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The Three Stages of Hernandez: Federal Abstention and the Unconstitutionality of the Illinois Attachment Act - Trainor v. Hernandez

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THE THREE STAGES OF *HERNANDEZ*: FEDERAL ABSTENTION AND THE UNCONSTITUTIONALITY OF THE ILLINOIS ATTACHMENT ACT— *TRAINOR V. HERNANDEZ*

Before a federal court can be required to abstain from hearing a case raising constitutional claims, the state court proceedings must provide an adequate forum for those actions. Whether the state forum is adequate is subject to determination by the federal court. This principle was recently underscored during the three stages of one significant case concerning the Illinois Attachment Act.[1]

In *Hernandez v. Danaher*,[2] the District Court for the Northern District of Illinois determined that the Illinois Attachment Act was "patently and flagrantly" unconstitutional because it failed to provide both notice and a hearing prior to an attachment.[3] Less than two years later, the Supreme Court reversed the district court in *Trainor v. Hernandez*.[4] The *Trainor* Court found that the abstention principles of *Younger v. Harris*[5] and *Huffman v. Pursue*[6] require non-interference by the federal courts in order that the state courts may construe their own statutes in the face of constitutional challenges.[7] The abstention doctrine states that although a federal court has jurisdiction, it may decline a proceeding in order to avoid needless conflict with a state regarding the proper administration of its own affairs.[8] Abstention also presupposes that an adequate remedy for federal constitutional claims is available in the state court.[9]

Trainor, however, expressly left unanswered the question of whether the Illinois Attachment Act provided an opportunity to raise constitutional challenges.[10] On remand, the district court in *Hernandez v. Finley*[11] evaluated the procedures of the Illinois Act and found that no such opportunity existed

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1. ILL. REV. STAT. ch. 11, § 1-43 (1977).

2. 405 F. Supp. 757 (N.D. Ill. 1975).

3. In Younger v. Harris, 401 U.S. 37 (1971), the Court took exception to the rule of noninterference by federal courts, and stated that where the challenged statute is "patently and flagrantly" violative of the Constitution the federal courts were justified in intervening.

4. 431 U.S. 434 (1977).

5. 401 U.S. 37 (1971).

6. 420 U.S. 592 (1975).

7. 431 U.S. at 442. *See also* note 42 *infra*.

8. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943), where the Court held that federal courts of equity should exercise discretionary power with proper regard for the rightful independence of state governments. *Id.* at 318. *See also* note 43 *infra*.

9. Gibson v. Berryhill, 411 U.S. 564 (1973).

10. 431 U.S. at 447.

11. 471 F. Supp. 516 (N.D. Ill. 1978), *aff'd sub nom.* Quern v. Hernandez, 99 S. Ct. 1488 (1979).

in the Illinois courts.[12] While the district court did not actually disregard *Trainor*, it nonetheless reinstated its earlier *Danaher* decision.[13] The court premised its reinstatement on the fact that abstention is not proper where state court proceedings are inadequate.[14] Thus, the district court addressed the merits of the case and again found the Illinois Attachment Act unconstitutional because the Act failed to require adequate notice and a hearing.[15]

The requirements of notice and a hearing are fundamental principles in the area of debtor-creditor relations.[16] In formulating the due process requirements as to attachments, the Supreme Court has developed two important concepts. First, parties whose rights are affected by a state's judicial processes are entitled to a hearing.[17] Second, notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[18] However, in light of *Hernandez v. Finley*, it now appears that the state court process must also provide an opportunity to present federal constitutional challenges.[19]

This Note will discuss the requirements of an adequate remedy at law and will analyze the inadequacies of the Illinois Attachment Act in light of the abstention principles of *Younger v. Harris* and *Huffman v. Pursue*. Attention also will be given to the due process requirements of prior notice and a hearing in the attachment area of debtor-creditor relations. Finally, due to the recent affirmation of *Hernandez v. Finley* by the Supreme Court in *Quern v. Hernandez*,[20] suggestions for amendments to the present Act will be advanced.

FACTS

On October 30, 1974, the Illinois Department of Public Aid (IDPA) filed suit in the Circuit Court of Cook County against Maria and Juan Hernandez.[21] The IDPA alleged that Juan and Maria Hernandez fraudulently concealed assets while applying for and receiving public aid. Although the

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12. *Id.* at 522.

13. *Id.*

14. *Id.* at 520.

15. *Id.* at 522. The decision of the district court was summarily affirmed in the recent decision of Quern v. Hernandez, 99 S. Ct. 1488 (1979), where the Illinois Department of Public Aid appealed the *Hernandez v. Finley* decision to the Supreme Court.

16. U.S. CONST. amend. XIV, § 1. The pertinent section of this amendment provides: "Nor shall any State deprive any person of life, liberty or property, without due process of law . . . . "

17. Baldwin v. Hale, 68 U.S. 233 (1863). *See* Grannis v. Ordean, 234 U.S. 385 (1914); Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVergh, 93 U.S. 274 (1876).

18. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

19. *See also* Juidice v. Vail, 430 U.S. 327 (1977); Gibson v. Berryhill, 411 U.S. 564 (1973).

20. 99 S. Ct. 1488 (1979).

21. Hernandez v. Danaher, 405 F. Supp. 757, 758 (N.D. Ill. 1975).

applicable statute[22] provided for criminal remedies,[23] the IDPA filed only a civil action seeking the return of the money.[24]

Simultaneously, the IDPA filed an attachment complaint,[25] which resulted in an attachment of the debtors' funds.[26] The plaintiff-debtors received notice of the attachment freezing their credit union savings account when they received the writ, complaint, and affidavit in support of the writ.[27] The plaintiffs failed to file an answer to the attachment and the underlying complaint.[28] Instead, they filed a lawsuit in the District Court for the

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22. ILL. REV STAT. ch. 23, § 11-21 (1977) provides:

> Any person who by means of any false statement, willful misrepresentation, or failure to notify the county department or local government unit, as the case may be, of a change in his status as required by Sections 11-18 and 11-19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or through other fraudulent device obtains or attempts to obtain, or aids or abets any person in obtaining financial aid under this Code to which he is not entitled, shall be guilty of a Class A misdemeanor . . . [T]he offender shall be subject to the penalties for perjury as provided in Section 32-2 of the Criminal Code of 1961 . . . . A person who receives financial aid for which he was not eligible . . . shall be answerable to the county department . . . for refunding the entire amount of any aid received . . . .

23. Two remedies were made available to the state under Illinois law. Either Hernandez could have been charged with perjury, or the state could have proceeded civilly and sought the return of the monies. 431 U.S. at 435-36.

24. *Id.*

25. In filing for an attachment under the Illinois Act, it is necessary under section 1 to allege one of nine grounds in order for an attachment to issue. The nine grounds include: the debtor being a non-resident of Illinois; the debtor concealing himself to avoid service of process; the debtor departing or planning to depart from the state, taking the property with him to the injury of creditors; the debtor within two years prior to the filing of the writ fraudulently conveying or concealing his effects or other property so as to hinder or delay creditors; the debt being litigated was fraudulently contracted on the part of the debtor and was reduced to writing and signed by the debtor, his agent, or his attorney. ILL. REV. STAT. ch. 11, §1 (1977).

The plaintiff-debtors specifically attacked those sections authorizing a writ of attachment based upon a creditor's allegation of debtor fraud. Hernandez v. Danaher, 405 F. Supp. at 761.

26. The sheriff executed the writ on November 15, 1974, thereby freezing the plaintiffs' credit union savings account. Section 8 of the Illinois Attachment Act provided the sheriff with the right to execute the writ of attachment against those properties described. In the event that no description was available, the sheriff could execute against lands, tenements, goods, chattels, credits, monies, and effects of the debtor. Additionally, the sheriff could execute against lands and tenements to which the debtor had or may have claimed any equitable interest, and which were sufficient to satisfy the creditor's claims. ILL. REV. STAT. ch. 11, § 8 (1977).

27. Hernandez v. Danaher, 405 F. Supp. at 759. The plaintiffs appeared in court on November 18, 1974, and were informed that the matter would be continued to December 19, 1974, which was the court date for a hearing on the underlying claim. Additionally, the writ of attachment had issued from the court clerk automatically, *i.e.*, without judicial control. 431 U.S. at 437. A plaintiff-creditor is examined only by a judge before issuance of a writ of attachment when the underlying action sounds in tort, whereupon the judge determines whether the damages suffered exceed the amount of the attachment. ILL. REV. STAT. ch. 11, § 2 (1977).

28. The return date, or hearing on the attachment, would have been not less than ten nor more than sixty days after the attachment had Hernandez proceeded under the Attachment Act. ILL. REV. STAT. ch. 11, § 6 (1977).

Northern District of Illinois seeking the return of the attached monies.[29] Additionally, the plaintiff-debtors alleged that the Attachment Act was unconstitutional in that it deprived them of their property without due process of law.

The Lower Court's Decision: Hernandez v. Danaher

The lower court's decision in *Danaher* addressed two issues: (1) whether the abstention doctrine articulated in *Huffman v. Pursue*[30] prevented the district court from intervening in the state civil proceeding; and (2) if abstention was not required, whether the challenged portions of the Illinois Attachment Act were unconstitutional.[31]

The district court applied the principles enunciated by the Supreme Court in *Younger v. Harris*,[32] noting the following two extraordinary circumstances that allow federal interference: a showing that an irreparable injury is great and immediate, and a showing that the statute in question is flagrantly and patently violative of express constitutional prohibitions.[33] The *Huffman* de-

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29. Hernandez v. Danaher, 405 F. Supp. 757 (N.D. Ill. 1975). The named defendants to the action were the officials of the IDPA, the court clerks of the Illinois Circuit Courts, and the sheriffs in Illinois. The relief sought by the plaintiffs included an injunction forbidding the named parties from issuing or serving writs under the Act. Upon resolution of the case, the particular relief requested had been granted. *Id.* at 762.

30. 420 U.S. 592 (1975). In *Huffman*, the State of Ohio brought a civil action under a nuisance statute and called for the closing of a theatre intended for the showing of obscene movies. The *Huffman* Court concluded that such a proceeding was closely related to that under a criminal statute, particularly because the statute at issue gave the State of Ohio an exclusive right of action. *Id.* at 605.

In *Hernandez*, the State of Illinois argued that the Attachment Act was within the purview of *Huffman*, as the state had a criminal right of action available but decided to proceed civilly. 431 U.S. at 435.

31. Hernandez v. Danaher, 405 F. Supp. at 760.

32. 401 U.S. 37 (1971). Harris was indicted for passing out leaflets in violation of the California Syndicalism Act. CAL. PENAL CODE § 11400 (West 1970). Harris filed a complaint in the federal district court seeking to enjoin the prosecution by alleging that the act inhibited the exercise of one's first amendment rights. The Supreme Court, however, clearly enunciated the abstention policy and found that historically, the federal courts usually have allowed state courts to try cases free of federal interference. 401 U.S. at 43-44.

The Court provided three reasons for noninterference. First, the doctrine of equity prohibits a court of equity from enjoining a criminal prosecution when the moving part has an adequate remedy at law. Second, the notion of comity asks the federal courts to give proper respect to state functions. Third, comity recognizes the separateness of state and federal governments, requiring states to be allowed to perform their own functions. The Court described these principles as "Our Federalism." *Id.* at 43-44.

The Supreme Court concluded that Harris had an adequate remedy at law because no allegations were made that the state court action was brought in bad faith or for harassment. *Id.* at 49. Had the aforementioned allegations been made, the federal court would have had a basis for intervention. *Id.* at 54. Thus, the finding that Harris had an adequate remedy at law also was a finding that the federal constitutional claims could be disposed of in the state court action.

33. Younger v. Harris, 401 U.S. 37, 53 (1971). *See also* Stefanelli v. Minard, 342 U.S. 117 (1951) (federal courts should refuse to intervene in state criminal proceedings); Spielman Motor

cision extended *Younger* one step further and made its provisions applicable to quasi-criminal proceedings.[34] The district court noted, however, that *Huffman* involved civil proceedings "in aid of and closely related to criminal statutes."[35] Therefore, it denied *Huffman's* applicability to the *Danaher* case and held that the Illinois Attachment Act was not of a quasi-criminal nature.[36]

Having overcome the abstention hurdle, the district court concluded that various sections of the Illinois Attachment Act[37] "patently and flagrantly" violated due process.[38] Thus, the court found that a debtor's property could be attached through the mere filing of an affidavit by a creditor alleging, in statutory language, any of the nine circumstances under which a writ would issue.[39] The *Danaher* court also found that the Illinois Attachment Act did not provide the defendant-debtor with an absolute right to a hearing immediately after seizure.[40] Thus, there was inadequate due process protection.

The Supreme Court's Decision: Trainor v. Hernandez

On appeal, the Supreme Court, in *Trainor v. Hernandez*,[41] reversed the district court on general principles of abstention and federalism.[42] The

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Sales Co. v. Dodge, 295 U.S. 89 (1935) (to justify interference there must be exceptional circumstances); Fenner v. Boykin, 271 U.S. 240 (1926) (set up and rely upon your defense in state courts).

34. Huffman v. Pursue, 420 U.S. 592, 607 (1975).

35. Hernandez v. Danaher, 405 F. Supp. at 759. The district court in *Danaher* noted that the *Huffman* Court did not extend abstention totally to civil cases, and observed that the cause of action in *Huffman* was more akin to criminal proceedings than most civil cases. *Id.* at 760.

36. *Id.* at 759.

37. ILL. REV. STAT. ch. 11, §§ 1, 2, 6, 8, 10, 14 (1977). *See* Hernandez v. Danaher, 405 F. Supp. at 760. These statutory sections spell out the provisions to be followed in the writ of attachment process. Section 1 states the nine grounds which may cause a writ to issue. Section 2 allows a writ to issue automatically unless it sounds in tort, in which case the plaintiff is examined before a judge under oath. Section 6 provides the writ of attachment form and the return date for the attachment hearing. Section 8 names the properties subject to seizure by the sheriff. Section 10 provides for service of the writ upon the debtor. Section 14 requires the sheriff to retain possession of the attached property pending court judgment, unless the debtor posts a bond.

38. Hernandez v. Danaher, 405 F. Supp. at 760. The court was thereby able to avoid application of the *Younger* abstention policy since a patent and flagrant violation of an express constitutional prohibition has been identified by the Supreme Court as a specific example of great and immediate "irreparable injury" justifying non-abstention. Younger v. Harris, 401 U.S. 37, 53 (1971).

39. Hernandez v. Danaher, 405 F. Supp. at 762. *See* ILL. REV. STAT. ch. 11, § 1 (1977).

40. Hernandez v. Danaher, 405 F. Supp. at 762. The plaintiffs alleged that it was the practice of the Illinois courts not to grant an immediate hearing on the attachment issue and to hear the claim in conjunction with the underlying claim causing the writ of attachment to issue. *See* Hawkins v. Albright, 70 Ill. 87, 90 (1873); Page v. Dillon, 61 Ill. App. 282, 288 (1895).

41. 431 U.S. 434 (1977).

42. *Id.* at 441. The Supreme Court, in taking this position, was following its earlier decision in *Younger v. Harris*, 401 U.S. 37 (1971). Therein, the Court felt that abstention should be the

majority noted the significance of the *Younger* case and stated that, under the basic doctrine of equity jurisprudence, "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[43] The *Trainor* Court particularly emphasized raising one's defenses in the state court, thereby exhausting those remedies,[44] unless exhaustion of state remedies would not afford adequate protection to the federal constitutional claims.[45] The Court held that absent

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policy of the federal court where the parties had an adequate remedy at law and would not suffer irreparable harm if denied equitable relief. *Id.* at 43-44. *But see* note 48 *infra*.

Abstention has been viewed by the Supreme Court as a discretionary judicial doctrine designed primarily to promote federalism. C. WRIGHT, LAW OF FEDERAL COURTS 196-208 (2d ed. 1970) [hereinafter cited as WRIGHT].One commentor has stated:

> Clearly, then, it is appropriate to talk of federal court abstention only when both of the following elements are present: (1) the federal court has jurisdiction to hear the case, and (2) federal court action would somehow operate to produce friction between the state and national governments, thereby rending, or at least creasing, the fragile fabric of federalism.

Burton, *The Abstention Doctrine: Some Recent Developments*, 46 TUL. L. REV. 762, 763 (1972).

Abstention often involves two related doctrines: exhaustion of state remedies and comity. Exhaustion of state remedies has been characterized as "a jurisdictional or a pseudo-jurisdictional requirement." Hobbs. v. Thompson, 448 F.2d 456, 461 (5th Cir. 1971) *quoting* Moreno v. Henckel, 431 F.2d 1299, 1307 (5th Cir. 1970). As judicially evolved, the exhaustion doctrine requires the petitioner to avail himself of state remedies before seeking relief in the federal court. *See* WRIGHT, *supra* at 187.

Comity, in contrast to the exhaustion-of-state-remedies doctrine, is a broad concept underlying and supporting federal court abstention. Basically, comity is the recognition that "the entire country is made up of a Union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

43. 431 U.S. at 440-41. The Supreme Court further adopted the position that the federal court's jurisdiction would act as a "direct aspersion" on the capabilities of the state courts, and would be disruptive of a legitimate state function. *Id.* at 441. *See, e.g.*, Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941), which declared that courts of equity should give "scrupulous regard [to] the rightful independence of state governments" *and* Steffel v. Thompson, 415 U.S. 452, 462 (1974), which held that intervention reflects negatively upon a state court's abilities. *See also* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Marino v. Ragen, 332 U.S. 561 (1947).

44. 431 U.S. at 440-41. *See* Kugler v. Helfant, 421 U.S. 117, 124 (1975) (policy of equitable restraint is founded on the premise that a state ordinarily provides a fair and sufficient opportunity for vindication of federal constitutional rights); Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (dismissal of federal suit presupposes the opportunity to have federal issues decided by a competent state tribunal). *But see* Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941) (scrupulous regard must be had for rightful independence of state governments).

45. 431 U.S. at 441. *See* Tully v. Griffin, 429 U.S. 68 (1976) (state court failure to provide plain, speedy, efficient relief); Hillsborough v. Cromwell, 326 U.S. 620 (1946) (remedy was so uncertain that it was speculative whether the state court afforded full protection to the federal right); Mountain States Power Co. v. Public Serv. Comm'n of Mont., 299 U.S. 167 (1936) (a plain, speedy, and efficient remedy cannot be predicated upon the problematical outcome of future litigation); Hopkins v. Southern Cal. Tel. Co., 275 U.S. 393 (1928) (no clear adequate

this exception, interference by federal courts would reflect negatively upon a state court's ability to resolve constitutional claims.[46]

Finding that the state civil suit was quasi-criminal in nature the Supreme Court applied the abstention principles of *Huffman*.[47] The Court held that because the proceeding giving rise to the plaintiffs' suit was an action filed by the state to recover fraudulently obtained funds, the attachment proceeding was arguably criminal in nature.[48] The Court reasoned that the underly-

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remedy at law, therefore equity proceeding is permissible); Wallace v. Hines, 253 U.S. 66 (1920) (ought not leave plaintiffs to speculate as to what the state court might say if an action were brought).

46. 431 U.S. at 443.

47. *Id.* at 444.

48. *Id.* It is important to note that at the time of the *Danaher* decision the abstention principle had only been applied in the context of criminal and quasi-criminal proceedings. By the time that the Supreme Court had an opportunity to review the *Trainor* case, Juidice v. Vail, 430 U.S. 327 (1977), had been decided. This decision extended the abstention principles to civil suits. *Id.* at 334. Therefore, the Court, in *Trainor*, placed less significance on the need to fit the case within the quasi-criminal category. In *Juidice*, the Supreme Court stated that the *Younger* doctrine of non-intervention did not rest on whether a state criminal process was involved, but rather on the notion of 'comity' which gives proper respect for state functions. *Id.* The Court, in *Juidice*, held that:

> [P]erhaps it [comity] is not quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman, supra*. But we think it is of sufficiently great import as to require application of the principles of those cases.

Id.

Labeling a cause of action as criminal, quasi-criminal, or civil appears, therefore, to be of secondary significance to the Supreme Court. The Court's primary consideration is the state's interest in vindicating the regular operation of its judicial system.

Justice Blackmun, concurring in *Trainor*, noted that in previous cases employing the *Younger* doctrine the Court imposed a requirement that states show an important interest before abstention is required—whether it is criminal, quasi-criminal, or civil. 431 U.S. at 448 (Blackmun, J., concurring). But where the state's interest is more attenuated, *Younger* abstention is not applicable. Justice Blackmun cited Steffel v. Thompson, 415 U.S. 452 (1975), as an example of where abstention was not required because a declaratory judgment was sought. In such a case, the opportunity for adjudication of constitutional rights authorized by the Declaratory Judgment Act becomes paramount. Justice Blackmun stated that the facts in *Danaher* support the finding that the state had a substantial interest in the present suit in that it brought the suit in its sovereign capacity to recover fraudulently obtained state funds, 431 U.S. at 449 (Blackmun, J., concurring). The fact that the state proceeded civilly rather than criminally, according to Justice Blackmun, should not be a factor in determining whether abstention applies. *Id.* at 449.

In *Trainor*, Justice Brennan forcefully dissented against the Court's decision to abstain, *id.* at 453, *citing* Juidice v. Vail, 430 U.S. 327, 342 (1977) (Brennan, J., dissenting). In *Juidice*, he asserted that abstention had no application to civil suits grounded upon 42 U.S.C. § 1983. 431 U.S. at 377. Justice Brennan's position would be relevant here, as Hernandez filed a § 1983 cause of action. Moreover, to abstain, according to Mitchum v. Foster, 407 U.S. 225, 242 (1972), is contrary to the Congressional purpose behind § 1983: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." 407 U.S. at 242.

ing suit and the accompanying writ of attachment were brought to vindicate the important state policy of safeguarding the fiscal integrity of the public aid program.[49]

The Supreme Court also noted that the state possessed the option of vindicating these policies through criminal prosecution.[50] Additionally, the Court asserted that the *Younger* and *Huffman* principles were broad enough to apply to a federal court's interference with a civil action brought by the state in its sovereign capacity.[51]

The Supreme Court concluded that the extraordinary circumstances warranting equitable relief under *Younger* were not present.[52] There was no suggestion of bad faith or harassment, and contrary to the district court's opinion, the Court held that the Illinois Act was not patently and flagrantly unconstitutional in light of recent Supreme Court decisions in the area.[53] The Court also noted that the district court did not deal with one important question requiring resolution: whether the plaintiffs could have presented their federal due process challenge to the attachment statute in the state proceeding.[54] Thereupon, the Supreme Court reversed and remanded the decision of the district court to resolve this remaining issue.[55]

Justice Brennan also cited Steffel v. Thompson, 415 U.S. 452 (1974), as additional support for federal intervention where a § 1983 suit is brought to determine one's federal constitutional rights. 431 U.S. at 456 (Brennan, J., dissenting). *Steffel*, unlike *Hernandez*, involved a federal plaintiff who was threatened with criminal prosecution, as opposed to having an actual suit pending. 415 U.S. at 452. The police already had threatened Steffel with arrest and prosecution if he continued to pass out handbills in a shopping center. Steffel sought a declaratory judgment that the Georgia criminal trespass statute was unconstitutional due to its interference with his constitutionally protected activities. *Id.* at 454-55. The Supreme Court found that the requirements for *Younger* abstention did not have to be met before a declaratory judgment was issued. *Id.* at 462. Since no state action was pending, there was no threat of duplicative legal proceedings. This left unresolved only a determination as to whether declaratory relief was appropriate.

Declararory judgments are judged by the same standards as an injunction. *Id.* Historically, the Declaratory Judgment Act was to be an alternative to injunctions, and the same tests were not to be applied. *Id.* Also, the *Steffel* Court noted that § 1983 suits do not have an exhaustion of state remedies requirement, due to the paramount role assigned to federal courts by Congress to protect constitutional rights. *Id.* at 464.

49. 431 U.S. at 444.

50. *Id.*

51. *Id.* Sovereign power is defined as that power in a state to which none other is superior or equal and which includes all the specific powers necessary to accomplish the legitimate ends and purposes of government. BLACK'S LAW DICTIONARY 1568 (4th rev. ed. 1968).

52. 431 U.S. at 446.

53. *Id.* at 447. The two cases cited by the Court were North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), and Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

54. 431 U.S. at 447.

55. *Id.* at 447-48.

The District Court on Remand: Hernandez v. Finley

The district court in *Hernandez v. Finley*[56] reinstated its earlier judgment of *Hernandez v. Danaher*.[57] Reinstatement was premised on the finding that the Illinois Attachment Act did not provide the plaintiffs with the opportunity to raise their federal due process claim,[58] and therefore the statute deprived them of an adequate remedy at law.[59] The district court found that the sole purpose of the attachment hearing was to determine the truth and sufficiency of facts in the affidavit that caused the writ to issue,[60] thereby precluding an opportunity to raise any constitutional challenge.[61] Additionally, the court determined that when the right to raise constitutional issues was available, yet denied, such a denial is interlocutory in nature and does not create an immediate right of appeal.[62] The court stated that rul-

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56. 471 F. Supp. 516, 522 (N.D. Ill. 1978), *aff'd sub nom.* Quern v. Hernandez, 99 S. Ct. 1488 (1979).

57. 405 F. Supp. 757 (N.D. Ill. 1975). Relying on the inadequacy of the Attachment Act's protections of the constitutional claims, the district court addressed the merits of the case and reinstated the prior judgment.

58. Hernandez v. Finley, 471 F. Supp. at 520.

59. In Juidice v. Vail, 430 U.S. 327, 335 (1977), the Court stated that for *Younger* abstention to be invoked, the state proceeding must provide an opportunity to present federal claims. The failure to avail oneself of such opportunities will not mean the state procedures were inadequate. *Id.* at 337. Therefore, it appears that the question of adequacy is resolved by the existence or nonexistence of such an opportunity.

Additionally, Justice Rehnquist, in *Huffman*, felt that the considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion of state remedies requirement merely because chances of success on appeal are not auspicious. 420 U.S. 592, 610 (1975).

60. Hernandez v. Finley, 471 F. Supp. at 519. *See* Schwabacker v. Rush, 81 Ill. 310 (1876); Ridgeway v. Smith, 17 Ill. 33 (1855). Both cases held that if the debtor successfully traverses the facts causing the writ of attachment to issue, the attachment shall be quashed. Neither case addressed the right to raise issues not stated on the face of the affidavit causing the writ to issue. *See also* ILL. REV. STAT. ch. 11, § 27 (1977), which states:

> The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and, if upon trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

61. Hernandez v. Finley, 471 F. Supp. at 519.

62. *Id. See, e.g.*, American Mortgage Corp. v. First Nat'l Mortgage Co., 345 F.2d 527 (7th Cir. 1965) (order denying request to quash writ is not final judgment); Smith v. Hodge, 13 Ill. 2d 197, 148 N.E.2d 793 (1958) (judgment quashing writ is not a final order and therefore not appealable); Brignall v. Merkle, 296 Ill. App. 250, 16 N.E.2d 150 (1938) (attachment rests upon the principle suit, and can not be appealed before final judgment of the main claim); Rabits v. Live Oak, Perry & Gulf R.R., 245 Ill. App. 589 (1927) (attachment is merely an adjunct to the main suit). *See also* ILL. REV. STAT. ch. 11, § 28 (1977), which provides:

> No writ of attachment shall be quashed, nor the property taken thereon restored, nor any garnishee discharged, nor any bond by him given canceled, nor any rule

ings on the validity of an attachment would, therefore, not be final until the underlying claim was resolved.[63] As a result, the court would have determined who was entitled to the attached property, thereby making any arguments regarding the initial attachment moot.[64] Thus, the court held that the Illinois Act provided an inadequate remedy at law.[65]

INADEQUATE REMEDY AT LAW

The plaintiffs' major criticism of the Illinois Attachment Act was that their ability to raise a constitutional challenge at the hearing was more "theoretical than real."[66] In order for a defendant to raise constitutional claims at an attachment proceeding, there must be an adequate statutory procedure. Minimally, such a procedure must provide a "forum competent to vindicate any constitutional objections interposed against those policies."[67] In addition, there should be an opportunity to raise both the federal and state issues involved, and to have timely decisions made by a competent state tribunal.[68] Assuming that the state court is an adequate forum to raise a constitutional claim, it also must provide a "meaningful opportunity to appeal any adverse ruling."[69] Moreover, when a state remedy is uncertain, the federal court must provide relief.[70] The inadequacy of state remedies therefore provides the proper basis for assertion of jurisdiction by the federal courts.[71]

Although federal courts try to minimize their interference with state matters,[72] Justice Stevens, in his *Trainor* dissent,[73] noted that federal courts

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entered against the sheriff discharged, on account of any insufficiency of the original affidavit, writ of attachment bond to be filed, or the writ to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient.

63. *See* note 62 *supra*.

64. Hernandez v. Finley, 471 F. Supp. at 520.

65. *Id.*

66. *Id.* at 519. *See also* Caulder v. Durham Hous. Auth., 433 F.2d 998, 1002 (4th Cir. 1970).

67. Huffman v. Pursue, 420 U.S. 592, 604 (1975).

68. Gibson v. Berryhill, 411 U.S. 564, 577 (1975).

69. Hernandez v. Finley, 471 F. Supp. at 520.

70. *See* Tully v. Griffin, Inc., 429 U.S. 68, 76 (1976).

71. 431 U.S. at 444 (1977). *See* Grandco Corp. v. Rockford, 536 F.2d 197, 206 (7th Cir. 1976) (administrative proceedings with limited state court review of record of administrative hearings); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1002 (4th Cir. 1970) (only a theoretical right to appeal); Doe v. Maher, 414 F. Supp. 1368, 1376-77 (D. Conn. 1976) (unwed mother had no means to challenge welfare statute requiring disclosure of putative father and institution of paternity suit); Lessard v. Schmidt, 413 F. Supp. 1318, 1320 (E.D. Wis. 1976) (civil commitment proceedings had questionable right of appeal of constitutional claims); Owens v. Housing Auth. of Stamford, 394 F. Supp. 1267, 1271 (D. Conn. 1975) (inability to appeal state eviction case rendered ability to litigate issues in state court "more theoretical than real").

72. 431 U.S. at 464. *See* note 75 *infra*.

73. 431 U.S. at 460.

have the right to review the adequacy of state court remedies.[74] The district court in *Hernandez v. Finley* applied the minimal requirements of an adequate state remedy to the Illinois Attachment Act and found that any challenges to an attachment by the defendant would proceed under section 27 of the Act,[75] which provided the defendant with a right to challenge an attachment and to request that it be quashed.[76] Section 28, however, specifically limited those rights guaranteed under section 27.[77] Section 28 provided that if the plaintiff filed a legally sufficient affidavit, the writ could not be quashed.[78] Furthermore, with respect to a hearing to determine whether a writ of attachment should issue, section 28 limited the issues to whether the allegations contained therein were true.[79] Such limitations ap-

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74. *Id.* Justice Stevens also recognized that the notion of non-interference began in the area of taxpayer remedies. *Id.* at 464. States do have a valid interest in collecting taxes or other interests, and in an effort not to interfere with this legitimate concern, federal interference should be limited. Tully v. Griffin, Inc., 429 U.S. 68 (1976). To effectuate this policy, Congress specifically prohibits federal injunctions where a taxpayer has a "plain, speedy and efficient" remedy under state law. *Id.* at 73. 28 U.S.C. § 1341 (1976) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Thus, Justice Stevens stated that the federal courts have available to them the right to determine whether the state remedy is in fact "plain, speedy and efficient." 431 U.S. at 464.

The application of this principle to non-tax cases came with the formulation of the *Younger* doctrine, which was developed from the same equitable principles applied to 28 U.S.C. § 1341 (1976). In the first Judiciary Act of 1789, Congress directed that equity was to be withheld if a "plain, adequate and complete remedy may be had at law." Scott v. Neely, 140 U.S. 106, 110 (1891). The Supreme Court, in *Scott*, noted:

> Whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity.

Id. at 110.

The *Younger* Court relied upon Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943), where the Court noted that while Congress in § 1341 had not specifically prohibited declaratory judgments concerning the validity of state statutes, equitable principles nonetheless required the same result: "[W]e are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of declaratory judgment procedure." *Id.* at 299.

75. ILL. REV. STAT. ch. 11, § 27 (1977).

76. *See* note 60 and accompanying text *supra*.

77. *See* note 62 and accompanying text *supra*. Where there is some question as to the sufficiency of the affidavit, such writ may be amended in the time and manner as the court directs, thereby making it impossible to quash the writ, as it would be legal and sufficient in its amended form. ILL. REV. STAT. ch. 11, § 28 (1977).

78. ILL. REV. STAT. ch. 11, § 28 (1977).

79. *See* note 60 and accompanying text *supra*. Whether the procedures of §§ 27 and 28 provided adequate protection to the constitutional claim requires an examination of what is "adequate." Adequacy is based on the premise of setting up one's defenses in state court, unless it plainly appears that this would not afford adequate protection. Fenner v. Boykin, 271 U.S. 240, 244 (1926).

pear to preclude constitutional challenges and therefore fail to provide a minimally adequate remedy at law.[80]

The Illinois Attachment Act also failed to allow the opportunity for appeal where the state court denied a motion to quash a writ of attachment. Case law indicates that an order by an Illinois court denying defendant-debtor's motion to quash a writ of attachment on due process grounds was regarded as interlocutory and thus not appealable.[81] Therefore, if the debtor had a constitutional challenge to be litigated at the attachment hearing, a rejection of that challenge would not have carried with it an immediate right to appeal. As a result, a ruling on the validity of the attachment would not have become final until the underlying claim had been resolved.[82]

The requirement that the debtor postpone the constitutional claim pending resolution of the underlying claim may have resulted in considerable harm to the debtor. More specifically, there may have been a continuing wrongful attachment from which the debtor had no recourse, even though this attachment was constitutionally invalid. The greatest possible harm that could have occurred to a debtor was that upon the resolution of the underlying claim, the prevailing party would have been entitled to the property regardless of the validity of the initial attachment.[83] The net effect of the entire process would have been to litigate the case from beginning to end without ever addressing the constitutional claim.[84]

In short, it is impossible to determine accurately what would have happened had the debtor presented his constitutional claim in the state court attachment proceeding. To require abstention, knowing the inadequacies of the attachment proceedings, would have been contrary to the basic principle that a federal court must provide relief where the state remedy is uncertain.[85]

DUE PROCESS AND *HERNANDEZ V. FINLEY*

A careful consideration of the four controlling decisions[86] addressing due process requirements in debtor-creditor relations will underscore the deficiencies of the Illinois Attachment Act. The Supreme Court, in *Sniadach v.*

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80. Hernandez v. Finley, 471 F. Supp. at 519.

81. *See* note 62 *supra*.

82. *Id.*

83. Hernandez v. Finley, 471 F. Supp. at 520.

84. *Id.*

85. Trainor v. Hernandez, 431 U.S. 434, 444 (1977). As stated by Justice Holmes: "[W]e ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought." Wallace v. Hines, 253 U.S. 66, 68 (1920). This position now enjoys the additional support of the *Quern* decision.

86. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). These cases represent the Supreme Court's analysis of the due process requirements of notice and hearing in debtor-creditor relations.

Family Finance Corp.,[87] squarely addressed for the first time in recent history the implications of the taking of property without due process of law. The plaintiff in *Sniadach* received notice of the wage garnishment the same day as her employer, but the Supreme Court deemed such notice insufficient[88] due to the resulting hardships of such an arbitrary encroachment.[89] Both the creditor's garnishment of wages in *Sniadach* and the attachment of a debtor's credit union account in *Hernandez* impose tremendous hardships by making such monies inaccessible without prior notice or hearing.

Unfortunately, lack of access to one's monies is not the only way in which an unfair deprivation can occur. *Fuentes v. Shevin*[90] involved a seizure of household appliances, absent prior notice or hearing,[91] upon the default of the consumer-debtors. In *Fuentes*, the plaintiff-consumers from Florida and Pennsylvania had purchased their goods under revolving credit plans.[92] Their respective state statutes[93] allowed seizure of their property under a writ of replevin.[94] Neither act provided for prior notice and a hearing or an immediate postseizure hearing.[95] The *Fuentes* court stated that, absent ex-

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87. 395 U.S. 337 (1969).

88. *Id.* at 340. The Wisconsin garnishment law only required notice to be served upon the debtor within 10 days after service on the garnishee. WIS. STAT. § 267.07(1) (1973) (current version at WIS. STAT. ANN. § 812.07(1) (West 1977)).

89. The Court's primary focus was on the deprivation to the wage earner of his earned wages without any opportunity to be heard or to tender a defense. Justice Douglas, writing for the Court, held that a "prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support." Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

90. 407 U.S. 67 (1972).

91. *Id.* at 70-72. *See generally* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950), where the Court viewed the right to notice as a fundamental requirement to give the parties an opportunity to present objections.

92. In *Fuentes*, the debtor was a Florida resident who purchased a stove and stereo from Firestone. She ceased payments due to problems with servicing. Thereafter, Firestone sought replevin. 407 U.S. at 70. In the Pennsylvania companion case, three of the four appellants purchased personal property under installment contracts and the sellers obtained and executed writs of replevin. The fourth appellant also had goods seized under replevin, but had a dispute with her husband. He executed the replevin and also seized their child's belongings. *Id.* at 72.

93. FLA. STAT. ANN. §§ 78.01, .10, .13 (West 1964) (current version at FLA. STAT. ANN. §§ 78.01, .10, .13, (West Supp. 1979)); PA. STAT. ANN. tit. 12, § 1821 (Purdon 1967) (repealed 1978); PA. R. CIV. P. 1073.

94. Both acts authorized the issuance of prejudgment writs of replevin through a summary process of *ex parte* application to the court clerk accompanied by the posting of a bond for an amount in excess of the property's value. Fuentes v. Shevin, 407 U.S. 67, 73-77 (1972).

A writ of replevin is a remedy of a secured creditor that is used where it is not possible to engage in self-help to repossess the items peaceably. Like attachment or garnishment, it is a prejudgment remedy which involves the taking of property prior to resolution of the underlying claim, and can impose hardships on the debtor and his/her family. *Id.* at 96.

95. The Florida statute provided no right to be heard until the trial on the possession. FLA. STAT. ANN. § 78.13 (West Supp. 1972-73). Also, as with the Illinois Attachment Act, all that was required of the creditor was the bare assertion to the court clerk that the creditor was lawfully entitled to possession. FLA. STAT. ANN. § 78.01 (West Supp. 1972-73). The Florida

traordinary circumstances,[96] if the right to notice and a hearing is to be meaningful, it must be granted when the deprivation can still be prevented.[97] Thus, the Court held both acts unconstitutional.[98]

The Court, in *Sniadach* and *Fuentes*, emphasized the debtor's property interest and ruled that no deprivation of such an interest could occur unless

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statute also provided the sheriff with the right to break open the home or building when the debtor did not peaceably turn over the property. FLA. STAT. ANN. § 78.10 (West Supp. 1972-73).

The Pennsylvania statute only required an ex parte application, with a bond posted by the creditor. PA. R. CIV. P. 1073. *See also* FLA. STAT. ANN. § 78.07 (West Supp. 1972-73). However, unlike the Florida law, in Pennsylvania there was no requirement that there ever be a hearing on the conflicting claims to the property. PA. R. CIV. P. 1073 (b). The reason for no hearing was that the creditor was not obliged to initiate court action. Fuentes v. Shevin, 407 U.S. 67, 77-78 (1972).

See generally Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972). In *Scott*, the court held that before a person can be deprived of property, he must first be provided with an opportunity to speak on his own behalf. *Id.* at 1275. *See also* Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Grannis v. Ordean, 234 U.S. 385 (1914).

96. Extraordinary circumstances were viewed by the court as exceptions to the due process requirements to notice and hearing. Those exceptions included: a seizure to secure an important governmental or general public interest; a special need for very prompt action; and situations in which the state has kept strict control over its monopoly of legitimate force. Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972).

See Brabham, *Sniadach Through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes*, 12 U. RICH. L. REV. 157 (1977). This article noted that it is not clear whether all three requirements must be met or just any one of the three. The author concluded that any one of the three would constitute an extraordinary situation. *Id.* at 166. *See also* Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases*, 64 KY. L. J. 705 (1976).

Examples of cases where the extraordinary situation argument applies include: Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (yacht seized with marijuana on board); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (misbranded drugs); Phillips v. Commissioner, 283 U.S. 589 (1931) (aid in collection of taxes); Coffin Brothers & Co. v. Bennet, 277 U.S. 29 (1928) (a bank failure); United States v. Pfitsch, 256 U.S. 547 (1921) (the war effort); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (protection of public from contaminated food).

97. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Considerable case law recognizes the waiver of notice and a hearing, but there is a general presumption against waiver. *See, e.g.*, D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (due process rights to notice and hearing prior to civil judgment are subject to waiver); Brady v. United States, 397 U.S. 742 (1970) (waiver must be knowing and intelligent, with awareness of consequences); Johnson v. Zerbst, 304 U.S. 458 (1938) (courts do not presume acquiescence in loss of fundamental rights). *See also* Boddie v. Connecticut, 401 U.S. 371 (1971); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937); First Nat'l Bank in DeKalb v. Keisman, 47 Ill. 2d 364 (1970).

98. Fuentes v. Shevin, 407 U.S. 67, 96 (1972). The *Hernandez* case also is typical of many recent cases attacking state statutes because of the failure to satisfy the due process requirements of *Sniadach* and *Fuentes*. *See, e.g.*, United States Gen., Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wis. 1976); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973); Clement v. Four N. State Corp., 360 F. Supp. 933 (D.N.H. 1973); Trapper Brown Constr. Co. v. Electromech, Inc., 358 F. Supp. 105 (D.N.H. 1973); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972).

timely due process protections were provided.[99] However, the Illinois Attachment Act failed to require notice and a hearing prior to seizure. Thus, under the Act, the debtor may not have received notice of the attachment until after the attachment occurred.[100]

Prior notice and a hearing, however, are not absolute requirements for a writ of attachment to issue if the procedural safeguards of *Mitchell v. W.T. Grant*[101] are met. *Mitchell* makes prior notice and a hearing unnecessary where: (1) the creditor alleges, under oath, facts entitling him to the writ; (2) there is judicial control of the summary seizure, from beginning to end; and (3) there is an immediate postseizure hearing.[102] At such a hearing, the burden is on the plaintiff to prove the adequacy of the grounds upon which the writ was issued.[103]

The Illinois Attachment Act also failed under the *Mitchell* exception. Under the Act, the only requirements to obtaining a writ of attachment were an affidavit stating the nature and amount of the claim,[104] and a bond covering damages in the event of a wrongful attachment.[105] Except for where a claim sounded in tort, the Illinois Act had no provisions for an appearance before the court. Otherwise, the writ was issued by the clerk of the court upon application.[106] More importantly, the immediate postseizure hearing was not available in that the return date, or attachment hearing, could have occurred anywhere from ten to sixty days after the attachment.[107]

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99. The Court, in *Sniadach*, noted that while creditors may have a legitimate claim, "recent investigations . . . disclosed the grave injustices made possible by prejudgment garnishment . . . ." Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969). As a result, the Court concluded, absent notice and a prior hearing, prejudgment garnishment violated the fundamental principles of due process. *Id.* at 342.

The *Fuentes* Court stated that the essential reason for the requirement of a prior hearing was to prevent unfair and mistaken deprivations. Fuentes v. Shevin, 407 U.S. 67, 97 (1972). Additionally, the Court held that "due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property . . . ." *Id.*

100. ILL. REV. STAT. ch. 11, § 8 (1977), provided the sheriff with the right to attach. No provision for notice was available. Section 10 of the Act stated that the defendant-debtor was to be served with a writ in the same manner as service of summons. The time when process was served, therefore, may have been the first time that the debtor was aware of the attachment. Further, nothing prevented the sheriff from attachment at the time of service, or even earlier. ILL. REV. STAT. ch. 11, § 10 (1977).

101. 416 U.S. 600 (1974). The debtor owed $574 on household items. As a result of his default, the creditor submitted an affidavit of the credit manager, swearing to the truth of the facts alleged, and swearing also that the debtor would try to dispose of the goods were they not sequestered. *Id.* at 602. The request for a writ of sequestration was made to a judge of the court rather than to a court clerk. *Id.* at 616. Sequestration under Louisiana law is similar to a writ of replevin. *Id.*

102. *Id.* at 616-18.

103. *Id.* at 618.

104. ILL. REV. STAT. ch. 11, § 2 (1977).

105. *Id.* § 4a.

106. *Id.* § 2.

107. *Id.* § 6.

Mitchell is also significant in that the Court, for the first time,[108] considered the creditor's interests in the sequestered property.[109] Under Louisiana law, vendors could take a lien on the debtor's property to the extent of the unpaid balance.[110] In the event of default, the debtor's right to possession and title were subject to defeasance.[111] Whether the *Mitchell* decision affected the principles of *Sniadach* and *Fuentes*, by allowing seizure prior to notice and a hearing, was ultimately resolved in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[112]

In *Di-Chem*, the Supreme Court determined that the Georgia garnishment statute[113] was unconstitutional because it failed to provide either prior notice and a hearing as required by *Sniadach* and *Fuentes*, or an immediate postseizure hearing as required by *Mitchell*.[114] The Georgia statute, like

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108. *Fuentes* and *Sniadach* never addressed the creditor's interest in the property. Both cases focused on the impending harm and hardship to the debtor.

109. LA. CODE CIV. PROC. ANN. arts. 281-83, 325, 2373, 3501, 3504, 3508, 3571, 3576 (West 1961).

Justice White, dissenting in *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972), addressed the question of protecting creditor's interests, but it was not until *Mitchell* that this notion was subject to consideration by the full Court. Justice White stated that a creditor's secured interest in property was an interest deserving of protection. He emphasized, however, that there must be a preexisting interest in the property. Otherwise, one is merely a general unsecured creditor and the debtor must be given notice and a hearing. *Id.* at 102.

Article 9 of the Uniform Commercial Code provides a secured creditor with the self-help remedy. U.C.C. § 9-503 (1972 version). Thus, state action is not involved, and therefore the need for notice and a hearing is removed. But where the sheriff becomes involved, the remedy is no longer private to the parties and the requirements of *Sniadach* and *Fuentes* should apply.

For a background of the constitutional implications of self-help under the U.C.C, *see* Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972); Bichel Optical Lab, Inc. v. Marquette Nat'l Bank, 13 U.C.C. Rptr. 738 (8th Cir. 1973); Michel v. Rex-Norect, Inc., 12 U.C.C. Rptr. 543 (D. Vt. 1972).

Commentaries in the area include: Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973); Mentschikoff, *Peaceful Repossession under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973).

110. LA. CODE CIV. PROC. ANN. art. 2373 (West 1961) provides: "[A]fter deducting the costs, the sheriff shall first pay the amount due the seizing creditor, then the inferior mortgages, liens, and privileges on the property sold, and shall pay to the debtor whatever surplus may remain."

The creditors would be lost if the debtor subsequently transferred possession. The Court was unconvinced that the impact on the debtor, due to the deprivation of household goods, was greater than the inability to make the creditor whole in the event of wrongful possession, destruction, or alienation. Mitchell v. W.T. Grant, 416 U.S. 600, 610 (1974).

111. Mitchell v. W.T. Grant, 416 U.S. 600, 604 (1974).

112. 419 U.S. 601 (1974).

113. GA. CODE ANN. §§ 46-101, -104, -401 (1979).

114. Mitchell v. W.T. Grant, 416 U.S. 600 (1974). The present status of debtor-creditor statutes as they relate to the due process clause can best be described by Justice Powell's concurrence in North Ga. Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601, 608 (1975). Powell was of the opinion that pregarnishment notice and a prior hearing were not constitutionally mandated in the past, nor imposed as requirements for the future. 419 U.S. at 611. He felt that

the Illinois Attachment Act, allowed the issuance of a writ by a clerk of the court upon the allegation that the plaintiff had "reason to apprehend" the amount claimed and upon the posting of a bond.[115] Unlike the earlier cases involving consumers, *Di-Chem* pertained to a business debtor whose funds were garnished, with the bank named as garnishee.[116]

The Court concluded that the Georgia Act was unconstitutional, thereby extending the *Mitchell* principles to businesses.[117] The basic effect of *Di-Chem* and *Mitchell* read together, therefore, was to extend the immediate postseizure hearing to non-consumer debtors.[118] The Court reasoned that corporations deprived of bank accounts suffer irreparable injury to the same extent as consumers who are deprived of household appliances.[119] Thus,

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Sniadach was limited to wages—"a specialized type of property presenting distinct problems in our economic-system"—and was therefore not relevant to *Di-Chem*. *Id.*

According to Powell, due process can be completely satisfied where state law requires the assurance of a prompt post-garnishment hearing before a judge. *Id.* Such a hearing would afford an opportunity to rectify any error in the decision to issue garnishment. Additionally, a prompt post-seizure hearing coupled with the imposition of a bond would compensate a debtor for any harms. *Id.* Finally, Powell was of the opinion that the prompt correction of possible error suffices to satisfy the requirements of procedural due process. *Id.* Thus, it should be sufficient for a clerk or other officer of the court to issue the original writ upon the filing of a proper affidavit.

Comparing *Fuentes* and *Sniadach* with *Mitchell* and *Di-Chem* should bring to light the uncertainty of the law in this area. *Fuentes* and *Sniadach* appear to represent the notion that a preseizure hearing is a must. *Mitchell* and *Di-Chem*, on the other hand, support the premise that postseizure hearings do not violate the due process clause where *Mitchell* protections are available. Powell, in his concurrence to *Di-Chem*, takes *Mitchell* the next step further by providing that an affidavit to a court clerk that causes a writ to issue is within the realm of due process as long as a state provides an immediate postseizure hearing. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 611 (1974).

The major cases in this area underscore the fact that there exists no hard and fast rule in this area. The Supreme Court, in Trainor v. Hernandez, 431 U.S. 434, 447 (1977), also failed to clarify a rule. The Supreme Court, while focusing primarily on abstention, did, however, make reference to *Di-Chem* and *Mitchell* to support the notion that the Illinois Attachment Act was not "flagrantly and patently" violative of the Constitution. *Id.* Although the court provided no reasoning for this proposition, both cases advocated the state courts' use of postseizure hearings. The majority of the *Di-Chem* Court compared the Georgia statute with the *Mitchell* decision and found as one of its requirements an immediate postseizure hearing. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1974). Assuming this isolated aspect of *Di-Chem* were applied to the Illinois Act, its constitutionality is still uncertain as the Act has no specific requirement for an immediate postseizure hearing. More specifically, the hearing on the attachment can be anywhere from ten to sixty days of the seizure. ILL. REV. STAT., ch. 11, § 6 (1977). Assuming that the Illinois Act was subjected to this one requirement, it's constitutionality remains uncertain.

115. GA. CODE ANN. § 46-102 (1979).

116. The business-debtor filed a bond with the court on the condition that funds would be available to pay any final judgment. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 603 (1974). The debtor also filed a motion to dismiss the writ of garnishment and attacked the garnishment procedure in light of the fourteenth amendment. *Id.* at 604-05.

117. *Id.* at 608.

118. *Id.*

119. *Id.*

the Court, in applying the due process clause, did not distinguish between differing types of property.

Extension of the due process requirements to both individuals and businesses provides favorable protection to those parties whose property would have been subject to attachment under the Illinois Attachment Act. The Attachment Act subjected many properties to attachment, which could have had a crippling effect upon the debtor. Specifically, the properties subject to attachment included: lands, tenements, goods, chattels, rights, credits, monies and effects of the debtor, plus any lands and tenements in which the debtor had or may have claimed any equitable interest.[120] Any individual or business whose property is subject to attachment must be provided with prior notice and a hearing before an attachment is executed. Under the *Mitchell* alternative, the writ of attachment should be evaluated by a judge as to its sufficiency, and then immediately followed by a post-seizure hearing.[121]

In *Hernandez v. Finley*[122] the district court, on remand, examined the Illinois Attachment Act in accord with earlier holdings of the Supreme Court. The Illinois Act provided neither notice and a hearing nor the safeguards of *Mitchell*. Thus, the district court had ample support for its determination that the Illinois Act fell within an exception to the *Younger* abstention policy in that it was "flagrantly and patently" unconstitutional.[123] Additionally, the Supreme Court's decision to abstain in *Trainor* was premised on the assumption that the constitutional question could, in fact, be raised at the state level. It was not until *Finley* that the district court evaluated sections 27 and 28, and held that no such opportunity was available.[124]

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120. ILL. REV. STAT. ch. 11, § 8 (1977).

121. Mitchell v. W.T. Grant, 416 U.S. 600 (1974).

122. 471 F. Supp. 516 (N.D. Ill. 1978).

123. In Watson v. Buck, 313 U.S. 387 (1941), the Court stated that where a state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it," this is an extraordinary circumstance warranting equitable relief. *Id.* at 402.

124. Hernandez v. Finley, 471 F. Supp. at 520. The decision of the district court was also affirmed in the recent decision of Quern v. Hernandez, 99 S. Ct. 1488 (1979), where the IDPA appealed the *Finley* decision. On January 26, 1979, the State of Illinois petitioned the Supreme Court for an appeal of the *Finley* decision. The two issues petitioned for review were whether or not the district court should have abstained, and whether or not the Illinois Attachment Act provided due process protections.

The Supreme Court, in March of 1979, summarily affirmed the decision of the district court in Quern v. Hernandez, 99 S. Ct. 1488 (1979). Apparently, the district court was correct in its decision that abstention was improper. Initially, the Supreme Court was of the opinion that abstention was the best policy to be followed by the federal courts. Yet the district court in *Finley* found that due to the inadequacies of the state statutory procedure, abstention was not possible. Affirmation of this decision by the Supreme Court, in *Quern*, establishes that abstention is premised upon a finding of an adequate state remedy.

IMPACT

The obvious consequence of the Supreme Court's affirmation of *Finley* in *Hernandez v. Quern* is that Illinois is presently without an attachment act. All parties that would play any role in the attachment process have been enjoined from such acts,[125] thereby leaving creditors in Illinois with one less available remedy. Until the Illinois General Assembly makes considerable revisions to the present statute, creditors will continue to be without the remedy of attachment.

The status of the Illinois Attachment Act has been clarified by the Supreme Court's *Quern* decision. Although the Court did not provide reasoning for its decision, the reasons for the Supreme Court's affirmation of *Finley* are apparent. First, the Illinois Attachment Act failed to provide the due process requirements of notice and hearing.[126] Second, the *Finley* Court determined that the attachment hearing available under the Act was not designed to address constitutional claims.[127] Third, when the Supreme Court invoked the abstention doctrine in *Trainor*, it presupposed an ability to address constitutional claims.[128] Finally, it was not until *Finley* that the court was put on notice that such an opportunity was not available.[129]

Quern, examined in conjunction with *Trainor*, demonstrates the Supreme Court's current view regarding federal court review of due process attacks of state creditor statutes. The Supreme Court in *Trainor* appeared to discourage federal intervention in cases that attack the constitutionality of creditor statutes that involve the taking of debtor's property without due process protections.[130] *Trainor* is significant in its own right because the Court expres-

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125. The district court in *Hernandez v. Danaher* granted an injunction which enjoined the court clerks from issuing, and the sheriff from executing, the writ. 405 F. Supp. at 762. Upon reinstating its earlier decision, the district court also reinstated the injunction. Hernandez v. Finley, 471 F. Supp. at 522.

126. Henandez v. Danaher, 405 F. Supp. at 762.

127. Hernandez v. Finley, 471 F. Supp. at 520.

128. 431 U.S. at 441.

129. Hernandez v. Finley, 471 F. Supp. at 520.

130. The cases of *Sniadach* through *Di-Chem* specifically involved attacks against state statutes for failure to meet the fourteenth amendment's procedural due process requirements. In *Sniadach*, the Court specifically stated that the issue was not whether the Wisconsin law was wise or unwise, because the Court does not sit as a legislative body. Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). The Court did state, however, that it could inquire into whether there had been a taking of property without the procedural due process required of the fourteenth amendment. *Id.*

The Court, in *Fuentes*, in an effort to prevent an arbitrary encroachment, held that the constitutional right to be heard was a basic aspect of the duty of government. Fuentes v. Shevin, 407 U.S. 67, 80 (1972). The Court also noted that the issue for resolution was whether or not the state statutes were constitutionally defective. *Id.*

The *Mitchell* Court also noted that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Mitchell v. W.T. Grant, 416 U.S. 600, 610 (1974).

sed a strong policy argument in favor of abstention, preferring the state courts to have an opportunity to handle any specific constitutional challenges directed against their own statutes.[131] It may be that the Court has concluded that the series of cases from *Fuentes* through *Di-Chem* provides ample guidelines for a state court to determine the constitutionality of its own statute. Such a stance allows the states to effectuate their own policies and provide a competent forum for the vindication of any constitutional objectives against those policies.[132] However, with the Court's recent affirmance of *Finley*,[133] the decision as to whether the constitutional claims will be addressed by a federal or state court will depend upon whether the state provides an adequate state statutory procedure.

Those legislators who will attempt to revive the Illinois Attachment Act may look to two sources for guidance: the California case of *Randone v. Appellate Department of the Superior Court of Sacramento County*[134] and the Illinois Replevin Act.[135] In *Randone*, which was decided shortly after *Sniadach*, the California Supreme Court suggested amendments to its own attachment statute[136] that are relevant to the current problem in Illinois. The *Randone* court placed particular emphasis on those pieces of property which would be considered "necessities of life"[137] and discouraged their attachment.[138]

One commentator on *Randone*[139] has offered the following pertinent suggestions: (1) do not allow attachment proceedings where the creditor seeks to attach necessities of life[140] because such a taking is so severe it

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Finally, in *Di-Chem*, the last of four major debtor-creditor relations cases, the Court stated that "[a]ny significant taking of property is within the purview of the Due Process Clause." North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1974). It was not until *Trainor* that abstention became the policy of the federal court. 431 U.S. at 434 (1977).

131. *Id.* at 441.

132. Huffman v. Pursue, 420 U.S. 592, 604 (1975).

133. Quern v. Hernandez, 99 S. Ct. 1488 (1979).

134. 96 Cal. Rptr. 709, 488 P.2d 13 (1971).

135. ILL. REV. STAT. ch. 119, § 1-28 (1977).

136. Randone v. Appellate Dep't of the Sup'r Court of Sacramento County, 96 Cal. Rptr. 709, 727, 488 P.2d 13, 31 (1971).

137. *See* note 140 *infra*.

138. *See* Note, *Randone Revisited: Due Process Protection for Commercial Necessities*, 26 STAN. L. REV. 673, 686 (1974).

139. *Id.* at 684-87.

140. The California Court in *Randone* enunciated for the first time the necessities of life principle. The court cited *Sniadach*, in which the garnishment of wages was found to be an undue hardship. The *Randone* court stated that such hardship did not end with garnishment of earned wages in the hands of an employer and that hardship can occur where the debtor places those moneys in a bank account which are subsequently attached. Randone v. Appellate Dep't of the Sup'r Court of Sacramento County, 5 Cal. 3d 536, 559, 488 P.2d 13, 28, 96 Cal. Rptr. 709, 724 (1971). In both instances, the attachment serves to deprive the debtor of assets used for everyday expenses. The court also stated that extreme hardship arises not only from attachment of liquid assets, such as wages or bank account proceeds, but also from the summary

should not be allowed without notice and a hearing; (2) the taking of a necessity must be preceded by a hearing on the validity of the underlying claim; and (3) the necessity of life principle also should apply to commercial debtors where there is an attempt to take accounts receivable, bank accounts, and/or inventory.[141]

The effect of these suggestions is that the court or legislature will have to determine whether the items subject to seizure are necessities, thereby not imposing undue hardship upon the debtor either individually or commercially. Assuming an item is a necessity, either it should be totally excluded from attachment, or prior notice and a hearing must be available before attachment may occur. Further, the statute should encourage creditors to choose those items for attachment whose seizure will satisfy their claims, yet not have a crippling effect upon a family or business.

With respect to legislative alternatives, the Illinois Replevin Act[142] is a viable model, as it provides notice and a hearing prior to seizure.[143] Under the Replevin Act, the defendant receives five days notice before an action in replevin is commenced.[144] No writ of replevin may issue, nor may property be seized, prior to notice and a hearing.[145] The right to notice and hearing may not be waived by any consumer.[146] Where a waiver otherwise takes

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seizure of personal property such as refrigerators, stoves, sewing machines, and furniture of all kinds, i.e., items that might loosely be described as "necessities" in our modern society. *Id.* at 29.

Extending the necessities principle to commercial debtors, the *Randone* court noted that the hardship and injustice stressed in *Sniadach* was equally applicable to businesses, whose account receivables should not be frozen prior to having their liability established. *Id.* at 725, 488 P.2d at 29. To deprive a debtor of those necessities essential for ordinary day-to-day living may give the creditor enormous leverage over the debtor. This may cause the debtor to settle the creditor's claim quickly, due to the pressure of such a deprivation. The *Randone* court found that debtors are denied a "meaningful" opportunity to be heard on the merits where they are deprived of the essentials needed to live, work, or support a family. *Id.* at 30.

141. Additional suggestions in the article that are worthy of consideration are as follows: (1) allow a taking in extraordinary situations, but specifically prohibit *ex parte* proceedings where statutory proceedings are involved; (2) adopt procedures similiar to Article 9 of the U.C.C. whereby a lien can be filed with the Secretary of State instead of depriving the debtor of its possession; (3) give the debtors the option of substituting the particular property to be attached, rather than the creditor's choices—this property must be of significant value to cover his obligations—and finally, (4) allow the creditor the right, as under Article 9-503 of the U.C.C., to have the debtor make the goods available at a place convenient to both parties. *Randone Revisited: Due Process Protection for Commercial Necessities*, 26 STAN. L. REV. 673, 684-87 (1974).

Creditors would not be without a remedy, however, in that they could still attach after a hearing on the merits, or in the alternative, file a lien against the debtor's property.

142. ILL. REV. STAT. ch. 119, § 1-22 (1977).

143. *Id.* § 4a.

144. *Id.*

145. *Id.* The requirements for notice and hearing are not absolute. If the court finds seizure necessary to prevent the sale, destruction, or transfer of the property by the debtor, seizure will occur. *Id.* § 4b.

146. *Id.* § 4a.

place, it must be in writing and given voluntarily, intelligently, and knowingly.[147] It is not clear why the state legislature has never provided the Illinois Attachment Act with analogous provisions. In view of the Act's recent invalidation, such a plan should be considered by the legislature.

CONCLUSION

There is a clear judicial movement[148] toward urging states to rewrite or amend their present statutes affecting debtor-creditor relations. Due process is of major importance to debtors and unfair deprivation ultimately must yield to such protections. Statutes, therefore, must provide the prior notice and hearing required by *Fuentes* and *Sniadach* or the alternate postseizure hearing provided in *Mitchell* and *Di-Chem*.

Assuming a question regarding due process reaches a federal court, the position of the Supreme Court appears to be clear. Unless the federal court determines that the state procedure is inadequate, the abstention doctrine will apply. *Younger v. Harris* initially established the notion that abstention should occur where the federal plaintiff has an adequate remedy at the state level.[149] Yet, it was not until *Quern* that the federal courts ceased to presuppose the opportunity to raise at the state level, and to have timely decided there, the federal issues involved.

Thus, in future litigation, federal courts will not abstain from hearing constitutional attacks on state statutes unless the state courts in which the claims arise provide an adequate statutory procedure for the resolution of constitutional claims. Therefore, states with adequate statutory procedures will be able to consider attacks against their debtor-creditor statutes free of federal intervention, using *Fuentes* through *Di-Chem*, and now *Quern*, as guidelines.

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147. *Id.*
148. *See* note 130 *supra*.
149. Younger v. Harris, 401 U.S. 37, 40 (1971).