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Due Process, Replevin, and Summary Remedies: What Sniadach Wrought

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they are more the result of personal convictions than the impartial application of legal principles. The majority carefully constructed a bridge from the preceding cases to their present decision, but there is no escaping the fact that their decision represents a rather radical shift from previous considerations of capital punishment. Indeed, the strength of the majority opinions lies not in their case law, but in their statistics of infrequent and uneven use of the death penalty, statistics which the majority themselves admit are not conclusive.[92]

It is generally considered a judicial sin for judges to wander too boldly away from the realm of legal principles and into the field of social policy making. But when judges are called upon to apply such rules as "the evolving standards of decency" their decisions are naturally vulnerable to such criticism. Regardless of its manner, the fact remains that the *Furman* decision was made. The very presence of a Supreme Court decision can often have a significant influence on the thinking of citizens and lawmakers, even those who initially oppose it. Whether *Furman* remains the high water mark in the campaign against capital punishment or provides the impetus to bring about its total abolition remains in doubt. At the very least, the decision has forced a long overdue reevaluation of the death penalty in American law and placed considerable obstacles in the path of its reinstatement.

Thomas P. Gilliss

Due Process, Replevin, and Summary Remedies: What Sniadach Hath Wrought

Although "due process of law" has traditionally meant that an individual was entitled to a hearing before the state took away his liberty or property, various summary remedies, without the safeguards of notice and hearing, have

92. All members of the *Furman* majority admit that "[t]he statistical evidence is not convincing beyond all doubt, but it is persuasive." The fact is there exists little reliable empirical data on the use and utility of the death penalty. The majority finds itself picking and choosing among conflicting figures to support their arguments. Their reasoning is perhaps best summed up by Justice White who wrote

> I (can not) "prove my conclusion from these data. But like my Brethren, I must arrive at a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.

408 U.S. 238, 313.

become imbedded in the legal structure. Recently, these summary remedies have come under attack as the result of new conceptions of what constitutes due process. In *Sniadach v. Family Finance Corp.*,[1] the Supreme Court struck down as a violation of the due process clause of the fourteenth amendment a Wisconsin statute which allowed a creditor, prior to obtaining a judgment, and without prior notice and hearing, to garnish up to fifty percent of a debtor's wages. The decision was not specific as to how the requirement of a prior hearing and notice applied to other summary procedures.[2] The Court's recent decision in *Fuentes v. Shevin*[3] extended the notice and hearing requirement to state replevin procedures which allowed pre-judgment recovery of a debtor's personal property without procedural safeguards. This decision represents not only significant advancements in the law of procedural due process, but also will undoubtedly have a pervasive effect on analogous summary remedies.

Fuentes and the Law of Due Process

History of Replevin Procedures

Modern replevin statutes, like those which were involved in *Fuentes*, are derived from the common law writ of replevin. Originally, the writ was issued by a court of equity on behalf of a person whose chattel was seized illegally by a creditor, often a landlord, for satisfaction of an alleged debt. The writ authorized the sheriff to seize the chattel and return it to the original possessor, the "distrainee."[4] Later statutory changes enabled the sheriff himself to issue the writ upon mere receipt of a complaint,[5] and required as security the posting of bond of double the value of the chattels to be replevied.[6] Modern replevin statutes embody these basic common law features. The Florida statute at issue in *Fuentes*[7] required the following procedure: first a complaint is filed, initiating an action for replevin, alleging wrongful detention of personal property. Bond for double the value of the property must be given, then the court officer seizes the chattel and delivers the summons. The seized property is held by the officer for three days, then delivered to the plaintiff-creditor pending the outcome of the action, unless the defendant posts bond for double the value of the property, in which case it is returned

1. 395 U.S. 337 (1969).
2. *Compare* Termplan Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969) *with* Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).
3. 407 U.S. 67 (1972).
4. Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 887-88 (1971).
5. Statute of Marlbridge, 52 Hen. 3, c.21 (1267).
6. 11 Geo. 2, c.19 (1738).
7. FLA. STAT. ANN. § 78.01 (Supp. 1973).

to him. It should be noted that the remedy has developed in one significant way differently from its common law ancestor. Under many modern statutory schemes, replevin is available where goods have been wrongfully *detained* as well as wrongfully taken. Thus, replevin has become an essential protection for the rights of creditors, rather than a safeguard of the rights of the debtor,[8] as it was in its infancy.

Perhaps due to their ancient ancestry, replevin procedures were apparently not challenged constitutionally, despite the lack of prior hearing, until after *Sniadach v. Family Finance Corp.*[9] Plaintiffs then began arguing that replevin resulted in the kind of hardship to debtors which apparently had motivated the *Sniadach* Court to mandate procedural safeguards.[10]

The Supreme Court's Decision

Each of the five plaintiffs in the *Fuentes* case—one from Florida and four from Pennsylvania—had purchased household goods on conditional sales contracts, each had defaulted in payments, and in each case, the vendor had obtained a writ of replevin under the respective state procedures without a prior hearing, on the mere allegation that the contract was in default. As a result, the goods were taken from the plaintiffs.[11]

The Supreme Court found that these statutes violated the requirements of due process because they did not, as applied, provide for a hearing to determine the probable validity of the claim prior to the seizure of the property. In reaching this conclusion, the Court accepted as axiomatic the principle that any deprivation, including even a deprivation which can later be remedied if in error, must be preceded by traditional due process safeguards. The primary question was not whether due process attached to summary proceedings, but whether the process afforded by such procedures was sufficient. The Court concluded that it was not, reasoning that the requirement of posting bond was not a significant deterrent to arbitrary and bad faith claims.

The Court was nevertheless faced with the defendant-creditors' contention, on five grounds, that no due process protections were required in this situation. First, despite the fact that the seizure was executed pending a final

8. At common law, the remedy for unlawful detention of chattels was detinue. Comment, *Laprease and Fuentes: Replevin Reconsidered,* 71 COLUM. L. REV. 886, 887-88 (1971). The *Fuentes* Court notes this distinction. 407 U.S. 67, 73.

9. 395 U.S. 337 (1969).

10. Perhaps the best formulation of the arguments against replevin procedures is that found in Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971).

11. The Pennsylvania replevin statutes, PA. STAT. ANN. tit. 12, §§ 1821, 1824-47 (1967), PA. R. CIV. P. 1071-87, had a novel feature which may have strengthened the plaintiff's case, viz., the creditor, after applying for the writ, was never required to institute an action. PA. R. CIV. P. 1073(a).

judgment, the Court ruled it was nonetheless a deprivation within the meaning of the fourteenth amendment.

The defendants argued next that the plaintiff-vendees possessed no property rights under the conditional sales contract after they defaulted. The Court held, however, that any "significant property interest" is entitled to constitutional protection.[12] The plaintiffs' rights under the contracts qualified as such an interest. The Court then rejected the defense's third argument that safeguards were required only in the case of seizure of goods which are necessary to sustain life; the Court claimed no prior cases turned on this distinction.

The defendant-creditors' fourth argument was that the pre-hearing seizure here was one of those extraordinary situations where courts have been willing to allow summary seizures due to the particular circumstances. In reviewing these cases, however, the Court found that in every case where such seizures have been upheld, three factors were always present: first, the seizure was always to enforce a state or public interest; second, there was always a special need for prompt action; and third, the seizure was always conducted or controlled by the state. Seizure under replevin statutes failed to meet these criteria, since a private interest was enforced, prompt action was not necessary in most cases, and the state failed to maintain strict control over the transaction.

The Court summarily rejected the final argument of the defendants' that the plaintiffs had waived their due process rights when they signed the sales contract, which specified creditors could repossess upon default. The Court held that the defendants had failed to show that the plaintiffs were aware of the significance of the waiver provision.

Three of the seven justices sitting dissented. The dissenting opinion by Mr. Justice White focused on the practical aspects of the procedures. The actual chances of abuse of replevin procedures by bad faith allegations of default were outweighed, it was felt, by the need to protect the rights of the creditors, whose interests the majority failed to adequately consider.[13]

Fuentes and the Requirement of a Hearing

The *Fuentes* opinion deals with most of the important facets of due process, but its holdings regarding non-final deprivations and extraordinary situ-

12. 407 U.S. 67, 86-87.

13. The dissenters also contended that the suit lacked jurisdiction to be heard in federal court, a problem facing many plaintiffs who challenge state summary remedies. Since replevin actions in state courts were pending at the time the *Fuentes* plaintiffs brought suit in federal court, the dissent argued that federal courts should have refused

ations represent the most significant change in the law. Moreover, the approach taken by the Court seems to indicate that in the future due process problems may be dealt with from a different vantage point.

The rule which *Fuentes* reiterated, that a hearing is required before a deprivation of property can occur, can be traced back at least as far as 1864.[14] It has also been clear that due process requirements are applicable when an individual uses state procedures to collect a debt.[15] The validity of these principles was not contested in *Fuentes*. What was important was the validity of summary procedures where a hearing was provided, but after the seizure. Prior to *Fuentes*, there was no comprehensive approach to summary seizure cases. Some older cases upheld such seizures, a few recent ones did not. There was no set of general principles developed to handle these kinds of cases. Perhaps the closest approximation to a general rule can be found in *Phillips v. Commissioner*,[16] where the enforcement of a federal tax lien without a prior hearing was upheld. Speaking for the Court, Mr. Justice Brandeis said, "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[17] This "property rights" rule has been relied on in several cases where summary seizures have been upheld.[18] The most frequent instance where such seizures have been sustained involved the governmental taking of property to protect some state or public interest. For example, in *Ewing v. Mytinger & Casselberry, Inc.*,[19] the seizure of misbranded drugs without a prior hear-

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to hear the suit. *See* Younger v. Harris, 401 U.S. 37 (1971). The majority claimed that such abstention is called for only when the party seeks to *enjoin* a state court proceeding. 407 U.S. 67, 71 n.3.

14. Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864). *See, e.g.*, Southern R. Co. v. Virginia, 290 U.S. 190 (1933); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

15. *E.g.*, Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915). Furthermore it has been consistently held that the hearing must be prior to the final deprivation. United States v. Illinois Cent. R.R. Co., 291 U.S. 457 (1934). This general principle was summed up in an oft-quoted passage from Mr. Justice Jackson's opinion in Mullane v. Central Hanover Bank & Trust Co.:

> 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.

339 U.S. 306, 313 (1950).

16. 283 U.S. 589 (1931).

17. *Id.* at 596-7.

18. Bowles v. Willingham, 321 U.S. 503, 520 (1944); Yakus v. United States, 321 U.S. 414, 442-3 (1944); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950). It is important to note, however, that in each of these cases, the seizure was held constitutional on at least one other ground than the *Phillips* rule.

19. 339 U.S. 594 (1950).

ing was upheld.[20] Likewise, in *Fahey v. Mallonee*,[21] the appointment of a conservator by the Federal Home Loan Bank Board for a savings and loan association without prior procedural protections was held to be constitutional. The Supreme Court rejected the claim that the appointment was a deprivation without a hearing both because of the necessity of preserving credit after an investigation was begun and because traditionally, heavy control had been exercised over the banking industry.[22]

In only one case prior to 1969, however, did the Supreme Court consider the validity of a summary seizure for a *private* purpose. In *McKay v. McInnes*,[23] the Court upheld in a *per curiam* opinion the decision of the Supreme Judicial Court of Maine,[24] which had held that the state attachment procedure, which permitted a seizure without prior hearing of private property to satisfy private debts, was not a violation of due process. The lower court reasoned that attachment is not a deprivation within the meaning of the fourteenth amendment, and even if it is so considered, there is no constitutional violation because attachment is part of a process which ensures a hearing. However, the Supreme Court has never subsequently affirmatively adopted this rationale.[25]

Beginning with *Sniadach*[26] in 1969, three important decisions struck down summary seizures pending a hearing. *Sniadach* invalidated a summary seizure for a private purpose, *i.e.*, the garnishment of wages. Because of the potential hardship of arbitrary garnishment without hearing, a hearing prior to garnishment was required in order to determine the validity of the claim. The governmental emergency cases were distinguished by the Court on the grounds that there was no special interest of the state or the creditor which

20. *See also*, North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Adams v. Milwaukee, 228 U.S. 572 (1913).

21. 332 U.S. 245 (1947).

22. A number of other governmental seizures pending a hearing have been upheld, generally following one or more of these three theories, *i.e.* the "property rights" rule, traditional control over the industry, and protection of the public. *See, e.g.*, Coffin Bros. Co. v. Bennett, 277 U.S. 29 (1928) (summary levying of execution on shareholders of defunct bank to pay off depositors); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (dismissal of civilian employee on military premises for security reasons without a prior hearing).

23. 279 U.S. 820 (1929).

24. 127 Me. 110, 141 A. 699 (1928).

25. The Court's opinion affirmed the lower court's decision and merely cited two cases, Ownbey v. Morgan, 256 U.S. 94 (1921), and Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928). The *Ownbey* decision upheld the Delaware foreign attachment statute, but the specific issue there was not the necessity of a hearing, but whether the condition on which a hearing was granted was valid. *Coffin Bros.* dealt with a governmental public interest seizure. *See* note 22 *supra*. Thus the affirmance was not supported by strong authority in point.

26. 395 U.S. 337 (1969).

needed protection. *McKay v. McInnes* was distinguished on the theory that wages are a specialized kind of property calling for special consideration.

In 1970, *Goldberg v. Kelley*[27] held that welfare benefits could not be terminated without prior notice and hearing, despite the fact that a subsequent hearing had been provided after the termination. The Court thus extended the *Sniadach* rule to another kind of summary seizure pending a hearing, although the seizure was not specifically for a private purpose. In the third recent case, *Bell v. Burson*,[28] the Court struck down a Georgia statute which required an uninsured defendant in a suit resulting from an auto accident either to post bond to cover the amount claimed against him or to forfeit his driver's license prior to a trial on the merits of the claim.

Each of these cases dealt with its own facts. No blanket prohibition of summary seizures pending a hearing was announced nor was a general approach to the problem adopted. Consequently, lower courts attempting to decipher these cases reached conflicting results. A good illustration of the problem are the lower court decisions on the constitutionality of replevin statutes. Although replevin procedures are analogous to garnishment, lower courts were not always willing to apply *Sniadach*. Where replevin was found to be a denial of due process, however, the courts did rely primarily on *Sniadach*. In *Laprease v. Raymours Furniture Co.*,[29] a federal district court concluded that the household goods replevied under the statute at issue,[30] were equivalent to wages, thus the protections of a hearing were necessary. In *Blair v. Pitchess*,[31] the Supreme Court of California applied *Sniadach* to the California replevin statute.[32] The court also made a separate finding that in this situation the possible hardship to the individual mandated due process safeguards.[33]

Several courts rejected constitutional attacks on replevin procedures in face of the *Sniadach* precedent. At least one court proceeded on the theory of a waiver of rights, holding that where the vendee has contracted to relinquish possession upon default, he cannot object to the summary replevin of the goods.[34] Other courts found that replevin, especially of goods bought on a conditional sales contract, involves different considerations than the garnishment of wages. Not only is the hardship to the debtor less than where wages

27. 397 U.S. 254 (1970).
28. 402 U.S. 535 (1971).
29. 315 F. Supp. 716 (N.D. N.Y. 1970).
30. N.Y. Civ. Prac. Law § 7101 (McKinney 1963).
31. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
32. Cal. Civ. Pro. Code §§ 509-521 (West 1954).
33. *Accord*, Westinghouse Credit Corp. v. Edwards, CCH 1971 Poverty L. Rep. ¶ 13,666 (Mich. C.P. Ct. City of Detroit 1970).
34. Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).

are seized, but the creditor has more of an interest to protect in a conditionally purchased chattel than in a debtor's wages. Thus, these courts concluded, due process safeguards are not necessary.[35]

The *Fuentes* decision will most likely clarify the muddy waters obscuring the law concerning summary seizures. Obviously, distinctions based on kinds of property taken, the nature of the interest to be protected, at least where it is a private interest, or the contractual agreements between the parties no longer have constitutional significance, because the *Fuentes* Court failed to take cognizance of these factors. Furthermore, when summary seizure is made for public protection, the seizure is valid only if it fits within the rigid requirements established by the decision. While previous cases upholding summary seizures were not overruled, it is difficult to conceive of many new situations where a seizure with a subsequent hearing would qualify as an extraordinary situation.

Fuentes and the Test of Due Process

Besides its remolding of the law concerning summary seizure, *Fuentes* is also noteworthy because of the manner in which the Court proceeded in establishing criteria to handle the problem. When faced with deciding whether or not due process safeguards are constitutionally mandated, courts generally have refrained from formulating a uniform rule which is to be mechanically applied in all cases. Instead, courts will usually look at all the circumstances, weighing the precise governmental function involved against the competing private interest. This "balancing test" has been formulated as follows:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed . . . the balance of the hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.[36]

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35. Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971); Jernigan v. Economy Exterminating Co., 327 F. Supp. 24 (N.D. Ga. 1971), *appeal dismissed* 407 U.S. 934 (1972); and the two lower court decisions which were reversed by the Supreme Court, Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970) and Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971). In Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 280 A.2d 862 (1971), a three-pronged attack on the New Jersey replevin statute (N.J. STAT. ANN. §§ 2A:59-1 to 59-19 (1952)) failed because the court refused to discuss the merits of a broad attack which could affect the Uniform Commercial Code.

36. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). For examples of instances where courts have consciously applied the balancing test, *see* Goldberg v. Kelley, 397 U.S. 254 (1970); Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961); Zemel v. Rusk, 381 U.S. 1, 14 (1965).

In *Fuentes*, the Court eschewed the balancing test in favor of a more direct mechanical approach. The Court looked only as far as necessary to determine if a deprivation with constitutional significance had taken place. Once such a deprivation was found, the only question was the adequacy of the procedural safeguards. The Court failed even to mention the countervailing creditor interest (prevention of damage, deterioration, or removal of the goods) and state interest, (lowest possible cost for consumer credit) which seizure without hearing and notice protects.

Because the opinion purports to be a comprehensive approach to the problem, the failure to discuss the rather obvious distinction between the taking of wages, in which the creditor has no legal interest, and the seizure of goods, in which, by virtue of the conditional sales contract, the creditor does have a legal interest, perhaps weakens the import of the decision. This failure can be viewed as support for the proposition that *Fuentes* established a new test where the necessity of a hearing is at issue. Regardless of the strength of the countervailing interests, they are of no import once a deprivation has been discovered. The failure to mention the compelling creditor and state interests in pre-hearing seizures emphasizes the point. There is other evidence which supports the view that *Fuentes* has unambiguously established a new test of due process. Textually, for example, the *Fuentes* opinion several times treats the rule that any deprivation requires a prior hearing as a long-standing principle, and cites a long line of cases as support.[37] In fact, most of these cases do not deal with seizures made prior to a hearing, but with seizures where no hearing was provided. This may be explained as implying that this distinction is now immaterial. Furthermore, in at least one subsequent decision, the Court has interpreted *Fuentes* as mandating a new test. *Fuentes* established, it was held, that the question whether due process attaches "is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[38] The question of whether the new test will become a constitutional standard under which all sorts of deprivations will become subject to the requirements of procedural safeguards must await future determinations by the courts.

Fourth Amendment and Equal Protection Arguments Against Replevin

Two other arguments against pre-hearing replevin procedures should also be considered. The attacks on the replevin statutes in lower courts alleged invariably three constitutional violations: due process, unreasonable search

37. 407 U.S. at 82.
38. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

and seizure, and denial of equal protection. A number of replevin statutes specifically authorize the sheriff or court officer to enter a building by force to carry out the writ.[39] Under these statutes, as well as where forcible entry is not specifically authorized, it was alleged that, since replevin procedures were conducted without a prior hearing, replevin thus constituted an unreasonable search. At least two courts agreed, in *Laprease v. Raymours Furniture Co.*,[40] and *Blair v. Pitchess*.[41] The essential reasoning was that, since *Camara v. Municipal Court*[42] and *Wyman v. James*[43] held that the fourth amendment applies to all governmental incursions, including civil debt-collecting procedures, and since warrantless searches are generally prohibited by the fourth amendment, replevin procedures are defective. Other courts reached the opposite result on three different grounds. First, some courts have held that the *Camara* and *Wyman* decisions do not affect the validity of *Murray's Lessee v. Hoboken Land and Improvement Co.*,[44] which exempts civil proceedings to recover debts from fourth-amendment strictures.[45] Secondly, it has been held that the conditional vendees contractually waived their rights.[46] The final ground was that the searches were not in fact unreasonable.[47] The *Fuentes* opinion does not reach the merits of the fourth amendment challenges. The Court suggests, however, that since a prior hearing to establish the probable validity of the claim is required on due process grounds, there may be no need for a probable-cause hearing to satisfy the fourth amendment.[48] The Court is silent on whether a warrant must issue at any time, or whether the writ of replevin would suffice.

The equal protection arguments are based on the provision found in most statutes which allows a debtor whose goods have been replevied to regain possession by posting bond for double the value of the replevied property, in which case the sheriff will return the property.[49] Thus, it was alleged that these statutes discriminated against indigents because poor people who had defaulted in payment could not in practice retain possession of the goods, while those with more financial resources could afford the bond. Apparently only one court has felt compelled to discuss the merits of this argument.[50]

39. *See* FLA. STAT. ANN. § 78.10 (Supp. 1973); WIS. STAT. ANN. § 265.09 (1957); N.J. STAT. ANN. § 2A:59-4 (1952); ORE. REV. STAT. § 29.890 (1969).
40. 315 F. Supp. 716 (N.D. N.Y. 1970).
41. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
42. 387 U.S. 523 (1967).
43. 400 U.S. 309 (1971).
44. 59 U.S. (18 How.) 272 (1856).
45. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).
46. Brunswick Corp. v. J & P, Inc., 424 F.2d 100 (10th Cir. 1970).
47. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971).
48. 407 U.S. at 96 n.32.
49. *E.g.*, FLA. STAT. ANN. § 78.13 (Supp. 1973).
50. Courts have been wary of the "murky area" of equal protection. Laprease v.

Since *Fuentes* did not consider this contention, it remains a possible challenge lurking in the background, which one day may emerge.

Fuentes and the Summary Seizure of Personal Property

All states have developed different kinds of summary procedures for the satisfaction of personal debts through the taking of personal property. The *Fuentes* decision will undoubtedly have a most direct effect on the venerable institution of replevin. All state replevin statutes are essentially similar to those at issue in *Fuentes*.[51] The essential provisions derive from the same source, *i.e.*, common law. The Field Code contained a replevin procedure, which formed the basis for the statutory formulation in several states.[52] There is some differentiation among the various states, for example, in which official is designated to issue the writ.[53] In no case, however, is there provision for a statutory hearing prior to issuance and the statutes are apparently invalid after *Fuentes*. The constitutional infirmity might conceivably be overcome by a mere change in court rules and procedure, but a statutory revision will not necessarily solve the problem. After *Laprease* struck down the existing replevin statute in New York, the legislature amended it. The new replevin procedures do not provide for mandatory hearing and notice prior to issuance. Instead, the statute authorizes issuance of the writ:

> . . . upon such 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. . . .[54]

The failure of the legislature to adopt the full implications of the court decisions has resulted in a vague mandate which presumably could not survive the clear demands of *Fuentes* that only a hearing prior to replevin will suffice.

The UCC Summary Remedy

Several judges, including the dissenters in *Fuentes*,[55] have intimated that the

Raymours Furniture Co., 315 F. Supp. 716, 724 (N.D.N.Y. 1970). However, in Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971), the replevin practices of the Peoples' Court of the City of Baltimore were upheld because the practice of the court of giving accelerated trials to indigents was not unreasonable.

51. Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886 (1971).

52. WIS. STAT. ANN. § 265.05, Comment (1957).

53. In some jurisdictions, the court is authorized to grant the order, *e.g.* N.J. STAT. ANN. § 2A:59-3 (1951). In others, the court clerk is empowered, *e.g.*, VA. CODE ANN. § 8-858 (1957), and in still others, both the court and clerk are authorized, *e.g.* MISS. CODE ANN. § 11-37-1 (1972). Replevin statutes bear different names despite their underlying similarity. Some adopt the name of the common law remedy of detinue, ALA. CODE tit. 7 §§ 918-936 (1960). California's replevin statute is called "Claim and Delivery." CAL. CIV. PRO. CODE §§ 509-521 (West 1954).

54. N.Y. CIV. PRAC. LAW § 7102 (McKinney 1972 Supp.).

55. 407 U.S. at 103.

shock waves from *Fuentes* may reach beyond the replevin statutes to the Uniform Commercial Code. The potential threat to the UCC is worthy of note because the UCC represents a comprehensive uniform approach to commercial law and has been adopted by every state (except Louisiana) and the District of Columbia. The UCC does provide for a summary remedy on default to a secured party:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.[56]

A secured party is defined as:

> . . . a lender, seller, or other person in whose favor there is a security interest, including a person to whom accounts, contract rights, or chattel paper have been sold.[57]

The creditors in *Fuentes* apparently could have peaceably seized the household goods in lieu of seeking a writ of replevin. The essential question is obviously whether there is any significant difference between seizure under the replevin statutes and under the UCC summary remedy in § 9-503. If the two remedies cannot be distinguished, or if replevin statutes preempt the UCC, a strong argument can be made that the due process requirements demanded by *Fuentes* must necessarily apply to the UCC.

It seems clear, however, that the two remedies were meant to be separate, alternative remedies. Early versions of the UCC contained a second section in § 9-503 which provided that a secured party could still proceed in law by a writ of replevin.[58] This provision was actually adopted in three jurisdictions.[59] The section was added to the earlier versions because it was not clear in some states that a secured party could proceed by replevin in absence of a statute conferring such authority.[60] Even in the absence of such statutory authorization, courts have been willing to construe § 9-503 not to preclude the use of a state's replevin statute to enforce a security interest.[61] Hence, the invalidity of the UCC summary remedy because it denied due

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56. UNIFORM COMMERCIAL CODE § 9-503.

57. *Id.* § 9-105.

58. Comment, *Remedies on Default under the Proposed UCC as Compared to Remedies Under Conditional Sales*, 39 MARQ. L. REV. 246, 256 (1956).

59. MD. CODE ANN. art. 95B § 9-503(2) (1964); PA. STAT. ANN. tit. 12A § 9-503 (2) (1967); UTAH CODE ANN. § 70A-9-503 (1968).

60. Comment, *Remedies on Default under the Proposed UCC as Compared to Remedies Under Conditional Sales*, 39 MARQ. L. REV. 246 (1956).

61. *In re* Yale Express System, Inc., 250 F. Supp. 249 (S.D.N.Y.), *rev'd on other grounds*, 370 F.2d 433 (2d Cir. 1966); General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N.W.2d 516 (1967).

process would not necessarily follow, in all probability, from the invalidity of the replevin statutes.

§ 9-503, however, must be able to pass constitutional muster on its own. In *Adams v. Egley*,[62] a federal district court extended the *Sniadach* rule to cover this situation. One plaintiff had purchased an automobile on a conditional sales contract, another borrowed on the collateral of several cars. Both plaintiffs defaulted, and the creditors repossessed the vehicles without any judicial process, in accordance with the California UCC.[63] The plaintiffs attacked the statute as a violation of due process. The creditors argued that *Sniadach* was inapposite because the rights of the parties here were established by contract, thus effecting a valid waiver. Such a waiver was found in *Brunswick Corp. v. J & P, Inc.*[64] However, the *Adams* court disagreed, finding that waiver in an adhesion contract where the parties are not of equal bargaining power is not automatically effective.

A different conclusion was reached in *McCormick v. First National Bank of Miami*.[65] Although there the court found that the plaintiff's complaint challenging the constitutionality of the corresponding section of the Florida UCC[66] lacked jurisdiction to be heard in federal court,[67] the court went on to decide that there was no due process infirmity in the UCC remedy. However, the dictum was based solely on the lower court opinion which was reversed in *Fuentes*. The distinction between replevin and the UCC, which is limited to instances where creditors have an interest in the goods themselves, may be significant. At least one court indicated that it might sustain a replevin statute if it were limited to such secured interest seizures.[68] However, since *Fuentes* chose not to make this distinction, it seems likely that § 9-503 is susceptible to the challenges of denial of due process, at least where, as in adhesion contracts, waiver cannot be effectively argued.

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62. 338 F. Supp. 614 (S.D. Cal. 1972).
63. CAL. COMM. CODE §§ 9503, 9504 (West 1964).
64. 424 F.2d 100 (10th Cir. 1970).
65. 322 F. Supp. 604 (S.D. Fla. 1971).
66. FLA. STAT. ANN. § 679.9-503 (1966).
67. A major, and perhaps the most crucial, problem in suits challenging this section of the UCC as well as other summary procedures, has been the establishment of federal court jurisdiction. Jurisdiction is usually alleged under 28 U.S.C. § 1343(3) (1962), which confers jurisdiction on federal courts in civil actions to redress deprivations of civil rights under color of state law. *See* 42 U.S.C. § 1983 (1970), which provides a cause of action in such cases. In McCormick v. First National Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971), the court found that the rights allegedly violated by the repossession of collateral prior to a hearing were not civil rights, nor were they violated under color of state law. In Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), the court found replevin was under the color of state law, based on the principles found in Reitman v. Mulkey, 387 U.S. 369 (1967). *See* Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972) (follows McCormick).
68. Laprease v. Raymours Furniture, 315 F. Supp. 716 (N.D.N.Y. 1970).

Other Summary Seizures of Personal Property

Of the many summary procedures which allow seizure of property to ensure payment of debts, attachment and garnishment are probably the most significant in terms of the day-to-day operation of the legal system. Though usually distinct from replevin procedures, attachment and garnishment are analogous to replevin. Since at a minimum they involve a restriction on the use of property, they constitute a deprivation as defined by *Fuentes* and consequently are apparently invalid without a prior hearing. However, these procedures can be divided into three distinct classes: attachment, where the property seized is in the debtor's possession; garnishment, where the property is possessed by a third person; and foreign attachment, where the property is owned by a non-resident. Each has its own peculiar circumstances which may effect its constitutionality in light of *Fuentes*.

On the issue of pre-hearing garnishments, decisions after *Sniadach* resulted in a split of authority. It was clear that garnishment of wages is invalid, but some courts upheld garnishment to the extent it was inapplicable to wages.[69] On the other side, some courts made a blanket condemnation of all garnishments,[70] or invalidated the garnishment of property other than wages. For example, in *Jones Press, Inc. v. Motor Travel Services, Inc.*,[71] a Minnesota statute authorizing the garnishment and impounding of accounts receivable without prior hearing was held unconstitutional on the basis of *Sniadach*.[72] However, since *Fuentes* specifically rejected the contention that the requirements of due process depended in any way on the nature of the property involved, a compelling argument can be made that all pre-hearing garnishments are constitutionally impermissible.

Even after *Sniadach*, courts were more ready to uphold summary attachments than garnishments, perhaps because attachment was approved in *McKay v. McInnes*,[73] albeit with dubious effect, and because *Sniadach* did not overrule that case, but limited itself to "specialized" property. Thus, despite the holding in *Sniadach*, a Connecticut statute which provided for the attachment of real property without a hearing was considered to be constitutionally

69. *See, e.g.*, Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); Michael's Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1970); American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970).

70. Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1970).

71. 286 Minn. 205, 172 N.W.2d 87 (1970).

72. Apparently the problem of obtaining jurisdiction in federal court will not hinder suits attacking pre-hearing garnishments in light of the Supreme Court's holding in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), that federal courts are not precluded by 28 U.S.C. §§ 1343(3) and 2283 (1962) from jurisdiction over a suit challenging the garnishment of a savings account.

73. 279 U.S. 820 (1929).

valid because the prejudice resulting therefrom was *de minimis*.[74] Where attachment statutes have been struck down, it was because they were not narrowly drawn to exclude the attachment of necessities.[75] Despite the more persuasive argument for validity, the stronger view is that attachment without hearing is as invalid as garnishment without hearing. *Fuentes* does not explicitly overrule *McKay*, but seems to treat it as an extraordinary circumstance,[76] which of course is exempt from the requirement of a hearing. However, an attachment for a private purpose can never fit within the *Fuentes* definition of an extraordinary circumstance, and thus, must be invalid without procedural safeguards. *McKay* perhaps should be regarded as implicitly overruled.

The summary remedy with the best chance of surviving the *Fuentes* requirement is the foreign attachment procedures. Even after *Sniadach*, summary seizures of non-residents' property have been struck down only in part,[77] or upheld *in toto*.[78] The theory seems to be that this situation is an extraordinary circumstance.[79] Although there may be a strong public interest in enforcement of debts against non-residents which may justify the seizure without notice and hearing, the *Fuentes* definition also specifies a need for prompt action, which may not always be present. Judicial clarification of this requirement may be necessary.

There are other debt-enforcement procedures which may well be within the purview of *Fuentes*. For example, states customarily provide summary remedies to landlords to enforce claims against tenants for rent. These remedies, often called distraint or warrant of distress, operate either to allow the taking of the tenant's property or the levying of a lien on it without a prior hearing. An analogous remedy applies to owners of hotels, the "hotelman's" or "innkeeper's" lien. With uniformity, these procedures have been invalidated on due process grounds in reliance on *Sniadach*.[80] Consequently, there is little doubt that such practices will continue to face constitutional difficulties.

Although *Fuentes* will have a widespread effect on all summary remedies,

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74. Black Watch Farms Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971).

75. Randone v. Appellate Dep't. of Superior Court of Sacramento County, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). *See* Lebowitz v. Forbes Leasing and Financing Corp., 326 F. Supp. 1335 (E.D. Pa. 1971).

76. 407 U.S. at 91 n.23.

77. Mills v. Bartlett, 265 A.2d 39 (Del. Super. Ct. 1970).

78. Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970).

79. *Id.*

80. Landlord's remedies: Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971). Hotelman's lien: Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).

it is possible certain such procedures, because of their built-in safeguards may not be invalidated for lack of prior notice and hearing. For instance, the execution of the warehouseman's lien, as embodied in the UCC,[81] without a prior hearing, was upheld in *Magro v. Lentini Bros. Moving & Storage Co.*[82] The UCC provides that the lien should not be enforced without notification to all known persons who claim an interest in the goods which will be sold to satisfy the lien in person or by registered mail. In addition, the notification must be specific, and an advertisement of the sale must appear once a week for two weeks consecutively in a newspaper of general circulation.[83] An argument might be made that such rigid procedures may be sufficient to protect the debtor, although *Fuentes* does seem to indicate that only a hearing with prior notice is an adequate protection for a debtor.[84]

Fuentes and Other Summary Procedures

Fuentes dealt with a seizure of property for a private purpose. How does it apply to summary seizures not of property or not for a private purpose? Since the decision made no distinction regarding the purpose of the taking, a taking for a non-private purpose would seem to be subject to the same requirement of a hearing.[85] Thus, the *Fuentes* rule would presumably apply to such summary remedies as the Emergency Repair Program of the New York City Department of Health. Under the Program, tenants could pay rent directly to the Department if the landlord failed to make certain repairs, prior to an adjudication of liability for the repairs. This procedure has been upheld, as long as the landlord is notified before payment of rent to the Department. No prior hearing is presently required.[86]

It is conceivable that *Fuentes* will be extended to cover deprivations of personal liberty subject to a subsequent hearing.[87] *Fuentes* may also be determinative of the constitutionality of the confession of judgment provision which is sanctioned by state law. However, the Court has treated this problem

81. UNIFORM COMMERCIAL CODE § 7-210(2).

82. 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd per curiam,* 460 F.2d 1064 (2d Cir. 1972), *cert. denied,* 406 U.S. 961 (1972).

83. UNIFORM COMMERCIAL CODE § 7-210(2).

84. 407 U.S. at 84.

85. For other summary remedies within this purpose, which have been challenged constitutionally, and in which *Fuentes* may require a different result, *see* Hutcherson v. Lehtin, 313 F. Supp. 1324 (N.D. Cal. 1970); Velasquez v. Thompson, 321 F. Supp. 34 (S.D.N.Y. 1970) (summary repossession of land); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970) (mortgage foreclosure); Balthazar v. Mari Ltd., 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd,* 396 U.S. 114 (1969) (tax lien).

86. 300 W. 145th St. Realty Co. v. Department of Buildings, 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970).

87. *See* Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970) (summary imprisonment for non-appearance at disclosure hearing).

not as a question of whether notice and hearing are necessary, but whether the court has jurisdiction or whether constitutional rights are in fact waived.[88]

Conclusion

Fuentes seems to mark a change of course in the law of due process in at least two ways. First, in its narrow holding, that the long-standing practice of the replevin of goods prior to a hearing is invalid, the decision casts doubt upon many other remedies which are similar in nature. Secondly, the Court endeavored to establish a new test to determine when due process safeguards are necessary, by ignoring, at least, the balancing test and by making the existence or nonexistence of a constitutionally recognizable deprivation the determinative factor. The new test may mean only a shift in emphasis rather than new substantive law, since the countervailing government and individual interests must be considered in deciding what process is due after it has been determined that some procedures are necessary.

The wisdom of this new rule can certainly be gainsaid at present. What may be gained by way of ease of judicial application of a mechanical rule, may be lost in the erection of a system of cumbersome, expensive, and not necessarily effective procedures. Regarding replevin, for example, the requirement of a hearing may result in an increase in the cost of consumer credit which may injure the very people it was designed to help. In addition, a hearing may not prevent the pre-judgment replevin of household goods, since a showing of default can be easily made by the creditor. Nevertheless, *Fuentes* marks a new chapter in the long complex struggle to decide exactly what constitutes due process of law.

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88. In D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), the Supreme Court held that a confession of judgment note, the result of a routine construction sub-contracting agreement, and authorized by state law, was not a denial of due process. A companion case, Swarb v. Lennox, 405 U.S. 191 (1972), affirmed a lower court ruling that the Pennsylvania practice of confession of judgment was unconstitutional with respect to a certain class, *i.e.*, those with incomes under $10,000, absent valid waiver. The cases apparently turn on the quality of waiver of due process rights.