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Chapter 12: Constitutional Law

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CHAPTER 12

Constitutional Law

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§12.1. Prejudgment Possessory Remedies and Due Process: Review of Supreme Court Decisions. In the last few years, federal and state courts across the country, including those in the Commonwealth, have struggled to determine the meaning, scope, and application of the United States Supreme Court's decisions on the requirements of due process in the context of prejudgment possessory remedies.[1] This is no mean feat since the Supreme Court, for the third time in fewer years, has made conflicting or, at best, finely distinguished statements on the subject.[2] A short review of these recent Supreme Court pronouncements on prejudgment possessory remedies (*e.g.* garnishment, replevin, sequestration, and attachment) is essential to an appreciation of the two pertinent developments in the Massachusetts courts during the *Survey* year[3] in *McIntrye v. Associates Financial Services Co., Inc.*[4] and *Porter v. Fleischhacker.*[5]

In 1975, the United States Supreme Court held the Georgia prejudgment garnishment procedures unconstitutional in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[6] The opinion in *North Georgia* relied

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§12.1. [1] *See, e.g.*, Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Younger v. Plunkett, 395 F. Supp. 702 (E.D. Pa. 1975); Girley v. Wood, 525 S.W.2d 454 (Ark. 1975); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues,* 26 HASTINGS L. REV. 383 (1974); Note, *Changing Concepts of Consumer Due Process in the Supreme Court– The New Conservative Majority Bids Farewell to Fuentes,* 60 IOWA L. REV. 262 (1974).

[2] *Compare* Fuentes v. Shevin, 407 U.S. 67 (1972), *with* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) *and* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). See text at notes 15-19, *infra.*

[3] See §§ 12.2. and 12.3, *infra.*

[4] 1975 Mass. Adv. Sh. 1490, 328 N.E. 2d 492.

[5] No. 00538 Eq. (Boston Housing Ct., Jan. 15, 1975).

[6] 419 U.S. 601 (1975).

expressly[7] on the 1972 decision in *Fuentes v. Shevin,*[8] where the Court struck down, as violative of due process of law, Florida and Pennsylvania replevin statutes.[9] Generally, these statutes permitted the repossession of collateral upon a debtor's alleged default in payments, without providing the debtor prior notice or an opportunity for a hearing.[10] *North Georgia* would have been an unremarkable application of precedent were it not for the fact that the vitality of *Fuentes* had been directly called into question in 1974 by the Court's intervening decision in *Mitchell v. W.T. Grant Co.*[11]

In *Mitchell,* the Court considered the constitutionality of Louisiana sequestration procedures, whereby a creditor upon *ex parte* application without notice to the debtor or an opportunity for a hearing, could obtain a writ of sequestration (the civil law equivalent of replevin).[12] The Court upheld the challenged Louisiana provisions, distinguishing *Fuentes* on the grounds that under the statutory scheme presented in *Mitchell,* unlike that considered in *Fuentes:* (1) the creditor could not prevail by making bare, conclusory allegations, but had to file an affidavit stating specific facts warranting sequestration;[13] (2) the state official issuing the writ was a judge rather than a court clerk;[14] and (3) the facts relevant to obtaining a writ of sequestration were narrowly confined to the existence of a vendor's lien and the issue of default, rather than the broad "wrongfully detained" standard applicable to replevin in *Fuentes.*[15] Justice Stewart, who wrote the majority opinion in *Fuentes,* found the distinctions advanced in *Mitchell* unpersuasive and concluded that *Fuentes* had been overruled.[16]

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[7] *Id.* at 605.

[8] 407 U.S. 67 (1972).

[9] *Id.* at 96.

[10] *Id.* at 80.

[11] 416 U.S. 600, 611 (1974).

[12] *Id.* at 603-07.

[13] *Id.* at 616.

Id. Although the Louisiana statutory scheme, LA. CODE CIV. P. ANN., ART. 281-3 (1961), provided in general for the issuance of writs by clerks of court, in the Orleans Parish, where the writ in *Mitchell* was obtained, issuance had to be made by a judge. *See* 416 U.S. at 606 n.5.

[15] 416 U.S. at 616-20. *See* Cronin, *Constitutional Law,* 1974 ANN. SURV. MASS. Law § 10.6, at 210-15.

[16] *See* 416 U.S. 600, 632 (Stewart, J., dissenting). Although admitting that the standardized Louisiana sequestration form called for more detailed information than that required by the Florida and Pennsylvania replevin statutes, Justice Stewart stressed that this procedure still tested "no more than the strength of the applicant's own belief in his rights." *Id.* at 632. He also found the second distinction of little constitutional significance, since "[w]hether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after which the issuance of the summary writ becomes a ministerial act." *Id.* at 632-33. Finally, Justice Stewart aptly noted that the issues to be resolved in both cases—the existence of a security interest and the debtor-vendee's default—were identical. *See id.* at 633.

As the Court stated in *Fuentes,* the relative complexity of the issues in dispute does not affect the right to a prior hearing: "The issues decisive of the ultimate right to con-

As if to vindicate the claim that *Fuentes* had been distinguished in *Mitchell,* and not overruled,[17] Justice White, writing for the majority in *North Georgia,* found that the Georgia statutory scheme contained certain defects that were not present in the Louisiana provisions considered in *Mitchell:* (1) the writ in Georgia could be obtained on the strength of an affidavit containing only conclusory allegations; (2) the writ was issuable by a court clerk or other authorized officer without participation by a judge; and (3) there was no provision for an early postseizure hearing at which the debtor could challenge the validity of the garnishment, the debtor being required to file a bond in order to dissolve the garnishment.[18]

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tinued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality, or scheduling of a prior hearing. . . . But it certainly cannot undercut the right to a prior hearing of some kind." 407 U.S. at 87 n. 18.

In unusually pointed language, Justice Stewart, concluding that *Mitchell* was constitutionally indistinguishable from *Fuentes* and that the Court had simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent, remarked that "the only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court." 416 U.S. at 635 (Stewart, J., dissenting). In light of this language, it is little wonder that the bar assumed that *Fuentes* had been overruled by *Mitchell,* as suggested by Justice Stewart (joined by Justice Douglas and Marshall) in a dissenting opinion, *id.* at 635, and Justice Powell, in a concurring opinion. *Id.* at 623.

The earlier *Fuentes* decision had been decided by a four-to-three vote. Justices Powell and Rehnquist were not members of the Court when the case was argued, and thus did not participate in its "consideration or decision." *Id.* at 635-36 n.8 (Stewart, J., dissenting), *citing Fuentes,* 407 U.S. at 97. Justice White, joined by the Chief Justice and Justice Blackmun, wrote the dissenting opinion in *Fuentes.* The 5-4 majority opinion in *Mitchell* consisted of the *Fuentes* dissenters and Justices Powell and Rehnquist.

[17] This prompted Justice Stewart to file the following droll concurrence in *North Georgia:* "It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . seems to have been greatly exaggerated. Cf. S. Clemens, cable from Europe to the Associated Press, quoted in 2 A. Paine, Mark Twain: A Biography 1039 (1912)." 419 U.S. 601, 608 (Stewart, J., concurring). Justice Blackmun, joined by Justice Rehnquist, in dissent, was in a less humorous mood. He took the opportunity to deliver a sharp criticism of the Court for having decided *Fuentes,* "with its 4-3 vote by a bobtailed Court," when the new judicial appointments "were on hand and available to participate on reargument." *Id.* at 615, 616 (Blackmun, J., dissenting). Justice Powell also expressed disagreement with the majority opinion insofar as it "appears to resuscitate *Fuentes v. Shevin.*" *Id.* at 609.

[18] 419 U.S. at 606-07. Justice White declared further that the Georgia prejudgment garnishment statutes were vulnerable to constitutional attack for the same reasons that appeared in *Fuentes:*

> Here, a bank account, surely a form of property, was impounded and, . . . put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk *without notice or opportunity for an early hearing and without participation by a judicial officer.*

Id. at 606 (emphasis added). Under the Georgia law, a creditor or his attorney could file an affidavit before a clerk of court or other authorized officer stating the amount claimed to be due and further stating that the affiant had reason to apprehend the loss of the same or some part thereof if garnishment should not issue. The creditor was required to file a bond in a sum double the amount sworn to be due, and the debtor was permitted to dissolve the garnishment by filing a bond conditioned to pay any judgment the creditor might recover. *Id.* at 604.

Notwithstanding the six-to-three decision in *North Georgia,* with Justices White and Powell joining the four Justices of the *Fuentes* majority, it is far from clear that *Fuentes* has been completely revived.[19] Concentration on the opinions of the two Justices who have been in the majority in both *Mitchell* and *North Georgia,* the so-called swing votes of Justices White and Powell, might yield some predictive potential.[20]

The views of Justices White and Powell coincide with one another and differ from those of the *Fuentes* majority in two significant respects. First, both Justice White and Justice Powell appear to believe that prejudgment attachment remedies meet constitutional standards by providing a prompt and adequate postattachment hearing, at which the claimant would be required to demonstrate at least probable cause for the attachment of the property of another. Justice Powell expressed himself on this point in the following terms:

> The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing. . . . Moreover, the Georgia statute contains no provision

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[19] Still, matters may not be as bad as Justice Blackmun suggests:

> [W]e [are] . . . immersed in confusion, with *Fuentes* one way, *Mitchell* another, and now this case decided in a manner that leaves counsel and the commercial communities in other States uncertain as to whether their own established and long-accepted statutes pass constitutional muster with a wavering tribunal off in Washington, D.C.

Id. at 619 (Blackmun, J., dissenting).

[20] Other distinctions have been drawn by various justices but none of these appear to have the assent of a majority coalition. For example, Justice White's view that it makes a difference that a judicial officer, rather than a clerk, issue the writ was rejected by the *Fuentes* majority, (416 U.S. at 632, Stewart, J., dissenting), by Justice Powell (419 U.S. at 611 n.3, concurring), and by the three dissenters in *North Georgia* (419 U.S. at 619, Blackmun, J., dissenting).

The effort to draw a distinction between commercial interests and personal interests (e.g. wages in *Sniadach)* or between parties of equal bargaining power and victims of contracts of adhesion, was rejected by the majority in *North Georgia,* 419 U.S. at 608. In view of his concurring position in that case, it is doubtful whether Justice Powell could join the *North Georgia* dissenters in making something of that distinction. *See id.* at 619 (Blackmun, J., dissenting); *cf.* 416 U.S. at 628 n.3 (Powell, J., concurring).

Similarly, the requirement that the claimant post a security bond, though possibly a necessary condition, is plainly not a sufficient condition for a valid law. The majority opinion in *Fuentes* represents the likeliest view to be taken on this and other specific conditions or safeguards:

> The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

407 U.S. at 83-84.

> enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact, nor any indication that the garnishor bears the burden of proving entitlement to the garnishment.[21]

Justice White's position on this question cannot be established with equal certitude. One of the grounds upon which he distinguished *Mitchell* from *North Georgia* is that in the former case the debtor is "expressly entitled . . . to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued."[22] Nevertheless, Justice White does cite with approval the language from *Fuentes* that states "[t]he Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property."[23] Perhaps the critical indication of his individual view, however, is to be found in his careful choice of language in the holding of the *North Georgia* case.[24] He does not say "without notice or opportunity for a pre-attachment hearing." He says "without notice or opportunity for an *early hearing*."[25] Thus, it would appear that the "swing" Justices would find a prompt and adequate postattachment probable cause hearing an acceptable substitute for the requirement of a similar preattachment hearing.

The second point upon which these two Justices concur has not yet been recognized as an explicit ground for distinguishing among the cases, but its potential cannot be denied. According to both Justices, the requirements of due process may well depend on whether or not the claimant has a preexisting property interest in the property over which he seeks to assert control. This distinction is a central point in Justice White's dissent in *Fuentes*[26] and stands as a sort of preamble to his opinion for the Court in *Mitchell.*[27] Justice Powell demonstrated his belief in the importance of this distinction by relying upon it to distinguish both *Mitchell* and *Fuentes* from *Sniadach v. Family Finance*

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[21] 419 U.S. at 613 (Powell, J., concurring). *See also Mitchell,* 416 U.S. at 625 (Powell, J., concurring).

[22] 419 U.S. at 607.

[23] *Id.* at 606, *quoting Fuentes,* 407 U.S. at 86.

[24] 419 U.S. at 606. See note 18 *supra.*

[25] 419 U.S. at 606.

[26] 407 U.S. at 67, 102 (White, J., dissenting).

[27] 416 U.S. at 604.

> 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, and the definition of property rights is a matter of state law. 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.

Id.

Corp.:[28] "[*Sniadach*] is readily distinguishable from the instant case [*Mitchell*] where the creditor does have a pre-existing property interest as a result of the vendor's lien .... Thus, we deal here with mutual property interests, both of which are entitled to be safeguarded. *Fuentes* overlooked this vital point."[29]

Justice Blackmun's description of the state of matters after *North Georgia* may well be accurate: "[T]he Court now has embarked on a case-by-case analysis (weighed heavily in favor of *Fuentes* and with little hope under *Mitchell)* of the respective state statutes in this area. That road is a long and unrewarding one, and provides no satisfactory answers to issues of constitutional magnitude."[30] Yet, whatever criticisms may be levelled at *Fuentes, Mitchell,* and *North Georgia,* these three opinions, taken together with *Sniadach,* do not leave the road wholly uncharted.

§12.2. Prejudgment Possessory Remedies: Self-Help and State Action. Two cases dealing with the validity of landlords' power to distrain—*i.e.,* to exercise a possessory lien through seizure of—personal effects of lodgers, under provisions of the Massachusetts boardinghouse keepers lien statute,[1] were decided during the *Survey* year. The cases reached incompatible results. In one case, *Porter v. Fleischhacker,*[2] the Boston Housing Court found the statute, section 23 of chapter 255 of the General Laws, unconstitutional.[3] In the other case, *Davis v. Richmond,*[4] the United States Court of Appeals for the First Circuit declined to pass on the validity of the statute on the ground that the landlord's actions pursuant to section 23 did not constitute "state action."[5] Consequently, no question of constitutionality under the due process clause or of violation of federal law was presented.[6] *Davis* is the subject of an extended student comment, *infra,*[7] and will therefore only be referred to comparatively in connec-

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[28] 395 U.S. 337 (1969).
[29] 416 U.S. at 628 n.3 (Powell, J., concurring).
[30] 419 U.S. at 620 (Blackmun, J., dissenting).

§12.2. [1] G.L. c. 255, § 23.
[2] No. 00538 Eq. (Boston Housing Ct., Jan. 15, 1975).
[3] *Porter,* at 4.
[4] 512 F.2d 201 (1st Cir. 1975).
[5] *Id.* at 205.
[6] *Id.* The federal action was brought under 42 U.S.C. § 1983 (1970). *Id.* at 201. Thus, technically, it can be said that the question of requisite governmental action arose under the "color of law" language of § 1983. *See* Gibbs v. Titelman, 502 F.2d 1107, 1110 (3d Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 741 (2d Cir. 1974). As to whether this makes any difference, see the discussion in United States v. Price, 383 U.S. 787, 794 n.7 (1966). *See also* Klim v. Jones, 315 F. Supp. 109, 115 (N.D. Cal. 1970).
[7] See § 12.9 *infra.*

Differences over the validity of lodging house lien provisions are not exactly earth-shaking. The real significance of the debate, of course, is how it bears on socially and economically more important forms of self-help repossession, particularly repossession

tion with the discussion of *Porter* which follows.

The facts in *Porter* were simple. The plaintiff rented a furnished room on a weekly basis in the defendant's lodging house. When the plaintiff failed to return to the room for two weeks and missed three successive rental payments, the defendant entered the premises, changed the lock, and seized the personal effects of the plaintiff.[8] The defendant landlord refused to return the plaintiff's belongings until the rent arrears were paid. This was in accordance with the landlord's usual practice once he had determined that a lodger who owed rent had abandoned a room.[9]

The plaintiff brought a bill in equity in the housing court seeking the return of his property, damages, and declaratory relief.[10] He alleged that the failure to follow formal eviction procedures was a ground for relief,[11] and that the lockout, seizure, and subsequent refusal to return personal property constituted unfair and deceptive practices.[12] The court, finding that the plaintiff had abandoned the premises, denied all prayers for injunctive relief and damages.[13] It ordered the return of the personal belongings only upon posting of a bond, and ruled that the defendant's refusal to return the belongings prior thereto "was under color of law, i.e., G.L. c. 255, § 23 et seq.,"[14] and therefore "was not, . . . in violation of G.L. c. 93A."[15]

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of goods under U.C.C. § 9-503. *See, e.g.,* Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974).

Justice White in his dissenting opinion in Fuentes v. Shevin, 407 U.S. 67 (1972), leaves no doubt that the validity of self-help repossession looms behind the *Fuentes* case. *See id.* at 102 (White, J., dissenting) and see text at note 56 *infra.* See also note 59 *infra.*

[8] *Porter,* at 2.

[9] *Id.*

[10] *Id.* at 1, 3-4. Upon the posting of a bond by the plaintiff, the personal property was returned by the defendant. *Id.* at 3.

[11] *Id.* at 3. G.L. c. 239, § 1 *et seq.* provide summary eviction procedures in Massachusetts. Acts of 1970, c. 842, § 9 provides the relevant administrative eviction procedures in Massachusetts.

[12] *See Porter,* at 3-4. The plaintiff apparently based a part of his damages claim upon violation of the Massachusetts consumer protection laws, specifically G.L. c. 93A. *See Porter,* at 3-4.

[13] *Id.*

[14] The court in *Porter* described the nature and operation of G.L. c. 255 as follows:

> The lien created by § 23 is what is commonly called a possessory lien, i.e., the lien is perfected by the lienor taking possession of the property subject to the lien. The lien may be enforced, i.e., the property subject to the lien sold by court order and the proceeds applied to satisfy the underlying debt, pursuant to G.L., c. 255, §§ 26-29. The owner of the property subject to the lien may redeem it pursuant to G.L., c. 255, §§ 32, 33 and 36. G.L., c. 140, § 12 in part imposes criminal liability upon the lodging or boarding house tenant who removes his baggage and effects from the lodging or boarding house while a lien exists thereon for the proper charges due from him for fare and board furnished therein.

Porter, at 4-5.

[15] *Id.* at 3-4. The court apparently assumed that action taken under color of law, by definition, could hardly constitute an unfair and deceptive practice. *See id.*

If the case had ended there, it would have been hardly worth noting. In surprising contrast to the denial of injunctive or damage relief, however, the court granted the declaratory relief[16] sought by the plaintiff on behalf of a certified class, and declared section 23 of chapter 255 of the General Laws unconstitutional.[17] In reaching this conclusion, the court addressed two questions: (1) whether self-help prejudgment remedies, "authorized" by section 23, constituted state action,[18] and, if so, (2) whether such self-help remedies met the requirements of the due process clause of the fourteenth amendment, as elucidated in the *Fuentes-Mitchell-North Georgia* line of cases.[19] The court postponed consideration of the first question—"one of the liveliest on the current judicial scene,"[20]—to its resolution of the second issue.[21] This unorthodox reversal of the discussion order, examining the due process issue first, though possibly at variance with tenets of judicial review,[22] actually served to enlighten the state action question.[23]

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[16] *Porter,* at 4. Judge Garrity's opinion provides no reasons for limiting the operation of the judgment of unconstitutionality to declaratory relief. *See id.* Presumably, the judge believed that the return of plaintiff's personal property fulfilled the requirements of equity in the instant case and that the finding of abandonment of the premises was ground enough to entitle the defendant to recovery of rent arrears. Nothing in the opinion vitiates the force of the bond the plaintiff was required to post.

It is also likely that Judge Garrity was concerned about avoiding the difficulties of the retroactive application of the declaration of unconstitutionality. See § 12.3 *infra.*

[17] *Porter,* at 4. The opinion is also less than explicit about the basis and scope of the holding of unconstitutionality. The plaintiff sought to have G.L. c. 255, §§ 23, 26-30 declared invalid as "unconstitutional on [their] face and in violation of the Fifth and Fourteenth Amendments ... and ... in violation of Part I, Article 10 of the [Massachusetts] Constitution." *Id.* Judge Garrity's only direct response to this prayer was: "I ... declare § 23 unconstitutional. ..." *Id.*

[18] *See id.* at 7-9.

[19] *See id.* at 5-7. The *Fuentes, Mitchell,* and *North Georgia* cases are discussed fully in § 12.1 *supra.*

[20] Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917, 919 (D. Mass. 1973).

[21] See notes 18 and 19 and accompanying text *supra.*

[22] *Cf.* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), for the proposition that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' "

[23] Ever since the Civil Rights Cases, 109 U.S. 3 (1883), where state action is at issue, it has usually been treated as a threshold question, the resolution of which governs the necessity of deciding the underlying substantive constitutional challenge. The result is that state action questions are often decided in a vacuum. Nonetheless, the determination of state action is not unrelated to the underlying constitutional claim being pressed. The Supreme Court has recently held that a utility company's service termination for nonpayment was not subject to the requirements of a due process hearing, even though the company was subject to extensive state regulation and was the sole provider of an essential service, because the conduct of the company was not state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358-59 (1974). Justice Marshall, however, in a dissenting opinion, asked the troubling question: what would have been the result if the company had "refused to extend service to Negroes." *Id.* at 365, 374. In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), the

In its discussion of the due process issue, the court in *Porter* placed heavy emphasis on the point that section 23 not only failed to provide for notice and an opportunity for an adversarial hearing prior to the seizure of property, but even failed to meet the lesser standard of an *ex parte* judicial hearing. Quoting from *Mitchell v. W.T. Grant,*[24] the housing court determined that the Supreme Court "upheld the Louisiana statute only because it 'provides for judicial control of the process from beginning to end.' "[25] Implicit in the housing court's reading of *Mitchell* that the seizure of another's property entails the judicial control of the process is the idea that such judicial control is a nondelegable function.[26] This exposition underscored the anomaly that the Supreme Court could insist that due process requires supervision by a judge, as opposed to mere "court functionaries," but might not be troubled by "supervision" by the opposing party.[27] Oddly, the court never drew the implication of nondelegable function or connected the anomaly to its state action analysis. Consequently, although the analysis of denial of due process is comprehensively and convincingly maintained,[28] it is never explicitly brought to bear on the more controversial question of state action.

The court was content to rest its conclusion regarding state action on the sole ground that the existence of statutory authority alone constituted state action.[29] The court's reasoning on this point was that lodging house owners, in contrast to innkeepers, had no right to self-help possessory liens at common law.[30] Therefore, the right, being statutorily created, had its source in governmental action in its most formal manifestation: legislation.[31] Possibly, the court's concentration on this argument, to the exclusion of all others, was provoked by its desire to refute the conflicting federal district court opinion in *Davis v. Richmond.*[32] In an excess of fervor, the housing court attacked the

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Court clearly considered the merits of the underlying first amendment claims first in deciding that union members could conduct picketing within a privately owned shopping center. Essentially, the Court held that businesses in the suburbs could not use the doctrine of state action to "immunize themselves from . . . criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication." *Id.* at 325.

[24] 416 U.S. 600 (1974).

[25] *Porter,* at 6, *quoting Mitchell,* 416 U.S. at 616.

[26] *Cf.* Terry v. Adams, 345 U.S. 461, 465-70 (1953); United States v. Classic, 313 U.S. 299, 320-21 (1941). This idea is alluded to directly, though in a different context, in language the housing court chose to quote from *Fuentes. See Porter,* at 7 and see text at notes 52 and 53 *infra.*

[27] See Porter, at 6-7. *Compare Mitchell,* 416 U.S. at 611-12 *with* Fuentes v. Shevin, 407 U.S. 67, 80 (1972). See also text at notes 12-18, § 12.1 *supra.*

[28] *Porter,* at 5-7.

[29] *Id.* at 9.

[30] *See id.* at 8-9.

[31] *Id.* at 9.

[32] Civ. Action No. 74-177-G (D. Mass., Aug. 9, 1974).

federal district court opinion in *Davis* for failing to deal with "the issue of whether G.L. c. 255, § 23 . . . created new rights and evidenced state policy favoring actions which were not provided for at common law."[33] In any event, the First Circuit's opinion in *Davis* did deal with the distinction directly:

> In any event we are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England. The statute at issue is a fairly unremarkable product of the continuing legislative function to define creditors' rights. . . . If it goes beyond the common law, it does so merely by broadening the class (innkeepers) having traditional right to a possessory lien. And even this modest change occurred 115 years ago.[34]

These points are well taken, but the distinction the housing court pressed[35] is equally troubling to those who agree with the result in *Porter*. A negative implication that may be drawn from the housing court's proposition is that claims that find their source in the common law, or even in custom and usage, may not constitute forms of state action.[36] If this analysis, that state action turns on whether the challenged law codified the common law or created new rights, were to be

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[33] *Porter,* at 8. The federal district court's memorandum and order of dismissal never reached such distinctions, concluding that "state action must rest on some significant state involvement other than the mere existence of state laws which are implicated in the day-to-day dealings of people." Davis v. Richmond, Civ. Action No. 74-177-G at 2.

[34] 512 F.2d 201, 203 (1st Cir. 1975). The First Circuit buttressed its point by quoting from Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay On The Fourteenth Amendment,* 47 S. CAL. L. REV. 1, 47 (1973):

> The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. . . . To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct, pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law.

512 F.2d at 204.

[35] The distinction was also relied upon in Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917, 920-21 (D. Mass. 1973). In view of *Davis,* the continued efficacy of *Boland* is highly questionable.

[36] The concept of state action received its basic statement in the Civil Rights Cases, 109 U.S. 3 (1883). The general understanding is that the meaning of state action has been less restrictively construed in this century than the last. The following statement, however, is drawn from the definition that the majority in the *Civil Rights Cases* gave the term: "[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Id.* at 17. The "sit-in" cases should be compared respecting the significance of custom and usage. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 161-174 (1970); Bouie v. City of Columbia, 378 U.S. 347, 365 (1964) (Black, J., dissenting).

adopted by the Supreme Court, serious shadows would be cast on such landmark opinions as *Shelley v. Kraemer*[37] and *Adickes v. S.H. Kress & Co.*[38]

Although the distinction drawn by the housing court may serve the function of deciding constitutional cases on the narrowest available ground, equally narrow grounds may be discovered that do not entail serious negative implications. For example, a court may rest its decision on the degree that law enforcement officials are involved, even on a stand-by basis, in aid of accomplishing the lockout or seizure of goods.[39] Indeed, in light of section 12 of chapter 140 of the General Laws,[40] a court may take judicial notice of the supporting obligations and thus likely involvement of the police in any contested seizure of property.[41] Resting a finding of state action on such factual grounds as the severity of the burden imposed on the individual whose property has been seized[42] has the virtue of extending constitutional protection to the most onerous situations, rather than extending protection to cases on the basis of irrelevant historical factors.

The federal circuit courts that have considered the question thus far have agreed with the First Circuit that the state action argument is not made out simply by demonstrating that the state has enacted legislation concerning activities otherwise unregulated by the common law.[43] In the face of this array, a lower state court opinion reaching a contrary conclusion must be indeed persuasive in its argument or, alternatively, prove that the resolution of the meaning of state action is not exclusively a federal question. Judge Garrity's opinion in *Porter*

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[37] 334 U.S. 1 (1948).

[38] 398 U.S. 144 (1970).

[39] In Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917, 921 (D. Mass. 1973), the court noted the probable "working arrangement between repossessors and the police," in the context of repossessions under § 9-503 of the Uniform Commercial Code. *Id.*

[40] See note 14 *supra.*

[41] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 161-174 (1970); Bouie v. City of Columbia, 378 U.S. 347, 365 (1964).

[42] One of the dissenting positions in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), called for limiting Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), according to its facts, to the conditions of "tremendous hardship" and "enormous leverage." 419 U.S. at 615 (Blackmun, J., dissenting). If this variable standard were applied to the state action concept, it would have to be justified pragmatically rather than theoretically. *See* Klim v. Jones, 315 F. Supp. 109, 122-23 (N.D. Cal 1970), *quoted in Porter,* at 5, pertaining to this standard as it relates to the due process issue.

[43] *See, e.g.,* Gibbs v. Titelman, 502 F.2d 1107, 1110-12 (3d Cir. 1974); Fletcher v. Rhode Island Hospital Trust Nat'l Bank, 496 F.2d 927, 931-33 (1st Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 741-45 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 329-38 (9th Cir. 1973); Bichel Optical Lab., Inc. v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973). For cases dealing with the relevant question in terms of the statutory language of 42 U.S.C. § 1983 (1970)—"under color" of law—see note 6 *supra.*

did not address this latter question, although it is clear that he did not feel bound by the extensive contrary federal authority on the meaning of state action in this context.[44] Aside from a cryptic reference to *Reitman v. Mulkey*[45] and *Burton v. Wilmington Parking Authority,*[46] at the close of the opinion, and narrow references to federal district court decisions of doubtful continued validity,[47] the housing court failed to convincingly justify its holding on the state action question.[48] Thus, even if "right," the housing court's opinion is not persuasive. That a more persuasive case might have been made is even more disheartening.

That more persuasive case was perhaps best expressed in Chief Judge Kaufman's dissenting opinion to the Second Circuit's decision in *Shirley v. State National Bank:*[49]

> [O]ur system of laws is bedrocked in the principle that the State has a "monopoly over techniques for binding conflict resolution." Moreover, the decisive difference between "binding conflict resolution," . . . and "private structuring" . . . is the element of voluntary, *mutual* consent . . . . Accordingly, where, as here, the creditor is empowered, whether by common law or by statute, to unilaterally resolve a conflict, he is acting within a sphere reserved for the state alone and, therefore, his power, like state power, must be fettered by the restraints of due process.
>
> Under the so-called "public function" test, then, self-help repossession is infused with the requisite "state action" because the creditor acts pursuant to a grant of the state's monopoly power to

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[44] The housing court did not specify whether its holding is based solely on the United States Constitution. The statute was also attacked as violative of article 10 of part I of the Massachusetts Constitution. The housing court's determination of the meaning of "state action" under the state constitution may immunize the decision from review by other than state tribunals. Clearly, reliance on the state constitution would constitute an adequate and independent state ground of decision.

[45] 387 U.S. 369 (1967).

[46] 365 U.S. 715 (1961).

[47] *See Porter,* at 5-10. See also note 35 *supra.*

[48] *See Porter,* at 5-10. The court's failure to draw support from the excellent dissenting opinion of Chief Judge Kaufman in Shirley v. State Nat'l Bank, 493 F.2d 739, 745-47 (2d Cir. 1974) is puzzling. See text at notes 49-50 *infra.* More disturbing, however, is that no effort was made to distinguish or explain the recent "retreats" on "state action" by the Supreme Court. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-59 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79 (1972). See also note 24 and accompanying text *supra.* The housing court's failure to distinguish *Jackson* is most troubling because the facts there (termination of electric service without a prior hearing) are sufficiently close to require some response. *See* 419 U.S. at 347. For a distinction of *Moose Lodge,* see Shirley v. State Nat'l Bank, 493 F.2d 739, 747 n.9 (Kaufman, C.J., dissenting). *Jackson,* is discussed further at note 62 *infra.*

[49] 493 F.2d 739, 745-47 (2d Cir. 1974). See note 48 *supra.*

lawfully seize a significant property interest without the consent of the holder.[50]

The reference to the state's "monopoly over techniques for binding conflict resolution," central to Judge Kaufman's analysis, is derived from Justice Harlan's opinion for the Court in *Boddie v. Connecticut.*[51] Similar language is used in *Fuentes* to describe the limited conditions under which prejudgment property seizures may be tolerated.[52] One of the conditions is that "the State has kept strict control over its monopoly of legitimate force."[53] Although the housing court quoted this excerpt in its opinion,[54] it failed to discern the relationship of the excerpt to the state action argument.[55]

In the concluding portion of his dissenting opinion in *Fuentes,* Justice White left no doubt that he considered a relationship to exist between the decision and the state-action—private-action dichtomy:

> The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion *simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all.*[56]

The majority in *Fuentes* likewise leaves little doubt what its likely response would be to that form of "private action" reflected in a contractual waiver of a hearing. The Court strongly intimated that it would not countenance a contractual surrender of a right to a hearing

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[50] *Id.* at 747. *But see* Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972). In *Lloyd,* the Court refused to extend the public function test to a shopping center with respect to handbilling and speech unrelated to the business purposes of the center's occupants. See note 23 *supra.*

[51] 401 U.S. 371, 375 (1971). The housing court's justification, unlike Judge Kaufman's justification, is unpersuasive because it bears no organic relationship to cognate, evolving constitutional doctrine. Whatever one may think about the line drawn, the Supreme Court did distinguish the waiver of filing fees in divorce actions (*Boddie*) from a denial of waiver of such fees in bankruptcy proceedings, United States v. Kras, 409 U.S. 434, 443-50 (1973), partly on the ground that the resolution of marital status, as compared to debt relief, was exclusively a state function. Judge Kaufman's analysis derives independent support from these Supreme Court cases for the proposition that the relevant question, in cases like *Porter,* is whether a nonconsensual transfer of private property is exclusively a state function. *See Shirley,* 493 F.2d at 745-47 (dissenting opinion). If the housing court sensed that an affirmative answer to this question is inherent in *Fuentes,* its analysis of state action failed to explicate the foundation of its intuition.

[52] *See Fuentes,* 407 U.S. at 90-91 (1972).

[53] *Id.* at 91.

[54] *Porter,* at 7, *quoting Fuentes,* 407 U.S. at 90-91.

[55] See text accompanying notes 22-28 *supra.*

[56] 407 U.S. at 102 (White, J., dissenting) (emphasis added).

" 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision.' "[57] If there is no constitutional barrier to examining "private agreements" of "consent" to repossess or seize property, it is difficult to understand why an "unpermitted" repossession or seizure might be treated differently.[58] If the answer is that the taking is not "unpermitted," then it appears obvious that the state supplies the permission. Not even the dissenters in *Fuentes* and *North Georgia* deny this. On the contrary, the dissenters argue that the Court must respect the distributional choices the states have made respecting the conflicting interests of the parties involved.[59] If their view is ultimately accepted, the validity of statutes such as section 23 of chapter 225 of the General Laws and section 9-503 of the Uniform Commercial Code[60] is more likely to be determined against the standards of equal protection and substantive due process,[61] than against standards of state action.[62]

At bottom, cases such as *Porter* concern the endless conflict between the courts and the legislatures over who finally decides a matter.[63] The court in *Davis,* characterizing the question in property terms, was willing to defer to the legislative rule-making power.[64] The court in

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[57] *Id.* at 95, *quoting* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972). The Court rested its response on very explicit dicta from the *Overmyer* case. There a "confession of judgment" provision was included in a contract negotiated by lawyers for two corporations and the Court noted that it was "not a case of unequal bargaining power or overreaching." *Id.* at 186. *See also* Swarb v. Lennox, 405 U.S. 191 (1972).

[58] Nevertheless, the majority in *Fuentes* noted that "[t]he creditor could, of course, proceed without the use of state power, through self-help, by 'distraining' the property before a judgment." 407 U.S. at 79 n.12. It would be wrong to attach much significance to this possibly unguarded remark since it was made purely in the context of explaining a historical point respecting common law remedies. *See id.*

[59] *See North Georgia,* 419 U.S. at 619-20 (Blackmun, J., dissenting); *Fuentes,* 407 U.S. at 100, 103 (White, J., dissenting). *Cf.* Lindsey v. Normet, 405 U.S. 56, 68-69 (1972).

[60] G.L. c. 106.

[61] The equal protection argument would raise such questions as why tenants are not accorded like self-help remedies for exerting claims against their landlords, or more broadly, why extraordinary seizure remedies are granted certain classes of claimants only. The due process argument would be that certain categories of private property are being taken without the requisite showing of sufficient state interest.

[62] *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), which stands as the most compelling precedent for handling these questions in state action terms. *Porter* is distinguishable from *Jackson,* however, on the ground that the claimant in *Porter* has no interest in the property except as "remedial leverage" recognized by the statute. Furthermore, the discontinuance of service in *Jackson* constitutes a refusal to continue to transfer the property of the company (viz., electricity) until the dispute is resolved. *Id.* at 347. A court would have to make a significant substantive reformation of the meaning of property (based on need) to place *Jackson* on the same footing as *Porter.* Such judicial extensions of the meaning of property have been eschewed. *See* Weinberger v. Salfi, 422 U.S. 749 (1975). *Cf.* Lindsey v. Normet, 405 U.S. 56 (1972).

[63] More accurately the "conflict" is between exponents of judicial activism and those of judicial restraint.

[64] "By granting the unpaid landlord a defeasible possessory right, the state merely adopts one possible resolution, acting not as participant but rulemaker." 512 F.2d at 204.

Porter viewed the problem as essentially one of dispute resolution; therefore, it insisted that the Legislature exceeds its power when it effectively forecloses review by the very institution that is impressed with the duty to resolve disputes on an individual and fair basis.[65] As with most confrontations in the law, the most likely outcome will be relief of tension through indirect means. One consequence of pressure for reform exerted by the judiciary has been legislative movement in areas long considered fixed. The real virtue of judgments such as *Porter* may lie in the impact they will have on the Legislature. Laws, like men, do not necessarily command respect because they are old.[66]

§12.3. Retroactivity of Supreme Court Holdings on Prejudgment Attachments. In *McIntyre v. Associates Financial Services Co., Inc.*,[1] the Supreme Judicial Court was asked to decide whether the requirements of due process established in *Fuentes v. Shevin*[2] should be applied retroactively to invalidate a real estate attachment made, without prior notice or an opportunity for a hearing, pursuant to sections 42 and 62-66 of chapter 223 of the General Laws.[3] The attachment in *McIntyre* was recorded on December 31, 1971, almost six months before the *Fuentes* decision was announced.[4]

After a cursory review of the Supreme Court's controversial post-*Fuentes* decisions,[5] the Supreme Judicial Court concluded, "with confidence," that the *Fuentes* case was viable.[6] Accordingly, the Court assumed that attachments of a debtor's real property, under the challenged provisions of chapter 223 of the General Laws, would be invalid under *Fuentes*.[7] Nevertheless, the Court did not decide the due process issues because it concluded that the *Fuentes* principles should not be applied retroactively.[8] The opinion proceeded to discuss the justification for treating the *Fuentes* case nonretroactively as if that de-

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[65] *Cf.* Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

[66] As noted previously, rules of practice respecting attachment procedures, which trace their roots to English common law, were substantially modified in response to the *Fuentes* line of cases. *See* MASS. RULES OF CIV. PROC. 4.1 and 4.2 (1974). See also § 12.2, note 15 *supra*. *Cf.* G.L. c. 255, § 13J; c. 255B, § 20B; c. 255D, § 22.

§12.3. [1] 1975 Mass. Adv. Sh. 1490, 328 N.E.2d at 492.
[2] 407 U.S. 67 (1972).
[3] 1975 Mass. Adv. Sh. at 1493, 328 N.E.2d at 494.
[4] *Id.* at 1490, 328 N.E.2d at 493.
[5] These Supreme Court decisions are discussed at length in § 12.1 *supra*.
[6] 1975 Mass. Adv. Sh. at 1494, 328 N.E.2d at 494.
[7] *Id.*
[8] *Id.* at 1496, 328 N.E.2d at 495.

termination could be made independently of the rationale of the *Fuentes* decision.[9]

The Supreme Judicial Court adopted the test enunciated by the United States Supreme Court in *Chevron Oil Co. v. Huson*[10] to determine whether a "new rule" is to be retroactive: "(1) whether a new principle has been established whose resolution was not clearly foreshadowed, (2) whether retroactive application will further the rule, and (3) whether inequitable results, or injustice or hardships, will be avoided by a holding of nonretroactivity."[11] In applying this test to the *Fuentes* rule, the Court referred to the holding of nonretroactivity reached by the three-judge federal court in *Higley Hill, Inc. v. Knight,*[12] where Circuit Judge Campbell, speaking for the court, stated:

> The rule, as we have indicated, was not clearly foreshadowed. Attempted retrospective application will not further its operation; indeed the limited resources of state and federal courts are better directed towards securing compliance with the new rule in post-*Fuentes* cases than in unravelling mature and possibly ancient litigation commenced under former law. Finally, plaintiffs will be subjected to the automatic destruction of attachments needed to afford them reasonable security regardless of the merits of their claims. Undoing such preexisting arrangements would work substantial hardship on creditors who reasonably relied upon lawful Massachusetts procedures. Moreover, a mechanistically retroactive application might leave unsettled the title to real estate sold at judicial sales, and the status of judgments already secured.[13]

On its face, the opinion of the Supreme Judicial Court appears unobjectionable. Closer analysis, however, reveals that the Court's resolution of the retroactivity issue fails to deal with several critical aspects of the problem presented. Indeed, the case is a paradigm of nonanalytical decision-making.[14] The opinion provides no analysis of

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[9] *See id.* at 1494-97, 328 N.E.2d at 494-95.

[10] 404 U.S. 97, 106-07 (1971). That case relied, in turn, on Linkletter v. Walder, 381 U.S. 618, 628 (1965).

[11] 1975 Mass. Adv. Sh. at 1495-96, 328 N.E.2d at 495.

[12] 360 F. Supp. 203 (D. Mass. 1973).

[13] 1975 Mass. Adv. Sh. at 1496-97, 328 N.E.2d at 495, *quoting Higley Hill,* 360 F. Supp. at 206.

[14] The actual facts of the case stretch incredulity further. The writ of attachment was instituted pursuant to an action in contract against the previous owners of the real estate. The attachment was recorded in the registry of deeds two months before petitioner McIntyre purchased the real estate. Therefore, McIntyre had constructive notice of the attachment, and possibly actual knowledge, at the time of purchase. The Court noted these points when it questioned the standing of the petitioner to assert the due process claims. 1975 Mass. Adv. Sh. at 1494-95, 328 N.E.2d at 494-95. Nonetheless, the Court pressed on to "decide" the "larger issues." *See id.* The Supreme Judicial Court may have considered the case an ideal vehicle to signal its views on the law without harming anyone's reliance interests.

what the rule in *Fuentes* is, a matter that admits of no easy answer.[15] Furthermore, the opinion supplies no analysis and hardly any description of the real estate attachment procedures at issue—a consideration that is crucial to an assessment of their validity under *Fuentes* and its progeny.[16] The Court did not attempt to define the "new rule" for which retroactive application was sought, but nevertheless concluded that such undefined but existing "new rule" did not apply retroactively to some unexamined statutory provisions.

The absence of analysis in *McIntyre* diminishes its value as precedent, not only in matters pertaining to all manner of prejudgment remedies, but on the broader problem of retroactivity of constitutional decisions in general. *McIntyre* will not prove helpful in the future for the very reasons that it does not enable us presently to better answer such questions as the following:

(1) How does the court determine that the "cut-off date" for due process safeguards is the date of the *Fuentes* decision without first inquiring whether the state statutes violated due process standards that predated *Fuentes*? After all, *Fuentes* did not appear full grown from the head of Zeus. As Justice Stewart noted:

> The *Fuentes* decision was in a direct line of recent cases in this Court that have applied the procedural due process commands of the Fourteenth Amendment to prohibit governmental action that deprives a person of a statutory or contractual property interest

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[15] See § 12.1 *supra.*

[16] Previous cases in the federal courts in Massachusetts have likewise treated "failure to provide prior notice or hearing opportunity" as dispositive of the denial of due process claim. These cases, however, were all decided in the light of the broad standard adopted in *Fuentes,* and before the qualifications and limitations of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem., Inc., 419 U.S. 601 (1974). *See* Schneider v. Margossian, 349 F. Supp. 741, 746 (D. Mass. 1972), declaring unconstitutional G.L. c. 246, § 1 *et seq.* (except § 32(8), which permitted prejudgment trustee attachments made at the unsupervised discretion of plaintiffs, without notice or hearing; Bay State Harness Horse Racing & Breeding Ass'n v. PPG Industries, Inc., 365 F. Supp. 1299, 1306 (D. Mass. 1973), declaring G.L. c. 223, §§ 42, 62-66, which allowed prejudgment real estate attachments, without prior notice or hearing opportunity, unconstitutional. The court in *Bay State Harness* made a careful examination of the real estate attachment procedures at issue before concluding that lack of notice and prior hearing amounted to a fatal defect, 365 F. Supp. at 1303-06.

See Higley Hill, Inc. v. Knight, 360 F. Supp. 203, 204-06 (D. Mass. 1973) in which doubt is also cast upon G.L. c. 223, § 62 (real estate attachments), G.L. c. 214, § 7 (trustee attachments), and G.L. c. 215, § 6A (equitable attachments).

Provisions referred to in *Higley Hill* relating to judicial supervision in ex parte prior hearings, and the postattachment dissolution hearings, suggest grounds for holding the provisions dealt with in that case valid under *Mitchell* and *North Georgia. See* 360 F. Supp. at 206-07.

with no advance notice or opportunity to be heard.[17]

(2) More specifically, without a careful examination of the operation of the real estate attachment provisions, how is the court certain that *Sniadach v. Family Finance Corp.*[18] is not the more pertinent precedent? After all, if the claim giving rise to the attachment is unrelated to the real estate, the claimant-creditor, prior to the attachment under dispute, has no property interest in the real estate. Moreover, the attachment may directly affect the right of the debtor to shelter.[19]

More pertinently perhaps, one is prompted to ask still another question: What is the predictive value of this decision with regard to post-*Fuentes* real estate or other prejudgment attachments?

Property attachments and "trustee process" attachments are now subject to the new Massachusetts Rules of Civil Procedure, which provide for notice and an opportunity for a prior hearing, except in unusual circumstances.[20] Nonetheless, the question remains as to the

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[17] Mitchell v. W.T. Grant Co., 416 U.S. 600, 635 (Stewart, J., dissenting).

The Supreme Judicial Court offered no explanation why it selected the decision date of *Fuentes,* rather than the date on which the Supreme Court granted certiorari in the *Fuentes* case as determinative. An explanation of this "timing matter," which goes to the issue of "foreshadowing," surely was called for since *Mitchell* arose on a possessory writ issued four months before the Court announced *Fuentes* and since *Mitchell* did not address the question of retroactivity.

[18] 395 U.S. 337 (1969).

[19] The existence of a homestead exemption may well be very relevant to this point. For a discussion of the nature of the property interest affected by a real property attachment, see Bay State Harness Horse Racing & Breeding Ass'n v. PPG Industries, Inc., 365 F. Supp. 1299, 1304-05 (D. Mass. 1973). *Cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974), and the discussion thereof at § 12.1 *supra.*

[20] *See* MASS. R. CIV. P. 4.1 & 4.2. Rule 4.1 provides in part:

> (c) ... No property may be attached unless such attachment for a specified amount is approved by order of the court. Except as provided in subdivision (f) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment. (f) ... An order approving attachment of property for a specific amount may be entered ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the attachment ... and that either (i) the person of the defendant is not subject to the jurisdiction of the court in the action, or (ii) there is clear danger that the defendant if notified in advance of attachment of the property will convey it, remove it from the state or will conceal it, or (iii) there is immediate danger that the defendant will damage or destroy the property to be attached.

MASS. R. CIV. P. 4.1(g) provides for the prompt dissolution or modification of ex parte attachments by the defendant.

As originally drafted, MASS. R. CIV. P. 4.1 did not apply to attachments of real property. The rule was amended June 27, 1974, to make its provisions applicable to all property. Since the rule did not become effective until July 1, 1974, the original provisions excluding real property were never in effect. It is not clear first, why real prop-

validity of attachments made between the date of the *Fuentes* decision, June 12, 1972, and the effective date of the new rules, July 1, 1974. Aside from judicial fiat, there is nothing in *McIntyre* that confutes the arguments that the notice and prior hearing requirements should operate only prospectively, that is, from the date of the first Massachusetts judicial pronouncement on the subject, the date of the *McIntyre* decision itself, or, if earlier, the effective date of the new procedural rules.[21] Such an argument would have especial cogency with respect to a plaintiff who followed the former attachment procedures, relying upon both the Supreme Court decision in *Mitchell* and the deliberate deferral of the effective date of the new rules of procedure.

Undoubtedly, the inability to determine the validity of certain post-*Fuentes* prejudgment attachments is largely a consequence of the uncertainty engendered by the Supreme Court rulings in this area. Nevertheless, by treating judicial developments of "new rules" the same way it would treat a legislative new rule, the Supreme Judicial Court missed an opportunity to inject an element of certainty—an interest the Court professed to serve in deciding on nonretroactivity in *McIntyre*[22]—into a field where it is required.[23]

The Court's approach suffers by comparison with the manner in which the federal courts handled the question of the retroactivity of the *Fuentes* rule so as to maximize the certainty of prospective operation without unduly disturbing past transactions. In *Higley Hill,*[24] the federal district court said:

> We would make but one exception to non-retroactivity. We think that a pre-*Fuentes* defendant is Constitutionally entitled, in any

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erty was originally excluded, and second, why second thoughts resulted in a change three days before the rule was to take effect.

The constitutionality of the new rules has not yet been determined. The "unusual circumstances" in which ex parte attachments are allowed tracks the exceptions alluded to by the courts. *See* Fuentes v. Shevin, 407 U.S. 67, 93 (1972). Exception (i) in Rule 4.1, respecting attachments made to attain jurisdiction, may present the most difficult question. *See* Note, 82 YALE L. J. 1023, 1025 (1973).

[21] See note 16 *supra.* Query, whether federal court pronouncements have in this context the same scope as an opinion by an appellate state court? The discussion of the use of the certified question procedure in Bay State Harness Horse Racing & Breeding Ass'n v. PPG Industries, Inc., 365 F. Supp. 1299, 1302-03 (D. Mass. 1973) may be of interest in this context.

[22] 1975 Mass. Adv. Sh. 1490, 1496, 328 N.E.2d 492, 495.

[23] The Court's apparent scruple is one of judicial power. Once the Court has determined that the new rule should not be applied retroactively, it relinquishes all power to pass on the validity of the challenged statute. Thus, the Court may be doing all it legitimately can to signal its projection of the law through dictum. This also could explain its desire to take the case notwithstanding its doubts concerning standing. See note 14 *supra.*

[24] 360 F. Supp. 203 (D. Mass. 1973).

> proceeding where his property remains attached, to a fully adequate hearing upon request—if one has never been afforded—in which the reasonableness of the attachment is carefully determined *de novo* in light of the probable validity of the underlying claim. . . . We recognize that such a hearing would be inadequate to save a post-*Fuentes* attachment from Constitutional attack, assuming the attachment was obtained without notice and opportunity for hearing. But it would afford to pre-*Fuentes* defendants the assurance of present fairness without penalizing plaintiffs for non-compliance with previously non-existent rules.[25]

Presumably, the Supreme Judicial Court in *McIntyre* intended to recognize the same "exception to nonretroactivity." At the close of the opinion, the Court noted that "[w]e have no doubt that a debtor whose real estate was subjected to a pre-*Fuentes* attachment was entitled on application to an expeditious judicial hearing to determine the reasonableness of the attachment."[26]

This "exception to nonretroactivity," of course, is really nothing of the kind. Recognizing this, a different three-judge federal panel, in *Bay State Harness Horse Racing & Breeding Association v. PPG Industries, Inc.*,[27] declined to follow their brethren in *Higley Hill*.[28] Instead the court in *Bay State Harness* concluded its opinion with the following statement on the scope of retroactivity:

> [W]e limit the effect of the judgment ordered today (1) to the parties in the cases at bar, including parties in cases not heard orally but who have participated as *amici curiae* in the proceedings before the court, and (2) to the enforcement of chapter 223, sections 42, 62-66 which are similarly constitutionally challenged in cases now pending before the district judges in the District, and (3) to the prospective enforcement of chapter 223, sections 42, 62-66 insofar as these sections deny parties notice and opportunity to be heard prior to the making of attachments of their real estate, from the time of the filing of the order entered herewith.[29]

The reasons that support this approach to retroactivity—which treats all relevant pending litigation within the District as subject to the benefits of a new rule—also provide a sound rationale for dealing with analogous situations in the present and future. These reasons

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[25] *Id.* at 206-07.

[26] 1975 Mass. Adv. Sh. at 1497, 328 N.E.2d at 495.

[27] 365 F. Supp. 1299 (D. Mass. 1973).

[28] *Id.* at 1307 n.7. "We note that another case in this District, *Higley Hill* . . . declined to apply *Fuentes* retroactively to attachments made before June 12, 1972, the date *Fuentes* was decided. We declined to take such a narrow approach . . . ." *Id.*

[29] *Id.* at 1307 (footnote omitted).

were succinctly articulated in *Gunter v. Merchants Warren National Bank:*[30]

> Furthermore, to rule that *Fuentes* is purely prospective is to hold that if a Supreme Court ruling is so characterized, not only may litigants not benefit from its specific application, but courts may not rely on it as precedent for analogous situations where the event in suit antedated the ruling. This we feel would hamper the traditional process of common law adjudication without advancing the pragmatic purposes of [the] retroactivity doctrine.[31]

The statements in both *Bay State Harness* and *Gunter* reflect misgivings about the concept of nonretroactivity. The notion that a new rule can be given purely prospective effect is fundamentally inconsistent with the principle of judicial review. The power of courts to declare law ultimately is a function of their duty to decide cases.[32] The judicial process itself therefore depends on "a case at bar exception" to the nonretroactivity concept.[33] The matter does not end here. The dilemma posed is how to make an exception for the party at bar and not make the same "exception" for those who have contemporaneously challenged the same (or similar) rules of law.[34]

The Supreme Court opinions on retroactivity have hardly served to resolve the dilemma posed. On the contrary, the Court has all but apologized for the necessity of a "case at bar exception." In an extraordinary inverse form of reasoning, the Court said:

> Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.[35]

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[30] 360 F. Supp. 1085 (S.D. Me. 1973).

[31] *Id.* at 1091-92 n.17.

[32] *See* Stovall v. Denno, 388 U.S. 293 (1967).

[33] If it were otherwise, the vitality of decisional law would be lost. Without "retroactive" application to the case at bar, why would a litigant ever challenge existing law? For a most telling judicial criticism of the current doctrine of prospectivity, see Justice Harlan's concurring opinion in Mackey v. United States, 401 U.S. 667, 675-702 (1971). *See also* Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law,* 79 HARV. L. REV. 56 (1965); Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin,* 33 U. CHI. L. REV. 719 (1966); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 YALE L. J. 907 (1962).

[34] The implication of this analysis questions the observation in Linkletter v. Walker, 381 U.S. 618, 628 (1965), that "there seems to be no impediment—constitutional or philosophical—to the use of [a prospective] rule in the constitutional area where the exigencies of the situation require such an application." It is not clear why prospective rulemaking does not pose serious article III doubts, as suggested in the text at notes 23-25 *supra,* if not equal protection questions.

[35] Stovall v. Denno, 388 U.S. 293, 301 (1967).

A sound argument can be made that the Supreme Court's recent pronouncements supporting the doctrine of prospectivity should be restricted to the criminal procedure cases that gave rise to the doctrine.[36] But the better argument, however, is that made by Justice Harlan: "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[37] According to this view, *McIntyre,* being theoretically subject to review by the Supreme Court, should have been decided in the light of the evolving constitutional principles of *Fuentes,* insofar as the deciding court is capable of seeing that light. For to do otherwise, as Justice Harlan cautioned, is to reduce "all other courts in this country . . . to the role of automatons," that no longer bear the "responsibility for developing or interpreting the Constitution."[38]

§12.4. Official Inquiry into Off-Duty Conduct of Police Officers. The extent to which public employees must divulge information relating to their off-duty conduct upon threat of dismissal was considered by the Supreme Judicial Court in *Broderick v. Police Commissioner of Boston.*[1] On Friday, May 10, 1974, approximately ninety off-duty Boston police officers travelled to Newport, Rhode Island, in order to participate in a Law Day celebration. The officers spent Fri-

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[36] In Linkletter v. Walker, 381 U.S. 618, 619-20 (1965), the Supreme Court refused to apply the rule of Mapp v. Ohio, 367 U.S. 643 (1961), retroactively. *Mapp* held that evidence derived from an illegal search was inadmissable in a state prosecution. *Id.* at 655. *Linkletter* held that the evidence exclusion rule of *Mapp* would not be applied to state court convictions that had become final before rendition of the *Mapp* opinion. 381 U.S. at 640. The Court reasoned that the main purpose of the *Mapp* exclusionary rule was deterrence of illegal police action and that purpose would not be served by extending it to police misconduct that occurred prior to *Mapp. Id.* at 635-40. In a series of cases, this analysis was applied in various police misconduct contexts. Moreover, the nonretroactivity concept was extended to pending cases so long as the newly proscribed official misconduct occurred before establishment of the new rule. *See, e.g.,* Williams v. United States, 401 U.S. 646 (1971); Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966).

It has been argued that cases, such as the foregoing, are distinguishable, for purposes of the application of the retroactivity concept, from cases in which "new" rules are manifestations of "evolving legal principles" rather than of instrumental policies (*e.g.,* deterring police misconduct). According to this distinction, cases based on "evolving principles," call for the ordinary operation of the retroactivity doctrine. Accordingly, cases like *Fuentes,* representing an extension of procedural due process, should be applied retroactively. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L. J. 221, 255-57 (1973).

In City of Phoenix v. Kolodziejski, 399 U.S. 204, 207 (1970), the Court rejected a strict nonretroactivity approach even though the security of municipal bonds was thereby threatened.

[37] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

[38] Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan J., dissenting).

§12.4. [1] 1975 Mass. Adv. Sh. 1838, 330 N.E.2d 199.

day evening at the Ramada Inn in Portsmouth; on Saturday they marched in a Law Day parade along with delegations from other communities. Following the weekend activities, the police commissioner of the City of Boston received complaints regarding the officers' conduct both at the inn and at the parade.[2]

Pursuant to an investigation of these complaints, a questionnaire was distributed to those officers listed as being off-duty on the dates in question.[3] The questionnaire "inquired generally as to whether the officer had been registered or present at the inn; whether the officer had witnessed any events thereat; and further asked specific questions relating to the activities at the parade."[4] The plaintiff policemen[5] unsuccessfully sought declaratory and injunctive relief to determine whether they were under any legal duty to answer the questionnaire and to prohibit the commissioner from ordering them to respond to it.[6]

On appeal, the plaintiffs argued that the questionnaire exceeded the scope of any constitutionally permissible inquiry since it inquired as to their off-duty, noncriminal conduct.[7] The plaintiffs further argued that the questionnaire violated their statutorily protected right of privacy.[8] The Supreme Judicial Court rejected both of these contentions, holding that the commissioner could require the policemen to submit written answers to the questionnaire without violating their constitutional or statutory rights.[9]

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[2] *Id.* at 1839-40, 330 N.E.2d at 200-01. The events leading to the complaints were summarized by the manager of the inn in an affidavit which alleged:

> that a customer at the inn, while playing pool in the bar area, had had his pool cue snatched away in the course of which he had been punched in the chest by a person subsequently identified by the manager as a Boston police officer; that the manager had observed "15 or 20 Police Officers at one point diving and playing in the pool in the nude, screaming and yelling like a bunch of wild kids"; that the manager had seen three nude males walking about in the vicinity of the pool area and the hotel lobby; that during the night a group of men roamed about the hallways using foul and opprobrious language; that at one point during the night the manager was awakened by what he thought were gun shots which were in fact some form of fireworks; that sometime during the night the hotel liquor cabinet was broken into and five quarts of liquor were stolen; and that some guests had left the inn without paying for their breakfast.

Id. at 1840, 330 N.E.2d at 201.

[3] *Id.* at 1841-42, 330 N.E.2d at 201.

[4] *Id.* at 1841, 330 N.E.2d at 201.

[5] Plaintiff Broderick was the chairman of the Boston Police Patrolmen's Association and the other plaintiffs were various officers of that organization. It was stipulated by the parties that a decision in the case would be binding as to all other patrolmen who were members of the association and who had received orders to answer the questionnaires. *Id.* at 1842 n.2, 330 N.E.2d at 202 n.2.

[6] *Id.* at 1842, 330 N.E.2d at 202.

[7] *Id.* at 1846, 330 N.E.2d at 203.

[8] *Id.* at 1843, 330 N.E.2d at 202. *See* G.L. c. 214, § 1B.

[9] *Id.* at 1844-50, 1855, 330 N.E.2d at 202-05, 206.

The Court in *Broderick* failed to delineate which, if any, constitutional rights were involved in determining the permissible scope of an inquiry into the actions of public employees.[10] In *Gardner v. Broderick,*[11] the United States Supreme Court delimited the power of a public employer to dismiss a police officer for failing to answer questions "specifically, directly, and narrowly relating to the performance of his official duties."[12] The Supreme Judicial Court applied these standards to the questionnaire in *Broderick,*[13] but did not make any attempt to explain or discuss the underlying constitutional principles. Although the principles involved in this case were not susceptible of precise explanation, the mere application of verbal formulas by the Supreme Judicial Court hardly serves as a substitute for an analysis of the interplay of the constitutional issues involved.

The limitations imposed by *Gardner* on the scope of an inquiry by a public employer into the off-duty activities of public employees appear to be derived from the due process rights of public employees.

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[10] The Court initially summarized the plaintiffs' constitutional claim as follows: "The legal grounds urged by the plaintiffs are that the questionnaire inquired as to 'off-duty non-criminal conduct' and was therefore violative of rights guaranteed by our State and Federal Constitutions . . . ." *Id.* at 1843, 330 N.E.2d at 202.

Subsequently, the Court stated that the constitutional issue presented was "whether the substance of the inquiry bears a rational connection either specifically to the officer's direct performance of official acts, or generally to the officer's fitness and ability to serve in governmental service." *Id.* at 1844, 330 N.E.2d at 202. Although this language suggests a due process analysis, the Court does not mention due process expressly. See text at notes 14-18 *infra.*

[11] 392 U.S. 273 (1968).

[12] *Id.* at 278-79. In *Gardner,* a New York City patrolman was called to testify before a grand jury investigating alleged criminal conduct. He was advised of his privilege against self-incrimination but was asked to sign a waiver of immunity after being told that he would be dismissed if he did not sign. The Court overturned the dismissal because it was based not upon his "failure to answer relevant questions about his official duties," but upon "his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege." *Id. See also* Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968). *But see* Spevack v. Klein, 385 U.S. 511 (1967).

The right of immunity under these circumstances was established in Garrity v. New Jersey, 385 U.S. 493 (1967), where the Court held that where a policeman had been compelled to testify by threat of removal from office for failure to testify, any testimony that he gave could not be used against him in a subsequent criminal prosecution. *Id.* at 500.

[13] *See* 1975 Mass. Adv. Sh. at 1843 n.3, 330 N.E.2d at 203 n.3. The questionnaire in *Broderick* conformed to the requirements of Garrity v. New Jersey, 385 U.S. 493 (1967), and of *Gardner* in that it expressly provided that any information related by an officer concerning the incident under investigation would not be used against him in a criminal proceeding. For these reasons, the Court concluded that no self-incrimination question was presented in the instant case. *Id.*

The exact nature and extent of these rights are not readily defined.[14] Although an individual may not have a *right* to public employment in the absolute sense, he clearly has a constitutionally protected interest in such employment, and he may not be subjected to unreasonable conditions.[15] As the Supreme Court noted in an earlier case: "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."[16]

The due process rights of public employees can be viewed as a corollary of the limits on the power of public authority.[17] In general, although the government may not be required to do a particular act, once it commences to do that act, it must do so in a way that is not arbitrary or unreasonable. Public employment, by definition governmental activity, therefore is subject to the requirements of due process.

In the case of a private employer, the same constraints are not yet present:

> While a private employer may have the right, in the absence of statute or contract, to refuse to hire an individual for personal

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[14] One of the troubling aspects of defining these rights is whether the rights are substantive or procedural. In Board of Regents v. Roth, 408 U.S. 564 (1972), the intimate relationship of these concepts is exposed. In that case, a university teacher, without tenure, sued to require his employer to state reasons for nonrenewal of his contract and to afford him a hearing. The Court found that he did not have a "legitimate claim of entitlement." If he had had such "entitlement," presumably the Court would have recognized his right to a hearing. Thus, even the right to be heard, a procedural due process right, depends upon the preliminary determination of "entitlement"—a substantive due process concept. *Cf.* Perry v. Sinderman, 408 U.S. 593 (1972). *See generally* Van Alstyne, *The Demise of the Right–Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439, 1460-64 (1968) [hereinafter cited as Van Alstyne]. *Cf.* Slochower v. Board of Education, 350 U.S. 551, 555 (1956); Bruns v. Pomerleau, 319 F. Supp. 58, 63-64 (D. Md. 1970).

[15] *See* Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-48 (1974); Pickering v. Board of Education, 391 U.S. 563, 573-74 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 604, 605-10 (1967); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960); Slochower v. Board of Higher Education, 350 U.S. 551, 555-59 (1956). *Cf.* Konigsberg v. State Bar, 353 U.S. 252, 269-74 (1957); Dixon v. Alabama State Board of Education, 294 F.2d 150, 158-59 (5th Cir. 1961); Bruns v. Pomerleau, 319 F. Supp. 58, 63-65 (D. Md. 1970); *See also* Van Alstyne, *supra* note 14, at 1460-64.

[16] Slochower v. Board of Education, 350 U.S. 551, 555 (1956). For many years, the prevailing judicial philosophy on the constitutional rights of public employees was reflected by the statement of Justice Holmes in McAuliffe v. Mayor and Aldermen of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), to the effect that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517. This view was predicated upon the belief that public employment was a privilege rather than a right. *See* Van Alstyne, *supra* note 14, at 1439-45; Note, 37 GEO. WASH. L. REV. 409 (1968). This view is no longer recognized. See cases collected in note 15 *supra.*

[17] See cases cited in note 15 *supra.*

> reasons, unrelated to job function, such as length of hair or personal dislike, an individual's interest in government employment is recognized as entitled to constitutional protection.[18]

The basis for this distinction rests upon the fourteenth amendment, which by its terms makes state action subject to due process safeguards while leaving purely private action beyond its scope.[19] Moreover, the fourteenth amendment does not provide for a relaxation of the due process requirement when the state is acting in a proprietary rather than a governmental capacity.[20] This distinction between public and private employment for constitutional purposes is further supported by public policy considerations. Inasmuch as the federal, state, and local governments either directly or indirectly control such a vast portion of the nation's employment, stricter controls upon the arbitrary exercise of power are required in the public sector than in the private sector.[21]

In *Broderick,* the plaintiffs argued that the questionnaire did not comply with the standards set forth in the *Gardner* case since the questions "sought to inquire as to off-duty conduct of the officers while in Rhode Island" and therefore did not specifically, directly, and narrowly relate to the performance of official duties.[22] In applying the *Gardner* standard to the facts before it, the Supreme Judicial Court found it unnecessary to base its decision on the on-duty-versus-off-duty dichotomy since the plaintiffs had engaged in the conduct at issue under the color of official authority.[23] Nonetheless, the Court made it clear that even if the investigation were viewed as concerning conduct "more private than official," the inquiry would have been permissible.[24] The Court noted that it did not read *Gardner* as limiting the scope of a permissible inquiry merely to those actions occurring while on duty:

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[18] Bruns v. Pomerleau, 319 F. Supp. 58, 64 (D. Md. 1970).

[19] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[20] Van Alstyne, *supra* note 14, at 1462.

[21] *Id.* at 1461-62. As Professor Van Alstyne states:

> This substantial influence which expanded governmental activity gives the government over the private lives of its citizenry makes the restraints of substantive due process necessary. *Indeed,* a failure to demand substantive due process of government even as it expands would be a constitutional incongruity against the emerging trend to bring [private] decision makers within the constitution when the impact of their enterprises becomes so great that the power they wield is functionally equivalent to that traditionally exercised only by government.

Id. (emphasis in original).

[22] 1975 Mass. Adv. Sh. at 1846, 330 N.E.2d at 203.

[23] The Court cited numerous factors in support of this conclusion. *Id.* at 1848-49, 330 N.E.2d at 204.

[24] *Id.* at 1849, 330 N.E.2d at 204.

> The crucial phrase in the *Gardner* quotation is "*relating to* the performance of his official duties" (emphasis supplied). "Relating to" implies more than matters taking place on duty; we think it extends to matters *of and concerning* an individual's fitness for public service. We decline to hold that the commissioner must close his eyes to what might constitute outrageous, even illegal, conduct on the part of police officers under his command on the principle that the conduct took place while the officer was off duty.[25]

The Court also summarily rejected the plaintiffs' privacy claim on the basis that this right was forfeited by public display.[26]

Cases such as *Broderick* are in the process of evolving the legitimate standards of behavior of public officials. In *Broderick,* an element of public control would seem to be warranted because the conduct at issue was open and notorious, and directly reflected discredit on the police force. Had the conduct at issue been more private, or had the public employees involved held positions not as dependent upon the public trust and confidence as that of a police officer, the result might well have been different. Thus, while the Court's reasoning in *Broderick* with respect to the on-duty-versus-off-duty dichotomy appears to be correct, the problem of defining the permissible scope of any inquiry into off-duty conduct remains a difficult one. As the court in *Broderick* acknowledged, the breadth of any inquiry relating to private conduct should be narrower than that permitted with respect to official conduct, and the public employer should have the burden of demonstrating that a rational nexus exists between any allegedly improper conduct and the performance of official duties.[27] The mere fact that a public employee engages in certain conduct that the public employer might deem to be either socially or morally "unacceptable" should not suffice to trigger an inquiry into essentially private conduct.[28]

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[25] *Id.* at 1847, 330 N.E.2d at 204. *See also* Mayor of Medford v. Judge of Dist. Court, 249 Mass. 465, 470, 144 N.E. 397, 398 (1924), where the court stated: "The circumstance that this testimony related to a time when the officer was not in uniform and was not on duty is not decisive. His conduct while off duty and in civilian clothes might be of such nature as to show him unfit to act as a police officer." *Id.*

[26] 1975 Mass. Adv. Sh. at 1854-55, 330 N.E.2d at 204-05, *citing* Wishart v. McDonald, 500 F.2d 110, 113-14 (1st Cir. 1974).

[27] 1975 Mass. Adv. Sh. at 1849-52, 330 N.E.2d at 204-05.

[28] *Compare* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (petitioner dismissed from federal civil service as result of homosexual act on off-duty time, and admission of prior homosexual acts as young man; reinstatement ordered); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971) (detailed questions concerning homosexual conduct were an invasion of privacy even though questions were asked in connection with granting of security clearance); Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970) (activities of applicant to police department in belonging to nudist camp not sufficiently violative of municipality's interest); Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970) (postal clerk could not be discharged from public employment because

§12.5. Anonymous Publication of Election-Related Material. In *Commonwealth v. Dennis,*[1] the Supreme Judicial Court held unconstitutionally overbroad[2] section 41 of chapter 56 of the General Laws, which prohibits the writing, printing, posting, or distribution of circulars or posters designed to aid or defeat any candidate for nomination or election to any public office, or any question submitted to the voters, unless such publication includes "either the names of the chairman and secretary, or of two officers, of the political or other organization issuing the same, or of some voter who is responsible therefor . . . ."[3] The defendant in *Dennis* was charged with violating section 41 after he printed and distributed a political circular critical of incumbent Saugus selectmen who were candidates for reelection. Neither the defendant's name nor address, nor that of any other person or organization responsible for the publication, appeared in the circular.[4]

Prior to the trial, the defendant unsuccessfully moved to have the complaint dismissed on both federal and state constitutional grounds.[5] Convicted and sentenced to three months in the house of correction, he appealed alleging error in the Superior Court's denial of the motion to dismiss.[6] On its own initiative,[7] the Supreme Judicial Court ordered direct appellate review and subsequently sustained defendant's exception to the trial court's denial of his motion to dismiss on constitutional grounds.[8]

The Supreme Judicial Court found that the statute imposed "an unconstitutional prior restraint on a nonvoter's exercise of First Amendment rights by requiring him to obtain the assent of a voter

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he was living with a woman to whom he was not married); *with* Riley v. Board of Police Comm'rs, 147 Conn. 113, 157 A.2d 590 (1960) (courting of sixteen-year-old girl by forty-year-old married police officer held sufficient to warrant dismissal); Mayor of Medford v. Judge of Dist. Court, 249 Mass. 465, 144 N.E. 397 (1924) (dismissal of police officer for improper relations with a woman not the officer's wife upheld).

§12.5. [1] 1975 Mass. Adv. Sh. 1924, 329 N.E.2d 706.

[2] *Id.* at 1927, 329 N.E.2d at 708.

[3] G.L. c. 56, § 41.

[4] 1975 Mass. Adv. Sh. at 1925, 329 N.E.2d at 707. The circular was entitled the "Saugus News Enquirer." Ownership was attributed to the Association of Concerned Taxpayers, Box 54, Saugus, Massachusetts, a fictitious name and mailing address. *Id.*

[5] *Id.* at 1925-26, 329 N.E.2d at 707. Specifically, he argued that § 41 violated the first and fourteenth amendments to the Constitution of the United States and article sixteen of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts. *Id.*

[6] *Id.*

[7] *Id.* at 1924, 329 N.E.2d at 706.

[8] *Id.* at 1926-29, 329 N.E.2d at 707-08.

before publishing election literature."[9] The Court's holding was predicated upon the fact that although section 41 ostensibly applied to nonvoters, it made no provision for an attribution on any election-related publication by a nonvoter.[10] A nonvoter wishing to circulate such a publication in conformity with section 41 would be required to find a voter willing to sponsor it.[11] The Court therefore concluded that section 41 overbroadly restricted the free expression of nonvoters.[12]

Although the record did not indicate whether the defendant was a nonvoter, the Court, giving effect to the relaxed standing requirements that have developed in the first amendment area, found that Dennis was entitled to argue the statute's overbreadth.[13] Dennis, the Court noted, would have standing even if it were demonstrated that he was in fact a registered voter or that his misrepresentation concerning the actual source of his publication could otherwise have been proscribed by the state without violating the first amendment.[14]

The Court went on to note that although the problem of overbreadth might be circumvented by construing the statute as being applicable only to voters, such a construction would run afoul of the equal protection clause of the fourteenth amendment by creating an arbitrary classification between voters and nonvoters.[15] Since no rational purpose is served by a distinction whereby voters would be required to identify their campaign literature whereas nonvoters would be free to express themselves anonymously, the Court concluded that it was not able to correct the statutory defect of over-

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[9] *Id.* at 1927, 329 N.E.2d at 707. The Court in *Dennis* added in a footnote that the statute could not be read as permitting a nonvoter to satisfy the mandates of the statute by disclosing his own name and residence. *Id.* at 1927-28 n.3, 329 N.E.2d at 707-08 n.3.

Moreover, the absence of a requirement that the nonvoter's name appear on the publication with that of the voter undermines the statute's ostensible purpose of revealing the true source of campaign-related literature, and would even seem to permit, if not encourage, misrepresentation by a nonvoter as to the publication's true source. *Id.* at 1926-27, 329 N.E.2d at 707.

[10] *See id.* at 1926-27, 329 N.E.2d at 707-08. *See also* G.L. c. 56, § 41.

[11] 1975 Mass. Adv. Sh. at 1926-27, 329 N.E.2d at 707.

[12] *Id.* A statute essentially the same as G.L. c. 56, § 41 was held unconstitutional on similar grounds in Canon v. Justice Court for the Lake Valley Judicial Dist., 39 Cal. Rptr. 228, 61 Cal. 2d 446, 393 P.2d 428, 429 (1964).

[13] 1975 Mass. Adv. Sh. at 1927, 329 N.E.2d at 708. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973), where the Supreme Court stated that:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected free speech or expression.

Quoted in Dennis, 1975 Mass. Adv. Sh. at 1928, 329 N.E.2d at 708.

[14] 1975 Mass. Adv. Sh. at 1927, 329 N.E.2d at 708.

[15] *See id.* at 1928-29, 329 N.E.2d at 708.

breadth by statutory construction without violating the defendant's fourteenth amendment rights to equal protection under the law.[16]

The Court observed that the statute's apparent overbreadth could be corrected by new legislation,[17] but suggested "that there are significant First Amendment problems with any statute which requires the author of a publication to reveal his identity."[18] In *Talley v. California,*[19] the United States Supreme Court struck down an ordinance that prohibited the distribution of all anonymous handbills on the grounds that such a proscription was overly broad.[20] The Supreme Court, however, left open the question whether the state might constitutionally enact narrowly drafted disclosure laws aimed at forestalling particular evils.[21]

Since the decision in *Talley,* the lower courts have differed as to whether general disclosure legislation relating only to elections comports with first amendment strictures.[22] The state, of course, must show a compelling interest that cannot be furthered by less restrictive means in order to justify a restraint on protected speech.[23] One of the interests commonly advanced in support of election-related disclosure requirements is that such requirements enable the recipient of information to assess the content of a publication in light of its source.[24] The Court in *Dennis* summarily rejected this rationale as a justification for prohibiting all anonymous campaign literature,[25] and went on to state that any total proscription of anonymous literature, regardless of its content, would violate the principles of *Talley.*[26] The Court left open the question whether more narrowly drafted legislation, requiring disclosure of material that is critical of a candidate or ballot issue, might withstand constitutional attack.[27]

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[16] *Id.*

[17] *Id.* at 1929, 329 N.E.2d at 708.

[18] *Id.*

[19] 362 U.S. 60 (1960).

[20] *Id.* at 63-64.

[21] *See id.* at 64-66.

[22] *Compare* Zwickler v. Koota, 290 F. Supp. 244 (E.D.N.Y. 1968), *vacated on other grounds sub. nom.* Golden v. Zwickler, 394 U.S. 103 (1969); *and* People v. Duryea, 76 Misc. 2d 948, *aff'd* 44 App. 2d 633 (N.Y. 1974) (both holding unconstitutional statutes similar to G.L. c. 56, § 41); *with* United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973), *rev'd on other grounds,* 496 F.2d 204 (5th Cir. 1974), *and* United States v. Scott, 195 F. Supp. 440 (D.N.D. 1961) (both upholding the constitutionality of 18 U.S.C. § 612 (1970), which proscribes the publication or dissemination of anonymous written campaign materials in federal elections).

[23] *See, e.g.,* Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539, 546 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960); NAACP v. Alabama, 357 U.S. 449, 463 (1958).

[24] *See Developments in the Law–Elections,* 88 HARV. L. REV. 1111, 1288-89 (1975).

[25] 1975 Mass. Adv. Sh. at 1931, 329 N.E.2d at 709.

[26] *Id.* at 1931-32, 329 N.E.2d at 709.

[27] *See id.*

The purpose behind disclosure legislation of this nature would be to eliminate fraudulent and deceptive campaign literature. This serves an undeniably valid, and arguably compelling, public interest, and one that has been amplified by the incidence of "dirty tricks" during the 1972 presidential campaign. However, it is unlikely that a disclosure requirement would serve to achieve the desired result of eliminating such tactics. An individual or organization intending to issue fraudulent material is not likely to identify the true source of the publication. The activity that should be punished is not the failure to disclose, but rather the promulgation of the fraudulent material itself. This purpose is served through the enactment of more narrowly drafted legislation that proscribes fraudulent statements or false attributions in election related material.[28] Such a statute would better achieve the desired result without imposing a selective chill on all campaign-related publications, and as such, represents a less drastic alternative to a disclosure requirement.

§12.6. Requirement of Parental Consent to Minor's Abortion. In *Baird v. Bellotti,*[1] a three-judge district court, in a 2-1 decision, held that the parental consent requirement of the 1974 Massachusetts statute governing abortions for minors[2] was unconstitutional on its face.[3]

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[28] *See* 18 U.S.C. § 617 (1975 Supp. I), the recently enacted federal campaign falsity statute, and *Developments in the Law–Elections, supra* note 24, at 1289 n.318.

§12.6. [1] 393 F. Supp. 847 (D. Mass. 1975). The plaintiffs in *Baird* were Mary Moe (a fictitious name), an unmarried sixteen-year-old girl who was eight weeks pregnant at the time the action was commenced; the Parents Aid Society Inc., a nonprofit corporation that provides abortions for varying fees, depending upon the mother's ability to pay; William Baird, founder and director of Parents Aid; and Dr. Gerald Zupnick, medical director of Parents Aid.

Mary Moe subsequently had an abortion, performed by Dr. Zupnick, following the issuance of a restraining order in the case suspending operation of the statute. 393 F. Supp. at 850 n.4. That fact did not moot the case as to her. *See* Roe v. Wade, 410 U.S. 113, 125 (1973).

The court found that plaintiffs Mary Moe, Parents Aid, and Dr. Zupnick had standing as representative party plaintiffs and certified the suit as a valid class action as to all of them. 393 F. Supp. at 850-52. Although the court found Baird's standing more problematical, it did not pass on that question in light of the other plaintiffs' standing. *Id.* at 851. The court also rejected the defendants' contention that no "case or controversy" existed inasmuch as none of the plaintiffs had been actually threatened with criminal prosecution. The court found a cognizable case or controversy because, under all the circumstances, "plaintiffs had every reason to believe that they had only two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit." *Id.* at 852.

[2] G.L. c. 112, § 12P, inserted by Acts of 1974, c. 706, § 1, which reads in part:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

Section 12P was part of a newly enacted, comprehensive statutory scheme regulating abortions. *See generally* G.L. c. 112, §§ 12I-12R.

[3] 393 F. Supp. at 857.

The court broadly enjoined enforcement of section 12P of chapter 112 of the General Laws, which makes it a criminal offense to perform an abortion upon a minor without the consent of both parents as well as that of the minor, with certain exceptions.[4] The defendants[5] and the intervenor[6] appealed, and the United States Supreme Court has noted probable jurisdiction.[7]

The validity of parental consent requirements had been expressly left unanswered by the United States Supreme Court in *Roe v. Wade,* the case that defined the constitutional rights of a woman to have an abortion without interference by the state.[8] The *Baird* opinion presented two issues that went beyond the scope of the decision in *Roe v. Wade*: (1) whether the rights of a minor female are coextensive with those of an adult,[9] and (2) whether the minor's personal rights are paramount to the interests either of the state or of her parents.[10] The court in *Baird* answered both questions affirmatively.[11]

In *Roe v. Wade,* the Supreme Court held that there is a constitutionally protected right of privacy that is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[12] and that at least during the first trimester of pregnancy, the abortion decision must be left to the woman, in consultation with her physician, without interference by the state.[13] Although the constitutional rights

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[4] *Id.*

[5] The defendants in *Baird* were Francis Bellotti, Attorney General of the Commonwealth; Garrett Byrne, district attorney for Suffolk County; and the district attorneys of all other counties in the Commonwealth. *Id.* at 849.

[6] Jane Hunerwadel was permitted to intervene "on behalf of, and as representative of, Massachusetts parents having unmarried minor daughters who are, or who might, become pregnant." *Id.* at 849-50.

[7] The Supreme Court noted probable jurisdiction in Bellotti v. Baird, 44 U.S.L.W. 3304 (U.S. Nov. 18, 1975) (No. 75-73), and Hunerwadel v. Baird, 44 U.S.L.W. 3304 (U.S. Nov. 18, 1975) (No. 75-109), and consolidated both cases for hearing. These cases are to be argued together with Planned Parenthood of Central Missouri v. Danforth, 44 U.S.L.W. 3304 (U.S. Nov. 18, 1975) (No. 74-1151), and Danforth v. Planned Parenthood of Central Missouri, 44 U.S.L.W. 3304 (U.S. Nov. 18, 1975), appeals from the decision in Planned Parenthood of Central Missouri v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975), *enforcement stayed,* 420 U.S. 918 (1975).

[8] *See* 410 U.S. 113, 165 n.67 (1973). For a discussion of Roe v. Wade, see Comment, 1974 ANN. SURV. MASS. LAW § 10.8, at 235.

[9] 393 F. Supp. at 855-56.

[10] *Id.* at 856-57.

[11] *Id.* A majority of the courts that have considered similar statutes have reached the same result. *See* Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed,* 417 U.S. 279 (1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973), *cert. denied,* 415 U.S. 958 (1974); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975). *But see* Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975), *enforcement stayed,* 420 U.S. 918 (1975). *See also* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent,* 60 VA. L. REV. 305 (1974).

[12] 410 U.S. at 153.

[13] *Id.* at 163-64.

of minors have not as yet been clearly delineated,[14] the court in *Baird* readily concluded that "there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age."[15]

The question remained, however, whether the child's rights could be made subordinate to interests of the state—for reasons not present in *Roe v. Wade*— or to those of her parents.[16] The state has traditionally promulgated reasonable regulations to protect minors, even when the minors or their parents have objected to the legislative enactments.[17] The court in *Baird,* however, concluded that the minor's right to have an abortion during the first trimester could not "be subordinated to the state any more than can be an adult's."[18] This conclusion rested upon the court's interpretation of the challenged statutory provisions. The court took the view that "the statute is cast not in terms of protecting the minor . . . but in recognizing indepen-

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[14] Most of the case law dealing with the rights of minors has arisen in the context of either the juvenile court system or the schools. *See, e.g.,* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (state need not provide juveniles with jury trials in the adjudicative phase of delinquency proceedings); *In re* Winship, 397 U.S. 358 (1970) (state must meet standard of proof "beyond a reasonable doubt" in juvenile proceedings); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (upholding child's right to wear armband in protest of Vietnam war); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (upholding child's right to remain silent during pledge of allegiance).

In *In re* Gault, 387 U.S. 1 (1967), the Supreme Court, although recognizing the juvenile's right to various procedural safeguards during the course of juvenile court proceedings, nevertheless made it clear that minors need not be accorded the full panoply of constitutional rights coextensive in kind and degree with those accorded an adult. *Id.* at 13. *Compare In re* Winship, 397 U.S. 358 (1970) *with* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

Although the Supreme Court has not yet considered the minor's right to privacy, lower courts have found it to exist. *See, e.g.,* Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973), where the court held that school questionnaires, designed to identify eighth-grade students with propensities for drug abuse so that preventive measures could be taken, were unconstitutional and constituted an invasion of the children's right to privacy. *Id.* at 920-22.

[15] 393 F. Supp. at 855-56. The court also rejected the defendants' argument that females under the age of 18 generally lacked the capacity to make an informed and intelligent consent. *Id.* at 854-55.

[16] *Id.* at 856.

[17] Prince v. Massachusetts, 321 U.S. 158 (1944), involved a challenge to the state child labor law, where the Court rejected the claim of a child to freely practice her religious convictions by distributing religious literature on the streets and that of the child's guardian to be free to direct the child's upbringing without interference by the state. *Id.* at 164-70. In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court, in upholding an obscenity law adjusting the definition of obscenity for materials sold to persons under 17 years of age, declined to accept the argument that it was impermissible to make a citizen's freedom to read or see material concerned with sex depend solely on his age. *Id.* at 639-41.

[18] 393 F. Supp. at 856.

dent rights of parents."[19] The court stated that:

> The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognized and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests.[20]

The fact that the statute afforded the minor the opportunity of judicial review of her parents' refusal of consent "for good cause shown" did not alter this view. The majority opinion took the position that such judicial review would merely insure that the refusal of consent be reasonably made in the interests of the *parents*.[21] The majority rejected the view expressed in the dissent that a reviewing superior court judge would consider only the interests of the minor.[22]

In assessing the competing interests of the parents and the minor, the court weighed many of the practical considerations bearing on the issue.[23] The court recognized the physiological and emotional risks surrounding an abortion, and noted that "parental support, if forthcoming, is most desirable."[24] While acknowledging that most parents are supportive, the court nevertheless felt constrained to find that many are not, for a variety of reasons, including the belief of some parents that abortion is "morally impermissible."[25] Reflecting the view that the interests of the minor and her parents are not necessarily consonant, the court noted that

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[19] *Id.*

[20] *Id.* at 855. Although it is possible that the United States Supreme Court could construe the parental consent requirement as merely affording protection to the minor, on behalf of the state, it is doubtful that the Court would adopt such an approach where the state has acknowledged that the statute is intended to recognize the competing interests of the parents themselves.

The federal court reserved judgment on whether the state could constitutionally regulate the minor's right to an abortion to a greater extent than an adult's exercise of that right, provided that the statute was cast in terms of affording additional protection by the state to the minor, rather than of recognizing independent rights of the parents. *Id.* For example, in order to provide a safeguard to the validity of the minor's consent and the wisdom of her decision, the state might require a confidential hearing, at which time the judge could satisfy himself that the minor was attended by a licensed physician, had been fully informed of the consequences surrounding the decision to abort, and was capable of making an informed consent.

The court, however, left no doubt about the futility of the existing scheme, even in terms of the parents' interests: "[Parents] have years in which to teach their children, counsel them, guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before." *Id.* at 856.

[21] 393 F. Supp. at 855.

[22] *Compare id.* at 855 n. 10 *with id.* at 857-64 (dissenting opinion).

[23] *Id.* at 852-54.

[24] *Id.* at 853.

[25] *Id.* at 854.

some parents believe that they have separate rights as parents, and that there is a family interest, separate and apart from that of the minor. These interests, which are asserted to be of constitutional proportions, they variously describe as "parents' liberties;" the parents' right to "promote and preserve the family as an important societal unit." These rights being, by hypothesis, antithetical to the minor's, it may not be unnatural for the minor to feel that she is in trouble enough without having to become subservient to claims of others.[26]

The court found that a significant number of minors, though independently reaching a reasonable decision about abortion, would be unwilling to inform their parents either out of fear of being forced into an unwanted marriage as punishment, or merely out of a desire to spare their parents any anxiety.[27] Finally, in drawing the balance, the court noted that it is the minor, not the parents, who will bear the child and be responsible for it, both financially and otherwise.[28] For these reasons, the court concluded that "even if it should be found that parents have rights vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected."[29]

The dissent maintained that parents have constitutionally protected rights that flow from the family relationship[30] and that the statutory

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[26] *Id.*

[27] *Id.* at 853.

[28] *Id.* at 856.

[29] *Id.* at 857. Although the court in *Baird* did not consider the issue, the provisions of G.L. c. 112, § 12P, could be subject to attack on equal protection grounds as well. The statutory provisions by their terms only apply to unmarried minors. This raises an equal protection question because married minors presumably are free to have an abortion during the first trimester without any interference, by the state, their parents, or their husbands. In Doe v. Doe, 1974 Mass. Adv. Sh. 1089, 314 N.E.2d 128 (1974), the Supreme Judicial Court held that a husband has no enforceable right to prevent his wife from having an abortion. *See* Comment, 1974 ANN. SURV. MASS. LAW § 10.8, at 234, 235. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Supreme Court rejected an attempted statutory classification based upon the marital status of persons seeking contraceptive devices. *Id.* at 446-55. Against this argument, it should be noted that the marriage of minors requires parental consent. G.L. c. 207, § 7.

[30] 393 F. Supp. 847, 857, 861-64. The dissent described the nature of the parents' interest in part as follows:

> The State parental consent statute protects an interest which is completely separate from the State's interest in the protection of the pregnant woman's health or the unborn child's life. The statute protects the right of the parents to the liberty guaranteed them by the Fifth and Fourteenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions, in the first instance, for the control and functioning of the family as a harmonious unit. The statute ensures that parents will have the opportunity to guide and counsel their daughter, and play a supportive role during and after the pregnancy.

Id. at 862.

guaranty of those rights serves a compelling state interest.[31] The dissent relied on cases such as *Pierce v. Society of Sisters,*[32] *Meyer v. Nebraska,*[33] and *Wisconsin v. Yoder*[34] to support its view that parents have rights in their own behalf. In each of these cases, however, the Court merely established the rights of the parents as against the state. The interests advanced by the parents in these cases were not shown to be different from, or adverse to, those of their children. For example, in *Yoder,* where the Supreme Court held that the Amish were exempt from a compulsory school attendance law, the majority opinion made it clear that the rights of the children were not before it.[35] Justice Douglas concurred in the result insofar as it applied to one child

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[31] The dissent also offered three narrower grounds of decision. First, the minor's constitutional right to have an abortion was reasonably protected by the statutory provision empowering a reviewing state court judge to override the parents' objections upon a showing that "the minor is mature enough to give an informed consent . . . and has been adequately informed about the nature of an abortion and its probable consequences to her." *Id.* at 864. Second, the parents of the minor in this case should have been joined as indispensable parties to the action, pursuant to FED. R. CIV. P. 19. *Id.* at 857-59. The parents of Mary Moe had no knowledge of her pregnancy, the abortion, or the court proceedings. The defendants' motion to join the parents as indispensable parties was denied. *Id.* Neither the court itself nor the defendants knew Mary Moe's real identity, and the majority ordered the defendants not to attempt to discover either her identity or that of her parents. *Id.* at 857-58. Third, a guardian ad litem should have been appointed for the minor, pursuant to FED. R. CIV. P. 17(c). *Id.* at 859-60. Mary Moe was represented by the same counsel as all the other plaintiffs, and the dissent viewed this as a conflict of interest. The majority expressly rejected this contention. *Id.* at 850 n.5. The defendants continued to press these issues in their appeal to the Supreme Court. *See* Appellants' Statement, Belloti v. Baird, No. 75-73.

It is unlikely that the United States Supreme Court noted probable jurisdiction in order to speak to the guardian ad litem issue or the indispensable party issue. The indispensable party issue is a derivative question. It depends on the underlying recognition of the parents' claim to participate in the abortion decision of their minor daughter. If the state defendants do not stress the guardian ad litem issue, they may be excused, because the very statute they defend explicitly waives the requirement of the appointment of a guardian in the event of a hearing. G.L. c. 112, § 12P(1). The statutory provision for judicial review of the parent's refusal of consent may, however, prove a pivotal point in the view of the Supreme Court. See text at notes 21 and 22 *supra.*

[32] 268 U.S. 510 (1925). In *Pierce,* the Court held that an Oregon law, which made public school attendance compulsory, was unconstitutional:

> The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535.

[33] 262 U.S. 390, 403 (1932). In *Meyer,* the Court struck down a Nebraska statute that prohibited the teaching of any modern language, other than English, to a child who had not passed the eighth grade. *Id.*

[34] 406 U.S. 205 (1972).

[35] *Id.* at 230-31.

whose views on the matter had been heard by the Court, but he dissented as to all the other children whose views had not been solicited. He recognized that the children had constitutionally protected interests in their own right, and took the position that "where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."[36]

The significance of the question reserved in *Yoder*—how to resolve situations in which the claims of the parent and the child are adverse—was never wholly confronted by the analysis of either the majority or dissenting opinions in *Baird.* Although both opinions recognized that the relationship of parent to child was more complex than one of competing rights,[37] both opinions "forced" the resolution into the familiar mold of adjudging between competing interests.[38] In doing so, the core questions of what is the source and scope of parental power was never directly faced.

The power of parents over their children may be viewed essentially in two theoretical perspectives. One theory, derived from the axiom that the state is the ultimate source of all legal power,[39] is that parental power is conferred or delegated by the state. According to this view, state power is the proper measure of the limits of parental power, or put differently, the state cannot confer or legitimate power that it did not itself possess.[40] Under this theory, the appropriate inquiry in *Baird* is whether the state could constitutionally do that which section 12P empowered the parents to do. Simply, could the state deny an abortion, by a licensed physician in the first trimester, to a pregnant minor?

The only power the state has under *Roe v. Wade* during the first trimester is to *facilitate,* by providing safeguards[41] for or minimizing

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[36] *Id.* at 241, 242-43 (Douglas, J., dissenting in part).

[37] The majority suggested that parents' "rights" might not exist independent of their childrens' interest. 393 F. Supp. at 856. Whenever the dissent referred to the "rights" of parents, it usually did so in conjunction with the term "duties." *Id.* at 862. See note 30 *supra.*

[38] The majority may have felt constrained to consider the case in this guise, because the defendants argued their case below in those terms. 393 F. Supp. at 855. By reducing the ultimate question to which interest is more important, the choices made take on an almost personal coloration.

[39] *See* J. AUSTIN, JURISPRUDENCE 37 (4th ed. rev. 1873).

[40] *Id.*

[41] In Connecticut v. Menillo,—U.S.—, 96 S. Ct. 170 (1975), the Court held that a Connecticut statute prohibiting attempted abortion by "any person" was not unconstitutional as applied to an attempted abortion performed by a person who was not a physician. The Court explained that its holding in Roe v. Wade was predicated upon the abortion being "performed by medically competent personnel under conditions insuring maximum safety for the woman." *Id.,* 96 S. Ct. at 171.

interference with,[42] the decision of the pregnant woman. Because the state's duty under the well-established doctrine of parens patriae is to advance the welfare and pursue the *best interests* of the minor,[43] unless the state can establish that the *best interests* of a pregnant minor are different than those of a pregnant adult, the only power the state possesses regarding a minor who desires an abortion is to *facilitate* her decision-making by informing her of the physical and psychological implications of her decision so that she can, to the best of her ability, make an informed decision.

There does not seem to be any dispute that the best interests of the minor mother are identical to those of an adult mother. The dispute, of course, is about whether the minor's decision is sufficiently mature to accord it recognition. The propriety of the conclusion to abort or not does not bear on this question of the maturity of the decision and therefore is unrelated to the determination of the minor's best interests.[44]

According to this analysis, section 12P fails because it does not circumscribe the parents, in the first instance, within the proper scope of their power—as the court put it— "to counsel and guide."[45] The state should be limited to establishing procedures for helping the minor mother to reach a mature decision, if she is capable of doing so. Only upon determination that she was unable to do so would the state be free to delegate the decision-making to others, possibly the parents.[46]

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[42] Hospital regulations that unduly restricted the right to an abortion have been struck down by several federal courts. *See* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), *cert. denied*,—U.S.—,95 S. Ct. 825 (1975); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974). *Cf.* Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975) (excusing individual employees from participating in abortions on grounds of conscientious objection). *See also* Doe v. Doe, 1974 Mass. Adv. Sh. 1089, 314 N.E.2d 128 (1974); and note 29 *supra*.

[43] Prince v. Massachusetts, 321 U.S. 158, 167-69 (1944); Richards v. Forrest, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932); Dumain v. Gwynne, 92 Mass. (10 Allen) 270, 271-72 (1865).

[44] For this reason, presumably no one has asserted that the minor's decision to bear her child may be overruled by her parents or the state, as not in her best interests, except for exigent medical reasons. (G.L. c. 112, § 12N, exempts an emergency abortion from consent requirements.) *See In re* Smith, 16 Md. App. 209, 295 A.2d 238 (1972) (parent unsuccessfully sought to compel her minor daughter to have an abortion).

An abortion under § 12P in fact requires the consent of the minor, as well as her parents. Apparently an adolescent mother is presumed by the Legislature to be competent to make an informed decision against abortion but not for abortion. Supposedly, in light of Roe v. Wade, this legislative presumption cannot be justified in terms of the state's interest in potential life during the first trimester.

[45] 393 F. Supp. at 856.

[46] Even at this juncture the state arguably might be required to adopt a procedure to "safeguard" minors from nonsupportive or recriminatory parental attitudes. The court in *Baird* even cast some doubt on more narrowly drawn legislation that might require mere notification of parents and an opportunity to communicate with the minor:

> There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the

Nonetheless, another general theory of parental power exists and must be considered. The dissenting opinion, rejecting the theory that parental power is predicated upon state power, adopted this other theory, which holds that the institution of the family provides an antecedent, independent source of authority.[47] Implicit in this theory is the idea that the state should not, and certainly need not, interfere with parental authority operating within traditional spheres, such as consent to surgical procedures.[48] In accordance with this interpretation, the doctrine of parens patriae merely operates to curb alleged abuses of parental power.[49] Seen in this light, the provision for judicial review "for good cause shown" in section 12P is a manifestation of the appropriate parens patriae role of the state.

In abstract terms, the foregoing position may be perfectly sound. Judicial judgments, however, turn on the application of theory to real circumstances. Put to this test, the theory founders.

The applicability of the theory depends on the definition or scope of the "traditional sphere of authority" of parents. If it is defined normatively—in terms of the power parents *ought* to have—the entire argument becomes tautological. If instead the "sphere of authority" is measured in terms of tradition—legal or customary[50]—or in terms of

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minor's own consequent feelings. While we shall not deal with this aspect further, we note that in a very real sense it precisely fits standard concepts of the right of privacy.

Id. at 853. See State v. Koome, 84 Wash. 2d 901, 914, 917, 530 P.2d 260, 268, 270 (1975) (concurring opinion) for the view that parental notification requirements of this type would likely pass constitutional muster. Unquestionably, a notification statute, or a statutory scheme that reversed the legislative presumption and imposed the initiative for a hearing upon parents (on the ground that a proposed abortion would be harmful to the physical or mental health of their child) would present closer constitutional questions than § 12P.

[47] *See* 393 F. Supp. at 862, *quoted in part* at note 30 *supra.* In Griswold v. Connecticut, 381 U.S. 479 (1965), in his dissenting opinion, Justice Black characterized this theory as a "natural law due process philosophy." *Id.* at 507, 515.

[48] *See, e.g.,* Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972). *See also,* E. HAYT, THE LAW OF HOSPITAL, PHYSICIAN AND PATIENT 463-86 (3rd ed. 1972).

[49] *See, e.g.,* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (N.D. Wash. 1967), *aff'd* 390 U.S. 598 (1968); *In re* Kauch, 358 Mass. 327, 264 N.E.2d 371 (1970). *Cf.* Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied,* 377 U.S. 985 (1964) (court appointed guardian when mother refused life preserving blood transfusions for viable fetus).

[50] The common law required the consent of one parent for medical treatment of a child. *See* MORRIS AND MORITZ, DOCTOR AND PATIENT AND THE LAW 161, 163 (5th ed. 1971). The rule may have rested on the common law assumption that the father spoke for the family, but in modern times consent of either parent has been deemed sufficient. *See In re* Rotkowitz, 175 Misc. 948, 951, 25 N.Y.S.2d 624, 627 (N.Y.C. Dom. Rel. Ct. 1941), where court authorized an operation opposed by father and consented to by mother. *Cf. In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942), where court refused to order an operation medically recommended because mother denied consent and father "abdicated" his duty to decide.

The court in *Baird* noted that accepted medical practice in Massachusetts required "the consent of *a* parent." 393 F. Supp. at 855 (emphasis added).

actual control of parents over their adolescent children's sexual behavior, there is hardly any basis for claiming that the "sphere" extends as far as the powers conferred by section 12P.[51] If indeed, prior to the enactment of section 12P, the consent of one parent was legally sufficient, it is difficult to comprehend on what ground the state rests its preference for the decision of the parent who opposes abortion. Were the state actually striving to do no more than implement the parental will, as this theory posits, the state should have refrained from acting in cases in which parental will was divided.

The independent parental power theory also proves wanting with respect to the judicial review provision of section 12P—the provision upon which the validity of the statute ultimately turns.[52] If the statutory language "for good cause shown" should be interpreted as imposing the reviewing standard of "the best interests of the child," as the dissent correctly asserts,[53] then section 12P creates an anomaly. The anomaly is that the statute does not limit parents to exercising their judgment according to the same standard, or even about the same matter, that the reviewing court must look to. The scope of the reviewing court's inquiry is, in the words of the dissent, to determine if "the minor is mature enough to give an informed consent and that she has been adequately informed about the nature of an abortion and its probable consequences to her."[54] The parental power to withhold consent simply exceeds the standard by which an abuse of the parents' authority is to be tested. The power to abuse is inherent in any authority, but it can never be claimed as part of the definition of the authority.

In the end, both theoretical approaches converge in the doctrinal proposition that section 12P is overbroad.[55] Two general suppositions,

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[51] Unless physicians were required by law to inform parents of their child's request for an abortion, parental involvement would depend on the voluntary disclosure by the minor.

[52] The appellants, in their brief to the Supreme Court, with candor concede that "[i]f § 12P provided no [judicial] recourse . . . constitutional problems might exist." On this basis, they contrast the parental consent statutes struck down in State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975) and Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975). Brief for Appellants, Bellotti v. Baird, No. 75-73, at 53.

[53] 393 F. Supp. at 864. As noted previously, the majority believed that the reviewing court was not necessarily bound to protect the best interests of the child. See text at note 21 *supra*. The dissent has the best of the argument on this point, not only because federal policy requires that the court must assume that state judges will be faithful to their constitutional responsibilities, 393 F. Supp. at 864-65 n.16, but in order to avoid the force of the argument for abstention. *Id.* at 863 n.15.

[54] 393 F. Supp. at 863-64.

[55] "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means that sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964). *But see* Broadrick v. Oklahoma, 413 U.S. 601 (1973), suggesting curtailment of the doctrine in certain contexts.

both indulged by the court in *Baird,* conduce to support this proposition of overbreadth: (1) some, perhaps many, minors are capable of forming mature judgments about abortions;[56] and, (2) some parents are likely to withhold consent for an abortion for reasons unrelated to their child's capacity to form a mature judgment about abortion.[57] These suppositions were not seriously challenged.[58] Instead, the Commonwealth emphasized that the provision for judicial review relieved the statute of its overbreadth. Perhaps another supposition, one within the expertise of the bench and bar, should have been the basis of the court's response to the Commonwealth's assertion that the review provision saved the statute, *i.e.,* that minor women, generally without independent resources or knowledge of the law, have no realistic access to the legal process.[59]

§12.7. Exclusion of Employables from General Relief: Irrebuttable Presumptions and the Right to Welfare. The assistance of all residents of the Commonwealth in economic need was a tradition which dated back to colonial times.[1] In 1975, with the enactment of amendments to sections 1 and 4 of chapter 117 of the General Laws,[2] that tradition ended. As Governor Dukakis explained in his message in support of the amendments:

> Our intention in redefining eligibility for General Relief is to make it clear that General Relief henceforth cannot be expected to meet the needs of every person in the Commonwealth with a demonstrable need, regardless of that person's other characteristics or his employment situation.[3]

Before enactment of the amendments, the Massachusetts House of Representatives propounded two questions to the Supreme Judicial Court concerning the constitutionality of the proposed amendments

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[56] 393 F. Supp. at 854-55.

[57] *Id.* at 853-54.

[58] The dissenting opinion did raise the question whether these "facts" were proven as to the minor plaintiff. *Id.* at 859. This question touches on the distinction drawn between legislative and adjudicative facts, on how a court informs itself of "facts" that support its suppositions, and the proper role of courts in pursuing such inquiries. *See* Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry,* 61 VA. L. REV. 1187 (1975).

[59] The Legal Services Corporation Act excludes legal assistance to "any unemancipated person of less than eighteen years of age" generally, and prohibits provision of legal assistance for nontherapeutic abortions regardless of age. 42 U.S.C.A. § 2996f(b)(4) and (8) (Supp. 1976).

§12.7. [1] Colonial laws (1890 ed.) 123, § 2, *reprinted in* Acts of 1788, c. 61. *See* Opinion of the Justices, 1975 Mass. Adv. Sh. 2521, 2548, 333 N.E.2d 388, 400 (1975).

[2] Acts of 1975, c. 618, §§ 1 and 2.

[3] *As quoted in* Opinion of the Justices, 1975 Mass. Adv. Sh. 2521, 2539, 333 N.E.2d 388, 397 (1975).

of the General Relief program, chapter 117 of the General Laws.[4] In *Opinion of the Justices to the House of Representatives,*[5] the Supreme Judicial Court answered each question of constitutional doubt negatively.[6]

Prior to its amendment, section 1 of chapter 117 of the General Laws,[7] established the scope of the General Relief program in the following broad terms:

> The commonwealth . . . shall assist, to the extent practicable, all poor and indigent persons residing therein, whenever they stand in need of such assistance. The aid furnished shall be . . . sufficient to maintain an adequate standard of living for the poor and indigent applicant and his immediate family who are eligible . . . [and] in an amount to be determined in accordance with budgetary standards of the department [of public welfare].[8]

The amended version of section 1 constitutes a radical change.[9] It provides: "The commonwealth . . . shall provide assistance to residents . . . found by the department [of public welfare] to be eligible for such assistance in accordance with this chapter."[10]

Although the amended version of section 1 constitutes the essence of the change made in the General Relief program, it did not attract the attention, publically or analytically, that the exclusionary language of amended section 4 commanded because section 4 figuratively constitutes the "cutting edge" of the amendments.[11] The amended section 4 reads in part: "A person who has no dependent children and who is determined by the department in accordance with its regulations to be employable shall not be eligible for assistance under this chapter."[12]

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[4] 1975 Mass. Adv. Sh. at 2521-22, 333 N.E.2d at 391-92. Two other questions propounded are not treated in this discussion. One of these asked whether making certain unemployed parents ineligible for General Relief would be in violation of federal statutes. The other question pertained to an amendment to G.L. c. 118E, § 6, which relates to medical care and services for the needy. 1975 Mass. Adv. Sh. at 2522, 333 N.E.2d at 391-92.

[5] 1975 Mass. Adv. Sh. 2521, 333 N.E.2d 388 (1975).

[6] *Id.* at 2521-23, 2549, 333 N.E.2d at 391-92, 400.

[7] Acts of 1971, c. 908, § 1, *as amended by* Acts of 1974, c. 623, § 2.

[8] *Id.* Even under this former law, certain categories of needy people were excluded, such as persons younger than eighteen and older than sixty-five, and all students. These exclusions presumably dovetailed with coverage by state or federal categorical assistance programs. The age limitations were declared unconstitutional in Morales v. Minter, 393 F. Supp. 88 (D. Mass. 1975). See notes 18-20 *infra.*

[9] G.L. c. 117, § 1, *as amended by* Acts of 1975, c. 618, § 1. This change precipitated the first question propounded to the Supreme Judicial Court—whether the Legislature had properly delegated the authority to determine welfare eligibility to the Department of Welfare with no other guidelines than "in accordance with this chapter."

[10] *Id.*

[11] Acts of 1975, c. 618, § 2, *amending* G.L. c. 117, § 4 (1975).

[12] *Id.* The remainder of the amended version of G.L. c. 117, § 4, consists of various excluded categories of persons, including the only group mentioned in the former § 4—*i.e.,* students—presumed to be eligible under other categorical programs. *Id.*

Question three posed by the House pertained to this exclusionary language, and the better part of the *Opinion of the Justices* was devoted to its treatment.[13] The question posed was whether this particular exclusion violated the due process and equal protection clauses of the fourteenth amendment, especially in view of *Morales v. Minter,*[14] a recent decision by the First Circuit Court of Appeals.[15] The Supreme Judicial Court concluded that the proposed amendment was constitutional.[16]

The Court began its analysis of question three by distinguishing the *Morales* case from the question before it.[17] In *Morales,* a federal district court upheld a constitutional challenge to the requirement of section 4 of chapter 117, as then in effect, that applicants for General Relief be between the ages of eighteen and sixty-five, concluding that the statute created an irrebuttable presumption and therefore violated the due process clause.[18] The court in *Morales* found that the age limitations imposed by section 4 created a "conclusive and irrebuttable presumption," with no opportunity for an individualized determination that persons under eighteen or over sixty-five were not in need of financial assistance.[19] Since that presumption was "not necessarily or universally true," the court concluded that it violated due process safeguards.[20]

The Supreme Judicial Court rejected the precedential value of *Morales* for two reasons. One reason was that the United States Supreme Court's opinion in *Weinberger v. Salfi,*[21] decided subsequent to *Morales,* cast doubt on whether the irrebuttable presumption analysis is the appropriate form of review in cases involving welfare claims.[22] In *Salfi,* the Supreme Court considered a constitutional challenge to a provision of the Social Security Act pursuant to which surviving wives and stepchildren of deceased wage earners were eligible for insurance benefits only if their relationship to the deceased had commenced at least nine months prior to his death.[23]

Reversing the lower court decision,[24] which had held the duration-of-relationship requirement invalid because the requirement irrebuttably presumed a fact (sham marriage) that was not necessarily or

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[13] 1975 Mass. Adv. Sh. at 2537-49, 333 N.E.2d at 396-400.
[14] 393 F. Supp. 88 (D. Mass. 1975).
[15] 1975 Mass. Adv. Sh. at 2537, 333 N.E.2d at 396.
[16] See text at note 6 *supra.* 1975 Mass. Adv. Sh. at 2537-49, 333 N.E.2d at 396-400.
[17] 1975 Mass. Adv. Sh. at 2539-40, 333 N.E.2d at 397.
[18] 393 F. Supp. at 96.
[19] *Id.*
[20] *Id.*
[21] 422 U.S. 749 (1975).
[22] 1975 Mass. Adv. Sh. at 2540, 333 N.E.2d at 397.
[23] *See* 42 U.S.C. §§ 416(c)(5) and (e)(2) (1970).
[24] Weinberger v. Salfi, 373 F. Supp. 961 (N.D. Cal. 1974).

universally true,[25] the Supreme Court held the duration requirement rationally related to the legitimate legislative objective of avoiding, by an easily administered prophylatic rule, the abuse of entering sham marriages to secure social security benefits.[26]

The Supreme Court in *Salfi* discussed the appropriate standard of review for challenges to the constitutionality of welfare legislation.[27] The Court attempted to distinguish cases such as *Stanley v. Illinois,*[28] and *Cleveland Board of Education v. LaFleur,*[29] in which irrebuttable presumptions had been held invalid in other legislative schemes,[30] on the ground that such cases involved claims enjoying "constitutionally protected status," whereas "a noncontractual claim to receive funds from the public treasury" does not enjoy similar status.[31] The Supreme Court concluded that under such circumstances, the appropriate standard of review is whether or not the challenged criteria are rationally related to a legitimate legislative objective.[32]

In applying this test, the Supreme Judicial Court concluded that the proposed exemption from General Relief benefits represented a rational means of furthering the state's avowed purpose of allocating finite resources where they are most needed:[33]

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[25] *Id.* at 965. The three-judge federal district court, relying on legislative history, had concluded that the purpose of the duration-of-relationship requirement had been to prevent sham marriages merely designed to secure Social Security benefits. *Id.* The lower court concluded that a presumption was created that marriages of less than nine months' duration were shams. *Id.* The presumption, moreover, was conclusive because the applicant was not afforded an opportunity to disprove the presence of the illicit purpose, although admittedly the presumed fact was not necessarily or universally true. *Id.* at 965-66. The district court found that this arbitrary foreclosure of proof of a genuine marriage was violative of due process. *Id.*

[26] 422 U.S. at 777.

[27] *Id.* at 768-70.

[28] 405 U.S. 645 (1972).

[29] 414 U.S. 632 (1974).

[30] In *Stanley,* the Court held that it was a denial of equal protection for the state to deny a hearing on parental fitness to an unwed father when such a hearing was provided to all other parents in custody challenges. 405 U.S. at 658. In *La Fleur,* the Court held invalid school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing five months before expected birth. 414 U.S. at 644-46.

[31] 422 U.S. at 772. In Vlandis v. Kline, 412 U.S. 441 (1973), the Court held invalid a statutory definition of "residents" for purposes of fixing tuition to be paid in a state university system. The majority in *Salfi* attempted to distinguish *Vlandis* on the basis that:

> [W]here Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. By contrast, "the Social Security Act [at issue in *Salfi*] does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible."

422 U.S. at 772. As Justice Brennan suggested in his dissent, *Vlandis* is not so readily distinguishable. *Id.* at 803.

[32] 422 U.S. at 772.

[33] 1975 Mass. Adv. Sh. at 2547, 333 N.E.2d at 399.

> Thus, in light of the Commonwealth's asserted inability to provide assistance to all those in financial need, the eligibility restriction introduced by the bill does not appear to us to represent an irrational means to accomplish the Commonwealth's objectives.[34]

The other, and in the Court's view, more important reason for not following *Morales,* was that the rationale in *Morales* rested on the proposition that the Commonwealth formerly purported "to assist *all* its residents in need of assistance."[35] Since the amended version of section 1 of chapter 117 no longer purports to cover all persons in need, the Court reasoned, the presumption that any person excluded is in fact not needy is not relevant.[36] The Court concluded that "we are not faced with the question whether it is 'necessarily or universally true' that 'employable' persons are not in need of assistance."[37]

Implicit in this reasoning process is the validity of the proposition, entailed in the amended version of section 1 of chapter 117, that the Commonwealth may aid *some* of its needy residents and not others. The Court addressed this proposition indirectly when it answered question one[38]—regarding the delegation of eligibility determination to the welfare department—and then directly in the latter portion of its opinion.[39] It approached the direct answer by observing that a due process challenge to the eligibility standards of a welfare statute dovetails with the claims that the classification drawn between those eligible for benefits and those not eligible violates equal protection.[40] Basically, the needy excluded are demanding an answer to the question "why us and not them."[41] The Court found the answer in the traditional test of whether the eligibility standard rationally furthers a legitimate state purpose.[42]

Concluding that the principal objective of the proposed amendment—"to achieve . . . a necessary allocation of finite State resources in a time of fiscal crisis"[43]—was a legitimate state objective, the Court noted that the Legislature may properly allocate funds to a somewhat limited class of recipients rather than spreading the same funds among all potential recipients.[44]

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[34] *Id.*
[35] *Id.* at 2539, 333 N.E.2d at 397.
[36] *Id.* at 2539-40, 333 N.E.2d at 397.
[37] *Id.* at 2540, 333 N.E.2d at 397.
[38] *Id.* at 2525-28, 333 N.E.2d at 392-93.
[39] *Id.* at 2543-49, 333 N.E.2d at 398-400. At one point, the Court remarked: "We might add that we are aware of no constitutional obligation on the State to provide financial assistance to all its needy residents." *Id.* at 2544, 333 N.E.2d at 398.
[40] *Id.* at 2542, 333 N.E.2d at 398.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 2543, 333 N.E.2d at 398.
[44] *Id.* at 2544, 333 N.E.2d at 398.

This statement of legislative objective—saving the Commonwealth money—is, to say the least, a very curious notion of a legitimate state objective. If this was the primary objective of the amendments, then *any* cuts the department instituted would be rationally directed to the achievement of that objective. For example, in pursuit of that objective the department might fairly decide to grant aid to every odd-numbered applicant. It must be obvious that "saving money" can never be more than a contingent purpose.

Nevertheless, the Court pursued this analysis to its "logical" conclusion that the exclusion of employables is not an irrational means of accomplishing its objective.[45] The Court stated the analytical link in its argument as follows: "Given the Commonwealth's objective of preserving the fiscal integrity of its welfare programs, the question is whether this particular exclusion [of employables] is a rational means of accomplishing that objective, free from invidious discrimination."[46] The Court immediately displayed the inconsistency of its own analysis, however, by attempting to demonstrate in the subsequent paragraphs a link between employability and a *lesser degree of need* rather than the link between employability and *preserving fiscal integrity.* For example, the Court intimated that the Legislature's conclusion that employables are the most able to bear the hardships of an inadequate standard of living is not irrational.[47]

In conclusion, when the Court actually examined the rationality of the exclusionary trait it did so, in terms of the underlying, *primary* purpose of the legislation, *aiding those in need.* Indeed, the Court acknowledged as much when it considered question one—the delegation question.[48] Moreover, at another point, the Court expressly stated that

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[45] *Id.* at 2547, 333 N.E.2d at 399.

[46] *Id.* at 2544, 333 N.E.2d at 399. The Court did not expand on what it meant by the key phrase "invidious discrimination." Presumably it would characterize the "every odd-numbered applicant" scheme as invidious.

[47] *Id.* at 2544-45, 333 N.E.2d at 399. In so doing, the Court indulged such assumptions as: "among those persons with a genuine financial need, those who are employable at least have the opportunity to meet that need . . . in the job market," *id.* at 2545-46, 333 N.E.2d at 399; and that employables "receive the benefit of other governmental efforts on their behalf." *Id.*

[48] *Id.* at 2526, 333 N.E.2d at 393. Responding to the argument that the amendments delegate to the department "unbridled discretion to determine who would be eligible for benefits and what benefits would be provided," *id.,* the Court said:

> Although § 4 includes no description of those who are eligible, there can be no doubt that the only test for those not declared to be ineligible is financial need. . . . This conclusion finds further support in the traditional purpose of c. 117 as a relief program for *all those in need.*

Id. (emphasis added). The Court implicitly recognized that amended § 1 established no guidelines, noting that standards are to be derived from the bill as a whole. *Id.* In doing so, the Court rightly concluded that aid to the poor remained the overriding purpose. *Id.*

"the general purpose of the Commonwealth's welfare programs is to assist needy persons."[49]

As much as the Court might have wished to isolate its analysis of the separate questions posed, when the opinion is read as a whole it is clear that the Court found the new legislation, like the preexisting legislation, to have the purpose of *aiding all those in need except those specifically excluded.* Once this is perceived, there is no way to distinguish *Morales* from the instant case unless one is prepared to establish that the Legislature's presumption regarding "employables" is worthy of more respect than the presumption regarding those "below 18 and over 65 years of age."[50]

This criticism of the Court's analysis does not mean that the outcome reached was necessarily wrong. In light of *Salfi,* the force of the "irrebuttable presumption" doctrine,[51] which entails a direct judicial challenge to the legislative function of classifying,[52] has been seriously eroded. If the Supreme Judicial Court is correct that *Salfi* appears to limit the doctrine to "affirmative Government action which seriously curtails important liberties cognizable under the Constitution,"[53] then the Court's remark that "we are aware of no constitutional obligation on the State to provide financial assistance to all its needy residents,"[54] is apposite. Arguably however, *Salfi* can be limited to contexts in which the Legislature is dealing with ancilliary matters (*e.g.,* sham marriages) rather than with presumptions that go to the core of the Legislature's purpose. The Supreme Court's statement in *Salfi* that the

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[49] *Id.* at 2545, 333 N.E.2d at 399.

[50] The Supreme Judicial Court expressed sympathy for the harshness of the result. "In a time of high unemployment it may be little comfort indeed for persons genuinely in need to be told that they are 'employable' . . . ." *Id.* at 2547, 333 N.E.2d at 400. It might have been more comforting if the Court had rested its acceptance of the Legislature's presumption on some facts. Is there any evidence for the assumption that employables may be able to fend better than people below eighteen or over sixty-five, in view of the other categorical programs and charitable programs available to these latter groups? Even the 10 percent-unemployment rate does not reflect the true situation, in all likelihood, for such subgroups as young black men and unskilled labor. Moreover, the room for arbitrary decision-making by agency personnel is far greater when applying standards such as "employability" rather than age or need standards.

[51] *See* Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Milton v. Civil Serv. Comm'n, 1974 Mass. Adv. Sh. 403, 312 N.E.2d 188 (1974).

[52] *See* Cleveland Board of Education v. La Fleur, 414 U.S. 632, 660 (1974) (Rehnquist, J., dissenting). Justice Rehnquist delivered the majority opinion in *Salfi.*

[53] 422 U.S. at 785. *See* 1975 Mass. Adv. Sh. at 2541, 333 N.E.2d at 397.

[54] 1975 Mass. Adv. Sh. at 2544, 333 N.E.2d at 398. This administrative cost of efficiency rationalization is not so readily applied to the Massachusetts scheme. The department presumably will have to invest as much—if not more—energy in fashioning and administering regulations relating to employability as they would in making determinations, for instance, on a "severity of need" standard.

duration-of-relationship requirement might also represent a legislative policy determination that limited Social Security "resources would not be well spent in making individual determinations"[55] is presumably not a statement that could be made about the core eligibility requirements of a program.

In any event, whether an employability standard that is consistent with the general standard of aiding those in need can be worked out is now a matter that the claimants, the department, and the courts must struggle with. This process was alluded to in a footnote to the Court's opinion:

> We assume, of course, that the regulations promulgated by the department to define the class of persons to be deemed "employable" would be written with this rationale in mind. Regulations which are arbitrary in light of the statutory purpose could be challenged at the appropriate time under G.L. c. 30A, §§ 3, 7. Furthermore, a determination that a particular individual is "employable" under the regulations and, hence, ineligible for GR benefits would be subject to procedural safeguards, including a hearing and the opportunity for judicial review. G.L. c. 18, § 16.[56]

On December 24, 1975, in *Perez v. Stevens*,[57] the United States District Court for the District of Massachusetts decided to abstain from resolving the constitutional challenges to the statute and the regulations,[58] until the state courts resolve the question whether the regulations are consistent with the statute. Thus, a definitive answer to these questions may be expected sometime in the indefinite future. One hopes that the plaintiffs, who were denied preliminary injunctive relief during the pendency of these actions,[59] can also wait.

§12.8. Warrantless Arrests in a Dwelling. During the *Survey* year, the Supreme Judicial Court in *Commonwealth v. Forde*[1] limited the ability of police to make a warrantless entry into a dwelling to make an arrest.[2] The facts in *Forde* are as follows. The defendant's apartment had been under police surveillance for almost six months. Prior to his arrest, the police had received information from a reliable informant that drugs were being sold by persons residing in the apartment. Upon learning that there was a likelihood of a sale on December 27, 1971, the police "staked out" the defendant's apartment.

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[55] 422 U.S. at 784.
[56] 1975 Mass. Adv. Sh. at 2546, 333 N.E.2d at 399.
[57] Memorandum Opinion, Civ. Action No. 75-4529-F (D. Mass. 1975).
[58] *Id.* at 2.
[59] *Id.* at 2-3.

§12.8. [1] 1975 Mass. Adv. Sh. 1625, 329 N.E.2d 717.
[2] *Id.* at 1637, 329 N.E.2d at 722.

Subsequently, they arrested Donald McDonald, who had been seen entering the defendant's apartment and leaving with a shopping bag. Marijuana was found in the bag and McDonald and three others were taken to police headquarters at 8:30 p.m.[3] At 11:30 p.m., the police were informed by an assistant district attorney that a warrant would be required to search the defendant's apartment. Prior to this time, the police made no effort to obtain any type of warrant for entry and search of the defendant's apartment. It was at this point that police overheard McDonald advising two of his companions to warn the others at the defendant's apartment. The police futilely sought to obtain a warrant, but were unable to contact either of the district court clerks. They then sent eight officers to the defendant's apartment and arrested all of the occupants, including the defendant.[4] A search warrant was subsequently obtained based on the evidence in plain view at the time of the initial entry into Forde's apartment.[5]

The defendant was convicted of possession of marijuana and LSD and possession with intent to sell the same.[6] He appealed and the Appeals Court reversed his conviction,[7] holding that although the arrests were valid, a search incident to the arrest could not be justified where no exigent circumstances excused the lack of a search warrant.[8] The Commonwealth appealed to the Supreme Judicial Court.[9]

In *Forde,* the Commonwealth argued in the alternative that (1) exigent circumstances had precipitated the warrantless entry and search;[10] and (2) the entry and subsequent search were justified as incident to a valid arrest.[11] The Court, however, found that (1) the claimed exigency was reasonably foreseeable;[12] and (2) the fourth amendment prohibits a warrantless entry into a dwelling to make an arrest in the

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[3] *Id.* at 1625-27, 329 N.E.2d at 718-19.

[4] *Id.* at 1625-28, 329 N.E.2d at 718-19. When the apartment door opened, the officers immediately arrested three persons standing close to the door, then arrested three other persons in the living room, and then fanned out through the apartment as one of the prisoners fled toward a back bedroom. Three others, including the defendant, were arrested in the kitchen. There were a warm pipe and bags of marijuana in plain view in the living room. Five glassine bags containing LSD were seen in an open bureau drawer in the boiler room in back of the apartment. *See* Commonwealth v. Forde, 1974 Mass. App. Ct. Adv. Sh. 725, 727-28, 313 N.E.2d 581, 583.

[5] 1975 Mass. Adv. Sh. 1625-28, 329 N.E.2d at 718-19.

[6] *Id.* at 1625, 329 N.E.2d 718. At the suppression hearing the chief investigator for the police testified that he had planned to obtain a search warrant but had failed to do so. *Id.* at 1626, 329 N.E.2d at 719.

[7] 1974 Mass. App. Ct. Adv. Sh. at 732, 313 N.E.2d at 586.

[8] *Id.*

[9] 1975 Mass. Adv. Sh. at 1626, 329 N.E.2d at 718.

[10] *Id.* at 1628, 329 N.E.2d at 719.

[11] *Id.* at 1632, 329 N.E.2d at 721.

[12] *Id.* at 1630, 329 N.E.2d at 720.

absence of sufficient justification for the failure to obtain a warrant.[13]

In *Forde,* the exigency was "said to spring from" McDonald's encouragement of his companions to warn the persons still at the defendant's apartment.[14] Presumably, such a warning would have resulted in the destruction or removal of the drugs.

Although the Supreme Judicial Court agreed that the exigency created by McDonald's admonition, if considered alone, would have constituted a sufficient justification for a warrantless entry, it nonetheless concluded that the propriety of the warrantless entry into a dwelling must be evaluated from the totality of the circumstances.[15] Writing for the Court, Justice Reardon[16] held the exigency claim unjustifiable not only because the police had been watching the apartment for six months,[17] but also because any reasonable officer could have foreseen the risk (during the three hours of booking procedures) that one of the arrestees would be released and might warn the defendant.[18] Therefore, the Court found that "[i]n these circumstances, the failure of the Commonwealth to offer any explanation why no effort was made to obtain a warrant in the 3 hours prior to the McDonald conversation . . . is fatal to its claim of exigency."[19]

Alternatively, the Commonwealth sought to justify the warrantless search and seizure as a seizure of evidence in plain view, incident to a valid arrest.[20] The Commonwealth argued that the purpose of the entry was to arrest the apartment residents and that no warrant was necessary because the police had probable cause to believe that a felony had been committed.[21] Affirming the decision of the Appeals Court—although rejecting its rationale[22]—the Court first assumed

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[13] *Id.* at 1637, 329 N.E.2d at 722.

[14] *Id.* at 1629, 329 N.E.2d at 720.

[15] *Id.* at 1629-30, 329 N.E.2d at 720.

[16] *Id.* at 1625, 329 N.E.2d at 718.

[17] *Id.* at 1630, 329 N.E.2d at 720.

[18] *Id.*

[19] *Id.* In a dissenting opinion, Justice Quirico accused the Court of applying a kind of "law enforcement estoppel, whereby the exigency exception to the warrant requirement is shut off where the exigency is reasonably foreseeable." *Id.* at 1653, 329 N.E.2d at 728 (dissenting opinion). The Court's decision, however, does not require the police to conduct a search as soon as probable cause arises. Instead, the Court recognized that "where the police are conducting an investigation of continuing criminal activities, the exigency of circumstances which develop unexpectedly is not diminished by the fact that in hindsight it appears there would have been time to obtain a warrant." *Id.* at 1632, 329 N.E.2d at 721. Thus, the Court's holding is limited to cases where the exigency is reasonably foreseeable and the police offer no justifiable excuse for their prior delay in obtaining a warrant. The Court, however, fails to define a "justifiable excuse." It is conceivable that, had the police, in the instant case, made several futile attempts to obtain a warrant in the three-hour booking period before the overheard conversation, a justifiable excuse would have existed.

[20] *Id.* at 1632, 329 N.E.2d at 721.

[21] *See* 1974 Mass. App. Ct. Adv. Sh. at 731.

[22] 1975 Mass. Adv. Sheet at 1633, 329 N.E.2d at 721.

that all the evidence seized in plain view was within the scope of a limited search incident to an arrest,[23] as permitted by *Chimel v. California.*[24] Therefore, the Court in *Forde* concluded that, if the arrests were valid, the items in plain view could be seized and observations made by the police while making the arrests could provide the basis for the subsequent issuance of a search warrant,[25] regardless of whether or not the evidence was inadvertently discovered.[26]

Thus, the Court was forced to consider whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.[27] Although the United States Supreme Court has often noted the importance of this question, it has left the issue unsettled.[28]

In *Forde,* the Supreme Judicial Court departed from the common law rule that a police officer has the right to make an arrest without a warrant whenever he has probable cause to believe that the defendant has committed a felony.[29] The Court specifically limited this rule by holding that the fourth amendment prohibits a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant.[30] Quoting from the Supreme Court's opin-

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[23] *See id.* at 1634, 329 N.E.2d 721.

[24] 395 U.S. 752 (1969). The Court in *Chimel* held that the scope of a search incident to a lawful arrest is limited to search of the person and the areas within his immediate control, construing that phrase to mean the areas from within which he might gain possession of a weapon or destructible evidence. *Id.* at 763.

Although *Chimel* has never been overruled, many circuit courts have attempted to discredit its rationale by expanding the interpretation of "within immediate control." *See, e.g.,* United States v. Patterson, 447 F.2d 424, 425 (10th Cir. 1971) (female defendant arrested for forgery while standing in doorway between kitchen and livingroom; court held search of envelope on shelf of kitchen cabinet four to six feet from defendant permissible under *Chimel* notwithstanding presence of five officers, one of whom stood between defendant and cabinet, and fact defendant was facing toward livingroom); United States v. Wysocki, 457 F.2d 1155, 1160 (5th Cir. 1972).

[25] *See* 1975 Mass. Adv. Sh. at 1634, 329 N.E.2d at 721. *Cf.* Comment, 1974 ANN. SURV. MASS. LAW § 3.5, at 60.

[26] In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court held that a seizure is justified by the plain view exception only when the police have a prior justification for an intrusion, when the incriminating nature of the object seized is immediately apparent, and when its discovery is inadvertent. *Id.* at 466. This limitation on the plain view doctrine was designed to prevent general warrantless searches when the police know what they are looking for and have time to seek a warrant. *Id.* at 466-67. Nonetheless, the Court was careful to note that the inadvertence requirement does *not* apply to items in plain view within the scope of a limited search incident to arrest as permitted by *Chimel. See id.* at 465 n.24. Therefore, the majority in *Forde* assumed the limitations set out in *Coolidge* did not apply. *See* 1975 Mass. Adv. Sh. at 1633-34, 329 N.E.2d at 721.

[27] *See* 1975 Mass. Adv. Sh. at 1634, 329 N.E.2d at 721.

[28] *See, e.g.,* United States v. Watson, 44 U.S.L.W. 4112, 4114 n.6 (U.S. Jan. 26, 1976); Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 476 (1971).

[29] 1975 Mass. Adv. Sh. 1637, 329 N.E.2d 722.

[30] *Id.*

ion in *Coolidge* v. *New Hampshire*[31], the Court reasoned:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without a warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'[32]

Therefore, the Court in *Forde* concluded that "[t]he right of police officers to enter into a home . . . represents a serious governmental intrusion into one's privacy. It was just this sort of intrusion that the Fourth Amendment was designed to circumscribe by the general requirement of a judicial determination of probable cause."[33]

In addition, the Supreme Judicial Court found that there was no valid reason why the Supreme Court's oft-stated preference for search warrants should not be equally applicable to arrest warrants.[34] Indeed, an entry to arrest appears a far greater intrusion than an entry to search.[35] In a concurring opinion to *United States* v. *Watson,*[36] Justice Powell stated:

> Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest,

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[31] 403 U.S. 443, 477-78 (1971).

[32] 1975 Mass. Adv. Sh. at 1635, 329 N.E.2d at 722.

[33] *Id.*

[34] *See id.* at 1636, 329 N.E.2d at 722.

[35] This rationale was recently adopted by a plurality of Justices in United States v. Watson, 44 U.S.L.W. 4112 (U.S. Jan. 26, 1976). In *Watson*, the Court held that the fourth amendment permits a law officer to make a warrantless arrest in a public place, even though he had adequate opportunity to procure a warrant after developing probable cause for arrest. *Id.* at 4116. Four Justices expressly adopted the rationale that an entry to arrest appears to be a far greater intrusion than an entry to search. *See id.* at 4117 (Powell, J., Concurring); *id.* at 4122 (Marshall and Brennan, J.J., dissenting); *and* Coolidge v. New Hampshire, 403 U.S. 443, 477-79 (1971) (per Stewart, J.).

[36] 44 U.S.L.W. 4112 (U.S. Jan. 26, 1976).

however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent.[37]

In a dissenting opinion to *Forde,*[38] Justice Quirico, however, argued strongly that although the Supreme Court has expressed a preference for the use of arrest warrants when feasible, it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.[39] He argued that the authority of a constable to arrest without a warrant in felony cases has been textbook law for centuries.[40] Quoting from the early Massachusetts decision in *Rohan v. Sawin,*[41] Justice Quirico found:

> It has been sometimes contended, that an arrest . . . without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers . . . to arrest without a warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law.[42]

The Court countered Justice Quirico's argument by noting that, although their conclusion departs from common law, the same result has been reached by nearly every court to address the issue.[43]

Although the Supreme Court has specifically left the issue of warrantless arrests in private dwellings unanswered, the Court's extended discussion in *Watson* of section 120.6 of ALI Model Code of Pre-Arraignment Procedure,[44] which recommends adoption of the old

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[37] *Id.* at 4117 (Powell, J., concurring).

[38] 1975 Mass. Adv. Sh. 1647, 329 N.E.2d at 725 (dissenting opinion).

[39] *Id.* at 1650, 329 N.E.2d at 727 (dissenting opinion).

[40] *Id.* at 1648, 329 N.E.2d at 726 (dissenting opinion).

[41] 59 Mass. (5 Cush.) 281, 284-85 (1851).

[42] 1975 Mass. Adv. Sh. at 1648-49, 329 N.E.2d at 726 (dissenting opinion), *quoting* Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 284-85 (1851).

[43] 1975 Mass. Adv. Sh. at 1637, 329 N.E.2d at 723. *See also* Dorman v. United States, 435 F.2d 385, 388-91 (D.C. Cir. 1970); Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir. 1970).

[44] ALI Model Code of Pre-Arraignment Procedure § 120.6(1) (1972).

common law rule, portends an ominous future for the *Forde* decision.[45] It is submitted that during this period of preference for protection of personal liberties, a reversion to the common law rule would be a giant step into the past.

Whereas both the Court and the dissenting justice preferred to view the issue in terms of justification for a warrantless arrest,[46] Justice Hennessey in a concurring opinion found that the issue is best approached through an analysis of the plain view doctrine and the requirement of inadvertence as a condition of the application of that doctrine.[47] Justice Hennessey's preference for the plain view analysis appears to be predicated upon the assumption that the seizure was not within the scope of a *Chimel* search. In *Chimel* v. *California,*[48] the Supreme Court held that the scope of a search incident to a lawful arrest is limited to search of the person and the areas within his immediate control—*i.e.,* the areas from within which he might gain possession of a weapon or destructible evidence.[49] In *Coolidge* v. *New Hampshire,*[50] however, the Supreme Court, although holding a seizure justified by the plain view exception only when the police have a prior justification for the intrusion and when the discovery of the object seized is inadvertent,[51] carefully noted that the inadvertence requirement does not apply to items in plain view within the scope of a limited search incident to arrest as permitted by *Chimel.*[52]

In conclusion, Justice Hennessey found no inadvertence where the police "in anticipation of, and with probable cause to know of, the presence of incriminating evidence, wait for the person to be arrested to enter a dwelling house in order that they may place themselves in a position to gain a plain view of the evidence."[53] Consequently, Justice Hennessey never reached the question of the validity of the arrests. In his dissenting opinion, Justice Quirico correctly questioned Justice Hennessey's reliance on the inadvertence doctrine because that part of the *Coolidge* decision was joined by only four Justices.[54]

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[45] *See* 44 U.S.L.W. at 4114 n.6.

[46] *Compare* 1975 Mass. Adv. Sh. at 1633-37, 1647-51, 329 N.E.2d at 721-22, 725-27 (dissenting opinion), *with id.* at 1641, 329 N.E.2d 724 (concurring opinion).

[47] 1975 Mass. Adv. Sh. at 1642-43, 329 N.E.2d at 724-25 (concurring opinion).

[48] 395 U.S. 752 (1969).

[49] *Id.* at 762-63.

[50] 403 U.S. 443 (1971).

[51] *Id.* at 464-68.

[52] *Id.* at 465-66 n.24.

[53] 1975 Mass. Adv. Sh. 1642, 329 N.E.2d 724.

[54] *See* 403 U.S. at 464-73 (Stewart, J., *joined by* Douglas, Brennan, and Marshall, J.J.). Nonetheless, many courts have accepted the inadvertence requirement. *See, e.g.,* United States v. Lisznyai, 470 F.2d 707, 709-10 (2d Cir. 1972), *cert. denied,* 410 U.S. 987 (1973); United States v. Pacelli, 470 F.2d 67, 70-71 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973); Martinez v. Turner, 461 F.2d 261, 264-65 (10th Cir. 1972). The California and

Whether or not one chooses to adopt the *Coolidge* plurality opinion as binding precedent, it is clear from the response of the lower courts that the Supreme Court's effort in *Coolidge* to clarify the plain view doctrine has hardly achieved complete success.[55] Thus, regardless of whether the facts in *Forde* justify the Court's assumption—that the plain view conformed to the limits of *Chimel*—or Hennessey's assumption—the plain view was outside the limits of *Chimel*—the better resolution of *Forde* lies in striking down the unjustified warrantless arrest in a private dwelling because "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[56]*

STUDENT COMMENT

§12.9. State Action—Seizures under Authorization of Lessors' Lien Statutes: *Davis v. Richmond*[1] *and Porter v. Fleischhacker*[2] The Massachusetts boarding house and lodging house keepers' lien statute grants lessors a lien on a tenant's personal property within the rented premises for past rent due.[3] It is generally understood to authorize

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Iowa Supreme Courts, however, have rejected *Coolidge*'s discussion of plain view. North v. Superior Court, 8 Cal. 3d 301, 307, 502 P.2d 1305, 1308, 104 Cal. Rptr. 833, 836 (1972); State v. King, 191 N.W.2d 650, 655-57 (Iowa 1971).

[55] In holding that a plain view seizure is proper only when the object seized is inadvertently discovered and only when its incriminating nature is immediately apparent, the Court in *Coolidge*, 403 U.S. at 465-69, failed to define or give standards for determining the following: (1) whether or not the object is in plain view, (2) what degree of apparency (a suspicion, probable cause, or virtual certainty) is necessary in order to be seized lawfully, and (3) whether the inadvertence requirement applies only to evidence but not to contraband and stolen goods. Other authorities also point up *Coolidge*'s failures in this regard. *See* United States v. Candella, 469 F.2d 173, 176-77 (2d Cir. 1972); United States v. Welsch, 446 F.2d 220, 222 (10th Cir. 1971); United States v. Brewer, 343 F. Supp. 468, 472-74 (D. Hawaii 1972). *See also* LaFave, *Warrantless Searches and the Supreme Court: Future Ventures Into the Quagmire*, 8 CRIM. L. BULL. 9, 24-30 (1972); Comment, *"Plain View"–Anything But Plain: Coolidge Divides The Lower Courts*, 7 LOYOLA L. REV. 489 (1974).

[56] Wolf v. Colorado, 338 U.S. 25, 27 (1949).

* Section 12.8 was written by Jeffrey S. Sabin, a second-year student at Boston College Law School.

§ 12.9. [1] 512 F.2d 201 (1st Cir. 1975).

[2] No. 538 (Boston Housing Ct., Jan. 13, 1975).

[3] G.L. c. 255, § 23, which provides: "Boarding house or lodging house keepers shall have a lien on the baggage and effects brought to their houses and belonging to their guests . . . for all proper charges due for fare and board or lodging. . . ."

the lessor to take and hold the property upon the tenant's default.[4] This right may be exercised without notifying the boarder of the intended seizure or obtaining a judicial determination that the claim for rent is actually valid.[5]

Plaintiffs in two recent cases have challenged the constitutionality of this lien statute on the ground that it authorizes a deprivation of property without due process of law. In *Porter v. Fleischhacker,*[6] the Boston Housing Court held that the lien statute is unconstitutional for failing to grant notice and a hearing to the tenant before seizure of his goods.[7] In *Davis v. Richmond,*[8] however, an action under the Civil Rights Act of 1864,[9] the United States Court of Appeals for the First Circuit never reached the due process question because it held that the lien statute involves private, rather than state action, to which due process protections do not apply.[10] Thus, the two courts disagreed, not necessarily on the due process issue itself, but rather on the initial question of whether that issue should have been considered.

Had the requisite state action been found in *Davis,* it is likely that the courts would have agreed that the Massachusetts boarding house and lodging house keepers' lien statute violated the plaintiffs' constitutional right to due process of law, in light of recent United States Supreme Court decisions holding various prejudgment seizures unconstitutional.[11]

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[4] *Davis,* 512 F.2d at 202; *Porter,* No. 538 at 4.

[5] No. 538 at 5.

[6] No. 538 (Boston Housing Ct., Jan. 13, 1975)

[7] *Id.* at 4-7.

[8] 512 F.2d 201 (1st Cir. 1975).

[9] 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.

[10] 512 F.2d at 205. The *Civil Rights Cases,* 109 U.S. 3, 11 (1883), are cited for the proposition that constitutional safeguards apply only against state action. *Id.* at 202. U.S. CONST. amend. XIV, § 1, provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . ."

[11] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605 (1975); Fuentes v. Shevin, 407 U.S. 67, 96 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 619 (1974). In *Mitchell,* the Court upheld sequestration of personal property upon the *ex parte* application of a creditor, who had originally sold the goods seized. *Id.* at 601, 619. The *Mitchell* decision appeared to limit the broad statement in *Fuentes* that the state must provide due process protections before *any* deprivation of a significant property interest. *Id.* at 623 (Powell, J. concurring). In *North Georgia,* however, *Fuentes* was apparently resurrected. 419 U.S. at 608 (Stewart, J. concurring).

The facts of *Mitchell* differ slightly from those of the other cases, and are the basis of the contrary result. A seizure under the statute in *Mitchell* was only allowed upon a clear showing of the specific facts behind the creditor's claim, while under the statute in *Fuentes,* the creditor only had to make bare allegations of ownership. *Mitchell,* 416 U.S.

In particular, in *Fuentes v. Shevin,*[12] the Court held that a state could not infringe any significant property interest without first according due process rights to the holder of the interest.[13] The statutes held unconstitutional in *Fuentes* had authorized state officers to seize a person's possessions upon the *ex parte* application of an alleged creditor.[14]

Seizures under the authority of the Massachusetts lessors' lien statute involve no such clear state participation. A number of United States Supreme Court decisions, however, have noted that the action of a state need not be overt for the protections of due process to apply.[15] "[C]onduct that is formally 'private,' " the Court has said, "may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[16] Thus, in the grey area between totally private and totally public conduct, the Court has tried to define the boundaries of the state action requirement[17] through a case-by-case analysis—a process of "sifting facts and weighing circumstances"[18] to determine the significance of state involvement in otherwise private conduct.

State action has been found, for example, in the passage of a con-

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at 616. Also important was the involvement of a judge—not a mere court functionary, as in *Fuentes,* 407 U.S. at 74, 76—at every step of the process in *Mitchell,* thus minimizing the risk of a wrongful taking. 416 U.S. at 616-17. The debtor was also entitled in *Mitchell* to an immediate hearing after the seizure. *Id.* at 610. In *Fuentes,* one of the challenged statutes provided for an eventual hearing, the other for none at all. 407 U.S. at 75, 77.

For a close look at the development of the law in this area, see Catz and Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond,* 28 RUTGERS L. REV. 541 (1975); Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem,* 9 GEO. L. REV. 589 (1975); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807 (1975); and Comment, *A Confusing Course Made More Confusing: The Supreme Court, Due Process, and Summary Creditor Remedies,* 70 NW. U.L. REV. 331 (1975).

[12] 407 U.S. 67 (1972).

[13] *Id.* at 86.

[14] *Id.* at 69, 96.

[15] *E.g.,* Evans v. Newton, 382 U.S. 296, 299 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

[16] Evans v. Newton, 382 U.S. 296, 299 (1966).

[17] The phrases "state action" and action "under color of" state law are often used interchangeably by the courts and will be so used in this paper. "In cases under §1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966). The same observation is made in one of the lessors' lien cases. Anastasia v. Cosmopolitan Nat'l Bank, No. 74-1995, 4 (7th Cir., Sept. 30, 1975).

[18] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

stitutional amendment that would have significantly encouraged private housing discrimination,[19] and where a private business' discrimination on property leased from the state involved the state as a joint participant.[20] The opposite result was reached where a private club with a state liquor license practiced racial discrimination,[21] and where a state regulated utility terminated power to consumers without granting due process notice.[22]

Thus, the Boston Housing Court, in *Porter,* and the First Circuit, in *Davis,* have sifted and weighed similar facts and circumstances and reached opposite conclusions concerning the existence of state action in seizures under the authority of the Massachusetts lien statute. Similarly, a number of courts throughout the nation have divided on the constitutionality of other lessors' lien statutes.[23] Of the three other

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[19] Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967). *Reitman* involved an amendment to California's constitution allowing freedom of choice in selling one's home, an amendment that, in effect, repealed several laws forbidding racial discrimination in such sales, and made such discrimination constitutionally permissible. *Id.* at 374, 376-77. This case has been interpreted to mean that significant state involvement in private actions is the standard for determining state action. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

[20] Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). The business, a coffee shop, had refused to serve Black patrons. *Id.* at 716. The business leased its premises from the Wilmington Parking Authority, a state agency. *Id.* The Court held that the relationship between the state and the lessee bound the lessee to act in a constitutional manner. *Id.* at 724-26. "The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . ." *Id.* at 725.

[21] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972). The Court held that this state involvement did not significantly implicate the State in the discriminatory guest policies of the Lodge. *Id.*

[22] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974). The extensive state regulation was held not to create a sufficient relationship between the state and the utility to warrant the imposition of due process protections with regard to the utility's action. *Id.* Even the partial monopoly status granted by the state to the utility was not found to create the necessary relationship for a state action finding. *Id.*

[23] Although the various statutes do not necessarily apply to the same classes of lessors—some, *e.g.,* ARIZ. REVISED STAT. § 33-951 (1956), apply to innkeepers, auto camp keepers, and others—this distinction has no effect on the state action question. Some states have more than one lien statute. For instance, Illinois has one lien for hotel, inn and boarding house keepers, ILL. REV. STAT. c. 82, § 57, (1966), and a second lien applying only to hotel proprietors, ILL. REV. STAT. c. 71, § 2 (1959).

The lien statutes also differ in their wording. Some specifically authorize a lessor to peaceably enter the tenant's premises to enforce the lien, *e.g.,* CAL. CIVIL CODE § 1861 (West 1954). Others hint at such a right, such as the Texas statute, see note 31 *infra,* which allows the landlord to "take and retain property," and some, such as that of Massachusetts, see note 3 *supra,* say nothing about the right to seize. This difference in wording is also insignificant because even in those jurisdictions where the lien statute is silent on the right to enter and seize, the courts have found such a right to be implicit in the statute. *Davis,* 512 F.2d at 202; Culbertson v. Leland, No. 73-1749, 1 (9th Cir., Oct. 3, 1975); Anastasia v. Cosmopolitan Nat'l Bank, No. 74-1995, 11 (7th Cir. Sept. 30, 1975), *cert. denied,* 44 U.S.L.W. 3467 (Feb. 24, 1976). Thus, the question remains whether the action authorized under the statutes in state action.

United States Courts of Appeals that have considered this issue, one[24] agrees with the First Circuit that seizures under the authority of such lien statutes do not constitute state action, while two[25] have reached the opposite result.

This comment will analyze the nature of this recent split of authority in the area of state action. Both the history and application of the public function theory and the significant involvement standard, the two means of finding state action most often applied in the lessors' lien decisions, will be discussed. Comparisons will be made between the lessors' lien cases and decisions involving similar seizures: in particular, self-help repossession allowed under the Uniform Commercial Code.[26] The possible treatment of future due process challenges to the lessors' lien laws will be examined. Finally, the need for legislative reform of lessors' lien laws and several possible improvements will be considered.

I. A Survey of the Lessors' Lien Decisions

The Boston Housing Court, in *Porter,* found state action in seizures under authorization of the Massachusetts lessors' lien statute on the ground that the lien statute created a right in favor of the boarding and lodging house keepers that they did not have at common law.[27] Since this law provided the only justification for the seizure, the court concluded that a seizure under the statute involved state action.[28]

A totally different approach was adopted by the United States Court of Appeals for the Fifth Circuit in *Hall v. Garson,*[29] which found state action in a seizure authorized by a Texas lien statute.[30] The statute gave the lessor a lien on tenants' goods within the rented premises and granted the lessor authority to enforce the lien by a peremptory seizure.[31] Finding that entrance into a home and seizure

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[24] Anastasia v. Cosmopolitan Nat'l Bank, No. 74-1995, 12 (7th Cir., Sept. 30, 1975), *cert. denied,* 44 U.S.L.W. 3467 (Feb. 24, 1976).

[25] Culbertson v. Leland, No. 73-1749, 9 (9th Cir., Oct. 3, 1975); Hall v. Garson, 430 F.2d 430, 439 (5th Cir. 1970), *appeal after remand,* 468 F.2d 845 (5th Cir. 1972).

[26] See the text of Uniform Commercial Code § 9-503 (1962 official text) in note 68 *infra.*

[27] *Porter,* No. 538 at 9.

[28] *Id.*

[29] 430 F.2d 430 (5th Cir. 1970), *appeal after remand,* 468 F.2d 845 (5th Cir. 1972).

[30] 430 F.2d at 439.

[31] Law of June 12, 1969, ch. 686 [1969] Tex. Laws (repealed 1973) provided:

> Section 1. The operator of any residential house, apartment, duplex or other single or multi-family dwelling, shall have a lien upon all baggage and all other property found within the tenant's dwelling for all rents due and unpaid by the tenant thereof; and said operator shall have the right to take and retain possession of such baggage and other property until the amount of such unpaid rent is paid.

Section 3 of the law exempted certain items from the reach of the lien, including all

of property were acts traditionally reserved to the state,[32] the Fifth Circuit reasoned that the granting of this power to a private citizen clothed him with the authority of state law, and exercise of the power thus was state action.[33] The theory relied upon by the court was that an authorized, private undertaking of conduct normally reserved to the state constitutes state action, a rationale that has been labeled the public function theory.[34]

The Ninth Circuit's opinion in *Culbertson v. Leland,*[35] finding state action in the Arizona innkeepers' lien statute,[36] involved a combination and refinement of the state action approaches adopted in *Porter* and *Hall.* The court first recognized that the lien statute created rights that did not exist at common law,[37] and noted that state action is more likely to be found where a statute creates new rights, rather than where it represents a mere codification of previous rights.[38] The court then looked to other indicia of state action. First, it noted that allowing a lessor to execute a lien extending to all the tenant's goods—a roving lien—would be state authorization of a state function, under the public function theory.[39] Second, a significant state involvement was found in the statutory authorization of the seizure, in view of the absence of any private contractual right to the lien.[40] Taking these factors into consideration, the Ninth Circuit found the state's role in the seizure to be significant.[41]

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clothes and tools of any trade. If a family was affected by the lien, such items as family portraits, some furniture, and one car and one truck were also exempted. *Id.*

The new statute, TEX. REV. CIV. STAT. art. 2536d (1973) grants the lien with similar exemptions; however, in § 5 the law now requires that the landlord inform the tenant of the landlord's right to the lien in the written agreement. Section 4 provides: "A contractual landlord's lien shall not be enforcable unless underlined or printed in conspicuous bold print in the rental agreement."

[32] 430 F.2d at 439.

[33] *Id.*

[34] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). The Fifth Circuit did not specifically mention the "public function" theory; however, the label was applied in Anastasia v. Cosmopolitan Nat'l Bank, No. 74-1995, 10 (7th Cir., Sept. 30, 1975).

[35] No. 73-1749 (9th Cir., Oct. 3, 1975).

[36] *Id.* at 9. ARIZ. REV. STAT. § 33-951 (1956) provides in part: "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 . . . for charges due for accommodation, board, lodging or room rent and things furnished. . . ."

[37] *Culbertson,* No. 73-1749 at 7.

[38] *Id.* at 8.

[39] *Id.* at 8, 9.

[40] *Id.* at 9.

[41] *Id.* at 9. The concurring judge preferred to base his finding of state action purely on the public function theory. *Id.* at 12, 14 n.5 (concurring opinion). The dissenting judge reasoned that since the tenant had been evicted before seizure of the goods, the landlord came into possession of the goods as bailee, and thus did not misuse the power of the lien law, which merely permitted him to retain possession. *Id.* at 15, 17 (dissenting opinion). This opinion states that even if the landlord had relied exclusively on the lien to seize the goods, no state action would exist so long as the lessor took possession of the property without breach of the peace. *Id.* at 16 (dissenting opinion).

Contrary conclusions have been reached by the First Circuit in *Davis* and the Seventh Circuit in *Anastasia v. Cosmopolitan Nat'l Bank.*[42] *Davis* held that state authorization and regulation are not "significant" involvements in a private action, and thus, do not support findings of state action.[43] The First Circuit also refused to classify the lien statute as one that created a new right, since one type of lessor, the innkeeper, had been granted such a lien at common law.[44] The Massachusetts statute, the court said, merely broadened the class of lessors entitled to this common law right.[45] The court also questioned whether the common law distinction between innkeepers and other types of lessors was a proper basis for a state action finding, since reliance on common law history could lead to different results in different jurisdictions, merely because of slight variations in the common law.[46] In reasoning virtually identical to that in *Davis,* the Seventh Circuit in *Anastasia* found no state action in seizures under authority of an Illinois lien statute for hotel proprietors.[47] The court also dismissed the public function argument, questioning whether the right granted had ever been traditionally reserved to the state.[48]

In summary, four United States Courts of Appeals have faced due process challenges to state lessors' lien statutes. The courts have evenly divided on the question of whether a lessor's action under the statutes constitutes state action.

II. Theories Used to Determine Whether State Action is Involved in the Lessors' Lien Statutes

A. The Public Function Theory

1. *Definition and Origin.* When a private citizen is vested by state law with the power to perform a function traditionally reserved to the state, the exercise of that power is state action. In summarizing this public function theory in *Evans v. Newton,*[49] the United States Su-

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[42] No. 74-1995 (7th Cir., Sept. 30, 1975), *cert. denied,* 44 U.S.L.W. 3467 (Feb. 24, 1976).

[43] 512 F.2d at 203.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 203-04, *citing* Burke and Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 47 S. CAL. L. REV. 1, 47 (1973) [hereinafter cited as Burke and Reber].

[47] No. 74-1995, 8-9, 12 (7th Cir., Sept. 30, 1975), *cert. denied,* 44 U.S.L.W. 3467 (Feb. 24, 1976).

ILL. REV. STAT. ch. 82, § 57 (1966) provides in part: "Hotel, inn and boarding house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding house by such guests or boarders for the proper charges due . . . ." ILL REV STAT. ch. 71, § 2 (1959) is a similar statute applying to hotel proprietors only.

[48] No. 74-1995 at 11-12.

[49] 382 U.S. 296 (1966).

preme Court stated that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[50]

The public function theory was first used to strike down discriminatory practices in party primary elections. In *Smith v. Allwright,*[51] the United States Supreme Court held that the right to vote cannot be nullified by a state's "casting its electoral process in a form which permits a private organization to practice racial discrimination."[52] The discrimination was state action because the primary election was conducted under state statutory authority, and thus, the political party was acting as a state agent.[53] The Court added that "[s]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state."[54]

Subsequently, in *Evans v. Newton,*[55] the Court found a public function where private citizens controlled a park in a discriminatory manner.[56] The park had been devised to the City of Macon, Georgia, to be run as a facility for whites only.[57] The City turned it over to private citizens in order to accomplish that goal.[58] The Court held that the public character of the park required that it be treated as a public institution, subject to constitutional limitations.[59]

The Supreme Court has also held, in *Marsh v. Alabama,*[60] that where a company-town has all the attributes of a municipality, the company may not deny First Amendment rights to persons on its premises.[61] The decision blocked the prosecution for trespass of a person handing out religious leaflets within the town.[62]

2. *Application of the Public Function Theory to the Lessors' Lien Cases.* The first court to adopt the public function theory in the lessors' lien cases was the Fifth Circuit in *Hall v. Garson.*[63] The court reasoned that the landlord's action in entering the tenant's apartment and seizing the tenant's property had the characteristics of a state act, and there-

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[50] *Id.* at 299.
[51] 321 U.S. 649 (1944).
[52] *Id.* at 664.
[53] *Id.* at 663-64.
[54] *Id.* at 660.
[55] 382 U.S. 296 (1966).
[56] *Id.* at 299, 302.
[57] *Id.* at 297.
[58] *Id.* at 297-98.
[59] *Id.* at 302.
[60] 326 U.S. 501 (1946).
[61] *Id.* at 509.
[62] *Id.* For other examples and a critical history of the public function theory, see Burke and Reber, 46 S. CAL. L. REV. 1003, 1050-74 (1973).
[63] 430 F.2d 430 (5th Cir. 1970), *appeal after remand,* 468 F.2d 845 (5th Cir. 1972).

fore was state action:[64] "The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgement lien has in Texas traditionally been the function of the Sheriff or constable."[65] Thus, the court held that since the state lien statute vested a private citizen—the lessor—with power to perform a state function, the enforcement of the lien involved state action.[66] This vesting of a power in the landlord that was traditionally given only to state officials was the key to the state action finding, because it clothed the lessor with state authority.[67]

It appeared that the public function found in *Hall* was simply entrance into another's dwelling to execute a lien. Subsequent decisions of the Fifth Circuit, however, have refined the application of this theory. These decisions dealt with seizures under state enactments of section 9-503 of the Uniform Commercial Code.[68] Section 9-503 authorizes private seizures by secured parties where the debtor has defaulted on payments and the collateral may be retaken without breach of the peace.[69]

In *James v. Pinnix*[70] the Fifth Circuit held that seizures under the Code were analogous to actions traditionally performed by private parties, and thus, were not state functions.[71] The court distinguished *Hall* on the basis of the differences between the nature of the seizures allowed by lessors' liens and those allowed by the Uniform Commercial Code.[72] In *Hall,* the lessor had seized goods in the tenant's apartment to satisfy a debt (rent), arising out of a contract (their lease), that had nothing to do with the goods taken.[73] The court found that this seizure closely resembled a seizure in satisfaction of a judgement, a function traditionally performed by a sheriff.[74] In *James,* however, the creditor repossessed an item (a car) in which he had a specific pur-

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[64] 430 F.2d at 439.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] UNIFORM COMMERCIAL CODE § 9-503 (1962 official text) provides: "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." The 1962 official text is cited because it served as a model for many state enactments. McDonnell, *Sniadach, The Replevin Cases and Self-Help Repossession–Due Process Tokenism?,* 14 B.C. IND. & COM. L. REV. 437, 438 n.15 (1973).

[69] See note 68 *supra.*

[70] 495 F.2d 206 (5th Cir. 1974).

[71] *Id.* at 208. Similar cases include Turner v. Impala Motors, 503 F.2d 607, 611-12 (6th Cir. 1974); Adams v. Southern California First Nat'l Bank, 492 F.2d 324, 336-38 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974); Bichel Optical Laboratories v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973).

[72] 495 F.2d at 207-08.

[73] *Id.* at 208.

[74] *Id.*

chase money security interest.[75] Such a repossession was, according to state custom, traditionally performed by private parties, not state officials.[76] The court also noted the absence in *James* of an entrance into another's home as a second reason for distinguishing the two cases.[77]

In *Calderon v. United Furniture Co.*,[78] the Fifth Circuit decided that a repossession under the Code that *did* involve an entrance into the alleged debtor's home was not state action under the public function theory.[79] The court downplayed the violation of the right to privacy in such seizures, while stressing the roving nature of the lessors' lien as the major reason that execution of that lien *was* a public function, even though a Code repossession was not.[80] Thus, the public function theory of state action in the lessors' lien cases, as set forth by the Fifth Circuit, is that the execution of a roving lien, a lien that resembles seizure in satisfaction of a judgment, is performance of a state function.

The Ninth Circuit, in *Culbertson v. Leland*,[81] also adopted this theory of state action: "[The roving lien,] because its extent is broad and undefined and because its impact is potentially much more severe [than repossession of a specific chattel], is the type of activity which is a function of the state and over which, ordinarily, the state has a monopoly."[82]

The First and Seventh Circuits, in rejecting application of the public function theory to the lessors' lien cases, failed to mention the roving nature of the lien. Indeed, the courts favorably compared the lessors' liens to repossessions under the Uniform Commercial Code[83] or to

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 505 F.2d 950 (5th Cir. 1974).

[79] *Id.* at 951.

[80] *Id.*

[81] No. 73-1749 (9th Cir., Oct. 3, 1975).

[82] *Id.* at 9. The dissenting judge reasoned that the entrance into another's dwelling, not the roving nature of the lien, is the public function involved in seizures under the lessors' lien. *Id.* at 17 (dissenting opinion). To name entrance as the public function, however, would be contrary to the findings in the well-settled Code cases, and other cases involving common law self-help, in which entrance was a factor. *See* Fuentes v. Shevin, 407 U.S. 67, 79 n.12, where the Court recognized the right to distrain property without state aid, by self-help.

Such a determination would also create a distinction between cases where the landlord entered the room and those where he merely changed the locks, although the ultimate effect—separation of the tenant from his goods—remains the same. It is suggested that although entrance into the dwelling of another is a factor to be "sifted and weighed" in determining the existence of state action, it should not be considered dispositive.

[83] *Davis*, 512 F.2d at 202-03; *Anastasia*, No. 74-1995 at 4-5 n.11.

other forms of self-help repossession of a specific chattel[84]—cases clearly distinguishable on the grounds of the extent of the lien. The question remains, however, whether these courts would have reached a contrary conclusion had the roving nature of the lien been called to their attention.[85]

A more important question is whether the United States Supreme Court would accept the public function theory in the lien cases, a question that may have been answered by the Court's latest decision involving the public function theory. In *Jackson v. Metropolitan Edison Co.*,[86] the Supreme Court referred to but rejected application of the public function theory to services provided by utility companies.[87] The Court stated that "[w]e have of course found state action present in the exercise by a private entity of powers traditionally *exclusively* reserved to the State."[88] The Court cited the power of eminent domain as such a power.[89] Furnishing of utility services, however, had never been an obligation of the state.[90]

It is submitted that *Jackson* narrows the scope of the public function theory as previously applied. In *Jackson* the Court spoke of powers "exclusively" reserved to the states, whereas previous decisions generally referred to functions merely "governmental in nature."[91] This difference is vital in the lien cases. Although power to execute a roving lien is clearly governmental in nature,[92] it has not been used exclusively by the government. The present day lessors' lien statutes, which grant this right, evolved from common law innkeepers' liens which, because of the special obligations imposed upon the innkeeper at common law, granted such a power.[93] Thus, under the *Jackson* interpretation of the public function theory, there would be no state action in the execution of roving liens.

The test of exclusivity places an unwarranted emphasis on the history of the exercise of a power within an individual state. Since the

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[84] *Id.*

[85] Apparently, this factor was never called to the attention of the First Circuit. The court summarized the plaintiff's public function argument as follows: "Since the execution of a lien by a sheriff or constable would constitute state action, plaintiff contends that it is merely formalistic to find no state action when a private individual performs a *functionally similar* act under the shield of a statutory scheme." 512 F.2d at 205 (emphasis added). The court rejected this argument, on the grounds that such a finding would destroy the boundaries between state and private actions, thus robbing the state action requirment of any meaning. *Id.*

[86] 419 U.S. 345 (1974). See note 22 *supra.*

[87] 419 U.S. at 352-53.

[88] *Id.* at 352 (emphasis added).

[89] *Id.* at 352-53.

[90] *Id.* at 353.

[91] Evans v. Newton, 382 U.S. 296, 299 (1966). See text at notes 55-59 *supra.*

[92] See text at notes 78-82 *supra.*

[93] The innkeepers' lien is discussed in the text at notes 111-18 *infra.*

common law powers of the state and the lessor could vary from jurisdiction to jurisdiction, anomalous results could occur. Thus, simple obedience to the historic tenets of the common law does not provide a satisfactory basis for a result so restrictive of constitutional protections where important property interests are involved.[94]

Furthermore, as Justice Marshall noted in dissent, "[t]he whole point of the 'public function' cases is to look behind the state's decision to provide public services through private parties."[95] It is submitted that where the power is of such importance that it *normally* is exercised by the state, a public function should be found—a view consistent with the Supreme Court's previous public function decisions.[96] Thus, state action should be found in the lessors' lien cases, since the public importance attaching to the exercise of the roving lien has made it a power normally exercised by the state. As stated by Judge Ely, concurring in the Ninth Circuit's decision in *Culbertson:*

> [E]xercise 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. Significant perils necessarily attend the arbitrary seizure . . . . The asserted debt may not be valid, and the seizure may therefore be wholly unjustified. Resistance from the debtor, with concomitant violence, may occur. The property seized may have a value that greatly exceeds the debt, or, on the other hand, the property seized may be essential to the satisfaction of the basic human needs of the alleged debtor and his family.[97]

Thus, although a literal reading of *Jackson* would prohibit a public function finding in the lien cases, it is submitted that the better view is that the execution of a roving lien is an act the nature of which has traditionally been regarded as governmental and which must remain in the control of the State. Accordingly, due process protections should apply when the state authorizes execution by private individuals.

B. Significant Involvement Standard

1. *Definition and Origin.* The United States Supreme Court has generally found the existence of state action in individual conduct where

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[94] See text at note 128 *infra.*

[95] 419 U.S. at 371 (dissenting opinion).

[96] See text at notes 49-62 *supra.*

[97] No. 73-1749 at 12 (concurring opinion). Judge Ely also noted a similarity between execution of a roving lien and the public function the majority in *Jackson* said it would recognize: "Like the power exercised here, the power of eminent domain, where conferred by a state on a private party, would enable that party to seize the property of another for his own purposes." *Compare id.* at 13 n.4 (concurring opinion), *with Jackson,* 419 U.S. at 353.

the state in some way facilitated—perhaps by authorization or encouragement—the individual conduct.[98] In *Reitman v. Mulkey,*[99] the Court adopted a broad approach to the state action question, concluding that state encouragement is state action.[100] In *Reitman,* the Court used a standard of a "significant state involvement" to find state action and strike down an amendment to California's constitution that would have, in effect, made housing discrimination constitutionally permissible.[101]

The reach of the significant state involvement standard has, in recent years, been narrowed by the Supreme Court. In *Jackson,* the private utility company's actions were not considered those of the state despite the state's heavy regulation of the utility.[102] The utility, acting on its own, had terminated power to defaulting customers,[103] without granting notice or a hearing. Had the state been actively involved, this action would have violated the customer's due process rights.

The Court in *Jackson* restated the "significant state involvement" test of *Reitman,* concluding that for a state action determination "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity."[104] The Court then held that where the initiative for an action comes from the private sector, and state policy—in this case rulings from a utilities commission—did not order the conduct, but merely refused to disallow the conduct, the action is not state action.[105]

It appears that *Jackson* represents a new narrow view of state action in the Supreme Court[106] requiring, for a state action determination under the significant involvement standard, that the state actually order the private conduct. Such a result would differ substantially from previous state action decisions.[107] It is submitted, however, that *Jackson* should not be read as overruling previous state action decisions, but rather as a narrow view of the state action doctrine in one specialized area—state regulation of economic activity. In its "sufficiently close nexus" test, the Court refers specifically to situations involving a regulated entity. It is suggested that this narrow approach was necessitated by the high degree of state regulation found in so

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[98] See notes 19-22 *supra.*

[99] 387 U.S. 369 (1967). See note 19 *supra.*

[100] *Id.* at 381.

[101] *Id.* at 377, 381.

[102] 419 U.S. at 358.

[103] *Id.* at 347.

[104] *Id* at 351.

[105] *Id.* at 357.

[106] *See* Note, 16 B.C. IND. & COM. L. REV. 867, 869 (1975).

[107] "[W]e have consistently indicated that state *authorization and approval* of 'private' conduct would support a finding of state action." *Jackson,* 419 U.S. at 369 (Marshall, J. dissenting) (emphasis added).

many important areas of the private sector.[108] Thus, the Court apparently will now require that where state regulation is argued as a basis for finding significant state involvement, the regulation must be specifically tied to the challenged activity, and regulatory policy must actually order the particular private conduct.[109] To read such a requirement into state action cases beyond the regulation area[110] would be to distort the apparent meaning of the Court. Thus the standard for recognizing state action in nonregulated private conduct remains whether the state is significantly involved in the private conduct.

2. *Application of the Significant Involvement Standard to the Lessors' Lien Decisions.* Several federal courts, and the Boston Housing Court in *Porter,* have reasoned that the lessors' lien statutes authorize and encourage seizures of property that would otherwise not be legal, and thus involve state action.[111] The starting point of such an analysis is that the lien statutes are not codifications of the common law, but instead create new rights in favor of the lessor. The court's review of common law history in *Porter* led to the conclusion that although a lien similar in scope did exist for one class of lessor—innkeepers[112]—the general lessor's lien did not exist at common law.[113] The privilege was granted to innkeepers because of their unique position at common law. They were obligated to accept all guests and safely keep their possessions,[114] and were strictly liable for any

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[108] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

[109] *Jackson's* "close nexus" test is apparently little more than a firm statement of the holding in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the Court found no state action in a private club's racial discrimination despite the fact that the club held a state liquor license. *Id.* at 177. No relation existed between the challenged activity and the granting of the license. *Id.*

[110] In *Reitman,* no state coercion was involved; however, no state regulatory activity was involved and thus the facilitation of racial discrimination in housing—the practical effect of the state's "free choice" constitutional amendment, 387 U.S. at 374-75—was a sufficiently significant involvement to support a finding of state action. *Id.* at 381. Nor was state coercion necessary for the state action determination in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The state, in leasing space to a private business which discriminated against blacks, was found to be a joint participant in the discrimination. *Id.* at 723, 725. Factors evidencing the interdependence of the state and lessee included the state's maintenance and repair responsibilities, *id.* at 724, but in no way involved a state command that such conduct be undertaken; however, no regulatory activity was involved, and thus a state command was unnecessary to a finding of state action.

[111] *Porter,* No. 538 at 9-10; Klim v. Jones, 315 F. Supp. 109, 114 (N.D. Cal. 1970). State action was also found in Collins v. Viceroy Hotel Corp., 338 F. Supp. 390, 394 (N.D. Ill. 1972). *Collins,* however, dealt with the same statutes upheld in *Anastasia* by the Seventh Circuit, No. 74-1995 at 5. The *Porter* and *Klim* reasoning was accepted without comment in Dielen v. Levine, 344 F. Supp. 823, 824 (D. Neb. 1972). This reasoning is often referred to as the "entwinement" theory, *see, e.g., Anastasia,* No. 74-1995 at 6, to indicate that the private conduct has become entwined with the governmental policies and thus is state action.

[112] *Porter,* No. 538 at 8.

[113] *Id.* at 8-9.

[114] *Id.* at 8.

losses.[115] To balance these obligations, the lien was granted.[116] At common law, boarding house and lodging house keepers did not have the same obligations as innkeepers,[117] and thus, neither group was granted a lien on the tenant's possessions.[118]

This historical background shows that the lessors' liens are statutory expansions of the common law. This expansion, authorizing and encouraging private seizures under authority of the law, serves as the basis for finding significant state involvement in such seizures. As stated in *Klim v. Jones,*[119] the lessor's seizure is not committed "against a backdrop of an amorphous state policy, but is instead action encouraged, indeed only made possible by explicit state authorization."[120]

This approach has been unanimously rejected by the federal courts of appeals for a variety of reasons. First, a state action finding on the basis of state encouragement has been attacked on the ground that *all* state laws encourage private conduct.[121] Second, *Reitman* has been distinguished from cases involving the lien statutes. As the First[122] and Seventh[123] Circuits have noted, the California constitutional amendment in *Reitman* not only repealed existing fair housing laws, but also effectively precluded state agencies from prohibiting housing discrimination.[124] In *Reitman* the Court had said:

> The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.[125]

In contrast, the First and Seventh Circuits, found that the lessors' lien statutes merely *allowed* certain private conduct.[126] Both courts agreed that unlike the constitutional amendment in *Reitman,* the state

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[115] *Id.*

[116] *Id.* at 9, *citing from* Klim v. Jones, 315 F. Supp. 109, 120 (N.D. Cal. 1970).

[117] *Porter,* No. 538 at 9. The boarding house keeper was required to provide board, but not room, and had no strict liability. Unlike the innkeeper, he had no right to enter the tenant's premises at any time. *Id.* The lien was not extended to the general landlord and tenant relationship. *Id.* at 8.

[118] *Id.* at 9.

[119] 315 F. Supp. 109 (N.D. Cal. 1970).

[120] *Id.* at 114.

[121] *Davis,* 512 F.2d at 204.

[122] *Id.* at 203 n.4.

[123] *Anastasia,* No. 74-1995 at 8.

[124] *Reitman,* 387 U.S. at 377.

[125] *Id.*

[126] 512 F.2d at 203 n.4; No. 74-1995 at 8-9.

lessors' lien statutes are unremarkable, representing a modest change from the common law in the course of carrying out the continuing legislative function of defining creditors' rights.[127]

The First and Seventh Circuits thus properly refused to find state action solely on the basis of the statutory origin of the lien. However, as two commentators have stated:

> The focus for state action purposes should always be on the *impact of the law upon the private ordering,* not the law's age or historical underpinnings . . . . To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct, pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law.[128]

It is submitted that the Boston Housing Court, in *Porter,* has applied the wrong test for determining the existence of state action in seizures under the lessors' lien statutes. Courts must look not to the historical differences between innkeepers' and lodging house keepers' liens, or to the fact of later statutory codification, but to the practical effect of the statutory lien on the debtor-creditor relatonship.[129]

Only the Ninth Circuit has carefully considered the nature of the lien: "[W]e disagree with the proposition that lien statutes which create new rights in favor of creditor landlords have only a minimal impact on private ordering, especially when the parties themselves have failed to agree on a like ordering in the particular case."[130] The court studied the lien itself, sought other indicia of state action,[131] and concluded that (1) execution of a roving lien is an exercise of a public function,[132] and (2) the absence of a private contractual agreement au-

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[127] *Id.*

[128] Burke and Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 47 S. CAL. L. REV. 1, 47 (1973) (emphasis added).

[129] The same commentators who advocate this "impact" approach argue, however, that the impact is to be measured by whether the state law merely allows a private citizen a choice of action or whether it mandates the action. Burke and Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 46 S. CAL L. REV. 1003, 1107 (1973). Thus, their conclusion is that if the state does not *order* the private conduct, there is no state action, the approach adopted by the Supreme Court in *Jackson.* It is submitted that the mandating approach must be limited to *Jackson's* particular facts. See text at notes 106-10 *supra.* The impact approach, however, should properly be regarded as simply ruling out the possibility that state action will be found solely on the basis of the common law origins of a statute, a factor that may still be taken into account, in "sifting facts and weighing circumstances," to determine the nature of the lien and from that the existence of state action.

[130] *Culbertson,* No. 73-1749 at 10.

[131] *Id.* at 8-9.

[132] *Id.* The Court, in effect, went full circle in first denying that it would rely solely on the common law origin of the lien statute, then placing emphasis on this factor.

thorizing the seizure meant that the seizure could not have been contemplated or agreed to in advance by the alleged debtor.[133] Thus, the court—correctly, it is submitted—found a significant state involvement in the seizure.[134]

All of the arguments in favor of applying the significant involvement standard to the lessors' lien cases have nonetheless been rejected by numerous courts in cases involving self-help repossession under section 9-503 of the Uniform Commercial Code, a somewhat analogous situation.[135] It is possible, however, to find state action in the lien cases without disturbing the traditional right to self-help recognized in the U.C.C. cases, by carefully distinguishing the two situations.

First, in U.C.C. cases, a creditor *re*possesses only goods in which he has a specific purchase money security interest;[136] he may not seize any other goods. Second, resort to the U.C.C. provision is clearly optional, taking place only in the absence of a private agreement.[137] The courts of appeals in the U.C.C. cases noted the fact that seizures were accomplished, not under the Code, but under private agreements.[138] On the other hand, whereas the U.C.C. often serves merely to repeat and confirm a private agreement, actions under the lien statutes run contrary to the expectations of the tenant. The Ninth Circuit, in *Culbertson,* concluded that whereas the U.C.C. statute thus may be superfluous, the lien statute is not.[139]

It is thus submitted that a failure to find state action in cases involving seizures pursuant to section 9-503 of the Uniform Commercial

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[133] *Id.* at 9.

[134] *Id.*

[135] The courts of appeals that have considered Uniform Commercial Code repossession cases have unanimously failed to find state action. *See* cases cited in *Anastasia,* No. 74-1995 at 4-5 n.11. Some lower courts have reached the opposite conclusion, *e.g.,* Boland v. Essex County Bank and Trust Co., 361 F. Supp. 917, 919 (D. Mass. 1973). Commentators are also in disagreement. *E.g.,* Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation,* 51 ORE. L. REV. 302 (1972) (finding state action); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More,* 1973 WIS. L. REV. 503 (1973) (no state action).

It is not necessarily the position of this comment that seizures in the Code cases do not involve state action. Rather, it is submitted that state action can be found in the lien cases *even if* the opposite result were reached in the Code cases.

[136] See text at notes 75-76 and note 68 *supra.*

[137] See note 68 *supra.*

[138] In Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973), the court noted that "the procedures challenged herein by appellant involve only private actions arising out of the express written agreements between the parties." *Id.* at 907. *See, e.g.,* Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 17 (8th Cir.), *cert. denied,* 419 U.S. 1006 (1974).

[139] No. 73-1749 at 9. The U.C.C. provision was also a codification of the creditor's common law right, as noted by the various courts of appeals, *e.g.,* Turner v. Impala Motors, 503 F.2d 607, 611 n.11 (6th Cir. 1974), whereas the lessors' lien expanded the common law. Although the factor alone should not result in a state action finding, see text at note 128 *supra,* it is a factor to be considered.

Code should not preclude a court from finding significant state involvement, and thus, state action, in the lessors' lien cases.[140] The arguments presented in this section—that the lien statutes allow conduct otherwise illegal, authorize a dangerous roving lien, and defy the expectations of the tenant by allowing a seizure outside the authority of the rental agreement—which, taken together, demonstrate involvement of the state to a significant degree in the private seizures, are not as strong as those supporting application of the public function theory.[141] However, there is enough merit to those arguments to permit a court to find state action in seizures under authority of the lessors' lien statutes.[142]

III. Policy Considerations in Lessors' Lien Cases

Although state action claims should be decided without regard to public policy considerations, any standard requiring a sifting of facts and weighing of circumstances leaves the door open for attention to such factors.[143] In recent United States Supreme Court decisions dealing with prejudgment seizures by the state,[144] the Court has attempted to strike a balance between the conflicting interests of the creditor and alleged debtor. On the one hand, the alleged debtor

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[140] The lessors' lien cases have also been favorably compared to other forms of self-help repossession, such as the mechanics' liens, *e.g.*, Phillips v. Money, 503 F.2d 990 (7th Cir. 1974) and the bankers' set-offs, *e.g.*, Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 930 (1st Cir. 1974), *cert. denied*, 419 U.S. 1001 (1975). As the First Circuit stated in *Fletcher:* "[A] creditor who holds something of value to his debtor is differently situated from one who does not; he does not need the state to facilitate his collection efforts." 496 F.2d at 930. It is submitted that these cases in fact differ markedly from the lessors' lien cases in that the right to seize arises against a specific item, already in the possession of the creditor, where the item itself is the subject of the debt. The lessor, on the other hand, has no goods in hand when the lessee's debt arises, and the goods he may seize have no relation to the debt itself.

[141] See text at notes 78-85 and 95-97 *supra.*

[142] *Cf.* Neth, *Repossession of Consumer Goods: Due Process for the Consumer, What's Due for the Creditor?*, 24 Case W. Res. L. Rev. 7, 62 (1972).

Although the merits of a case are considered separately from the state action question, the factual situation in *Culbertson* was so offensive that the court may have been inclined to find state action partly on policy grounds. The tenant was a diabetic and almost totally blind. No. 73-1749 at 12-13 n.3 (concurring opinion). Among the items taken were special foods and medicine, items vital to the tenant but of little use to the lessor, particularly if he intended to resell them. *Id.* (concurring opinion). Although not all seizures under authority of the lien statutes are likely to involve such misuses of power, the potential for such conduct cannot be ignored. Policy considerations are considered further in the text at notes 143-162 *infra.*

[143] For example, Justice Marshall, dissenting in *Jackson,* speculated that the Court's failure to find state action may have been partially a result of "its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them." 419 U.S. at 373 (Marshall, J. dissenting). See the discussion of *Culbertson* at note 142 *supra.*

[144] See note 11 *supra.*

should be protected against seizures made upon the basis of invalid claims, while on the other hand, a creditor should not be left without a remedy.[145]

It is submitted that the Massachusetts boarding house and lodging house keepers' lien statute fails to provide the needed balance between the creditor and alleged debtor, because it fails to provide adequate protection for the debtor. He may be locked from his room and deprived of any of his personal possessions without being given an opportunity to protest. Unlike the situation in *Mitchell v. W. T. Grant Co.*,[146] where sequestration of personal property was upheld by the Supreme Court,[147] no showing of convincing proof of the debt is required to be made to a judge prior to a seizure under the lien law. In fact, seizures under the lessors' lien law do not meet even the procedural standards of the seizures struck down by the Court in *Fuentes v. Shevin*,[148] where the creditor had to at least allege to a court officer that the claimed debt was actually due.[149] Under the lessors' lien statute, the lessor need not answer to any judge or court officer before the seizure is allowed. He may act solely on his own, under authority of state law. The goods he may seize bear no relation to the debt, and may be essential to the needs of the alleged debtor and his family. As the Supreme Court noted in *Sniadach v. Family Finance Corp.*,[150] such deprivations are most likely to affect the poor, and place upon them an unfair pressure to pay the debt, even if the claim is false.[151] The lessors' lien statutes allow seizures far broader than the wage garnishment statutes at issue in *Sniadach*, and thus, are potentially more destructive.[152]

Massachusetts does attempt to provide some protection for the lessee. For instance, the creditor may not sell the goods taken without

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[145] In Sniadach v. Family Finance Corp., 395 U.S. 337 (1967), the Court held unconstitutional a Wisconsin wage garnishment procedure. *Id.* at 342. The Court noted that the statute was most likely to affect the poor, those most likely to be in debt, and those least able to bear the burden of having their wages garnished. *Id.* at 340-42. This hardship would place great leverage upon the debtor to pay the creditor, even if the claim were false or fraudulent. *Id.* at 341.

In Mitchell v. W.T. Grant, 416 U.S. 600 (1974), the Court upheld sequestration of property sold under an installment sales contract. *Id.* at 601, 619. The Court stressed that both parties had an interest in the property, and that the creditor would suffer if repossession were delayed. *Id.* at 604, 608.

[146] 416 U.S. 600 (1974).

[147] *Id.* at 619.

[148] 407 U.S. 67 (1972).

[149] *Id.* at 96.

[150] 395 U.S. 337 (1969).

[151] *Id.* at 342.

[152] Klim v. Jones, 315 F. Supp. 109, 122-124 (N.D. Cal. 1970).

judicial involvement.[153] The property owner also has the statutory right to redeem his possessions by posting a bond and seeking judicial intervention.[154] Neither alternative, however, protects the lessee from the possibly unjustified, sudden loss of property. Furthermore, because it is the poor who will be affected, provisions calling for posting of a bond may be less than viable. Therefore, it is submitted that the interests of the tenant are not protected to the same extent as are the interests of the lessor under the Massachusetts boarding and lodging house keepers' law.[155]

Legislative inaction has forced the courts to step in and choose a theory of state action to relieve the inequities of these antiquated laws.[156] This is not surprising, in view of the stronger political clout of landlords generally, and particularly in comparison to that of the transients often affected by the boarding and lodging house keepers' lien statute. Changes should be made legislatively, however, to include due process protections for the alleged debtor. These changes are warranted whether or not the courts find state action in the lessors' lien laws.

Some changes have been made in Texas, where the landlord's lien statute exempts many personal and necessary items from the reach of the lien, and requires that the lien be the subject of a private contractual agreement.[157] The statute thus avoids state action difficulties by limiting the roving lien (the public function)[158] and by making the entrance and seizure authorized not solely by statute, but by private contracts (avoiding the significant involvement argument).[159] Nonetheless, while such a statute may take the lien out of the jurisdiction of the court by avoiding state action, it does little to create the needed balance of protection between landlord and tenant.

Recent United States Supreme Court decisions on prejudgment seizures suggest further ways to alter the lessors' lien statutes to create that balance. Judicial involvement prior to the seizure, requiring proof

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[153] G.L. c. 255, §§ 26-29, *as amended by* Acts of 1973, c. 1114, §§ 330-332. Such provisions are typical of lessors' lien statutes. For the purposes of this comment, reference to such provisions has not been necessary, since the lessors' seizures involved in the cases under consideration had not progressed to this step. Sales under such statutes have, in themselves, been held unconstitutional. *E.g.,* Santiago v. McElroy, 319 F. Supp. 284, 295 (E.D. Pa. 1970), where heavy reliance was placed on the *Sniadach* decision.

[154] G.L. c. 255, § 33 (1952), *as amended by* Acts of 1973, c. 1114, § 333.

[155] In Holt v. Brown, 336 F. Supp. 2, 6 (W.D. Ky. 1971) and Shaffer v. Holbrook, 346 F. Supp. 762, 765-66 (S.D. W. Va. 1972), these same remedies afforded to the lessors fell short of the due process protections required by *Sniadach.* See text at notes 150-52 and note 145 *supra.*

[156] *See, e.g.,* Klim v. Jones, 315 F. Supp. 109, 120-21 (N.D. Cal. 1970); *Porter,* No. 538 at 5.

[157] See note 31 *supra.*

[158] See text at notes 80-82 *supra.*

[159] See text at notes 98-110 *supra.*

that the debt is valid,[160] and limitation of the present lien law to "extraordinary circumstances"[161] are two possibilities. The law, of course, must not tilt the necessary balance in favor of the tenant.[162] For example, provision must be made for a lessor who suspects that a tenant is about to flee the jurisdiction, without paying his rent. In this situation, long court procedures would harm the creditor significantly.[163] The workings of such a statute require the reasoned consideration of the Legislature. Particularly in view to the conflicting decisions of the Boston Housing Court in *Porter* and the First Circuit in *Davis,* there must be immediate legislative reform.

CONCLUSION

This comment has surveyed the lessors' lien decisions and analyzed the various arguments used by courts to find or deny the existence of state action in seizures under the authority of the lien statutes. It is submitted that such seizures do constitute state action, particularly under the public function theory—which states that where private parties are given powers normally reserved to the state, in this case the power to exercise a roving lien, their actions are subject to constitutional limitations—and possibly under the significant involvement standard, which states that private conduct facilitated by the state to a high degree is state action. New lien laws, striking a proper balance of protection between lessor and lessee, should be enacted by the Legislature whether or not the present lien statutes are declared unconstitutional by the courts.

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[160] *Mitchell,* 416 U.S. at 616.

[161] *Sniadach,* 395 U.S. at 339. Extraordinary circumstances would exist, for example, where the taking is necessary to secure an important governmental or general public interest and where there is a need for prompt action. Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972). Summary seizure has been allowed to collect internal revenue of the government, to meet the needs of a national war effort, and to protect the public from misbranded drugs and contaminated food. *Id.* at 91-92.

[162] [T]he innkeeper will not be left to the mercy of lodgers by the instant decision [holding the lessor's lien statute unconstitutional]. The court is not purporting to abolish the innkeeper's lien, but only to require that it be conditioned by the procedural due process safeguards discussed by the Supreme Court in *Sniadach.* Moreover, a feasible if not entirely attractive alternative exists by which the California proprietor can guarantee that he will be paid, namely payment in advance.

Klim, 315 F. Supp. at 124.

[163] One argument in favor of the lessor is that the lien is his sole protection against such defaults. However, as the court in *Klim* pointed out: "The boarder who desires to leave the jurisdiction without paying his bill can easily do so and take all his possessions with him, so that threat of a lien is hardly an iron-clad safeguard for the California proprietor." 315 F. Supp. at 124.