right to a release bond exists.[170] As one commentator has observed, "the theoretical availability of the counterbond should have no constitutional consequence."[171]

IV. BALANCING INTERESTS

A. *The Debtor*

Secured installment sales contracts for which the goods purchased constitute collateral are signed today by all classes of buyers from giant corporations to welfare families. Although low-income families acquire less installment debt than higher income families, installment credit is nevertheless a "mainstay of low-income consumption."[172] Installment credit permits consumers to finance durable goods through a species of enforced saving[173] and supports the growth of the markets in which these goods are sold.[174] The process of debt creation has, in the last twenty-five years, been one of the prime factors supporting increased affluence and greater satisfaction of the material wants of a

169. Thus in North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4193 (U.S. Jan. 22, 1975), the corporate debtor immediately obtained discharge of the garnishment of its bank account by filing a release bond. The procedure was nevertheless held unconstitutional. *But see* Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1347 (E.D. Pa. 1971) (court noted that even though corporate defendant could have afforded substantial cost of release bond, existence of bond obligation and its appearance on corporation's books would impair its credit standing). "Substantial" creditors can obtain surety bonds at a 1% premium on the strength of their credit. *See* note 150 *supra.*

170. *See* Fuentes v. Shevin, 407 U.S. 67, 84 n.14 (1972); text accompanying notes 225-26 *infra.*

171. Neth, *supra* note 165, at 32. The author also suggests that monetary prerequisites have unconstitutional implications. *Id.* at 31, *citing* Boddie v. Connecticut, 385 U.S. 371 (1971). For a possible equal protection argument, see Williams v. Shaffer, 385 U.S. 1037 (1967) (Douglas, J., dissenting from denial of certiorari, joined by Warren, C.J.); Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U.L. REV. 158, 171 (1970) (observing that equal protection argument was made and dismissed in lower courts in *Sniadach*).

172. *See* D. CAPLOVITZ, THE POOR PAY MORE 94-104 (1967) [hereinafter cited as CAPLOVITZ].

Between 1950 and 1971, consumer credit outstanding grew at more than a 9% compound annual rate, rising from $21.5 billion to $137.2 billion. NATIONAL COMM'N ON CONSUMER FINANCE, REPORT ON CONSUMER CREDIT IN THE UNITED STATES 5 (1972) [hereinafter cited as NCCF REPORT]. In 1971, the installment debt breakdown was as follows:

substantially enlarged proportion of the nation's consumers of goods and services. In forty-nine states, when contracts go bad, self-help repossession[175] of collateral held by defaulting business debtors dominates, with little need for resort to judicial remedies.[176] "In the underworld of consumer finance, however, repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play."[177] Summary repossession of non-

TABLE I
INSTALLMENT DEBT BY
INCOME BRACKET

Annual Family Income	Percentage of Families with Installment Debt
Less than $3,000	29
$3,000-4,999	39
$5,000-7,499	51
$7,500-9,999	53
$10,000-14,999	60
$15,000 or more	46
All Families	48

NCCF REPORT 156.

Consumer installment debt hit an all-time peak of $154.5 billion in August 1974, an increase of more than 50% since 1970 and 3500% since 1946. BUS. WEEK, Oct. 12, 1974, at 94.

173. *See* Affidavit of V. Morgan, Manager of Retail Credit, Firestone Tire & Rubber Co., App. at 57-59, Fuentes v. Shevin, 407 U.S. 67 (1972) (suggestion that, "due to the improvident savings habits of many consumers" in the $5,000 to $12,000 income bracket, any restriction on debt creation mechanism would result in denial of "essentials such as automobiles [and] furniture . . . as well as work-saving and luxury appliances"). *See also* Brief for General Motors Acceptance Corp., *et al.*, as Amici Curiae at 6, Fuentes v. Shevin, *supra*:

> [T]he facility with which hardpressed and impecunious consumers, without ready access to substantial funds of their own, can afford to possess both necessities and amenities of life is the result of the ease with which they are granted credit.

174. Affidavit of V. Morgan, *supra* note 173, at 59. *See generally* NATIONAL CONSUMER FIN. ASS'N, 1974 FINANCE FACTS YEARBOOK.

175. The "self-help" repossession remedy is authorized by UCC § 9-503. In Louisiana, self-help repossession is not permitted, and the creditor must proceed by ordinary judicial process, LA. CODE CIV. PRO. ANN. arts. 2631-44 (West 1961), or by executory process, *id.* arts. 851-65 (West 1960). Under the latter procedure, the contract must contain a confession of judgment and must be by authentic act, that is, signed by a notary. *See* Anderson & L'Enfant, *Fuentes v. Shevin: Procedural Due Process and Louisiana Creditor's Remedies*, 33 LA. L. REV. 62, 77 (1972); Comment, Fuentes v. Shevin: *Its Treatment by Louisiana Courts and Effect Upon Louisiana Law*, 47 TUL. L. REV. 806, 819 (1973).

176. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1212 (1965).

177. *Id.*

automobile[178] consumer goods purchased under secured installment sales contracts is the most common modern application of provisional remedies,[179] and it is to the low-income consumer group that these remedies are applied with greatest frequency. Indeed, a 1966 study in the District of Columbia showed that, while retailers serving the general market resorted to judicial process once for every $230,000 of net sales, the average for retailers selling in low-income markets was once for every $2600 of net sales.[180]

"If you don't pay, they take it away"[181] is of course true for all classes of buyers; nevertheless, the impact of provisional collection remedies falls most heavily on low-income consumers for a number of reasons relevant to evaluation of due process requirements. Few would find it surprising that debtors living in a precarious financial situation are more likely to default than are their more affluent neighbors. When the debt-to-income ratio is high, even small decreases in available resources caused by temporary illness or layoff, or an unforeseen repair bill, may render the debtor unable to make payments. And creditors generally agree that most defaults occur because the low-income consumer has become unable, rather than unwilling, to pay.[182] Large

178. In states that have adopted the Uniform Commercial Code, self-help repossession is used almost exclusively to repossess automobiles since entering homes uninvited to repossess household goods would be a breach of the peace not permitted by UCC § 9-503. Thus, judicial repossession by provisional remedy is the method generally used to repossess household goods. A California study disclosed that less than 1% of automobile repossessions in that state are by replevin. Johnson, *supra* note 150, at 95; *see* White, *supra* note 40, at 513.

179. In this Note, the term "provisional remedy" is intended to include the prejudgment collection remedies of attachment, garnishment, replevin or claim and delivery, and sequestration insofar as they permit seizure of a debtor's property in order to secure the debt or claim in the event judgment is obtained. Replevin and sequestration, as used in Louisiana, are distinguished from attachment in general for they seek return of chattels *in specie*. *See* J. COBBEY, *supra* note 14, § 23; note 291 *infra*.

It is often said that no contract provision gives better protection than the security interest and its matching remedy, the right to repossess on default. *See* NCCF REPORT 27.

180. FEDERAL TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS 33-34 (1968) [hereinafter cited as FTC REPORT].

181. Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 69, 280 A.2d 862, 864 (Dist. Ct. 1971) (upholding replevin in light of *Sniadach*).

182. NCCF REPORT 23:

> *Survey* results indicated that most creditors thought debtors failed to meet their contractual obligations because they became unemployed, ill, or overextended after incurring the debt, not because they were "deadbeats" who never intended to repay.

families, high levels of unemployment or part-time employment, a high proportion of unskilled workers, low income, job insecurity, negligible savings, little or poor education, nonwhite race—all these factors are associated by creditors with high credit risk, hence high credit cost.[183] Yet credit is extended to low-income consumers because many of these factors make it profitable despite the high proportion of those expected to default.[184]

Other factors, less obvious to those without experience in this market, exacerbate the problems of low-income debtors. Low-income market[185] retailers protect themselves against the risk by selling low-quality goods at high markup on a "dollar down and a dollar a week" installment contract at high credit cost.[186] The low-income consumer is "trained by society (and his position in it) to want the symbols and appurtenances of the 'good life.' "[187] At the same time he lacks the means, information, and sophistication to be an effective buyer in a

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See Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 480 (1968); Comment, *The Constitutional Validity of Attachment in Light of* Sniadach v. Family Finance Corp., 17 U.C.L.A.L. REV. 837, 846 n.60 (1970) (citing data that 61% of payment lapses attributed to illness, loss of work, pressure of other debts; 16% based on belief in creditor fraud); Project, *Resort to Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs*, 14 U.C.L.A.L. REV. 879, 894 (1967).

Marital problems appear to be a substantial reason why some debtors are unwilling to pay. *See id.* at 894 n.64. Others refuse to pay because of dissatisfaction with, or as a means of coercing repair of, merchandise purchased. *See* text accompanying note 452 *infra*.

183. *See* NCCF REPORT 156.

184. Project, *supra* note 182, at 895.

185. CAPLOVITZ 30:

> The basic function of the low-income marketing system is to provide consumer goods to people who fail to meet the requirements of the more legitimate, bureaucratic market, or who choose to exclude themselves from the larger market because they do not feel comfortable in it. . . . Almost no one—however great a risk—is turned away. Various mechanisms sift and sort customers according to their credit risk and match them with merchants ready to sell them the goods they want.

186. *Id.* at 15-20, 23-25.

187. *Id.* at 14; *see* J. GALBRAITH, THE AFFLUENT SOCIETY chs. 9-14 (Mentor ed. 1958); Kripke, *supra* note 182, at 479. In a recent work, Professor Galbraith states:

> All forms of consumer persuasion affirm that the consumption of goods is the greatest source of pleasure, the highest measure of human achievement. They make consumption the foundation of human happiness.

J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 157 (1973). In Watson v. Branch County Bank, 380 F. Supp. 945, 969 (W.D. Mich. 1974), the court said that "families in modern industrial society require a certain level of material welfare in order to be successful institutions."

commercial society.[188] The result is that the low-income consumer is particularly susceptible to high-pressure[189] and fraudulent[190] sales techniques and often winds up contracting for shoddy merchandise at high prices[191] and high credit costs.[192] Thus the average customer of one

188. CAPLOVITZ 14.

189. *See id.* at 165:

> Apart from the unscrupulous practices of merchants, many of these incidents [documented in the study] show the ineffectiveness of these families as consumers. Some are gullible to an extraordinary degree, susceptible to the appeal of easy credit, ready to assume heavy installment debt provided the payments are small, and completely lacking in foresight and resources.

Id. at 141-47; FTC REPORT at xiv; Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 895-912 (1969). *See also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

190. *See* Project, *supra* note 189, at 912-13 (footnotes omitted):

> A fraudulent sale occurs when a consumer is induced to purchase goods or services because of a material misrepresentation as to the quality, price or benefits to be expected of the product. . . .
>
> The outright use of a fraudulent sales pitch by door-to-door salesmen is rare. . . .
>
> . . . [W]hen it does exist, [it] is practiced almost exclusively by disreputable companies in low-income areas. Low-income consumers tend to be less sophisticated and, hence, they are more easily fooled.

Use of fraudulent techniques is increased because the capacity of many low-income consumers to protect themselves from fraud, deception, and misrepresentation is limited by ignorance of the fraud, unawareness of their rights, or reluctance for any of several reasons to bring legal action. *Id.* at 913 n.81.

The low-income marketing system

> is in many respects a deviant one, in which unethical and illegal practices abound. . . . A close association probably exists between the amount of risk that merchants in this system are willing to accept and their readiness to employ unethical and illegal tactics. It may even be that under the present marketing arrangements in our society, unethical practices are an inevitable consequence of serving the wants of the poorest risks. Society now virtually presents the very poor risks with twin options: of foregoing major purchases or of being exploited.

CAPLOVITZ 180. *See also* Project, *supra* note 182, at 879-90.

191. CAPLOVITZ 18-19, 81-93. California studies indicated that the complaint of unreasonably high price for inferior goods was

> particularly prevalent among low-income buyers. Although 13 percent of the purchasers interviewed in middle-income neighborhoods reported dissatisfaction with price in relation to quality of goods sold to them by door-to-door vendors, about 65 percent of the purchasers interviewed in a low-income Black neighborhood, and 35 percent in a slightly more affluent Mexican-American neighborhood believed that they had paid too much for the products they had purchased at the door.

Project, *supra* note 189, at 914.

The District of Columbia survey showed that "on the average, goods purchased for $100 at wholesale sold for $225 in low-income market stores, compared with $159 in general market stores." FTC REPORT at x; *see* 114 CONG. REC. 1831-32 (1968) (remarks of Representative Sullivan).

192. Although interest rate ceilings are regulated in all states, nothing prevents the

such retailer in the District of Columbia had a family of five and a monthly income of $348 per month at a time [mid-1960's] when the Bureau of Labor Statistics estimated that $730 per month would maintain a family of four at a moderate standard of living. Nevertheless, this average consumer made furniture and appliance installment purchases of over $200, paying substantially higher prices than he would have paid general market retailers for comparable merchandise.[193]

Given that most defaulting low-income debtors are not "deadbeats" but are simply unable to pay,[194] collection tactics short of legal process or threats of it are least effective in the low-income system.[195] Moreover, these debtors often lack the resources to arrange a settlement of disputed debts. Consequently, low-income consumers are much more likely to be subject to collection techniques involving provisional reme-

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retailer from including credit charges in his markup on the goods. *See* CAPLOVITZ 16-18, 87-90. In the FTC study, it was found that:

> Most of the [low-income market] retailers surveyed determined finance charges in terms of an "add-on" rate based on the unpaid cash balance. When calculated on an effective annual rate basis, finance charges of general market retailers varied between 11 percent and 29 percent, averaging 21 percent when contracts were assigned and 19 percent when retailers financed their own contracts. Finance charges by low-income market retailers imposing such charges ranged between 11 and 33 percent per annum, averaging 25 percent on contracts assigned to finance companies and 23 percent on contracts the retailers held themselves.

FTC REPORT at xii.

193. FTC REPORT 48. *See generally id.* at xii-xvi.

Although he discredits much of the "folklore of the rapacious repossessing creditor," Professor Kripke nevertheless registers the following caveat:

> [T]he law of averages makes certain that some percentage of credit extensions will go into default, even those of a conservative and careful creditor. The economic growth made possible by sales financing in middle-class contexts has been well worth the social cost of these defaults. But recent evidence makes it clear that the growth of the urban slums, welfare loads and our "revolution of rising expectations" has extended the instalment buying system beyond the middle class to levels that the companies which pioneered the sales finance system would never have touched. In the process merchants use shocking sales tactics to overload the consumers with debt for shoddy merchandise, and find financing to meet their needs. . . . Credit has become increasingly available to, and even forced on, persons of lower and lower economic strata, thus increasing the percentage of cases of default.

Kripke, *supra* note 182, at 450.

194. Kripke, *supra* note 182, at 480 (footnotes omitted), notes:

> The bulk of the default problem arises not from overextension of credit or other over-reaching, but from the debtor's change of circumstances. . . . There are also the real deadbeats, the debtors who can pay but will not, or who have used fraudulent devices to build up the debt.

See Williams, *supra* note 31, at 111; note 286 *infra*.

195. *See* Project, *supra* note 182, at 895; *cf.* text accompanying notes 223 & 394 *infra*.

dies. In one study, "one in every five [low-income] families had encountered the penalties of repossession, garnishment, and threat of garnishment."[196] Since provisional remedies serve different purposes, depending on whether the market within which they are used is commercial, middle- or high-income retail, or low-income retail, the failure of the *Mitchell* Court to acknowledge these distinctions is anomalous.[197]

1. *Impact of Deprivation*

That prejudgment wage garnishment "may as a practical matter drive a wage-earning family to the wall"[198] has been well documented[199] and has produced Supreme Court[200] and congressional re-

196. CAPLOVITZ 138. Another study reportedly found that debtors whose incomes are less than $5,000 a year are more than 3½ times as likely as other installment debtors to be sued for their debts. Project, *supra* note 189, at 927 n.138, *reporting* WESTERN CENTER ON LAW AND POVERTY, A STUDY ON THE IMPACT AND EXTENT OF WAGE GARNISHMENT IN LOS ANGELES COUNTY (1968).

197. *See, e.g.*, Sandnes' Sons, Inc. v. United States, 462 F.2d 1388, 1393 (Ct. Cl. 1972) (in proceeding for redetermination of excessive profits, court said "requirements of constitutional due process may be different for indigent and solvent natural persons . . . and for indigent and solvent corporations also"). *See also* Note, *supra* note 166, at 1001 n.69; Comment, *supra* note 182, at 848 n.70.

The Supreme Court has been invited to make this distinction. In *Fuentes* it was pointed out that

> the remedy of replevin is also important to wholesale financing of dealer inventory. A dealer in possession of goods which he sells in the normal course of his business can pass title to those goods to his customers free and clear of any security interest held by the inventory financer. *See* Fla. Stat. § 679.307 (1969) [UCC § 9-307(1)]. The remedy of replevin is crucial at this point and allows the inventory financer to protect against additional loss by taking the collateral into his possession and preventing further sales to customers.

Brief for General Motors Acceptance Corp., *et al.*, as Amici Curiae at 13-14, Fuentes v. Shevin, 407 U.S. 67 (1972); *see id.* at 4; Brief for Appellee Firestone Tire & Rubber Co. at 43, Fuentes v. Shevin, *supra*. In North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1975), *discussed at* notes 485-512 *infra* and accompanying text, the Court declined to distinguish *Fuentes* or *Mitchell* on the grounds that the debtors in those cases were consumers rather than corporations. *See* note 509 *infra*.

198. Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969).

199. *See, e.g.*, Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Note, *supra* note 166; Note, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968); 1967 WIS. L. REV. 759. *See also* Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 356-59 (1973); Comment, *supra* note 182.

200. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

sponse.[201] Courts, however, often have turned a deaf ear to, or dismissed as mere inconvenience, the somewhat less draconic impact on low-income debtors of other provisional seizures.[202] Prejudgment seizure is usually impractical unless the collateral is of substantial value; consequently, most items repossessed are furniture or appliances such as refrigerators, stoves, beds, or sewing machines.[203] Unless one assumes that food is life's only necessity, it is difficult to distinguish the wages that purchase life's essentials from the essentials purchased.[204] To paraphrase one sympathetic court, the debtor cannot keep perishable food in, cook on, or sleep on the creditor's bond while he waits for the claim to be tried.[205] Moreover, the impact of judicial reposses-

201. Consumer Credit Protection Act §§ 303, 304, 15 U.S.C. §§ 1673, 1674 (1970) (maximum garnishment 25 percent of disposable earnings or 30 times federal minimum wage, whichever is less; no discharge of employee for garnishment for any single indebtedness).

202. Mitchell v. W.T. Grant Co., 416 U.S. 600, 609, 625 (1974) (majority and concurring opinions). *See generally* Latham v. Tynan, 435 F.2d 1248 (2d Cir. 1970); American Oil Co. v. McMullin, 433 F.2d 1091 (10th Cir. 1970); Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970); Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *vacated sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *vacated sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970); Craig v. Commonwealth Dep't of Pub. Safety, 471 S.W.2d 11 (Ky. Ct. App. 1971); Yoder v. County of Cumberland, 278 A.2d 379 (Me. 1971); Reutzel v. Minnesota Dep't of Highways, 290 Minn. 88, 186 N.W.2d 521 (1971); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 280 A.2d 862 (Dist. Ct. 1971). *See also* cases cited in Fuentes v. Shevin, 407 U.S. 67, 71 n.5 (1972).

203. *See* Blair v. Pitchess, 5 Cal. 3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971); White, *supra* note 40, at 530.

204. *E.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 723 (N.D.N.Y. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 279-80, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971); *see* Note, *Replevin: A Due Process Prescription for an Ancient Writ*, 45 TEMP. L.Q. 259, 268 (1972).

205. *See* McMeans v. Schwartz, 330 F. Supp. 1397, 1400 (S.D. Ala. 1971); *cf.* Arnett v. Kennedy, 416 U.S. 134, 190-93 (1974) (White, J., concurring in part and dissenting in part).

Until recently, some courts had held that the consumer's interest in continued utility service, such as gas or electricity, was protected by the fourteenth amendment. Therefore, a summary cutoff of service was said to violate due process if carried out prior to proper notice and an opportunity for a hearing. *See, e.g.*, Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 168 (6th Cir. 1973) (gas service is necessity since life may depend on it); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 669 (7th Cir. 1972) (dissenting opinion), *cert. denied*, 409 U.S. 1114 (1973) (electricity is absolute necessity of modern life); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 450 (S.D.N.Y. 1972) (termination notice inadequate on account of failure to advise of remedies available); Hattell v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972) (some type of hear-

sion on the debtor's privacy and peace is, in a sense, greater than the impact of wage garnishment. The sheriff will usually arrive to seize goods in the daytime, perhaps in the presence of children or friends and neighbors. In Louisiana, for example, he may enter the debtor's home and use the force necessary to effect the seizure, even to the extent of breaking doors or arresting those who resist.[206] The attendant embarrassment, invasion of privacy, and interference with the debtor's peace are manifest.[207] Furthermore, to the extent that the debtor perceives the seizure as wrongful, arbitrary, or unfair, there result erosion of respect for the judicial system,[208] rancor for the creditor, and alienation from the marketing system he represents.[209]

This "parade of horribles"[210] obviously occurs only in a small minority of cases, and the equities are not all in favor of the debtor. Only a very small percentage of installment sales contracts result in default.[211] In the majority of default cases, debtors apparently return or

ing required). *But cf.* Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973) (no state action); Lucas v. Wisconsin Elec. Power Co., *supra* (no state action). *See also* Clark & Landers, *supra* note 199, at 391-92. In December 1974, the Third Circuit's result in *Jackson* was affirmed by the Supreme Court. In an opinion by Justice Rehnquist, the Court held that the action of an extensively regulated, privately owned utility in terminating petitioner's service was not sufficiently connected to the state to make the conduct "attributable to the state for purposes of the Fourteenth Amendment." Jackson v. Metropolitan Edison Co., 95 S. Ct. 449, 457 (1974). Since it found no state action, the Court had "no occasion to decide whether petitioner's claim to continued service was 'property' for purposes of that Amendment . . . ." *Id.*

206. *See* LA. CODE CIV. PRO. ANN. art. 325 (West 1960) (right of entry for execution). *See also* White, *supra* note 40, at 525-26.

At least two courts have held that prejudgment seizure of property by a sheriff without a probable cause warrant violates the fourth and fourteenth amendments. *See* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D.N.Y. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 277, 486 P.2d 1242, 1255, 96 Cal. Rptr. 42, 55 (1971).

207. *See* Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1, 9-10, 40-46, 66-69.

208. *See* Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971).

209. *See Hearings on H.R. 11,601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., pt. 2, at 661 (1967) (statement of D. Caplovitz): "Numerous newspaper accounts have quoted ghetto residents as rationalizing the looting on the grounds that they have been victimized and robbed by the merchants for many years." Exploitation of consumers has been recognized as a cause contributing to the civil disorders of the summer of 1967. *See* REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 276 (Bantam Books ed. 1968).

210. Clark & Landers, *supra* note 199, at 357, so describe Mr. Justice Douglas' characterization in *Sniadach* of the evils of wage garnishment.

211. Statistics for 1966 showed delinquency rates as follows: average for all types of installment credit, 1.76%; direct automobile loans, 1.08%; FHA modernization

surrender the merchandise voluntarily.[212] A fair inference is that the expectation of most debtors is that, if they default, they will have to do without the merchandise. Therefore, creditors argue that the impact of a deprivation of goods is not great and is much less than the impact of garnished wages.[213] While many low-income families use installment credit, "a substantial percentage [manage] to do without [goods] until sufficient cash [has] been saved to purchase outright."[214] The argument follows that if the debtor got along without the goods before the contract was entered, he can get along without them after they are seized.[215] Creditors argue further that, instead of causing violence, judicial repossession by a peace officer ensures the public peace and protects buyers, sellers, and innocent bystanders.[216]

Nevertheless, a summary procedure that, in an individual case, permits a wrongful[217] or meritless[218] seizure to leave a low-income family with its frozen food defrosting on the floor, without a cooking stove or a bed, and with no assets with which to replace the seized articles qualifies as more than a mere "inconvenience."[219] Even if the deprivation exists only for a short time, the impact on the consumer's interests in maintaining both a "minimum standard of decency"[220] and his self-respect is substantial.

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loans, 2.41%; home appliance loans, 2.45%. Brief for Appellee Firestone Tire & Rubber Co. at 15, Fuentes v. Shevin, 407 U.S. 67 (1972), *citing* AMERICAN BANKERS ASS'N, TRENDS IN INSTALLMENT CREDIT 35 (1967). By 1974, average delinquency rates had risen to 2.7%—the highest level in 25 years—no doubt influenced by inflation. BUS. WEEK, Oct. 12, 1974, at 94.

212. Affidavit of V. Morgan, *supra* note 173, at 52-53; *see* note 224 *infra* and accompanying text.

213. *E.g.*, Brief for Appellee Firestone Tire & Rubber Co. at 17, Fuentes v. Shevin, 407 U.S. 67 (1972).

214. *Id.*

215. *See* Sugar v. Curtis Circulation Co., 377 F. Supp. 1055, 1058 n.2 (S.D.N.Y. 1974), in which the following quotation appears:

"The sweet things in life, to you were just loaned,
So how can you lose what you've never owned."

The lines are said to be from the 1930's pop song "Life is Just a Bowl of Cherries," copyright 1931 by DeSylva, Brown & Henderson, Inc.

216. *See, e.g.*, Brief for General Motors Acceptance Corp., *et al.*, as Amici Curiae at 15-16, Fuentes v. Shevin, 407 U.S. 67 (1972); note 367 *infra*.

217. That is, a malicious, mistaken, or coercive writ.

218. That is, a writ issued pursuant to a claim that the debtor could defeat on the merits.

219. Mitchell v. W.T. Grant Co., 416 U.S. 600, 625 (1974) (Powell, J., concurring).

220. Arnett v. Kennedy, 416 U.S. 134, 190-93 (1974) (White, J., concurring in part and dissenting in part), *discussing* Goldberg v. Kelly, 397 U.S. 254 (1970).

2. *Impact of Legal Process*

The direct impact caused by loss of possession and use of goods is a primary, but not the only, cost element of the debtor's interest in freedom from deprivations resulting from wrongful or meritless provisional writs. Equally important are the implications flowing from the fact that provisional seizure shifts the burden of proceeding from the creditor to the debtor.[221] Here, too, the courts should recognize that cost magnitude will depend on who is affected.[222] Compared with consumers, commercial debtors are more knowledgeable, less susceptible to economic coercion, and more likely to have legal aid. Apart from the small businessman whose inventory, and thus his means of earning a living, may be seized summarily, the property seized from a commercial debtor is unlikely to be as important as his refrigerator or bed. The more affluent and better educated consumer is apt to recognize the need for legal assistance and have the resources to obtain it. But the empirical data confirm that those who are least competent to protect their rights through the legal process are members of the same groups that are most likely to be affected by provisional seizure—working and lower-middle classes, and the poor.[223]

Since execution of a provisional writ forecloses the debtor's ability to protect his rights prior to seizure, if he is to have immediate relief, he must act. Most do not.[224] For those who do act, the barriers to

221. Thus, in Louisiana the debtor must go to court and move for a dissolution of the writ, LA. CODE CIV. PRO. ANN. art. 3506 (West 1961), or furnish a release bond, *id.* art. 3507. *See* Johnson, *supra* note 1, at 16-17, 24-25; notes 144-71 *supra*, 264-79 *infra* and accompanying text. It has been suggested that perhaps

> one of the finest consequences of constitutionalized repossession will be a shifting of the burden of proceeding with litigation from the debtor to the creditor. . . . [T]he result of a shifted burden might be fewer pleas "copped" by debtors and more good defenses preserved.

Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116, 144 (1973); *see* Neth, *supra* note 165, at 47-48.

222. *See, e.g.*, Jordan & Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 449 (1967).

223. *See* 1 D. CAPLOVITZ, DEBTORS IN DEFAULT 1-15 (1972); Project, *supra* note 182, at 895; text accompanying note 196 *supra*.

224. CAPLOVITZ 171 (emphasis original):

> The families who reported that they had been cheated were asked what they did about their problem. *Half of them did nothing at all*; they did not even complain to the merchant. Another 40 per cent tried to deal with the merchant themselves. *Only 9 per cent sought professional help.*

See Project, *supra* note 182, at 900. A Los Angeles County study in 1968 demonstrated that in the cases in which garnishment was used, 97% did not go to trial, even though

relief are substantial. Ignorance of his legal rights and misunderstanding of the action taken not only make the debtor easy prey[225] for the unscrupulous user of process, but also effectively close avenues of redress open to the more sophisticated. The data suggest that perhaps two-thirds of low-income consumers do not even know where to go for help.[226] Financial disability will deter the few who have the acumen to claim their rights on their own[227] or who would seek private legal aid. Debtors who are able to obtain help from low-cost or free legal aid groups[228] still must bear burdens, which to others are of little consequence.[229] The more affluent debtor is not so vexed by the costs of lost work time, the difficulty in obtaining time off from work, and the necessity of getting to court, perhaps a considerable distance without an automobile.[230] Moreover, there appear to be significant psycholog-

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less than one-fourth of those garnished felt they had no defense. "Most considered the garnishment a final action about which they could do nothing." Comment, *supra* note 182, at 840.

225. Project, *supra* note 182, at 900.

226. CAPLOVITZ 175-78. For a discussion of consumer education programs see NCCF REPORT 193-200.

227. *See* Watson v. Branch County Bank, 380 F. Supp. 945, 968 (W.D. Mich. 1974) ("Because of the economics of legal action and automobile financing, debtors as a practical matter have no legal remedy for abuses"); *cf.* Williams v. Shaffer, 385 U.S. 1037 (1967) (Douglas, J., dissenting from denial of certiorari, joined by Warren, C.J.).

228. *See* Project, *supra* note 182, at 901. An article heavily cited in the reviews is Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966). *See also* Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1965).

Consumer credit transactions usually involve such small sums that lawyers are not interested in litigation involving them. When low-income debtors are able to obtain legal aid program advocates, the creditor may be placed in a dilemma. Since he can no longer obtain an inexpensive default judgment, he can either dismiss his action and write off the debt, or pay private counsel to prosecute. Unless the creditor has an attorney on retainer, legal fees are likely to be larger than the debt. In one case, the attorney for a small retailer spent several hundred hours to win a several-hundred-dollar claim against a debtor represented by a legal aid attorney. Interview with David H. Vernon, Visiting Professor of Law, Washington University, in St. Louis, Mo., Oct. 18, 1974. Consumer finance officials recommend that legal services programs continue to receive federal, state, and local governmental support and that consumer protection laws be amended to assure payment of legal fees. NCCF REPORT 62. It is likely that readily available, free or low-cost legal aid would have a greater impact on creditor costs than the notice and hearing requirements discussed in this Note.

229. Project, *supra* note 189, at 927:

> Some purchasers cannot afford to leave their job long enough to contest the claim by personal appearance. Loss of even one day's pay may be sufficient to unbalance their precarious budgets.

230. *See* CAPLOVITZ 161.

ical barriers to obtaining relief from wrongful deprivation. Some debtors plainly believe there is nothing they can do;[231] others, after failing to obtain relief from the seller, simply resign themselves to the loss and "do not complain."[232] Therefore, unless the debtor is fully informed of his rights at the time of seizure, or unless he can afford the price of a release bond or the services of an attorney, any rights of redress after the execution are of small value.

A further consequence of the debtor's inability to protect himself is the opportunity that the legal process gives the knowledgeable creditor to exert leverage on the debtor prior to judgment. Conventional doctrine holds that the state provides creditors with the provisional seizure remedy in order to ensure that the claim or debt can be satisfied in the event that a judgment is obtained. Nevertheless, prejudgment seizure itself, or the threat of it, effectively enlists the state's aid to coerce the debtor. Although in most cases the resale value of provisionally seized merchandise, and therefore its value as security, is relatively low,[233] the cost of executing the writ is further offset because seizure of necessary household goods exerts great pressure on the debtor to meet the creditor's demands. Availability of provisional seizure gives the creditor bargaining leverage in several ways. If the creditor is in fact unconcerned with resale of the collateral,[234] seizure may neverthe-

231. *Id.* at 172.

232. Project, *supra* note 182, at 900. *See also* Project, *supra* note 189, at 927:

> [T]here is a general feeling of fear and suspicion of the entire legal process held especially by low-income consumers. They have been mistreated by the system too many times in the past to want to expose themselves again.

233. One study reports that, in 1967, a large Los Angeles finance company measured the value of repossessed merchandise *immediately after purchase* by the following rule of thumb: hard good, about 50% of initial value; soft good, about 25% of initial value. Project, *supra* note 182, at 894 n.63. A St. Louis legal aid attorney reports that there is virtually no market for repossessed goods. Interview with Barrett Braun, Staff Attorney, The Legal Aid Society of the City and County of St. Louis, in St. Louis, Mo., Aug. 5, 1974. It is not surprising that no market exists for a greasy armchair or used bed. Although there has in the past been a lively market for some hard goods, the recent exodus to suburbia with its built-in kitchens has produced a glut of stoves and refrigerators. *See* Kripke, *supra* note 182, at 448 (resale market for nonautomobile consumer goods is "fantasy"); text accompanying notes 283-84 *infra*.

234. The value of replevied collateral is not so low if the creditor can recondition and sell it again as new merchandise. Since this practice is illegal, it is obviously difficult to document. Caplovitz reports evidence that the practice occurs with some degree of regularity in low-income markets; merchants can get away with it because their customers are too inexperienced to know the difference. CAPLOVITZ 28, 150, 189. A St. Louis legal aid attorney specializing in consumer problems agrees. Interview with Bar-

less exert pressure sufficient to induce the debtor to abandon valid defenses and counterclaims and capitulate to a dubious claim or settle for more than the court would find him to owe.[235] With such severe consequences in the offing, the mere threat of seizure may well cause the debtor to submit to a new and more costly repayment schedule.[236] Indeed, some low-income market creditors occasionally effect seizures merely to maintain credibility among their installment debtors.[237] Thus, in many cases, the state, rather than ensuring collectability of judgments, has provided an *in terrorem* device.[238] In those cases in which the debtor fails, for whatever reason, to take the initiative to contest the seizure or the underlying claim, or take advantage of procedural safeguards, the "temporary taking" becomes permanent without a hearing or a judicial determination of the validity of the claim on which the seizure was based.[239]

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rett Braun, Staff Attorney, The Legal Aid Society of the City and County of St. Louis, in St. Louis, Mo., Aug. 5, 1974.

235. *See* Fuentes v. Shevin, 407 U.S. 67, 83 n.13 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341 (1969); Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 559-63, 488 P.2d 13, 28-31, 96 Cal. Rptr. 709, 724-26 (1971); White, *supra* note 40; *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 52, 88 (1972); Note, *supra* note 154, at 1260; Note, *supra* note 204, at 268; Comment, *supra* note 182, at 840; Project, *supra* note 182, at 893.

236. Professor White describes several instances in which a creditor sent out dunning letters designed to look like complaints. "At the top left corner of the notice the debtor's name was printed and below that was the creditor's name with the letters 'vs' between them." White, *supra* note 40, at 515 n.44. *See also* CAPLOVITZ 21 n.8: "Since recipients of welfare funds are not supposed to buy on credit, this threat [to disclose credit purchases to welfare authorities] exerts powerful pressure on the family."

237. Interview with Barrett Braun, Staff Attorney, The Legal Aid Society of the City and County of St. Louis, in St. Louis, Mo., Aug. 5, 1974. "One merchant said that he will occasionally repossess an item, not to regain his equity, but to punish a customer he feels is trying to cheat him." CAPLOVITZ 21.

238. *See* Hobbs, *supra* note 130, at 183; White, *supra* note 40, at 530; *cf.* 114 CONG. REC. 1831 (1968) (remarks of Representative Sullivan):

> We have hundreds of pages of testimony on the cruelties of the garnishment system . . . as a means not of satisfying just debts but of selling shoddy or defective goods at high prices to poor people who cannot afford them . . . and then using the device of garnishment to force the courts and the employers to do the bill collecting.

239. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 82 n.13 (1972); Comment, *supra* note 182, at 840.

One of the most heavily criticized results of the entire collection process occurs when repossession, self-help or judicial, is followed by a deficiency judgment. If the collateral is grossly undervalued, as is usually the case with nonautomobile consumer goods, *see* note 233 *supra*, the deficiency claim will be inflated accordingly. Additionally, boilerplate in many installment contracts providing that the debtor is liable for reasonable

The commentators are in agreement with creditors that state coercion should be available against debtors who are able, but refuse, to pay just debts due and owing.[240] Undoubtedly it is true that judicious use of leverage against the majority of debtors in default—those who are not "deadbeats," but who nonetheless have no valid defense—results in some payments and a substantial number of voluntary surrenders of merchandise.[241] "All too often, however, it is not the 'deadbeat,' but rather the naive victim of the overreaching creditor, who is subjected to the worst collection practices."[242] Given the cost elements described—the direct impact of loss of possession and use, the leverage wielded by creditors, the barriers to redress—it seems impossible to regard as less than substantial the individual consumer's interest in preventing execution of a *wrongful* or *meritless* provisional writ.[243] Moreover, if a recent estimate that "[a]t least 20 percent of *default* debtors interviewed had valid defenses"[244] is accurate,[245] the equitable and constitutional problems resulting from overbroad application of

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legal expenses will further inflate the deficiency by the costs of the repossession, court costs, and attorney's fees. It has not been unusual for the consumer to be finally liable for more than the purchase price of goods which he no longer owns. *See, e.g.*, NCCF REPORT 28; B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 24 (1972); Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Solution*, 51 ORE. L. REV. 302 (1972); Jordan & Warren, *supra* note 222, at 458; White, *Representing the Low Income Consumer in Repossession, Resales and Deficiency Judgment Cases*, 64 NW. U.L. REV. 808 (1970); Note, *supra* note 204, at 267-68. *But cf.* LA. CODE CIV. PRO. ANN. art. 2373 (West 1960).

240. *See, e.g.*, Jordan & Warren, *supra* note 222, at 457 ("Coercion by the state . . . is defensible where the debtor can pay but will not, and the specter of the 'deadbeat' is constantly invoked by creditors to justify tough collection remedies"); Kripke, *supra* note 182, at 480-83; Williams, *supra* note 31, at 111; Project, *supra* note 182, at 894 n.64.

241. *See* text accompanying note 212 *supra*.

242. Jordan & Warren, *supra* note 222, at 457.

243. *See* note 202 *supra* and accompanying text.

244. Professor D. Caplovitz, *quoted in* Gansberg, *Courts Are Held Creditors' Allies*, N.Y. Times, July 19, 1971, at 17, col. 3.

245. *See* Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 969-70 (1974). *But cf.* Johnson, *supra* note 150, at 114; White, *supra* note 40, at 526-27. In the context of automobile repossession, Professor Johnson suggests that the large number of voluntary surrenders and default judgments indicates that "only a small proportion of consumers in default appear to have a valid defense." Johnson, *supra* note 150, at 114. In the same context, Professor White doubts "that repossession from debtors not actually in default is a serious problem." White, *supra* note 40, at 527. For criticism of Johnson, see Dauer & Gilhool, *supra* note 221, in which the authors state that Johnson's conclusion that consumers in default generally have no defense to offer is "patently . . . non sequitur." *Id.* at 143.

prejudgment seizure without prior notice and hearing should be conspicuous.

3. Fuentes *and* Mitchell *Compared*

Mr. Justice White wrote in *Arnett v. Kennedy*[246] that, in assessing due process hearing requirements, the Court considers how the "legitimate interests asserted" by both parties "would be furthered or hindered."[247] His statement of principle makes even more remarkable the stark contrast between the *Fuentes* Court's evaluation of the debtor's interests and the treatment given the same interests in *Mitchell*. In *Fuentes*, the debtor's property interest in chattels purchased by conditional sale was said to be an interest sufficiently significant[248] to warrant due process protection from "substantively unfair or mistaken"[249] encroachment. The debtor's interest was defined as an interest in "continued possession and use."[250] The Court considered with some particularity the hindrances resulting from summary seizure.[251] In *Mitchell*, the debtor's property interest was said to be a heavily encumbered, defeasible "ownership."[252] More explicitly, "until the purchase price was paid in full,"[253] the debtor's interest

> was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims.[254]

After reciting that a duality of interests existed, the *Mitchell* Court expansively appraised the ways in which Louisiana process promoted and safeguarded the interests of both creditor and debtor.[255] Nowhere in the opinion was there a serious assessment of the significance of the fact that the same procedure interfered with the debtor's interest in continued possession and use. The interest-hindering impacts of leverage on low-income debtors and the barriers to redress were ignored.[256]

246. 416 U.S. 134 (1974). *Arnett* was decided a month prior to *Mitchell*.
247. *Id.* at 188.
248. 407 U.S. at 86. *See also* Sniadach v. Family Fin. Corp., 395 U.S. 337, 347 (1969) (Harlan, J., concurring) (due process protects any property interest that is not de minimis).
249. 407 U.S. at 81.
250. *Id.* at 81, 86.
251. *Id.* at 82-87.
252. 416 U.S. at 604.
253. *Id.*
254. *Id.*
255. *Id.* at 608-10, 616-20.
256. *See* text following note 224 *supra*.

The direct impact of deprivation was said to carry little weight because the debtor's basic source of income was unimpaired.[257] Moreover, Mitchell's failure to pursue a hearing was evidence that the deprivation was not severe.[258]

If the *Fuentes* Court was overly solicitous for the interests of low-income debtors, the *Mitchell* Court was exceedingly indifferent to the realities of consumer credit in low-income markets. The dollars-and-cents definition of the consumer's interest ignores the effects of minimal resale value.[259] It is a definition more appropriate in a commercial context in which bargaining power is more nearly equal. The Court's evaluation of the debtor's interest overlooks the reality that "[t]he consumer's usual interest in goods is a specialized consumptive interest"[260] and represents a commercial or upper- and middle-income consideration of what is essentially a lower-income problem.[261]

If an interest-balancing test for due process is to be achieved rather than a "Procrustean rule"[262] of prior notice and hearing vel non, the first step is for both factions of the Court to admit that they have been guilty of tunnel vision. The result reached on particular facts is less likely to depend on the manner in which interests are defined if the interests of all parties to the issue—debtor, creditor, and state—are realistically evaluated and compared, *in the same case*.[263] This Note has thus far evaluated the interests of debtors. To be sure, creditors and the state both have interests that are furthered or hindered by procedural rules; those interests are considered next.

B. *The Creditor*

As a matter of economics, the creditor's paramount interest under his contract is in collecting the debt as soon as each installment becomes due with the expenditure of as little effort and money as possible.[264] This interest is impaired by any procedural rule that directly or indirectly operates to increase the creditor's costs, decrease the value

257. 416 U.S. at 610.
258. *Id.*
259. *See* notes 233 & 239 *supra.*
260. Hobbs, *supra* note 130, at 183.
261. *Cf.* Jordan & Warren, *supra* note 222, at 449.
262. Mr. Justice Powell's characterization of the holding in *Fuentes*. 416 U.S. at 628.
263. *But see* North Ga. Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975) (no balancing analysis).
264. Greenfield, *supra* note 207, at 8.

of his security, delay the receipt of monies due, or interfere with his collection efforts.

1. *Interest in Avoiding Provisional Remedies*

Most consumers pay their debts on time.[265] If, however, an installment debtor misses a payment or suspends payment altogether, the least expensive and time-consuming collection methods are nonjudicial—by letter, telephone call, and personal contact.[266] The process begins with several notice letters and, if payment is not forthcoming, often may carry through a long and notorious checklist of coercive tactics, depending on the scale and specialization of the creditor's collection operation.[267] Only after extrajudicial efforts fail to induce the debtor to pay or make new financing arrangements[268] will the creditor assign the account to a collection agency[269] or resort personally to the more expensive and time-consuming judicial process. Of course, as legal controls become more comprehensive, costs increase.[270]

The *Mitchell* majority clearly believed that the increased cost of resorting to judicial process "weighs heavily" to minimize the risk that creditors will bring wrongful or mistaken suits.[271] The almost universal first resort to nonjudicial methods testifies to the fact that, in most cases,[272] creditors stand to lose money if they must repossess.[273]

265. *See* note 211 *supra.*

266. Greenfield, *supra* note 207, at 8; Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970); Project, *supra* note 182, at 886. Extrajudicial efforts are also less likely to alienate the consumer and are thus more favorable to future business. *Id.*

267. *See generally* Greenfield, *supra* note 207.

268. In 1968, about 10% of families with debt payments reported rescheduling such payments, though not necessarily as a result of collection tactics. G. KATONA, L. MANDELL & J. SCHMIEDOSKAMP, 1970 SURVEY OF CONSUMER FINANCES 34 (1970).

269. Smaller retailers with less elaborate collections operations often assign accounts for collection earlier than their larger counterparts. "The collection agency is in a better position to exert unwelcome pressure on the buyer, for the countervailing force of maintaining the customer's good will is no bar to effective collection." Project, *supra* note 182, at 887; *see* FTC REPORT 34; Leff, *supra* note 266, at 35-36.

270. "[E]very nuance of regulation that forces individual handling or variation from routine adds greatly to expense." Kripke, *supra* note 182, at 448.

271. 416 U.S. at 616-17; *see* Fuentes v. Shevin, 407 U.S. 67, 100 (1972) (dissenting opinion). This assumption seems to underlie much of Justice White's reasoning.

272. It has been argued that some retailers "gear their operations to repossess" in order to profit from repossession and execution of a subsequent deficiency judgment. A study suggests that although this is true for a "few sharp dealers," it is not generally the case. *See* NCCF REPORT 28; Neth, *supra* note 165, at 29-30.

273. *See* White, *supra* note 40, at 527.

Professor Kripke states the case less cautiously:

> Even if every dollar of principal and finance charge is ultimately realized by collection, an account that requires individual collection handling yields a loss.[274]

It is undoubtedly true that cost will deter creditors from suing on frivolous claims and that a "creditor of *institutional size* [does not] deliberately walk into a collection struggle at the inception of the credit . . . ."[275] The reality is, however, that sellers in low-income markets rely heavily on efficient, high-volume collection techniques to minimize the costs of using judicial remedies.[276] Procedures are standardized and "[c]reditor suits are often filed en masse with a pro forma recitation of the claim."[277] Indeed, the National Commission on Consumer Finance's *Report on Consumer Credit in the United States (NCCF Report)*

> disclosed that creditors thought the single most important remedy or contract provision in a secured consumer credit transaction was the right to take a security interest in the goods . . . and the concomitant right to repossess if the debtor defaulted.[278]

Given the leverage that can be achieved by summary seizure, or the threat of it, and the barriers to contesting seizures experienced by lower income debtors, the cost deterrent, though real, may be of much smaller impact on creditors than the *Mitchell* majority believed. There is evidence that many low-income market retailers use judicial remedies against consumers who suspend payments as a "normal matter of business rather than as a matter of last resort."[279]

2. *Impact of Depreciation*

As a matter of theory, the greater the delay between the debtor's discontinuation of payment and the seizure of the collateral by the

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274. Kripke, *supra* note 182, at 448.

275. *Id.* (emphasis added).

276. Hobbs, *supra* note 130, at 184; Leff, *supra* note 266, at 22-23; Project, *supra* note 182, at 885, 887-88.

277. Hobbs, *supra* note 130, at 184. *But see* Martin, *Secured Transactions*, 19 WAYNE L. REV. 593, 630 (1973): "Another probable result of required pre-seizure hearings is the mass scheduling of pro forma hearings, with debtors routinely failing to appear . . . ."

278. NCCF REPORT 29-30.

279. FTC REPORT at xiv-xv. The *Report* also states:

> Low-income market retailers have every incentive to continue these [door-to-door, sometimes deceptive and high-pressure sales] techniques since their risk

creditor, the greater is the creditor's cost. Continued possession and use by the consumer cause steady deterioration of the merchandise, with resultant depreciation in resale value.[280] Creditors argue[281] that, because low-income debtors are often judgment proof, any deterioration in resale value pendente lite is an unrecoverable loss.[282] If creditors must absorb this loss, they insist that credit to low-income consumers must be either curtailed or permitted to become more expensive.

In a commercial context or in the consumer automobile market, in which the collateral is likely to have substantial value and the resale market is lively, theory comports reasonably with reality.[283] In the

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of loss is substantially reduced by their virtually unopposed access to judgment and garnishment proceedings to enforce payment or secure repossession.

Id. at xv.

280. Mitchell v. W.T. Grant Co., 416 U.S. 600, 608 (1974); *see* Brief for General Motors Acceptance Corp., *et al.*, as Amici Curiae at 8, 13, Fuentes v. Shevin, 407 U.S. 67 (1972).

The amici brief in *Fuentes* contains an interesting argument. It was suggested that the delay of notice and hearing would impair "the use made of replevin to recover goods from abandoned, boarded, locked premises whose continued presence is an open invitation to theft." *Id.* at 8. There was no indication of the frequency with which this occurs. Self-help repossession under UCC § 9-503 would *seem* to be available in this situation, but there is room for argument. The amici brief also argued that, in addition to usual wear and tear, obsolescence and perishability were aggravated by delay. *Id.*

281. *See, e.g.*, Blair v. Pitchess, 5 Cal. 3d 258, 278 n.12, 486 P.2d 1242, 1256 n.12, 96 Cal. Rptr. 42, 56 n.12 (1971).

282. Debtors may be "judgment proof" in several ways. In California, for example, a secured creditor may proceed against a defaulting debtor either by disregarding the security and suing directly on the debt or by repossession and foreclosure sale. If he repossesses, any deficiency is lost because the alternatives are exclusive. CAL. CIV. CODE §§ 1812.2-.5 (Deering 1972). Of course, even if the creditor gets a judgment on the debt, he may still be unable to find assets of the debtor sufficient to satisfy his judgment. This is the traditional definition of "judgment proof." In those states in which repossession *and* deficiency judgment are available, creditors would seem to be amply protected from deterioration of security since any depreciation would turn up in the deficiency. The only apparent cost differentials are the opportunity cost of any delay caused by notice and hearing requirements prior to seizure and the risk that the deficiency judgment will be uncollectable. Repossession and subsequent deficiency judgment are often unmitigated disaster for the consumer, *see* note 239 *supra*, and the availability of deficiency judgments is being limited in many states. For some effects of the Uniform Consumer Credit Code and the National Consumer Act, see B. CLARK & J. FONSECA, *supra* note 239, § 24, at 100-03; Neth, *supra* note 165, at 15-17.

283. *See generally* Johnson, *supra* note 150; White, *supra* note 40 (both articles deal with automobile repossession).

A staff attorney for a large St. Louis general market retailer stated that about the only item his company would consider repossessing judicially was a fur coat. Interview with Anonymous Staff Attorney for a General Market Retail Corporation, in St. Louis, Mo., Aug. 5, 1974.

household goods market, however, and especially in its low-income segment, relatively low initial cost of merchandise, very low or null resale values, and nonexistent resale markets undermine the argument that depreciation pendente lite is a serious problem. If a $400 washing machine is "worth" $200 the day after purchase, but is perhaps unsalable at a cash price of even $100, it is doubtful that it would further depreciate more than marginally during the delay necessary for notice and hearing.[284] If it is true that the real value of judicial repossession in this market is in leverage and the credibility gained by an occasional seizure *in terrorem*,[285] the depreciation argument all but vanishes, leaving exposed the somewhat less savory, but nonetheless valuable, creditor interest in judicial process for its coercive effect.[286]

Alternatives less onerous than summary deprivation give ample protection to this interest of creditors. Although the leverage obtained by mere availability of provisional seizure would be weakened somewhat by preseizure notice and hearing requirements,[287] it seems that creditors could maintain the credibility of their repossession threats as well in such a procedure as in one permitting summary seizure. If depreciation pendente lite is seen as a realistic consideration,[288] a provision requiring the debtor to post bond in the amount of the depreciation expected would adequately protect the creditor's interest.[289] The California Supreme Court suggested what is the most rational alternative, however, when it said that

284. Some used goods are practically worthless on the resale market and would not bring proceeds sufficient to pay the costs of seizure. *See* note 233 *supra*. Creditors obviously would not cause judicial repossession of such merchandise but for the *in terrorem* effect. In such a case, a depreciation argument is clearly frivolous since what is already worthless cannot depreciate further.

285. *See* notes 233-39 *supra* and accompanying text.

286. For the implication that the small minority of defaulting debtors fairly capable of characterization as "deadbeats" (those who can afford to pay legitimate debts but refuse to do so) deserve whatever coercion they sustain, see Jordan & Warren, *supra* note 222, at 457; Project, *supra* note 182, at 894 n.64; note 194 *supra*.

287. Presumably notice and hearing requirements would deter wrongful and mistaken writs, which are more likely to result in summary seizure where no such requirements exist. *See* notes 345-53 *infra* and accompanying text.

288. The limiting case occurs when the creditor determines that his debtor in default has no potential for paying, his assets are insufficient to warrant bringing a deficiency suit, or the resale value of the merchandise is less than the costs of seizure and lost good will. *See* Project, *supra* note 182, at 894.

289. *See* Hobbs, *supra* note 130, at 184. Typical release bond provisions operate in practice to strengthen creditor leverage. *See* notes 144-71 *supra* and accompanying text.

> the answer . . . is not to deprive the debtor of a hearing but to provide him with an expeditious one so that the property may be quickly recovered.[290]

3. *Risks of Debtor Misconduct*

State recognition of the creditor's interest in protecting his security from debtor misconduct pendente lite is demonstrated by the availability of the various provisional remedies. In addition to preventing depreciation pendente lite, seizure without warning is said to prevent the debtor from concealing, transferring, destroying, removing, or otherwise disposing of the collateral, or absconding with it, before the creditor can obtain judgment and execution.[291] The *Fuentes* and *Mitchell*

290. Blair v. Pitchess, 5 Cal. 3d 258, 278 n.12, 486 P.2d 1242, 1256 n.12, 96 Cal. Rptr. 42, 56 n.12 (1971).

291. Although there are distinctions in the purposes of, and specific property affected by, each of the prejudgment seizure remedies made available by the various states, the statutes generally either imply or expressly provide for protection from debtor misconduct.

Attachment is the seizure of property out of a debtor's general assets to secure a claim in event of judgment where, *inter alia*, the defendant has assigned, disposed of, secreted, absconded with, or committed some fraudulent act in order to put the property beyond the reach of creditors, or is about to do any of the foregoing. *E.g.*, IND. CODE § 34-1-11-1 (Burns 1973); LA. CODE CIV. PRO. ANN. art. 3541 (West 1961); MO. REV. STAT. § 521.010 (1969); OHIO REV. CODE ANN. § 2715.01 (Page 1954, Supp. 1973); VA. CODE ANN. § 8-520 (1957); WASH. REV. CODE ANN. §§ 7.12.020(4)-(8) (1961, Supp. 1973); *see* S. REISENFELD, CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION 180-81 (1967); Countryman, *supra* note 14, at 523-24.

Replevin is the seizure of specific chattels wrongfully detained, in which the creditor has a property interest; this remedy is used to recover purchase money collateral. Claim and delivery, the statutory twin of replevin, also permits recovery of value when delivery of specific property is impossible. Although simple default and refusal by a debtor to redeliver the property are sufficient to ground the actions, both actions are founded in theory on tortious detention and imply protection from debtor misconduct. *But see* text accompanying notes 112-13 *supra*. In Missouri, for example, replevin lies if, *inter alia*, "plaintiff will be in danger of losing his said property, unless it be taken out of the possession of the defendant or otherwise secured." MO. REV. STAT. § 533.010(5) (1969). After the decision in Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), California modified its claim and delivery statute to require a preseizure hearing unless, *inter alia*,

> [t]here is [probable cause shown of] an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed . . . or will become substantially impaired in value by acts of destruction or by failure to take care . . . in a reasonable manner . . . .

CAL. CIV. PRO. CODE § 512.020(b)(3)(ii) (Deering Supp. 1974).

Detinue, like replevin, is the seizure of specific chattels wrongfully detained. Originally distinguishable from replevin in that detinue would lie for goods obtained rightfully, whereas replevin would lie only for goods wrongfully taken, detinue permits chat-

opinions both recognized the substantive legitimacy of this creditor interest. The procedural emphasis in the two opinions, however, was quite different. In *Fuentes*, the Court stated that under the standards of a narrowly drawn statute, "special situations demanding prompt action" could be grounds for seizure without prior notice and hearing.[292] Thus, in the unusual situation "in which [the] creditor could make a showing of [an] immediate danger" of debtor misconduct, summary seizure might comport with due process.[293] In *Mitchell*, the Court stated, as a preliminary to balancing interests, that the risks of debtor

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tels to remain in the possession of defendant pendente lite. Today detinue is used for the same purposes as replevin and permits summary prejudgment seizure. A seizure order may, in Virginia for example, be issued by a judge or magistrate ex parte, if, *inter alia*,

> there shall appear from [the] evidence . . . (ii)(A) that such property will be sold, removed, secreted, or otherwise disposed of by the defendant . . . or (B) that such property will be destroyed or materially damaged . . . if permitted to remain longer in possession of such defendant . . . .

VA. CODE ANN. § 8-586(b) (Supp. 1974). *See generally* 26A C.J.S. *Detinue* § 1 (1956); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.13 (1973).

Sequestration seizes or sets apart specific property that is the subject of conflicting claims; it is used generally in civil law jurisdictions to accomplish the same purposes as replevin by providing for summary seizure prior to judgment. In Texas, for example, sequestration may issue if, *inter alia*, plaintiff

> makes oath that he fears the defendant . . . will injure, ill-treat, waste or destroy, or remove the same out of the county during pendency of the suit.

TEX. REV. CIV. STAT. ANN. art. 6840(3) (1960); *see* LA. CODE CIV. PRO. ANN. art. 3571 (West 1961); 70 AM. JUR. 2D *Sequestration* § 6 (1973).

Although there is no self-help repossession in Louisiana, *see* LA. REV. STAT. §§ 9:4562-64, 13:3851 (1950); Thomas v. Werlein, 181 La. 104, 158 So. 635 (1935); *cf.* Brandeson v. International Harvester Corp., 223 La. 504, 66 So. 2d 317 (1953); Morelock v. Morgan & Bird Gravel Co., 174 La. 658, 141 So. 368 (1931), in other states the UCC permits self-help repossession on contractually defined grounds that are analogous to debtor misconduct in judicial repossession. UCC § 1-208 authorizes the use of an "insecurity clause," which provides that the creditor may accelerate the maturity of the entire debt whenever he "deems himself insecure." If the creditor fears debtor misconduct, he presumably "deems himself insecure" and may accelerate. If the debtor is caught by surprise, he is likely to default, which triggers the creditor's right to self-help repossession under UCC §§ 9-501 to -507. Use of the insecurity clause in consumer contracts is widespread, and its frequency increases as the debtor's bargaining position is weaker. *See* 2 G. GILMORE, *supra* note 176, at 1195-99; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 954-75 (1972).

292. 407 U.S. at 93. That is, the situation is an "extraordinary" one and due process protection may be postponed. *See* text accompanying notes 55-57 *supra*.

293. 407 U.S. at 93. It is unclear whether such a showing under a narrowly defined statute is a sufficient, or merely a necessary, condition to seizure without prior notice and hearing. *Cf.* Clark & Landers, *supra* note 199, at 363. In *Fuentes*, the Florida and Pennsylvania statutes were held to be insufficiently narrow to meet only such an "unusual condition." 407 U.S. at 93.

misconduct are real, exacerbated by the warning effect of preseizure notice, and compounded in Louisiana by expiration of the "vendor's lien" if the debtor transfers possession.[294] The risks of debtor misconduct and the impact of those risks on the interests of creditors, in Louisiana in particular, deserve further consideration.

a. *Loss by Transfer*

The conditional sale, in which the seller retains title until the purchase price is paid,[295] is impossible under the civil law of Louisiana. Vesting of title is said to be the essence of a sale, and divided incidents of ownership are not recognized.[296] The installment seller is not left without security, however, for the Louisiana seller is by statute afforded a privilege on the property sold, analogous to the UCC security interest,[297] to the extent of the unpaid purchase price.[298] The seller's privilege on personalty is a "substantive right" incident to the sales

294. 416 U.S. at 608-09.

295. For a statutory definition, see UNIFORM CONDITIONAL SALES ACT § 1. *See generally* 1 G. GILMORE, *supra* note 176, at 62-85; J. WHITE & R. SUMMERS, *supra* note 291, at 755-56.

296. *See* Comment, *The Conditional Sale in Louisiana*, 2 LA. L. REV. 338, 340 (1940) (cases cited).

297. UCC § 1-201(37): " 'Security interest' means an interest in personal property . . . which secures payment or performance of an obligation . . . ." *See* text accompanying note 308 *infra*.

Terms used in *Mitchell* by the Supreme Courts of the United States and Louisiana may be confusing. The United States Supreme Court called the privilege a "seller's vendor's lien." 416 U.S. at 609. The Louisiana court distinguished the common law vendor's lien from the privilege, 263 La. at 637, 269 So. 2d at 189, by pointing out that the former is lost when the vendor delivers possession to the buyer, but the latter is created by the same act. The Louisiana court correctly defined the traditional, common law lien; however, the modern tendency is to refer to a lien as a charge on the buyer's property that must be satisfied before the property is available to general creditors. *See* D. EPSTEIN, DEBTOR-CREDITOR LAW IN A NUTSHELL 3, 74-76 (1973).

298. LA. CIV. CODE ANN. art. 3217 (West 1952) provides:

> The debts which are privileged on certain movables, are the following:
>
> . . . .
>
> 7. The price due on movable effects, if they are yet in the possession of the purchaser.

Id. art. 3227 provides:

> He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

The seller is also given statutory protection called a "resultory condition," which permits him to dissolve the contract if the buyer defaults. *See id.* arts. 2561-64; Comment, *supra* note 296, at 346.

contract[299] and gives him an assurance of payment even if nonprivileged creditors receive nothing.[300] The privilege may be exercised only so long as the personalty sold remains in the buyer's possession.[301] If the seller desires security against third party assignees of the buyer, he must protect himself by taking a chattel mortgage.[302] Upon recordation, the lien arising therefrom is "superior in rank to any privilege or lien arising subsequently thereto."[303]

In UCC states, creditors are subject to hazards similar to expiration of the vendor's privilege in Louisiana. Like civil law sales, UCC sales may be for cash or on credit; credit sales may be secured or unsecured. Unlike the civil law vendor, the unsecured UCC seller has no "privilege": he has only the buyer's promise to pay the price.[304] If the buyer defaults, the unsecured seller has a limited right to reclaim the goods; generally he must sue for the price.[305] Further, the unsecured seller's

299. W.T. Grant Co. v. Mitchell, 263 La. 627, 636, 269 So. 2d 186, 189 (1972).

300. LA. CIV. CODE ANN. arts. 3217, 3227 (West 1952), *quoted in* note 298 *supra*; *see* Dainow, *Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law*, 13 LA. L. REV. 537, 538, 545-46 (1953); Comment, *Vendor's Privilege*, 4 TUL. L. REV. 239 (1930).

301. 263 La. at 636, 269 So. 2d at 189; LA. CIV. CODE ANN. arts. 3217(7), 3227 (West 1952); *see* Dainow, *supra* note 300, at 545; Comment, *supra* note 296, at 346 (and cases cited); Comment, *supra* note 300.

302. LA. REV. STAT. § 9:5354 (1950); *see* Daggett, *The Chattel Mortgage in Louisiana*, 13 TUL. L. REV. 234 (1939); Comment, *supra* note 296, at 346.

303. Daggett, *supra* note 302, at 234. As long as the chattel remains in the hands of the original vendee, an unrecorded vendor's privilege is superior to a subsequently recorded chattel mortgage. *Id.*

304. The rights of sellers in unsecured sales are governed by UCC art. 2. *See generally* W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964); R. NORDSTROM, HANDBOOK OF THE LAW OF SALES (1970); J. WHITE & R. SUMMERS, *supra* note 291, at 21-396.

305. A cash-sale buyer's default can occur if, for example, subsequent to delivery the buyer's check is dishonored, the "cash" is counterfeit, or the buyer tendered in exchange goods in which he had no title. In the case of dishonor of the buyer's check, the cash seller may sue for the price, UCC § 2-709, or on the check, *id.* § 3-413, or reclaim the goods, *id.* § 2-507(2).

More commonly, the unsecured sale is on credit. If the buyer is insolvent, the seller may reclaim the goods under UCC § 2-702(2). Otherwise, the seller's only recourse, other than an action for the price, lies in the remedies indexed in § 2-703. That section permits cancellation of the contract, and perhaps return of the goods, if the buyer's conduct in default is within one of four categories. The usual case in which the buyer has taken delivery and subsequently fails to pay is not within any of these categories. The unsecured creditor is therefore limited to his action for the price and, unlike the Louisiana seller, his legal position is indistinguishable from other creditors of the buyer. *See* W. HAWKLAND, *supra* note 304, at 298-301; R. NORDSTROM, *supra* note 304, at 498-503. Compare the Louisiana remedy called a resultory condition, note 298 *supra*.

rights in the goods sold are restricted by the protection the UCC affords good faith purchasers for value.[306] Under UCC section 2-403, if a debtor with voidable title transfers the goods to a good faith purchaser for value, any right the seller may have had to reclaim the goods is lost, for the third party purchaser has priority.[307]

If the credit sale under the UCC is secured,[308] the seller may take an interest in the goods sold that is perhaps more nearly analogous to the privilege than is the unsecured seller's limited right to reclaim. Like the holder of a Louisiana chattel mortgage,[309] the UCC seller with a perfected security interest[310] in the goods generally has the right on default to proceed against the goods,[311] to take the collateral free from the claims of general, and later secured, creditors,[312] and to be protected against third party purchasers.[313] There are, however, several special UCC provisions relevant to consumer goods.[314] Although the most common and most important method of perfecting an article 9 security interest is the filing of a financing statement,[315] purchase money security interests in nonautomobile consumer goods[316] are automatically perfected at the time of creation without further action by

306. *See* UCC §§ 1-201(19), 2-103(1)(b) ("good faith"); *id.* §§ 1-201(32), (33) ("purchaser"); *id.* § 1-201(44) ("value").

307. A buyer's title may be voidable because his seller has a right to reclaim under UCC § 2-507 (cash sale) or § 2-702 (credit sale), *see* note 305 *supra*. *See* R. NORDSTROM, *supra* note 304, at 511-18.

308. The rights of sellers in secured sales are governed primarily by UCC art. 9. *See generally* 2 G. GILMORE, *supra* note 176; J. WHITE & R. SUMMERS, *supra* note 291, at 754-1007.

309. *See generally* Daggett, *supra* note 302.

310. *See* UCC §§ 1-201(37), 9-107. A security interest is ordinarily perfected by making a public filing or by taking possession of the collateral. *Id.* § 9-302(1). *But see id.* § 9-302(1)(d); text accompanying note 317 *infra*. *See generally* UCC art. 9, pts. 1 & 4.

311. *See generally* UCC art. 9, pts. 2 & 5.

312. *See id.* art. 9, pt. 3.

313. *See id.* §§ 9-201, -306(2), -307.

314. "Consumer goods" are defined in UCC § 9-109(1) as goods that "are used or bought for use primarily for personal, family or household purposes . . . ."

315. J. WHITE & R. SUMMERS, *supra* note 291, at 796.

316. UCC § 9-107 states:

> A security interest is a "purchase money security interest" to the extent that it is
>
> (a) taken or retained by the seller of the collateral to secure all or part of its price; or
>
> (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

the creditor.[317] The creditor holding a security interest perfected without filing enjoys the same rights in his collateral as does the creditor whose interest was perfected by filing or taking possession, except for a transaction relevant to this discussion. Unless a creditor holding a purchase money security interest in consumer goods files a financing statement, a qualifying third party purchaser may, under UCC section 9-307(2), take the collateral free of the creditor's security interest.[318] Such a security interest is lost in nearly the same manner as the Louisiana vendor's privilege is lost;[319] it may be protected in much the same way that a privilege may be converted into a chattel mortgage;[320] and the reason why ultimate protection is not always sought by sellers is much the same in both cases.[321]

Thus, both the UCC creditor with a perfected but unfiled security interest and the Louisiana creditor with less than a properly recorded chattel mortgage have an interest in preventing possible transfer of consumer goods by the debtor. In fact, the unsecured UCC creditor has

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317. UCC § 9-302(1)(d); *see* J. WHITE & R. SUMMERS, *supra* note 291, at 797.

318. UCC § 9-307(2) provides:

> In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

This section applies primarily to the situation in which one consumer sells used goods to another consumer. For explication see 2 G. GILMORE, *supra* note 176, at 715-17; J. WHITE & R. SUMMERS, *supra* note 291, at 943-44; Vernon, *Priorities, The Uniform Commercial Code and Consumer Financing*, 4 B.C. IND. & COM. L. REV. 531 (1963).

319. That is, when the debtor transfers. The UCC provision does not protect third party dealers since the purchase must be for the buyer's "own personal, family or household purposes . . . ." UCC § 9-307(2), *quoted in* note 318 *supra*.

320. The analogy is not perfect. The privilege attaches absent contractual provisions while the security interest must be provided for in the contract. A privilege does not become a chattel mortgage merely by recording; the chattel mortgage too is contractual and must be recorded.

If the secured UCC seller chooses not to rely on automatic perfection and instead files a financing statement, he will have complete protection against all unauthorized buyers, absent preclusion by waiver or estoppel. *See* 2 G. GILMORE, *supra* note 176, at 716.

321. This reason, also a prime rationale of the UCC's provision for automatic perfection, was well expressed by the Louisiana Supreme Court in *Mitchell*:

> The formality, time and expense involved in executing and recording chattel mortgages often prevent their use, particularly on small, inexpensive chattels or where the vendor neglects or is prevented from using the chattel mortgage.

263 La. at 637, 269 So. 2d at 189. For discussion of the rationale of automatic perfection, see J. WHITE & R. SUMMERS, *supra* note 291, at 798-99.

less protection than his "privileged" counterpart in Louisiana.[322] It follows that the argument implicit in the *Mitchell* opinion that creditors have less protection from debtor transfers in Louisiana than in UCC states[323] is not persuasive, since transfers likely to be made by consumers in default produce similar results[324] under both systems.

No data have been found that would indicate the frequency with which debtors make unauthorized transfers of consumer goods on which they still owe money. Of those transfers that do occur, some are undoubtedly made by good faith debtors out of ignorance of contract responsibilities.[325] It is also probably true that some debtors[326] postpone the inevitable by transferring collateral one step ahead of the sheriff, thereby forcing both UCC and Louisiana creditors to sue on the debt.[327] Available data indicate, however, that the profile of the defaulting debtor is generally one of good faith inability to pay rather than of the deadbeat.[328] It would seem to follow that, if and when transfers take place, the majority are probably not in bad faith. Particularly in low-income markets, the nature of the consumer goods sold and the general lack of resale markets for those goods[329] imply further that there are probably very few such transfers made in good faith *or* in bad, and that the creditor's risk of losing his collateral to a third party is probably not very great.[330]

b. *Loss by Removal*

Another facet of debtor misconduct recognized in many statutes and argued by creditors is the risk that the debtor will remove the collateral from the reach of process, that is, the debtor will abscond.[331] It is obvi-

322. *See* note 305 *supra* and accompanying text.

323. 416 U.S. at 607-10.

324. That is to say, a seller is remitted to suing on the debt and must take his place with other general creditors.

325. *Cf.* text accompanying notes 188 & 223 *supra.*

326. *See* note 286 *supra.*

327. *Cf.* note 286 *supra. But cf.* text accompanying note 223 *supra.*

328. *See* note 182 *supra* and accompanying text.

329. *See* notes 203 & 233 *supra* and accompanying text.

330. *See* Comment, *supra* note 175, at 816. The writer suggests that the creditor's risk be further discounted since, if he is vulnerable to a transfer, he has "not availed himself of the methods provided by law that insure his right of pursuit." *Id.*; *cf.* text accompanying note 177 *supra. But cf.* note 209 *supra* and accompanying text.

331. Insofar as the debtor may conceal himself or leave the jurisdiction to avoid proc-

ous that the most ironclad security agreement is worthless for reclaiming property if a writ of execution is returned "nulla bona" by the sheriff. Creditors, therefore, have an interest in preventing debtors from removing property, and, so the argument goes, this interest is protected by summary seizure.[332]

In an individual case there well might be a real danger that a debtor has removed, or is about to remove, the collateral.[333] It is not clear, however, that seizure without prior notice and hearing will protect against this risk. If the debtor intends to abscond, he will have had ample opportunity to do so before the sheriff arrives;[334] the debtor is the first to know of a default. If the debtor has withstood the routine panoply of private collection efforts without removing the collateral, it is not compelling to argue that he will abscond on receipt of court papers announcing suit, hearing, and possible seizure.[335] Moreover, if the debtor is unable to pay his debt, it seems unlikely that he could afford to remove the property from the jurisdiction. Generally, the average debtor most often subject to legal process is a member of lower income and minority groups who has lived in the same area for a long time and whose stability makes him amenable to execution levy.[336] In a recent

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ess, the use of provisional remedies to secure the court's jurisdiction is not here considered. This Note's concern is with the unreliable defendant and the collateral, rather than with the unavailable defendant and jurisdiction. *See* Ownbey v. Morgan, 256 U.S. 94 (1921); Clark & Landers, *supra* note 199, at 366-71.

332. *See, e.g.*, Hall v. Garson, 430 F.2d 430, 440-41 (5th Cir. 1970); Santiago v. McElroy, 319 F. Supp. 284, 293-95 (E.D. Pa. 1970); Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 556-57, 488 P.2d 13, 26, 96 Cal. Rptr. 709, 722 (1971); Cedar Rapids Eng'r Co. v. Haenelt, 39 App. Div. 2d 275, 277, 333 N.Y.S.2d 953, 956 (1972); Gardner, Fuentes v. Shevin: *The New York Creditor and Replevin*, 22 BUFFALO L. REV. 17, 35 (1972).

333. During oral argument before the Court in *Mitchell*, Mr. Justice Rehnquist said: "Notice and hearing also give an opportunity to debtors to spirit chattels away. Experience with this type of practice shows that the stuff disappears." 42 U.S.L.W. 3345 (U.S. Dec. 11, 1973).

334. Blair v. Pitchess, 5 Cal. 3d 258, 278-79, 486 P.2d 1242, 1256-57, 96 Cal. Rptr. 42, 56-57 (1971).

335. *See* White, *supra* note 40, at 515; Note, *supra* note 204, at 268. In the former article, Professor White suggests that although receipt of court papers motivates some to abscond, the papers motivate others to pay. White, *supra*.

336. *See* Comment, *supra* note 182, at 845-46; Project, *supra* note 189, at 927. One writer quotes a veteran collector as follows:

> The argument that prejudgment garnishment is necessary to catch someone about to leave town is a lot of bunk. I know of only one such case in forty-five years experience.

Note, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 753 (1968).

case, the California Supreme Court noted that no exigency exists in the "vast majority" of cases.[337]

c. *Loss by Destruction or Concealment*

Two other classes of debtor misconduct often mentioned are destruction and concealment. One can only guess at the frequency with which debtors maliciously destroy collateral out of spite.[338] If consideration is limited to those cases involving consumer goods and lower income debtors, the general importance of the collateral to the debtor[339] ought to resolve ipso facto the question of how great is the creditor's risk. Would a debtor destroy his own refrigerator?

Concealment of assets is perhaps the most realistic option for a bad faith debtor fearful of repossession. Concealment, however, means loss of use, which raises the same questions of debtor impact as seizure.[340] Given the impracticality of hiding household goods, it is questionable whether this risk is sufficiently large to warrant inclusion in the due process balance as a significant hindrance to creditor interests.

d. *Warning*

Even if it be taken as true that bad faith debtors pose a significant threat to creditor interests, it should be reemphasized that the interests of creditors in preventing misconduct are not being evaluated to determine if prejudgment seizure should be abolished. What should be assessed is the impact on the incidence of misconduct effected by granting notice and a hearing prior to prejudgment seizure. In *Mitchell*, the Court agreed with the creditor's argument by taking the following position:

> The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may

337. Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 558, 488 P.2d 13, 27, 96 Cal. Rptr. 709, 723 (1971). To the absconding-debtor argument, the court in MacQueen v. Lambert, 348 F. Supp. 1334, 1337 (M.D. Fla. 1972), replied: " 'Emergency!' is the cry of intuition rather than reason." For an evaluation of what New York courts consider to be "exigent circumstances," see Gardner, *supra* note 332, at 33-35.

The risk of the absconding debtor is much greater in the commercial context, in which replevin can be used, for example, to seize easily removed stock certificates, securities, or commercial paper.

338. *Cf.* Leff, *supra* note 266, at 18-19.

339. *See generally* notes 198-220 *supra* and accompanying text.

340. *See* text accompanying notes 198-205 *supra.*

furnish a warning to the debtor acting in bad faith.[341]

Notice and hearing would no doubt impress a bad faith debtor with the seriousness of the creditor's intention to press ahead with collection. But it is also true that notice and hearing would not be the first warning received by the debtor. Since private collection efforts are less expensive than judicial remedies, creditors almost always make extensive use of delinquency notices, personal letters, the telephone, personal visits, and negotiation before resorting to the judicial process.[342] Professor Johnson's study indicates that the average repossession is preceded by thirty-four contacts between the creditor and the debtor.[343] The conclusion reached by the California Supreme Court seems inescapable:

> If the debtor wishes to abscond with the property [or conceal, destroy, or transfer it], he will have had more than ample opportunity to do so long before the claim and delivery process is initiated. Affording alleged debtors a hearing on the merits prior to seizure of their property will not substantially increase the risk that they "Shall fold their tents, like the Arabs, And as silently steal away."[344]

4. *Loss of Leverage*

One suspects that the genuine creditor interest hindered by the provision of preseizure notice and hearing is the leverage gained by

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341. 416 U.S. at 609.

342. *See* notes 266-69 *supra* and accompanying text.

Professor Leff suggests that in some cases in which businesses combine large volume collection with no concern about business reputation, it "may be cheaper overall to standardize all activities and 'go to law' immediately in every case, without regard to the specific facts of the specific debtor's problem." Leff, *supra* note 266, at 22-23 (footnote omitted).

343. Johnson, *supra* note 150, at 94, *citing* CONSUMER BANKERS ASS'N, REPOSSESSION SURVEY FOR THE YEAR 1971.

344. Blair v. Pitchess, 5 Cal. 3d 258, 278, 486 P.2d 1242, 1256, 96 Cal. Rptr. 42, 56 (1971), *quoting*, Longfellow, *The Day Is Done* (1845).

The creditor's rebuttal to the argument in text was well stated in Brief for General Motors Acceptance Corp., *et al.*, as Amici Curiae at 14, Fuentes v. Shevin, 407 U.S. 67 (1972):

> Experience of these *amici* dictate [*sic*] that any notice of an impending replevin results in destruction, removal or disappearance of the chattel in a high percentage of instances. The bill-collection demands which are made often and with some persistence prior to any replevin, serve only to notify the debtor that immediate action will be taken but apparently does [*sic*] not convince him, as the real and close threat of immediate repossession seems to do, to destroy, sell or secrete the security.

seizure, rather than protection against debtor misconduct.[345] Unless the protection from coercion inherent in the due process clause[346] has been emasculated, it is doubtful that the interest of creditors in protecting their leverage is sufficiently legitimate to warrant due process protection; this is especially true when there is no concomitant requirement that debtor misconduct be shown to have occurred or be imminent. By requiring preseizure notice and hearing unless, *inter alia*, the creditor can show an immediate danger of misconduct, *Fuentes*[347] in effect partially severed the misconduct interest from the leverage interest.[348] *Mitchell* unmistakably reunites them. For sequestration in Louisiana, an immediate danger of debtor misconduct need not be shown. Sequestration can issue merely "if it is *within the power of* the defendant to conceal, dispose of, . . . waste . . . or remove the property . . . ."[349] With respect to household goods, this is obviously no requirement at all since a creditor can always truthfully swear to the existence of the debtor's power of misconduct.[350] The *Mitchell* Court's ac-

345. *See The Supreme Court, 1971 Term, supra* note 235, at 91 n.37; Comment, *supra* note 182, at 846; text accompanying notes 232-38 *supra*.

346. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 340-42 (1969); *cf.* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

347. *See* text accompanying note 293 *supra*.

348. Leverage is reduced if the debtor is informed of the seizure and granted an opportunity to contest it.

349. LA. CODE CIV. PRO. ANN. art. 3571 (West 1961) (emphasis added) (grounds for sequestration). Prior to revision of the statute, in order for sequestration to issue, the creditor was required to have "good reason to fear" that the debtor would perform some act that would deprive him of the property. *Id.*, Comment (a). The revision provides "the more liberal requirement that the detrimental act be 'within the power' of the defendant . . . so that no longer is the apprehensiveness of the plaintiff at issue." Johnson, *supra* note 1, at 15. It is interesting to note that the corresponding grounds for issuance of a writ of attachment are that the debtor has engaged, or is about to engage, in misconduct with intent to defraud or give a preference to one or more of his creditors. LA. CODE CIV. PRO. ANN. arts. 3541(2)-(3) (West 1961). Apparently the burden on the creditor is lighter in sequestration because of the alleged interest in the specific property to be seized. *See* Anderson & L'Enfant, *supra* note 175, at 76-77; Comment, *supra* note 175, at 814.

It might be noted that, apparently to be on the safe side, the creditor in *Mitchell* asserted reason to believe that the debtor would "encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of [the] proceedings . . . ." 416 U.S. at 602.

350. *Cf.* Young v. Guess & Swanson, 115 La. 230, 38 So. 975 (1905). The colloquy between the creditor's counsel and Justices Stewart and Marshall during oral argument in *Mitchell* is illustrative:

> Mr. O'Sullivan: "[T]his case falls within the exception to Fuentes because a creditor may make a showing of the possibility of destruction of the chattels."
>
> Mr. Justice Stewart: "What in this case shows that?"

ceptance of this "requirement" as a reflection of the creditor's misconduct interest permits reinjection of the leverage interest into the balancing equation without so much as an allegation of misconduct.[351]

Plainly, debtor misconduct hinders creditor interests; if a showing of misconduct is made, the leverage obtained incident to the availability of a misconduct seizure is easily justified. The low incidence of debtor misconduct implies, however, that the rule in *Mitchell* giving substantial weight to creditors' interests in avoiding misconduct[352] actually protects the leverage interest. The legitimate creditor interest in protection from debtor misconduct would be fairly preserved by limiting misconduct seizures to those individual cases in which the showing required by *Fuentes* can be made.[353]

Mr. O'Sullivan: "The uncontradicted allegations that the property may be destroyed."

"Isn't that part of a form routinely used in Louisiana?"

"I don't know."

"Suppose it was, would it make any difference?"

"Yes, there must be something more than a pro forma showing."

"Wasn't it pro forma here?"

"It may have been. . . ."

. . . .

Mr. Justice Marshall: "In the appendix to the petition . . . it appears that a form was indeed used by the creditor in this case in seeking the writ. Do you now agree that the allegations were made on a form?"

Mr. O'Sullivan: "Yes, sir."

42 U.S.L.W. 3346 (U.S. Dec. 11, 1973).

351. The *Mitchell* opinion assumed that debtor misconduct might occur and, as a general rule, weighed the possibility in the due process balance; the *Fuentes* opinion assumed that debtor misconduct would not occur unless shown in the individual case. *See* text accompanying notes 291-94 *supra*.

352. *See* text accompanying note 294 *supra*. *But see* note 344 *supra*.

353. *But see* Williams, *supra* note 31, at 111:

> If a realignment of debtor-creditor law requires that the debtor be protected against unscrupulous creditors, it conversely should require that creditor and public interests be protected against unscrupulous debtors.

In *Randone* the court did not doubt that the legislature could draft a constitutional statute which would

> permit attachment before notice in exceptional cases where, for example, the creditor can additionally demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond.

Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 563, 488 P.2d 13, 31, 96 Cal. Rptr. 709, 727 (1971). Professors Clark and Landers argue that, in addition to documentary symptoms of debtor misconduct, the creditor should be required, *inter alia*, to show that there are no other assets from which a judgment could be satisfied. Clark & Landers, *supra* note 199, at 369-70.

For consideration of what the creditor must allege in New York, see Cedar Rapids Eng'r Co. v. Haenelt, 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (1972); Finkenberg Furni-

5. *Costs of Notice and Hearing*

Perhaps the most obvious creditor interest in maintaining provisional remedies without prior notice and hearing inheres in the fact that as procedures become more elaborate, costs and difficulty increase and the creditor's return from using the legal system goes down.[354] The additional cost increments of more process are both explicit and implicit.

In the general case in most states, a creditor may obtain a provisional seizure simply by filing a complaint accompanied by an application and affidavit asking for issuance of a seizure writ.[355] Additionally, the creditor must post bond[356] and pay for service and execution of the writ.[357] The complaints and affidavits may be "mass produced," and plaintiff need not send a witness to court. Although *Fuentes* has not been decided long enough for the exact nature of the required hearing to emerge, if a preseizure hearing is necessary, the creditor must incur the added cost of making the requisite showing that the seizure writ should issue.[358] The explicit costs include the increased legal costs of pleading with greater specificity, the cost of sending a witness to court, and delay. Implicit costs result from decreased ability to mass produce complaints and affidavits, lost leverage, and decreased recoveries[359]—

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ture Corp. v. Vasquez, 67 Misc. 2d 154, 324 N.Y.S.2d 840 (Civ. Ct. 1971); Gardner, *supra* note 332, at 33-34.

354. *Cf.* Project, *supra* note 182, at 891.

355. *See, e.g.*, ALA. CODE tit. 7, § 918 (1960) (statutory detinue), *held unconstitutional in* Yates v. Sears, Roebuck & Co., 362 F. Supp. 520 (M.D. Ala. 1973), *and* Anderson v. Barnett First Nat'l Bank, 60 F.R.D. 104 (M.D. Ala. 1973); ILL. ANN. STAT. ch. 11, §§ 1, 2, 2a (Smith-Hurd 1963) (attachment); LA. CODE CIV. PRO. ANN. arts. 3501, 3571 (West 1961) (sequestration); MO. REV. STAT. § 533.010 (1969) (replevin); WASH. REV. CODE ANN. §§ 7.64.010-.020 (1961) (claim and delivery).

For data on the cost of using judicial repossession in California and Louisiana, see Johnson, *supra* note 150, at 98 n.40.

356. *See, e.g.*, ALA. CODE tit. 7, § 918 (1960); ILL. ANN. STAT. ch. 11, §§ 4a, 4b, 5 (Smith-Hurd 1963); LA. CODE CIV. PRO. ANN. arts. 3501, 3544, 3574 (West 1961); MO. REV. STAT. § 533.030 (1969); WASH. REV. CODE ANN. § 7.64.030 (1961).

357. *See, e.g.*, MO. REV. STAT. § 533.210 (1969). For examples of costs involved see White, *supra* note 40, at 517 n.47.

358. In the context of automobile repossessions, see Johnson, *supra* note 150; White, *supra* note 40.

359. Creditors with marginal collateral who doubt that debtor's assets are sufficient to warrant carrying the suit to judgment and attempted execution may simply write off the debt. Recoveries will be diminished generally if the opportunity for a hearing encourages more debtors having defenses to contest seizure. Also, fewer summary seizures will be granted. *See* Gardner, *supra* note 332, at 29-30; *cf.* Brunn, *Wage Garnishment*

that is to say, the increased cost of requiring the creditor to shoulder the additional procedural burden.[360]

The magnitude of these cost increases would be allayed by at least two factors. First, not all and perhaps very few cases would result in a full contest at the preseizure hearing. More probably, as *Fuentes* recognized, "many debtors would forego their opportunity, sensing the futility of the exercise in the particular case."[361] In light of the foregoing discussion,[362] this seems a realistic observation. Secondly, although the hearing opportunity and its potential costs should give debtors greater bargaining power, it may be that in a substantial number of cases the debtor's increased power will result in a negotiated settlement, a result costing everyone, including the creditor, less than judgment and execution.[363] Even so, it is clear that preseizure notice and hearing do inject added costs. The costs to creditors may be substantial in those cases in which the genuine value of summary seizure lies in its coercive, leverage effect.

Because the paramount interest of seller-creditors lies in obtaining maximum profits, they can be expected to pass any additional cost increment on to others if at all possible. The methods are many: higher prices of goods; increased interest rates; higher downpayments; denial of credit to the poorer risks; shifting costs to cash buyers and better credit risks;[364] and shifting costs to buyers of other goods.[365] Some of the effects and implications of these efforts will be discussed below.

C. *The State*

If maximizing the general welfare is one of the state's prime goals, then in the installment credit sales context the state entertains a catalog of interests.[366] In order that commercial prosperity be promoted, the

in California: A Study and Recommendations, 53 CALIF. L. REV. 1214 (1965). *But cf.* Note, *supra* note 204, at 265-67.

360. *See* text accompanying note 221 *supra*.

361. 407 U.S. at 92 n.29.

362. *See* notes 221-45 *supra* and accompanying text (discussion of "barriers to redress").

363. This factor has been called the "workout effect." *See* Dauer & Gilhool, *supra* note 221, at 144-45. *But see* Johnson, *supra* note 150, at 105.

364. *See* NCCF REPORT 124.

365. *See* White, *supra* note 40, at 522.

366. *See* Blair v. Pitchess, 5 Cal. 3d 258, 273, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971); Gardner, *supra* note 332, at 34; Note, *supra* note 204, at 264-65; *cf.* Greenfield, *supra* note 207, at 14-15.

state is interested in providing a framework within which debts may be promptly paid and contracts performed. Also the state is interested in protecting the vitality of the credit and sales industry so that credit resources will be readily accessible. In contrast to this collective commercial interest is the underlying concern for the protection of individuals. The state should be interested in protecting persons from coercion, that is to say, from the use or threatened use of judicial power to effect takings from innocent parties.[367] Moreover, the state has an interest in preserving the right to judicial process for redressing grievances. Finally, the state is interested in protecting the fisc by promoting efficiency and reducing congestion in the courts and by ensuring that its writs and process are complied with expeditiously.

As alluded to above,[368] the availability of provisional remedies reflects state recognition of the interests of the parties, and it also reflects the state's concern that disputes be resolved with dispatch. Presumably the specific procedures chosen and the manner in which they affect the rights of the parties reflect the state's determination of the wise and proper accommodation of state, consumer, and creditor interests. The typical state's two-stage accommodation of these interests, however, has not necessarily been based upon a fair and modern appraisal of all the interests.[369] At the bargaining stage, the state remains essentially neutral and permits the parties to reach whatever agreement is within their respective powers. Theoretically, the full power of the state is thereafter available to coerce any reluctant party to perform. In reality, the coincidence of state and creditor interests in promoting commercial prosperity has combined with barriers to redress and the unequal bargaining power of many consumers to make the power of the state more readily available to creditors than to individual debtors.[370] A symptom of this imbalance is the disparity in legal costs: the

367. An historical theme of both sequestration and replevin was the state's interest in "forestall[ing] violent self-help and retaliation." Mitchell v. W.T. Grant Co., 416 U.S. 600, 605 (1974); *see* J. COBBEY, *supra* note 14, § 38; T. PLUCKNETT, *supra* note 93, at 368 (replevin); Millar, *Judicial Sequestration in Louisiana: Some Account of Its Sources*, 30 TUL. L. REV. 201, 206 (1956) (Latin sources of sequestration); *cf.* Yudof, *supra* note 245, at 972. *But cf.* 3 W. BLACKSTONE, COMMENTARIES *4.

368. *See* text accompanying note 291 *supra.*

369. *See* Jordan & Warren, *supra* note 222, at 457.

370. *See* CAPLOVITZ 151; NCCF REPORT 24; Neth, *supra* note 165, at 46.

Individual consumer interests, however, have not been ignored by the state. With respect to recent "truth in lending" legislation, the following comment is instructive:

> [Existing] consumer-credit laws have been aimed at permitting credit suppliers to charge profitable rates and at regulating the strictly "credit" aspects of trans-

consumer's marginal cost of defending a repossession suit is much greater than the creditor's marginal cost of prosecuting it.[371] If in fact the state has neglected seeing to its interest and that of the debtor in protecting the individual, the remedy ought to be found in the due process clause.[372] Complications arise, however, when it is recognized that a measure intended to increase the protection and alleviate the costs of the debtor—for example, preseizure notice and hearing—will of necessity decrease the protection and increase the costs of creditors.[373] The question therefore arises: Given this inverse relation, how would the various state interests be affected by requiring preseizure notice and an opportunity to be heard?

1. *Welfare Economics*

A substantial element of creditor dominance derives from the fact that, under the umbrella of state interests, creditors are more successful than debtors at shifting transaction costs from themselves onto the other party and the state. Easy access to state-subsidized judicial process and the leverage available in a summary seizure scheme permit creditors to externalize some of their collection costs.[374] Greater bargaining power permits further cost shifting; debtors whose property is seized and against whom judgment is executed pay direct costs of legal process as well as indirect costs, shared by all debtors, generated by debtors who have been unable to satisfy judgments.[375]

Standard microeconomic theory holds that "social welfare is a maximum when marginal social cost equals marginal social benefit . . . ."[376] It follows that insofar as creditors are successful at externalizing their costs of achieving wrongful or mistaken recoveries, ex-

actions—namely, placing ceilings on, or requiring disclosure of, finance and related charges. These laws have emphasized protecting the consumer at the contract-formation stage, and have largely ignored safeguarding him at the vital default and collection stages . . . .

Jordan & Warren, *supra* note 222, at 448.

371. Dauer & Gilhool, *supra* note 221, at 144; Leff, *supra* note 266, at 19-23; Neth, *supra* note 165, at 46.

372. U.S. CONST. amend. XIV.

373. *See, e.g.*, Neth, *supra* note 165, at 35.

For effects of notice and hearing on court congestion and efficiency, see notes 397-401 *infra* and accompanying text.

374. *See* Leff, *supra* note 266, at 23; *cf.* Note, *supra* note 154, at 1263-64.

375. *See* Leff, *supra* note 266, at 23; Project, *supra* note 182, at 902; *cf. Hearings on H.R. 11,601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., pt. 1, at 264 (1967); NCCF REPORT 124.

376. C. FERGUSON, MICROECONOMIC THEORY 391 (1966).

ternal diseconomies result.[377] To the extent that notice and an opportunity to be heard weaken the impact of leverage and tend to minimize wrongful or mistaken seizures, costs are shifted back to creditors and internalized as real costs of doing business. Theoretically, any resulting adjustment in availability or price of credit will be in the direction of a more efficient allocation of resources.[378]

The theoretical result is consonant with the response of creditors. Whether, as creditors contend,[379] both *substantially* decreased availability of credit and *substantially* higher prices would occur if preseizure notice and hearing were required is problematical. What is certain is that the internalized costs of notice and hearing would be spread over a greater number of consumers,[380] protection of the individual debtor would be increased, and perhaps social resources would be more efficiently allocated.

2. *Impact of Restricted Remedies*

Several methods available to creditors for passing on increased costs resulting from restricted collection remedies were listed earlier.[381] Essentially, all methods are of two classes: a creditor can either keep credit rates constant and exercise greater selectivity or keep risk standards constant and increase rates to absorb increased collection costs and bad debt losses.[382] Which alternative, or relative mix of alternatives,

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377. An "external diseconomy" occurs when "marginal social cost is greater than marginal social benefit." *Id.*; *see id.* at 391-92; *cf.* Note, *Direct Loan Financing of Consumer Purchases*, 85 HARV. L. REV. 1409, 1411-12 (1972).

378. *See* C. FERGUSON, *supra* note 376, at 391-92.

379. *See, e.g.*, Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 556-57, 488 P.2d 13, 25-26, 96 Cal. Rptr. 709, 721-22 (1971); Affidavit of V. Morgan, *supra* note 173, at 55. Mr. Justice White appears to agree. *See* Fuentes v. Shevin, 407 U.S. 67, 103 (1972) (dissenting opinion).

380. *See* Project, *supra* note 182, at 902-03; Williams, *supra* note 31, at 98-99. Professor Kripke views this mechanism as analogous to the recent growth of strict liability in tort in products liability law.

> The debtor's misfortune could be "insured" by our legal institutions by throwing the loss on the creditor through denial of enforcement remedies. But the loss so allocated would not come to rest on the bloated stockholders of the creditor. The cost would be and would have to be passed on by the creditor to the debtors who do pay, as bad debt expense . . . . This spreading of cost might be legitimate social engineering.

Kripke, *supra* note 182, at 485.

381. *See* text accompanying note 365 *supra*.

382. NCCF REPORT 114; *see* Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEXAS TECH L. REV. 23, 52-53 (1972); Affidavit of V. Morgan, *supra* note 173, at 55:

creditors would choose, and the magnitude of the effect, is not known. There is some indication that availability of credit would be affected less than price,[383] but the *NCCF Report* suggests the contrary.[384] Although it seems that lower income consumers would be more greatly affected by increased selectivity than by higher credit prices,[385] the crucial consideration, about which there is almost no hard data, is the magnitude of either effect. Apart from the claims of credit sellers, the information available suggests that the magnitude of effects resulting from a *Fuentes*-type notice and hearing requirement may not be very large.[386] The primary reason appears to be that because the default and repossession rates for consumer goods are quite small,[387] if costs resulting from notice and hearing are widely spread, the individual increment of increased cost is small.

It has been assumed that increased purchasing on credit is good for the economy and good for purchasers and suppliers.[388] If notice and

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> [T]he retailer, operating under our present credit system at or below his cost of credit sales, if confronted by an increased rate of loss from repossession, must either increase his prices to a noncompetitive level, or restrict his extension of retail credit, thereby curtailing his sales volume.

383. *See* Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 556-57, 488 P.2d 13, 26, 96 Cal. Rptr. 709, 722 (1971); 114 CONG. REC. 1833 (1968); Brunn, *supra* note 359, at 1240-43; Comment, *supra* note 182, at 846.

384. *See* NCCF REPORT 23-44, 109-48. *But cf. id.* at 124.

385. Although higher credit prices, reflected either in finance charges, interest rates, or costs of goods, restrict demand, it is arguably better to have dearer credit than none at all. Moreover, rather than curtailing consumption, reduced availability may stimulate deviant credit patterns such as loan sharking and peddling. *See* CAPLOVITZ 191-92.

Creditors, of course, put the argument more forcefully:

> A fallacious impression which should be corrected is that business can or will absorb this additional cost in its existing profit margins.
>
> [L]arge proprietary retailers will continue to engage in the extension of retail credit, but will confine their credit sales to high or middle income consumers with demonstrated credit ratings. While perhaps smaller retailers will be competitively forced to accept somewhat more marginal credit risks; [*sic*] clearly, the low income consumer, who is most in need of retail credit would not find such credit readily available at lawful rates.

Affidavit of V. Morgan, *supra* note 173, at 56, 55.

386. *See* Krahmer, Clifford & Lasley, *supra* note 382, at 54-62; *cf.* White, *supra* note 40, at 530. *See also* Note, *supra* note 204, at 268.

387. *See* CAPLOVITZ 121; FTC REPORT 33-34; NCCF REPORT 20; Krahmer, Clifford & Lasley, *supra* note 382, at 61-62; *The Supreme Court, 1971 Term, supra* note 235, at 91 n.37; Project, *supra* note 182, at 885 n.22; note 211 *supra.*

388. *See, e.g., Hearings, supra* note 375, at 278 (statement of R. Moot, Administrator, Small Business Administration). Even this point is not free from argument. Although the growth of credit stimulates growth in production and mass markets in dura-

hearing were required and the concomitant costs internalized and widely spread, it is reasonable to conclude that the increased protection for debtors *qua* individuals would accrue at an insubstantial cost to creditors and debtors *qua* purchasers. On balance, the trade-off furthers state interests.

If, however, creditors perceive the costs of notice and hearing as too substantial to spread effectively and, for that or some other reason, choose instead to concentrate the costs by passing them on in low-income markets via increased prices and stricter selectivity, a policy dilemma of the proper accommodation of state interests emerges.[389] On the one hand, it can be argued that credit is too easy and that the poor as a class receive too much credit. The question that follows is whether it is within the state's general welfare interest to act affirmatively to prevent low-income debtors from becoming overburdened or whether the state should acquiesce in a free market denial of credit to the high risk class—an ironic possible result of increased costs of notice and hearing.[390] On the other hand, it can be argued that the state should be

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ble goods, which would be damped by credit restrictions, it has been argued that easy credit creates artificial material wants and contributes to uncertainty and instability in the national economy. J. GALBRAITH, THE AFFLUENT SOCIETY 157-66 (Mentor ed. 1958). Comparison of the following is illustrative:

> To disturb the balance of the existing credit structure can have immediately amplified repercussions on employment, production, stock prices, inflation, welfare, and, indeed, our entire standard of living. . . . There would be an increase in retail prices of consumer durables, which would contribute to our already serious inflationary spiral . . . .

Affidavit of V. Morgan, *supra* note 173, at 58-59.

> The effect of the expansion of consumer credit is to add an uncertainty . . . to the hitherto more reliable consumer spending. . . .
>
> . . . [C]onsumers will add the most spending from borrowed funds to their spending from current income during the period when it is least needed. This will exaggerate inflationary pressures.

J. GALBRAITH, *supra* at 163.

> The contributions of consumer credit to cyclical movements of the economy are not substantial and may be controlled by general monetary and credit policy.

Williams, *supra* note 31, at 110.

389. *See generally* Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 554-57, 488 P.2d 13, 25-26, 96 Cal. Rptr. 709, 721-22 (1971); CAPLOVITZ 188-92; P. MCCRACKEN, J. MAO & C. FRICKE, CONSUMER INSTALLMENT CREDIT AND PUBLIC POLICY (1965); NCCF REPORT 156; Neth, *supra* note 165, at 34-35; Williams, *supra* note 31, at 110-12; Shay, *The Uniform Consumer Credit Code: An Economist's View*, 54 CORNELL L. REV. 491, 496-97 (1969); Project, *supra* note 182, at 902-03.

390. *Cf.* Kripke, *supra* note 182, at 478-79 (footnotes omitted):

> It must be recognized that even in the poverty situations, putting aside the cases of fraud and high pressure in home sales, the buyers do want the goods. . . . Thus we cannot adopt restrictions on remedies so punitive as to put the

concerned about the availability of credit to the poor as a class, and that the state should act affirmatively to support liberal credit for those lower income consumers who need credit and who would repay just debts.

Regardless of the stance taken by the state in resolving the conflict, no grand accommodation of collective interests should be permitted to deprive substantial numbers of debtors of individual procedural protections.[391] It should be reemphasized that the due process requirement was designed to protect against overemphasis on collective solutions and the basing of state determinations of procedural rules on results in most cases rather than on just results in individual cases.[392]

3. *Debt Collection and Tort Remedies*

Society and the state have a strong interest in providing a mechanism by which individuals may be protected from the socially unreasonable conduct of other individuals. In our system of law, the mechanism provided is embodied in the law of torts.[393] Coercive and socially abusive debt collection practices are notorious and have provided a fertile source of tort liability.[394] As is the case with all judicial remedies, the

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credit sellers in the poverty areas, and their financers, out of business. Despite the present high social cost, they serve a social purpose. The demand for modern appliances and other amenities, and for such necessities as color television and stereo sets, is irresistible at all levels of poverty, including that of welfare clients.

391. *See* Randone v. Appellate Dep't of Superior Court, 5 Cal. 3d 536, 557, 488 P.2d 13, 26, 96 Cal. Rptr. 709, 722 (1971). *See also* NCCF REPORT 30:

> With full understanding of its probable impact, the Commission, nevertheless, recommends that prior to repossession—whether with or without judicial process—the debtor must be given notice of the claim against him and the opportunity to be heard on the merits of the underlying claim.

392. *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 894-95 (1961); Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974). In striking down the self-help provisions of the Michigan UCC, the *Watson* court said:

> Although the Constitution does recognize rights to life, liberty, property, and due process of law . . . a diligent search has failed to reveal that the institutional availability of credit is a fundamental constitutional value. In past years, automobile advertising has been aimed at convincing the individual that his personal worth and happiness depend upon his owning a snazzy car. . . . This hustle, and the credit which supports it, does not find protection in the Constitution.

Id. at 970 (footnote omitted); *cf.* Yudof, *supra* note 245, at 970-71. *See also* Vlandis v. Kline, 412 U.S. 441, 451-52 (1973); Stanley v. Illinois, 405 U.S. 645, 650 (1972).

393. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 1, comment *d* (1965); W. PROSSER, *supra* note 95, §§ 1-4.

394. For an exhaustive survey defining the limits of extrajudicial debt collection tac-

consumer-plaintiff must have his day in court if he is to obtain relief. One might speculate, however, that if perhaps two-thirds of low-income consumers do not know how to respond to a summary deprivation of property,[395] even fewer are aware of the tort remedies available against abusive collection tactics. If this conjecture is valid, a procedure that apprises consumers of, or provides them with, an opportunity to assert available remedies furthers the interests of the state. It is clear that notice and even a limited opportunity to be heard serve the state's interest by affording information. It has been suggested, moreover, that

> the possibility that a creditor may be called to account (at a hearing) for the frequency and the nature of [his preseizure contacts with the debtor] may be expected to inhibit any creditor conduct that might smack of nascent tort.[396]

4. *Burden on Courts*

The state, of course, has an interest in conserving financial, administrative, and judicial resources. Some say that a preseizure notice and hearing requirement would jam the courts.[397] Presumably the argument is that more debtors would appear and that an additional hearing would require more of the courts' time.[398] Nevertheless, any additional burden would be mitigated to the extent that creditors would be deterred from seeking provisional writs in situations in which the debtor could move successfully for dissolution.[399] Moreover, it can be expected that notice and hearing would discourage a significant fraction of the disproportionately large number of actions presently being brought by low-income market creditors in the expectation of a default judgment.[400] Neither of these arguments, however, can be finally persuasive. Courts are established by the state for the fair adjudication of disputes. Ultimately it is in the interest of society that vindication of

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tics and evaluating the tort remedies that establish those limits, see Greenfield, *supra* note 207.

395. *See* text accompanying note 226 *supra.*

396. Dauer & Gilhool, *supra* note 221, at 145-46 (footnotes omitted).

397. *See, e.g.*, Epps v. Cortese, 326 F. Supp. 127, 135 (E.D. Pa. 1971), *vacated sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972); *cf.* NCCF REPORT 30:

> Although ["probable cause" type] hearings . . . would probably be unduly burdensome to the existing court system, the Commission insists that an opportunity for hearing should be granted.

398. *But see* text accompanying note 361 *supra.*

399. *See* Note, *supra* note 166, at 1005.

400. *See* FTC REPORT 34; notes 221-45 *supra* and accompanying text.

rights not "be made dependent on any theory that it is less expensive or more expedient to deny them than to afford them."[401]

5. *Conclusion*

Although the Court adverted to state interests, with vastly different emphasis, in both *Fuentes* and *Mitchell*, neither opinion dealt satisfactorily with "routine" state interests. *Fuentes* emphasized the possibility of extraordinary situations in which a summary seizure might be "directly necessary to secure an important governmental or general public interest"[402] and dismissed the interest in debt collection as "no more than private."[403] Other than concluding that "the State has reached a constitutional accommodation of the respective interests of buyer and seller,"[404] the *Mitchell* majority made no explicit evaluation of the state's stake in the collective interests of creditors or in the protection of the individual.[405] Implicitly, however, the Court's decision to balance interests in the general case aligned the interests of creditors and the state in promoting commercial prosperity against the interests of the individual debtor; the result was a deemphasis of individual protection. In so doing, the Court adopted the commercial bias of the state[406] rather than balancing afresh the state's collective and individual

401. Brenneman v. Madigan, 343 F. Supp. 128, 139 (N.D. Cal. 1972). *See also* Yudof, *supra* note 245, at 967-68 (footnotes omitted):

> Where the judicial backlog is substantial, obviously other statutory solutions may be required. The legislature might also take up the Supreme Court's invitation in *Fuentes* to create more efficient, informal and less time-consuming systems for redressing creditor-debtor conflicts, *e.g.*, special consumer courts. Such courts, relying perhaps upon lay advocates, might well reduce the low income consumer's fear of the judicial process and his unwillingness or inability to employ it as well. Legislative innovation might, alternatively, allow a creditor to prove his claim inexpensively, by affidavit in the . . . cases in which the debtor defaults. Thus, given a reasonable response by creditors, lawyers and legislators, . . . estimate[s] of the costs of judicial repossession may be greatly exaggerated.

402. 407 U.S. at 91. Harmonizing its prior decisions, the Court suggested that the public interests in collecting taxes, conducting a war, and protecting against bank failure, misbranded drugs, or contaminated food are extraordinary. *Id.* at 92 (citing cases); *see* notes 42-90 *supra* and accompanying text.

403. 407 U.S. at 92.

404. 416 U.S. at 610.

405. *See* text accompanying note 366 *supra*. *But cf. The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 75 (1974) (interpretation of Court's interest analysis).

406. In his concurring opinion, Mr. Justice Powell made it explicit:

> The governmental function . . . is to provide a reasonable and fair framework of rules which facilitate commercial transactions on a credit basis.

due process interests.[407]

It is clear that the state has various interests in the debtor-creditor context that are hindered or furthered by the procedural rules it chooses. If the state reaches an accommodation of interests that is excessively unbalanced, the due process clause is the available remedy. When called upon to apply due process to challenged procedural rules, the Court should evaluate the effects of state interests and inject them into the balancing process. Otherwise, the party prejudiced by a biased state accommodation enters that process at a distinct disadvantage.

V. NARROWING THE ISSUES

The Court in *Mitchell* began its constitutional analysis by answering the debtor's claim that the due process clause guaranteed continued possession of the property in question pendente lite.[408] Citing cases dealing with interests in land, the Court noted that the issue of possession may be severed from adjudication of the ultimate right involved.[409] Thus the issue in *Mitchell* became not whether due process guaranteed continued possession but whether a hearing on the issues relevant to possession must precede the taking.[410] In the Court's view, the issues relevant to the possessory action were three: default, the existence of a vendor's privilege, and the possession of the debtor.[411] It was against

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416 U.S. at 624-25. The "reasonable and fair" emphasis is on procedural safeguards rather than on balancing of interests. *Id.*

407. *See* text accompanying note 370 *supra*. *But cf.* Consumer Credit Protection Act § 102, 15 U.S.C. § 1601 (1970).

408. 416 U.S. at 607. Petitioner was undoubtedly relying upon the *Fuentes* majority's statement:

> [I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment. . . .
>
> . . . .
>
> . . . It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

407 U.S. at 84-85, 87 (footnote omitted). *See also* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969) (Harlan, J., concurring).

409. 416 U.S. at 607, *citing* Lindsey v. Normet, 405 U.S. 56 (1972), Bianchi v. Morales, 262 U.S. 170 (1923), *and* Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

410. 416 U.S. at 607.

411. *Id.*:

> Petitioner's claim must accordingly be narrowed to one for a hearing on the issues in the possessory action—default, the existence of a lien, and possession of the debtor—before property is taken.

this narrow background that the "balance of interests" was struck in *Mitchell*. The Court neither questioned the basis for this narrowing nor explored the implications.

Separating the issue of possession from the issue of an ultimate right—for example, ownership—is conceptually sound in situations in which the promises of undisturbed possession and payment for property are independent. Independent covenants are quite common in the law of landlord and tenant.[412] Thus, in *Lindsey v. Normet*,[413] the provision of Oregon's Forcible Entry and Detainer Statute[414] that precluded an evicted tenant from raising any defenses that did not rebut the claim for nonpayment of rent was held to comport with due process. The tenants in *Lindsey* sought to assert the landlord's breach of an implied warranty of habitability as a defense to nonpayment.[415] In upholding the Oregon court's dismissal of this pleading, the Court held that the due process clause guarantees that every available defense may be raised.[416] That Oregon did not make the defense available was not unconstitutional since the "Constitution has not federalized the substantive law of landlord-tenant relations . . . ."[417] The holding implies that a state may regulate the timing and substance of defenses.[418] Due process requires only that the defense be available in some fashion before the final adjudication on the merits.[419] In *Lindsey*, this requirement was met because the tenants could bring a separate action to redress the

412. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 69-73 (1962).

413. 405 U.S. 56 (1972).

414. ORE. REV. STAT. § 105.145 (1974).

415. *See, e.g.*, Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). For a discussion of the implied warranty of habitability, see 1973 WASH. U.L.Q. 949.

416. Lindsey v. Normet, 405 U.S. 56, 66 (1972), *quoting* American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932), *and citing* Nickey v. Mississippi, 292 U.S. 393, 396 (1934).

417. 405 U.S. at 68.

418. *Cf.* Clark & Landers, *supra* note 199, at 407-08:

> The essence of the *Lindsey* holding is that the tenant's defenses may not be raised because, as a matter of substantive law, they are not defenses to the landlord's request for possession on the ground of nonpayment of rent. The clear implication of this holding is that if the tenant's claims were defenses, they would have to be considered at the hearing [for forcible entry and detainer].

See also The Supreme Court, 1971 Term, supra note 235, at 91 n.34.

The question turns on the state's recognition of which parties have what property interests. This recognition will not be disturbed by the Supreme Court. Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974).

419. *See* cases cited note 416 *supra*.

uninhabitable conditions of the premises.[420]

A. *Contractual Defenses*

Professor Williston once suggested that the conditional sale was essentially the chattel version of the realty mortgage transaction; the relatively low value of chattel security in the individual case made it desirable to abridge mortgage formalities by providing that the seller retain title.[421] That some courts, prior to the UCC, overemphasized the importance of title and refused to permit affirmative defenses in possessory actions for chattels more clearly reflects the realty concept of independent covenants than it does the contract notion of dependent promises. Enactment of the UCC in all but one state has made the substance of Williston's insight obsolete. Nevertheless, this emphasis on title and analogy to real property rules underlie what is perhaps a crucial premise in the *Mitchell* opinion—that the issues may be narrowed in an action for possession of chattels.

At early common law, mutual promises in a bilateral contract were held to be independent of each other and unconditional. Absent an express condition, one party could obtain judicial enforcement of the other's promise even though the first party had breached the contract.[422] Since the development of the doctrine of constructive conditions of exchange,[423] substantial performance on one side has been considered a condition to the duty of performance on the other side, and a material breach by one party discharges the other.[424] Thus, in an ordinary sales transaction, a material defect of performance, such as failure to deliver or delivery of defective goods, is a good "defense"[425] to an action for the price.[426] In addition to failure of consid-

420. 405 U.S. at 66. The Court also noted that Oregon law recognized certain defenses to the landlord's claim for possession. *Id.* at 66 n.11.

421. 3 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS § 579, at 225 (1948) [hereinafter cited as WILLISTON].

422. *See* 3A A. CORBIN, CONTRACTS §§ 653-57 (1960) [hereinafter cited as CORBIN]; E. FARNSWORTH, W. YOUNG & H. JONES, CASES AND MATERIALS ON CONTRACTS 691-92 (1972).

423. In Kingston v. Preston, 99 Eng. Rep. 436 (K.B. 1773), Lord Mansfield held that mutual promises were dependent and conditional even though absolute in form.

424. *See generally* 3A CORBIN §§ 653-60; L. SIMPSON, LAW OF CONTRACTS §§ 152-63 (1965).

425. "Defense" is used generically in this context to include the various buyer's remedies, *e.g.*, rescission, counterclaim, setoff, recoupment.

426. *See* RESTATEMENT OF CONTRACTS §§ 267-69 (1932); UCC §§ 2-301, -314, -711, -717; J. WHITE & R. SUMMERS, *supra* note 291, at 307 n.3.

eration[427] and breach of warranty,[428] the buyer's "defenses" generally include fraud[429] and, under the UCC, unconscionability,[430] among others.[431]

A "defense" is valuable, of course, only to the extent that it produces a remedy. Historically, the value of buyers' defensive remedies has varied depending on the action brought and the form of the sale. Where the buyer has accepted the goods and the seller has been guilty of some misconduct[432] but claims the purchase price, the common law generally affords election[433] among three remedies: recoupment,[434] counterclaim for damages,[435] or rescission.[436] With im-

427. *See generally* 3A CORBIN §§ 658-60; RESTATEMENT OF CONTRACTS §§ 274, 347 (1932).

428. *See generally* 5 CORBIN §§ 1015, 1119 (1964); J. WHITE & R. SUMMERS, *supra* note 291, at 306-25; 1 WILLISTON §§ 178-257.

429. *See generally* W. PROSSER, *supra* note 95, § 105; RESTATEMENT OF CONTRACTS §§ 470-91 (1932); 3 WILLISTON §§ 623-52.

430. UCC § 2-302; *see* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). *See generally* J. WHITE & R. SUMMERS, *supra* note 291, at 112-33.

431. *E.g.*, statute of frauds, impossibility, marriage, duress, mistake, illegality, usury. *See generally* RESTATEMENT OF CONTRACTS §§ 454-609 (1932). In secured transactions, the most obvious defense is nondefault. Other defenses may be classified generally as those based on defects in the goods and those based on defects in the contract. Martin, *supra* note 277, at 635.

432. "Seller misconduct" refers to seller's failure to perform, breach of warranty, fraudulent misrepresentation, etc.

433. *See, e.g.*, UNIFORM SALES ACT § 69. *But see* UCC § 2-608, Comment 1.

434. *E.g.*, if there is a breach of warranty by the seller, the buyer need not seek rescission, but may keep the goods and set up the breach by way of recoupment in diminution or extinction of the purchase price. *See* Campbell Music Co. v. Singer, 97 A.2d 340 (D.C. Mun. Ct. App. 1953); Desbergers, Ltd. v. Lincoln Labs., Inc., 344 Ill. App. 184, 100 N.E.2d 395 (1951); J.B. Beaird Co. v. Burris Bros., 216 La. 655, 44 So. 2d 693 (1950); Morrow v. Barron Motor Co., 229 Miss. 51, 90 So. 2d 20 (1956); Heuer v. Ulmer, 281 S.W.2d 320 (Mo. Ct. App. 1955). *See generally* 3 WILLISTON §§ 605-06. *See also* note 435 *infra*.

435. "It is fundamental that the breach of an obligation gives rise to a right of action [claim or counterclaim] for damages." 3 WILLISTON § 607, at 339. For the distinction between recoupment and counterclaim, see *id.* § 605.

The UCC has generally followed the common law in allowing the buyer to deduct, in the seller's action for the price, damages resulting from the seller's breach. *See* UCC §§ 2-714, -717; J. WHITE & R. SUMMERS, *supra* note 291, at 306-11.

Regarding the requirement that the buyer give notice of breach within a reasonable time after taking possession, see RESTATEMENT OF CONTRACTS § 412 (1932); UCC §§ 2-607(3)(a), -714(1), UNIFORM SALES ACT § 49.

436. Rescission is the primary remedy for failure of consideration, that is to say, when seller's breach is total even though he may have partly performed. 3A CORBIN §§ 658-59; RESTATEMENT OF CONTRACTS §§ 274, 347 (1932); 3 WILLISTON § 600. Thus, if the seller does not deliver, or delivers goods of a kind both different from

portant but now obsolete exceptions, these remedies are available today whether the transaction was a cash sale or one on secured credit.[437]

Under the same circumstances, if the seller brings an action for possession, the buyer's situation is less clear. Prior to adoption of the UCC, the location of title was crucial. Conventional doctrine was that, in order to bring an action for possession on a contract of absolute sale, the seller must have had title to the goods, or title must have revested in him as a result of rescission.[438] Title residing in the seller was the

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and inferior to that called for in the agreement, the buyer's defense to a claim for the price is to rescind and return or tender the goods delivered. "The further element of mistake or fraud is a proper ground for rescission everywhere." *Id.*; *see* UNIFORM SALES ACT § 69.

The UCC changes the language of this remedy. *See* UCC §§ 2-601, -608, -612. Professors White and Summers suggest that, under the UCC, "rescission" applies only to cases involving fraud, mistake, etc. J. WHITE & R. SUMMERS, *supra* note 291, at 248.

Under the UCC, a finding of unconscionability may operate as a rescission, or produce the same result as recoupment. UCC § 2-302(1); *see* J. WHITE & R. SUMMERS, *supra* note 291, at 112-33.

437. Generally speaking, the conditional buyer may plead in defense to the seller's action for the price any matter that a cash buyer may plead, *e.g.*, failure of consideration and fraud. 78 C.J.S. *Sales* § 613(d) (1952); *cf.* UNIFORM CONDITIONAL SALES ACT § 2. The ordinary buyer's right of action for breach of warranty was not, however, uniformly recognized in conditional sales because warranty rights are collateral to complete sale and passage of title. Taking the view that the conditional buyer had no independent right of action for warranty damages, courts usually held that there could be no recoupment or counterclaim by the conditional buyer in the seller's action for the price. *But cf.* Starrett Operating Serv. v. Baker, 70 F.2d 780, 781 (D.C. Cir. 1934). Although early in this century it was apparently the general view, with substantial exceptions, that the conditional buyer could not as defendant plead breach of warranty, the trend of the decisions, accelerated by modern procedural and statutory reform and supported by the commentators, was in the direction of permitting such "defenses." *See, e.g.*, Peuser v. Marsh, 167 App. Div. 604, 153 N.Y.S. 381 (1915); Pullen v. Johnson, 67 S.D. 173, 290 N.W. 488 (1940); U.S. Mach. Co. v. International Metals Dev., Inc., 74 Cal. App. 2d 5, 168 P.2d 37 (Dist. Ct. App. 1946); *cf.* Starrett Operating Serv. v. Baker, *supra*. *See generally* Annot., 130 A.L.R. 753, 761-62 (1941); Annot., 48 A.L.R. 969, 970-73, 983 (1927); 3 WILLISTON § 607a.

Since the UCC deemphasizes the location of title, the pre-UCC rationale for cutting off warranty defenses in secured transactions vanishes. Moreover, the UCC's conceptual bifurcation of the sale and security elements of a secured transaction supports the same conclusion. *See* UCC §§ 2-102, -401, 9-102, -202. In an action for the price on a secured transaction, there is presently no reason why "defenses" available to the buyer should be different from those available when the sale is absolute. *Cf.* FED. R. CIV. P. 8, 12, 13; 2 G. GILMORE, *supra* note 176, at 1091.

438. *See, e.g.*, Keeler v. General Prods., Inc., 137 Conn. 247, 250, 75 A.2d 486, 487 (1950); Ryder & Brown Co. v. Lissberger, 300 Mass. 438, 15 N.E.2d 441 (1938); Aetna Ins. Co. v. Weatherford, 370 S.W.2d 100, 103 (Tex. Civ. App. 1963); 3 WILLISTON § 608; *cf.* J. COBBEY, *supra* note 14, § 250.

distinctive characteristic of a contract of conditional sale.[439] In theory, therefore, the absolute seller whose contract was repudiated and the conditional seller whose buyer was in default were entitled to possession of the goods.[440]

Other than the customary general denial,[441] which has always been permitted in any action, the matters that the buyer could raise by way of defense to judicial repossession, usually replevin, varied with the jurisdiction.[442] Some courts held that the buyer was permitted to interpose matters questioning the seller's title, right to possession, or buyer's default, and that a breach of contract by the seller would not defeat the repossession.[443] A possibly larger number of courts refused to permit the buyer to defend, or recoup or counterclaim for damages, by arguing breach of warranty.[444] In most jurisdictions, however, either by rule or exception, buyers were permitted to interpose "defenses" either to defeat the possessory action or for recovery of damages.[445] Commonly in those jurisdictions permitting recoupment or counterclaim, if the damages would be equal to or exceed the amount due on the contract, the possessory action could be defeated.[446]

The UCC contains no provision that necessarily modifies the rights of

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439. *See* note 437 *supra.*

440. *See, e.g.,* UNIFORM CONDITIONAL SALES ACT § 16 (conditional sales); 69 AM. JUR. 2D *Secured Transactions* §§ 583-84 (1973) (conditional sales); 67 AM. JUR. 2D *Sales* § 571 (1973) (absolute sales); 2 G. GILMORE, *supra* note 176, at 1213 (conditional sales); cases cited note 438 *supra* (absolute sales).

441. *See* 66 AM. JUR. 2D *Replevin* §§ 83-84 (1973); 77 C.J.S. *Replevin* §§ 154-59 (1952); Annot., 194 A.L.R. 1154, 1157 (1936).

442. *See generally* 69 AM. JUR. 2D *Secured Transactions* § 586 (1973); 78 C.J.S. *Sales* § 420 (1952) (absolute sales); 3 WILLISTON § 607a (conditional sales); Annot., 151 A.L.R. 520 (1944) (replevin, counterclaim, and setoff); Annot., 130 A.L.R. 753 (1941) (conditional sales, breach of warranty); Annot., 48 A.L.R. 969 (1927) (same).

443. *See, e.g.,* Mills Novelty Co. v. Transeau, 196 A. 187 (Del. Super. Ct. 1937); Salant & Salant v. Richfield Shirt Co., 29 Pa. Dist. 651 (Dist. Ct. 1919); Beck v. Lee, 52 Utah 31, 172 P. 686 (1918).

444. *See* Annot., 130 A.L.R. 753, 757-58 (1941); Annot., 48 A.L.R. 969, 973-75 (1927).

445. *See, e.g.,* Stevens v. Whalen, 95 Ark. 488, 129 S.W. 1081 (1910); U.S. Mach. Co. v. International Metals Dev., Inc., 74 Cal. App. 2d 5, 168 P.2d 37 (Dist. Ct. App. 1946); W.H. Bintz Co. v. Mueggler, 65 Idaho 760, 154 P.2d 513 (1945); Capitol Refrig. Co. v. Schmidt, 120 N.J.L. 433, 200 A. 552 (Sup. Ct. 1938), *aff'd per curiam,* 121 N.J.L. 581, 3 A.2d 603 (Ct. Err. & App. 1939); Peuser v. Marsh, 218 N.Y. 505, 113 N.E. 494 (1916); Millenson v. Lamp, 99 W. Va. 539, 130 S.E. 137 (1925).

446. *See, e.g.,* Riss & Co. v. Wallace, 350 Mo. 1208, 171 S.W.2d 641 (1943); Apple v. Edwards, 92 Mont. 524, 16 P.2d 700 (1932).

buyers or sellers vis-à-vis judicial repossession.[447] Nevertheless, the Code's deemphasis of the location of title and the increasing acceptance by the states of modern procedural systems, which in most cases permit and sometimes require the assertion of affirmative defenses and counterclaims,[448] will quite clearly curtail the few instances in which the buyer has been forced to bring a separate action if he is to have any relief at all. On this analysis, the rule under which issues were narrowed in *Lindsey* is clearly distinguishable from the rule applicable in personal property, consumer contract disputes in UCC states.

B. *Consumer Defenses After* Mitchell

As applied in *Mitchell*,[449] the narrowed-issue technique undercuts, sub silentio, two procedural safeguards announced in *Fuentes*. First, the thrust of *Fuentes* was to protect the defaulting debtor from losing his property absent a showing of the probable validity of the creditor's claim.[450] Although the content of a probably valid claim was left open,[451] the Court recognized that defenses on the contract might be raised.[452] The Louisiana hearing procedure, however, occurs after the seizure and provides no forum for debtor defenses.[453]

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447. There is no repossession provision in article 2 of the UCC. *See* UCC §§ 1-103, 9-501, -503; *cf. id.* § 2-507.

448. *See, e.g.*, FED. R. CIV. P. 8, 13.

449. 416 U.S. at 607.

450. 407 U.S. at 97, *quoting* Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

451. 407 U.S. at 96-97 (footnote omitted):

> The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication.

452. *Id.* at 87; Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring). One court has followed the suggestion in *Fuentes*:

> The court realizes that the details of *Fuentes* hearings were left to state legislation . . . and that states may set up procedures in particular types of cases which preclude defendants from raising certain affirmative defenses, *Lindsey v. Normet* . . . . But this court is of the opinion that if the pre-seizure hearing is to be fair (in the sense of allowing both sides an opportunity to present their available, good-faith legal arguments) and to provide a real test (in the sense of allowing the court to consider *all* relevant factual and legal matters before making a decision), such a hearing must include the right to raise affirmative defenses. Absent some limiting legislation, preclusion of affirmative defenses would turn the hearing into a proceeding only slightly more fair than an *ex parte* appearance by plaintiff, as defendant would be unduly restricted to disproof of plaintiff's assertions, when valid affirmative defenses may exist which could entitle defendant to possession until final adjudication.

Computer Leasing Co. v. Computing & Software, Inc., 66 Ohio Op. 2d 44, 45, 306 N.E.2d 191, 193 (C.P. Franklin County 1973) (emphasis original).

453. Definitional confusion was evident in oral argument before the Court in

The writ of sequestration in Louisiana is not strictly analogous to the common law replevin action, the conventional judicial repossession device in UCC states.[454] Prejudgment seizure under both devices is considered conservatory. Seizure under a writ of replevin is a remedial element of the underlying action of replevin.[455] Although ancillary to the main demand for relief, the Louisiana sequestration procedure is conceptually more self-contained.[456] Unlike a writ of replevin, sequestration may stand or fall without affecting the trial on the merits of the underlying dispute. If the seller obtains a writ of sequestration and causes the goods to be seized, Louisiana permits the buyer to contest the seizure by filing a motion to dissolve without waiting for trial.[457] The ensuing summary proceeding is a "mini-trial" for possession pending final adjudication. All that is tested, however, is the strength of the seller's sequestration petition. The buyer may not interpose defenses other than those that controvert the grounds on which the writ issued.[458]

In a sense, the Louisiana motion to dissolve can be viewed as a compromise between the procedure for possession of realty upheld in *Lindsey* and the mini-trial on the merits apparently envisioned in *Fuentes*. In this mini-trial, the debtor may defeat the seizure if he can raise a reasonable doubt that the creditor will prevail on the merits.[459]

Mitchell.

> Mr. Justice White: "What is the Louisiana standard at a hearing to quash the seizure? Probable cause? Is it comparable to a preliminary hearing?"
>
> Mr. O'Sullivan [creditor's counsel]: "There is an inqury [*sic*] into the probable validity of the claim."

42 U.S.L.W. 3346 (U.S. Dec. 11, 1973).

454. Modern replevin is "common law" only in a generic sense; in most states it is now statutory. *See* note 291 *supra.*

455. *See generally* 66 AM. JUR. 2D *Replevin* §§ 67-71 (1973); J. COBBEY, *supra* note 14; D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 5.13 (1973); note 291 *supra.*

456. *See* LA. CODE CIV. PRO. ANN. arts. 3501-14, 3571-76 (West 1961). *See generally* Johnson, *supra* note 1.

457. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

458. *Id.* & Comments (a)-(f); Johnson, *supra* note 1, at 25-26; *see, e.g.*, Oil City Iron Works v. S. Bender Supply Co., 147 La. 450, 85 So. 201 (1920); Young v. Guess & Swanson, 115 La. 230, 38 So. 975 (1905); Tucker & Schonekas v. Dohmann Chev., Inc., 260 So. 2d 99 (La. Ct. App. 1972). *See also* Martin, *supra* note 277, at 636:

> [S]urely [the defense of nondefault] is one of the least important for which to hold a hearing. Either [the debtor] has or has not [defaulted], and the matter ought to be settled by quick reference to the records. The more important defenses, such as breach of warranty, . . . need hearings for resolution . . . .

459. *See* 407 U.S. at 87.

Louisiana's notions about title[460] and its modern procedural rules[461] ensure that the debtor will have an opportunity to interpose defenses at some time before possession is finally adjudicated. Nevertheless, the grounds on which the sequestration may be dissolved are narrow.[462] The debtor will be unable to defeat the sequestration unless the creditor is unable to prove his grounds—the debtor's default, the existence of a lien or privilege, debtor's possession, and the debtor's power to conceal, dispose of, or waste the collateral. In the typical case in which the debtor can prevail on the merits, his defense will be breach of warranty, and the existence of prima facie grounds for the writ will be a foregone conclusion. The debtor who has withheld installment payments in a self-help attempt to obtain repair or other relief from the seller for defective goods will find the motion to dissolve entirely useless. Moreover, the debtor with a valid claim of fraud, duress, or a Truth-in-Lending violation is silenced until the merits are reached.[463] Pending final adjudication on the merits, he has no chance to reclaim the property other than by posting a release bond.[464] Even if the explicit refusal in *Mitchell* to follow the *Fuentes* preseizure hearing requirement was justifiable, the Court's failure to recognize the limited nature of the postseizure hearing is very difficult to support.

Secondly, *Fuentes* cast doubt on the propriety of compelling a debtor to bring an action to reclaim his property.[465] The *Fuentes* majority remarked that a constitutional wrong could not be "undone" by allowing the debtor another day in court.[466] The Court in *Mitchell* made no mention of this principle. Rather, it pointed out that the availability of an immediate postseizure hearing was a safeguard for the debtor.[467]

460. *See* text accompanying note 295 *supra*.

461. Louisiana borrows heavily from the Federal Rules of Civil Procedure. *See* LA. CODE CIV. PRO. ANN. arts. 1003-06, 1061-65 (West 1960, Supp. 1974).

462. *Id.* arts. 3506, 3571 (West 1961).

463. Compare Justice Douglas' careful description of the Wisconsin procedure that unconstitutionally deprived the debtor of his property "without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise." Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).

464. LA. CODE CIV. PRO. ANN. art. 3507 (West 1961); Johnson, *supra* note 1, at 24-25.

465. *See* 407 U.S. at 80-84.

466. *Id.* at 82:

> But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

See also Stanley v. Illinois, 405 U.S. 645, 647 (1972).

467. 416 U.S. at 616-18.

As noted, however, the Louisiana debtor is protected only to the extent that he is permitted to attack the face of the petition for sequestration. He may not contest the contractual dimensions of the creditor's claim until a later date.[468]

The narrowed-issue device also taints the *Mitchell* Court's balancing-of-interests analysis. Within the narrow issues, the debtor has only one interest, continued possession. His interests in freedom from fraudulent and oppressive contract terms and shoddy merchandise, expressible only by affirmative defense, are not cognizable under the Court's approach. To say that the debtor may be subjected to "limited hardship"[469] ignores the realities of consumer installment sales. Balancing interests is not meaningful if the important interests are artificially eliminated.

VI. CONCLUSION

The question most often asked about *Mitchell* is whether it overruled *Fuentes*. Insofar as *Fuentes* established a rule of general and certain application in the consumer context—that due process requires notice and an opportunity to be heard prior to a taking of any significant property interest—inescapably the answer is yes.[470] The pains taken by the majority to distinguish *Fuentes*,[471] however, prompt the question: Why was *Fuentes* not explicitly overruled? At oral argument, Mr. Justice Blackmun inquired of respondent's counsel, "Are you asking that *Fuentes* be overruled?" The reply was, "No sir. Louisiana law [is] distinguishable . . . ."[472] Justice Blackmun later asked, "Why don't you urge reversal of *Fuentes*? It was a four to three decision." The reply of counsel was, "Because we are disturbed that so many courts have acted in response to and in reliance on *Fuentes*."[473] It seems

468. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).

469. 416 U.S. at 618-19.

470. In Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974), a post-*Mitchell* case, the court upheld Florida's Mechanics' Lien Law and said that its "decision [was] made with the realization that the once ominous spectre of the *Sniadach-Fuentes* doctrine has faded into the past." *Id.* at 432 (footnotes omitted). Woods v. Tennessee, 378 F. Supp. 1364 (W.D. Tenn. 1974), upheld a repossession statute enacted "in response to" *Fuentes*, but which permitted seizure before notice and hearing. The debtor's "counsel . . . conceded, in effect, that . . . *Mitchell* does require a holding that the involved Tennessee statute is constitutional on its face." *Id.* at 1365. The court agreed.

471. *See* notes 42-90 *supra* and accompanying text.

472. 42 U.S.L.W. 3346-47 (U.S. Dec. 11, 1973).

473. *Id.* at 3347.

a fair inference, moreover, that the majority may be less certain of the surefootedness of its balancing analysis than appears from Justice White's opinion. If this observation is accurate, one should not be surprised at the tentativeness of the conclusion of one recent commentator: "It is evident that *Mitchell*, at least tacitly, has overruled *Fuentes* in part."[474] Two articles published since the *Mitchell* opinion point out that the result of *Mitchell*'s reasoning will likely be increased confusion in the lower courts.[475] The cases decided since *Mitchell* confirm these predictions.

In *Singer Co. v. Gardner*,[476] decided two and a half months after *Mitchell*, the New Jersey Supreme Court invalidated its state's replevin statute, as follows: "It does not seem debatable that insofar as our statute deviates from [the *Fuentes*] standard, it too is unconstitutional."[477] *Mitchell* was mentioned only in the dissenting opinion as calling into question the viability of *Fuentes*.[478] In *Garcia v. Krausse*,[479] a federal district court in Texas invalidated that state's sequestration provisions because they

> fail[ed] to comply with prior notice and hearing requirements of *Fuentes* and [did] not measure up to the standards approved by the Supreme Court in *Mitchell*.[480]

Although the Texas procedure provided that judges or court clerks were authorized to issue writs, the court emphasized the "lack of judicial administration and supervision under the Texas law."[481] The same deficiency was held inconsequential in North Dakota, however, in *Guzman v. Western State Bank*.[482] In *Guzman*, the federal district court upheld North Dakota's attachment statute even though the seizure order was issued by the clerk and the debtor was dispossessed without prior notice and hearing. Ironically, the court cited Justice Stewart's dissent in *Mitchell* for the proposition that there is no consti-

474. Note, Mitchell v. W.T. Grant Co.—*The Repossession of* Fuentes, 5 MEMPHIS ST. U.L. REV. 74, 87 (1974).

475. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 82 (1974); Note, *supra* note 474, at 89.

476. 65 N.J. 403, 323 A.2d 457 (1974).

477. *Id.* at 415, 323 A.2d at 464.

478. *Id.* at 422, 323 A.2d at 468.

479. 380 F. Supp. 1254 (S.D. Tex. 1974).

480. *Id.* at 1259.

481. *Id.*

482. 381 F. Supp. 1262 (D.N.D. 1974), *vacated*, No. 74-1740 (8th Cir., Mar. 11, 1975).

tutional significance in whether a judge or a clerk signs the writ;[483] the court concluded that the North Dakota procedure "gives the same broad constitutional protection to the debtor as that provided by the Louisiana statute."[484] To highlight these anomalous results, it is arguable that, in substance, the closer statutory analogies are between the Texas and Louisiana statutes, on the one hand, and the North Dakota, Pennsylvania, and Florida statutes, on the other hand. None of the courts in the post-*Mitchell* cases embarked on a balancing analysis.

On January 22, 1975, the Supreme Court added a curious case to the *Sniadach-Fuentes-Mitchell* series, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[485] In an opinion joined by the four-Justice *Fuentes* majority, with Justice Powell concurring in the judgment, Justice White reversed the Georgia Supreme Court and struck down Georgia's prejudgment garnishment statute. Under the Georgia provision, a typical garnishment statute exempting wages from impoundment, Di-Chem filed an affidavit before a superior court clerk asserting that North Georgia's debt of over $51,000 was due and owing and that the corporate creditor had " 'reason to apprehend the loss of said sum or part thereof unless process of Garnishment issues.' "[486] The clerk issued process, and the debtor's bank account was garnished without prior notice. The corporate debtor filed a release bond three days later and subsequently moved to dismiss the writ and discharge its bond on the ground that the statutory procedure was unconstitutional.[487]

Upholding the statute, the Georgia Supreme Court[488] reasoned that *Sniadach* was not controlling, for it had merely "carve[d] out an exception for wage earners from . . . the general rule of legality of garnishment statutes."[489] Justice White, however, said that "[t]his approach failed to take account of *Fuentes* . . . ."[490] The Georgia statute was said to have "none of the saving characteristics of the Louisiana statute."[491] The affidavit contained only conclusory allega-

483. *Id.* at 1265-66; *see* notes 123-43 *supra* and accompanying text.
484. 381 F. Supp. at 1266.
485. 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975).
486. *Id.* at 4193, *quoting* Affidavit of Respondent Di-Chem, Inc.
487. *Id.*
488. North Ga. Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 201 S.E.2d 321 (1973).
489. *Id.* at 263-64, 201 S.E.2d at 323.
490. 43 U.S.L.W. at 4193.
491. *Id.* at 4194.

tions and was issued without judicial participation; moreover, there was no provision for an early hearing at which the creditor would have to show probable cause.[492] Concluding his opinion on a paradoxical note, Mr. Justice White said:

> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error.[493]

Although he relied primarily on the same distinction drawn by Justice White, Justice Powell declined to join the majority opinion because "it sweeps more broadly than is necessary and appears to resuscitate *Fuentes* . . . ."[494] In footnotes, however, Justice Powell voiced his view that *Sniadach*'s wage emphasis made it only "peripherally relevant" and his discord with the "Court's suggestion that the Due Process Clause might require that a *judicial* officer issue the writ of garnishment."[495]

Justice Blackmun dissented, joined by Justice Rehnquist and, in part, by the Chief Justice. Observing that the Court had "endeavor[ed] to say as little as possible in explaining just why the Supreme Court of Georgia [was] being reversed,"[496] Justice Blackmun pursued two themes. First, he argued that *Fuentes* should not have been decided on a "4-3 vote by a bobtailed court" and that the result of *Fuentes* is that

> we [are] immersed in confusion, with *Fuentes* one way, *Mitchell* another, and now this case . . . [leaving] other States uncertain as to whether their own . . . statutes pass constitutional muster with a wavering tribunal off in Washington, D.C.[497]

Secondly, Justice Blackmun thought that "*Sniadach* . . . concerned and reeks of wages" and observed correctly that the debtor North Georgia was "no wage earner."[498] Georgia's requirements that suit be

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492. *Id.*

493. *Id.* This statement seems at variance with Justice White's finding in *Mitchell*: "[W]e remain unconvinced that the impact on the debtor . . . overrides his inability to make the creditor whole . . . ." 416 U.S. at 610.

494. 43 U.S.L.W. at 4194.

495. *Id.* at 4195 nn. 2 & 3 (emphasis original).

496. *Id.* at 4196.

497. *Id.* at 4196, 4197.

498. *Id.* at 4197.

filed, double bond be posted, and apprehension of loss be sworn were said to be adequate to protect a corporate debtor.[499]

The conclusions to be drawn from *North Georgia* regarding due process are unclear. Justice White's reasoning departs significantly from that developed in his *Fuentes* dissent, his concurrence in *Arnett*,[500] and the majority opinion in *Mitchell*.[501] No attempt was made to balance the interests involved in *North Georgia*, perhaps because of the case's similarity to *Sniadach*.[502] As Justice White pointed out in *Mitchell*, *Sniadach* could be distinguished from *Mitchell* in that "[t]he suing creditor . . . had no prior interest in the property attached . . . ."[503] In *Arnett*, however, Justice White did take a balancing approach to *Sniadach*.[504]

The approach taken in *North Georgia* appears to be one of matching the safeguards found adequate in *Mitchell*.[505] Since the Georgia statute did not match up to the safeguards in *Mitchell*, it was struck down.[506] If Georgia were to reenact the statute with the safeguards employed in Orleans Parish, Louisiana, presumably it would be upheld.

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499. *Id.* at 4197-98. Chief Justice Burger concurred in this second theme.

500. Arnett v. Kennedy, 416 U.S. 134, 190-93 (1974).

501. *See* notes 61, 68, 89 *supra* and accompanying text.

502. *But see* 43 U.S.L.W. at 4195 (Powell, J., concurring); *id.* at 4197 (Blackmun, J., dissenting).

503. 416 U.S. at 614.

504. *See* Arnett v. Kennedy, 416 U.S. 134, 190-93 (1974); note 68 *supra*.

505. The Court's first reference to *Fuentes*, 43 U.S.L.W. at 4193, is confusing. At first glance, one might suppose that the Court is urging a two-step analysis: the statute is defective under *Fuentes*, and it is not "saved" by *Mitchell*. The reference to *Fuentes*, however, serves no purpose, since under *Fuentes* any statute that does not operate in "extraordinary situations" and does not provide for preseizure notice and hearing presumably will violate due process. Justice White's reference to *Fuentes* is idiosyncratic. In both *Mitchell* and *North Georgia*, he read *Fuentes* as requiring notice, opportunity for a hearing, "or other safeguard." 43 U.S.L.W. at 4193; *see* 416 U.S. at 615 (*Fuentes* struck down statutes because they did not provide for notice, hearing, or "judicial participation"). It is difficult to reconcile the *Fuentes* opinion with Justice White's reading of it. *See also* notes 59-82 *supra* and accompanying text.

The majority's second reference to *Fuentes* may be more defensible: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 43 U.S.L.W. at 4194. If this is taken to mean that due process always applies in some manner to a taking of property, the statement is consistent with precedent. If taken to mean that due process applies in the same manner to all takings of property, it is not so consistent. The latter reading does not recognize any balance of interests, even though the broad rule of *Fuentes* does so in its recognition of "extraordinary situations." *See* 407 U.S. at 90-92.

506. 43 U.S.L.W. at 4194.

North Georgia appears to make little new law. *North Georgia* and *Calero-Toledo*[507] do demonstrate some viability for *Fuentes*, even if it no longer represents a rule of general and certain application. The relevant inquiry then is for what propositions does *Fuentes* stand. *Calero-Toledo* verified *Fuentes* insofar as the latter case permitted taking property in extraordinary situations without prior notice or hearing.[508] If Justice White's opinion in *North Georgia* is read carefully and in context, however, it seems to attribute to *Fuentes* little that could not have been attributed to other cases.

Perhaps the best and safest inference to be drawn from *North Georgia* is that it is a signal to those who would return to the halcyon days before the Court decided *Sniadach*. For those who inferred that *Fuentes* was overruled in toto by *Mitchell* and viewed the latter case as a first step on the road to dismembering *Sniadach* and others, Justice White may be setting one due process boundary: in addition to expressing the extraordinary-circumstances rule, *Fuentes* stands for the extension of *Sniadach* beyond wages.[509] Therefore, the boundary set is that "*any* significant taking of property by the State"[510] must be accompa-

507. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

508. *See* notes 83-86 *supra* and accompanying text.

509. *See* 407 U.S. at 88-90. This rationale may explain Justice White's statement that the Georgia Court's reasoning, based on the old case of McKay v. McInnes, 279 U.S. 820 (1929), and the proposition that *Sniadach* applied only to except wages, 231 Ga. at 263-64, 201 S.E.2d at 323, failed to take account of *Fuentes*. Justice Powell appears to agree with this analysis, for, after pointing out the Court's past approval of prejudgment remedies in *McKay*, *Coffin*, and *Ownbey*, he said:

> But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests.

43 U.S.L.W. at 4195, *citing* Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970), *and* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 613-15 (1974). Dissenting in *North Georgia*, Justice Blackmun, joined in this part of the opinion by Chief Justice Burger, said:

> *Sniadach* should be allowed to remain in its natural environment—wages—and not be expanded to arm's-length relationships between business enterprises of such financial consequence . . . .
>
> . . . [P]erhaps *Sniadach* for a time was . . . expanded . . . by the implications and overtones of *Fuentes*. But *Mitchell* came along . . . . *Sniadach*'s expansion was surely less under *Mitchell* than it might have appeared to be under *Fuentes*.

43 U.S.L.W. at 4196.

510. 407 U.S. at 86 (emphasis added). Note that the last three words of the quoted phrase do not say "under the state's aegis." *See also* Jackson v. Metropolitan Edison Co., 95 S. Ct. 449 (1974) (summary cutoff of utility service upheld; no state action); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir.

nied by prior notice and an opportunity to be heard or by some "other safeguard against mistaken repossession . . . ."[511] Where there is no prior notice and hearing, whether *Mitchell* represents the other boundary—that is, whether procedural safeguards affording the debtor less protection than those in Louisiana are sufficient—remains for litigation.[512] A disappointing feature of the post-*Mitchell* cases, however, is that, in spite of the emphasis on interest analysis in *Fuentes* and *Mitchell*, neither the lower courts nor the Supreme Court in *North Georgia* embarked on a balancing analysis.

Given the history of cases before and after *Mitchell* and the proposition that what a rule is does not necessarily follow from the conclusion of what it is not, the question posed at the outset of this Part—whether *Fuentes* is overruled by *Mitchell*—seems largely irrelevant. In the present state of affairs, in which each party can cite a Supreme Court case in his favor and distinguish his opponent's Supreme Court case to his heart's content, the safest and surest approach for a court is a balancing analysis that fully and thoroughly accounts for all the interests involved.

1973), *cert. denied*, 95 S. Ct. 325 (1974) (UCC self-help repossession upheld; no state action); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues*, 26 HASTINGS L.J. 383, 387-88, 396-97 (1974); note 205 *supra*. *But see* Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974) (UCC self-help repossession unconstitutional; state action).

511. 43 U.S.L.W. at 4193.

512. Based on the *ratio decidendi* of *North Georgia*, it is quite arguable that, were the statutes in question in *Fuentes* again before the Court, they would again be held violative of the fourteenth amendment. Debtors, nervous since *Mitchell*, might breathe easier were they reminded that the usual provisional remedy statute in common law states bears a greater resemblance to the *Fuentes* statutes than to the *Mitchell* provisions. Nevertheless, if the opinions are reread and the Justices recounted, a 5-4 decision upholding the next statute challenged would not be surprising.