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I. DUE PROCESS RIGHTS OF HOMOSEXUALS

A. INTRODUCTION

In *Singer v. Civil Service Commission*,[1] the plaintiff, a homosexual, was dismissed from his job as a clerk typist with the Seattle Office of the Equal Employment Opportunity Commission (EEOC) for "immoral and notoriously disgraceful conduct"[2] which "[did] not promote the efficiency of the service . . . ."[3] This conduct included active participation and leadership in the Seattle Gay Alliance, Inc. and public speeches made by Singer in which he discussed homosexuality. The initial determination of the Commission was affirmed by a hearing examiner and the Board of Appeals and Review of the United States Civil Service Commission. Singer subsequently brought suit in a federal district court seeking injunctive and declaratory relief. The district court entered a summary judgment dismissing Singer's action, and, on appeal, the Ninth Circuit affirmed the judgment. The *Singer* court held that the Commission had met its burden of establishing a reasonable connection between the plaintiff's conduct and the impairment of the efficiency of the service.[4] The court also held that Singer's first amendment rights had not been improperly infringed by his dismissal.[5]

B. REVIEW OF GOVERNMENT AGENCY DISMISSALS

Due Process Rights of Government Employees

Until the 1950s, the government, as an employer, had almost unlimited discretion to hire and fire employees.[6] The Supreme

1. 530 F.2d 247 (9th Cir. Jan., 1976) (per Jameson, D.J.), *vacated and remanded*, 45 U.S.L.W. 3462 (U.S. Jan. 10, 1977). For a discussion of the action taken by the Supreme Court see note 58 *infra*.

2. 530 F.2d at 250. Exec. Order No. 10,577, 3 C.F.R. 218 (1954-58 Comp.), *reprinted in* 5 U.S.C. § 3301 (1970), authorized the Civil Service Commission to establish eligibility standards for removal of federal employees. The plaintiff in *Singer* was dismissed pursuant to a violation of those standards enumerated in 5 C.F.R. § 731.201(b) (1968), which provides for the removal of appointees who engage in criminal, infamous, dishonest, immoral or notoriously disgraceful conduct. Section 731.201(b) was recently amended to delete the word "immoral." *See* 5 C.F.R. § 731.202 (1976).

3. 530 F.2d at 250 n.3. 5 U.S.C. §§ 7501(a), 7512(a) (1970), provide for the removal of federal employees "only for such cause as will promote the efficiency of the service."

4. 530 F.2d at 255.

5. *Id.* at 256.

6. For a discussion of the traditional approach taken by the federal courts in review-

Court considered the due process clause inapplicable to government agency personnel decisions because it concluded that public employees held their jobs as a privilege and not as a matter of right.[7] Courts were reluctant to review the merits of administrative agency decisions, indicating that the doctrine of separation of powers frustrated the judiciary's ability to interfere with the internal operations of the executive branch.[8] Consequently, upon adopting the position that the hiring and firing of employees was an administrative matter, the courts were inclined to refrain from interfering with such employment determinations.[9]

Today, public employees receive substantially greater due process protections than they have previously enjoyed, especially in cases involving the exercise of first amendment rights.[10] This is primarily the result of two factors: first, the Supreme Court's explicit rejection of the right-privilege distinction,[11] and second, the increased willingness of the courts to examine agency decisions more closely. The courts require that a reasonable connection be established between the fired employee's conduct and the "efficiency of the service."[12] In past years, agencies themselves determined whether the employment of a particular individual

ing agency dismissals see Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287, 307-28 (1968). *See also* Martin, *The Improper Discharge of a Federal Employee by a Constitutionally Permissible Process: The OEO Case*, 28 AD. L. REV. 27 (1976); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 199-202 (1973).

7. The right-privilege distinction originated in Judge Holmes' opinion in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). For a discussion of the distinction see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

8. *See* Keim v. United States, 177 U.S. 290 (1900); Decatur v. Paulding, 39 U.S. (15 Pet.) 496 (1840); Washington v. Summerfield, 228 F.2d 452 (D.C. Cir. 1955); Friedman v. Schwellenbach, 159 F.2d 22 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 838 (1947); Levine v. Farley, 107 F.2d 186 (D.C. Cir. 1939), *cert. denied*, 330 U.S. 838 (1940).

9. *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

10. *See, e.g.*, Rosenbloom & Gille, *The Current Constitutional Approach to Public Employment*, 23 KAN. L. REV. 249, 254-66 (1975), and cases cited therein.

11. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971). For discussions of the rejection of the right-privilege distinction see Rosenbloom & Gille, *supra* note 10, at 252-54; Van Alstyne, *supra* note 7; Note, *Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment*, 1973 DUKE L.J. 1037, 1048-49 (1973) [hereinafter cited as Note, *Employee's Privacy Rights*]. At least one commentator has suggested that the Supreme Court decision in Arnett v. Kennedy, 416 U.S. 134 (1974), indicates that a majority of the Justices still maintain this functional distinction exists for government employees. *See* Martin, *supra* note 6, at 36-38.

12. Today, the generally accepted standard of judicial review requires not only that an agency substantially comply with its statutory and regulatory procedures, but also that a dismissal not be discriminatory, arbitrary, capricious or an abuse of discretion,

would adversely affect public confidence. Homosexuals were normally barred from government service as a result of the exercise of this unbridled discretionary power.[13] Today, however, courts have made it clear that homosexuality per se will not be considered proper grounds for dismissal.[14]

Norton v. Macy[15] was the first case to recognize due process protections for civil service employees who are homosexuals. The majority of courts and commentators who have examined the constitutional issues involved in dismissals of homosexuals have recognized the importance of *Norton*'s suggestion of a broader standard for judicial review of agency decisions.[16] Norton, a budget analyst for the National Aeronautics and Space Administration (NASA), was discharged for making a homosexual advance, which NASA concluded amounted to immoral and disgraceful conduct. Chief Judge Bazelon, writing for a District of Columbia Circuit panel, held that due process restrictions on government agency dismissals allow de novo review of agency decisions by district courts and require a showing of a rational basis for concluding that the dismissal would lead to increased efficiency of the service.[17] The court recognized that simply labeling homosexual conduct of an employee as "immoral" does not necessarily make it deleterious to service efficiency. In dictum, the

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and that it be based upon substantial evidence. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952); Taylor v. Civil Serv. Comm'n., 374 F.2d 466 (9th Cir. 1967); Gadsden v. United States, 78 F. Supp. 126 (Ct. Cl. 1948), *cert. denied*, 342 U.S. 856 (1951). For further discussion of judicial review of agency decisionmaking see Note, *Employee's Privacy Rights*, *supra* note 11, at 1049-50; Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970).

13. *See* Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969); Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1742-44 (1969) [hereinafter cited as Note, *Government-Created Disabilities*]. *See also* Note, *Federal Employment of Homosexuals: Narrowing the Efficiency Standard*, 19 CATH. U.A.L. REV. 267 (1969) [hereinafter cited as Note, *Federal Employment of Homosexuals*].

14. *See, e.g.*, Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (high school teacher); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) (librarian at a state university); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (NASA budget analyst); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (public school teacher).

15. 417 F.2d 1161 (D.C. Cir. 1969).

16. *See, e.g.*, Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd*, 528 F.2d 905 (9th Cir. 1975); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); Kovarsky, *Fair Employment for the Homosexual*, 1971 WASH. U.L.Q. 527, 549 (1971); Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84, 88-89 (1973); Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 709 (1973); Note, *Federal Employment of Homosexuals*, *supra* note 13.

17. 417 F.2d at 1164.

Norton court suggested that homosexual conduct might bear on the efficiency of the service in three situations: (1) when positions require security clearance; (2) when positions require a stable personality; or (3) when an employee makes offensive overtures on the job or when his or her conduct is notorious. If any one of these situations is pertinent to any individual dismissal, *Norton* stated that the agency would have to demonstrate that the "immoral" acts have some reasonably foreseeable and specific connection with an ascertainable deleterious effect on the efficiency of the service.[18]

Many of the circuit courts have not been as willing as the *Norton* court to consider the merits of government agency dismissals.[19] In fact, there is even disagreement within the District of Columbia Circuit on this issue. In *Gayer v. Schlesinger*,[20] for example, a District of Columbia Circuit panel was far more reluctant than the *Norton* panel to make a decision de novo on the facts before it. Instead, the *Gayer* panel emphasized the deference which must be paid to the conclusions of the agency authorities charged with the initial decisionmaking responsibility. In a recent decision, another District of Columbia Circuit panel limited *Norton* to its facts[21] and stated that in a case involving an agency dismissal of an employee for a previous criminal conviction, a specific showing of the deleterious effect of such conduct on the efficiency of the service is not required.

First Amendment Rights

A year before *Norton* enlarged due process protections for civil service employees and established a broader standard of ap-

18. *Id.* at 1165.

19. *See, e.g.*, Embrey v. Hampton, 470 F.2d 146 (4th Cir. 1972) (civil service dismissal of employee previously convicted of a fraudulent statement on FHA loan application); Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970) (dismissal of civilian homosexual employee of the Dep't of the Army from nonsecurity position); Vigil v. Post Office Dep't, 406 F.2d 921 (10th Cir. 1969) (dismissal of assistant janitor after conviction for lewd act); Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969) (dismissal of homosexual employee from position as post office clerk).

20. 490 F.2d 740 (D.C. Cir. 1973). Two plaintiffs in *Gayer* sought review of the suspensions of their security clearances, while a third sought review of the withdrawal of his security clearance.

21. *See* Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974), wherein Judge Tamm, who dissented in *Norton* on the ground that the court had exceeded the proper scope of judicial review, stated: "Discretion primarily lies in the hands of the administrative agencies involved, and the courts will not substitute their own judgment for that of the agency's." *Id.* at 1225.

pellate review of administrative agency decisions, the Supreme Court, in *Pickering v. Board of Education*,[22] had greatly expanded constitutionally protected first amendment rights of government employees. In *Pickering*, a school teacher was fired for writing a letter published in a local newspaper in which he identified himself as a teacher and criticized the manner in which money was spent by a board of education. The *Pickering* Court rejected the argument that public employees must give up first amendment rights when they comment on matters of public interest; instead, the Court found the public interest in free and unhindered debate on matters of public importance to be "the core value of the Free Speech Clause of the First Amendment."[23] Nevertheless, the Court recognized that the state has an interest, as an employer, in regulating the speech of its employees in order to promote the efficiency of the public services it performs. The *Pickering* Court noted that the problem presented in each case is to arrive at a balance between the rights of employees and the interests of the state.

The primary factor considered in *Pickering* was whether the teacher's letter-writing impeded the proper performance of his daily duties in the classroom or interfered with the regular operation of the school. The Court concluded that the teacher's activities did not lead to either result and, therefore, held that the "exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[24]

Circuit courts have developed a two-step analysis in their application of *Pickering* to public employee dismissal cases.[25] First, the courts evaluate to what degree the expression of the employee falls within the ambit of the first amendment.[26] If there is a recognizable communicative element in the expression, the courts then

22. 391 U.S. 563 (1968).

23. *Id.* at 573.

24. *Id.* at 574.

25. *See, e.g.*, Roseman v. Indiana Univ. of Pa., 520 F.2d 1364 (3rd Cir. 1975); Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

26. Conduct, as well as speech, may be protected by the first amendment. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), where the Court stated that the wearing of armbands by students in a school to protest the government's foreign policy in Vietnam was "closely akin to 'pure speech' " and thus was entitled to protection under the first amendment. *Id.* at 506. The lower federal courts have followed the Supreme Court in giving first amendment protection to certain types of conduct. *See* Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974) (social events of college homosexual organization had communicative content sufficient to fall within ambit of first amendment); Russo v. Central School Dist. No. 1, 469 F.2d

inquire into the public nature of the communication as another factor to determine the degree of first amendment protection required. Second, the courts balance the employee's first amendment interests against the employer's interest in avoiding substantial interference with its provision of public services. In balancing, consideration is given to the factors suggested in *Pickering* and *Tinker v. Des Moines Independent Community School District*,[27] another Supreme Court decision dealing with the disruptive effect of the exercise of first amendment rights on public agency operations.

C. THE *Singer* OPINION

In *Singer*, the Ninth Circuit, after noting that the scope of judicial review of agency decisions is limited,[28] found that there was substantial evidence to support the findings and conclusions of the Civil Service Commission. The court stated that the plaintiff's dismissal was neither arbitrary nor an abuse of agency discretion and found that the Civil Service Commission had met its burden, under *Norton*, of demonstrating a "rational connection" between Singer's conduct and the efficiency of the service. The court implicitly adopted the Civil Service Commission's finding that general public knowledge of the plaintiff's activities would

623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (refusal to salute the flag is a form of expression protected by the first amendment); James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972) (wearing of black armband by public school teacher protected by the first amendment). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

27. 393 U.S. 503 (1969). *Tinker* evaluated what type of conduct by students in schools is protected by the first amendment. The Court stated:

> [C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasions of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.

Id. at 513. The *Tinker* Court required an actual disruption before first amendment protections were deemed to be inapplicable to student conduct. *See* note 53 *infra*. The simple threat of a disruption would not be sufficient for school authorities to abridge first amendment freedoms. *See* 393 U.S. at 508. For decisions which apply the principles of *Tinker* see cases cited in note 25 *supra*.

28. 530 F.2d at 251. For a short summary of the Ninth Circuit's standards of judicial review of agency dismissals see Dennis v. Blount, 497 F.2d 1305, 1309 n.4 (9th Cir. 1974). In this footnote, the Ninth Circuit noted that Toohey v. Nitze, 429 F.2d 1332 (9th Cir. 1970), set forth the broadest standards of agency review. *Toohey* looked to agency actions to determine if the agency (1) complied with statutory and administrative procedures; (2) acted in an arbitrary or capricious manner; (3) abused its discretion; and (4) supported its factual determinations by substantial evidence.

impede the efficiency of the service by lessening public confidence in the fitness of the government.[29] Thus, the court held that in applying the balancing test of *Pickering*, the government's interest as an employer in promoting the efficiency of the service outweighed the interest of the plaintiff in exercising his first amendment rights through "publicly flaunting and broadcasting his homosexual activities."[30] Consequently, the plaintiff's dismissal from his EEOC position was affirmed.

The Norton *"Specific Connection" Test*

Although it extensively cited *Norton*, the *Singer* court failed to apply its holding correctly. Most significantly, *Singer* failed to identify a specific connection between the plaintiff's homosexual conduct and the efficiency of the service. The Civil Service Commission cited eight instances of Singer's homosexual conduct and made an unsubstantiated assertion that there was a specific connection between this conduct and the efficiency of the service.[31] The Ninth Circuit panel accepted this assertion without question. The court failed to focus on the *Norton* declaration that if an employee's "conduct is notorious, the reactions of other employees and of the public with whom he comes into contact in the performance of his official functions may be taken into account"[32] in determining whether such conduct impairs the efficiency of the service. By accepting the Civil Service Commission's contention that Singer's activities were "such that general public knowledge thereof reflects discredit upon the Federal Government,"[33] the *Singer* court broadened the considerations to be taken into account in evaluating the propriety of public employee conduct. It looked far beyond the effect of homosexual conduct on members of the public who come into contact with such conduct in the course of their business with a government agency; instead, it considered the effect of such conduct on the public in general.[34] In so doing, the court introduced an even greater degree of specu-

29. 530 F.2d at 255.

30. *Id.* at 256. The court was careful to note that Singer's employment was not terminated because of his status as a homosexual. *Id.* at 255.

31. *Id.* at 251.

32. 417 F.2d at 1166.

33. 530 F.2d at 251.

34. There was no evidence in *Singer* indicating that Singer's conduct adversely affected his co-employees. In his evaluation report, Singer had been rated by his supervisor as "superior" or "very good" in various categories of job performance, and a letter from his co-workers stated that they felt their experience with him had been "educational and positive." *Id.* at 250 n.4.

lation into determinations of the fitness of public employees than had existed previously.

Both *Gayer v. Schlesinger*[35] and *Society for Individual Rights, Inc. v. Hampton*,[36] cited by the *Singer* panel as construing *Norton*, reinforce the foregoing conclusions. Although *Singer* apparently relied on these decisions to support its conclusion that flagrant homosexual conduct alone might affect the efficiency of the service, both decisions also clearly require the Civil Service Commission to explain its determinations "in such a manner that a reviewing court may be able to discern whether there is a rational connection between the facts relied upon and the conclusions drawn."[37] In particular, the *Hampton* court emphasized that the vague threat of hypothetical embarrassment to the government as a result of public knowledge that an agency employs homosexuals will not be deemed sufficient reason to dismiss a public employee.[38] Thus, it seems evident that all of the decisions cited by the *Singer* court require a *specific* rational connection between homosexual conduct and the efficiency of the service before such conduct can justify an employee dismissal. Although the Ninth Circuit clearly recognized this standard, it failed to apply it in a manner consistent with the strict requirements set forth in the *Norton*, *Hampton* and *Gayer* decisions.[39] The *Singer* decision indicates that the Ninth Circuit will not require a particularly strong showing of a specific connection between employee conduct and service efficiency, at least in cases involving homosexuals who persist in "publicly flaunting and broadcasting [their] homosexual activities."[40]

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35. 490 F.2d 740 (D.C. Cir. 1973). *Gayer* involved a plaintiff whose security clearance was withdrawn as a result of his homosexuality. Courts have tended to allow greater decisionmaking discretion by the agency in security clearance cases than in cases like *Singer*, which involve nonsensitive clerical positions in nondefense related agencies. Presumably, the state's interest in national security justifies broader agency discretion in *Gayer*-type cases.

36. 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd*, 528 F.2d 905 (9th Cir. 1975).

37. 490 F.2d at 751.

38. 63 F.R.D. at 401.

39. The Civil Service Commission's findings regarding Singer's homosexual conduct recited that public knowledge of Singer's conduct would reflect discredit on the federal government and would impede the efficiency of the service by lessening public confidence in the fitness of the government. *See* 530 F.2d at 250-51. Nowhere did the Commission specifically indicate that Singer's conduct presented anything more than a vague threat of hypothetical embarrassment to the government, an insufficient rationale for dismissal. *See* text accompanying note 38 *supra*.

40. 530 F.2d at 256. Other courts give formalistic recognition to the *Norton* test, but fail, like *Singer*, to look for a specific connection between employee conduct and agency

Application of the Pickering *Balancing Test*

Singer relied on *Gay Students Organization v. Bonner*[41] and *Acanfora v. Board of Education*[42] to support his contention that his

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efficiency. *See* Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); Richardson v. Hampton, 345 F. Supp. 600 (D.D.C. 1972).

Schlegel required only that a government employee's homosexual conduct be such that "the efficiency of the service will *in time* be adversely affected." 416 F.2d at 1378 (emphasis added). The *Schlegel* court clearly engaged in speculation as to the effect of the plaintiff's conduct; it only looked to the future results of such conduct and did not attempt to isolate any specific connection between the conduct and its effect on service efficiency. In addition, the court made an unnecessary characterization of homosexual conduct, stating "[a]ny schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true." *Id.*

Richardson v. Hampton held that the federal government could make a "reasonable inquiry" of an applicant for federal employment, about whom there was evidence of homosexuality, to determine if the applicant's homosexual conduct would affect his suitability for appointment to federal employment. The court, although citing *Norton*, stated that such an inquiry was necessary since "[a]n employee's homosexual conduct *may* jeopardize the security of classified information . . . or . . . *may* . . . be evidence of an unstable personality . . . ." 345 F. Supp. at 609 (emphasis added). *Richardson*, like *Schlegel*, appeared to ignore the *Norton* requirement that homosexual conduct is only relevant to public employee job-fitness where a specific connection is demonstrated between the conduct and an ascertainable effect on the efficiency of the service. For a critical discussion of *Richardson v. Hampton see* Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 710-14 (1973).

A few courts follow both the language and spirit of *Norton* and demand that the government demonstrate with specific evidence that an employee's homosexual conduct will impair the agency's ability to carry out its functions. *See, e.g.*, Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 229, 461 P.2d 375, 386, 82 Cal. Rptr. 175, 186 (1969).

McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972), like *Singer*, appeared to distinguish between private homosexual conduct and activist homosexual conduct. In *McConnell*, the plaintiff had publicly applied for a marriage license with another male in Hennepin County, Minnesota. Subsequently, he failed to receive an instructor's position at the University of Minnesota, which he alleged had been offered to him and then withdrawn. The *McConnell* court upheld the University's decision not to hire the plaintiff. In its discussion of McConnell's right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals, the court stated that "[w]e know of no constitutional fiat . . . which requires an employer to accede to such extravagant demands . . . ." 451 F.2d at 196. The court's position appears to contradict the basic tenets of first amendment principles enunciated by the Supreme Court. The protection given speech by the first amendment is not dependent on its content, absent any indication that the speech is obscene, defamatory or involves provocations to violence. *See* text accompanying notes 46-53 *infra* for a discussion of this issue.

As the above cases indicate, the attitudes expressed by some courts which have dealt with the dismissal of homosexual government employees have ranged from specious tolerance to overt hostility. *See generally* Note, *Government Employment and the Homosexual*, 45 ST. JOHN'S L. REV. 303, 314-17 (1970). The constitutional rights accorded to individuals by the courts should not be dependent on the sexual preferences of such individuals.

41. 509 F.2d 652 (1st Cir. 1974).

42. 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

first amendment rights were violated by his dismissal. *Bonner* involved the validity of a regulation prohibiting a homosexual organization from holding social activities on a university campus. The *Bonner* court found the regulation to be invalid and stated that "[t]he GSO's efforts to organize the homosexual minority, 'educate' the public as to its plight, and obtain for it better treatment for individuals . . . represent but another example of the associational activity . . . singled out for protection . . . by the Supreme Court."[43] In *Acanfora*, the Fourth Circuit upheld the transfer by a board of education of a teacher to a nonteaching position when the board discovered that he was a homosexual. The transfer was upheld on the ground that he omitted information in his teaching application relating to his homosexuality. However, in the course of its opinion, the *Acanfora* court emphasized that the plaintiff's public statements on homosexuality were protected by the first amendment. *Acanfora* noted: "The transcripts of [Acanfora's interview with the Public Broadcasting System] . . . disclose that he spoke about the difficulties homosexuals encounter and, while he did not advocate homosexuality, he sought community acceptance."[44] *Singer* distinguished *Bonner* and *Acanfora* on the sole ground that neither involved the open and public flaunting or advocacy of homosexual conduct.[45] The court thus recognized a distinction between conduct which advocates homosexuality and conduct which merely educates the public about homosexuals or discusses the difficulties involved in being a homosexual.

In light of well-settled constitutional principles, the *Singer* court clearly erred in determining that Singer's conduct was less worthy of protection than that described in *Bonner* or *Acanfora*. The Supreme Court has consistently stated that the first amendment is a prohibition of governmental interference with speech "because of its message, its ideas, its subject matter or its content."[46] The essence of forbidden governmental censorship is content control. Any restriction on expression because of its content would completely undercut "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[47]

The distinction drawn by the Ninth Circuit panel between the

43. 509 F.2d at 660.
44. 491 F.2d at 500.
45. 530 F.2d at 256.
46. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
47. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

content of Singer's speech and that of Acanfora and Bonner was constitutionally impermissible. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"[48] is not sufficient justification to overcome the right of freedom of expression. As long as the "means [of a communication or expression] are peaceful, the communication itself need not meet standards of acceptability."[49] Since Singer's conduct presented no threat of violence or other disruption, the Ninth Circuit's determination that his conduct did not fall under the aegis of the first amendment was fundamentally erroneous.

The Ninth Circuit also failed to balance properly Singer's first amendment interests against the government's interests in avoiding disruption of public services, as mandated by *Pickering* and *Tinker*. In these two cases the Supreme Court made it clear that what must be weighed in any balancing of these competing interests is an *actual* disruption, as opposed to a potential disruption.[50] The *Pickering* Court, in discussing the public statements of a school teacher, stated:

> What we do have before us is a case in which a teacher has made erroneous public statements . . . which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.[51]

Similarly, *Tinker* stressed that "mere undifferentiated fear or apprehension"[52] of disruption is not sufficient to overcome the right to exercise first amendment freedoms. The Ninth Circuit failed to make any finding that Singer's conduct would have led to any actual disruption of public services and therefore improperly affirmed the plaintiff's dismissal.[53]

48. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969).

49. Organization for A Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

50. *See* Jones v. Battles, 315 F. Supp. 601 (D. Conn. 1970); *In re* Chalk, 441 Pa. 376, 272 A.2d 457 (1971); Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of Pickering and Tinker*, 8 GA. L. REV. 900, 903-07 (1974).

51. 391 U.S. at 572-73.

52. 393 U.S. at 508.

53. In Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975), the Ninth Circuit applied the *Pickering* balancing test and found that the plaintiff, a schoolteacher, could be dismissed since her conduct actually disrupted the relationship between her school district and a county welfare agency. The court stated that "Mrs. Gray *created* so much 'havoc' with the Welfare Department that relations between the

Retaliatory Motivation

The Supreme Court and the lower federal courts have long recognized that an action by a governmental employer which would ordinarily not be subject to constitutional scrutiny may be invalidated if the action was motivated by a desire to curtail or penalize the exercise of an employee's constitutional rights.[54] The evidence presented in *Singer* indicates that the Civil Service Commission may have used its dismissal procedures to penalize the plaintiff as a result of the active role he played in the homosexual community, rather than as a consequence of any im-

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Department and the [Intermediate Education District] were strained." *Id.* at 807 (emphasis added). This is in direct contrast to the approach taken by *Singer*, where the court failed to make any specific finding that any actual disruption of EEOC's operations would occur as a result of Singer's conduct.

However, Arnett v. Kennedy, 416 U.S. 134 (1974), indicates that the *Pickering* balancing test may be looked upon with disfavor by the present Court. In *Arnett*, the Court upheld the dismissal of a nonprobationary employee from his position in the Office of Economic Opportunity (OEO) for allegedly having made recklessly false and defamatory statements about other OEO employees. The plaintiff argued that the statute authorizing the dismissal, 5 U.S.C. § 7501(a) (1970) (permitting dismissals for such cause as will promote the efficiency of the service), was vague and overbroad and violated his first amendment rights. Justice Rehnquist, writing for the Court, rejected this contention by citing *Pickering*: "[*Pickering*] makes it clear that in certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment . . . ." *Id.* at 160. He went on to state that in a situation where an employee's conduct "improperly damages and impairs the reputation and efficiency of the employing agency . . . ," discharge may be proper. *Id.* at 162. To date, none of the courts of appeals have expressly applied this standard. However, it could be read to allow curtailment of first amendment rights on the basis of a highly subjective finding by a court that an agency's reputation was injured. Under this view of *Pickering*, Singer's dismissal may not necessarily have violated any of the guarantees of freedom of expression embodied in the first amendment.

54. The Supreme Court has long recognized that improper motivation may be considered in determining the propriety of governmental action. *See* Washington v. Davis, 96 S. Ct. 2040 (1976); Epperson v. Arkansas; 393 U.S. 97 (1968); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964). *Contra*, Palmer v. Thompson, 403 U.S. 217 (1971). The lower federal courts, including the Ninth Circuit, have specifically stated that "[a] decision to terminate employment . . . which is . . . in retaliation for the exercise of a constitutional right is unlawful." Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975). *See* Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975); Simard v. Board of Educ., 473 F.2d 988 (2d Cir. 1973); Cook County College Teachers Union v. Byrd, 456 F.2d 882, 888 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971). *See generally* Bishop v. Wood, 96 S. Ct. 2074, 2080 (1976); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, in 1971 SUP. CT. REV. 95 (Kurland ed.); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

In raising a defense based on improper motivation, a plaintiff may encounter proof problems, since it is sometimes difficult to ascertain precisely the motivation of a government decisionmaking body. *See* Palmer v. Thompson, *supra* at 224-25. In addition, courts differ as to whether improper motivation must be the "sole" or "primary" motive in the decisionmaker's mind, or merely its "partial" motive. *Compare* Bertot v.

pairment to the efficiency of the service that arose from this conduct.

Singer was first informed by the Civil Service Commission that

> [i]n determining your employment will not promote the efficiency of the service, the Commission has considered such pertinent factors as the potential disruption of service efficiency . . . ; the possible use of Governmental funds . . . in furtherance of conduct offensive to the mores . . . of our society; and the possible embarrassment to . . . the Federal civil service.[55]

After Singer's hearing, he was informed by the hearing examiner that his conduct "would reflect discredit upon the Federal government . . . ."[56] Finally, the Board of Appeals and Review of the Civil Service Commission, in its affirmance of the decision of the hearing examiner, stated: "Activities of the type [Singer] has engaged in are such that general public knowledge thereof reflects discredit upon the Federal Government . . . ."[57]

The Civil Service Commission appeared to subtly alter its rationale for Singer's dismissal during the course of its dismissal procedures. The Commission initially indicated Singer's conduct might cause possible embarrassment to the federal government, but concluded with the definitive statement that such conduct discredited the federal government. The Ninth Circuit could have found that the efficiency of the service rationale set forth as the basis of Singer's dismissal was a mere pretext; agency action could have been found to be motivated by a governmental desire to curtail Singer's vigorous exercise of his first amendment rights. If this were the case, as the evidence in *Singer* seems to indicate, the court should not have upheld the agency action.

D. Conclusion

The result reached in *Singer* encourages government agencies to dismiss employees whose political views or lifestyles differ

School Dist. No. 1, *supra* at 1182 (referring to "paramount and recurring" motive for teacher's contract nonrenewal), *with* Fluker v. Alabama State Bd. of Educ., *supra* at 210 (noting that plaintiffs could obtain relief even if their contract nonrenewal was in partial retaliation for their anti-administration activities).

55. 530 F.2d at 250 n.3.

56. *Id.* at 250.

57. *Id.* at 251.

from those of the majority of society. The first amendment was made a part of the constitution to insure public debate on important issues by protecting the right of expression of individuals who advocate unpopular ideas. *Singer*, instead of carefully preserving that right, indicated that individuals who openly advocate controversial views may be forced to give up their first amendment rights.[58]

While very little evidence was presented in *Singer* to demonstrate that unorthodox conduct will be detrimental to the efficiency of the service, there is every indication that dismissals of individuals who practice or advocate such conduct will promote uniformity of thought among governmental employees. Such uniformity will ultimately lead to a most damaging type of service efficiency, for it will create government agencies which are insulated from and unresponsive to the needs of anyone but their own internal hierarchy.[59] As Justice Douglas once wrote:

> [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas is therefore

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58. The Supreme Court vacated and remanded the *Singer* decision. 45 U.S.L.W. 3462 (U.S. Jan. 10, 1977). However, the constitutional claims of the plaintiff were not considered by the Court. Therefore, the question of whether a federal employee may be discharged for public advocacy of homosexuality remains unanswered.

Singer was remanded to the court of appeals for reconsideration on the narrower basis of new civil service regulations and guidelines which were adopted between the time of Singer's discharge and the court of appeals decision. Under the new guidelines, dismissal of homosexual employees is permissible only if evidence establishes that homosexual conduct affects job fitness.

The Court approved the position taken by the Solicitor General in a memorandum filed on behalf of the Civil Service Commission. Solicitor General Bork noted that the new regulations follow the approach taken in a line of cases from *Norton* to *Society for Individual Rights*, which require a showing of actual impairment of efficiency. Bork argued that the rationale of the Commission's Board of Appeals and Review rested on generalized and unsubstantiated conclusions concerning possible embarrassment to the agency, and that such speculative determinations can no longer be relied upon to support the discharge of federal employees.

59. *See* Justice Douglas' dissent in Arnett v. Kennedy, 416 U.S. 134 (1974):

> A pleasant manner, promotion of staff harmony, servility to the cadre, and promptness, civility and submissiveness are what count [in agency employee selection]. The result is a great leveling of employees. They hear the beat of only one drum and march to it.

Id. at 205-06.

> one of the chief distinctions that sets us apart from totalitarian regimes.[60]

Mary A. Gerber

II. THE RIGHT TO PRIVACY AND FREEDOM OF THE PRESS

A. INTRODUCTION

Virgil v. Time, Inc.[1] was a case of first impression decided by a Ninth Circuit panel last term. The plaintiff, Michael Virgil, was a well known body-surfer and frequenter of a public beach near Newport Beach, California, popularly known as the "Wedge." He was one of a number of persons interviewed and photographed by a *Sports Illustrated* magazine reporter writing a feature article about the "Wedge" and the men who surfed there. Virgil believed the article would be limited to a discussion of his skills as a body-surfer. When he discovered that it would also contain references to some rather bizarre incidents in his life, not directly related to surfing, he indicated to a representative of *Sports Illustrated* that he did not want either his name or any information about his private life to appear in the article. Virgil sued Time, Inc., owner of *Sports Illustrated*, for invasion of privacy when the article was published despite his express objection. After the trial court rejected defendant's motion for summary judgment, the defendant appealed to the court of appeals.

Virgil was the first public disclosure of truthful private facts case to come before the Ninth Circuit since the Supreme Court decided *Cox Broadcasting Corp. v. Cohn*.[2] In that case, the Court refused to address the broad question of "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments . . . ."[3] Subsequently, in *Virgil*, a Ninth Circuit panel held that truthful disclosure of private facts could be recognized as a tortious invasion of privacy.[4] In so holding, the court accepted the Restatement (Second) of Torts definition of the elements of the tort which

60. Terminiello v. Chicago, 337 U.S. 1, 4 (1949), *citing* DeJonge v. Oregon, 299 U.S. 353, 365 (1936).

1. 527 F.2d 1122 (9th Cir. Dec., 1975) (per Merrill, J.), *cert. denied*, 96 S. Ct. 2215 (1976).

2. 420 U.S. 469 (1975).

3. *Id.* at 491.

4. 527 F.2d at 1128. The *Virgil* court applied California law in reaching this conclu-

requires that the published matter not be of legitimate public concern.[5] The *Virgil* court also held that the question of whether a matter is to be regarded as of legitimate public interest is to be decided by a jury applying a community mores standard.[6] Finally, *Virgil* held that a trial judge, in ruling on a motion for summary judgment in a privacy case when first amendment issues are involved, should apply the same standard used in all other civil cases.[7]

B. First Amendment Theory Developed Through Defamation Cases

Supreme Court decisions have reflected a belief that the first amendment is crucial to the existence of our constitutional form of government, but the decisions have not been in accord on why or how this is true.[8] As a consequence of this judicial disagreement

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sion. California has adopted Dean Prosser's analysis of the tort of invasion of privacy. *See* Kapellas v. Kofman, 1 Cal. 3d 20, 35 n.16, 459 P.2d 912, 921 n.16, 81 Cal. Rptr. 360, 369 n.16 (1969).

5. 527 F.2d at 1129, *citing* Restatement (Second) of Torts § 652D (Tent. Draft No. 21, 1975).

6. 527 F.2d at 1129.

7. *Id.* at 1130.

8. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Miller v. California, 413 U.S. 15 (1973); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For discussion of the significance of the first amendment see T. Emerson, The System of Freedom of Expression (1970); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 Rutgers L. Rev. 41 (1974); Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Meiklejohn, *The First Amendment is an Absolute*, in 1961 Sup. Ct. Rev. 245 (Kurland ed.); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Calif. L. Rev. 935 (1968).

Alexander Meiklejohn has argued that while the second through ninth amendments to the Constitution were included to protect the people in their role as the governed, the first and tenth amendments embodied the revolutionary idea that the people are sovereign, *i.e.*, the governors of the nation. Meiklejohn, *supra* at 253-54. The first amendment does not, in other words, protect a private right of self-expression, but instead protects the freedom of those activities of thought and communication by which the people govern. When speech or press publications involve communications relevant to the people's self-governing function, Meiklejohn argued, there should be an absolute privilege to publish such statements. However, communications which involve private defamation are wholly outside the scope of the first amendment and therefore may be abridged to protect other interests. Professor Emerson identified four main functions of freedom of expression: (1) to insure individual self-fulfillment; (2) to advance knowledge and truth; (3) to assure participation in decisionmaking; (4) to achieve a stable community. T. Emerson, *supra* at 6. He drew a fundamental distinction between belief, opinion and communication of ideas, and different forms of conduct. Expression, he concluded, should be specially protected, while action may be regulated.

Professor Bloustein developed Meiklejohn's basic analysis and applied it to the areas of defamation and privacy. He argued that when the speech or a publication does

about the purpose of the first amendment, no consensus has ever been reached as to its scope. In the twentieth century alone, there have been at least three judicial tests used to determine what constitutes protected speech within the meaning of the first amendment.[9] Until very recently, defamatory statements published in the mass media were not considered "speech." However, the Supreme Court rejected this view in *New York Times Co. v. Sullivan*[10] and found that in certain instances such defamatory statements could be considered protected speech. This decision marked a major turning point in first amendment theory in relation to defamation.[11]

In *New York Times*, the Court held that the first amendment confers a qualified privilege on a newspaper which publishes false defamatory statements of fact about the official conduct of a public official.[12] The Court declared that a state does not have the power to award damages in a libel action brought by a public official unless the official can show "actual malice," *i.e.*, that the

not involve the absolutely protected first amendment rights of the people as governors, it may be penalized. Bloustein, *supra* at 89-95.

9. First, obscenity is considered beyond the pale of the first amendment. Only if allegedly obscene material contains some redeeming social value, determined in light of community mores, will it come under the protection of the first amendment. Second, in regulating subversive activity and public matters believed to obstruct justice, a clear and present danger test is used in determining whether particular expression falls within the scope of the first amendment. Finally, a balancing test has been used to determine the validity of regulations which, although not intended directly to condemn the content of speech, do incidentally limit its free exercise.

10. 376 U.S. 254 (1964).

11. For a discussion of the impact of *New York Times* on first amendment theory see Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Bloustein, *supra* note 8; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* in 1964 SUP. CT. REV. 191 (Kurland ed.)

Professor Kalven and Justice Brennan both note that the *New York Times* decision reflected a general acceptance by the Court of Meiklejohn's first amendment analysis. For a very brief statement of Meiklejohn's theory see note 8 *supra*. The *New York Times* Court found the central meaning of the first amendment expressed in the Sedition Act of 1798. The Act underscored the importance of the first amendment in protecting the sovereignty of the people by prohibiting government sanctions against seditious libel. However, Justice Brennan pointed out that the Court had not totally adopted Meiklejohn's position. Brennan, *supra* at 18-19. Professor Bloustein agreed and noted that even the two great admirers of Meiklejohn, Justice Douglas and Justice Brennan, had failed to grasp and properly apply some of Meiklejohn's crucial distinctions. Professor Bloustein criticized the *New York Times* "actual malice" test. To be consistent with the Meiklejohn approach ostensibly adopted in *New York Times*, the Court should not have allowed liability for defamation, even for outright falsehoods published with malice, if their subject involved public affairs. Bloustein, *supra* note 8, at 85-87.

12. 376 U.S. at 279-80.

defamatory statement was made with knowledge that it was false or with reckless disregard of the truth.[13] The constitutional theory underlying the Court's decision is largely attributable to Alexander Meiklejohn.[14] He postulated that the first amendment was meant to protect an interest inhering in the body politic to debate, hear and be informed about issues necessary to self-government. The Court explained its holding by noting that unless the law provides some protection to the press in its role of fostering public debate, the fear of large damage awards will cast a "pall of fear and timidity . . . upon those who would give voice to public criticism . . . ."[15] However, because constitutional principles were involved, the Court stated that it would also "examine for [itself] the statements in issue and the circumstances under which they were made to see . . ."[16] whether first amendment protection was required as a matter of law.

Public Figure versus Public Issue Standard

In a series of cases decided after *New York Times*, the Court has attempted to define more explicity the scope of first amendment protection in defamation cases. It has struggled with the problem of whether to apply an "actual malice" test on the basis of the status of the speaker, as it did in *New York Times*, or on the basis of the issues discussed in the defamatory statements. The Court initially moved in the direction of a broadly defined public issues standard.[17] However, in the recent decisions of *Gertz v.*

13. Justice Brennan noted that the underpinning of the "actual malice" requirement is a "redeeming social value" idea borrowed from the area of obscenity. Brennan, *supra* note 11, at 18. Thus, the majority accepted the idea that a calculated falsehood, which discussed public officials in their conduct of public business, is of such slight social value that it is not deserving of first amendment protection. Three justices in *New York Times* rejected the "actual malice" test. However, Justice Black, joined by Justice Douglas, concurred in the result in a separate opinion. They expressed the view that the constitutional guarantees of free speech and a free press afforded the defendants an absolute, unconditional privilege to publish their criticism of official conduct. 376 U.S. at 293. They argued that because the Court should have focused on the right of the body politic to have the widest possible variety of opinions before it, the motive of the speaker in any defamation action involving public officials should be irrelevant. Thus, their reasoning more consistently follows that of Alexander Meiklejohn. For a discussion of the Court's adoption of Meiklejohn's first amendment theory see notes 8 & 11 *supra* and accompanying text.

14. *See* note 11 *supra*.

15. 376 U.S. at 278.

16. *Id.* at 285, *quoting* Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

17. In Rosenblatt v. Baer, 383 U.S. 75 (1966), Justice Brennan, writing for the Court, defined "public officials" in light of the principles expressed in *New York Times* to include "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of gov-

Robert Welch, Inc.[18] and *Time, Inc. v. Firestone*,[19] it has retreated from this position to a public official/public figure versus private individual test and has narrowly defined the public figure category.[20]

By adopting the public figure test, the Court recognized the necessity of protecting the reputation interests of private citizens. The Court considered private individuals more vulnerable to injury than public figures, who have greater access to the media and who have assumed the risk of close public scrutiny by seeking public office or by assuming roles of special prominence in the affairs of society.[21] Given these factors, the Court found, in *Gertz* and *Firestone*, that first amendment interests could be adequately protected in cases involving private individuals as long as the states require proof of fault and of actual damages in defamation actions.[22]

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ernmental affairs." *Id.* at 85. Justice Douglas concurred, but argued that the first amendment requires, at the minimum, an unconditional right to discuss all issues involving public affairs. *Id.* at 89-90. He pointed out that the public official designation was an artificial, court-created term which was not adequate to protect the public's first amendment right to information necessary to decide significant issues of the period.

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court extended the constitutional privilege to protect defamatory criticism of public figures, defined as nonpublic persons who are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164.

The plurality opinion of the Court in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), shifted to a "public issues" test. That case presented the Court for the first time with the problem of a defamatory publication regarding a private individual. Justice Brennan, writing for the Court, reasoned that the distinctions between "public" and "private" individuals were "artificial," since vast areas of economic and social power that vitally affect the nature and quality of life in the nation are in private hands. *Id.* at 41-42. Thus, the Court held that the first amendment applies to state libel actions when the utterance involved concerns an issue of "public or general concern," *id.* at 44, even if the individual involved is not a public figure.

18. 418 U.S. 323 (1974). *Gertz* held that a publisher of defamatory falsehoods about an individual who is not a public official or a public figure may not claim *New York Times* protection against liability for defamation.

19. 424 U.S. 448 (1976).

20. In Time, Inc. v. Firestone, *id.*, the plaintiff, a prominent figure in Palm Beach society whose activities were widely reported in the local press, was found not to be a public figure by the Court, since she did not occupy "a role of especial prominence in the affairs of society . . . ." *Id.* at 453.

21. In *Gertz*, the Court balanced first amendment interests with the interests of the private individual. *See* 418 U.S. at 343-46. However, Justice Goldberg, in his concurring opinion in *New York Times*, concluded that first amendment interests are unrelated to private defamation. He stated that "[p]urely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment." 376 U.S. at 301-02.

22. Four justices dissented in *Gertz*. Justice Douglas reiterated his position that there

Functions of Judge and Jury

The Court in *New York Times* indicated that, on appeal, a reviewing court should make a de novo evaluation of the issue of malice to insure that first amendment interests are being adequately protected.[23] Although there has been some disagreement as to the propriety of this procedure,[24] there has been considerably more debate as to the proper function of the judge and jury in defamation cases. A number of Justices, in opinions from *New York Times* through *Firestone*, have expressed dissatisfaction with permitting juries (1) to determine fault under either a *New York Times* malice standard or a *Gertz* negligence standard;[25] and

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should be an absolute immunity for the press when discussing public affairs. He defined public affairs in sweeping terms to signify not merely political affairs, but "any matter of sufficient general interest to prompt media coverage . . . ." 418 U.S. at 357 n.6. Justice Brennan argued, as he had in *Rosenbloom*, for a *New York Times*-level first amendment protection for statements about events of public or general interest, whether they involve public officials, public figures or private individuals. He asserted that the public figure/private individual distinction "bears little relationship either to the values of the first amendment or to the nature of our society." *Id.* at 364.

Justice White, dissenting, argued that the first amendment was aimed only at preventing a cause of action for seditious libel. Historically, cases involving private individuals did not raise first amendment problems. Therefore, in the absence of any constitutional concerns, Justice White believed that the Supreme Court should not interfere, as it was doing in *Gertz*, with a state's assessment of the amount of protection due to an individual's interest in his or her reputation. *Id.* at 386-89.

In *Firestone*, Justice Marshall was the only dissenting Justice to point out that "[i]f *Gertz* is to have any meaning at all, the focus of analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated . . . ." 424 U.S. at 489.

23. 376 U.S. at 285. The majority opinions in later Supreme Court cases support the *New York Times* holding on standards to be used on judicial review. *E.g.*, in *Rosenbloom*, Justice Brennan noted that the Court can not avoid excursions into factfinding when important first and fourteenth amendment interests are at stake. He concluded that "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." 403 U.S. at 54.

24. In Time, Inc. v. Pape, 401 U.S. 279 (1971), Justice Harlan, dissenting, expressed disapproval of the Court's de novo factual review of the evidence in defamation cases. *Id.* at 294.

25. Justice Goldberg, concurring in the result in *New York Times*, favored an absolute immunity vis-à-vis statements relating to official conduct of public officials. He urged that under the majority's "malice" standard, the speaker takes the risk that the jury will inaccurately determine his or her state of mind and will fail to apply properly the constitutional standard set by the "elusive" concept of malice. 376 U.S. at 304. Justice Douglas, dissenting in *Gertz*, was equally concerned that where controversial subject matter is involved, "a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, [*sic*] a virtual roll of the dice separating them from liability for often massive claims of damage." 418 U.S. at 360. Justice Brennan also feared that the negligence standard established by the majority in *Gertz* might be used by the jury as "an instrument [of] suppression . . . ." *Id.* at 367.

(2) to assess punitive damages.[26] On the other hand, Justice White has charged the Court with "constitutionalizing the factfinding process" in these areas and has been disturbed by the Court's denigration of "the good sense of most jurors."[27]

The proper role of the judge in a defamation action was discussed in *Gertz*. The Court's fear of ad hoc subjective determinations by judges as to what issues are of general or public concern led it to abandon that standard in favor of a public official/public figure versus private individual distinction.[28] Thus, the trial judge is now required to make an initial determination of the public or private status of the individual defamed.

Impact of Privacy Theory on the Court's Analysis of Defamation Interests

In the course of the Court's debate over the first amendment issues involved in defamation cases, a number of Justices began to

26. Justice Marshall, joined by Justice Stewart, dissented in *Rosenbloom* partly on the ground that allowing the jury to determine punitive damages gave it unlimited discretion to penalize unorthodox and unpopular views. 403 U.S. at 84.

27. Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (White, J., dissenting).

28. *Id.* at 346. Writing for the Court, Justice Powell noted that the public issues test, most clearly enunciated in *Rosenbloom*, discussed at note 17 *supra*, would force state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not. He concluded: "We doubt the wisdom of committing this task to the conscience of judges." 418 U.S. at 346.

Criticism of the public issues test was first voiced in *Rosenbloom* in the dissent of Justice Marshall. Justice Marshall criticized Justice Brennan for not providing guidelines or standards by which courts could define the scope of public concern. 403 U.S. at 79. He argued that the Court seemed to be abandoning the attempt made in *New York Times* to set up general rules in favor of standards which would require ad hoc balancing to be "achieved at a substantial cost in predictability and certainty." *Id.* at 81.

Only Justice Brennan, dissenting in *Gertz*, still contended that the best solution was to leave to the judges the task of determining the general or public interest in particular issues rather than establishing the standard on the basis of the status of the speaker. 418 U.S. at 368-69. Responding to critics of the public issues standard, he argued that this task would become less burdensome as the case law developed. *Id.* at 369.

While *Gertz* seemed to have settled the issue in favor of a standard based on the status of the speaker, Justice Marshall, dissenting in *Firestone*, contended that the test rejected in *Gertz*—judicial inquiry into the legitimacy of an interest in a particular event or subject—was, in fact, being adopted by virtue of the majority's interpretation of the term "public controversy" which was used in *Gertz*. 424 U.S. at 487-88.

Regardless of whether the standard used is the public issues standard or the public official/public figure standard, the Court has indicated that the trial judge, not the jury, will make the determination. This approach was most clearly demonstrated in Rosenblatt v. Baer, 383 U.S. 75 (1966), in which the Court defined "public official." Justice Brennan, writing for the Court, held that it was for the trial judge in the first instance to determine whether the evidence demonstrated that the plaintiff was a "public

equate one interest protected by defamation laws with a similar interest protected by privacy laws.[29] Justice Stewart, in a much quoted concurring opinion in *Rosenblatt v. Baer*,[30] identified and discussed this interest as the "essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[31] In subsequent defamation decisions, the Supreme Court increasingly focused on the privacy interests protected by defamation laws.[32] *Gertz* reflected this trend not only by concentrating on this privacy interest, but also by giving it far greater protection than that accorded reputation interests in *New York Times*.[33]

C. Origin of the Tort of Invasion of Privacy

Unlike the tort of defamation, the tort of invasion of privacy has only recently been recognized by the courts. Most commentators credit Samuel Warren and Louis Brandeis with defining the tort in their *Harvard Law Review* article in 1890.[34] Warren and Brandeis argued that the concept of privacy had grown naturally out of the common law's protection of the individual

official." *Id.* at 88. The underlying rationale for such an approach is to "both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." *Id.* at 88 n.15.

29. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971) (Brennan, J.); Rosenblatt v. Baer, 383 U.S. 75, 91 (1966), (Stewart, J., concurring).

30. 383 U.S. 75, 91 (1966).

31. *Id.* at 92 (Stewart, J., concurring).

32. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

33. 418 U.S. at 341, 348. While the Court in *New York Times* mentioned that state defamation statutes provide a remedy for injury to reputation, it concluded that "libel can claim no talismanic immunity from constitutional limitations." 376 U.S. at 269. The Court's recent trend of giving greater weight to reputation interests and linking those interests to privacy interests has been thrown into question by its decision in Paul v. Davis, 424 U.S. 693 (1976). The Court, per Justice Rehnquist, held that the plaintiff's interest in his reputation was not a "liberty" or "property" interest and, therefore, the plaintiff was not entitled to protection under the due process clause of the fourteenth amendment. *Id.* at 712.

In a dissenting opinion, Justice Brennan, joined by Justices Marshall and White, noted:

> It is strange that the Court should hold that the interest in one's good name and reputation is not embraced within the concept of "liberty" or "property" under the Fourteenth Amendment, and yet hold that that same interest, when recognized under state law, is sufficient to overcome the specific protections of the First Amendment.

Id. at 723 n.11 (citations omitted).

34. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

and that "the right to life has come to mean the right to enjoy life—the right to be let alone . . . ."[35] In order to protect the "inviolate personality" of the individual and to protect society from the "blighting influence"[36] of the press, they urged that the courts recognize a distinct right to privacy. In 1960, Dean Prosser published an article which has been as influential as the seminal Warren and Brandeis work in the development of the right to privacy.[37] Dean Prosser noted the courts' gradual acceptance of the tort of invasion of privacy and concluded that the tort actually encompasses four separate torts: (1) intrusion upon a person's solitude; (2) public disclosure of embarrassing private facts; (3) false light in the public eye; and (4) appropriation of a name or a likeness.[38]

Although the articles by Warren and Brandeis and Dean Prosser have retained their central importance in the law, there has also been a recent proliferation of other articles discussing invasion of privacy. These commentators have focused on the nature of the interests invaded by defamation and their relationship to those interests violated by invasion of privacy. Some have concluded that the tort of invasion of privacy protects interests similar to those protected by the tort of defamation,[39] while others contend that "the basic rationale for speech [which] justifies first amendment immunity for defamatory statements . . . does not justify immunizing privacy-invading speech."[40] The Supreme Court, with its most recent privacy decisions, has apparently taken the latter position, as the following discussion will illustrate.

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35. *Id.* at 193.

36. *Id.* Warren and Brandeis noted that the press had become a powerful industry "overstepping in every direction the obvious bounds of propriety and of decency." *Id.* at 196. The press, by making an industry out of the publication of idle gossip, was invading the privacy of individuals and "lowering . . . social standards and . . . morality . . . , thus dwarfing the thoughts and aspirations of a people." *Id.*

37. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Dean Prosser suggested that privacy was not an independent value, as Warren and Brandeis had implied, but rather a composite of the interests of reputation, emotional tranquility and intangible forms of property. Professor Bloustein has challenged Dean Prosser's analysis and has argued that the interest of privacy is an independent value, recognizing invasions of and assaults on human dignity and human personality. *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

38. Prosser, *supra* note 37, at 389.

39. *See e.g.*, Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963); Kalven, *Privacy, Defamation and the First Amendment: The Implications of Time, Inc., v. Hill*, 67 COLUM. L. REV. 926 (1967).

40. Nimmer, *supra* note 8, at 961-62. Professor Nimmer argues that the rationale for first amendment immunities in defamation cases does not exist with respect to privacy.

D. THE SUPREME COURT AND PRIVACY: *Time, Inc. v. Hill* AND BEYOND

Time, Inc. v. Hill[41] was the first case involving the tort of invasion of privacy to be considered by the Supreme Court subsequent to its decision in *New York Times*. Hill had brought suit under a New York statute which allowed a cause of action for appropriating a living person's name for advertising or trade purposes without consent.[42] The Court held that constitutional protections of free expression precluded the application of New York's statute to redress false reports of matters of public interest absent proof of malice as defined in *New York Times*.[43] The Court emphasized that the guarantees of speech and press are not only reserved to political expression or comment upon public affairs, but also embrace "all issues about which information is needed or

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Speech necessary for effective and meaningful democratic dialogue does not generally require references to the intimate activities of individuals. *Id.* at 912.

At least one commentator has taken the approach that privacy interests should be protected not only by tort liability, but also by constitutional mandate. *See* Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973) [hereinafter cited as *Privacy* Note]. The author argues that the first amendment requires protection of individual privacy in order to ensure citizens' confidence that the process by which they make decisions about public issues will not be subject to the chilling effect of public disclosure. *Id.* at 1467-69.

41. 385 U.S. 374 (1967). The plaintiff and his family in *Time* had been held hostage by escaped prisoners in their home and were ultimately released unharmed. Three years later, a play about a family held hostage by escaped convicts opened on Broadway in New York City. *Life* magazine published an article describing the play as a dramatization of the incident involving the Hill family and included pictures of re-enacted scenes of violence taken from the play. Hill then brought suit for invasion of privacy against the defendant, Time, Inc.

42. The New York statute had been passed subsequent to a New York Court of Appeals decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), holding that no common law right to privacy existed. The state courts had construed the statute broadly so as to allow recovery for fictionalized public disclosure of newsworthy facts. *See* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded*, 387 U.S. 239, *reconsidered*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

43. 385 U.S. at 387-88. For a critique of the Court's holding see Bloustein, *Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?* 46 TEX. L. REV. 611 (1968). Professor Bloustein argued that the broad test of newsworthiness applied in *Time* was at odds with Meiklejohn's interpretation of the first amendment protecting the public's right to information necessary to self-government. He urged that the mere fact that a matter is interesting or attractive to the public should not be sufficient to warrant constitutional protection. The newsworthy nature of information should be measured by the public's right to be informed and not by the publisher's right to communicate. *Id.* at 626-27. Consequently, he concluded that because no conceivable governmental decision that the public could be called upon to make would depend on the name of the family involved in the Hill incident, the Court should not have protected the publication of their name. *Id.*

appropriate to enable the members of society to cope with the exigencies of their period."[44]

The Court rejected a negligence standard as a basis for liability in appropriation cases, as opposed to defamation cases, on two grounds. First, in some cases, the content of the speech itself might afford no warning to the press of the prospective harm which might be inflicted on another through the publication of false information.[45] Second, the press would bear the "intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."[46] Refusing to require proof of negligence, the Court instead adopted a malice standard for appropriation cases and expressly declined to consider the question whether truthful publication of private matters unrelated to public affairs could be constitutionally proscribed.[47]

The most recent Supreme Court decision on privacy, *Cox Broadcasting Corp. v. Cohn*,[48] involved a newspaper's publication of the name of a seventeen-year-old rape victim who died as a result of the rape. A newspaper reporter had obtained the name of the victim from the indictments of six individuals on trial for the crime. The victim's father brought suit pursuant to a Georgia statute which made it a misdemeanor to publish the name of a rape victim. The Court determined that public records contain information about public affairs which is crucial to the self-government of the body politic.[49] Consequently, the Court reasoned that there are overriding first and fourteenth amendment interests which necessitate an absolute privilege to publish information contained therein. Thus, it found that no cause of action for invasion of privacy could exist in *Cox*.

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44. 385 U.S. at 388, *citing* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

45. 385 U.S. at 389.

46. *Id.*

47. *Id.* at 383 n.7.

48. 420 U.S. 469 (1975).

49. The Court discussed four reasons for giving maximum protection to the publication of public records. First, individuals rely on the press for facts concerning the operation of their government. Second, without this information, individuals could not vote intelligently or register their opinions about the operations of the administration of the government. Third, the press guarantees the fairness of trials and brings to bear the beneficial effects of public scrutiny upon the administration of justice. Fourth, crime and its prosecution are events of legitimate concern to the public and fall within the responsibility of the press to report on the operations of the government. *Id.* at 491-92.

The analysis by the Court of the first amendment interests at stake clearly follows Meiklejohn's approach. *See* notes 8 & 11 *supra* and accompanying text.

In both *Time* and *Cox*, the Court had to confront the problem of defining precisely the type of interest protected by the tort of invasion of privacy. There are at least two significant differences in the Court's approach to this question in *Cox*, which involved public disclosure of true facts, compared to *Time*, which involved public disclosure of false information. First, in *Time*, the majority opinion indicated that in invasion of privacy cases, where falsity is an element of the tort, the interest protected is similar to that protected in defamation cases—injury to reputation.[50] However, Justice Fortas, in a dissenting opinion joined by Chief Justice Warren and Justice Clark, discussed the right to privacy in terms of an individual's basic right to be let alone, and not simply as a means of protecting his or her reputation.[51] Justice Fortas linked the tort of invasion of privacy to the constitutionally recognized right to privacy emanating from the specific guarantees of the Bill of Rights. In *Cox*, the majority gave greater weight to the importance of privacy interests than did the majority in *Time*. Justice White, writing for the *Cox* Court, utilized the "zone of privacy" language of *Griswold v. Connecticut*[52] in defining the scope of the right to privacy,[53] although he was unwilling to link the constitutional right of privacy with the tort of invasion of privacy, as did Justice Fortas.

Second, the *Cox* Court established a presumption that any information contained in a public record involves the public interest:

> By placing . . . information in the public domain on official court records, the State must be presumed to have concluded that the

50. 385 U.S. at 384 n.9.

51. *Id.* at 413-14.

52. 381 U.S. 479 (1965). Justice Douglas, writing for the *Griswold* Court, reasoned that "[t]he Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Id.* at 484.

The use of language taken from a case involving constitutional level privacy rights in discussing the tort of invasion of privacy indicates a conceptual vagueness common in the area of privacy law. Not only are there various theories as as to the nature of the interest protected by the tort, but there are also a number of definitions of the constitutionally protected interests in privacy. As one commentator cogently noted, the definitions of privacy in *Griswold* "are at best descriptions of a widely shared emotional attitude. Analytically, the reasoning of *Griswold* and *Wade* offers no guidance for separating what privacy is from what it is not . . . ." *Privacy* Note, *supra* note 40, at 1476. Justice White's language in *Cox* does little to establish a clearer conceptual framework of the interests involved in the right of privacy.

53. 420 U.S. at 487.

> public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records . . . .[54]

The Court in *Cox* thus presumed that information contained in public records is relevant to the administration of government. Similarly, in *Time*, the first amendment interests of the press are protected if the information falsely published is a "matter of public interest."[55] However, the *Time* Court did not limit a matter of public interest solely to information relevant to the administration of government.[56]

E. The Ninth Circuit Analysis in *Virgil*

In support of its appeal from the district court's denial of its motion for summary judgment, the defendant, Time, Inc., first argued that Virgil had consented to the publicity given to the description of his lifestyle and thus could not maintain an action for invasion of privacy. In response, the *Virgil* court initially noted that the alleged cause of action could be characterized as the public disclosure of embarrassing private facts.[57] Then, relying on the definition of the elements of the tort as set forth in the Restatement (Second) of Torts, the court rejected the contention that Virgil, by voluntarily disclosing details about his life to the repor-

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54. *Id.* at 495.

55. 385 U.S. at 388.

56. *Id. See* note 44 *supra* and accompanying text.

57. 527 F.2d at 1125. A discussion of the elements of this tort may be found in the Restatement (Second) of Torts § 652D (Tent. Draft No. 21, 1975). Section 652D states in pertinent part that

> [o]ne who gives publicity to matters concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy, if the matter publicized is of a kind which (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id. The primary limitation on the applicability of the tort is the requirement that the matter complained of be highly offensive to a reasonable person. The courts have always recognized that the publication of a particular private fact would be an invasion of privacy if the publication extended so far beyond the bounds of decency as to offend a reasonable person of ordinary sensibility. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), where the court stated:

> Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.

Id. at 809.

ter from *Sports Illustrated*, had himself rendered public the facts that were published. The *Virgil* panel stated that simply talking "freely to a member of the press . . . is not then in itself making public [disclosure of facts]."[58]

The court next considered the defendant's argument that its publication was privileged under the first amendment. *Virgil* explicitly focused on the question, left unanswered by the Supreme Court in *Cox*, of whether there can ever be civil or criminal liability for publication of truthful statements. The court considered the first amendment interests of the press and concluded that they were limited by the public's right to learn only of newsworthy matters. Thus, the *Virgil* panel held that the publicizing of private facts is not protected by the first amendment unless the facts publicized are deemed newsworthy.[59]

The *Virgil* court adopted the Restatement (Second) of Torts standards for newsworthiness,[60] which impose liability for invasion of privacy only if "the matter publicized is of a kind which . . . is not of legitimate concern to the public."[61] In determining what is a matter of legitimate public interest, the court noted that "account must be taken of the customs and conventions of the community . . . and in the last analysis . . . becomes a matter of community mores."[62] The court stated that the determination of

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58. 527 F.2d at 1127.

59. *Id.* at 1128.

60. *Id.* at 1129. Commentators who have examined the case law preceding the Supreme Court decision in *Time, Inc. v. Hill* have concluded that a majority of courts considered the very fact that a matter was published as proof of its newsworthiness, regardless of its content. *See, e.g.*, Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 336 (1966), *citing* Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958). Only a minority of courts venture to utilize objective criteria in defining newsworthiness. *See, e.g.*, Melvin v. Reid, 112 Cal. App. 285, 297 P.91 (4th Dist. 1931). One commentator has concisely summarized the problems behind defining a standard for newsworthiness:

> If the scope of the newsworthiness privilege is fixed by reference to the range of popular interest, then little is left of the tort of invasion of privacy; it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest. But it seems bootless to structure a tort-privilege relation so that the privilege effectively annihilates the tort.

Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 734 (1963).

61. 527 F.2d at 1129, *citing* RESTATEMENT (SECOND) OF TORTS § 652D (Tent. Draft No. 21, 1975).

62. 527 F.2d at 1129, *citing* RESTATEMENT (SECOND) OF TORTS § 652F, Comment f (Tent. Draft No. 13, 1967). The *Virgil* court relied on the comments to RESTATEMENT (SECOND)

whether a particular matter is newsworthy is to be made by the jury. However, the *Virgil* court recognized that leaving such a determination wholly to the jury might increase the possibility that the jury would utilize its verdict to punish unpopular ideas or speakers. Consequently, it mandated that the trial judge in any invasion of privacy action must examine "the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect."[63] Thus, on any motion for summary judgment, directed verdict or judgment n.o.v., the trial judge should closely scrutinize the evidence in order to determine whether first amendment protection is required. The manner in which the evidence is to be examined is identical to all other types of situations in which it is claimed that a case should not go to the jury. Only after evaluating the evidence in the light most favorable to the party against whom the motion is made, and only if reasonable minds could differ as to the state of community mores, should a judge permit the case to be decided by the jury.

Applying the foregoing standards to the facts before it, the *Virgil* panel found that even though the subject of body-surfing was newsworthy as a matter of law, it did not necessarily follow that it was in the public interest to know private facts about the persons who engaged in this newsworthy activity.[64] The fact that individuals engage in an activity in which the public has a general interest does not render every aspect of their lives subject to public disclosure. Consequently, the *Virgil* court remanded the case to the district court to decide whether reasonable minds could differ as to the state of the community mores on this issue and other closely related questions.[65]

OF TORTS § 652F, (Tent. Draft No. 13, 1967), which section was incorporated by RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 21, 1975) into section 652D. However, the court treated the prior comments to section 652F as applicable to the present form of section 652D because, in the opinion of the court, "nothing [was] said [in the Restatement (Second) Tentative Draft Number 21] to indicate that a substantive change with respect to any matter in the comments [was] intended." 527 F.2d at 1129 n.10.

The comments to the Restatement (Second) of Torts were written in 1967, well before the implications of *New York Times* and *Time* were clearly grasped. They were drawn from a wide variety of cases decided in prior years during which the elements underlying the tort of invasion of privacy were in an inchoate stage. The comments reflect a press-created definition of newsworthiness and not a true balancing of the first amendment against the individual's right to privacy. *See generally* note 60 *supra*.

63. 527 F.2d at 1130, *quoting* Guam Fed'n of Teachers, Local 1581, AFT v. Ysrael, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974).

64. 527 F.2d at 1131.

65. Other issues which the *Virgil* court concluded were presented on the motion for

Balancing the Privacy Interest with First Amendment Interests

In reaching its holding, the court adopted the analysis applied in recent Supreme Court defamation cases which gives a distinct and meaningful value to the right of privacy.[66] Having established the importance of privacy interests, the court next considered the nature of the first amendment privilege of the press in order to determine a reasonable limitation on first amendment freedoms in cases involving publication of private facts. The *Virgil* court reasoned that the first amendment primarily protects the public's right to know, not the press' right to publish,[67] implicitly adopting the Meiklejohn analysis of the first amendment.[68]

Balancing the conflicting interests of privacy and the first amendment, the *Virgil* court found that when the press publishes a truthful matter of legitimate concern to the public, it is entitled to absolute protection from liability under the first amendment.[69] However, the imposition of post-publication liability where a court finds that a matter is not in the public interest may have a chilling effect on the press. Compelling publishers to anticipate judicial analysis of their stories at some time after publication may

summary judgment were (1) whether private facts respecting Virgil, as a prominent body-surfer, are matters in which the public has a legitimate interest; and (2) whether the identity of Virgil as the one to whom such facts apply is a matter in which the public has a legitimate interest. *Id.*

66. The *Virgil* court asserted that certain areas of privacy must have the protection of law if the "quality of life is to continue to be reasonably acceptable." *Id.* at 1128. The court supported this position by citing Justice Stewart's concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 92-94 (1966), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), both of which indicated that privacy is not merely a personal interest, but one of concern to society as a whole. 527 F.2d at 1128 nn.7 & 8.

67. 527 F.2d at 1128.

68. *Virgil* never explicitly indicated its reliance on the Meiklejohn theory of the first amendment. Instead, it cited two factually inapposite cases, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Both of these cases concerned the public broadcasting media. The Court in *Columbia Broadcasting Sys., Inc.* explicitly drew a distinction between public broadcast licensees and private newspapers, 412 U.S. at 117, and stated that because public broadcasting is a limited public resource, it presents special problems not present in the traditional free speech case. *Id.* at 101.

69. 527 F.2d at 1129. Although the Court in *Gertz* rejected a similar standard, 418 U.S. at 346, defamation cases involve different considerations than public disclosure cases. Since truth is the goal of public debate, the question with respect to public disclosure of truthful private facts is not whether debate is fostered, but whether the subject is appropriate for public debate. In contrast, the essential question in defamation cases is whether debate leading to truth is fostered by publication of false statements. In addition, unlike public disclosure, defamation involves falsity, which the courts traditionally considered unprotected by the first amendment. *Id.* at 340.

lead them to decide not to print articles which do not clearly fall within the scope of a matter of public interest.[70] This would have the effect of severely limiting the public's "right to know" and would frustrate the objective of the Meiklejohn analysis of the first amendment implicitly adopted by the *Virgil* court. Nevertheless, considering the substantial harm that the press is capable of inflicting on an individual, it should not be given unlimited license to publish truthful private facts.[71] The *Virgil* standard should be adopted by other courts, as it provides an equitable balance between the interests of the first amendment and the right to privacy.[72] The adoption of the *Virgil* standard and its subsequent interpretation by other courts will have a positive influence in reducing any chill produced by the standard because the press will be provided with an increasingly clear idea of what matters lie in the public interest.

The Community Mores Test

A fundamental weakness of the court's analysis in *Virgil* is its adoption of the community mores test to determine what matters are newsworthy. The court cited two Supreme Court obscenity cases[73] in support of its finding that a community mores test is

70. *See* Franklin, *supra* note 39. Professor Franklin contended that privacy actions are more susceptible to constitutional attack than defamation actions. He noted that, unlike defamation, where publishers can know ahead of time whether a statement is false or not, the tort of invasion of privacy imposes "a standard necessarily either inchoate at the time defendant acted or so vague that entry into the area was inhibited impermissibly." *Id.* at 142.

71. Some commentators have argued that the press should not be accorded special constitutional status. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) eloquently presented the view that newspapers are simply a monopoly controlled by the owners of the media. *Id.* at 248-50. The Court cited the REPORT OF THE TASK FORCE IN TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS 4 (1973), which stated that "[the news media] has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them." 418 U.S. at 250.

72. Some courts have given greater weight to the first amendment interests of the press. *See, e.g.*, Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). The *Briscoe* court stated that "a truthful publication [of private facts] is constitutionally protected if (1) it is newsworthy and (2) it does not reveal facts so offensive as to shock the community's notions of decency." *Id.* at 541, 483 P.2d at 42-43, 93 Cal. Rptr. at 874-75. In order to protect first amendment freedoms, *Briscoe* required the plaintiff to prove that a publisher invaded his or her privacy with reckless disregard of the fact that reasonable persons would find the invasion highly offensive. *Id.* at 542-43, 483 P.2d at 44, 93 Cal. Rptr. at 876. This last requirement makes it extremely difficult for a plaintiff to recover for invasion of privacy and is not necessary to protect the first amendment interests of the press. Those interests are adequately protected under the newsworthiness standard.

73. Jenkins v. Georgia, 418 U.S. 153 (1974); Miller v. California 413 U.S. 15 (1973).

constitutionally permissible under the first amendment. However, the analogy made to obscenity cases is inappropriate. Obscenity cases involve a determination of moral questions,[74] while *Virgil*-type privacy cases do not involve morality, but simply a determination of the extent of the public's "right to know." To permit a jury to decide what is a matter of legitimate public concern on the basis of a reasonable person standard of decency invites the jury to introduce its moral judgments into an area which should be closely guarded from such potentially prejudicial judgments. In addition, the proven unmanageability of the community mores test in obscenity cases, where there are at least arguable grounds for its appropriateness,[75] should make courts reluctant to extend its application to other equally important areas of the law.

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74. When individual members of the Court or commentators have used the word "obscenity" in the context of obscenity law, they have generally implied reference to a concept of public morality derived from Judeo-Christian thought. For example, in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Justice Burger explicitly defended the prohibition on obscenity as necessary to protect "the social interest in order and morality." *Id.* at 61 (emphasis deleted). While Justice Burger did not define "morality," he seemed to use the term in a broad Judeo-Christian sense. This implied connection between obscenity and Judeo-Christian notions of morality has been discussed and applauded by at least one commentator. *See* Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L.A.L. REV. 207 (1974).

Other definitions of morality, derived from different sources of thought, lead to a very different analysis of the relationship of the Constitution to obscenity law. One commentator has described the underlying moral purpose of the Constitution, and the first amendment specifically, in terms of a utilitarian theory of morality tempered by protection of minority rights. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). According to Professor Richards, the moral purpose of the first amendment is "to secure the greatest equal liberty of communication compatible with a like liberty for all." *Id.* at 73.

75. The view of the majority of the Court has been that a community mores test is appropriate and viable. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974); Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957). However, there has also been a vigorous minority view that the problems of vagueness and overbreadth are insurmountable in any definition of obscenity, particularly one based on a community mores test. Justice Brennan, concurring in the result in *Jenkins*, noted that "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." 418 U.S. at 164-65. Similarly, Justice Harlan, dissenting in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), concluded that the attempt to provide tools to separate obscenity from other sexually oriented, but constitutionally protected, speech has only "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Id.* at 704-05. Finally, Justice Douglas, dissenting in *Roth*, declared that "[a]ny test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment . . . . This is community censorship in one of its worst forms." 354 U.S. at 512.

Allocation of Functions to Judge and Jury

While the community mores test may be an inappropriate standard of newsworthiness, there are justifiable grounds for approving *Virgil's* allocation of the function of determining whether a matter is of legitimate public concern to the jury. Although the court never articulated its rationale for allocating this function to the trier of fact, it clearly manifested its basic faith in the ability of the jury to make accurate determinations of this issue free from prejudice.[76] However, there is a need for close judicial scrutiny of jury decisions in the first amendment area to ensure that the rights of the press have received sufficient protection.

The *Virgil* court, although cognizant of the problem, did not adequately safeguard the press' first amendment rights. The court provided the trial judge with no definitive standards that could be used to determine whether statements are protected by the first amendment.[77] *Virgil* might have given greater first amendment

76. Judges are not necessarily less immune from the influence of prejudices than are private citizens on juries. In addition, some studies have indicated that there is a close correlation between the decisions reached by the jury and a judge when they are presented with identical fact situations. *See generally* J. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

77. *See* text accompanying note 63 *supra*. The *Virgil* court adopted the role of the trial judge enunciated in Guam Fed'n of Teachers, Local 1581, AFT v. Ysrael, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974). In *Guam*, the Ninth Circuit expressly rejected the proposal of Judge J. Skelly Wright regarding the function of the trial judge in defamation cases where "actual malice" is at issue. Judge Wright proposed that on a motion for summary judgment, if a court finds that the plaintiff can prove "actual malice" under the *New York Times* standard in a defamation case, it should not grant the motion. Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970). Judge Wright further stated:

> If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity." In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with "convincing clarity."

424 F.2d at 922. The *Guam* panel incorrectly read Judge Wright's opinion as indicating that judges are to weigh credibility of witnesses on a motion for summary judgment. 492 F.2d at 441. Judge Wright had suggested weighing credibility of witnesses only if a motion for summary judgment were *not* granted.

protection to the press by establishing a "clear and convincing" standard for newsworthiness. This standard would be applied by the jury at trial and by the judge on motions for summary judgment, directed verdict, and judgment n.o.v. The judge would decide if reasonable minds could differ with respect to whether the plaintiff could prove with "clear and convincing" clarity that a matter is not of legitimate public concern.[78]

F. Conclusion

The *Virgil* panel is only the first court of appeals to decide a case since *Cox* involving the public disclosure of truthful private facts. Other courts of appeals may decide to adopt standards of care which are more protective of the rights of the press. Until the Supreme Court ultimately defines the standard to be used in invasion of privacy cases, it is hoped that all the courts faced with the issue will not be overly solicitious of the first amendment rights of the press and will not, consequently, disregard the individual's right to be let alone.[79]

Mary A. Gerber

III. INNKEEPERS' LIENS AND STATE ACTION

A. Introduction

Sniadach v. Family Finance Corp.[1] and *Fuentes v. Shevin*[2] expanded the due process protections of the fourteenth amend-

78. The Supreme Court has adopted a "clear and convincing" standard of proof to determine whether a defamatory statement was published with "actual malice." *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

79. On remand, the district court, pursuant to the *Virgil* standard of newsworthiness, granted the defendant's motion for summary judgment. N.Y. Times, January 4, 1977, at 12, col. 4.

1. 395 U.S. 337 (1969). In *Sniadach*, the Supreme Court held that a Wisconsin prejudgment wage garnishment procedure which failed to provide notice and a hearing before a temporary deprivation of wages occurred was violative of the due process clause of the fourteenth amendment. *Id.* at 342.

2. 407 U.S. 67 (1972) (4-3 decision). The Supreme Court expanded the scope of *Sniadach* in *Fuentes* and held that the prejudgment replevin laws of Florida and Pennsylvania authorizing summary prejudgment seizure of property without providing for prior notice and a hearing violated the due process clause of the fourteenth amendment. *Id.* at 96. In *Fuentes*, a sheriff, acting pursuant to an ex parte act of replevin, had seized household goods bought under a conditional sales contract before the debtor had received any notice or an opportunity to be heard. *Fuentes* differed factually from *Sniadach* in two areas: (1) the prejudgment seizure was of household goods, not wages; and (2) the creditor was a secured creditor seizing his collateral, not an unse-

ment[3] to include prejudgment seizures of property.[4] In *Cul-*

cured creditor seizing property essentially unrelated to the debt. *Id.* at 84. In broad language, the majority opinion emphasized the importance of judicial supervision in all prejudgment seizures of property where a state agent, acting for a creditor, may deprive a debtor of a significant property interest. *Id.* at 80-81.

3. U.S. CONST. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. § 5 provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. The scope of the *Fuentes* decision was limited by Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). In *Mitchell*, defendant W.T. Grant Co. sold household goods to plaintiff Mitchell under a conditional sales contract. When Mitchell fell behind in his payments, W. T. Grant Co. petitioned a Louisiana state judge for a writ of sequestration, in order to prevent alienation of the property. (In Louisiana, at the time of the decision, a creditor lost his or her interest in secured goods if the debtor sold them to a third party.) In order to obtain the writ of sequestration, W. T. Grant Co. presented the judge with a sworn affidavit pursuant to the state vendor's lien which provides secured creditors with a remedy to secure unpaid balances. The writ was issued without notice or prior hearing, and Mitchell's goods were seized by a sheriff pending a hearing on the merits. *Id.* at 601-03. Mitchell challenged the seizure as a violation of his fourteenth amendment right to due process. Justice White, who had dissented in *Fuentes*, wrote for the majority, joined by Justices Powell and Rehnquist, who did not hear *Fuentes*. The Court held that the Louisiana standards regulating the use of the writ of sequestration did not deprive Mitchell of procedural due process. *Id.* at 619-20. The Court distinguished *Mitchell* from *Fuentes* in three respects. First, in *Mitchell*, only a judge could issue a writ, whereas in *Fuentes*, no judicial approval was necessary since a clerk could issue a writ. *Id.* at 615. Second, in *Mitchell*, the creditor had to initiate court action for repossession, submit a sworn affidavit containing specific allegations and post a bond to insure the debtor from any loss, whereas in *Fuentes*, the creditor only had to submit an affidavit stating the value of the property in order to obtain a writ. *Id.* at 616. Third, in *Mitchell*, the debtor was entitled to seek dissolution of the writ in a post-seizure hearing in which the creditor was required to prove the allegations upon which the writ was issued, while in *Fuentes*, there was no provision for a post-seizure hearing. *Id.* at 618.

In North Ga. Furnishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court determined that an ex parte writ for prejudgment seizure issued by a clerk upon posting of a security bond by a secured creditor violated the fourteenth amendment due process clause. *Id.* at 606. The decision clearly indicated that *Fuentes* had not been overruled by *Mitchell*. *Id.* at 605-07. *Mitchell* was distinguished from the instant case on two grounds. First, the ex parte writ was issuable only by a judge, not a clerk, upon the filing of an affidavit setting out the facts entitling the creditor to sequestration. Second, in *Mitchell*, the statute entitled the debtor to an immediate post-seizure hearing and to dissolution of the writ absent proof of the grounds on which it was issued. *Id.* at 606-07.

In *Mitchell*, the Court stated that both seller and buyer had current, real interests in the disputed property and that resolution of the due process issue requires consid-

bertson v. Leland,[5] the Ninth Circuit considered whether an innkeeper's seizure and detention of a nonpaying boarder's property pursuant to a state innkeepers' lien statute was effected under color of law within the meaning of 42 U.S.C. section 1983.[6]

In due process adjudication, two basic issues are continually raised. Procedural due process places constraints on decisionmaking processes that deprive an individual of governmental benefits in which he or she has a constitutionally protected liberty or property interest, *i.e.*, an "entitlement."[7] The first inquiry in any procedural due process question, therefore, is whether the individual litigant has been deprived of a liberty or property interest which is protected by the fourteenth amendment. If there has been a deprivation of the type of constitutionally protected interest which triggers the litigant's entitlement, the second inquiry concerns what specific protective procedures are required.[8]

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eration of the interests of both parties. *Id.* at 606. Although the Court found no due process violation in *Mitchell*, that case does not limit due process requirements in prejudgment seizures to unsecured creditors or wages. In a secured creditor context, *Mitchell* holds that a full adversarial hearing prior to a prejudgment seizure is not required by the due process clause. However, it does not foreclose judicial review entirely. One commentator has stated:

> What *Mitchell* and *North Georgia* taken together indicate, however, is that judicial review, perhaps immediately after the seizure or perhaps only ex parte, is still required by the due process clause. The simplest view would be this: an ex parte proceeding with judicial review in the secured creditor context is permissible (*Mitchell*); an ex parte proceeding without judicial review is not (*Fuentes*). . . .
>
> Judicial review remains fundamental to due process. *Fuentes* tells us judicial review is required prior to the seizure, but *Mitchell* and *North Georgia* tell us an ex parte proceeding rather than an adversary proceeding before a judge will suffice—at least where an immediate post-seizure adversary hearing is also provided. . . .

Comment, *State Action: A Pathology and A Proposed Cure*, 64 CALIF. L. REV. 146, 173-74 (1976) [hereinafter cited as Comment, *State Action*].

5. 528 F.2d 426 (9th Cir. Oct., 1975) (per Weigel, D.J.).

6. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (an untenured teacher has no entitlement to the renewal of his or her contract).

8. *See* Krinsky, *Procedural Due Process*, 33 GUILD PRAC. 140 (1976); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV.

The preliminary consideration of the first inquiry is the issue of state action;[9] a determination must be made as to whether the alleged deprivation occurs "under color of law" as required by section 1983. The Supreme Court has recognized that the "under color of law" requirement of section 1983 is the functional equivalent of the state action requirement under the fourteenth amendment.[10] Without an affirmative finding of state action, the due process inquiry is terminated.[11] Thus, the "under color of law" requirement of section 1983 is quasi-jurisdictional in nature.

B. STATE ACTION

In the *Civil Rights Cases*[12] the Supreme Court restricted the application of the protections of the fourteenth amendment to the actions of states or their agents. Because the concept of state action is inherent in fourteenth amendment challenges to statutory innkeeper liens, the following section will briefly examine Su-

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L. REV. 1510 (1975). The specific dictates of due process, as formulated in Goldberg v. Kelly, 397 U.S. 254 (1970), depend upon a balancing between the individual's need for procedural safeguards and the governmental interest in summary action. In recent years, the Supreme Court has extended procedural protections into areas of governmental action never before considered to be within the scope of the fourteenth amendment. The current Supreme Court majority, however, is in the process of cutting back procedural protections in different areas of the law. *See, e.g.*, Mathews v. Eldridge, 96 S. Ct. 893 (1976) (an evidentiary hearing is not required prior to termination of Social Security disability payments; *Baxter v. Palmigiano, 96 S. Ct. 1551 (1976) (no right to counsel at prison disciplinary hearings).*

9. For discussions of the state action issues see Horan, *Law and Social Change: The Dynamics of the "State Action" Doctrine*, 17 J. PUB. L. 258 (1968); Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479 (1975); Comment, *State Action, supra* note 4; Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974) [hereinafter cited as Note, *State Action*].

10. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966).

11. In The Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court first stated that the due process and equal protection clauses of the fourteenth amendment apply only to actions of the states, their officials and those acting by authority of the state. *Id.* at 11. Justice Bradley's statement that "[i]ndividual invasion of individual rights is not the subject of the amendment," *id.*, has been quoted in virtually every subsequent recorded case in which state action was an issue. *See generally* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973), 47 S. CAL. L. REV. 1, 2-57 (1973), for a thorough discussion of the state action issues involved specifically in the procedural due process realm of the fourteenth amendment.

12. 109 U.S. 3 (1883). In the *Civil Rights Cases*, the Court was able to strike down congressional legislation prohibiting racial discrimination in public accommodations by determining that the act was beyond the power of Congress under either the thirteenth or fourteenth amendments. *Id.* at 25. As to the fourteenth amendment issue, the Court found that Congress could only proscribe state and not individual private action. *Id.* at 11.

preme Court cases which ascribe state action to the conduct of private individuals.

State Involvement to A Significant Extent

In *Shelley v. Kraemer*,[13] the Supreme Court expanded the concept of state action and extended the operative scope of the fourteenth amendment. The *Shelley* Court held that voluntary adherence to racially restrictive covenants was private action and, therefore, did not violate the equal protection clause. However, it was determined that judicial enforcement of the restrictive covenants constituted impermissible state action within the meaning of the fourteenth amendment.[14] In reaching this conclusion, the Court seemed to suggest that state involvement of any sort in private affairs might result in denial of rights protected by the fourteenth amendment.[15] The precise meaning of *Shelley* has never been articulated by the Court,[16] but it has been suggested that the significant question for analysis, once state governmental connection is established, is not whether state action exists, but whether the state action that is concededly present is unconstitutional.[17]

The most general formulation of state action is couched in terms of whether there is state involvement in private affairs to a *significant* degree. In *Burton v. Wilmington Parking Authority*,[18] it was determined that a coffee shop which engaged in racially discriminatory practices and was located in a public building maintained with public funds was subject to the restrictions of the equal protection clause of the fourteenth amendment. Justice Clark, writing for the Court, stated that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its

13. 334 U.S. 1 (1948).

14. *Id.* at 19.

15. Note, *State Action*, *supra* note 9, at 844.

16. Several commentators who have explored the meaning of *Shelley* and succeeding cases have reached the same general conclusion—whether private persons would be subject to constitutional limitations following *Shelley* depends upon balancing the interests of parties involved, and not upon some formal connection with government. *See* Yackle, *supra* note 9, at 495; Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 481 (1962); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 7 (1961); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U. PA. L. REV. 402, 413-14 (1948).

17. Yackle, *supra* note 9, at 495, *citing* Van Alstyne & Karst, *supra* note 16.

18. 365 U.S. 715 (1961).

manifestations has been found to have become involved in it."[19] Although significant state involvement is required to bring private conduct within the ambit of the fourteenth amendment, it is impossible "to fashion and apply a precise formula [to evaluate state responsibility] . . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[20]

The significant state involvement test is satisfied if the state authorizes, encourages or creates an atmosphere in which private interests may deprive individuals of their constitutional rights. In *Reitman v. Mulkey*,[21] the Court assessed the "potential impact of official action"[22] to determine whether California had significantly involved itself in impermissible discrimination. The *Reitman* Court invalidated a state constitutional amendment which repealed prior open housing legislation and barred the state from imposing any limitation on an individual's right to sell real property. It held that the state need not take an affirmative role in private conduct which deprives an individual of constitutional rights in order for state action to be present; it is enough that the consequences of state "neutrality" encouraged private interests to do so.[23]

Inquiry into the source of the impetus for discrimination violative of the fourteenth amendment is another approach to determine whether there was significant state involvement in the actions of a private individual. In *Moose Lodge No. 107 v. Irvis*,[24] the Court found that Pennsylvania's licensing of a private club to serve liquor was not state action, and therefore, the club's refusal to serve a black person was not reviewable under the fourteenth amendment.[25] Although the liquor–licensing regulations of the state were extensive, Justice Rehnquist's opinion for the Court

19. *Id.* at 722.

20. *Id.* Commentators have criticized the "narrowness" of the *Burton* holding. *See* Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1459 (1961) (*Burton* contained no instruction or guidelines for future developments in state action litigation); Yackle, *supra* note 9, at 497 ("[t]he *Burton* holding was a classic illustration of . . . law that is good for this day and this case only.").

21. 387 U.S. 369 (1967).

22. *Id.* at 380.

23. *See* 387 U.S. at 394 (Harlan, J., dissenting).

24. 407 U.S. 163 (1972).

25. *Moose Lodge* was the first case in 35 years in which the Court failed to find state action and apply the constitutional restrictions of the fourteenth amendment. Grovey v. Townsend, 295 U.S. 45 (1935), the last case where the Court failed to find state action, was overruled by Smith v. Allwright, 321 U.S. 649 (1944).

emphasized that it did not in and of itself "foster or encourage racial discrimination."[26] Justice Rehnquist applied the ad hoc factual analysis of *Burton*, but distinguished that case: "[W]hile [the defendant in *Burton*] was a public restaurant in a public building, Moose Lodge is a private social club in a private building."[27]

The approach taken in *Moose Lodge* prevails in circumstances where the state in some manner regulates the operations of a private entity. The Court has continued to examine the precise relationship between the state regulation and the challenged private activity to determine whether the former initiated the latter. In *Jackson v. Metropolitan Edison Co.*,[28] the plaintiff alleged that the termination of her electrical service by the defendant before she had been afforded notice and an opportunity to be heard was a violation of the due process clause. The defendant was a privately owned and operated utility, licensed and regulated by a state public utilities commission. The plaintiff contended that she possessed an entitlement to electrical service under state statute and could not be deprived of her property interest without due process of law.[29] The Court held that there was not sufficient state action to inquire whether Metropolitan Edison Company had violated the due process clause. Relying heavily on *Moose Lodge*, Justice Rehnquist, writing for the Court, stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself."[30]

26. 407 U.S. at 176-77.

27. *Id.* at 175. Neither the majority nor the dissent mentioned that Pennsylvania monopolized the sale of all liquors to hotels, restaurants and private clubs, although Justice Douglas, in his dissent, did focus on the fact that Pennsylvania limited the number of liquor licenses issued and allowed slightly longer hours of sale to private clubs. He failed, however, to note the direct benefits the state received from the sale of liquor. Comment, *State Action*, *supra* note 4, at 161 & n.74.

28. 419 U.S. 345 (1974).

29. Plaintiff Jackson argued that her property interest was created by a provision of the Pennsylvania statute relating to public utilities which expressly required the power company to provide service without unreasonable interruptions. *Id.* at 348 n.2.

30. *Id.* at 351. Dissenting, Justice Douglas criticized the majority for its apparent repudiation of *Burton*. It was made clear by *Burton*, he stressed, that the "dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility." *Id.* at 360. Following *Jackson*, it is arguable that the aggregate of factors in state action determination is no longer controlling. Although *Burton* was distinguished in *Jackson* as involving a "symbiotic relationship" between the state and private discriminatory conduct, there is some question as to whether *Burton* remains good authority, Yackle, *supra* note 9, at 516-17 n.157, or whether *Burton* would meet the *Jackson* test. Comment, *State Action*, *supra* note 4, at 163. The Court's reasoning in *Jackson* prompted the following comment from Professor Yackle:

The Public Function Theory

The principle underlying the public function theory of state action is that a state may not delegate to the private sector to a substantial degree a traditional government function or allow the private sector to assume governmental power without requiring it to comply with the provisions of the fourteenth amendment.[31] In *Jackson*, the plaintiff also argued that the defendant Metropolitan Edison Company was performing a public function. The Court began its analysis with implicit approval of previous Supreme Court public function cases,[32] which involved "the exercise by a private entity of powers traditionally exclusively reserved to the State."[33] Justice Rehnquist then removed *Jackson* from the realm of the public function cases, reasoning that because there existed no requirement that the state furnish utility service, no public function had been delegated to the defendant:

> If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obliga-

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> After *Jackson* it is no longer sufficient to show numerous contacts between the state and the private entity; the only contacts that merit attention are those that rationally relate to the specific action under attack. In *Jackson* itself Metropolitan was heavily regulated by the state, but neither its monopoly status nor its effect on the public interest established a rational nexus between the state and the procedure by which the company had terminated the petitioner's electrical service.

Yackle, *supra* note 9, at 517 (footnote omitted).

31. Marsh v. Alabama, 326 U.S. 501 (1946), was the genesis of the public function doctrine. It underscored and expanded the basic premise originally asserted in the White Primary decisions, which broadened state action to incorporate the actions of private persons exercising power delegated by the States. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). In *Marsh*, the Court found that private persons who possess power to significantly deprive a community of rights protected by the Constitution against state infringement possess governmental power. Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 691 (1974). *But see* Burke & Reber, *supra* note 11: "[I]t is doubtful that a 'public function' state action doctrine is viable outside the narrow first amendment context of *Marsh v. Alabama*. . . ." *Id.* at 50.

32. 419 U.S. 352, *citing* Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Nixon v. Condon, 286 U.S. 73 (1932). In recognizing the public function theory of state action and implicitly approving the preceeding decisions, the Court did not limit its application to the first amendment area, as suggested by Professors Burke and Reber. *See* note 31 *supra*.

33. 419 U.S. at 352.

> tion to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.[34]

C. Prejudgment Seizures of Property by Private Persons

The state action theories discussed in the previous section have been applied by several federal courts of appeals which con-

34. *Id.* at 352-53. Comment, *State Action*, *supra* note 4, criticized Justice Rehnquist's reasoning:

> [O]ne of the "state function" cases cited with approval by the Court, *Marsh v. Alabama*, involved a company town whose existence was due to the free play of economic forces, *i.e.*, a "natural monopoly" in the Court's terms. . . .[I]t is difficult to see why the heavily regulated utility should not also be characterized as a state function. During much of the 20th century, when electricity and oil and gas heat became essential to modern life, such power has been provided through state operated facilities or through heavily regulated private utilities. Such utilities, providing an essential of modern life tantamount to police and fire protection, would appear to be precisely the traditional government function which the state may not leave in the hands of the private sector without subjecting the latter to requirements imposed by the fourteenth amendment which the state would have to meet if it provided the service.

Id. at 162 (footnote omitted).

Justice Marshall dissented from the Court's decision. He stated that

> [t]he majority's conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them. Elaborate hearings prior to termination might be quite expensive, and for a responsible company there might be relatively few cases in which such hearings would do any good. The solution to this problem, however, is to require only abbreviated pretermination procedures for all utility companies, not to free the "private" companies to behave however they see fit. At least on occasion, utility companies have failed to demonstrate much sensitivity to the extreme importance of the service they render, and in some cities, the percentage of error in service termination is disturbingly high. Accordingly, I think that at the minimum, due process would require advance notice of a proposed termination with a clear indication that a responsible company official can readily be contacted to consider any claim of error.

419 U.S. at 373 (citations omitted). The Court has never specifically defined public function. Justice Marshall's dissenting opinions in *Jackson*, 419 U.S. at 365-74, and Hudgens v. NLRB, 96 S. Ct. 1029, 1039-48 (1976), represent the most significant effort by any member of the Court to identify the components of the public function analysis and to discuss the underlying rationale of *Marsh* and its progeny.

sidered the validity of prejudgment lien statutes prior to the Ninth Circuit decision in *Culbertson*.[35] Two cases in particular, *Adams v. Southern California First National Bank*[36] and *Hall v. Garson*,[37] were heavily relied upon in each of the three opinions in *Culbertson*.

In *Hall*, a Fifth Circuit case factually similar to *Culbertson*, an innkeeper entered a boarder's apartment and removed a television set pursuant to a Texas inkeepers' lien statute. The statute gave innkeepers a lien for unpaid rent on the personal property within their boarders' dwellings and the right to enforce the lien, without prior notice or hearing, by peremptory seizure and retention of the property until the rent due was paid. Plaintiff Hall brought an action pursuant to section 1983 challenging the constitutionality of the statutory authority under the due process clause of the fourteenth amendment. The Fifth Circuit found the seizure to be state action on the basis of the public function theory.[38]

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35. *See, e.g.*, Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1143 (1976); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), *reaff'd*, 468 F.2d 845 (1972).

36. 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

37. 430 F.2d 430 (5th Cir. 1970), *reaff'd*, 468 F.2d 845 (5th Cir. 1972).

38. 430 F.2d at 439. The Seventh and First Circuits both explicitly rejected the public function rationale articulated in *Hall* as a basis for finding that an innkeeper's indiscriminate seizure of a nonpaying boarder's property pursuant to a statutory innkeeper lien is state action. *See* Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1143 (1976); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975). In *Davis*, the First Circuit stated:

> [T]he Massachusetts legislature has made the seizing and holding of property a matter of a private creditor invoking a private remedy. Such self-help is inherently private, and we can find no significant state involvement in the legislature's choice of a point at which to draw the line between permissible individual conduct and the necessity for state intervention.

Id. at 205. The First Circuit also distinguished Marsh v. Alabama, 326 U.S. 501 (1946), by contrasting the public properties involved in *Marsh* with the boarder's residence in *Davis*. The court failed to realize that it was not the boarder's residence that constituted the basis of a public function, but the act itself, *i.e.*, the seizure of the boarder's property pursuant to a statutory lien without affording notice or an opportunity to be heard. For a detailed analysis of the First Circuit's treatment of the state action issue in *Davis* see Note, *State Action and the Boardinghouse Lien Statute*, 10 SUFFOLK U.L. REV. 182 (1976).

In *Anastasia*, the Seventh Circuit claimed that *Hall* and *Anastasia* could not be factually distinguished, but stated that it simply fundamentally disagreed with the result in *Hall*. 527 F.2d at 157. In reaching this conclusion, the court relied on the commentary of Burke & Reber, *supra* note 11, at 50.

The constitutionally protected interest of the plaintiff was identified by the *Hall* court as a boarder's right to be free from unreasonable searches and seizures, rather than her property rights in the television set.[39] Although the entry and seizure were performed by a private individual, the Fifth Circuit panel determined that this action "possesses many, if not all, of the characteristics of an act of the state."[40] Execution of a lien[41] had historically been a function of state officials under Texas law.[42] Relying on Supreme Court authority,[43] the court reasoned that identical conduct undertaken by a private individual "draped" with the authority of state law constitutes state action.[44]

In *Adams*, the parties entered into a security agreement pursuant to the terms of the California Commercial Code.[45] The *Adams* court addressed the question of whether prejudgment self-help repossession of property pursuant to a security agreement constituted sufficient state involvement in private activity to support a cause of action under section 1983.[46] Plaintiff Adams

39. 430 F.2d at 438.

40. *Id.* at 439.

41. The *Hall* court made no distinction between secured and unsecured debts—execution of both was traditionally the function of the sheriff in Texas. *Id. But see* Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974).

42. 430 F.2d at 439.

43. *Id., citing* United States v. Classic, 313 U.S. 299 (1941).

44. 430 F.2d at 439. The court reasoned that "[t]he functional role of the creditor's attorney and debtor's employer in *Sniadach*, even when coupled with the formal role of the clerk who issued the writ, is not significantly different from the role of the landlady here." *Id.* at 440.

45. The code section involved was section 9503, which provides in pertinent part:

> 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. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's promises under Section 9504.

CAL. COM. CODE § 9503 (West 1964).

46. Plaintiff Adams, who had maintained a longstanding good credit record in San Diego, borrowed $1,000 from the Bank of La Jolla. In return, he executed a promissory note to repay a certain amount per month and a security agreement giving the bank a security interest in three of his vehicles. The security agreement provided, in case of default, for repossession pursuant to the California Commercial Code with all rights and remedies of a secured party as provided therein. After repaying nearly $900 of the loan, Adams was forced by intermittent unemployment to default. Shortly thereafter, a repossessor licensed by the State of California took two of Adams' vehicles from his possession, giving rise to the section 1983 claim. 492 F.2d at 326-27.

contended that state action could be found on the basis of either of two general theories.

First, Adams claimed that California *encouraged* self-help repossession through the pervasive statutory scheme of its commercial code, relying primarily on *Reitman v. Mulkey*[47] to support this argument. The *Adams* court, however, found the case distinguishable on two grounds. First, the state was involved in the challenged conduct to a far greater degree in *Reitman*. The proposed constitutional amendment involved in that case had been initiated to change the law, while in *Adams*, the California Commercial Code simply codified existing law.[48] Second, the court refused to resolve a state action issue concerning a creditor's remedy by relying on a case involving racial discrimination.[49] The *Adams* court claimed that racially discriminatory action involves intentional circumvention of constitutional rights, while the commercial lien statutes are predicated on economic policy. After declaring that the existence of a statute authorizing the private remedy of self-help repossession is "not the final answer to the touchstone of state action,"[50] the *Adams* court utilized the significant state involvement test derived from *Burton v. Wilmington Parking Authority*[51] and *Moose Lodge No. 107 v. Irvis*,[52] but distinguished these decisions on their facts.

Adams' second major contention was that the creditor's seizure was a public function, an activity normally performed by the state.[53] To support this assertion, the plaintiff relied principally

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47. 387 U.S. 369 (1967).

48. In *Adams*, Judge Trask stated: "Unlike *Reitman*, there has been no finding that it was the intent of the State in passing § 9503 to authorize any conduct that would violate the Fourteenth Amendment." 492 F.2d at 333.

49. The *Adams* court stated:

> And unlike racial discrimination cases in general, which have evidenced a pattern of intentional indirect circumvention of constitutional rights, these creditor remedies were based on economically reasoned grounds of very long standing, which appear to have been the topic of extensive research and legislative investigation.

Id. (footnotes omitted).

The position taken in *Adams* is consistent with that of several other circuits which do not recognize racial discrimination challenges raised in equal protection cases as precedent for solving the threshhold state action issue raised when other constitutional rights are involved. *See, e.g.*, Parks v. "Mr. Ford," 386 F. Supp. 1251, 1266 (E.D. Pa. 1975).

50. 492 F.2d at 330.

51. 365 U.S. 715 (1961).

52. 407 U.S. 163 (1972).

53. 492 F.2d at 335 n.31.

on *Hall*. The *Adams* court rejected the *Hall* public function test in the context of the facts of the instant case, finding *Hall* inapposite on two grounds. First, the property seized in *Hall* belonged to the boarder, while title to the property repossessed in *Adams* was subject to the defendant's security interest established by agreement between the parties.[54] Thus, in *Adams*, the property was the subject of the debt, whereas in *Hall*, it bore no relation to the debt. Second, the innkeeper in *Hall* invoked procedures specifically created by statute in order to seize the boarder's property, while the creditor in *Adams* employed a traditional private remedy.[55] Execution of a lien, the procedure prescribed in the statute involved in *Hall*, had historically been a function of the state of Texas, whereas repossession was traditionally a procedure agreed to and executed by private individuals.[56] Because the statute codified preexisting rights, the *Adams* court concluded "that state enforcement procedures, applied neutrally, will not alone rise to the level of state action absent a showing that a state in applying its law is privy to a private party's discriminatory purpose. . . ."[57]

D. THE *Culbertson* DECISION

In *Culbertson v. Leland*,[58] the defendant, manager of a Phoenix, Arizona hotel, seized the plaintiffs' personal possessions because their rent was overdue. Arizona's Innkeepers' Lien Statute[59] authorizes an innkeeper to impose and execute a lien

54. *Id.* at 336.

55. *Id.*

56. The *Adams* court stated: "[I]t does not appear likely that the Fourteenth Amendment, when written, was intended to eliminate summary self-help in light of the prevailing use of peaceful repossession." *Id.* at 337 (footnote omitted).

57. *Id.* at 337.

58. 528 F.2d 426 (9th Cir. Oct., 1975) (per Weigel, D.J.). The Culbertsons rented their hotel room for $20 per week. After several weeks of paying their rent on time, they failed to pay one week's rent and were evicted by the manager, Alice Leland. At the time of eviction, she seized their possessions remaining in the room as security for the unpaid rent. *Id.* at 427. The Culbertsons will hereinafter be referred to as "boarders," even though they technically had been evicted before the seizure and subsequent litigation.

59. ARIZ. REV. STAT. § 33-951 (1956) provides:

> Hotel, inn, boarding house, lodging house, apartment house and auto camp keepers shall have a lien upon the baggage and other property of their guests, boarders or lodgers, brought therein by their guests, boarders or lodgers, for charges due for accommodation, board, lodging or room rent and things furnished at the request of such guests, boarders

upon the personal property of a boarder whose rent is in arrears; the lienor need not provide the boarder with notice or an opportunity to be heard prior to execution of the lien. Following the seizure of their property, the plaintiffs brought an action in the federal district court under section 1983. They claimed that execution of the statutory inkeepers' lien without prior notice and hearing deprived them of their fourteenth amendment right to due process of law. The district court granted the defendant's motion to dismiss, finding that she did not act under color of law.[60]

On appeal, the Ninth Circuit reversed. The court found that the state statute provided the sole authority for the seizure which would have been illegal at common law. Consequently, the court determined that Arizona's involvement in the seizure was significant and held that the defendant's actions were performed under color of state law.[61] To reach its conclusion, the *Culbertson* court relied primarily on the analysis promulgated in *Adams*.

The Ninth Circuit found the facts of *Culbertson* distinguishable from those of *Adams*. Writing for the court, Judge Weigel noted that state action was not present in *Adams* because the statute involved "merely codified a right already present in the common law,"[62] a right which was "essentially 'a private remedy rather than a delegated state power'."[63] Judge Weigel reasoned that:

> The *Adams* holding is limited to repossession of a chattel subject to a specific security agreement. When a creditor, acting solely on the authority of the statute, takes possession of a debtor's property which is unrelated to the debt and which is not subject to prior contractual agreement, we cannot say that *Adams* dictates the conclusion that no state action is involved.[64]

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or lodgers, with the right to possession of the baggage or other property until the charges are paid.

60. After suit was filed, defendant Leland abandoned her claimed lien and returned the plaintiffs' property. Therefore, the district court also held that since the defendant no longer asserted a claim and had returned plaintiffs' possessions, the challenge to the statute was moot. On appeal, however, the court held that dismissal for lack of jurisdiction on grounds of mootness was error, since a damage claim remained. 528 F.2d at 428.

61. *Id.* at 432.

62. *Id.* at 429.

63. *Id.*, *quoting* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 326 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

64. 528 F.2d at 429.

Although it restricted the specific holding of *Adams* to repossessions pursuant to contractual agreement, the *Culbertson* court determined that the prior Ninth Circuit decision identified the proper approach for resolution of the state action issue. Consequently, the court concluded that, as in *Adams*, the elements of the case must be examined to determine whether the state of Arizona had significantly involved itself in the conduct of the innkeeper in the instant case.[65] The *Culbertson* court then explored the three factors it deemed critical to disposition of the state action issue.

Rights at Common Law

The court began its analysis by examining the lien rights of innkeepers at common law.[66] The *Culbertson* opinion addressed the question of whether the Arizona lien statute represented a codification of the common law rights of innkeepers. The court recognized that many circuit courts of appeals regard the creation of rights not extant at common law as an indication of the presence of state action.[67]

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65. *Id.*

66. *See generally* Klim v. Jones, 315 F. Supp. 109, 118-20 (N.D. Cal., 1970), and authorities cited therein. In *Klim*, the court declared the California Innkeepers' Lien Statute unconstitutional.

67. 528 F.2d at 431. *See* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). *See also* Gibbs v. Titleman, 502 F.2d 1107, 1111 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974) (self-help repossession existed as private remedy at common law; therefore, no state action found regarding statute permitting self-help repossession of automobiles subject to security interests); Shirley v. State Nat'l Bank, 493 F.2d 739, 744, 745 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (statute permitting self-help creditor repossession without due process requirements upon default by purchaser under a retail installment contract was codification of common law; therefore, no state action).

The Supreme Court has not directly addressed and resolved the issue of whether derogation from common law is a relevant factor to consider when deciding the presence of state action. However, in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), Justice Stewart concurred with the finding of state action in Justice Clark's lead opinion, but only because the state of Delaware had authorized racial discrimination by restaurant proprietors by statute. *Id.* at 726-27 (Stewart, J., concurring). Justice Frankfurter, in dissent, claimed that had he the opportunity to analyze the Delaware statute involved in terms of the reasoning employed by Justice Stewart, he would come to the opposite conclusion—that the statute "was merely declaratory of the common law and did not give state sanction" to racial discrimination. *Id.* at 727. Justice Harlan, in dissent, stated that the enactment of the statute alone would be state action to satisfy fourteenth amendment reguirements unless the state, by enacting the statute, meant only to codify the existing common law, "and only then would the question of 'state action' be presented in full-blown form." *Id.* at 729-30. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Justice Rehnquist commented that Metropolitan's right to terminate service for nonpayment had existed at common law before the advent of the

The Ninth Circuit panel concluded that the Arizona lien statute affords innkeepers a right which did not exist at American common law.[68] To reach this result, the court explored the origins of innkeepers' liens at English common law. Historically, innkeepers were obligated to accommodate all travelers and were strictly liable to their guests for the safekeeping of their belongings.[69] The innkeepers' lien on the property of guests existed concurrently with this absolute liability.

Judge Weigel determined that the concept of the innkeepers' lien was recognized by the American common law concomitantly with the strict liability imposed on innkeepers.[70] Further, in the

disputed regulation. *Id.* at 354 n.11. The Supreme Court has, therefore, indicated that it could consider the relationship of a statute to the common law a viable factor in determining the state action issue.

68. *Contra*, Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150, (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1143 (1976); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975). The First and Seventh Circuits were the only other circuit courts of appeals to address the common law issue specifically in the context of actions brought by plaintiffs pursuant to section 1983 challenging the statutory innkeepers' liens on due process grounds. They both expressly rejected the argument that the statutory lien afforded innkeepers a right which did not exist at American common law and, therefore, was a factor to be considered in determining state action.

The *Davis* court was not persuaded by the fact that the Chief Justice of the Boston Housing Court had recently held the same lien statute unconstitutional because it created rights which did not exist at common law. *See* Porter v. Fleischhacker, No. 00539 (Boston Housing Ct., Jan. 15, 1975). Likewise, the *Anastasia* court was not persuaded by the fact that the United States District Court for the Northern District of Illinois had previously held that seizure of property pursuant to the same statutory lien was unconstitutional. *See* Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972), which may have been overruled sub silentio by *Anastasia*. *See* 527 F.2d at 154 n.13.

Both the First and Seventh Circuits dismissed the plaintiffs' reliance on Reitman v. Mulkey, 387 U.S. 369 (1967), by distinguishing the constitutional amendment involved in *Reitman*. 512 F.2d at 203 n.4; 527 F.2d at 155-56. For a discussion of *Reitman* see text accompanying notes 21-23 *supra*. Some courts have accepted *Reitman* as authority for finding state action within the context of statutory lien challenges. *Compare* Palmer v. Columbia Gas, Inc., 479 F.2d 153, 163 (6th Cir. 1973) (*Reitman* applicable to statutes authorizing violations of Constitution), Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917, 919 (D. Mass. 1973) (*Reitman* encompasses statute changing common law), Collins v. Viceroy Hotel Corp., 338 F. Supp. 390, 394 (N.D. Ill. 1972) (*Reitman* applicable where state by its affirmative action has made deprivations of due process legally possible), Klim v. Jones, 315 F. Supp. 109, 114 (N.D. Cal. 1970) (*Reitman* clear authority for jurisdiction for section 1983 challenge to California Innkeepers' Lien), *with* Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974) (*Reitman* not applicable to case dealing with bankers' set-off), Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1973) *cert. denied*, 419 U.S. 1009 (1974) (*Reitman* concerned only with constitutional right of state to discriminate).

69. 528 F.2d at 429-30.

70. In reaching this conclusion, Judge Weigel relied primarily on Hogan, *The Inn-*

United States, "hotel, boardinghouse and lodging house keepers had no absolute duty to accept all transient guests and keep their belongings safe; therefore they had no common law lien against those belongings."[71] Consequently, the court concluded that the Arizona innkeepers' lien was "purely statutory" in nature, suggesting that state action existed. The court supported this conclusion by noting that defendant Leland would not be recognized as an innkeeper at common law.[72]

Relationship of the Property to the Debt

Judge Weigel recognized that the common law analysis was not dispositive of the state action issue, although the conclusion that the defendant had acted pursuant to a lien "purely statutory" in nature increased the likelihood that state action was present.[73] Therefore, the court proceeded to consider another indicium of state action—the relationship of the property seized to the underlying debt. According to *Culbertson*, the *Adams* holding has been broadly accepted as limited to situations in which the creditor holds a purchase money security interest in the property repossessed.[74] To support this conclusion, the court relied on two Fifth Circuit cases, *James v. Pinnix*[75] and *Calderon v. United Furniture Co.*,[76] decided after both *Hall* and *Adams*. In each case the Fifth Circuit did not find state action because of the nature of the property repossessed. The Ninth Circuit distinguished *Hall* from *Adams* because, in the latter case, "the property seized was the property whose purchase had created the debt and in which the seizor had a security interest."[77] Thus, since both *James* and *Calderon* "left *Hall* intact" and distinguished *Adams*, the *Culbertson* court reasoned that the Fifth Circuit had limited the *Adams* holding to repossession cases where the property seized was related to the underlying debt.[78]

keeper's Lien at Common Law, 8 HASTINGS L.J. 33 (1956) and Note, 9 HARV. L. REV. 216 (1895). 528 F.2d at 430.

71. *Id.* at 430.

72. *Id.* at 431.

73. *Id.* Judge Weigel stated: "*Adams* appears to call for the foregoing investigation of the common law, and it suggests that state action is more likely found where the common law did not permit the action in question." *Id.*

74. *Id.* at 431, *citing* Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Bichel Optical Laboratories v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973).

75. 495 F.2d 206 (5th Cir. 1974).

76. 505 F.2d 950 (5th Cir. 1974).

77. *Id.*, *quoting* Calderon v. United Furniture Co., 505 F.2d 950, 951 (5th Cir. 1974).

78. 528 F.2d at 431.

Culbertson employed the Fifth Circuit factual distinction to bolster its finding of state action in the instant case on the basis of the public function theory. Judge Weigel explained that an individual seller retains a special interest in property specifically reserved as collateral for a debt; repossession of such property is "much more narrowly confined" than indiscriminate seizures "of property to satisfy a general debt."[79] Thus, repossession of a specific chattel is appropriately left to private individuals, as has traditionally been the practice. The *Culbertson* court, however, concluded that the general seizure of collateral, "because its extent is broad and undefined and because its impact is potentially much more severe, is the type of activity which is a function of the state and over which, ordinarily, the state has a monopoly."[80]

Private Contractual Remedies

The *Culbertson* analysis included a third and final factor: it examined the facts to determine whether a written agreement existed between the parties defining their respective rights and liabilities. In *Adams*, the parties had a contractual agreement concerning the property that was repossessed. The statute involved in *Adams* merely reiterated and confirmed the contractual arrangement of the parties; thus the *Culbertson* court concluded:

> Entirely apart from the statute, the repossession did no violence to the expectations of the debtor, nor did it deprive him of any rights which he had not already yielded voluntarily and for consideration. In that context the involvement of the state, through its statute, was nearly superfluous.[81]

In *Culbertson*, no such contract existed, and there was no indication that the plaintiffs consented to or had notice or knowledge of the fact that their property was subject to seizure at the time of eviction.

In addition, the defendant had no right to seize the plaintiffs' property independent of the statute because she was not a common law innkeeper.[82] Therefore, in the absence of both common law authority and a contractual agreement, the statute provided

79. *Id.*
80. *Id.*
81. *Id.* at 432.
82. *See* note 72 *supra* and accompanying text.

the sole authority for the seizure. Since "the statute was the *sine qua non* for the activity in question,"[83] the court found that Arizona had significantly involved itself in the seizure.

The Concurring Opinion

Judge Ely, concurring in the *Culbertson* holding,[84] rejected Judge Weigel's distinction between common law rights and additional rights created subsequently by statute. Judge Ely asserted that such a distinction "creates unfortunate anomalies"[85] and instead chose to rely on the broader public function principle expressed in *Hall*:

> In my view, the principle that has emerged from *Hall* is unquestionably sound. The state has, and must retain, a monopoly over the power to exercise a "roving commission to extract a debtor's goods to satisfy a separate debt. As held in *Hall* and recognized in *Adams*, such a power has traditionally reposed only in the officers of the state. Furthermore, I hold the firm conviction that the exercise of such a power is so fraught with dangers that it must be retained in the state so that it can be circumscribed by due process protections.[86]

Judge Ely noted that certain dangers are involved in the private seizure of property by a creditor, specifically, the possibility (1) that an invalid debt will lead to an unjustified seizure; (2) of concomitant violence if the debtor resists the taking of the property; (3) that the value of the property seized may greatly exceed the debt; and (4) that the property seized may be essential to the basic human needs of the debtor and his or her family.[87] He recognized that such dangers are inherent in any seizure of property, but maintained that they are increased when the state delegates the power to seize directly to the private creditor.

Judge Ely, relying principally on *Jackson v. Metropolitan Edison Co.*,[88] concluded that it provided ample authority to employ the

83. 528 F.2d at 432.

84. *Id.* at 432-35.

85. *Id.* at 435 n.5.

86. *Id.* at 433 (citation omitted).

87. *Id.* at 433-34.

88. 419 U.S. 345 (1974). Although in *Jackson*, the Court did not find state action with respect to a private utility company regulated by the state, it did not foreclose application of the public function doctrine. *See* notes 28-34 *supra* and accompanying text.

public function test employed in *Hall* to determine whether the acts of a private individual constitute state action.[89] Believing that the *Culbertson* facts came "squarely within the rationale of *Hall*,"[90] Judge Ely found that the actions of the defendant constituted state action.

The Dissenting Opinion

In his dissent,[91] Judge Choy recognized the potential for violence and invasion of privacy rights when individuals are delegated the power to seize property. He maintained, however, that these dangers are not diminished by a contractual agreement authorizing the seizure of specific property in which the creditor has a security interest, because the existence of the contract and the validity of the security interest could be disputed. Therefore, Judge Choy construed *Adams* expansively as holding that a state can authorize a creditor to seize the property of his or her debtor pursuant to a statutory lien without becoming significantly involved in the actions of the creditor.[92] "Where this can be done without a breach of peace," argued Judge Choy, "the creditor does not perform a public function so as to constitute state action."[93]

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89. Judge Ely stated: "I think it preferable to follow the approach taken in *Hall* and suggested in *Metropolitan Edison*, an approach which focuses upon the power or function being exercised in its relationship to the state, rather than to perpetuate common law distinctions which may have become obsolete." 528 F.2d at 435 n.5.

90. *Id.* at 434.

91. *Id.* at 435-37.

92. *Id.* at 436. Apparently, Judge Choy neglected the pertinent language of the Supreme Court in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). *See* discussion of *Mitchell* in note 4 *supra*. In *Mitchell*, the Court stated:

> Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property . . . Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

416 U.S. at 604. The language in *Mitchell* does not support Judge Choy's conclusion that *Adams* authorized the seizure in *Culbertson*. *Mitchell* placed heavy emphasis upon the secured nature of the goods seized, which shifted the possessory interests in favor of the creditor in a due process challenge to a prejudgment seizure. The property in *Culbertson* was unsecured and it bore no relation to the underlying debt. Following the rationale of *Mitchell*, the prejudgment seizure in *Culbertson* would be a clear violation of due process, notwithstanding the state action issue, as the innkeeper had no "current, real interests" in the property which was "exclusively" that of the boarders.

93. 528 F.2d at 436.

In contrast to his broad reading of *Adams*, Judge Choy agreed with *Hall*'s application of the public function test only because the landlady in that case entered the tenant's residence before seizing the tenant's television set. In such circumstances, where a "grave threat to privacy interest occasioned by permitting a creditor to intrude upon the residential privacy of the debtor in quest of collateral . . ."[94] could result, Judge Choy agreed that a finding of state action was mandated. He maintained, however, that no intrusion occurred in *Culbertson* because the landlady had entered the Culbertson's apartment after lawfully terminating their tenancy. Judge Choy regarded the seizure as the retention of a bailment rather than the exercise of a public function. Consequently, he found that no state action was present in the actions of the defendant Leland.

E. *Melara v. Kennedy*: Recent Analysis of the State Action Question

On its face, *Culbertson* appears to embrace both the significant involvement and public function theories as means to approach the issue of state action in the context of statutory innkeeper liens. However, Judge Choy's subsequent opinion for the Ninth Circuit in *Melara v. Kennedy*[95] suggests an extremely narrow reading of the *Culbertson* holding as a basis for finding state action.

In *Melara*, the defendant, a van and storage company, planned to conduct an extra-judicial sale of plaintiff's stored goods pursuant to a warehouse lien enforcement provision of the California Commercial Code.[96] Plaintiff Melara brought a section 1983 action to enjoin the proposed sale, asserting that such extra-judicial action violated the due process clause of the fourteenth amendment.[97] The district court dismissed on the ground that the plaintiff failed to state a cause of action cognizable under section 1983. On appeal, the Ninth Circuit Court affirmed, holding that an extra-judicial sale to enforce a warehouse lien is not action under color of state law.[98] In so holding, Judge Choy recognized both *Adams* and *Culbertson* as the controlling Ninth Circuit decisions dealing with the state action issue in this context.

94. *Id.* at 437.
95. 541 F.2d 802 (9th Cir. Aug., 1976) (per Choy, J).
96. Cal. Com. Code § 7210 (West 1964).
97. 541 F.2d at 803.
98. *Id.* at 808.

With respect to *Culbertson*, Judge Choy noted that none of the three opinions in that case represented a majority of the court and thus concluded that there was little consensus with respect to "the applicable standard to be used and what factors were to be considered in determining whether private conduct qualified as state action."[99] Stating that there is no specific formula for defining state action, he proceeded to summarily dispose of the plaintiff's arguments in an opinion which essentially expanded his dissent in *Culbertson*. Judge Choy began by identifying several factors as bearing on the question of significant state involvement in private activity: (1) the source of the authority for the private action; (2) the extent of state regulation of the private activity; (3) the extent to which the state and the creditor received mutual benefits from the private action; (4) the relationship of the property seized to the underlying debt; and (5) the extent to which a state has delegated what has traditionally been a public function to private individuals.[100]

Relying on *Culbertson*, Judge Choy concluded that the fact that a private party acts pursuant to a statutorily created right unknown at common law is "of dubious worth."[101] Although the *Culbertson* decision indicated that the source of the authority alone is not determinative of the state action issue,[102] the court's thorough analysis suggests that it is a factor of some significance. However, Judge Choy's approach in *Melara* was to consider each factor individually and to discard it if it did not prove dispositive, rather than "sifting facts and weighing circumstances,"[103] as mandated by the Supreme Court.

Judge Choy relied on *Adams* for the proposition that state regulation of private conduct is not a basis for finding significant state involvement "where the creditor has not requested help from the state and where there has been no direct action or review

99. *Id.* at 805 n.4.

100. *Id.* at 805.

101. *Id.*

102. 528 F.2d at 431.

103. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). Judge Hufstedler, dissenting in *Adams*, recognized this approach:

> Although each aspect of California's participation, considered alone, might be inadequate to compel a state action conclusion, the combination of its activities draws the state well within the state action ambit.

492 F.2d at 340.

by state officials."[104] Finding that there was no creditor request or direct action and review in *Melara*, Judge Choy disposed of the state regulation factor. However, an essential part of this analysis in *Adams* was the court's conclusion that the self-help remedy of repossession was a "recognized and permitted . . . part of the common law."[105] Thus, the *Adams* court performed an integrated analysis. In view of this approach taken in *Adams*, Judge Weigel's direct reliance thereon in *Culbertson*[106] and the mandate of the Supreme Court in *Burton*, *Melara's* isolation and summary dismissal of each operative factor appears to be unsound.

The greatest impact of *Melara* inheres in its flat rejection of the application of the public function theory to statutory liens. Judge Choy stated that the *Hall* doctrine had never been accepted in the Ninth Circuit.[107] He noted that although Judge Ely had adopted it in his *Culbertson* concurrence, the issue had not been specifically addressed in Judge Weigel's opinion for the court.[108]

F. The *Culbertson* Approach Analyzed

Although the Ninth Circuit reached a desirable result in *Culbertson*, the court's approach of examining common law antecedents, the relationship of the property seized to the debt and private contractual rights limited the potential impact of the decision. *Melara* clearly demonstrated the infirmity of an analysis in which each of these factors is considered in isolation. Reliance on common law antecedents allows automatic dismissal of due process challenges of statutes which simply codify existing rights, without mandating examination of the actual effect of the action taken pursuant to the statute. Similarly, whenever property seized pursuant to a statutory lien bears some relationship to the debt and/or a private contract exists, the courts, relying on *Culbertson*, can immediately avert a due process challenge by claiming that state action is not present.

In contrast, the public function analysis, in which each of these three factors is weighed but no single element is outcome determinative, would provide a more realistic and consistent assessment of the state action issue. Although Judge Choy declared

104. 541 F.2d at 806.
105. 492 F.2d at 330.
106. *See* notes 62-65 *supra* and accompanying text.
107. 541 F.2d at 807.
108. *Id.* at 807 n.10.

in *Melara* that the public function doctrine had never been accepted in the Ninth Circuit, the theory was implicitly adopted by the court in *Adams*,[109] was a factor in Judge Weigel's analysis in *Culbertson*,[110] was the sole basis of Judge Ely's concurrence[111] and was also recognized by Judge Choy in his *Culbertson* dissent.[112] In addition, the Supreme Court recognized the existence of the public function theory in *Jackson v. Metropolitan Edison Co.*[113] Uniform application of the public function doctrine would insure more equitable results in the current spate of litigation challenging statutory liens on due process grounds. The broad underlying principles of the doctrine should encompass private self-help repossessions effected pursuant to statutory commercial code liens, as well as private execution of statutory innkeepers' liens.[114]

109. *See* 492 F.2d at 335-36.

110. *See* 528 F.2d at 431.

111. *See id.* at 432-35.

112. *See id.* at 435-37.

113. 419 U.S. at 352-53.

114. *See, e.g.*, Shirley v. State Nat'l Bank, 493 F.2d 739, 745-47 (2d Cir.) (Kaufman, J., dissenting), *cert. denied*, 419 U.S. 1009 (1974), on which Judge Ely relied in his concurring opinion in Culbertson v. Leland, 528 F.2d 426, 433 n.2 (9th Cir. Oct., 1975). In *Shirley*, the Second Circuit rejected plaintiff's section 1983 due process challenge of a Connecticut statute substantially similar to the commercial code statute involved in *Adams*. Disputing the majority's conclusion that the creditor's seizure of the plaintiff's automobile was not state action, Chief Judge Kaufman argued that all "lawful nonconsensual taking of property is a uniquely governmental function." 493 F.2d at 745. This principle was derived from Boddie v. Connecticut, 401 U.S. 371 (1971), in which Justice Harlan stated:

> It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. . . . Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.

Id. at 375, *quoted in* 493 F.2d at 747.

Judge Hufstedler, in her dissent from denial of hearing en banc in Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 340-42 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974), also argued that private self-help remedies exercised pursuant to statute are public functions: "Demonstration of governmental interest . . . of the specific activity, is the public function indicium." 492 F.2d at 342. She clearly expressed the relationship of the public function theory of state action to self-help repossession:

> California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasi-judicial officers. The state cannot avoid the impact of the Fourteenth Amend-

Self-Help Remedies and the Public Function Theory

Because of the Supreme Court's mandate of an ad hoc approach to the issue of state action,[115] public function analysis entails an inherent balancing and judicial accommodation of the conflicting interests involved.[116] To the extent that a court will openly engage in a balancing process, the outcome of any state action question will be influenced by public policy considerations.[117]

Two paramount interests are asserted in favor of leaving self-help remedies in the hands of private parties without subjecting them to due process requirements. First, it is argued that the costs of requiring preexecution judicial proceedings exceed the benefits.[118] Courts are reluctant to impose constitutional restrictions when self-help remedies are purportedly more efficient, less costly and more effective than legal proceedings.[119] Second, it is contended that finding state action in the invocation of statutes authorizing private self-help remedies portends inclusion of all private conduct that is the subject of state legislation within the fourteenth amendment, thereby eroding the fundamental principles of federalism by improperly allocating responsibility between state legislatures and the federal judiciary.[120]

> ment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees.

Id.

115. *See* notes 18-20 *supra* and accompanying text.

116. Note, *State Action*, *supra* note 9, at 841-46.

117. Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 963 (1974).

118. *See* Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503. For a critical examination of Professor Johnson's cost-benefits analysis see Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973).

119. *See* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 810 (1975); Comment, *Power of Sale Foreclosure After* Fuentes, 40 U. CHI. L. REV. 206, 206-14 (1968). *See also* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 333 n.25 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

120. Professors Burke and Reber claim that the reasons for the state action doctrine reflect the purposes of the fourteenth amendment. In addition to preserving federalism and properly allocating judicial and legislative functions, these purposes include protection of individuals from arbitrary government interference and protection of private structuring of relationships. Burke & Reber, *supra* note 11, at 1012-18.

Extension of due process requirements to private persons exercising self-help remedies pursuant to statutory liens will not seriously impede either of the latter two objectives. Debtors deserve as much protection from arbitrary government interference as do creditors who act pursuant to terms prescribed by state legislatures. The legislative

Although the cost-benefit argument has merit, the economic interest of the state and creditors in retaining self-help remedies unhampered by costly due process requirements must be balanced against debtors' expectations that their possessory interest in property may not be infringed in the absence of consent or judicial intervention.[121] Particularly with respect to innkeepers' liens, boarders have a privacy interest which includes the expectation that the state will not sanction the use of private force to seize personal property without imposing due process protections.[122] Such indiscriminate seizures can have a particularly grievous impact when the items seized are greater in value than the debt owed or are essential to the physical welfare of a debtor.[123]

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mandate grants creditors broad discretion in the exercise of their statutory rights. Consequently, when a debtor does not receive even minimal due process protections during the self-help process authorized by the state, he or she certainly is not free from arbitrary government interference.

Similarly, debtors and creditors do not operate in positions of equal bargaining power when they structure their private relationships, regardless of contractual agreements with debtors. When creditors act pursuant to statutory self-help remedies, they have the final authority to determine whether the facts exist which would entitle them to the remedy sought. In addition, the primary impact of the self-help remedies exercised pursuant to statutory liens is on those who are of extremely limited financial means and are least able to economically withstand the distraint procedure. *See, e.g.*, Klim v. Jones, 315 F. Supp. 109, 122-23 (N.D. Cal. 1970), in which the court stated that the California statutory innkeeper lien has primary impact on those of extremely limited means and often attaches to all of the boarder's worldly goods.

121. *See* Yudof, *supra* note 117, at 980-81. Professor Yudof reasoned:

> The problem is not simply whether judicial repossession is more expensive than private repossession, or even whether judicial repossession confers economic benefits on debtors as a group equivalent to the additional costs incurred by them; the problem is whether the inevitable additional costs are worth it, in the light of the individual rights which are protected. . . . The due process balance cannot be drawn solely in economic terms; rather, intangible factors must be taken into account, the most important of which is the strength of our ethical belief, grounded in the Constitution, that a person should not be deprived of his possessory interest in property without notice and an opportunity for a hearing. Cost is not irrelevant, but it must be analyzed within the broader framework.

Id. at 970-71 (footnotes omitted).

122. *Id.* at 978-80.

123. *Culbertson* provides a potent illustration of such a circumstance. Mrs. Leland seized Helen Culbertson's specially-processed diabetic food, prescription medicine for her eyes, and medicine prescribed for her seeing-eye dog, as well as Charles Culbertson's prescription medicine and special clothing that was required for his job. The nature of the property seized prompted Judge Ely to comment:

> None of these items could have had more than minimal resale value; consequently, they could have been of little use to Leland in satisfying the Culbertsons' alleged debt. But they

The interests of both creditor and debtor can be equitably accommodated by imposing due process requirements on private seizures of property executed pursuant to statutory liens. A creditor's economic interest would be protected by the existence of the lien. Similarly, a debtor's property and privacy interests would be satisfied by the imposition of judicial process prior to any seizure. This was precisely the result in *Culbertson*; the court did not abolish the innkeepers' lien, but simply remanded the case in order to condition the statutory lien with appropriate procedural safeguards.[124] In addition, requiring innkeepers and creditors who exercise self-help remedies pursuant to statutory liens to comply with the procedural protections of notice and hearing will not threaten the balance between the federal judiciary and state legislatures. Although deference to the popularly elected political body is a noble ideal, minority groups are less likely than popular majorities to be represented effectively in the political process.[125] Consequently, the task of protection falls upon the judiciary.[126] Objection to judicial intervention based upon the argument that the legislature is the more democratic arena for decision of public issues ignores the mandate that the federal courts must offer protection against the infringement of individual constitutional rights of all citizens, including those who are inadequately represented in state legislatures. Finally, a judicial determination that a private party's actions taken pursuant to a statutory lien are equivalent to those of the state does not threaten the tenets of federalism; it simply requires the state legislature to provide a creditor with a means of exercising the lien which also meets the standards of procedural due process.[127]

G. Conclusion

The courts of appeals that have dealt with the *Culbertson* issue are evenly divided as to its resolution. To date, the Supreme

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> were of critical and undeniable importance to the Culbertsons. I have no doubt that the items would have been exempt from any execution ordered by a state court.

528 F.2d at 434 n.3.

124. *Id.* at 432.

125. *See* Choper, *On the Warren Court and Judicial Review*, 17 Cath. U. Amer. L. Rev. 20, 40 (1967).

126. *See* Yackle, *supra* note 9, at 572-73.

127. The legislative response to the recent judicial invalidation of the California garagekeeper's lien sale statute (*see* Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974)) indicates that such action is feasible. *See* Cal. Civ. Code §§ 3071-3073 (West Supp. 1976).

Court has declined to address the question of whether statutory innkeeper liens entail state action, leaving the issue largely unsettled. In the interim, it is essential that debtors pursue such due process challenges in order to insure that the federal courts retain their proper role as the primary guardians of constitutional rights.

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