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Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor

Spencer Neth

One of the most effective remedies that secured creditors have had against defaulting consumer debtors has been to replevy the goods securing the debt. The Supreme Court in a recent decision, however, held that goods could not be replevied in a consumer transaction unless the debtor was given notice and an opportunity for a hearing. After discussing typical replevin procedures and the recent Supreme Court cases that have affected those procedures, the author goes on to suggest a procedure that would satisfy both the requirements of due process and the fears of creditors that such a hearing might be prohibitively expensive. He also examines the requirements of due process when the creditor recovers the goods through self-help rather than by replevin. The author concludes that even if a hearing is not constitutionally required in self-help repossession, legislative judgment should provide for one, given the necessity for a hearing in replevin.

I. INTRODUCTION

CONSUMER CREDIT HAS REACHED enormous proportions, ironically at a time when personal income and wealth are greater than ever before in the history of mankind.¹ Consumer credit now outstanding in the United States exceeds \$112 billion,

or more than \$500 for every man, woman, and child.² This scale of indebtedness is a relatively recent development. Prior to the turn of the century consumer credit was negligible, with most of the increase taking place since World War II.³

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A number of factors account for this dramatic economic and social phenomenon: the develop-

¹ "Consumer credit" as used here does not include first mortgage loans commonly used to finance residential real estate, or transactions that for limited purposes are considered credit transactions, e.g., goods paid for by check or goods delivered prior to billing. Most of the problems discussed here arise out of installment credit transactions.

² 58 FED. RES. BULL. A56 (1972). The figure is as of May 1972. At the end of World War I outstanding consumer credit was less than one billion dollars.

³ Compare the figures below showing total consumer installment credit at varying intervals:

ment of durable and expensive consumer goods, an increase in personal incomes which makes repayment possible, a change in social morals and mores, a growing appreciation among businessmen and economists of the profit potential in consumer credit, and perhaps in some measure the changing legal framework in which credit is extended and collected.

From the creditor's point of view, the law relating to creditor's rights and remedies has improved since the turn of the century, particularly with respect to personal property security devices.⁴ Recently, however, there have been a number of changes and proposals for change which would significantly affect the creditor's remedies. Although it is difficult, if not impossible, to determine the individual impact of the various changes in the law, we should expect that any significant general erosion of creditor remedies would have the following effects: to restrict the availability of credit, primarily to those considered marginal risks; to increase the cost of credit, although not to the same extent for all classes of debtors; to reduce the profits of those involved in extending or profiting from consumer credit; or most likely some combination of these three.⁵ Although the point is debatable,⁶ I shall assume that any of these effects would be undesirable.

One of these besieged creditors' remedies — the repossession of consumer goods by secured creditors — is the subject of this article. This past summer the United States Supreme Court, resolv-

1929	\$ 3.2 billion
1939	4.5 billion
1950	14.7 billion
1959	39.2 billion
1962	48.2 billion

McCracken, Mao & Fricke, *Consumer Installment Credit & Public Policy*, 17 MICH. BUS. STUDIES, 1, 7 (1965).

⁴ The Uniform Conditional Sales Act and other conditional sales acts were generally a significant improvement over pre-existing common law conditional sales doctrine and were more suitable for consumer goods than the chattel mortgage had been. See Bogert, *The Proposed Uniform Conditional Sales Act*, 3 CORNELL L.Q. 1, 1-2 (1917). Article 9 of the Uniform Commercial Code, adopted in most states during the early 1960's, clarified and streamlined much of the law of personal property security interests. In addition, the small loan laws and other exceptions made to the general usury law contributed greatly to the expanded availability of consumer credit in the last seventy years. See generally Benfield, *Money, Mortgages, and Migraine — The Usury Headache*, 19 CASE W. RES. L. REV. 819 (1968).

⁵ Kripke, *Consumer Credit Legislation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 478-486 (1968).

⁶ For a discussion of the policy considerations, see generally McCracken, Mao & Fricke, *supra* note 3. See also *Randone v. App. Dep't*, 5 Cal. 3d 536, 556, 488 P.2d 13, 26, 96 Cal. Rptr. 709, 722 (1971).

ing divergent decisions in the lower courts,⁷ in *Fuentes v. Shevin*,⁸ held unconstitutional the commonplace replevin method of repossession. *Fuentes* came only three years after the Court's decision in *Sniadach v. Family Finance Corp.*⁹ which held that prejudgment garnishment of wages, when made effective without notice and prior to an opportunity for a hearing, violated the due process clause of the fourteenth amendment to the United States Constitution. Predictably, *Sniadach* was seized summarily by debtors' attorneys, especially Legal Services attorneys from the Office of Economic Opportunity,¹⁰ as a weapon to attack a wide range of the standard creditor remedies including the summary repossession of consumer goods by means of the ancient writ of replevin and by self-help repossession.¹¹

Fuentes has left open a number of questions and the legal implications and practical consequences of the decision are worthy of extensive discussion. For instance, to what extent are the creditors' remedies currently found in the statute books and in the standard form contracts constitutional? If the remedies traditionally available to secured creditors are in whole or in part unconstitutional, what are creditors and their attorneys to do, besides throw up their hands in despair? And how should the American Law Institute, the National Conference of Commissioners on Uniform State Law,

⁷ *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); *Hall v. Stone*, 229 Ga. 96, 189 S.E.2d 402 (1972); and *Cedar Rapids Engineering Co. v. Haenelt*, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. 1971) held the procedure unconstitutional prior to *Fuentes* as did several unreported decisions, e.g., *Paldon Repossession Bureau v. Oberg*, No. 37281 (Wash. Dist. Justice Ct. 1972). *Contra*, *Brunswick Corp. v. J. & P., Inc.*, 424 F.2d 100 (10th Cir. 1970); *Wheeler v. Adams Co.*, 322 F. Supp. 645 (D. Md. 1971); *Epps v. Cortese*, 326 F. Supp. (E.D. Pa. 1971); *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970); and *Almor Furniture and Appliances, Inc. v. MacMillan*, 116 N.J. Super. 65, 280 A.2d 862 (1971). See also *Lawson v. Mantell*, 62 Misc. 2d 307, 306 N.Y.S.2d 317 (Sup. Ct. 1969) denying debtor's motion for preliminary injunction, permanent injunction granted *sub nom.*, *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970). Most of these cases are discussed in Annot., 45 A.L.R.3d 1233 (1972) written largely prior to *Fuentes*.

⁸ 407 U.S. 67 (1972), *rev'g* *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971) and *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970).

⁹ 395 U.S. 337 (1969).

¹⁰ In a high percentage of the cases which apply *Sniadach*, Legal Services attorneys represented the consumer. The impact of the OEO Legal Services Program upon the development of the law is especially impressive in the area of consumer protection.

¹¹ *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971) and *Greene v. First Nat'l Exch. Bank of Va.*, CCH SEC. TRANS. GUIDE ¶ 51,930 (W.D. Va. 1972) (post *Fuentes*) held self-help repossession constitutional. *Contra*, *Adams v. Egley*, 334 F. Supp. 614 (N.D. Cal. 1972).

Ralph Nader, law reformers, and do-gooders generally respond to this challenge?

While lawyers and judges have been attempting to fit old remedies into new constitutional bottles, the reformers and the consumer advocates have been busy drafting new model statutes and revising old ones in a manner that would significantly alter the traditional rights of the secured creditor. A number of states have recently adopted reform consumer credit legislation which modifies the remedies of secured creditors, and virtually all of the remaining states either have considered or are currently considering such reform legislation.

After reviewing the variety of state laws affecting the secured creditor's remedies in consumer transactions, this article will attempt to describe the impact of recent Supreme Court decisions on these remedies, and then propose legislative solutions to many of the possible constitutional problems that have been raised.

II. THE REMEDIES AND PROCEDURES HERETOFORE AVAILABLE TO SECURED CREDITORS

A. *The Uniform Commercial Code*

Part 5 of Article 9 of the Uniform Commercial Code (UCC), law in every state but Louisiana, sets out the remedies of a secured creditor and the procedures for exercising those remedies. The UCC's remedies and procedures are supplanted, in whole or in part, with respect to security interests in consumer goods in a number of states by various statutes such as retail installment sales acts or, in six states, by the Uniform Consumer Credit Code.¹²

The UCC provides that in the event of default the secured party may take possession of the collateral without the aid of judicial process "if this can be done without breach of the peace."¹³ Independent of the Commercial Code, nearly all security agreements, consumer and otherwise, contain language which seems to give the creditor the right to repossess through self-help in the event of default. Frequently the security agreement will go beyond the Code to provide that the creditor is entitled to enter the debtor's premises at any time to remove the collateral.

Alternatively, the creditor can "proceed by action." That is, the

¹² The *Uniform Consumer Credit Code* [hereinafter cited as UCCC] has been adopted by Colorado, Idaho, Indiana, Oklahoma, Utah, and Wyoming.

¹³ UCC § 9-503.

creditor may use any appropriate local judicial procedure for the recovery of personal property — usually a replevin action or its equivalent.¹⁴ Replevin, historically¹⁵ and under the practice current in most states, typically begins with seizure of the goods by a sheriff or comparable official upon the filing of a complaint, the filing of a bond, and sometimes a sworn affidavit establishing the creditor's right to repossess. The debtor usually can recover the goods pending a hearing on the merits by posting a counterbond, though this is seldom done.¹⁶ The sheriff, having taken possession of the goods, will turn them over to the secured creditor, although the statute often requires him to hold them for a short period to give the debtor opportunity to file the counterbond.¹⁷

Once the creditor has obtained possession of the secured goods he generally has the alternative of keeping the goods in satisfaction of the debt or of selling or otherwise disposing of the goods in any commercially reasonable manner and applying the proceeds toward his reasonable expenses and payment of the debt.¹⁸ Any surplus proceeds from the sale must be remitted to the debtor, although a surplus is rare indeed in the case of consumer transactions. If the proceeds of the sale are insufficient to pay the reasonable expenses of the creditor plus the debt, the creditor is entitled to collect any deficiency from the debtor and any sureties.¹⁹

¹⁴ The action of claim and delivery is the equivalent of replevin in a number of states, e.g., CAL. CIV. PRO. CODE §§ 509-21 (West 1954). See R. SHINN, A TREATISE ON THE AMERICAN LAW OF REPLEVIN AND KINDRED ACTIONS FOR GETTING POSSESSION OF CHATTELS 354 (1809) [hereinafter cited as SHINN]. New York merely calls it an action to try the right to possession of a chattel, N.Y. CIV. PRAC. LAW §§ 7101 to 7111 (1963).

¹⁵ There are a number of old treatises describing the history of replevin. J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES (2d ed. 1900) is most often cited, but SHINN and P. MORRIS, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN (1894) are also good sources for historical background material. Replevin practice is also described in 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 146-51 (1st ed. Reprint 1966).

¹⁶ The appellants in *Fuentes v. Shevin*, 407 U.S. 67 (1972), asserted that out of 442 cases of prejudgment replevin in the Dade County, Florida, small claims court in 1969, there was not one case in which the defendant posted a counterbond. Few defendants are aware of their rights, and the ordinary consumer would have practical difficulties in obtaining a bond. *Id.* at 84-85.

¹⁷ In practice, however, the creditor often takes immediate possession from the sheriff, as was the case with Mrs. Fuentes' stove. Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 985 (1972) (written prior to the *Fuentes* decision). Abbott & Peters describe the variety of state replevin procedures. *Id.* at 964, n.33. See generally Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886 (1971).

¹⁸ UCC §§ 9-504, -505.

¹⁹ *Id.* § 9-504(2).

If the creditor wishes to keep the goods in satisfaction of the debt, a procedure analogous to strict foreclosure which was at one time common in real property mortgages, he must give the debtor notice to that effect and the debtor has 30 days upon receipt of the notice to object. If the debtor objects or if he has paid 60 percent of the cash price of the goods, or of the loan in a consumer loan transaction, the creditor must sell or otherwise dispose of the goods.²⁰ The sale or other disposition may be public or private. The creditor himself can purchase at a public sale and, in some instances (unlikely in consumer goods transactions), at a private sale.²¹ The only significant limitations on sale or disposition are that the creditor must give the debtor notice of the time and place of any public sale or of the time after which he plans to make a private sale and that the creditor must in all respects act in a commercially reasonable manner. The notice to the debtor enables him to exercise his right of redemption by tendering fulfillment of all obligations secured by the collateral, plus the creditor's reasonable expenses, prior to the creditor's disposition.

Although Article 9 of the UCC has recently gone through a rather extensive revision, the procedures and rights regarding repossession, resale, and deficiency judgments were virtually unchanged.²² Furthermore, few of the states adopting the Code during the 1960's made any significant alteration to Part 5 of Article 9, and no state changed the repossession procedures.²³

The consequence of the creditor's failure to comply with the repossession and resale procedures of the UCC are not clearly spelled out and pose a problem area for creditors. Section 9-507 states that the debtor is entitled to recovery from the creditor "any loss caused by failure to comply" with the provisions of Part 5 of Article 9. Under section 9-507 a consumer goods debtor is entitled at a mini-

²⁰ *Id.* § 9-505.

²¹ *Id.* § 9-504(3).

²² The revision of Article 9 did not alter the rights of the consumer for much the same reason consumer protection was excluded from the original version of Article 9. See notes 35, 36 *infra* & accompanying text. The Commission also paid deference to the other bodies working on consumer protection legislation. Braucher, et al., *A Look at the Work of the Article 9 Review Committee*, 26 BUS. LAW. 307, 319-20 (1970).

²³ Mississippi changed UCC § 9-506 so as to permit redemption as if there were no acceleration clause. MISS. CODE ANN. § 41 A: 9-506 (Spec. UCC Supp. 1967). New Mexico and Washington have eliminated deficiency judgments in consumer transactions. N.M. STAT. ANN. § 50A-9-504(2) (1971); WASH. REV. CODE ANN. § 62A 9-501(1) (1967). North Carolina has a detailed, but non-mandatory procedure for public sale. N.C. GEN. STAT. § 25-9.601 (1967). Rhode Island restricts the type of cross collateral clauses that will be enforced. R.I. GEN. LAWS ANN. § 6A-9-503.1 (1971).

imum to a recovery equal to the amount of the credit service charge plus ten percent of the principal amount of the debt. In some cases, for instance where public sale was not conducted in a commercially reasonable manner, the actual loss and thus the recovery, would be the difference between the true value of the goods and the amount actually realized.²⁴ In cases of technical non-compliance, it would seem that the debtor could show little or no loss arising from the failure to comply with the Part 5 procedures. Nonetheless, most courts have not required the debtor to prove whether or not a loss was caused by failure to comply, either by shifting the burden of proof with regard to loss to the creditor, or else on the theory that repossession or sale not in technical compliance with the UCC constitutes conversion.²⁵ As a practical matter, therefore, the debtor is entitled to the true value of the goods sold in all cases where the creditor has failed to comply with the Code procedures.

The UCC says nothing about how the creditor's failure to comply with repossession or resale procedures affects his right to a deficiency. One could argue with considerable force that section 9-507 is exclusive, that is, that the sole consequence of failure to comply with UCC procedures is the damage remedy.²⁶ However most courts have held that the right to a deficiency judgment is conditional upon complete compliance,²⁷ a result approved of by Professor Gilmore, reporter for Article 9.²⁸

Finally, while the Code adopts freedom of contract as its keystone, or at least one of its principal cornerstones,²⁹ in most respects the enforcement scheme of Part 5 of Article 9 prior to default is

²⁴ As Professor Gilmore put it with his characteristic wit, "the difference between the amount for which the secured party sold the collateral and its fair or true or real value, determined by jury-guess or by some other comparably scientific method." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.2 (1965).

²⁵ See, e.g., *Carter v. Ryburn Ford Sales Inc.*, 248 Ark. 236, 451 S.W.2d 199 (1970); *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966); *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 276 A.2d 402 (D.C. 1971).

²⁶ See Hogan, *Pitfalls in Default Procedure*, 2 U.C.C.L.J. 244, 257 (1970).

²⁷ See, e.g., *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *rev'd in part*, 335 F.2d 846 (3d Cir. 1964); *Edmondson v. Air Serv. Co.*, 123 Ga. App. 263, 180 S.E.2d 589 (1971); *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968); *Associates Discount Corp. v. Cary*, 47 Misc. 2d 369, 262 N.Y.S.2d 646 (N.Y. City Civ. Ct. 1965).

²⁸ 2 G. GILMORE, *supra* note 24, § 44.9.4. But an amicus curiae brief filed by the Permanent Editorial Board of the UCC in *Norton* argued contrary to this conclusion. See 1 P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 8.06 (1963).

²⁹ UCC § 1-102(3).

not subject to significant variation by agreement.³⁰ In any event, most of the commonly-used forms for consumer credit contracts do little more than restate the Code scheme, sometimes merely by a cross reference.

While this is, of course, an oversimplified picture of the status of secured creditors' remedies under Article 9 of the UCC, it will be helpful to have this outline in mind as we consider the impact of recent constitutional developments. It should be noted that from the creditor's viewpoint, the remedies of the UCC were a significant improvement over previous laws, such as the Uniform Conditional Sales Act.³¹

The problem with the scheme that concerns us here is that the consumer debtor is usually deprived of the use of the goods before he has had an opportunity to contest or even question the merits of the creditor's right to repossession. Private repossession by definition provides no opportunity for a hearing, and the typical state replevin procedure allows the debtor to recover his goods pending resolution of the merits of the creditors' claims only by posting a counterbond, a requirement that many poor consumers are unable to satisfy or even understand.³²

While it is probable that in most cases the consumer is in fact in default and the creditor is entitled to repossess, this certainly is not always true. A recent elaborate study of the reasons for consumer debtors defaulting indicates that about a third give reasons for their ceasing to pay which implicate the creditor in some way or other — principally fraud or misrepresentations concerning the goods.³³ While not all debtor complaints are legitimate, or, if

³⁰ *Id.* § 9-501(3).

³¹ The UCC's looseness and lack of formalities in the foreclosure procedure is in sharp contrast to the detail of the Uniform Conditional Sales Act (UCSA) which governed the creditor's remedies in a number of states prior to the UCC. The UCSA, which generally required public sale at an auction with detailed notice requirements, was generally thought to be unsatisfactory from the point of view of all parties. It was difficult for creditors to insure that they had complied with all the terms of the statute, and the public sale at auction generally realized substantially less than the true value of the goods. All too often the result was either an unnecessarily large deficiency judgment or "a sort of strict foreclosure with attorney's fees on both sides." 2 G. GILMORE, *supra* note 24, § 44.4 at 1228. On the other hand, the UCSA provided for pre seizure notice which, if given by the creditor, cut off the debtor's right of redemption. This procedure for formal notice prior to repossession was intended to stimulate the buyer into performing the contract. Whether or not it realized the purpose, the pre seizure notice might have avoided some of the constitutional problems raised by *Fuente*.

³² See note 16 *supra*.

³³ D. CAPLOVITZ, *DEBTORS IN DEFAULT* 4-8, 4-12 (1971) [hereinafter cited as CAPLOVITZ]. See also Note, *Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles — Alternative Methods for Allocating Present*

legitimate, sufficient to justify a cessation of payment, it nevertheless seems likely that there is a significant percentage of cases where the debtor has a good defense and the creditor has no legal right to repossess.

B. *Variations of the Pattern: Retail Sales Acts and Other Consumer Credit Legislation*

Article 9 of the UCC is a general statute governing all security interests in personal property, whether the goods be a \$10 million steam shovel or a \$15 radio, and whether the debtor be General Motors or Joe Schmoie. But, it is clear that the draftsmen were more concerned with General Motors and the steam shovel than they were with Joe Schmoie and his radio.³⁴ Although there are a number of references in the UCC to consumers and consumer goods, the Code in general does not address itself to the particular problems of consumer goods financing. At one time in the drafting of Article 9 a separate part was planned to deal specifically with consumer credit, and the problems discussed here might have been dealt with by that part.³⁵ In any event such consumer credit legislation would necessarily be controversial if it were to deal in any adequate way with the serious problems involved, and it apparently was dropped for political reasons.³⁶ A judgment was made to first bring order to the existing chaos in commercial law, particularly with respect to personal property security interests, and this no doubt was wise. The controversy currently raging over the Uniform Consumer Credit Code, hardly a radical document, suggests that we might still be fighting about whether a transaction was a chattel mortgage or a conditional sale if the original plan to adopt the consumer credit part had been carried out.

Meanwhile, and in fact long before the UCC was widely adopted, the states were enacting a variety of statutes governing different segments of consumer credit, and the UCC is expressly made subject to these statutes.³⁷ Most of these statutes, however, have little or nothing to say about secured creditors' remedies.³⁸

Costs, 14 U.C.L.A.L. REV. 879 (1967), for a less elaborate study also indicating substantial numbers of default judgments against consumers having legal defenses.

³⁴ For a good criticism of Article 9 of the UCC as applied to consumers see Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972).

³⁵ The history is recounted in 1 G. GILMORE *supra* note 24 § 9.2.

³⁶ *Id.*

³⁷ UCC § 9-203(2).

³⁸ B. CURRAN, *TRENDS IN CONSUMER LEGISLATION* 110 at n. 232 (1965).

The retail installment sales acts, which most states have adopted, do sometimes regulate the enforcement of security interests, for instance, by restricting or eliminating deficiency judgments,³⁹ voiding acceleration clauses,⁴⁰ and prescribing procedures for foreclosure sales.⁴¹ These acts frequently apply only to certain classes of goods such as motor vehicles.⁴² None that I am aware of significantly affect the creditor's repossession rights or procedures. Some statutes, however, do prohibit contract clauses giving the creditor the right to enter the debtor's premises or breach the peace in repossession,⁴³ and some require or encourage notice prior to repossession.⁴⁴

The Uniform Consumer Credit Code (UCCC), now adopted in six states and being considered by most of the others, eliminates deficiency judgments in the case of goods sold for \$1,000 or less but does not otherwise change the UCC scheme.⁴⁵ A preliminary working draft for a revision of the UCCC would, however, make three significant modifications of the UCC scheme of secured creditors' remedies:⁴⁶ It would substantially restrict the operation of acceleration clauses;⁴⁷ it would require the creditor to give the debtor at least 20 days notice of default prior to repossession;⁴⁸ and it would permit self-help repossession only "if possession can be taken without entry into a dwelling and without the use of force or other breach of peace."⁴⁹ These proposed amendments to the UCCC result in part from criticism made by the National Consumer Law Center, the sponsor of the rival National Consumer Act (NCA).⁵⁰

Whereas the UCCC eschewed any attempt to reform the repossession scheme of the Commercial Code, the NCA completely rewrites the remedies of the secured creditor in consumer transactions by severely restricting acceleration clauses and permitting a debtor

³⁹ See, e.g., CAL. CIV. CODE § 1812.5 (West Supp. 1972).

⁴⁰ MD. ANN. CODE art. 83, § 142 (1969).

⁴¹ CONN. GEN. STAT. ANN. § 42-98 d (1958).

⁴² See, e.g., PA. STAT. ANN. tit. 69, §§ 601-37 (Purdon 1965).

⁴³ MICH. COMP. LAWS ANN. § 445.864(c) (1967).

⁴⁴ MASS. GEN. LAWS ANN. ch. 255D, §§ 21, 22 (Supp. 1972).

⁴⁵ UCCC § 5.103.

⁴⁶ Working Redraft No. 3. This proposal is in a preliminary stage of drafting and consideration. It has not been approved or considered by the National Conference of Commissioners on Uniform State Laws or even approved by its UCCC Committee.

⁴⁷ UCCC § 5.111 (Working Redraft No. 3, 1972).

⁴⁸ *Id.*

⁴⁹ *Id.* § 5-112.

⁵⁰ The references here will be to the First Final Draft, available from the National Consumer Law Center, Boston College Law School. The NCA has not been adopted in any state. Only Wisconsin has adopted a version of the NCA.

to halt repossession at any time by tendering overdue installments.⁵¹ In addition, the debtor could not be declared in default until he is three installments in arrears.⁵² Repossession would only be effected by legal process and then not until fifteen days after the debtor has been served with a copy of a complaint setting forth the nature of the default, the amounts overdue, and so forth.⁵³ During this 15-day period the debtor may demand an expedited preliminary hearing on the merits.⁵⁴ If the consumer raises "substantial doubts" at the hearing, repossession is stayed until a final full hearing on the merits.⁵⁵ After the fifteen days or a preliminary hearing at which the debtor fails to raise a substantial doubt, the goods can be seized by judicial process. The NCA also restricts deficiency judgments in a manner similar to the UCCC.⁵⁶ The debtor can force the creditor into strict foreclosure whether he likes it or not and regardless of the value of the goods by merely tendering return of the goods.⁵⁷ Finally, the debtor's right to redeem after repossession is considerably broadened.⁵⁸

While the NCA appears radical in its approach to the consumer-secured creditor problem, it does offer some valuable suggestions, as indicated by the reaction of the UCCC Committee of the National Conference of Commissioners on Uniform State Laws. The 20-day notice before repossession provision is of particular interest in that it may arguably provide a solution to the constitutional problems which are discussed in detail below.

III. DUE PROCESS LIMITATIONS ON THE REPOSSESSION REMEDY

A. *The Sniadach and Fuentes Decisions*

Normally, before resorting to repossession or formal legal processes, a creditor will first seek payment by some informal method of persuasion, such as telephone calls or correspondence, or by negotiations to reschedule repayments or reduce the size of install-

⁵¹ NATIONAL CONSUMER ACT § 5.207 [hereinafter cited as NCA].

⁵² *Id.* § 5.103(1).

⁵³ *Id.* §§ 5.204, .206.

⁵⁴ *Id.* § 5.208(1).

⁵⁵ *Id.* § 5.208(2).

⁵⁶ *Id.* § 5.211. However the NCA's limitation is based on the unpaid balance as opposed to the original price.

⁵⁷ *Id.* § 5.205.

⁵⁸ *Id.* § 5.209.

ments.⁵⁹ Studies have indicated that most debtors, even most of those who feel they did not receive a fair deal initially, want to pay.⁶⁰ Thus most creditors, in their efforts to maximize profits, do better by first exhausting their power of informal persuasion, including threats of repossession and garnishment, before resorting to the more expensive remedies of repossession or the legal process.

While this may be the normal pattern, there is ample evidence that some creditors in some cities resort to repossession and legal process without any serious efforts to work something out with the debtor. And some who work out an arrangement with debtors change their minds and proceed with repossession and legal process.⁶¹ Both the usual pattern of collection practices and deviations from that pattern should be kept in mind in appraising the application of the constitutional guarantee of due process to the collection process.

While the constitutional attacks on creditors might seem to have started with *Sniadach v. Family Finance Corp.*,⁶² in a real sense *Sniadach* does not mark a radical departure in constitutional adjudication. It is . . . but a part of the mainstream of past procedural due process decisions of the United States Supreme Court."⁶³

Many controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.⁶⁴

In *Sniadach*, the Family Finance Corporation had instituted a garnishment action in a Wisconsin state court. The Wisconsin

⁵⁹ See Note, *supra* note 33, at 885-88, describing California practice. See also *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). California practice may be atypical because a creditor upon repossession is denied the right to a deficiency judgment with respect to all goods but automobiles, CAL. CIV. CODE § 1812.5 (West Supp. 1972). Some of the less pleasant, informal means of persuasion are described in 2 CAPLOVITZ, *supra* note 33, at ch. 10.

⁶⁰ See 1 CAPLOVITZ, *supra* note 33, at ch. 4; and Note, *supra* note 33, at 894 (1961), where the authors conclude on the basis of interviews with creditors, that most defaulting debtors want to pay, but are unable to do so. Of course, the motive here may be principally the desire to retain an acceptable credit rating.

⁶¹ See 1 CAPLOVITZ, *supra* note 33, at ch. 4.

⁶² 395 U.S. 337 (1969).

⁶³ *Randone v. App. Dep't of Sup. Ct.*, 5 Cal. 3d 536, 550, 536 P.2d 13, 22, 96 Cal. Rptr. 709, 718 (1971), *quoted in* *Fuentes v. Shevin*, 407 U.S. 67, 88 n.19 (1972).

⁶⁴ *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1949). For a frequently cited earlier affirmation of this principle, see *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915). See also *Boddie v. Conn.*, 401 U.S. 371, 378 (1971); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

procedure permitted a creditor to freeze an alleged debtor's wages by merely serving a summons and complaint upon the alleged debtor's employer and then, within ten days, serving the debtor himself with a complaint. The clerk of court issued the summons at the request of the creditor's lawyer without notice to the debtor, without any opportunity for the debtor to be heard, and without any scrutiny by a judge or other public official of the merits of the creditor's claims. The debtor's wages remained frozen until a decision at the trial on the merits, although it was possible for the debtor to have the garnishment lifted prior to trial if he could show the suit was brought in bad faith.⁶⁵ Presumably this would be by motion or an order to show cause procedure to dismiss the garnishment action, the method by which *Sniadach* arose and reached the United States Supreme Court. The alleged debtor could also have the garnishment lifted by posting a bond.

A divided Supreme Court of Wisconsin affirmed the lower court's holding that the Wisconsin prejudgment garnishment procedure was constitutional. The United States Supreme Court reversed, with Justice Black dissenting. Justice Douglas's opinion for the majority stressed that wages are "a specialized type of property presenting distinct problems in our economic system."⁶⁶ The freezing of wages which the debtor relies upon for the basic daily needs of himself and his family, "may as a practical matter drive a wage-earning family to the wall as well as perhaps cause the loss of his employment."⁶⁷ With such leverage the creditor could force the wage earner to pay whether he has a defense or not.⁶⁸

⁶⁵ The availability of this remedy was questioned by Justice Harlan in his *Sniadach* concurrence. 395 U.S. at 343.

⁶⁶ *Id.* at 340.

⁶⁷ *Id.* at 341.

⁶⁸ Justice Douglas at this point quoted from the congressional debates over the Consumer Credit Protection Act of 1968 suggesting that the debt is frequently a fraudulent one. *Id.* at 341.

It should be noted that Wisconsin did exempt from garnishment a portion of the defendant's wages, presumably on the theory that one should not be left without a subsistence income. Although more generous than some state exemption statutes, the exemption was clearly inadequate given the degree of inflation since the statute was enacted. Existing state wage garnishment statutes are described in Note, *Federal Restrictions of Wage Garnishments: Title III of the Consumer Credit Protection Act*, 44 IND. L.J. 267, 290 (1969).

The Consumer Credit Protection Act of 1968 (CCPA) exempts from garnishment wages amounting to 25 percent of disposable weekly earnings or 30 times the federal minimum hourly wage, whichever is larger. 15 U.S.C. § 1673 (1970). This presumably reflects a congressional judgment as to subsistence wages, although there is no adjustment for variation in family size. The CCPA was not in effect at the time *Snia-*

Justice Harlan's concurring opinion did not rely on the specialized type of property theory of Justice Douglas but was instead based upon the broader principle that the *use* of the garnished portion of wages is property and that the deprivation pending the resolution of the suit on the merits was not *de minimis*.⁶⁹ Thus the defendant was deprived of property without notice and without a prior hearing, a violation of the "norms of 'fundamental fairness'" found in the due process clause of the fourteenth amendment. It was the temporary nature of the deprivation in *Sniadach* that made new law, the holding that "due process requires a prior hearing even when the taking is relatively brief and an eventual hearing is guaranteed."⁷⁰

While the principles applied in *Sniadach* had ancient antecedents and many contemporary applications, it was necessary for the Court to deal with a number of its past decisions where it had approved of *ex parte* prejudgment seizures of property. Justice Douglas' opinion did so, obliquely stating merely that "such summary procedure may well meet the requirements of due process in extraordinary situations,"⁷¹ citing four such cases and noting that the Wisconsin statute was not in any event narrowly drawn to meet only extraordinary situations.⁷²

dach arose, but it would seem to be relevant to Justice Douglas' argument concerning the undue pressure put upon the debtor.

⁶⁹ In *Sniadach* six weeks lapsed between the service of the garnishment and the lower court's denial of the defendant's motion to remove the garnishment. Some of the delay was attributed to the debtor. 37 Wis. 2d 163, 165-166, 154 N.W.2d 259, 260-61 (1967).

⁷⁰ *Aaron v. Clark*, 342 F. Supp. 898, 900 (N.D. Ga. 1972). See also *The Supreme Court*, 1968 Term, 83 HARV. L. REV. 7, 114 (1969).

⁷¹ 395 U.S. at 339.

⁷² The cases cited were *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) involving multiple seizures by the Food and Drug Administration of misbranded drugs; *Fahey v. Mallonee*, 332 U.S. 245 (1947) involving the summary appointment of a conservator for a savings and loan association by the Federal Home Loan Administration; *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) involving an assessment by a state bank supervisor against stockholders of an insolvent bank; and *Ownbey v. Morgan*, 256 U.S. 94 (1921) involving prejudgment attachment of a non-resident defendant's property perhaps necessary for jurisdiction in pre-long arm days. The first two cases involved governmental actions where there was, arguably, great and immediate danger to the public. *Ownbey* involved a special situation and possibly is still good law under some conditions. See *Lebowitz v. Forbes Leasing & Fin. Corp.*, 326 F. Supp. 1335 (E.D. Pa. 1971). *Coffin Bros.* did not involve taking of property prior to hearing. The court might have cited other cases involving governmental action. See, e.g., *Phillips v. Commissioner*, 283 U.S. 589 (1931). See also cases cited in Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U. L. REV. 158, 160 n.9 (1970).

The *Sniadach* court later cited *McKay v. McInnes*, 279 U.S. 820 (1928), a *per curiam* affirmance of a decision upholding prejudgment attachment. Justice Douglas

Although Douglas' opinion seems limited to wages, *Sniadach* has since been widely used with varying success in attempts to overturn diverse procedures that involve the temporary denial of a property interest. As a later court put it, "*Sniadach's* seed has been scattered by the winds."⁷³ Among the procedures that have been attacked on the basis of *Sniadach* are: eviction of a lessee;⁷⁴ exercise of a landlord's right of distraint and sale;⁷⁵ exercise of an innkeeper's lien;⁷⁶ real estate mortgage foreclosure;⁷⁷ attachment of real estate;⁷⁸ attachment of bank accounts;⁷⁹ foreclosure of a warehousemen's lien under Article 7 of the UCC;⁸⁰ enforcement of confession of judgment clauses;⁸¹ termination of services by a public utility;⁸² and, on point for our purposes, replevin and self-help repossession under the UCC.⁸³ The results and the language in these cases are by no means all reconcilable. In the cases upholding summary procedures, *Sniadach* has been distinguished on a number of grounds, most frequently on the nature of the property affected; that is, whether the property falls within a special category as Justice Douglas argued wages did in *Sniadach*.⁸⁴ More often this distinction has been rejected in favor of the broader rationale of Harlan's concurrence.⁸⁵

This last term the Supreme Court resolved a split among the cir-

dismissed *McKay* by observing: "A procedural rule that may satisfy due process attachments in general, . . . does not necessarily satisfy procedural due process in every case." 395 U.S. at 340. *McKay* might be explained on the basis that the defendant was not deprived of the *use* of the property attached: real estate and securities.

⁷³ *Lebowitz v. Forbes Leasing and Fin. Corp.*, 326 F. Supp. 1335, 1337 (1971).

⁷⁴ *Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970) (held unconstitutional).

⁷⁵ *Musselman v. Spies*, 343 F. Supp. 528 (M.D. Pa. 1972); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970) (held unconstitutional).

⁷⁶ *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (held unconstitutional).

⁷⁷ *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970) (held constitutional).

⁷⁸ *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971) (held constitutional).

⁷⁹ *Randone v. App. Dep't of Sup. Ct.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (held unconstitutional).

⁸⁰ *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971) (held constitutional).

⁸¹ *Osmond v. Spence*, 327 F. Supp. 1349 (D. Del. 1971) (held unconstitutional).

⁸² *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972) (held unconstitutional).

⁸³ See cases cited note 11 *supra*.

⁸⁴ See, e.g., *Brunswick Corp. v. J & P Inc.*, 424 F.2d 100 (10th Cir. 1970).

⁸⁵ See, e.g., *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

cuit courts in *Fuentes v. Shevin*,⁸⁶ and held that summary seizure of personal property by means of the typical replevin procedure described earlier violated the due process clause of the fourteenth amendment.⁸⁷ Between *Sniadach* and *Fuentes* the Court had, in several significant decisions, applied the fundamental due process principle recognized in *Sniadach*. These cases relied to some extent upon *Sniadach*, but did not go beyond ancient and often affirmed principles of fairness in procedural due process. And in a sense these cases did little to clarify the scope of *Sniadach*.

In *Goldberg v. Kelly*⁸⁸ the Court declared that New York could not cut off welfare payments without notice and an opportunity for a hearing. In *Bell v. Burson*⁸⁹ the Court held that a state could not suspend a driver's license without similar minimum procedural safeguards. *Goldberg* involved welfare payments which the Court, relying in part on the *Sniadach* rationale, noted were as essential to life as wages. On the other hand, *Goldberg* went beyond *Sniadach* since the initial decision to terminate benefits was made by a presumably well-intentioned governmental official, and since in *Goldberg* the extortion feature of prejudgment garnishment was absent. In *Bell* the Court noted that the use of an automobile may also be as essential to subsistence as wages, since it is often the only form of transportation to the job where those wages are earned.

Another important Supreme Court decision coming between *Sniadach* and *Fuentes* was *D. H. Overmyer Co. v. Frick Co.*,⁹⁰ in which the Court held that confession of judgment clauses were not per se unconstitutional. In *Overmyer*, there was equal bargaining power and the waiver was negotiated between commercial parties and was knowingly and intelligently made. I shall have more to say about *Overmyer* later. For now it is enough to note that it reaffirmed the basic requirement of notice and hearing for even provisional remedies.⁹¹

⁸⁶ 407 U.S. 67 (1972).

⁸⁷ The Pennsylvania procedure involved in *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971), one of the cases reversed in *Fuentes*, was in a sense nonjudicial. A party seeking repossession in Pennsylvania need not initiate court action. The writ issues from a prothonotary upon the mere filing of a bond and an affidavit regarding the value of the property to be seized. See *Fuentes v. Shevin*, 407 U.S. 67, 77 (1972).

⁸⁸ 397 U.S. 254 (1970).

⁸⁹ 402 U.S. 535 (1971).

⁹⁰ 405 U.S. 174 (1972).

⁹¹ A cognovit judgment is provisional in the sense that the judgment debtor can usually reopen the judgment with little more than an allegation that he has a colorable defense.

Against this background the *Fuentes* Court considered the replevin procedures of Florida and Pennsylvania. As described earlier, replevin typically requires the creditor to file a bond and an affidavit indicating his right to possession. Without intervention of the Court and without any notice to the debtor or opportunity for a hearing, the sheriff or some similar official seizes the property. Pending final disposition of the merits, the alleged debtor cannot recover his property unless he posts a counterbond, usually in an amount twice the value of the property seized. The majority of the Court in *Fuentes*, through an opinion by Justice Stewart, found these procedures unconstitutional on the basis of a broadly stated concept of due process reminiscent of Harlan's concurrence in *Sniadach*. Douglas' reliance upon the specialized nature of wages as a basis for *Sniadach* was expressly discarded.⁹² Such a distinction between necessities and non-necessities was quite rightly found to be unworkable and inconsistent with a respect for "an individual's choices in the marketplace . . ."⁹³

The fact that the defendant could have recovered his goods prior to resolution of the merits of the case, Justice Stewart said, was irrelevant because of the burden of the counterbond requirement.⁹⁴ Thus the Court remained consistent with a number of recent rulings striking down filing fees as unconstitutional prerequisites to justice.⁹⁵

The retail installment sales contracts involved in all but one of the cases consolidated in *Fuentes*⁹⁶ contained clauses stating that "in the event of default of any payment or payments, Seller at its option may take back the merchandise" or similar language. The creditors argued that this amounted to a waiver of any constitutional rights to a pre-seizure hearing. While expressing doubts about the effectiveness of waivers in adhesion contracts, Justice Stewart lim-

⁹² The Court did not consider the debtors' challenge of prejudgment replevin under the fourth amendment search and seizure provision, made applicable to the states by the fourteenth amendment. The debtors' arguments are described in Abbott & Peters, *supra* note 17, at 984-90. Both *Blair v. Pritchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), and *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) finding summary seizure in replevin actions unconstitutional, were based at least as much on the search and seizure issue as the due process issue. Any hearing that would satisfy the due process clause would also no doubt satisfy the fourth amendment. *Wheeler v. Adams Co.*, 322 F. Supp. 645, 657 (D. Md. 1971).

⁹³ 407 U.S. at 90.

⁹⁴ *Id.* at 84-86.

⁹⁵ See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁹⁶ One of the cases involved a domestic dispute over rights to custody of a son and possession of his personal property.

ited his ruling to the particular contract language used, which did not clearly express a waiver and therefore was held not to be considered as a waiver of the buyer's rights to a preseizure hearing.⁹⁷

Justice White wrote a short dissenting opinion in which Chief Justice Burger and Justice Blackmun joined. That dissenting opinion, and the criticisms which it contains, have a special significance, for in one sense *Fuentes* was a minority decision. The vote was four to three, with Justices Powell and Rehnquist, who had just been appointed at least in part because of their conservative views, not participating.⁹⁸ The recent dramatic change in the composition of the Court and the current Court's surprisingly attenuated treatment of its own recent precedents,⁹⁹ make even less certain the life span and future influence of *Fuentes*. In this light, the soundness of the dissent becomes relevant as perhaps an indication of the Court's future attitude.

The dissent noted that the seller retaining a security interest has an "interest" in the property, just as the buyer has, and went on to state that "[i]n considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved."¹⁰⁰ Most creditors, the dissent thought, prefer the transaction to go forward and be completed as planned. Creditors ordinarily do not attempt to repossess unless they in good faith believe there is a default. Since it is in both parties' interest to repossess only in the case of a true default, there will likely be few cases of unjust repossession. In fact, in one of the cases consolidated by the Court in *Fuentes*, the debtor had conceded default.¹⁰¹ Since the creditor has a property interest in the goods which might be injured by the debtor's continued use pending resolution of the merits, there is danger that the creditor will be

⁹⁷ Some of the debtors could have argued that the waiver was only effective if they were in default, and since they claimed there was no default, there could be no waiver. See *Fuentes v. Faircloth*, 317 F. Supp. 954, 957 (S.D. Fla. 1970). This argument could not be made by those debtors in *Fuentes* who admitted to being in default.

⁹⁸ Labeling Supreme Court justices is a hazardous business, particularly so early in their term of office. In any event, Justice Powell, if not Justice Rehnquist, may well prove to be a judicial conservative of the Frankfurter-Harlan variety; given his opinion in *Snidach*, Justice Harlan would probably have concurred in *Fuentes*.

⁹⁹ See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

¹⁰⁰ 407 U.S. at 100.

¹⁰¹ Although Justice White's dissent says that one other of the debtors in *Fuentes* had conceded default, 407 U.S. at 101 n.*, this is inaccurate. The appellant *Fuentes* and defendants stipulated that payments had not been made, but Mrs. *Fuentes* had asserted defenses which should have entitled her to withhold payment. Abbott & Peters, *supra* note 17, at 990-92.

harm by the delay if a hearing is required. Since it is unlikely that creditors will abuse the process, there is little danger that debtors will be harmed by the current replevin practice.

Finally, the dissent styled the Court's ruling as "no more than ideological tinkering with state law."¹⁰² Assuming the limited holding on the waiver point, the dissent suggested that creditors need only redraft their forms or, alternatively, that if a hearing were held, the creditor would generally be able to show probable cause and the debtor would be no more protected than under current procedures. The end result, in the opinion of the dissent, is an additional expense which might affect the availability or cost of consumer credit.

B. *A Critique of the Fuentes Rationale*

1. *Specialized Property*.— By the time the Court heard *Fuentes*, it had begun to appear that the "specialized type of property" rationale of Justice Douglas in *Sniadach* would not bear close analysis and in any event had not proved workable in practice. Some forms of property could easily be classified as necessities of life, and therefore within the specialized property rationale. For instance, bank checking accounts, which for many contain little more than deposited wages from the most recent paycheck, quite sensibly have been held to be specialized property for due process purposes.¹⁰³ Some household items such as beds and stoves have also understandably been included.¹⁰⁴ Other consumer goods such as television sets, hi-fidelity equipment and the like have given the courts more difficulty; some found them to be necessities of the modern American family, while others insisted that they are luxuries and therefore outside the *Sniadach* rule.¹⁰⁵ Automobiles, probably the most frequent object of repossession, are often a prerequisite to earning the wages Justice Douglas deemed essential. *Bell v. Burson*,¹⁰⁶ where the Supreme Court held the suspension of a driver's license without an adequate

¹⁰² 407 U.S. at 102.

¹⁰³ See, e.g., *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972); *Aaron v. Clark*, 342 F. Supp. 898 (N.D. Ga. 1972); *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); and *Stillwater*, *The California Banker's Lien Law: A Reappraisal of a Creditor's Remedy in a New Economic Context*, 27 BUS. L. 777 (1972). *Contra*, *Michael's Jewelers v. Handy*, 6 Conn. 103, 266 A.2d 904 (1969).

¹⁰⁴ Compare *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971), *rev'd sub nom. Fuentes v. Shevin*, 407 U.S. 67 (1972), with *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970).

¹⁰⁵ See cases cited note 104 *supra*.

¹⁰⁶ 402 U.S. 535 (1971).

hearing violated due process, might be explained on that basis.¹⁰⁷ There the use of the automobile was important to the petitioner's proper performance of his job as a clergyman, although the Court made no special point of it and it is unlikely that a clergyman would lose any income pending a hearing. Presumably, tools of trade would be included for the same reason.¹⁰⁸ Tools of trade are essential to the earning of wages, the loss of which, even for a short interval, Justice Douglas thought so critical to the average person. Thus, the concept of a "specialized type of property" lent itself to what was in essence the case-by-case development of a class of partially exempt property — property subject to attachment or seizure but not without a hearing. While no doubt feasible, at least if done by means of general categories rather than entirely case by case,¹⁰⁹ it does not seem worth the expenditure of our already over-extended judicial resources to determine the nature of each article of consumer property. As with most things it is a matter of degree.¹¹⁰ However, the prospect of the Supreme Court reconciling the inevitable conflicts among the lower courts over the proper category for a washing machine, dishwasher, or sewing machine seems a terrible waste of everyone's time. The Court should not get involved in subtle distinctions where the interests at stake are not significant. As I shall show, the costs to the creditor of requiring notice and opportunity for a hearing will not be great. On the other hand, for at least some debtors the temporary deprivation of property may be a significant hardship, and one which does not lend itself to legal recompensation. While the dissent in *Fuentes* may disagree with this assessment of the importance of the interests, it would seem that the creditors, when seeking the assistance of the coercive power of the state, should have the burden of proof in the matter.

Aside from these practical objections, the notion of "specialized

¹⁰⁷ *But see Fuentes v. Shevin*, 407 U.S. at 89, 90.

¹⁰⁸ *Cedar Rapids Eng'r Co. v. Haenelt*, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. 1971).

¹⁰⁹ *E.g.*, automobiles could be deemed specialized regardless of whether essential to the particular defendant. State exemption laws offer some guide and the concept of "necessities" is no stranger to the law. *See* Annot., 41 A.L.R.3d 607 (1972); Annot., 65 A.L.R. 1337 (1930). The standards for determining necessities in the various contexts, however, may differ.

¹¹⁰ In addition to the coercive factor, some commentators have thought "necessities" a special case in that they are unlikely to be destroyed or moved in order to defraud the creditor. *See* Note, *Attachment and Garnishment — Constitutional Law — Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Snaidach Case and Its Implications for Related Areas of Law*, 68 MICH. L. REV. 986, 1001 (1970); and *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 117 (1969). This factor would only slightly weaken the criticism in the text.

property" presents conceptual problems. Even in the clearest cases of luxury consumer items, the leverage which Justice Douglas found to be so strong in the case of necessities is often present to some degree. One reason for this is that the goods repossessed may well be worth much more to the consumer than they are likely to bring at even an efficiently conducted foreclosure sale,¹¹¹ particularly when the debtor has to pay for the cost of the repossession and sale.¹¹²

It follows that, at least with respect to consumer goods, there ought to be a single rule with regard to pre-seizure hearings. If due process requires a hearing in the case of necessities, the most sensible rule is to require a hearing in all cases of consumer goods, which is, of course, the holding in *Fuentes*.¹¹³

Thus, the narrow holding of Justice Douglas's opinion in *Sniadach* would not likely survive regardless of how restrictive the Court might later interpret *Fuentes*. This leaves us with the broader principle of *Sniadach* found in Justice Harlan's concurrence, which is that "some form of notice and hearing — formal or informal — is required before deprivation of a property interest that cannot be characterized as *de minimis*."¹¹⁴ Once this principle is accepted, *Fuentes* is an easy case except for the problem of the contractual waiver.

2. *Waiver*.— Since the majority opinion in *Fuentes* resolved the waiver problem by simply adopting a narrow reading of the contract language, the question arises whether creditors may overcome future difficulty by redrafting their contracts as suggested by the dissent. It seems clear enough from *Overmyer*, which held a confession of judgment provision not per se unconstitutional, that it is possible for a waiver of rights to notice and opportunity for a hear-

¹¹¹ "The concourse of bidders at the typical foreclosure sale, be it ever so 'public,' is apt to be about as lively as a group of mourners at a funeral." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.6, at 1242 (1965).

¹¹² For instance, a repossessed automobile in the best of circumstances is likely to sell for less than a comparable used automobile that has not been repossessed due to the "dead beat discount." See Clark, *supra* note 34, at 305. See also Leff, *Injury, Ignorance and Spite — The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 12 (1970). That is, the debtor's replacement cost of the automobile will be greater than the amount realized at a fair foreclosure sale and he will have to pay the costs of the repossession and resale as well.

¹¹³ While the concern here is strictly with consumer transactions, there is good reason for applying the broad *Sniadach* principle to commercial cases. Compare *Jones Press, Inc. v. Motor Travel Serv. Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970), with *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970). The pressure for unfair settlements and the impact of the temporary deprivation could be equally disastrous in either consumer or commercial transactions. The principal distinction between the two situations lies in the effectiveness of the contractual waiver.

¹¹⁴ *Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972).

ing to be valid if the parties intelligently, knowingly, and fairly bargain for such terms.¹¹⁵ *Overmyer*, however, on its facts is about the strongest conceivable case for enforcing contract terms waiving constitutional rights. There the parties had revised and negotiated a new agreement twice after the debtor had defaulted on the original agreement. The cognovit provision did not appear until the second revision. The parties were both relatively sophisticated businesses represented by attorneys, and the creditor's need for a cognovit provision was understandable. *Swarb v. Lennox*,¹¹⁶ the companion case to *Overmyer*, is not so easily explained. There consumer plaintiffs sought to have the Pennsylvania statute authorizing cognovit clauses declared unconstitutional on its face. This the Court held it could not do and remain consistent with *Overmyer*.¹¹⁷ *Swarb* suggests that the Pennsylvania and Florida summary seizure procedures in replevin actions may not be altogether invalid. They still may be available where the parties have in fact knowingly and intelligently bargained for a waiver of the right to a hearing.¹¹⁸ How this would work in practice, however, is troublesome. How is the court or the sheriff to know that the waiver has been bargained for knowingly and intelligently, and is therefore valid, unless some sort of hearing is held? While this problem was also presented in *Swarb* and was argued by the petitioners in that case, it had no effect on the decision.¹¹⁹

The case of a cognovit clause is analogous to replevin. While a cognovit judgment itself does not deprive the defendant of any property, once such a judgment is entered, execution can issue without notice or hearing and the debtor's property can be levied upon and seized or his wages and property garnished.¹²⁰ Thus a confes-

¹¹⁵ See also *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964); and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972).

¹¹⁶ 405 U.S. 191 (1972).

¹¹⁷ It is worth noting that in *Overmyer* the Court refused to rule on the challenged procedure on its face whereas it did so in *Sniadach* and, at least as to consumer debtors in *Fuentes*, even though in *Sniadach* and *Fuentes* the petitioners, or some of them, were concededly in default and thus not deprived of any property to which they were entitled.

¹¹⁸ The Supreme Court did not mention this possibility. The Supreme Court of California in *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) recognized the issue but held that the statute was not salvageable. See also *Thorpe Credit Inc. v. Barr*, 41 U.S.L.W. 2205 (Iowa Sup. Ct. Sept. 19, 1972).

¹¹⁹ 40 U.S.L.W. 3233. See also *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972); *Osmond v. Spence*, 327 F. Supp. 1349, 1359 (D. Del. 1971).

¹²⁰ This is the rationale for the Federal Reserve Board's Regulation under the CCPA equating a cognovit note with a note granting a lien on the debtor's real prop-

sion of judgment clause may, as a practical matter, implicitly include a waiver of *Sniadach* rights regarding wage garnishments and a waiver of *Fuentes* rights regarding replevin.¹²¹ Furthermore, deprivation of the debtor's property by means of a cognovit judgment in conjunction with the post-judgment collection devices such as garnishment and levy upon the debtor's property is, like replevin, temporary, for generally cognovit judgments can be reopened by a mere motion showing that the alleged debtor has a colorable defense to the action.¹²²

In any event, voluntary, knowing, and intelligent waivers of rights rarely if ever happen in consumer credit sales transactions. For good reasons,¹²³ consumer credit transactions are carried out by printed standard-form contracts, often with substantially similar terms regardless of the seller or lender. Even if the consumer were to read and understand the terms, which is unlikely, there is almost never any opportunity for bargaining about terms other than the interest rate and the payment terms. The normal consumer credit contract is the archetypal contract of adhesion¹²⁴ in which there is no meaningful assent to the specific terms of the contract.¹²⁵ Apart from the questionable "conscionability" under UCC section 2-302 of a term purporting to waive a debtor's *Fuentes* rights, creditors would not and should not be able to extract by means of a printed form a waiver of the constitutionally-protected right to a preseizure hearing.

This conclusion is strongly supported by Justice Blackmun's majority opinion in *Overmyer* where he stated that the Court's "holding, of course, is not controlling precedent for other facts of other

erty. 12 C.F.R. § 226.9 (1971). See also *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972), which held unconstitutional a post-cognovit judgment garnishment.

The statement in the text is not accurate as applied to Ohio procedure which requires notice to the judgment debtor before execution can issue. OHIO REV. CODE § 2323.13 (Page 1970). The Wisconsin statute is similar. WIS. STAT. ANN. § 270.69 (Supp. 1972-73). See Note, *Consumer Protection — Truth in Lending and the Cognovit Judgment*, 1970 WIS. L. REV. 216 (1970).

¹²¹ *Scott v. Danaher*, 343 F. Supp. 1271 (N.D. Ill. 1972) held that garnishment without notice following a cognovit judgment was unconstitutional under *Sniadach*.

¹²² This is not true of the Pennsylvania cognovit procedure since the entry of the judgment shifts the burden of proof to the judgment debtor. *Swarb v. Lennox*, 314 F. Supp. 1091, 1094 (E.D. Pa. 1970).

¹²³ See generally Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939).

¹²⁴ Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943), is the leading early article on the subject.

¹²⁵ There is, of course, assent to such terms as price and terms of payment, but they are often not bargained for.

cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."¹²⁶ This conclusion is also supported by that portion of the district court decision in *Swarb v. Lennox*¹²⁷ holding cognovit clauses unconstitutional as applied to the class of consumers with income under \$10,000 per year.¹²⁸

Most cases facing the waiver problem have applied the same standard in civil actions as applied in the criminal context, which is that the waiver be "voluntarily, intelligently, and knowingly" made."¹²⁹ While the *Overmyer* Court recognized a stricter standard might be appropriate in a criminal case where personal liberty rather than property is involved, no court has attempted to formulate or apply a less stringent test for civil cases. Indeed, dicta in a number of cases has indicated that "in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'"¹³⁰ While it is conceivable that the Court could decide that even with respect to consumer credit contracts, inquiry into the individual facts of each case will be required to determine if a waiver has been "voluntarily, intelligently, and knowingly" made, according to the apparent mandate applicable to commercial transactions after *Overmyer*, this is an unlikely and undesirable approach. Thus, it seems likely that the small print in consumer credit standard-form contracts will not be found to waive *Fuentes* rights, and the better reasoned opinions considering the question have reached this result.¹³¹

Finally, spelling out in bold type the creditor's rights of repossession in a manner understandable to the average consumer,¹³² if

¹²⁶ 405 U.S. 173, 188 (1972).

¹²⁷ 314 F. Supp. 1091 (E.D. Pa. 1970).

¹²⁸ Limiting the decision to low-income consumers was based on the definition of the class under FED. R. CIV. P. 23. This in turn was a result of the evidence introduced at trial; it was not a ruling that cognovits are constitutional for high-income consumers.

¹²⁹ *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) quoted in *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *Johnson v. Zerbst*, 304 U.S. 458 (1938), a criminal case, is usually cited for the same standard.

¹³⁰ *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

¹³¹ See, e.g., *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (1970); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). But see *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970); *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970). (a nonconsumer case).

¹³² As the *Overmyer* Court noted, the Ohio cognovit statute had been amended since the transaction there in question so as to require a conspicuous warning as to the nature

that is possible, should not make any difference when the repossession provision is virtually universal in consumer credit standard-form contracts. It still is a contract of adhesion whose terms were not, and indeed could not be bargained for. Lack of notice was not one of the factors mentioned in Justice Blackmun's caveat.

3. *Bond and Counterbond*.— One aspect of the due process issue remains. Both the Pennsylvania and Florida replevin statutes, as do the replevin statutes of most states, permit the defendant to recover his property from the sheriff by posting within a relatively short period of time (72 hours in Pennsylvania and Florida) a counterbond in the same amount as the plaintiff's bond. It might therefore be argued that since the defendant can recover his property almost immediately by posting a bond, the deprivation of the defendant's property is so temporary as to be *de minimis*. The Court's answer to this was to assert that the counterbond option merely allowed the defendant to regain his property by surrendering other property. In many situations that answer may be adequate. For example, in *Leibowitz v. Forbes Leasing & Finance Co.*,¹³³ where a foreign attachment of a bank account could be lifted by posting a bond, the bond would not only be costly but would also require the depositor to put up security which would seriously affect its ability to obtain essential credit. And though posting a bond may not always be burdensome in commercial cases, it almost certainly will be burdensome where the debtor is an ordinary consumer. Aside from the practical difficulties in obtaining a bond, the consumer would probably have to put up the full value of the property seized, or at least such was the case in Dade County Florida where one of the *Fuentes* cases arose.¹³⁴

The counterbond does not satisfy the due process objections for another reason that the Court impliedly recognized but did not rely upon. At least with respect to low-income consumers with few assets, a cash bond or a bond written by a surety company will be difficult or impossible to obtain. In other contexts the Court has found monetary prerequisites to justice unconstitutional. The case most closely in point is *Boddie v. Connecticut*,¹³⁵ which held it violative of fourteenth amendment due process to deny a person a di-

of the cognovit clause. 405 U.S. at 175-76 n.1. The Court did not indicate how this would be material.

¹³³ 326 F. Supp. 1335 (E.D. Pa. 1971).

¹³⁴ Abbott & Peters, *supra* note 17, at 982.

¹³⁵ 401 U.S. 371 (1971). See also *Reeves v. Motor Contract Co. of Ga.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

voiced because he is unable to pay the statutorily required costs of giving notice.¹³⁶ Of course, this approach has the disadvantage of being limited in application to indigent or relatively poor consumers. Furthermore, in *Sniadach* there evidently was a similar procedure for release from garnishment upon posting bond,¹³⁷ although this bonding procedure was not mentioned in the majority opinion.

Finally, the counterbond is not in reality available to the poor consumer and is difficult to obtain and costly for the middle-income consumer, even if he is informed of the availability of the remedy.¹³⁸ Therefore, the theoretical availability of the counterbond should have no constitutional consequence with regard to the due process objections to seizure without notice and an opportunity for a hearing.

C. *Public and Creditor Interest in Summary Replevin*

Prior to *Fuentes* only two of the lower courts upholding replevin fully confronted the due process issue¹³⁹ by going beyond distinguishing *Sniadach* on the basis of the nature of the property involved or the contractual waiver. Both these decisions turn on the "practical considerations involved" and attempt a "balancing of the various interests of the State and individuals in judging whether a particular procedural scheme or process satisfies rudimentary principles of fairness."¹⁴⁰ It no doubt is true that due process determinations involve a balancing and this is recognized by the concession of the majority opinions in both *Sniadach* and *Fuentes* that prehearing garnishment or seizure might be justified in extraordinary situations. There no doubt are extraordinary situations where creditors can show reason to believe that the debtor is about to take some action which would cause the creditor irreparable injury, but neither the Wisconsin garnishment procedure nor the typical replevin procedure is limited to such cases.

Nevertheless, even in the more typical cases there are legitimate interests to be served by seizure before hearing in a replevin action,

¹³⁶ *Boddie*, and the argument made here, might also be explained on equal protection grounds. See Justice Douglas's concurring opinion, *Boddie v. Connecticut*, 401 U.S. at 383.

¹³⁷ See also *Bell v. Burson*, 402 U.S. 535 (1971), where there was a bonding option.

¹³⁸ The *Fuentes* court seemed influenced by the debtors' evidence that the counterbond option was rarely if ever exercised. 407 U.S. at 84.

¹³⁹ *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971); and *Wheeler v. Adams Co.*, 322 F. Supp. 645 (D. Md. 1971).

¹⁴⁰ *Epps v. Cortese*, 326 F. Supp. 127, 134 (E.D. Pa. 1971).

which interests arguably must be balanced by due process considerations. First, the prehearing seizure will usually obviate the need for any hearing and thus "conserve State financial resources and administrative time."¹⁴¹ Even if we put aside the cases where the debtor is so intimidated by the seizure that he fails to raise available defenses, the current evidence indicates that in most cases where the creditor attempts to repossess he is in fact entitled to repossess and there are no defenses, or at least no defenses relevant to the issue of who is entitled to immediate possession.¹⁴² Thus the courts and the creditors would be saved the trouble and expense of providing for a preseizure hearing if summary replevin procedures had been upheld, and in most cases no injustice would have been done. The trouble with this argument is that it would apply to all situations where due process would require a hearing. Hearings are expensive but they are also essential to justice in the individual case.¹⁴³ "Vindication of constitutional rights cannot be made dependent on any theory that it is less expensive or more expedient to deny them than to afford them."¹⁴⁴

Moreover, there is evidence that some sellers pervert the system and profit from default and repossession.¹⁴⁵ This class of creditor, relying on the ignorance and inertia of their customers, may have reason to repossess where there is no legitimate default. There are other cases where the creditor wrongfully seeks to repossess due to a mistake, perhaps through a failure in a computer billing system.¹⁴⁶ More common, perhaps, are the cases in which the debtor refuses to make installment payments because of a dispute he has with the

¹⁴¹ *Id.*

¹⁴² Even the Caplovitz study mentioned earlier indicates that at least two-thirds of defaulting debtors do so for reasons which would not constitute a defense, e.g., loss of job and inability to pay. See 1 D. CAPLOVITZ, *supra* note 33, ch. 4.

¹⁴³ The converse of individualized judgment is adjudication by categories, e.g., most accused criminal defendants are guilty, therefore trial is unnecessary.

¹⁴⁴ *Brennenan v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972).

¹⁴⁵ Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969). Doubts about the general validity of the Shuchman study may be raised by recent studies by the National Commission on Consumer Finance. See Johnson, *Creditor's Remedies and Rate Ceilings*, 26 PERSONAL FINANCE L.Q. REP. 64, 65 (1972). Shuchman's study in Connecticut is supported by a similar study in the District of Columbia. Note, *Business as Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 CONN. L. REV. 511 (1971).

¹⁴⁶ E.g. *Ford Motor Credit Co. v. Hitchcock*, 116 Ga. App. 563, 158 S.E.2d 468 (1967). Caplovitz describes several cases of deficiency judgments where the creditor had made bookkeeping errors or there was a misunderstanding or a failure of communication between the debtor and creditor; such categories constituted about 7 per cent of the cases studied. 1 D. CAPLOVITZ, *supra* note 33, at 7-2.

seller over the warranty. The buyer's only effective weapon in such a dispute is to withhold payment.¹⁴⁷ Prior to *Fuentes* the creditor could retain the upper hand by summary seizure through replevin, and the mere threat of such action was often enough to force the debtor, who may have needed or very much wanted the continued use of the goods, to capitulate. Even if such cases were uncommon, it is unjust to deny a debtor a hearing merely because most debtors are unsuccessful in court and because we want to avoid the expense of determining if he is an exception to the usual result. To do justice in individual cases is perhaps expensive but it seems to me to be the essence of due process.

A second interest said to be furthered by the opportunity for a prehearing seizure is the protection of the creditor's interest in the property from concealment, destruction, or even deterioration pending the hearing. This interest is not limited to cases where the creditor doubts the debtor's good faith. For instance, in the case of automobiles the debtor may have an accident during the pendency of the hearing. Accidents, however, do not happen very often and most credit agreements involving automobiles require the debtor to carry insurance adequate to protect the creditor. With respect to deterioration, creditors cannot reasonably rely on the security of consumer goods so ephemeral as to lose significant value during the short period pending hearing. Except for automobiles, the principle function of security interests in consumer goods is not to provide assets from which the creditor can look to for payment, but to provide the creditor with a weapon. Repossession and sale of most consumer goods will generally not realize much for the creditor, but the mere threat can be an effective inducement for the debtor to pay.¹⁴⁸ All of which is to say that the creditor's rights in the usual case should not be affected by the exceptional case. Furthermore, these creditors' interests can be adequately protected without depriving the debtor of his possession of the goods, as will be discussed below.¹⁴⁹

A third interest said to be served by prehearing seizure is the creditors' need for an adequate, practical, and inexpensive remedy, making possible the continued availability of retail credit. While there is little empirical evidence on the effect of creditors' remedies

¹⁴⁷ Where a holder in due course intervenes that power is lost.

¹⁴⁸ The point is well made in the recent Crowther Report to the British Parliament on Consumer Credit, 1 CONSUMER CREDIT COMMITTEE, FIRST REPORT, CMD. NO. 4596, at 287 (1971).

¹⁴⁹ See note 185 *infra* & accompanying text.

upon the availability of consumer credit, it seems reasonable to assume that significant interference with important creditor remedies, particularly those having to do with security interests will impair the availability of consumer credit. The preliminary studies conducted by the National Commission on Consumer Finance indicate that repossession is one of the most valued tools of collection.¹⁵⁰ For many consumers, particularly low-income buyers, a purchase money security interest in the goods is the only kind of security they are able to grant creditors other than future earning capacity. If unable to give any effective security, at least the marginal consumers may well have difficulty buying automobiles, major appliances, and other much needed and desired goods. Effective creditor remedies are, in a real sense, in the interests of potential debtor-consumers as well as creditors. If consumer credit is in the public interest then it would seem that efficient and effective creditor remedies are in the public interest.¹⁵¹

The question remains whether in requiring notice and an opportunity for a hearing prior to seizure *Fuentes* has deprived creditors of an effective and efficient remedy. That in turn depends upon the nature of the required notice and hearing. But before examining the nature of the hearing, it should be noted that, as Justice Stewart pointed out, all *Fuentes* requires is an *opportunity* to be heard and then probably only on very short notice.¹⁵² Given the high rate of default judgments in consumer collection cases, it is unlikely that there will be many actual hearings and most cases will be decided by default.

IV. WHAT'S DUE THE DEBTOR: THE NATURE OF THE REQUIRED HEARING

While the opportunity for a hearing of some sort may not generally be dependent upon the nature of the interests involved, so

¹⁵⁰ Preliminary reports of the National Commission on Consumer Finance studies indicate that security interests in personal property are considered the most important remedy for banks and finance companies in secured transactions. Johnson, *Creditors' Remedies and Rate Ceilings*, 26 PERSONAL FINANCE L.Q. REP. 64 (1972). A recent, but limited, study suggests *Fuentes* will have little effect upon the availability or cost of consumer credit. Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEXAS TECH. L. REV. 23 (1972).

¹⁵¹ The court in *Laprease v. Raymours Furniture Co.*, was surely unnecessarily glib in suggesting that there was no governmental or debtor interest in maintaining effective creditor remedies. 315 F. Supp. at 723. Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) more frankly recognized the public interest in effective creditor remedies, although it gave such interest little weight. *Id.* at 278-79, 486 P.2d at 1257, 96 Cal. Rptr. at 57.

¹⁵² See *Lindsey v. Normet*, 405 U.S. 56 (1972) regarding the length of notice.

long as those interests are not de minimis, the Supreme Court has on a number of occasions indicated that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."¹⁵³

The possible types of preseizure hearings might range from a pre-emptory review of the papers filed in court by a clerk or an administrative aide to a full dress trial with all the protections afforded a criminal defendant. Without spelling out in detail the nature of the required hearing, the Court in *Fuentes* suggested two elements were necessary: (1) "evaluation by a neutral official" and (2) an opportunity for the defendant to be heard.¹⁵⁴ There certainly was no indication that the hearing need be elaborate, as was the case in *Goldberg v. Kelly*,¹⁵⁵ the Supreme Court's most detailed analysis of the nature of hearings required by due process. *Goldberg* held that before welfare benefits can be cut off the recipient must be afforded: the opportunity to appear personally, with counsel, before an independent decision-maker; the right to confront and cross examine the witnesses relied on by the state; the right to present evidence; and the right to require the decision-maker to state the reasons for his decision and the evidence relied upon.

It might in some instances seem difficult to distinguish the importance of the interests of the defendant in a replevin case where the property seized is truly a necessity from the case of the welfare recipients' welfare benefits. However, as the Court in *Goldberg* emphasized, nearly all welfare recipients who are legally entitled to benefits will be put in a condition of "overpowering need" if their benefits are cut off.¹⁵⁶ A welfare recipient is by definition living on a thin margin and he has no alternative means of holding on long enough for a hearing. On the other hand, in a significant number of replevins the defendant will have alternative means of surviving pending final determination of the merits of the suit.¹⁵⁷ If the nature of the hearing is to be the same in all replevin cases, the distinction is perhaps justified.

Other contemporary Supreme Court cases say little as to the na-

¹⁵³ *Boddie v. Conn.* 401 U.S. 371, 378 (1971). See also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

¹⁵⁴ This would rule out the ex parte hearing approved of in *Wheeler v. Adams Co.*, 322 F. Supp. 645 (D. Md. 1971).

¹⁵⁵ 397 U.S. 254 (1969).

¹⁵⁶ *Id.* at 261.

¹⁵⁷ Wage garnishments probably lie somewhere between replevin and welfare cut-offs, but, there also, not all wage garnishments produce desperation.

ture of the hearing. In most cases, such as *Bell v. Burson*, the Court thought it sufficient to assert the necessity for a hearing and to add some general language indicating that it must be fair and appropriate¹⁵⁸ or, as Justice Stewart put it in *Fuentes*, "the hearing must provide a real test."¹⁵⁹ This analysis leaves little guidance as to what kind of hearing must be provided in replevin actions. The issue is of great importance because after *Fuentes* virtually every state will be forced to amend their laws and procedures for replevin.¹⁶⁰ However, as I shall argue, in at least those jurisdictions having modern procedural systems modeled after the Federal Rules, alternatives under existing law are available.

Justice Stewart's bald statement in *Fuentes* that the hearing must provide a "real test" leaves unanswered the obvious question what the hearing should be a true test of. The opinion in *Fuentes* simply quotes from Harlan in *Sniadach* that the hearing is for "establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor. . . ."¹⁶¹ In *Bell v. Burson* the Court stated that the hearing requirement provides "a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him."¹⁶² In contrast, *Goldberg* required a hearing "to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments. . . ."¹⁶³ This would seem to indicate that the *Goldberg* hearing must determine more than just the reasonable possibility that the claimant is not entitled to continuation of welfare benefits, and there is nothing in *Goldberg* or the HEW regulations issued in response to *Goldberg* to suggest otherwise.¹⁶⁴ Here again, *Gold-*

¹⁵⁸ 402 U.S. at 542.

¹⁵⁹ 407 U.S. at 97.

¹⁶⁰ Justice Stewart's opinion purposely left open all questions concerning the type of hearing required saying that it was a "subject, at this point, for legislation — not adjudication." *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) (footnote omitted). The New York statute enacted prior to *Fuentes* and in response to *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970), seems hardly an adequate answer. N.Y. CIV. PRAC. LAWS § 7102(d) (McKinney Supp. 1972-73):

(1) Upon presentation of the affidavit and undertaking and upon terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States, the court shall grant an order directing the sheriff of any county where the chattel is found to seize the chattel. . . .

¹⁶¹ 395 U.S. at 343.

¹⁶² 402 U.S. at 542.

¹⁶³ 397 U.S. at 267.

¹⁶⁴ 45 C.F.R. § 205.10 (1971).

berg is probably distinguishable on the basis of the overriding need of all legitimate welfare recipients for continued benefits.

To summarize, the hearing which *Fuentes* requires prior to seizure in a replevin action must have the following features in order to satisfy the minimum requirements of due process: (1) the hearing must be before an independent decision-maker, who need not be a judge or even an officer of the court,¹⁶⁵ (2) the controlling issue is to be whether the plaintiff is likely to succeed at a trial on the merits, and (3) on this issue the defendant must have the opportunity to be heard.

There exists in the Federal Rules of Civil Procedure and in some states a procedure which satisfies both the minimum requirements of due process and the needs of creditors. Under federal rule 65 a temporary restraining order (TRO) may be granted *ex parte* and without notice, but only if the affidavits or verified complaint show that irreparable injury will occur unless the motion is granted *ex parte* and the attorney certifies that he has attempted to notify the other side or indicates the reason for not so notifying them. The TRO itself must state reasons for its being issued without notice. A TRO cannot, unless extended, last more than 10 days and the defendant can get a hearing within two days if he requests it. The next step is a speedy hearing, with notice to the other side, on the preliminary injunction which, if granted, can remain in force until the trial on the merits.

The traditional criteria for granting either a preliminary injunction or a TRO are the probability of the plaintiff's success on the merits, the irreparability of harm to the plaintiff pending a final hearing on the merits, the likelihood that the damage to the plaintiff if the injunction is denied outweighs the foreseeable harm to the defendant caused by the grant of preliminary relief, and, in the case of a TRO without notice, the extent to which immediate and irreparable injury, loss, or damage will result before the other side can be heard.¹⁶⁶ All these criteria are, of course, subject to the traditional discretionary powers of equity courts to deny injunctive relief in appropriate cases.¹⁶⁷ The ultimate merits are not decided unless the

¹⁶⁵ Cf. *Shadwick v. City of Tampa*, 407 U.S. 345 (1971). Indeed this and many other aspects of the debtor-creditor relationship might be handled best through a separate quasi-judicial administrative agency.

¹⁶⁶ *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994, 1056 (1965).

¹⁶⁷ H. McCLINTOCK, EQUITY § 23 (1948).

De Beers Consol. Mines v. United States, 325 U.S. 212 (1945). However, there have been cases of what might be called equitable replevin under FED. R. CIV. P. 65, usually involving seizure of allegedly obscene material. *E.g. Vali Books Inc. v. Murphy*, 343 F. Supp. 841 (S.D.N.Y. 1972). If the credit agreement requires the debtor to turn over the collateral upon default, a court could perhaps order specific performance of this promise under rule 65.

hearing on the motion for provisional relief is consolidated with the trial on the merits, which the rules explicitly permit.

If, as I will attempt to show, the procedures for provisional equitable remedies are appropriately applied to replevin, it should be simple enough for a state legislature to either model a new replevin law after federal rule 65 or else include replevin among the remedies available under rule 65. In those states where the courts have adequate rule-making power this may be possible without legislation.¹⁶⁸

There is, however, one respect in which rule 65 practice is probably not an appropriate model for replevin. As indicated, the court's decision to issue a TRO or preliminary injunction turns in part on a determination that the applicant will suffer irreparable injury if the provisional remedy is denied, and on a balancing of that injury with the harm which might foreseeably occur to the other side if the provisional relief is granted. The object of provisional relief is to maintain the status quo until a full hearing on the merits can be held. In the traditional replevin action no such determination and balancing could occur because the writ was issued and the property seized without notice, hearing, or scrutiny by an official. If it is correct to conclude that the plaintiff in replevin need only establish a reasonable probability of success in the trial on the merits, no such determination of irreparable injury or balancing of the injuries in individual cases is necessary.¹⁶⁹

It is as though there were a rule-of-thumb judgment that in replevin cases as a class the balance of the equities requires the availability of provisional relief in the form of seizure prior to a full trial on the merits, subject, however, to a constitutional requirement of due process for one element of the usual test for provisional relief: that the plaintiff be reasonably likely to succeed at the trial on the merits.

It could, and no doubt will, be argued that due process requires the opportunity to be heard on the issue of irreparable injury and the balancing of the injuries. This argument should not succeed. There is no basis, given the current state of constitutional doctrine,

Rule 64, relying on existing state law, is not of any help and neither is rule 70 which deals only with final judgments. 7 J. MOORE, FEDERAL PRACTICE § 70102 (2 ed. 1948).

¹⁶⁸ Rule 65 probably could not be used directly because replevin is a legal remedy.

¹⁶⁹ There are other requirements sometimes invoked in denying provisional equitable relief that should not apply to replevin. For example, it should not be necessary to demonstrate that the plaintiff's injuries would be irreparable if the provisional relief were not granted; nor should there be a requirement that provisional relief not grant the plaintiff the full measure of relief he would have received with a permanent injunction. See *Developments, supra* note 166, at 1056-69.

for finding the traditional standards for issuing provisional equitable relief constitutionally required.¹⁷⁰ If this be true, there is no reason why Congress or a state legislature could not authorize provisional relief upon a mere showing by the plaintiff that he is more likely than not to succeed. If provisional relief can constitutionally be granted on the basis of probability of success in all cases, there is no reason why this cannot be done in a limited class of cases, such as replevin actions.¹⁷¹

It is relevant at this point to suggest some possible explanations why replevin, one of the most ancient of the common law provisional remedies,¹⁷² was historically available without the now-customary showing of irreparable injury and a balancing of the comparative injuries. The most obvious historical reason is that replevin was an action in law and injunctions were in equity. Courts of law did not consider themselves empowered to make such a vague determination or to balance equities.

A second historical reason derives from the origin of replevin. Replevin was originally designed to remedy wrongful distraint by landlords and was for a time limited to such cases.¹⁷³ The action

¹⁷⁰ There is little law on the potential due process objections to provisional equitable relief. *Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75, 82 (10th Cir.), *cert. denied*, 350 U.S. 986 (1955). *But see* *Buchman v. Smith*, 136 N.J. Eq. 246, 248, 41 A.2d 262, 264, *aff'd*, 137 N.J. Eq. 215, 44 A.2d 179 (1945). *See also* *Carroll v. Commissioner*, 393 U.S. 175 (1968). The courts have stressed the importance of caution in granting *ex parte* restraining orders. *See* *Detroit & Toledo Shore Line R.R. v. Brotherhood of Locomotive Firemen*, 357 F.2d 152 (6th Cir. 1966); *Carpenters' Dist. Council v. Cicci*, 261 F.2d 5 (6th Cir. 1958); *Sims v. Greene*, 161 F.2d 87 (3d Cir. 1947); and comments accompanying 1966 revision of FED. R. Civ. P. 65, 39 F.R.D. 69, 124-25 (1966).

¹⁷¹ As a matter of policy, as opposed to constitutional law, one might argue for a balancing of the hardships test for both the provisional and final replevin remedies. Giving the court discretion to deny replevin would enable the court to force the parties to work out an arrangement which might save the transaction. This is done in several Canadian provinces with no apparent ill effects upon the availability of consumer credit. Ziegel, *Consumer Credit Regulation: A Canadian Consumer Oriented Viewpoint*, 68 COLUM. L. REV. 488, 504-07 (1968).

¹⁷² Replevin can be traced as far back as the end of the 12th or the beginning of the 13th century. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 248 (3d ed. 1922). Antiquity provides, of course, no immunity from constitutional challenge. "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to property in its modern forms." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1968). On the other hand, as Justice Holmes said, "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

¹⁷³ J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES § 53 (2d ed. 1900); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 249 (3d ed. 1922). Distraint is a self-help remedy whereby the landlord seizes the tenant's chattels and holds them as ransom until the tenant pays his due. The landlord at early common law had no right to sell the goods. *Id.* at 248; T. PLUNCKETT, A CONCISE HISTORY OF THE COMMON LAW 383 (5th ed. 1956).

was a legal remedy for a wrongful taking where the landlord made no claim of ownership to the property but only claimed a primitive sort of lien. As Justice Stewart was careful to point out in *Fuentes*, at common law a replevin action did not authorize a sheriff to summarily seize property where the defendant asserted a claim of ownership in the property. Once the defendant asserted ownership the plaintiff was forced to resort to a writ of *de proprietate probanda*, a remedy which developed in response to the practice of defendants using the claim of ownership merely as a delaying tactic.¹⁷⁴ This writ required the sheriff to determine summarily the question of ownership, presumably after some sort of hearing, although the authorities are not clear on the nature of the procedure.¹⁷⁵ This resulted in merely a preliminary determination, as the defendant retained the right to defend in the replevin action.¹⁷⁶ Replevin was an effort to restore the status quo pending a determination of the landlord's right of distraint. Since the landlord in a replevin action was ultimately deprived only of his self-help weapon of withholding the tenant's property, which he could not use or sell, the return of the property to the tenant did not deprive the landlord of any "property," only of his weapon.¹⁷⁷

By the time the Constitution was adopted, however, replevin had significantly changed in at least some of the states so that the defendant in a replevin action could retain possession only by giving a counterbond, much as is true today. Indeed, Pennsylvania, one of the states whose replevin law was before the Court in *Fuentes*, as early as 1705 required a counterbond from the defendant in order for him to retain possession of the property subject to the replevin action.¹⁷⁸ Therefore, in at least some states at the time the Constitution and the fourteenth amendment were adopted, replevin procedure existed in substantially the same form, though not in the same scope, as is typical today.¹⁷⁹

Over a period of time replevin became available for other alleged wrongful "takings" but it was not until quite recently in the

¹⁷⁴ 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 249 (3d ed. 1922).

¹⁷⁵ Ames referred to it as an "inquest of office." Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 23, 32 (1889). See also P. MORRIS, *supra* note 15, at 26.

¹⁷⁶ P. MORRIS, *supra* note 15, at 26.

¹⁷⁷ This functional analysis was supported by the fiction that the chattels distrained were "in the custody of the law, and not merely in that of the distrainer." 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 146 (1st ed. reprint 1966).

¹⁷⁸ P. MORRIS, *supra* note 15, at 32.

¹⁷⁹ Seizure without notice or opportunity for a hearing predates the Constitution and thus history does not, as Justice Stewart seemed to suggest, support the *Fuentes* result.

long history of replevin that the action became generally available for wrongful retention as opposed to wrongful taking.¹⁸⁰ Detinue was the historical remedy for wrongful detention, and seizure prior to trial was not available in such an action. Thus, in the distinction between detinue and replevin, and particularly when replevin was limited chiefly to a remedy for wrongful distraint, a rough but generally sound balancing of equities with regard to provisional relief had been struck. Only when the plaintiff was able to allege a recent wrongful taking, upsetting the status quo, were provisional remedies available to restore that status quo.¹⁸¹

In the judicial repossession of property subject to a security interest, the most common use of replevin today, the plaintiff seeks the possession of property wrongfully detained by the debtor but in which the debtor initially had rightful possession.

This use of replevin suggests a different set of equities and possibly a different judgment as to the availability of provisional remedies. There are, however, two factors that justify the continued use of replevin as a provisional remedy once the defendant has an opportunity to be heard on the creditor's probable right to possession. First, the plaintiff has, or must show that he probably has, a "property" interest in the goods in the form of a security interest. Second, the creditor's need to quickly and economically realize the value of his security interest justifies a provisional remedy once the creditor has shown a likelihood of success at a trial on the merits. Given the shameful delays of trial common today in every major metropolitan area, security interests in consumer goods would be nearly worthless if there were no provisional remedy. Even the most durable consumer good would likely lose most of its value in the two or three years the creditor would have to wait today for a full trial. As has been previously argued, it is in the interest of debtors as a class, as well as creditors and society in general, to maintain effective security devices.

As I indicated earlier, rule 65 is an appropriate model and is the basis of my primary suggestion to those revising their replevin procedures. One important reason for this is that the federal courts

¹⁸⁰ R. SHINN, A TREATISE ON THE AMERICAN LAW OF REPLEVIN AND KINDRED ACTIONS FOR GETTING POSSESSION OF CHATTELS § 23-24 (1809); P. MORRIS, *supra* note 15, at 37-45.

¹⁸¹ The same principle is found in modern provisional equitable remedies, see *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994, 1058 (1965), where status quo is defined as the "last actual peaceable non-contested status . . . which preceded the pending suit," quoting *Cornett v. Reynolds*, 289 S.W.2d 660, 662 (Tex. Civ. App. 1956).

and many state courts have operated under such procedures for many years, have found them workable, and would find them familiar if applied to replevin actions. Conceptually replevin is like a temporary restraining order or a preliminary injunction insofar as they all are provisional specific remedies. The principal difference between replevin, a legal remedy, and an injunction, an equitable remedy, is that the injunction runs to the defendants named in the decree or order. In replevin, enforcement is effected through a sheriff and not by contempt.

Something like the two-tier approach of federal rule 65 is desirable in a post *Fuentes* scheme of remedies. While in most cases notice and an opportunity for a hearing prior to seizure is constitutionally required, both the *Sniadach* and *Fuentes* Courts recognized that in extraordinary circumstances it may be desirable and constitutional for seizure of the property to take place without notice and an opportunity for a hearing. It is true that Justice Stewart in *Fuentes* appeared initially to limit those extraordinary situations to cases where there is an important governmental or general public interest involved, pointing out that the Pennsylvania and Florida replevin statutes "allow summary seizure of a person's possessions when no more than private gain is directly at stake."¹⁸² But he 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."¹⁸³ A revamped state replevin statute should make provision for such cases. This could be done, as in federal rule 65, by requiring the creditor's attorney to certify to the court why notice should not be required and for the court's order to state why no notice was required. There is a danger, of course, that the attorney's certification will become a hollow formality. Because of the volume of cases it is unlikely that the certification will be given the close scrutiny that is the general practice under rule 65. Whether the danger is realized will depend on the diligence and capacity of the courts.¹⁸⁴

The temporary order granted in extraordinary situations with-

¹⁸² 407 U.S. at 92.

¹⁸³ *Id.* at 93.

¹⁸⁴ Cedar Rapids Engineering Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. N.Y. 1971) (decided under a statute designed to satisfy the due process holding of *Laprease*, see note 160 *supra*), is a hopeful sign. "The mere filing of perfunctory allegations by the creditor that the debtor was about to abscond with or fraudulently convey the property and that there was a valid debt are not constitutionally sufficient to justify the temporary deprivation of the use of special property." *Id.* at 210, 326 N.Y.S.2d at 658.

out notice should be of short duration, perhaps only ten days as under rule 65, and the plaintiff should post an appropriate bond. The defendant, upon short notice, thereafter could recover the property if he moves successfully for its return. During this 10-day period the sheriff would retain the goods until after the hearing or, in case of default, until after the time set for a hearing has passed. This would be analogous to the holding period provided for by most replevin statutes during which time the defendant may post a counterbond. The counterbond option, incidently, need not be abolished by this suggested reform.

As a matter of course, the notice of the hearing required by *Fuentes* can contain an order from the court directing that the defendant not remove, conceal, damage or dispose of the property subject to a security interest. Such an order would not interfere with the defendant's normal use of the property and would ordinarily maintain the status quo until the time of the hearing required by *Fuentes*. If the defendant's use of the property is not significantly interfered with by the temporary restraining order, he can have no due process objections to the order having been issued prior to an opportunity for a hearing.¹⁸⁵

This order restraining the defendant from changing the status quo would, in most cases, merely spell out the debtor's duties under the retail installment contract. However, a damage remedy against a defaulting debtor is not much protection since a defaulting debtor is almost by definition a collection problem. On the other hand, the threat of enforcement through a contempt of court order, carrying the possibility of a jail sentence, is more likely to be effective.

At the hearing the plaintiff will be required to show only that he would likely succeed at a full trial on the merits. If the defendant is able to raise substantial doubts regarding this, he should be permitted to retain the goods. This suggested scheme bears some similarity to that provided for by the NCA. The NCA, however, significantly modifies the effect of acceleration clauses and the debtor's right to redeem — issues that are beyond the scope of this article and which are too closely geared to the repossession provisions to be separately evaluated.

¹⁸⁵ *Accord*, *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971) holding prejudgment attachment of real estate not unconstitutional because, *inter alia*, it does not deprive the defendant of the use and enjoyment of the land pending hearing. *But see* *Osmond v. Spence*, 327 F. Supp. 1349, 1356 (D. Del. 1971). *See also* *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D. N.Y. 1971); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

In case of failure to prosecute or default by the plaintiff, the property will be retained by the defendant or returned to him if the first tier remedy has been granted. In case of default by the defendant with respect to the hearing on the provisional remedies, the plaintiff's allegations in his verified complaint will be taken as true and the plaintiff should be given possession of the property subject to the qualification discussed below. If the defendant fails to appear at the appointed hearing but has filed a written plea denying the allegations of the complaint or raising an affirmative defense, the question arises whether the creditor or his attorney must appear at the hearing in order for the court to be able to issue an order for the immediate seizure of the property pending trial.

An efficient procedural system should avoid requiring the attorney for the plaintiff to appear in court in order to obtain a seizure order by default. Even for the attorney processing such cases on a mass basis, as most collection attorneys do, the considerable expense of requiring the attorney's presence should not be required unless substantial benefit is realized.

While there is some authority that the courts can grant a preliminary injunction on default,¹⁸⁶ in practice courts generally will not grant a preliminary injunction, even with notice, without requiring the plaintiff to appear and demonstrate by evidence or affidavit that he has grounds for such relief. The preliminary injunction, however, often will raise more serious problems than the stereotypic replevin action. Whereas with replevin the only remedy sought is the transfer of possession of specified property, the remedies sought and available in a proceeding for a preliminary injunction could involve many very significant matters, some of which might affect interests beyond those of the particular defendant.¹⁸⁷ Therefore there might be good reason for requiring the plaintiff seeking a preliminary injunction to appear in court and make some kind of showing even when the defendant has defaulted.

An ideal replevin system would permit the court to decide the issue of the plaintiff's reasonable probability of success either on the basis of affidavits or verified pleadings, if any, much as in the

¹⁸⁶ *Estee Lauder, Inc. v. Satsky*, 323 F. Supp. 1064 (S.D.N.Y. 1970); 7 J. MOORE, FEDERAL PRACTICE § 65.03(3) (2d ed. 1972). In *Estee Lauder*, however, only some of the defendants had defaulted and there had been an evidentiary hearing for the other defendants.

¹⁸⁷ *E.g.*, *Boomer v. Atlantic Cement Co.* 26 N.Y.2d 219, 257 N.E.2d 870 (1970), 309 N.Y.S.2d 312. This analysis could help explain the result in two of the cases distinguished by Mr. Justice Douglas in *Sniadach*: *McKay v. McInnes*, 279 U.S. 820 (1928); and *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928).

case of a motion for summary judgment in federal practice.¹⁸⁸ Where the defendant has by pleadings, motions, or appearance at the hearing raised a substantial question, a determination must be made by the court. In the case of complete default by the defendant, the order directing the sheriff to seize the goods should be made only after a clerk of court has examined the complaint and any papers filed by the plaintiff and has determined that, on their face, the papers show the plaintiff is entitled to possession of the property and that no defense exists.¹⁸⁹ The reason for this last limitation on the usual rules of default is that a large percentage of consumer credit collection suits end by default. There is evidence that in a significant number of these cases the defendant has a defense but is merely ignorant of his rights, is unable to obtain counsel, is unaware of the availability of legal aid, is put off by the majesty of the courts, or is lazy and does not take the appropriate steps to defend.¹⁹⁰

While it is clear that our whole system of justice is founded upon the premise that the court is passive and the parties must protect their own rights, this premise is frequently qualified in practice.¹⁹¹ At least some courts give the pleadings superficial scrutiny before entering default judgments, if only to determine the appropriate amount of the judgment.¹⁹² Furthermore, in the typical consumer credit case many of the usual assumptions concerning the operation of the judicial system are just not true. First of all the cost of defending a repossession case for the typical consumer is much greater than the cost of prosecution for the typical creditor.¹⁹³ Collection attorney's, unlike those of debtors, generally are able to operate on an assembly line basis. And while the massive expansion of legal aid to the indigent has significantly changed the balance of power for some groups, it still is impractical for the middle class consumer to defend a repossession case. The amount involved would seldom justify the fee for an attorney's time. However, the additional cost and burden on the court of having a competent clerk

¹⁸⁸ The experience under FED. R. CIV. P. 65 is relevant here. See, e.g., *Detroit & Toledo Shore Line R.R. v. Brotherhood of Locomotive Firemen*, 357 F.2d 152 (6th Cir. 1966); *Carpenters' Dist. Council v. Cicci*, 261 F.2d 5 (6th Cir. 1958); *Sims v. Green*, 161 F.2d 87 (3d Cir. 1947).

¹⁸⁹ For instance a retail installment contract may show on its face violation of the state usury laws, a complete defense in some states.

¹⁹⁰ See generally, 1 D. CAPLOVITZ, *supra* note 33, ch. 4.

¹⁹¹ F. JAMES, CIVIL PROCEDURE § 1.2 (1965).

¹⁹² The Los Angeles practice is described in Note, *supra* note 33, at 888-92.

¹⁹³ Leff, *supra* note 112, at 19-24.

thoroughly review all documents in default cases would be small compared with the encouragement of honesty and care that such a system would produce, although it should be stressed that this last suggestion is not required by due process as presently understood and is independent of the basic proposed replevin scheme.

Indeed, it should also be understood that the proposed scheme probably goes beyond the minimum due process requirements in a number of respects. A considerably simpler system may well meet the minimum requirements of *Fuentes*. For instance, if there is sufficient advance notice that the creditor intends to bring an action of replevin, the debtor has a chance to hire an attorney and bring his own action to enjoin the anticipated replevin. Informal notice by the creditor that the debtor's property will be repossessed should not, however, be deemed sufficient notice given the common collection practice of making numerous false threats. More formal advance notice may satisfy the constitutional requirement of notice and opportunity for a hearing if the state procedures permit an injunction of a replevin action¹⁹⁴ and if the fact that the replevin defendant took the initiative to determine the right of replevin does not alter the burden of proof.¹⁹⁵ These last requirements may well require a change in the law of procedure and equity in some states.

A second alternative would be to require the replevin plaintiff to serve the defendant with a copy of the complaint along with a notice that a writ of replevin ordering the sheriff to seize the named property would issue unless the replevin defendant appeared within a certain period of time and showed cause why such writ should not issue. The same reservations about a shift in the burden of proof under state procedure would apply here but the difficulty of proving meaningful notice is resolved by the formality of the complaint and notice showing that a law suit had been or was about to be initiated.

With both of these alternatives, and particularly the first, an objection may be raised that the procedure leaves too much to the initiative of the debtor, often too poor or too ignorant of the law to know how to respond. I find less difficulty with the second alternative in this respect since it raises no more problems for the debtor

¹⁹⁴ Cf. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971); *Young v. Ridley*, 309 F. Supp. 1308 (D.C. 1970). Advance notice is not enough unless there are procedures for a preseizure hearing. *McCallop v. Carberry*, 1 Cal. 3d 903, 83 Cal. Rptr. 666, 464 P.2d 122 (1970).

¹⁹⁵ See *Armstrong v. Lanzo*, 380 U.S. 545 (1965); *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970).

than the primary suggestion outlined earlier or, indeed, than any legal proceeding. The first alternative, however, is subject to some of the same objections as the counterbond, which, of course, could be made available prior to seizure without eliminating the due process problem. While it is entirely possible for an individual debtor to appear *pro se* at a hearing on the provisional seizure, no unassisted layman could be expected to be able to bring a suit to enjoin a contemplated replevin action. Even when an attorney is involved it would be necessary to prepare the papers to start such a suit, to serve the creditor, and then to appear before a court for a temporary restraining order or a preliminary injunction, all within the few days that would probably be available. And this assumes that the amount of money involved would justify retaining an attorney, who might reasonably expect a retainer for this task, involving considerably more time and expense than a simple appearance at the replevin hearing that my primary suggestion contemplates.¹⁹⁶ The filing fees and the practical likelihood of a retainer may subject the first alternative scheme to the same due process and equal protection arguments mentioned earlier with regard to the counterbond.

V. DUE PROCESS AND SELF-HELP REPOSSESSION

A. *The Nature of Self-Help Repossession*

The typical consumer credit security agreement provides that the creditor may repossess the debtor's property by physical removal without the aid of judicial process. Even if the agreement is silent the UCC gives the creditor that right if he can do it "without breach of peace." One might ask why all the talk of replevin hearings if creditors can avoid the impact of *Fuentes* by merely bypassing the legal processes and repossessing privately. If this were possible then perhaps *Fuentes* would be, as the dissent put it, mere "ideological tinkering." There are two answers to that suggestion: first, self-help repossession is often not legally or practically possible and, in any event, is subject to considerable hazard; second, self-help repossession itself may be subject to due process limitations.

Automobiles are often relatively easy objects of private repossession. If the automobile is left on a street or parking lot, all the repossessioner need do is exercise the skills of an ordinary car thief and drive the automobile away. This is more difficult with other

¹⁹⁶ One common problem faced is determining the appropriate legal name of a merchant or creditor who operates under a trade name different from his legal name. The creditor's legal name is obtainable but often not without time, trouble and expense. See Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 420 (1966).

consumer goods such as furniture and appliances which require the reposessor to enter the debtor's residence. To gain entrance to the debtor's home may require threats, fraudulent misrepresentations, or trickery, and these tactics often create a risk of violence or lesser breaches of the peace. The men hired to repossess consumer goods, sometimes called "repo goons," are usually menacing in appearance and manner. Their tactics are often forceful and crude, and the debtor is usually traumatized by the whole process. "In the underworld of consumer finance, . . . repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play."¹⁹⁷

The law varies from state to state as to what constitutes a "breach of the peace," and even within any one jurisdiction the standards are likely to be fuzzy.¹⁹⁸ Even a sophisticated creditor can seldom be certain that he has not gone too far. Furthermore, the case law in some states makes it difficult to legally repossess goods from an occupied home unless the debtor lays out the welcome mat.¹⁹⁹ Although the law has probably not gone far enough to protect debtors from the tough tactics of the repo goons, the legality of many private repossessions is at least questionable. This may be one reason why replevin is resorted to so often even though it usually is the more expensive remedy. The expense, however, is not such an important factor where the debtor has funds. Although repossession requires an initial cash outlay by the creditor, consumer installment contracts nearly always contain a clause requiring the debtor to pay the creditor's costs of repossession and collection of the inevitable deficiency judgment.

The legal consequence to the creditor of having a court find his repossession tactics illegal is not altogether clear. Most cases hold the creditor liable for conversion of the goods, for trespass if such has occurred, and for any consequential damages.²⁰⁰ Some courts have even allowed punitive damages, in some cases substantial,²⁰¹

¹⁹⁷ 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1, at 1212 (1965).

¹⁹⁸ The cases are collected in White, *Representing the Low-Income Consumer in Repossessions, Resales and Deficiency Judgment Cases*, 64 NW. U.L. REV. 808, 810-12 (1970); 3 U.C.C.L.J. 199, 201-03 (1970). See also Note, *Non-Judicial Repossession — Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435 (1970).

¹⁹⁹ See, e.g., *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400 (1934); *Kirkwood v. Hickman*, 223 Miss. 312, 78 So. 2d 351 (1955).

²⁰⁰ See, e.g., *Manhattan Credit Co. v. Brewer*, 232 Ark., 976, 341 S.W.2d 765 (1961).

²⁰¹ E.g., *Beneficial Fin. Co. v. Wiener*, 405 P.2d 691 (Okla. 1965) (72-year-old

increasing the risk to the creditor who decides to rely upon his self-help remedies. The clause common to consumer credit agreements purporting to give the creditor the right to enter the debtor's premises to recover the goods is generally not effective in protecting the creditor, either by reason of statute²⁰² or case law.²⁰³ Repossession is safer in the case of automobiles but even then there is danger that the creditor's agent will be found to have acted wrongfully.²⁰⁴ In any event, self-help repossession is not an adequate substitute for replevin from any point of view.²⁰⁵

B. *The Constitutional Status of Self-Help Repossession*

1. *The State of the Law.*— Even if the creditor can repossess without a breach of the peace, there is considerable question whether after *Fuentes* this common creditor remedy is constitutional. The issue of whether fourteenth amendment due process standards will be applied to self-help repossession has been directly raised in four reported and a number of unreported cases with varying results.²⁰⁶ The question is of great importance and will probably have to be resolved ultimately by the Supreme Court.²⁰⁷

As noted earlier, the UCC gives the secured creditor the right to repossess without judicial process even if the contract is silent on the issue. Nevertheless, virtually all consumer credit contracts in-

widow recovered \$2000 for actual and \$1500 for exemplary damages incurred in repossession following default on a \$183 balance of the \$300 obligation); *Kirkwood v. Hickman*, 223 Miss. 372, 78 So. 2d 351 (1955).

²⁰² *E.g.*, DEL. CODE ANN. title 6, § 4311 (1970).

²⁰³ *See, e.g.*, *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400 (1934); *Douglas v. Humble Oil & Refining Co.*, 445 P.2d 590 (Ore. 1968).

²⁰⁴ *See, e.g.*, *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970); *Manhattan Credit Co. v. Brewer*, 232 Ark. 976, 341 S.W.2d 765 (1961).

²⁰⁵ *See generally* Note, *supra* note 198, at 435 (1970).

²⁰⁶ *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *Adams v. Egley*, 334 F. Supp. 614 (S.D. Cal. 1972); *Green v. First Nat'l Exch. Bank of Va.*, CCH SECURED TRANS. GUIDE ¶ 51,930 (W.D. Va. 1972); *McCormick v. First Nat'l Bank of Miami*, 322 F. Supp. 604 (S.D. Fla. 1971).

²⁰⁷ As important as the issue of state action clearly is, it is surprising that it was not discussed in two recent case notes discussing *Adams v. Egley*, 334 F. Supp. 614 (S.D. Cal. 1972): 5 CREIGHTON L. REV. 360 (1972); 13 B.C. IND. & COM. L. REV. 1503 (1972). State action was also curiously not mentioned in several post-*Sniadach* cases which would, based on the analysis presented here, present the issue. *See, e.g.*, *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970) involving a private real estate foreclosure sale; *But cf.* *Logan v. Short*, 342 F. Supp. 1349 (E.D. Mo. 1972). *See also* Stillwater, *The California Bankers Lien Law: A Reappraisal of a Creditors' Remedy in a New Economic Context*, 27 BUS. LAW. 777 (1972). Other cases have apparently confused state action and "under color of law" under 42 U.S.C. § 1983 (1970). *See, e.g.*, *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972).

volving a security interest contain specific authorization for such self-help repossession either by incorporating the UCC remedies by reference or by an express statement that the creditor can repossess upon default. No notice is required under either the UCC or under the terms of the usual consumer credit contract.²⁰⁸ Upon deciding that the debtor is in default, the creditor simply hires a repo goon to seize the property and the first notice that the debtor receives, other than the disappearance of his property, is that the creditor plans to dispose of the collateral at private or public sale. In practice then, the self-help repossession procedure results in the deprivation of the debtor's property without notice or opportunity for a hearing every bit as much as does the replevin procedure found unconstitutional in *Fuentes*. The chief differences are first that the debtor has in some states, at least in theory, the right to resist the seizure and therefore to force the creditor to resort to legal process,²⁰⁹ and second, that private repossession is not carried out by a publicly appointed and controlled official. Of course, when the property is seized while the debtor is absent the first difference is irrelevant and the second suggests the debtor would prefer replevin.²¹⁰ Nevertheless as a constitutional matter, self-help repossession and replevin are distinguishable on the basis of the involvement of the state. Regardless of how oppressive and unfair self-help repossession might be, unless there is state action there can be no violation of the debtor's constitutional rights under the fourteenth amendment.²¹¹

The first case to face the issue, *McCormick v. First National Bank of Miami*,²¹² found no state action since the repossession was pursuant to contract and not pursuant to state law. The fact that the contract merely stated the creditor might exercise his rights under the UCC was said to be of no consequence. "Reference to the Uniform Commercial Code is simply a matter of incorporating by reference . . . provisions which could have been set forth word for

²⁰⁸ Preseizure notice under some state retail installment sales statutes will, however, limit the debtor's right to redeem. *E.g.*, MASS GEN. LAWS ANN. ch. 2550 §§ 21, 22 (Supp. 1972).

²⁰⁹ *See, e.g.*, *Morris v. First National Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970).

²¹⁰ Comment, *Non-Judicial Repossession — Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435 (1970).

²¹¹ Civil Rights Cases, 109 U.S. 3 (1883) is generally cited for this fundamental principle.

²¹² 322 F. Supp. 604 (S.D. Fla. 1971).

word in the contract signed by the plaintiffs."²¹³ This was only one of three alternative holdings of the decision denying the debtor relief; the other two holdings have been clearly overruled by later Supreme Court cases.²¹⁴ In spite of this rather poor batting average, there is no sign that the *McCormick* court was wrong on the state action issue.

In *Adams v. Egley*²¹⁵ the contracts made less explicit reference to the UCC, yet the court had no difficulty in finding state action, and once having done that, in finding a violation of due process. The *Adams* court relied almost entirely on *Reitman v. Mulkey*²¹⁶ in which the Supreme Court held that proposition 14, a newly-adopted provision in the California constitution prohibiting state restrictions on an individual's right to discriminate in the sale of residential real estate, violated the equal protection clause of the fourteenth amendment. The effect of proposition 14 was to void various state and local anti-discrimination laws and to make it difficult or impossible to enact new anti-discriminatory laws. The *Adams* court thought *Reitman* analogous to self-help repossession since in both cases the state is encouraging as well as authorizing private actions which the state could not itself constitutionally undertake. The *Adams* court reasoned that "the presence of Sections [9-503 and 9-504 of the UCC] had a significant impact on the contents of that contract's provisions" and that the contractual cross-references to the Code showed that "in drawing up the agreements defendant creditors were 'persuaded or induced to include' repossession by the fact that such repossession was permitted by statute."²¹⁷ These Code sections "set forth a state policy, and the security agreements upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions, are merely an embodiment of that policy,"²¹⁸ and therefore constitute state action.

The third case, *Oller v. Bank of America*²¹⁹ rejected the *Adams*

²¹³ *Id.* at 606.

²¹⁴ The holding that 28 U.S.C. § 1343(3) (1970) does not confer jurisdiction where only "property rights" are involved was overruled in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972). A second alternative holding adopted the reasoning in *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), which of course was overruled by the Supreme Court in *Fuentes v. Shevin*, 470 U.S. 67 (1972).

²¹⁵ 338 F. Supp. 614 (S.D. Cal. 1972).

²¹⁶ 387 U.S. 369 (1967).

²¹⁷ 338 F. Supp. at 617.

²¹⁸ *Id.* at 618.

²¹⁹ 342 F. Supp. 21 (N.D. Cal. 1972).

holding and suggested a fundamental problem with the *Adams* rationale:

It is difficult to imagine any statutory provision that does not, in some way, control human relationships. To say, as plaintiff seems to contend, that all human behavior which conforms to statutory requirements is "State action" or is "under color of State law" would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well.²²⁰

The fourth case, *Greene v. First National Exchange Bank of Virginia*,²²¹ reached the same result as *McCormick* and *Oller*, without citing either. The court based its decision on language in *Fuentes* referring to governmental action and on the lack of "active and direct state action" in self-help repossession.²²²

The *Adams* resolution of the state action issue finds some support in several other cases applying *Sniadach* principles, although not always on the same rationale. For instance, in *Magro v. Lentini Bros. Moving & Storage Co.*,²²³ a *Sniadach*-based attack upon UCC section 7-210 which grants a warehousemen's lien and provides for the nonjudicial sale of property subject to the lien was rejected. Before reaching the due process argument however, the Court indicated, without so holding, that if necessary it would have found state action on the theory that the warehouseman's execution on his own lien constituted a private person performing a traditionally public function.²²⁴ In *Klim v. Jones*²²⁵ the California Innkeeper's Lien Law was held unconstitutional on the basis of *Sniadach* and its progeny. California's innkeeper's lien was completely statutory although there were direct common law antecedents, and there was no form contract distinguishing the case from *Adams*. The *Klim* court found state action, relying principally on racial discrimination cases such as *Reitman*, *Adickes v. S. H. Kress & Co.*²²⁶ and the often-quoted statement from *United States v. Classic*²²⁷ that "misuse of

²²⁰ *Id.* at 23. *Adams v. Egley* and *Oller v. Bank of America* are reviewed and quoted at some length by Burke, *Conflicting Views on Self Help Provisions of Uniform Commercial Code Expressed by Federal District Courts in California*, 26 PERSONAL FINANCE L. Q. REP. 33 (1972).

²²¹ CCH SECURED TRANS. GUIDE § 51, 930 (W.D. Va. 1972).

²²² *Id.*

²²³ 338 F. Supp. 464 (E.D.N.Y. 1971).

²²⁴ *Id.* at 466. Citing, among other cases, *Marsh v. Alabama*, 326 U.S. 501 (1946); and *Smith v. Allwright*, 321 U.S. 649 (1944).

²²⁵ 315 F. Supp. 109 (N.D. Cal. 1970).

²²⁶ 398 U.S. 144 (1970).

²²⁷ 313 U.S. 299, 326 (1941).

power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.' "

Adickes involved a suit, under Section 1983 of title 42 of the United States Code,²²⁸ against a store which had refused to serve the plaintiff, a white woman, because she was accompanied by blacks. The state action in that case was found, at least in part, in the fact that the police by arresting the plaintiff for vagrancy were assisting the store owner in his discriminatory policies, a situation not comparable to self-help repossession.²²⁹ However, Justice Brennan's opinion in *Adickes*, concurring in part and dissenting in part, contained some very broad language, quoted in *Klim*, which might arguably cover self-help repossession:

Thus, when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action. . . . A private person acts "under color of" a state statute or other law when he, like the official, in some ways acts consciously pursuant to some law that gives him aid, comfort, or incentive²³⁰

Also supporting *Adams* is *Hall v. Garson*²³¹ which involved the constitutionality of a statutory landlord's lien enforced by the landlord's private seizure of the tenant's property. The court found state action on the basis that

the entry into another's home and the seizure of another's property [were acts that possess] many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the Sheriff or constable. Thus [the statute in question] vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function.²³²

*Santiago v. McElroy*²³³ also involved the constitutionality of a landlord's statutory right of distraint, ironically the codified version

²²⁸ 42 U.S.C. § 1983 (1970).

²²⁹ *But see* *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970), where the sheriff accompanied the repo goon. This situation may be controlled by *Adickes*.

²³⁰ 398 U.S. at 203, 212.

²³¹ 430 F.2d 430 (5th Cir. 1970). *Contra*, *Kerrigan v. Boucher*, 326 F. Supp. 647 (D. Conn.), *aff'd* 450 F.2d 487 (2d Cir. 1971). *See also* *Dielen v. Levine*, 344 F. Supp. 823 (D. Neb. 1972).

²³² 430 F.2d at 439.

²³³ 319 F. Supp. 284 (E.D. Pa. 1970). *See also* *Musselman v. Spies*, 343 F. Supp. 528 (M.D. Pa. 1972); and *Sellers v. Contino*, 327 F. Supp. 230 (E.D. Pa. 1971).

of the landlord's distraint that gave rise to the summary writ of replevin. In *Santiago*, however, there was also a standard-form lease which, by its terms, purported to give the landlord the right of distraint by contract. State action was found, but not by reason of the landlord's self-help repossession, an issue which the court thought was unnecessary to decide. It was found in the distress sale, which the statute required to be carried out by a sheriff or other public official.²³⁴ Thus *Santiago* is readily distinguishable from *Adams* because of the direct participation of state officials in the very step of the procedure being attacked.²³⁵

*Palmer v. Columbia Gas Co.*²³⁶ might also be considered precedent supporting the *Adams* result. The court there held unconstitutional under *Sniadach* the termination of public utility service for alleged nonpayment where there was no notice or opportunity for a hearing. The defendant there, however, was a state-created monopoly whose practices, including the authority to cut off service, were subject to direct state regulation and control. Thus, a finding of state action was not difficult, and the case is not closely analogous to *Adams*.

The cases just described suggest three possible arguments for finding state action in self-help repossession: (1) because the creditor's right to repossession derives from or is encouraged by UCC section 9-503, a state statute expressing state policy; (2) because repossession is an act traditionally performed by state officials and self-help repossession, therefore, involves the state authorizing a private party to perform a state function; and (3) because self-help repossession, insofar as it is aided in enforcement or is given legal recognition by the state, involves state action.²³⁷

As Professor Charles Black put it, "there were and are no clear

²³⁴ See also *United States v. Barr*, 295 F. Supp. 889 (S.D.N.Y. 1969), finding state action by private parties authorized by statute to act as process servers.

²³⁵ *Kerrigan v. Boucher*, 326 F. Supp. 647 (D. Conn. 1971), also involving a landlord's lien or right of distraint, found no state action. *Logan v. Short*, 342 F. Supp. 1349 (E.D. Mo. 1972), found no state action in the private foreclosure under a deed of trust. In *Young v. Ridley*, 309 F. Supp. 1308 (D.C. 1970), and *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958), private foreclosure sales of real estate were found constitutional without discussion of the state action issue.

²³⁶ 342 F. Supp. 241 (N.D. Ohio 1972). But see *Taglianetti v. N.E. Tel. & Tel.*, 81 R. I. 351 (1954) an early case not finding state action in a utilities cutoff. See also *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952); *Intercontinental Indus. Inc. v. American Stock Exch.*, 452 F.2d 935 (5th Cir. 1971).

²³⁷ In those states which license private repossessioners, such as California, there is an additional argument probably now precluded by *Moose Lodge No. 107 v. Irvis*, 404 U.S. 816, 934 (1972), which held that the granting of a liquor license did not make discrimination by the licensee state action.

and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catch-phrase."²³⁸ It is impossible to confidently predict how the Supreme Court will ultimately rule on the issue of state action in the case of self-help repossession, but it is worth analyzing the theories suggested by the above cases.

2. *UCC Section 9-503 as State Action.*— Nothing could be more clearly state action than the adoption by the individual states of the Uniform Commercial Code. The issue, however, is not whether Code section 9-503 is state action, but whether self-help repossession pursuant to section 9-503 is state action and thus deprives a person of property without due process of law.²³⁹ Section 9-503 does not in itself require that any secured creditor have the right to private repossession. As is true with most of the UCC, it may be varied by agreement of the parties.²⁴⁰ If section 9-503 were mandatory in its effect on the parties, the case would be quite different and it would be much easier to find state action.²⁴¹ On the other hand, by enacting section 9-503 a state does not remain truly neutral. Even if the parties make no express agreement regarding self-help repossession, section 9-503 gives the secured party that right. In this respect section 9-503 is analogous to proposition 14, the California constitutional amendment involved in *Reitman*.

Proposition 14 not only made it possible for private citizens to discriminate, it gave the right to discriminate the status of a constitutional right, one that cannot be restricted by the usual methods of state or local legislation. Thus, in both *Reitman* and *Adams* the state has not remained neutral but has made it more difficult for private citizens in their law making capacities, as voters and makers of contracts, to opt out of the privately authorized conduct. As in *Reitman*, section 9-503 expresses a state policy favoring and encouraging a private action which, if done by the state, would be unconstitutional.

Nonetheless, if *Reitman* applies to *Adams* for only those reasons suggested above, it surely would be little more than the ideological tinkering decried by the dissenters in *Fuentes*. Repeal of section 9-503 would still leave the parties to a security agreement free to in-

²³⁸ Black, "State Action," *Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 88 (1967).

²³⁹ See *Reitman v. Mulkey*, 387 U.S. 369, 392 (1967) (Harlan, J., dissenting); P. KAUPER, *CIVIL LIBERTIES AND THE CONSTITUTION* 143 (1962).

²⁴⁰ UCC §§ 1-102(3), (4).

²⁴¹ *Accord*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

clude a provision for self-help repossession. At least in the case of consumer transactions, we can be sure that such a clause would always be included, as in practice it now is. Even if the debtor could understand the meaning and import of the clause, he would be powerless to have it removed. He cannot go elsewhere, for all other creditor's contracts would say the same thing. So if he needed credit he would have no choice but to grant the creditor the right to self-help repossession without notice or an opportunity for a hearing. Therefore, when dealing with consumer transactions, leaving the matter to private contract means leaving it up to the creditors. A consumer credit contract is in reality private law-making in which the creditor has the only vote.²⁴²

Before taking these assertions as a new argument for state action it should be realized that consumer credit transactions could hardly be otherwise. Consumer credit must be processed on a mass basis with standardized contracts just as goods must be mass produced in standard sizes, shapes, and forms if they are to be within the economic grasp of the average consumer. Custom-made contracts like custom-made goods are expensive. Individually negotiated consumer credit contracts are not worth the price, and consumers are not collectively organized so as to play a role in the drafting of the contracts.²⁴³ It is neither accident nor the result of conspiracy that virtually all consumer secured credit agreements contain a clause giving the creditor the right of self-help repossession. Such a clause is clearly in the creditor's interest and when it is left to him he naturally will include it. It matters little whether the industry is in competition or is oligopolistic since there would be little competition in the terms of default in credit contracts.²⁴⁴ Few consumers read or understand the small print and fewer still are concerned with default procedures at the moment the sale is made or the credit extended. Any creditor's attorney who failed to include such a clause when drafting his client's contracts should be dismissed as incompetent — unless, of course, he had good reason to believe the clause illegal and unenforceable or that the clause would cause his client to lose customers.

Since the state is not responsible for creating the conditions that result in this one-sided private lawmaking, the results of that law-

²⁴² See generally Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). Mr. Slawson's helpful analysis has contributed greatly to the discussion here.

²⁴³ See Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).

²⁴⁴ Slawson, *supra* note 242, at 531.

making — the consumer credit contract — should not be considered state action.²⁴⁵ Of course, the argument for state action becomes much stronger if the party drafting the contract has a monopoly power that is created or tolerated by the state, such as the case of the public utility in *Palmer v. Columbia Gas*,²⁴⁶ or if the contract is drafted by a conspiracy of creditors (perhaps a trade association), which for this purpose would be the equivalent of a monopoly.

Absent such significant monopoly power on the creditor's side, freedom of contract should not yield a basis for a finding of state action, at least for purposes of the due process clause. In this regard recall the discussion concerning contracts of adhesion in connection with *Fuentes* and *Swarb v. Lennox*.²⁴⁷ Once a constitutional right is found to have been violated, which involves a finding of state action, it seems perfectly sensible to ignore the language in adhesion contracts which purports to waive those constitutional rights. This, however is far different from saying that the state is involved in every term of a contract of adhesion. Waiver of a constitutional right must be done knowingly and intelligently, but every term in a consumer credit contract is not a constitutional matter.²⁴⁸

3. *Legal Recognition by the State of the Private Repossession as State Action.*— A recent article by Professor Barkley Clark suggests that "the imprimatur of UCC §9-503, coupled with the use of the court system to grind out deficiency judgments following repossession would seem to constitute sufficient state action under the fourteenth amendment."²⁴⁹ Code section 9-503 has been dealt with above, but the other aspect of Professor Clark's statement deserves discussion. There are two threads to Professor Clark's suggestion about, as he calls it, the "deficiency judgment machine." First, as Professor Clark argues persuasively, section 9-503 is only one of many sections in Part 5 of Article 9 of the UCC which favors the creditor, often to a greater degree than did the pre-Code law. Two instances mentioned are the authorization of acceleration

²⁴⁵ But see Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 217, 220 (1970).

²⁴⁶ 342 F. Supp. 241 (N.D. Ohio 1972).

²⁴⁷ See text accompanying note 116 *supra*.

²⁴⁸ But see Skilton & Helsted, *Protection of the Installment Buyers of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1475 (1967).

²⁴⁹ Clark, *supra* note 34, at 329. To support this hypothesis Clark cites only *Adams v. Egley* and *Reitman v. Mulkey*.

clauses and the elimination of the election of remedies doctrine.²⁵⁰ Each of these provisions, when applied to consumer transactions, makes repossession and deficiencies more likely. I generally agree with his analysis of the unfortunate way that Article 9 treats the consumer in fact if not in theory. These other provisions, however, have nothing to do with the due process issue under section 9-503, which is concerned only with the availability of notice and hearing.

In most cases, when consumer goods are repossessed there is a discrepancy between the value of the collateral, or what it realizes, and the amount of the debt plus the costs of repossession and resale. Frequently the creditor will resort to the courts to establish and to collect the deficiencies.²⁵¹ At this point an organ of the state — the court — is called upon to determine the lawfulness of the repossession. As indicated earlier, if the repossession is unlawful because it involved a breach of the peace, some courts have held the creditor guilty of conversion and, at a minimum, the debtor is entitled to be credited with the value of the goods repossessed rather than the amount realized on the resale.²⁵² It is at least arguable that if the court deems a self-help repossession without notice or opportunity for a hearing as lawful, it is, in a sense, enforcing the repossession clause of the contract.²⁵³ At this point the often cited but seldom decisive case of *Shelley v. Kraemer*²⁵⁴ may be used to support a finding of state action. *Shelley* held that enforcement by a state court of racially restrictive covenants in real property deeds constituted state action and thus violated the equal protection clause of the fourteenth amendment.

This is not the place to fully explore the enigma of *Shelley v. Kraemer*. The case, however, has not been read to make any action by a court giving legal effect to privately created rights "state action" for purposes of the fourteenth amendment. *Shelley* involved what in effect is private zoning, traditionally a state activity. Furthermore, *Shelley* involved an attempt to affirmatively enforce a racial covenant against a willing seller and a willing buyer. In the

²⁵⁰ UCC §§ 3-109(1)(c), 9-504(2).

²⁵¹ The early reports of the National Commission on Consumer Finance Studies indicate that deficiency suits are not as common as one would think. See Johnson, *Creditors' Remedies and Rate Ceilings*, 26 PERSONAL FINANCE L.Q. REP. 64, 65 (1972).

²⁵² See note 200 *supra*, & accompanying text.

²⁵³ *But see*, Thorp Credit Corp. v. Barr, CCH SECURED TRANS. GUIDE ¶ 51,925 (Iowa Sup. Ct. 1972).

²⁵⁴ 334 U.S. 1 (1948).

case of private repossession the courts are not called upon to enforce the creditor's right to possession but only to recognize that the repossession was done legally.

The distinction between court enforcement of privately created rights and giving legal effect to those rights is supported by *Evans v. Abney*.²⁵⁵ There property had been conveyed in trust to the city of Macon, Georgia for a park for the exclusive use of whites. When the Supreme Court held that the park could not constitutionally exclude blacks,²⁵⁶ the Georgia courts subsequently held the purpose of the trust could not be carried out and that the land therefore must revert to the heirs of the donor. This action by the Georgia courts was held constitutional by the Supreme Court in *Evans v. Abney*, even though in holding that the property reverted, the Georgia courts had to give legal effect to the racial restriction in the deed of trust. The relevance of *Evans* is even greater, for the racial restriction on the deed was authorized by a statute which probably had changed the common law.²⁵⁷

Finally, the most recent important state action decision by the Supreme Court, while not in point, indicates that the Court is not likely to expand the current concept of state action even in racial discrimination cases.²⁵⁸ And the concept of the state action may well be narrower when applied to the due process clause than the equal protection clause.²⁵⁹

4. *Repossession as Private Parties Carrying Out Traditionally Public Functions.*— The foundation for a finding of state action where private parties are carrying out a traditional state function derives from *Marsh v. Alabama*²⁶⁰ and *Smith v. Allwright*.²⁶¹ In *Marsh v. Alabama* the Supreme Court held that a company town is bound to the legal strictures of a state municipality if it so functions. In *Smith v. Allwright* the Court held that the Texas Democratic Party, even if allegedly a voluntary and private organization, could not discriminate on the basis of race in its primary elections. Later cases held that states cannot insulate the electoral process by dele-

²⁵⁵ 396 U.S. 435 (1970).

²⁵⁶ *Evans v. Newton*, 382 U.S. 296 (1966).

²⁵⁷ *Id.* at 310.

²⁵⁸ *Moose Lodge No. 107 v. Irvis*, 404 U.S. 816, 934 (1972).

²⁵⁹ Note 270 *infra* & accompanying text.

²⁶⁰ 326 U.S. 501 (1948).

²⁶¹ 321 U.S. 649 (1944).

gating the conduct of primary elections entirely to "private" political parties,²⁶² and the principle has been applied in other contexts.²⁶³

The state function theory was applied to *Sniadach* rights in *Hall v. Garson*.²⁶⁴ There the Court said that execution of a lien in Texas had traditionally been a function of the Sheriff or constable and therefore found state action when a landlord so authorized by statute seized the tenant's property. Assuming the Court accurately described the Texas tradition, the question remains whether the tradition is the same for self-help repossession.

Pollock and Maitland tell us that early English law prohibited "in uncompromising terms any and every attempt to substitute force for judgment," and that "[i]n our own day our law allows an amount of quiet self-help that would have shocked Bracton."²⁶⁵ But they were talking of the 13th century and admit that things became more lax during the later middle ages. The one exception to the early law's prejudice against self-help was the landlord's power to distrain. But even this was limited and was subject to hazards not too different from those found today in self-help repossession.²⁶⁶ Gilmore tells us that

[t]he secured party's right to take possession of collateral on default and without judicial proceedings is a relatively late development. The seventeenth century pattern . . . required the institution of a suit in equity for foreclosure. The right to take possession without applying to a court for permission was concomitant of the mortgagee's right to conduct his own foreclosure under a power of sale clause, whose validity came to be recognized during the nineteenth century.²⁶⁷

However, all modern security statutes, including the Uniform Trust Receipts Act²⁶⁸ and the Uniform Conditional Sales Act²⁶⁹ which predated the UCC, permit the creditor the right of self-help repossession.

Thus, whether repossession of property subject to a security interest was traditionally a function of the state depends on how long

²⁶² *Terry v. Adams*, 345 U.S. 461 (1953).

²⁶³ *See, e.g., Evans v. Newton*, 382 U.S. 296 (1966).

²⁶⁴ 430 F.2d 430 (5th Cir. 1970).

²⁶⁵ 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 574 (2d ed. 1968).

²⁶⁶ *Id.* at 576.

²⁶⁷ 2 GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 44.1, at 1212 (1965).

²⁶⁸ U.T.R.A. § 6(2).

²⁶⁹ U.C.S.A. § 16.

it takes to make a tradition. If we have to go back to the time of the drafting of the Constitution, then it would seem tradition is that repossession is a function of the state. If our point of reference is the time the fourteenth amendment was adopted, the tradition is not so clear. In any event, self-help repossession is nothing new. If tradition be the guide, I would guess the Supreme Court would not find it a matter of state action on that basis alone. It is difficult to see anything inherent in repossession that makes it peculiarly a function of the state and so this theory for a finding of state action, like the others, to me seems not determinative.

Furthermore, there is considerable reason to question whether state action has the same meaning when applied to the due process clause of the fourteenth amendment than it does when applied to the equal protection clause.²⁷⁰ As suggested by the *Oller* case, the fourteenth amendment was directed primarily at the evils of racial discrimination.²⁷¹

There remains a very practical consideration that may in the end win the day. When repossession takes place without his knowledge, a debtor is just as helpless and as propertyless after self-help repossession as with replevin. If it makes sense to require notice and an opportunity for a hearing prior to seizure in a replevin action, it should make sense prior to self-help repossession. The fourteenth amendment is not just part of a constitution but is a most fundamental expression of policy. While not convincing to me, there is enough in the arguments discussed above to permit a Supreme Court so inclined to find state action in self-help repossession. On the other hand, with only a minority of the present Court voting for the requirement of notice and an opportunity for a hearing in replevin actions, that inclination is at best questionable.

But the Constitution is not the only depository of wisdom and policy. If notice and an opportunity for a hearing before seizure make sense in a replevin action, as I believe they do, the state legislatures should require the same procedures for self-help repossession. Perhaps, as suggested earlier, mere notice by the creditor, if it is formal enough to strike home, would be sufficient if it were done in connection with the filing of a suit for a deficiency judgment. I would not, as does the National Consumer Act, do away entirely with the self-help remedy. While in some ways less desirable than

²⁷⁰ Black, *supra* note 238, at 85; P. KAUPER, *supra* note 239, at 128-29. See also *Loving v. Virginia*, 388 U.S. 1, 8 (1966).

²⁷¹ 342 F. Supp. at 23.

replevin, given the accounts of terror and humiliation through heavy-handed techniques, self-help repossession often will be the least expensive remedy for the creditor and thus of obvious advantage to the debtor ultimately saddled with that expense.

Since the debtor pays this expense in the deficiency judgment it would not seem in his interest to require repossession only through the courts. Where the debtor cannot pay for the costs of repossession the creditor must. If we increase the costs for the creditors we probably increase the cost or decrease the availability of credit, or so our economic theory would tell us.

VI. CONCLUSION

While the requirements for notice and the opportunity for a hearing may increase the creditor's cost, that increment is probably not very great and is, in any event, justified. As I have tried to show, the changes in replevin procedures required by *Fuentes*, and even the system suggested here, when applied to either replevin or self-help repossession will only somewhat alter the balance of power between creditors and debtors. It need not significantly interfere with the legitimate secured creditor's remedies even in the unusual case of the true deadbeat and it will not damage the value of the personal property security interest.

Fuentes, as I read it, and the reforms I propose will by no means solve the problems of the consumer. It will do nothing to help those probably in greatest need — debtors who are in default and cannot pay. It will help the debtor who is quick enough in mind and deed to prevent an injustice from being done to him. And even for the alert debtor, notice and an opportunity for a hearing will not be much help until he or our society can find a solution to the problem of providing adequate legal services to the poor and middle class. The procedure for notice and a hearing prior to repossession, however, represents another step, even if a small one, toward assuring the debtor as well as the creditor his due.