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Evolving Concepts of the Innkeeper's Lien

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EVOLVING CONCEPTS OF THE INNKEEPER'S LIEN*

Man's existence depends upon compromising his own interests with the general interests of society. In fulfilling his personal needs and desires, an individual must often comply with customs or laws adopted by the community. The innkeeper[1] and the guest,[2] for example, have been able to accommodate their differing priorities by adhering to certain common-law principles. The laws that have governed the innkeeper-guest relationship for centuries, and that have been carried down to the present time,[3] with certain limitations imposed by statute, appropriately illustrate this necessity to compromise.

The obligation of the innkeeper to receive all travelers for whom accommodations were available[4] and his extraordinary responsibility to safeguard the goods of the guest[5] led to the develop-

* I would like to express my appreciation to Professor John H. Sherry who gave me the inspiration to do research on the innkeeper's lien.

[1] An innkeeper is one who professes to serve the public by keeping an inn. His regular business is to entertain and accommodate any traveler who arrives in a condition fit to be received and who promises to pay an adequate price. As subsequently used in this Note, an innkeeper is also referred to as a hotelkeeper.

[2] A guest is a transient who receives accommodations at an inn for reasonable compensation. It is the transient character of the visit, that is, its indefinite or temporary duration, which distinguishes a guest from a lodger, boarder, or tenant in a hotel. However, as is pointed out in 40 AM. JUR. 2d *Hotels, Motels, and Restaurants* § 14, at 910-11 (1968):

> It is difficult, if not impossible, to define with precision who is a guest, as distinguished from a boarder, lodger, or roomer, and each case is to be determined by all the circumstances thereof. Generally, a guest is one who is a transient, that is, free to go and come as he pleases, and who does not sojourn in the inn for a specified time or permanently, and he is entertained from day to day without any express contract, whereas a boarder or lodger contracts for accommodations for a definite period and usually has an arrangement for payment of a fixed sum of money at definite intervals. Under some statutes, however, the term "guest" is defined to include a boarder, lodger, or roomer.

Id. (footnotes omitted).

[3] For example, New York's first Constitution provided:

> And this convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE AND DECLARE that such parts of the common law of England, and of the statute law of England and Great Britain . . . shall be and continue the law of this state . . . .

N.Y. CONST. art. XXXV (1777). Similar provisions were included in subsequent versions of the New York Constitution and are presently embodied in article 1, § 14 of the constitution of 1938. The innkeeper's lien rested wholly upon the common law prior to statutory enactment in 1897. *See* 27 N.Y. JUR. *Hotels, Restaurants, and Motels* § 93, at 384 (1963).

[4] *See, e.g.*, Perrine v. Paulos, 100 Cal. App. 2d 655, 657, 224 P.2d 41, 42 (1950); Vansant v. Kowalewski, 28 Del. (5 Boyce) 92, 90 A. 421 (Super. Ct. 1914); J. BEALE, LAW OF INNKEEPERS AND HOTELS § 61, at 42 (1906).

[5] With few exceptions, such as acts of God, inherent defects in the property, or negligence of the guest, the innkeeper was absolutely liable for any injury or loss to the guest's

ment of the innkeeper's lien.[6] By custom, the innkeeper was given the power to execute a lien on the property of the guest to compensate for expenses in keeping the goods, as well as for the food and entertainment provided.[7] This quid-pro-quo system[8] effectively defined and continues to define[9] the contours of the relationship between innkeeper and guest. Any disturbance of this state of affairs can therefore be justified only under the most compelling of circumstances.

The constitutional validity of the innkeeper's lien has recently been questioned in a number of states.[10] The New York Court of Appeals case of *Blye v. Globe-Wernicke Realty Co.*[11] is representative of

property. *See* Burton v. Drake Hotel Co., 237 Ill. App. 76 (1925); Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 206 Ky. 494, 267 S.W. 555 (1925); Todd v. Natchez-Eola Hotels Co., 171 Miss. 577, 157 So. 703 (1934). The innkeeper was not, however, obligated to accept an item that was extremely dangerous, such as a wild animal or package of dynamite, or that might create a nuisance. *See* J. BEALE, *supra* note 4, § 68, at 47; J. SCHOULER, LAW OF BAILMENTS 258 (1880).

[6] *See* Hogan, *The Innkeeper's Lien at Common Law*, 8 HASTINGS L.J. 33, 43-48 (1956).

[7] In L.E. Lines Music Co. v. Holt, 332 Mo. 749, 60 S.W.2d 32, (1933), the court pointed out that

> [t]his extraordinary privilege corresponds to, and is concurrent with, the extraordinary liabilities which the law imposes on the innkeeper. The lien is not created by a contract, but by law; the innkeeper, being obliged by law to receive the guest, is given the lien by the law as a protection.

Id. at 753, 60 S.W.2d at 33, *quoting* 32 C.J. *Innkeepers* § 84, at 569 (1923).

[8] For a compilation of references supporting the proposition that, at common law, an innkeeper had a lien upon all goods rightfully possessed by the guest for the value of the guest's board and lodging, see Waters & Co. v. Gerard, 189 N.Y. 302, 309-13, 82 N.E. 143, 144, 145-47 (1907).

[9] For example, the introduction of the automobile and other advanced modes of transportation have enabled the guest to escape more easily with his goods as well as to avoid service of process. *See* text accompanying note 76 *infra*. And although no empirical studies are available to illustrate the practical effectiveness of the lien in terms of the frequency of its execution, the exercise of the lien by certain types of hotels as applied to certain kinds of guests, and the actual monetary compensation an innkeeper derives from its execution, the lien does serve the important practical function of deterring a guest from defaulting on payments due and owing the innkeeper.

[10] Finding state action to be present, four courts have held the innkeeper's lien unconstitutional as violative of procedural due process. Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973). The Seventh Circuit Court of Appeals upheld the Illinois innkeeper's lien in Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), on the basis that state action was not involved, and the First Circuit Court of Appeals applied the same rationale in upholding a boardinghousekeeper's lien in Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975).

[11] 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

In *Blye*, a third-month resident of a Manhattan hotel, Judy Blye, was temporarily deprived of her possessions when she failed to make payment for one week's hotel charges. An action for a declaratory judgment was therefore instituted challenging the constitutionality of the innkeeper's lien law.

the legal issues that have confronted the courts and will therefore be used as a vehicle to assess present and future attacks on the lien. In *Blye,* the court held that a state statute codifying the common-law lien of the innkeeper[12] was unconstitutional because it did not comply with the procedural due process requirements of notice and hearing[13] prior to the detention of a hotel resident's property. In reaching this decision, the court found that the innkeeper's conduct constituted state action since the execution of a lien was traditionally a function performed by an agent of the state[14] and since the innkeeper's actions were clothed with the authority of state law.[15]

The court also noted that the innkeeper's lien was irreconcilable with the concepts of due process developed in *Sniadach v. Family Finance Corp.*[16] and *Fuentes v. Shevin.*[17] While conceding that an

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Although Blye's property had been returned to her after the filing of the complaint, the court held that the case was not moot because the appellant's cause of action involved an outstanding claim for monetary damages. The court concluded that "[t]he due process and search and seizure issues [were], therefore, 'live' and the controversy justiciable." *Id.* at 19, 300 N.E.2d at 713, 347 N.Y.S.2d at 174 (citations omitted).

The court also intimated that the execution of an innkeeper's lien might constitute a violation of the fourth amendment prohibition against unreasonable searches and seizures. A detailed discussion of this point, however, is beyond the scope of this Note.

[12] At the time suit was brought in *Blye,* the New York innkeeper's lien statute provided that

> [a] keeper of a hotel, apartment hotel, inn, boarding house, rooming house or lodging house, except an emigrant lodging house, has a lien upon, while in possession, and may detain the baggage and other property brought upon his premises by a guest, boarder, roomer or lodger, for the proper charges due from him, on account of his accommodation, board, room and lodging, and such extras as are furnished at his request. If the keeper of such hotel, apartment hotel, inn, boarding, rooming or lodging house knew that the property brought upon his premises was not, when brought, legally in possession of such guest, boarder, roomer or lodger, or had notice that such property was not then the property of such guest, boarder, roomer or lodger, a lien thereon does not exist. An apartment hotel within the meaning of this section includes a hotel wherein apartments are rented for fixed periods of time, either furnished or unfurnished, to the occupants of which the keeper of such hotel supplies food, if required. A guest of an apartment hotel, within the meaning of this section, includes each and every person who is a member of the family of the tenant of an apartment therein, and for whose support such tenant is legally liable.

N.Y. LIEN LAW § 181 (McKinney 1966).

[13] *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Groppi v. Leslie, 404 U.S. 496 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972) (invalidating Illinois's innkeeper lien law on due process grounds); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (invalidating California's innkeeper lien law on due process grounds).

[14] *See* note 48 and accompanying text *infra.*

[15] *See* note 40 and accompanying text *infra.*

[16] 395 U.S. 337 (1969). In *Sniadach,* Family Finance Corporation brought a garnishment action against Mrs. Sniadach as defendant and her employer as garnishee. The complaint alleged that $420 was presently due on a promissory note. In accordance with Wisconsin law,

extraordinary situation might justify summary seizure without due process safeguards,[18] the *Blye* court failed to find any public interest that would meet this exception. Furthermore, the court could not perceive how the lien afforded an innkeeper any real protection against a guest intent on absconding. It concluded that the interests of a guest in the possession and use of his property were paramount to any interests of the hotelkeeper in satisfying a claim against the guest by means of prejudgment seizure.[19]

In striking down the innkeeper's lien, the *Blye* court failed to distinguish innkeeper's liens from liens employed in other types of

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one-half of the wages under the control of the garnishee were paid to the defendant as a "subsistance allowance" and the remainder was retained subject to order of the court. The United States Supreme Court reversed the holding of the Wisconsin Supreme Court and invalidated the state's garnishment statute because it authorized garnishment of a debtor's wages without adequate notice or a prior opportunity to be heard.

[17] 407 U.S. 67 (1972). *Fuentes* involved actions instituted by debtors in Florida and Pennsylvania challenging the constitutionality of the states' prejudgment replevin laws. The Florida appellant purchased a gas stove and a service policy under a conditional sales contract from the Firestone Company. After two-thirds of the contract amount was paid, a dispute arose regarding servicing of the stove. The appellant refused further payments and Firestone instituted a claim for replevin. The Pennsylvania appellants presented similar facts.

The replevin laws of both states enabled a private party, without a hearing or prior notice to the debtor, to obtain a writ of replevin upon an *ex parte* application to an official of the state and upon the posting of a bond. Delivery of the writ of replevin to the sheriff required him by law to seize the property described therein. The defendant had a subsequent right to reclaim possession of that property by posting his own security bond. The Supreme Court, in a four-to-three opinion, held that these replevin acts violated the due process rights of the defendants by depriving them of their property without a prior opportunity to be heard on the validity of the underlying claim.

[18] *Sniadach* and *Fuentes* were cited in support of this proposition, but the court nevertheless concluded that "[i]t cannot be said that the statute before us serves such an important governmental or general public interest." 33 N.Y.2d at 21, 300 N.E.2d at 714, 347 N.Y.S.2d at 176.

[19] Normally, in cases in which the necessity for prior notice and a hearing has been examined, the courts have employed a balancing test to weigh the countervailing public and private interests. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969). One frequently cited opinion has described the balancing test in the following manner:

> [T]o determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand.

Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).

The court in *Blye*, however, did not use the traditional balancing test in weighing the countervailing public and private interests of the innkeeper and the guest. The court merely focused on the lien's "disastrous" effects upon the guest, ignoring the lien's traditional function as an equalizing device to compensate the innkeeper for his legal ohligation to receive the guest and safeguard his property.

The connection between the innkeeper's liability and the innkeeper's lien at common law was discussed in Threfall v. Borwick, L.R. 7 Q.B. 711, 713-14 (1872). *See* note 25 *infra*. *See also* Broadwood v. Granara, 156 Eng. Rep. 499 (Ex. 1854).

business activity. In its analysis, the court did not differentiate between a guest, to whom the common-law innkeeper's lien applied, and a lodger or tenant, to whom liens were initially applied by statute rather than by common law. In addition, the court resorted to a strained interpretation of the cases it cited, unduly expanding their meaning and application in order to buttress its own conclusion. Its finding that the lien sufficiently involved the state so as to constitute state action[20] and its belief that the innkeeper had alternative measures at his disposal other than the lien are both of questionable validity.[21] The purpose of this Note is to examine the constitutional validity of the innkeeper's lien in terms of the historical relationship existing between an innkeeper and his guest, the conduct of the innkeeper as constituting state or private action, the legal bases for invoking fourteenth amendment procedural due process requirements, and the alternative measures that may be available to the innkeeper.

I

SCOPE OF THE INNKEEPER'S LIEN

Although the innkeeper's lien dates back to Roman law, the common-law concept of the lien originated in Medieval England. At that time a traveler had to contend with poorly constructed roads, and a variety of robbers and outlaws. He was thus compelled to seek nightly shelter for his own personal safety[22] and for the protection of his property.[23]

[20] In finding state action, the court cited other types of liens as involving an agent of the state, and added that "innkeepers are possessed of certain powers by virtue of section 181 of the Lien Law." 33 N.Y.2d at 20, 300 N.E.2d at 714, 347 N.Y.S.2d at 175. Unlike the innkeeper's lien, which has always been exercised by the innkeeper in his capacity as a private citizen, the other types of liens cited in *Blye,* including a writ of attachment and a judgment lien, have traditionally been exercised by a sheriff as an agent of the state. *See* notes 45-49 and accompanying text *infra.*

Keepers of apartment hotels, boardinghouses, roominghouses, or lodginghouses are granted the powers of the lien by virtue of § 181, but this section does not provide innkeepers with any additional powers not granted at common law. The statutory language is similar in import to the common-law rule expressed by Judge Chase in Waters & Co. v. Gerard, 189 N.Y. 302, 309, 82 N.E. 143, 146 (1907): "[A]n innkeeper has a lien at common law upon all goods in the rightful possession of his guest for the value of the guest's entertainment."

[21] *See* notes 108-17 and accompanying text *infra.*

[22] *See, e.g.,* Bowling v. Lewis, 261 F.2d 311 (4th Cir. 1958); St. Paul Hotel Co. v. Lohm, 196 F.2d 233 (8th Cir. 1952); Clancy v. Barker, 71 Neb. 83, 98 N.W. 440 (1904); Shank v. Riker Restaurants Associates, 28 Misc. 2d 835, 216 N.Y.S.2d 118, *aff'd,* 15 App. Div. 2d 458, 222 N.Y.S.2d 683 (1961); Danner v. Arnsberg, 227 Ore. 420, 362 P.2d 758 (1961); Rommel v. Schambacher, 120 Pa. 579, 11 A. 779 (1887).

[23] *See* Navagh, *A New Look at the Liability of Inn Keepers for Guest Property Under New York*

Recognizing the imperiled position of the traveler and his reliance upon the innkeeper, the English courts created a special liability of the innkeeper, based not on tort or contract principles, but rather on what has been called the "custom of the realm."[24] The common-law precedents, including the extraordinary liabilities of the innkeeper,[25] were subsequently brought to America in colonial times.

With the improvement of traveling conditions in the colonies, the dangers to a guest's property were reduced. In addition, insurance for the traveler became increasingly available. In light of these circumstances, it appeared inequitable to impose the expanded and virtually unlimited common-law liability upon the hotelkeeper, who usually had no knowledge of the value of the property of his guests. Legislation was thus enacted in New York[26] and other states[27] to

Law, 25 FORDHAM L. REV. 62, 63 (1956). *See, e.g.*, Bidlake v. Shirley Hotel Co., 133 Colo. 166, 292 P.2d 749 (1956); Coskery v. Nagle, 83 Ga. 696, 10 S.E. 491 (1889); Layton v. Seward Corp., 320 Mich. 418, 31 N.W.2d 678 (1948); Hulett v. Swift, 33 N.Y. 571 (1865); Southwestern Hotel Co. v. Rogers, 183 S.W.2d 751 (1944), *aff'd*, 143 Tex. 343, 184 S.W.2d 835 (1945); Shifflette v. Lilly, 130 W. Va. 297, 43 S.E.2d 289 (1947).

[24] "It was the custom of the realm to impose special duties upon certain callings which involved public confidence and the exercise of special skills and competence." Note, *The Innkeeper's Lien in the Twentieth Century*, 13 WM. & MARY L. REV. 175, 176 (1971).

[25] Rex v. Ivens, 173 Eng. Rep. 94, 96 (1835), stated:

> The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants . . . .

The concomitant principle was expressed by Justice Mellor in Threfall v. Borwick, L.R. 7 Q.B. 711, 713-14 (1872):

> [W]hen, having accommodation, [the innkeeper] has received the guest with his goods and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances the lien must be held to extend to goods which he might possibly bave refused to receive.

And in Cook v. Kane, 13 Ore. 482, 11 P. 226 (1886), the court observed that

> [w]henever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession.

Id. at 485-86, 11 P. at 228.

[26] N.Y. GEN. BUS. LAW §§ 200 to 203-a, 207 (McKinney 1968); N.Y. LIEN LAW § 181 (McKinney 1966).

[27] ALA. CODE tit. 24, §§ 11, 13-15, 17-19 (Supp. 1973); *id.* tit. 33, §§ 11-12, 15, 17-19 (1958); ALASKA STAT. §§ 08.56.050, .060 (1973); *id.* §§ 34.35.510, .520, .530 (1975); ARIZ. REV. STAT. ANN. §§ 33-302, -951, -952 (1974); ARK. STAT. ANN. §§ 71-1109 to -1112 (1957); CAL. CIV. CODE § 1861 (West 1954 & Supp. 1975); *id.* §§ 1859-61; COLO. REV. STAT. ANN. §§ 38-20-102, -104, 12-44-105 to -112 (1973); CONN. GEN. STAT. ANN. §§ 44-1, -2, 49-69 (1975); FLA. STAT. ANN. §§ 509.111, 713.67-.68, 85.011-.051 (Supp. 1975-76); GA. CODE ANN. §§ 52-105, -106, -108, -111 (1974); HAWAII REV. STAT. §§ 507-7 to -10 (1968); IDAHO CODE §§ 39-1824, -1826, -1827 (1961); ILL. ANN. STAT. ch. 71, §§ 1, 3-4 (Smith-Hurd 1959 & Supp. 1975-76); IND. ANN. STAT. §§ 32-8-27-1 to -2, 32-8-28-1 to -5 (Burns 1973); IOWA CODE ANN. §§ 105.1-.9, 583.1-.2, .4 (1949); KAN. STAT. ANN. §§ 36-201 to -203, -402 (1973); KY. REV. STAT. ANN. §§ 306.010-.030 (Baldwin 1971); *id.* §§ 376.340-.350 (Baldwin 1969); LA. CIV.

protect the innkeeper from fraudulent claims, and to place upon the guest a portion of the risk of loss. These statutes imposed certain limitations upon the amount that a guest could recover at common law for the loss of, or damage to, his property.[28] The limitations were dependent upon the nature of the property and its location in the hotel at the time the loss or damage occurred.

Although these statutes were designed to limit the innkeeper's liability, he was nevertheless left with more responsibilities and fewer safeguards than his commercial counterparts, the landlord and the roominghouse proprietor. In contrast to the boardinghouse or roominghouse proprietor, the innkeeper was under a common-law duty to provide accommodations to all persons, often without regard to any prior or express agreement as to the duration of their stay.[29] In addition, the common law continued to place a greater

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CODE ANN. art. 3236 (West Supp. 1975); *id.* arts. 2937, 2965, 2971, 3232-34 (West 1952); ME. REV. STAT. ANN. tit. 30, §§ 2901-04, 2951, 2952 (1965); MD. ANN. CODE art. 71, §§ 3-4 (1970); MASS. ANN. LAWS ch. 255, §§ 26-29 (Supp. 1974); *id.* ch. 150, § 10 (1972); *id.* ch. 255, §§ 23, 26-30 (1968); MICH. COMP. LAWS ANN. §§ 18.301-.303, .311, .312 (1971); MINN. STAT. ANN. §§ 327.01-.06 (1966); MISS. CODE ANN. §§ 75-73-1 to -17 (1972); MO. ANN. STAT. § 419.010 (Vernon Supp. 1975); *id.* §§ 419.010-.030, .060 (Vernon 1949); NEB. REV. STAT. §§ 41-122, 41-123, 41-123.01-.04, 41-124 to -125, 41-127 to -128 (1974); N.H. REV. STAT. ANN. §§ 353:1, 444:1, 448:1 (1966); N.J. STAT. ANN. §§ 2A:44-48 to -50 (1952); N.M. STAT. ANN. §§ 49-6-1 (1966); *id.* §§ 61-3-11 to -14 (1974); N.C. GEN. STAT. §§ 72.2-.3 (1975); *id.* §§ 44A-2 to -5 (1974); N.D. CENT. CODE §§ 35-19-01, -02, 60-01-29 to -33 (1960); OHIO REV. CODE ANN. §§ 4721.01-.06 (Page 1954); OKLA. STAT. ANN. tit. 15, §§ 501, 503a, 503b (1966); ORE. REV. STAT. §§ 87.525 to .530, 699.010-.050 (1973); PA. STAT. ANN. tit. 37, §§ 63-64, 71-72 (1954); R.I. GEN. LAWS ANN. §§ 5-14-1 to -2 (1956); *id.* §§ 34-33-1 to -2 (1970); S.C. CODE ANN. § 35-4 (Supp. 1974); *id.* §§ 35-3 to -6 (1962); S.D. COMPILED LAWS ANN. § 44-11-5 (Supp. 1975); *id.* §§ 43-40-4 to -6, 44-11-5, -7 (1967); TENN. CODE ANN. §§ 62-703 to -706, -709, 64-1701 (1955); TEX. REV. CIV. STAT. ANN. arts. 4592, 4594-95 (1960); UTAH CODE ANN. §§ 29-1-2 to -3 (1969); *id.* §§ 38-2-2, -4 (1974); VT. STAT. ANN. tit. 9, §§ 3141-43 (1971); *id.* tit. 13, § 2585 (1974); VA. CODE ANN. §§ 35-10 to -11, -13, 43-31, -34 (1970); WASH. REV. CODE ANN. §§ 19.48.030, 19.48.070, 60.64.010 (1961); W. VA. CODE ANN. § 38-11-14 (Supp. 1975); *id.* § 16-6-22 (1972); *id.* §§ 38-11-5, -14 (1966); WIS. STAT. ANN. § 289.48 (Supp. 1975-76); *id.* §§ 160.31-.33 (1974); *id.* §§ 289.43-.48 (1958).

Those state statutes not placing monetary limitations on the amount the guest could recover include the following: DEL. CODE ANN. tit. 24, § 1502, tit. 25, § 3901 (1974); MONT. REV. CODES ANN. §§ 34-102 to -103, -109 to -110 (1961); NEV. REV. STAT. §§ 108.480, 651.010 (1973); WYO. STAT. ANN. §§ 33-247, -249 (1959).

[28] In New York, for example, the hotelkeeper was not obligated to receive property for safekeeping exceeding $500 in value. The hotel was not liable for any loss of property, by theft or otherwise, exceeding this figure, except when there was a special agreement in writing. *See* N.Y. GEN. BUS. LAW §§ 200 to 203-a, 207 (McKinney 1968).

Because the potential liability of an innkeeper already existed at common law, New York's lien law did not create a new liability, but merely limited the amount of a guest's recovery. *See* Navagh, *supra* note 23, at 64 *citing* Honig v. Riley, 244 N.Y. 105, 110, 155 N.E. 65, 67 (1926), and Wilkins v. Earle, 44 N.Y. 172 (1870).

[29] *See* Sherry, *Innkeeper's Liability for Failure to Honor Reservations,* 15 CORNELL HOTEL & RESTAURANT ADMIN. Q. 72, 73 (May 1974). In Pinkerton v. Woodward, 33 Cal. 557, 91 Am.

burden upon the innkeeper to maintain the safe condition of his premises.[30] The burden of these responsibilities was compounded by the innkeeper's inability to ensure the collection of charges incurred by the guest, for, unlike the landlord, the innkeeper was not afforded the common-law protection of a security deposit.[31]

The legal duties placed upon the innkeeper with respect to the operation of his inn and his relationship with his guests thus justified affording him the protection of a lien. Proprietors of boardinghouses and lodginghouses, on the other hand, always retained sufficient control and flexibility over associations with their guests; a lien was therefore unnecessary as a protective device.[32] Further-

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Dec. 657 (1867), the court distinguished an inn from a private lodging or boardinghouse in the following manner:

> [T]he keeper of the latter is at liberty to choose his guests, while the innkeeper is obliged to entertain and furnish all travellers of good conduct and means of payment, everything which they have occasion for as such travellers, whilst on their way.

Id. at 583.

[30] A tenant acquired an interest in the realty of his landlord, or a right to the exclusive possession of the premises occupied, and was therefore obligated properly to maintain his living quarters. Because an innkeeper's guest did not acquire any realty interest, he was not responsible for keeping the premises safe and clean; that task devolved upon the innkeeper. *See, e.g.*, 49 AM. JUR. 2d *Landlord and Tenant* § 6, at 47-48 (1970), wherein it is stated:

> The chief distinction between a tenant and a lodger apparently rests in the possession. A tenant has the exclusive legal possession of the premises, he and not the landlord being in control and responsible for the care and condition of the premises. A lodger, on the other hand, has merely a right to the use of the premises, the landlord retaining the control and being responsible for the care and attention necessary.

[31] Along with this greater burden, however, came an inchoate right to a lien on the goods of the innkeeper's guest as of the time hoard and lodging were furnished. The lien became fixed and certain only after the indebtedness was established, and it remained in effect until the innkeeper voluntarily surrendered the goods to the guest or until the debt was satisfied. In the landmark case of Robinson v. Walter, 81 Eng. Rep. 227 (1616), Justice Dodderidge asserted the innkeeper's common-law right to the lien: "He is [bound] to receive all guests and horses that come to his inn . . . and therefore there is very great reason for him to [execute the lien]." *Id. See also, e.g.*, Broadwood v. Granara, 156 Eng. Rep. 499 (1854); Threfall v. Borwick, L.R. 7 Q.B. 711 (1872); Coates v. Acheson, 23 Mo. App. 255 (K.C. Ct. App. 1886); Cook v. Prentice, 13 Ore. 482, 11 P. 226 (1886).

[32] Historically, the keeper of a boardinghouse or lodginghouse was not extended the prerogative of a lien. *See* notes 127-28 and accompanying text *infra*. He was required to resort to a normal civil action to recover charges due. The availability of the common-law lien was limited strictly to innkeepers. *See* Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867); Turner v. Priest, 48 Ga. App. 109, 171 S.E. 881 (1933); Pollock v. Landis, 36 Iowa 651 (1873); Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N.W. 56 (1893); Cochrane v. Schryver, 12 Daly 174 (N.Y.C.P. 1883); 1 L. JONES, A TREATISE ON THE LAW OF LIENS § 513, at 462 (3d ed. 1914). Many modern statutes, however, have extended the lien to one or both of the above categories. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-302, -951, -952 (1974); CAL. CIV. CODE §§ 1859-61 (West 1954 & Supp. 1975); GA. CODE ANN. §§ 52-105, -106, -108, -111 (1974); MASS. ANN. LAWS ch. 255, §§ 26-29 (Supp. 1974); *id.* ch. 140, § 10 (1972); *id.* ch. 255, §§ 23, 26-30 (1968); MICH. COMP. LAWS ANN. §§ 18.301-.303, .311-.312 (1971); MONT. REV. CODES ANN. §§ 34-102 to -103, -109 to -110 (1961); NEV. REV. STAT. §§ 108.480, 651.010 (1973); N.H.

more, a hotel guest, because of his transient status, ordinarily traveled very light and was ready and able to leave at a moment's notice. A lodger or boarder, however, usually entered into a relatively long-term contract with the owner and consequently did not have the mobility to default easily on payments. These distinctions, virtually ignored by the *Blye* court,[33] are important in evaluating those statutes that extend the privilege of the innkeeper's lien to boardinghouse and lodginghouse keepers.[34] In considering proposals for a modified lien law, deference should also be given to the public policies that under common law resulted in granting only the innkeeper a right to the lien.[35]

II

INNKEEPER'S LIEN AND STATE ACTION

The notice and hearing requirements related to prejudgment seizures are, in large part, predicated upon Title 42 of the United States Code, section 1983,[36] which creates a civil cause of action for the deprivation of constitutional rights. To recover under this statute a guest must prove that an innkeeper deprived him of a right secured by the Constitution, such as freedom from deprivation of property without due process of law,[37] and that the deprivation occurred "under color of state law." The latter element will normally be present whenever state action sufficient to violate the fourteenth amendment's due process clause is found. Thus, the issue is readily discussed primarily in terms of state action.[38] If the innkeeper-

REV. STAT. ANN. §§ 353:1, 444:1 (1966); N.Y. GEN. BUS. LAW §§ 200 to 203-a, 207 (McKinney 1968); N.Y. LIEN LAW § 181 (McKinney 1966); TEX. REV. CIV. STAT. ANN. arts. 4592, 4594, 4595 (1960); WIS. STAT. ANN. § 289.48 (Supp. 1975-76); *id.* §§ 160.31-.33 (1974); *id.* §§ 289.43-.48 (1958); WYO. STAT. ANN. §§ 33-247, -249 (1959).

[33] In *Blye* the court struck down a statute that encompassed not only innkeepers but also proprietors of boardinghouses, lodginghouses, and roominghouses, thereby failing to take into account the important differences among these classifications.

[34] *See* statutes cited in note 27 *supra.*

[35] *See* notes 118-28 and accompanying text *infra.*

[36] 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.

[37] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[38] Subsequent to the Supreme Court decision in Civil Rights Cases, 109 U.S. 3 (1883), the primary development and expansion of the state-action doctrine has occurred in racial

creditor's remedy does not in any manner involve the state through statute, court, or officer, such prejudgment seizure will not violate the due process clause.

The *Blye* case involved a summary seizure of personal property by a private creditor, the innkeeper, without state participation and without any direct action or review by state officials. In this context, any possible state involvement would only come "after the fact, after the [seizure had] taken place."[39] Although *Blye* concerned the private act of an innkeeper, the court held that the innkeeper was clothed with the authority of state law and was therefore infringing upon the guest's constitutional rights.[40] The court did not distinguish whether a seizure made under the common law, as opposed to

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discrimination cases involving the equal protection clause of the fourteenth amendment. State action has been found to exist in the following situations: Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment prohibiting legislative enactment of open-housing laws); Evans v. Newton, 382 U.S. 296 (1966) (discrimination in the operation of park owned by city, but turned over to private trustees); Robinson v. Florida, 378 U.S. 153 (1964) (health regulations which encouraged segregation); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (operation of privately leased restaurant in state-owned building); Pennsylvania v. Board of Directors, 353 U.S. 230 (1957) (operation of private college whose organization was authorized by state law); Terry v. Adams, 345 U.S. 461 (1953) (discrimination by private political club in voting in pre-primary election); Shelley v. Kraemer, 334 U.S. 1 (1948) (court enforcement of racially restrictive covenant in a real estate deed); Marsh v. Alabama, 326 U.S. 501 (1946) (exercise of governmental powers in privately owned company town); Smith v. Allwright, 321 U.S. 649 (1944) (nominating elections conducted by private, segregated political parties).

When an attack is launched against a creditor, however, at least initially the applicability of the above-cited cases involving racial discrimination may be questioned. This argument was developed in Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay On the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, (1973), wherein the authors pointed out that:

> First, a creditors' rights case will not involve an attack upon conduct whose elimination was the motivating force behind the adoption of the fourteenth amendment. Unlike racial discrimination, the conduct under attack will not be inherently iniquitous and, in fact, may have positive value. . . .
>
> While these considerations do not dictate the wholesale scrapping of 100 years of state action adjudication in equal protection cases involving issues of racial discrimination, they may be instrumental in shaping future development of the state action doctrine in the creditor-debtor due process area. At the very least, they permit the fairly confident conclusion that, if creditor remedies do not satisfy state action principles developed in racial discrimination cases, state action will not be found.

Id. at 1040-41.

[39] Note, *State Action and the Constitutionality of UCC § 9-503*, 30 WASH. & LEE L. REV. 547, 563 (1973). Once a lien had been effected, either the innkeeper or the guest could choose to resort to the courts of the state. An innkeeper who failed to recover the uncollected debt owing on the accommodations provided to the guest could seek to obtain a deficiency judgment, or a guest who felt that the innkeeper's lien was unjustified could seek to sue the innkeeper for recovery of the property or for money damages in an action for conversion. *Id.*

[40] 33 N.Y.2d at 20, 300 N.E.2d at 714, 347 N.Y.S.2d at 175 (footnote omitted): "[The innkeeper's] actions are clothed with the authority of State law and their actions may be said to be those of the State for purposes of the due process clauses."

one authorized solely by statute, would be state action.[41] Yet because the innkeeper's lien parallels the common-law doctrine in almost all respects, a significant question arises as to whether a private party's acts, pursuant to the common law, can constitute state action.

In *Adams v. Southern California First National Bank*,[42] the United States Court of Appeals for the Ninth Circuit held that a repossession pursuant to the common law, prior to adoption of the Uniform Commercial Code, was neither state action nor accomplished under color of state law:[43]

> [M]erely enacting into statutory form what had been the accepted practice for years, and a limited involvement that may be sufficient for racial cases, does not command a finding of "state action" [within the meaning of the civil rights statute] in an economic due process case.[44]

An analogous argument applied to the innkeeper's lien would result in a rejection of *Blye*'s underlying thesis that the statutory enactment

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[41] The issue of state action never arose in *Sniadach* or *Fuentes* because in each case the deprivation was accomplished by the state agents. However,

> [t]he mere fact that the state has historically seized property in the enforcement of remedies such as replevin, garnishment and attachment cannot serve to establish that private conduct which resembles what the state has done in these other contexts is thereby converted into a "state function."

Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay On the Fourteenth Amendment* (pt. III), 47 S. CAL. L. REV. 1, 50 (1973).

[42] 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). In support of its decision, the court cited *Fuentes*, which had intimated that self-help did not involve state action. *Id.* at 338; *see* Fuentes v. Shevin, 407 U.S. 67, 79 n.12 (1972).

[43] Several federal courts have determined that no state action is present when a secured creditor repossesses goods without resort to judicial process as authorized by § 9-503 of the Uniform Commercial Code, and have dismissed due process challenges to the constitutionality of such self-help repossessions. *See, e.g.*, Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir), *cert. denied*, 419 U.S. 1034 (1974); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir), *cert. denied*, 419 U.S. 1006 (1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Shirley v. State Nat'l Bank of Conn., 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank of Minneapolis, 487 F.2d 906 (8th Cir. 1973).

Although a distinction could be drawn between a repossessing creditor who had previously owned the secured property outright and an innkeeper who never had any ownership rights over the property of the guest, other considerations provide equally compelling justification for the innkeeper's right to a lien. An innkeeper has rendered food and lodging, and because these items have been "consumed" by the guest, they cannot possibly be subject to repossession. Consequently, the innkeeper should have a right to substitute other property belonging to the guest as compensation for the no-longer tangible property that was *originally* the exclusive possession of the innkeeper and subsequently "transferred" to the guest.

[44] 492 F.2d at 333 n.24, *citing* Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

of the lien law established a policy sufficient to support a finding of state action, while a long-standing common-law tradition did not.[45] If codification in a statute had evinced a sufficient change of policy or other adequate "encouragement" to support a finding of state action, the result in *Blye* might have had some merit. But the encouragement existed only in the limited sense that the presence of the statute reduced the "risks" to the innkeeper. By statute, the innkeeper was expressly clothed with authority of the law in executing the lien, and there was no "risk" of liability so long as he complied with its terms. Prior to codification of the innkeeper's lien, however, the innkeeper acted pursuant to common law. There thus existed the possibility that if the state did not adopt the common law in its entirety or if the courts would apply it in only limited circumstances, the innkeeper would incur a greater risk by executing a lien without any foreknowledge of whether he might be exceeding his prerogative. Despite the presence of a statute, such a self-help remedy is actually "encouraged more by economic considerations than by anything else."[46]

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[45] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975).

In *Davis*, the First Circuit Court of Appeals held that the distraint of a lodger's property pursuant to a Massachusetts boardinghouse lien statute did not involve state action to a degree sufficient to violate the fourteenth amendment:

> Merely because a state "legalizes" something does not necessarily signal that the state itself has become a participant. . . . The "impetus" for any given distraint remains wholly private.

Id. at 204.

In *Moose Lodge*, a liquor license was granted by the state to a private club that discriminated on the basis of race, and in *Jackson*, a public utility terminated electric service to a private citizen without notice or hearing for nonpayment of bills. Both cases involved the state to the extent that liquor licensing and public utilities were activities regulated by the state. Nevertheless, the Supreme Court found that there was insufficient state involvement in either case to constitute a violation of the fourteenth amendment. Under the rationale of these cases, a statute granting a private hotel proprietor the privilege of executing a lien on a guest's property in a privately owned establishment should not be considered state action. The fact that the innkeeper's exercise of the lien is not regulated in any way by state law and that the innkeeper does not necessarily use the lien device when a guest defaults manifests an even smaller degree of state involvement than in *Moose Lodge* and *Jackson*.

In *Anastasia*, the Seventh Circuit Court of Appeals upheld the actions of hotel proprietors in executing liens because the "degree of involvement [by the state fell] short of the significant degree of encouragement or affirmative support necessary to the existence of state action." 527 F.2d at 156. Thus, the conduct of the defendant hotels was not taken under "color of law" within the meaning of 42 U.S.C. § 1983.

[46] Kirksey v. Theilig, 351 F. Supp. 727, 731 n.8 (D. Colo. 1972). In *Kirksey*, the question of state involvement or encouragement in self-help repossessions pursuant to statute was addressed by the court in the following manner:

> We would be less than candid if we did not note that the private activity can be interpreted as being encouraged by the statutes. But encouragement exists only in

Aside from the "encouragement" or state-sanction theory, the courts have employed a "public-function" doctrine as a basis for finding state action.[47] An individual is considered to be acting "under color of state law" if he performs a function traditionally exercised by the state or if he acts as an agent of the state.[48] In *Blye*, the court perfunctorily assumed that the innkeeper was performing a traditionally public function thereby attributing such action to the state for purposes of the fourteenth amendment.[49] But it is unlikely that the Supreme Court would consider the innkeeper's lien to be a traditionally public function since the right of the innkeeper to execute a lien upon default in payment by the guest has been recognized for centuries and would thereby constitute private action.[50] Furthermore, several courts have held that state enforcement procedures, applied neutrally, do not intrinsically give rise to state action.[51] State laws of a permissive character that merely authorize

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the very limited sense that under the statutes the secured parties have less risk in making the repossessions than they would if there were no statutes or case law on the subject. . . . The self-help repossessions are really encouraged more by economic considerations than by anything else.

Id.

[47] *See* Comment, *UCC § 9-503—Repossession*, 50 DENVER L.J. 261, 267 (1973).

[48] The court in *Blye* justified a finding of state action in the following manner:

> In this State, the execution of a lien, be it a conventional security interest, a writ of attachment, or a judgment lien traditionally has been the function of the Sheriff.

On this view, "State action" can be found in an innkeeper's execution on his own lien. 33 N.Y.2d at 20, 300 N.E.2d at 713-14, 347 N.Y.S.2d at 175 (citations omitted). The analogy between an innkeeper's lien and other liens is not particularly relevant in the context of state action because, in fact, execution of the innkeeper's lien has never been a traditional function of any officer of the state. From its inception in Medieval England and continuing through to the present time, exercise of tbe lien has always been considered a function exclusively reserved to the innkeeper. In contrast to other forms of prejudgment seizure, the impact of the innkeeper's lien would be diminished if the innkeeper were not permitted immediately to employ this private remedy to prevent a defaulting guest from escaping with his baggage.

[49] The *Blye* court cited Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970), a California case invalidating the innkeeper's lien, as authority for this proposition. 33 N.Y.2d at 20, 300 N.E.2d at 714, 347 N.Y.S.2d at 175. In finding state action, the court in *Klim* relied primarily on the Supreme Court decision of Reitman v. Mulkey, 387 U.S. 369 (1967). *Klim* interpreted *Reitman* as standing for the proposition that private conduct was state action if that conduct was "encouraged" by the state. The *Klim* court remarked that "the only state involvement at all [in *Reitman*] was the enactment of the statute in question by the California legislature." 315 F. Supp. at 114. However, because it failed to recoguize that *"Reitman* involved a constitutional amendment—not a statute—which effectively foreclosed the ability of minority groups to obtain fair housing legislation through ordinary political channels," the district court in *Klim* misconstrued the case. Burke & Reber, *supra* note 41, at 51. For a more complete discussion of this point, see Burke & Reber, *supra* note 38, at 1074-82.

[50] *See* Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975).

[51] The state cannot assist or facilitate in any manner discriminatory actions undertaken by a private party. *See, e.g.*, Griffin v. Maryland, 378 U.S. 130 (1964) (state arrest and prosecution of blacks for entering privately owned amusement park with racially restrictive admission policy); Adams v. Southern Calif. First Nat'l Bank, 492 F.2d 324, 337 (9th Cir.

private conduct, and therefore only indirectly encourage such conduct, do not satisfy the fourteenth amendment's state-action requirement.[52] Because state law has an authoritative impact upon almost every form of private conduct,[53] all such conduct would thus be subjected to these constitutional restraints under the *Blye* rationale. Yet the fourteenth amendment was designed to extend no further than protecting a citizen from arbitrary and capricious action by the state.[54]

III

PROCEDURAL DUE PROCESS CONCEPTS APPLIED TO THE INNKEEPER'S LIEN

In view of the unique relationship between the innkeeper and his guest, it is evident that, in order to prevent the guest from defrauding the innkeeper, the practical effectiveness of a lien is dependent upon the innkeeper's right to seize immediately property in the possession of a guest prior to a hearing. Several recent court decisions,[55] however, construing the safeguards required by the

1973) (collecting cases); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (state approval of Federal Housing Administration mortgage benefits and rent supplements received by landlord, combined with use of state eviction procedures, constituting state action).

[52] Adams v. Southern Calif. First Nat'l Bank, 492 F.2d 324, 330-31 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (footnotes omitted):

> The test is not state involvement, but rather is significant state involvement. Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.

See also Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). In *Bond*, the plaintiffs executed wage assignments as security for loans but subsequently defaulted. Although the loan companies were licensed under the New York Banking Law to engage in the business of making small loans, the court held that the lenders' action in filing wage assignments with the borrowers' employers did not constitute state action. The state was not a partner of the lenders, the intent of the wage assignment statute was not to encourage wage assignments, and the statute did not vest lenders with a function traditionally performed by the state. The court employed language used in Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1974), a case that involved a Connecticut codification of the common-law right of self-help repossession in conditional sales transactions: "Codification did not encourage the practice one whit. As we have pointed out, the legislation made it less attractive by providing greater safeguards . . . ." *Id.* at 310.

[53] For example, in Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1973), the court held:

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

See also Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 121 (D. Neb. 1972).

[54] *See generally* Burke & Reber, *supra* note 38, at 1012.

[55] *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell

fourteenth amendment's due process clause, have held that a person must be given notice and an opportunity to be heard before he may be deprived of his property.[56] Following this approach, the Supreme Court in *Sniadach v. Family Finance Corp.*[57] struck down a Wisconsin statute that permitted prejudgment wage garnishment.[58] In refining this concept of a deprivation of property, the Court in *Fuentes v. Shevin*[59] emphasized that the opportunity for a prior hearing was a constitutional requirement that did not depend upon the particular type of summary remedy sought,[60] the nature of the property involved,[61] or the duration or severity of the deprivation.[62]

Justice Douglas, writing for the majority in *Sniadach,* carefully noted that not every interference with or restraint upon an owner's assets prior to judgment constituted a deprivation of property within the meaning of the due process clause.[63] It was pointed out that "[s]uch summary procedure may well meet the requirements of due process in extraordinary situations."[64] Furthermore, the Court in *Sniadach* seemed to indicate a presumption in favor of the constitutionality of attachment and garnishment from which it was carving a rather limited exception when there was no adequate

v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[56] Past attempts to reconcile the requisites of procedural due process with prejudgment attachment procedures resulted in a determination that such detention of a person's property was merely deprivation of the possession or use and not a defeasance of the title. *See, e.g.,* Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932); McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928); Brown Shoe Co. v. Hunt, 103 Iowa 586, 72 N.W. 765 (1897).

[57] 395 U.S. 337 (1969). *See* note 16 *supra.*

[58] The Supreme Court held that absent certain special circumstances that would justify a summary procedure, a person must be afforded notice and an opportunity to be heard before his wages could be garnished. 395 U.S. at 339.

[59] 407 U.S. 67 (1972). *See* note 17 *supra.*

[60] 407 U.S. at 81-82.

[61] *Id.* at 88-90.

[62] *Id.* at 86.

[63] 395 U.S. at 340.

> A procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case. . . . We deal here with wages—a *specialized* type of property presenting distinct problems in our economic system.

Id. (emphasis added).

[64] *Id.* at 339. *See* notes 70-71 and accompanying text *infra.* Prejudgment seizure has been permitted in the following situations: Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (to protect the public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (Federal Home Loan Bank's appointment of conservator to take charge of the affairs of loan association); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary seizure of property to collect revenue for the United States); Coffin Bros. v. Bennett, 277 U.S. 29 (1928) (execution upon failing bank's shareholders by a State Superintendent of Banks to protect interests of depositors); United States v. Pfitsch, 256 U.S. 547 (1921) (to meet the needs of a national war effort).

showing of a countervailing "state or creditor interest."[65] Arguably, the innkeeper has such a "creditor interest."

Although the lien today is generally statutory, the courts in this country have continued to place certain special duties, embodied in the common law, upon the innkeeper. The first of these duties is the requirement that all travelers be accepted who properly apply to be admitted as guests.[66] Proprietors of strictly private business enterprises are under no such obligation, enjoying an absolute right to serve whom they please under common-law and state statutory provisions.[67] The innkeeper's second principal duty is to receive all possessions accompanying the guest, as long as they properly qualify as baggage.[68] Liability is imposed upon the innkeeper for loss of the guest's baggage or property and this liability can be limited only by state statutory enactment. In view of these responsibilities, there appears to be justification for according the innkeeper a lien as an avenue of recourse against a defaulting guest.[69] This is especially true when one considers the unusual creditor interest of the innkeeper. Space and service are being rendered to the guest; neither can be recaptured in the sense that a creditor of consumer items can repossess the products that he has sold. The innkeeper's "commodities" are therefore intangibles, for which he can only be compensated by monetary payment or by seizing the property of the guest.

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[65] 395 U.S. at 339. *But see* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). In its refusal to recognize any overriding creditor interest, the *Klim* court failed to distinguish such an interest in the vendor-creditor context from that in the innkeeper-guest relationship. *Id.* at 121.

[66] "When the hotel opens its doors to the general public, in the eyes of the law its owner sends out an invitation to the public." J. SHERRY, HOW TO EXCLUDE AND EJECT UNDESIRABLE GUESTS 3 (1943). *See also* Willis v. McMahan, 89 Cal. 156, 26 P. 649 (1891).

In New York, the refusal of an innkeeper, without just cause or excuse, to receive and entertain a guest (an indictable offense at common law) has been made a misdemeanor. N.Y. CIV. RIGHTS LAW § 40-e (McKinney Supp. 1975), which provides:

> A person, who, either on his own account or as agent or officer of a corporation, carries on business as innkeeper, or as common carrier of passengers, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

[67] In Madden v. Queens County Jockey Club, 296 N.Y. 249, 72 N.E.2d 697, *cert. denied*, 332 U.S. 761 (1947), the New York Court of Appeals concluded that places of amusement and resort, unlike inns or common carriers engaged in a public calling, enjoy an absolute power to exclude anyone, subject to the legislative restriction of N.Y. CIV. RIGHTS LAW § 40 (McKinney 1948) that no one may be excluded on the basis of his race, creed, color, or national origin. *See also* Sherry, *supra* note 29.

[68] *See* notes 5 & 25 and accompanying text *supra*.

[69] Bonner v. Welborn, 7 Ga. 296, 307 (1849): "And it is because of the compulsion innkeepers are under, to afford entertainment to any body [*sic*], that the law has clothed them with extraordinary privileges." *See* note 4 and accompanying text *supra*.

The Court in *Fuentes,* as it had done in *Sniadach,* noted that in certain extraordinary circumstances statutes need not provide for a hearing prior to the taking of property.[70] The Court defined these extraordinary situations to include those involving a "public interest," or "special situations demanding prompt action."[71] The innkeeper's situation certainly meets this test because quick and decisive action is necessary to place a lien upon the property of a guest before the latter can remove his baggage.[72] This argument was articulated by the Massachusetts Supreme Judicial Court in *Smith v. Colcord:*[73]

> [A] guest who had obtained credit upon the strength of the lien, might destroy the security . . . by a sale or by removing the goods, at any time before the bill for board became payable by the contract; a result which is inconsistent with the nature of the lien . . . .[74]

In essence, the law has clothed the innkeeper with the power of the lien as a device commensurate with the extent of his extraordinary responsibilities.

The Court in *Sniadach* and *Fuentes* also indicated that an extraordinary situation sufficient to warrant postponement of a hearing may exist when there is a necessity of using prejudgment seizures to obtain quasi in rem jurisdiction over the property of the debtor.[75] In *Fuentes* the Court referred to this factor as "clearly a

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[70] 407 U.S. at 93. One extraordinary situation permitting summary seizures arises where the disputed goods may be concealed or destroyed by a debtor. The difficulty in using this criterion as a justification for the lien is that the meaning of the words "disputed goods" is ambiguous. These words may impose no limitation at all so that goods involved in any dispute may be taken summarily in special situations demanding prompt action; or conceivably, summary seizure may be allowed only where a dispute between the creditor and debtor arises as to the right to possess the goods that are sought to be taken. Under this interpretation, *Fuentes* may confine the "special situations demanding prompt action" to those cases in which a secured party seeks to repossess the collateral to which his security interest has attached. *See* Hawkland, *The Seed of Sniadach: Flower or Weed?,* 78 COM. L.J. 246, 250-51 (1973).

[71] 407 U.S. at 91-93.

[72] Under these circumstances, notice and opportunity for a hearing may lawfully be postponed until after seizure as "a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." *Id.* at 93.

[73] 115 Mass. 70 (1874). This case involved a boardinghouse keeper's statutory lien, but the reasoning would apply equally to the common-law lien of an innkeeper.

[74] *Id.* at 71.

[75] In discussing extraordinary situations, both *Sniadach* and *Fuentes* cited Ownbey v. Morgan, 256 U.S. 94 (1921), which sustained the constitutionality of Delaware's foreign attachment statute even though the statute permitted the property of the defendant to be taken prior to a hearing and denied the defendant the right to defend unless he first posted security in the amount of the value of the goods attached. Justice Douglas's reliance on *Ownbey* and his allusion in *Sniadach* to the fact that "*in personam* jurisdiction was readily obtainable" in that case (395 U.S. at 339) suggests that this is one situation requiring special protection to a

most basic and important public interest,"[76] and even the presence of a liberal long-arm statute would not dilute the significance of that interest. In relation to the innkeeper's situation, a transient guest might leave a false address or name with the innkeeper or otherwise be constantly moving about, making service of process difficult if not impossible. In addition, if the innkeeper were required to institute a hearing prior to the seizure of a guest's goods, the guest might easily circumvent the proceedings by taking his property and leaving the jurisdiction prior to the hearing. There is nothing to prevent his quick departure since the guest is, by definition, a transient.[77] By permitting the innkeeper to take possession of a guest's property prior to notice and hearing, jurisdiction may be conferred upon the court such that a quasi in rem judgment against the property detained will at least partially satisfy the amount owed to the innkeeper if an in personam judgment is unavailable.

For the above reasons, the innkeeper has a greater need to detain his guest's property without a prior hearing than a vendor-creditor has to detain the property of a debtor.[78] The *Blye* opinion, in fact, concedes that a state's summary seizure of a person's property may be permissible under the due process clause when the need for prompt action is paramount.[79] Logic would therefore dictate that the rationale of *Sniadach* and *Fuentes* not be extended to the area of the innkeeper's lien. The creditor's interest in this context is clearly paramount,[80] and the innkeeper also has a legitimate claim to due process of law in the protection and collection of what is owed him for services rendered.

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state or creditor interest, and thereby justifies the constitutional use of a summary procedure when in personam jurisdiction is not readily obtainable.

Because a nonresident guest is more likely to be willing and able to transfer his goods outside the state, the hotel-creditor's need to retain the innkeeper's lien may be greater when the debtor is a nonresident than when he is a resident. A default judgment rendered against the guest may be uncollectible if he is beyond the jurisdiction of the court. Furthermore, it is generally agreed that states have a valid creditor interest in affording residents access to their courts to prosecute claims against nonresidents. *See, e.g.*, Lebowitz v. Forbes Leasing & Finance Corp., 326 F. Supp. 1335, 1348-49 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 1049 (1972).

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

[77] *See* note 2 *supra*.

[78] *See* Note, *The Innkeeper's Lien and Due Process—Klim v. Jones*, 5 U. RICH. L. REV. 447, 452-53 (1971).

[79] 33 N.Y.2d at 21, 300 N.E.2d at 714, 347 N.Y.S.2d at 176.

[80] In the majority of garnishment actions the debtor is permanently settled within the jurisdiction of the court, as the wage-earner was in *Sniadach*. Under these circumstances, the employee-debtor is not likely to quit his job, pack up, and leave the jurisdiction in order to avoid a garnishment proceeding. Thus, postjudgment garnishment would be an effective substitute for the prejudgment garnishment of wages held unconstitutional in *Sniadach*.

In the recent Supreme Court case of *Mitchell v. W.T. Grant Co.*[81] sequestration of household appliances was upheld against an attack based upon *Fuentes* when the seizure was used to enforce a claim against a customer. The lower courts and the Supreme Court refused to vacate the order of sequestration and rejected the claim by the defaulting purchaser that the seizure violated his due process rights to notice and a prior hearing.

In holding that the sequestration in *Mitchell* satisfied the strictures of the fourteenth amendment, the Court in effect retreated from the broad principles enunciated in *Fuentes.* The concurring opinion of Justice Powell affirmatively expressed the view that the application of *Fuentes* to prejudgment seizure cases was no longer subject to a liberal interpretation:[82] "The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled."[83] In emphasizing the similarities between the sequestration and replevin procedures, the dissenting opinion also confirmed this view.[84] The Court, however, did not expressly overrule *Fuentes;* rather, the majority opinion attempted to distinguish sequestration from replevin by noting the additional "safeguards" contained in the former action.[85]

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[81] 416 U.S. 600 (1974).

[82] Mr. Justice Powell stated in his concurring opinion that

> [i]t seems to me . . . that it was unnecessary for the *Fuentes* opinion to have adopted so broad and inflexible a rule, especially one that considerably altered settled law with respect to commercial transactions and basic creditor-debtor understandings.

416 U.S. at 624.

Several New York cases have followed the Supreme Court's rationale in *Mitchell. See In re* Jerry v. Board of Education of Syracuse, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (suspension of tenured teacher without pay pending final determination of disciplinary proceedings pursuant to properly worded state statute does not infringe upon teacher's constitutional rights so long as such determination is not unreasonably delayed); *In re* Sanford v. Rockefeller, 35 N.Y.2d 547, 324 N.E.2d 113, 364 N.Y.S.2d 450 (1974) (due process afforded in disciplining of public employees, charged with having engaged in a strike contrary to injunctive provisions of a state statute, by summarily imposing upon them a fine and a one year probationary status with the right *thereafter* to file objections); Hunt v. Marine Midland Bank-Central, 80 Misc. 2d 329, 363 N.Y.S.2d 222 (1974) (citing *Mitchell* in support of the proposition that the interests of both the buyer and seller of property should be taken into account in deciding due process questions); Jones v. Banner Moving & Storage, Inc., 78 Misc. 2d 762, 773-75, 358 N.Y.S.2d 885, 898-99 (1974) (maintaining that the *Mitchell* safeguards, though not present in *Banner,* comport with due process).

[83] 416 U.S. at 623.

[84] *Id.* at 629-34. In both actions the creditor claiming an interest in goods was permitted to seize them without giving any prior notice to the debtor or presenting him with a prior opportunity to rebut the allegations of the vendor. The creditor was merely required to file a complaint and an affidavit generally alleging his purported entitlement to the goods in order to procure the issuance of a writ and seizure of the goods.

[85] *Id.* at 615-18. These safeguards included conserving the property of the debtor

The divergent views expressed by the majority and the dissent clearly illustrate that the requirements of due process may vary according to one's perception of the adequacy of available procedural safeguards other than prior notice and hearing, and according to the manner in which the interests of the parties are defined. The additional safeguards protecting the debtor under the sequestration statute involved in *Mitchell* are comparable in degree to those protective measures that effectively balance the interests of the innkeeper and the guest. As a practical matter, because the guest is frequently unaware that payment is due, the innkeeper wants to give the guest notice of this fact before resorting to the potentially unnecessary procedure of exercising the lien. An innkeeper holding a lien on goods is also under a legal obligation to take reasonable care of such goods. In addition, where several people constitute a single party but only one is responsible for payment of the bill, only the property that actually or ostensibly belongs to the responsible party can be held on lien for the charges.[86] Finally, most states have enacted statutes authorizing the sale by innkeepers of property held under the lien only upon strict compliance with statutory procedures.[87]

The most recent Supreme Court opinion on the constitutionality of prejudgment remedies is *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[88] In striking down a Georgia prejudgment garnishment

pending judgment (as compared to giving the property outright to the creditor under the replevin procedures formerly considered by the Supreme Court), requiring a judge to pass upon the *ex parte* application (as compared to automatic issuance by a court clerk under the replevin procedure), and requiring the applicant to make a "convincing" showing, rather than a bare assertion of entitlement to the goods. *See* text accompanying note 101 *infra*.

[86] J. SHERRY, THE LAWS OF INNKEEPERS 451 (1972).

[87] *See, e.g.*, N.Y. GEN. BUS. LAW §§ 207-09 (McKinney 1968). In New York, before an innkeeper can make a sale of such property, he must prepare a notice of sale and publish it in a local newspaper at least 15 days prior to the date of sale. He is also under a duty to send a copy of the notice of sale to each person whose property is put up for sale at the address appearing on the records of the hotel. *Id.* The procedures set forth in the statute must be strictly followed; failure to do so will expose the innkeeper to liability for damages to a guest returning at some future date, making claim for the property, and offering to pay the charges. Dajkovich v. Hotel Waldorf Astoria Corp., 285 App. Div. 421, 137 N.Y.S.2d 764 (1955), *aff'd*, 309 N.Y. 1005, 133 N.E.2d 456 (1956).

[88] 419 U.S. 601 (1975). In *North Georgia Finishing*, the plaintiff corporation instituted a suit against the defendant corporation on an alleged indebtedness for goods sold and delivered. Simultaneously and pursuant to Georgia statute, the plaintiff filed an affidavit and bond with the court's clerk for process of garnishment upon the defendant's bank. The defendant thereafter filed a counterbond with the court's clerk resulting in the discharge of the bank as garnishee. As the bank account was no longer frozen by the writ, the defendant's motion to dismiss was thus directed toward the release of its bond. In reversing the Supreme Court of Georgia, the United States Supreme Court held that the garnishment procedure lacked sufficient due process safeguards as required by the fourteenth amendment.

statute,[89] the Court continued to employ the flexible due process analysis developed in *Mitchell.*[90] Writing for the majority, Justice White stated that the statutes in *Fuentes* and *North Georgia* were unconstitutional "[b]ecause the official seizures had been carried out without notice and without opportunity for a hearing *or other safeguard* against mistaken repossession."[91] Conspicuously absent from this language are the words "prior notice" and "prior opportunity." It is therefore clear that "[b]y stopping short of an absolute proscription against seizures not preceded by notice and hearing,"[92] the standard for due process set forth by Justice White is weaker than that established in *Fuentes*. Thus, one impact of the *Mitchell* and *North Georgia* cases would seem to be that in the area of creditor remedies a prior hearing is unnecessary when other standards sufficiently protect the interest of the debtor.[93]

In view of the Supreme Court's trend toward a more flexible approach to the concept of procedural due process, it is reasonable to conclude that the "exceptional circumstances" test articulated in *Sniadach-Fuentes*[94] still survives the Court's analysis in *North Georgia Finishing.*[95] A paramount creditor interest has been recognized by

[89] GA. CODE ANN. §§ 46-101, -102, -401 (1974). In permitting issuance of a writ of garnishment, the Georgia statutes did not require authorization by a judge, an affidavit containing statements of fact as opposed to mere conclusory allegations, nor did the statute provide for a prompt postseizure hearing.

[90] This analysis involves an examination of various procedural safeguards that might justify a postseizure hearing, rather than strict adherence to the prior notice and hearing requirements of *Fuentes*.

> In a practical sense, the shift to a balancing test [*i.e.*, a flexible analysis] means that counsel for an individual who has been deprived of a property interest by summary seizure can no longer unequivocally assert that due process mandates opportunity for a prior hearing.

28 VAND. L. REV. 908, 918-19 (1975).

This position was highlighted in *Mitchell,* wherein the Court stated that "[t]he requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.'" 416 U.S. at 610, *quoting* Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945). *See also* Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961): "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . ."

[91] 419 U.S. at 606 (emphasis added). The reference to "other safeguards" indicates an attempt by the Court to reconcile *Fuentes* with *Mitchell,* as the latter case embodied other procedural safeguards which did not include the notice and hearing requirements expressed in *Fuentes.*

[92] *See* Note, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Sniadach to North Georgia Finishing,* 8 LOYOLA OF L.A. L. REV. 339, 357 (1975).

[93] *See* notes 123-29 and accompanying text *infra.*

[94] *See* Fuentes v. Shevin, 407 U.S. 67, 93 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969).

[95] Although *Sniadach* and *Fuentes* had mandated a strict requirement of prior notice and hearing in order to survive constitutional attack, the Court nonetheless created exceptions where the circumstances indicated an emergency situation or a paramount creditor interest.

the Court as an exceptional circumstance,[96] and as pointed out earlier in this Note, the innkeeper's interest in the collection of his debt should outweigh any countervailing interest of the guest.[97]

Although the innkeeper's interest falls within the purview of the "exceptional circumstances" test, it is clear that the innkeeper's lien statutes could not presently survive constitutional attack since there are no provisions for a prompt hearing subsequent to seizure of the guest's baggage.[98] In *Mitchell,* the Court pointed out that unlike the replevin statutes of Florida and Pennsylvania examined in *Fuentes,* Louisiana's sequestration procedure provided for an immediate hearing, and dissolution of the writ unless the plaintiff "proves the grounds upon which the writ was issued."[99] *North Georgia* also indicates that the constitutional adequacy of a creditor statute depends upon an express provision for an early hearing.[100] In light of these decisions, the innkeeper's lien law of every state will, at a minimum, have to be modified to the extent of incorporating a definite provision for hearings.

IV

INNKEEPER'S LIEN STATUTE CONFORMING WITH PROCEDURAL DUE PROCESS REQUIREMENTS

Assuming *arguendo* that the innkeeper-guest relationship does not constitute an exceptional circumstance that would exempt the innkeeper's actions from prior notice and hearing requirements, it is necessary, in light of *Mitchell* and *North Georgia,* to determine what criteria must be embodied within an innkeeper's lien statute to

Mitchell and *North Georgia* relaxed these procedural due process requirements but left intact the Court's prior "exceptional-circumstances" test. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), wherein the Court returned to the *Fuentes* "extraordinary-situation" test one week after the announcement of the *Mitchell* decision. See 60 CORNELL L. REV. 467, 483-84 (1975), for a discussion of the Court's rationale in applying this test to *Pearson.*

[96] *See* notes 64-77 and accompanying text *supra.*

[97] Statements by Justice Powell in his concurring opinion in *North Georgia* lend support to this proposition:

> I continue to doubt whether *Fuentes* strikes a proper balance, especially in cases where the creditor's interest in the property may be as significant or even greater than that of the debtor.
>
> . . . .
>
> . . . The State's legitimate interest in facilitating creditor recovery through the provision of garnishment remedies has never been seriously questioned.

419 U.S. at 609-10.

[98] *See* notes 26-27 *supra.*

[99] 416 U.S. at 606.

[100] 419 U.S. at 607-08.

survive constitutional attack. In distinguishing the replevin statutes in *Fuentes* from the Louisiana sequestration procedure, the Court in *Mitchell* specified five separate safeguards embodied in the Louisiana statute.[101] Briefly stated, the creditor is required to file an affidavit alleging specific facts as opposed to mere conclusory statements, there must be authorization by a judge rather than a court clerk as a condition precedent to issuance of the writ, an attaching creditor is required to post bond and a debtor can regain possession by posting a counterbond, and finally, the statute must provide a definite opportunity for an early hearing at which the plaintiff must prove the existence of the debt.

North Georgia found three of the five criteria lacking in the Georgia statute and therefore struck down the garnishment procedure as unconstitutional.[102] It is still unclear whether the Court would require, in similar creditor cases where notice and a hearing are absent, a mechanical application of *Mitchell* resulting in a quantitative rather than a qualitative approach in determining the protection that must be afforded the debtor.[103] It is possible, for example, that the Georgia procedure would have been upheld by the court had it included three factors similar to those approved in *Mitchell;* but because *North Georgia* was not decided against a factual background involving the absence of only one of the *Mitchell* criteria, it is open to question whether the Court would view the test evolving from *Mitchell* as one requiring strict compliance.[104]

[101] 416 U.S. at 605-10.

[102] *See* note 89 and accompanying text *supra*.

[103] The lower court cases following *Mitchell* indicate that the relative importance of these procedural safeguards is still unresolved. An attachment procedure in Tennessee was upheld as constitutional despite the absence of two safeguards present in *Mitchell* (no debtor counterbond or immediate postseizure hearing). Woods v. Tennessee, 378 F. Supp. 1364 (W.D. Tenn. 1974). *See also* Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974), wherein the absence of a provision for judicial supervision was not held fatal to the constitutionality of a North Dakota replevin statute. On the other hand, a narrow reading of *Mitchell* would require strict compliance with all five criteria. *See, e.g.,* Sugar v. Curtis Circulation Co., 377 F. Supp. 1055 (S.D.N.Y. 1974), wherein the court struck down an attachment statute which met all *Mitchell* criteria except the one requiring an early postseizure hearing. For cases following the approach employed in *North Georgia,* where the challenged statute was compared to the *Fuentes* and *Mitchell* statutes, see Garner v. Tri-State Development Co., 382 F. Supp. 377 (E.D. Mich. 1974) (mortgage foreclosure statute invalidated due to absence of provision of pre- or postseizure hearing); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974) (Arizona garnishment and attachment statutes that did not provide for prior notice and opportunity to be heard held violative of due process); Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974) (Texas sequestration statutes denied procedural due process in failing to provide judicial supervision of issuance of the writ and an immediate postseizure hearing).

[104] The dissenting opinion of Justice Blackmun (with concurrence by Justice Rehnquist) in *North Georgia* indicates the confusing state of affairs emanating from this decision:

> [I] venture to suggest that we would not be immersed in confusion, with *Fuentes* one

In examining these five criteria as they relate to the innkeeper-guest relationship, it is evident from *Mitchell* and *North Georgia* that the procedural safeguard mandating an immediate postseizure hearing would have to be embodied in an innkeeper's lien statute.[105] The other four safeguards enumerated in *Mitchell* would not be relevant in the context of an innkeeper's lien. The two safeguards that involve issuance of provisional writs[106] would have the effect of emasculating the lien because the innkeeper would be unable to exercise the lien immediately if he were first required to file an affidavit before a judicial officer.[107] Processing provisional writs would also create an overwhelming amount of legal work for the courts in addition to imposing an impractical burden upon the innkeeper, who would be constantly running to the courts to obtain a writ.[108] Such writs would rob the lien law of any substance; for the ability of the innkeeper to execute the lien immediately gives it strength and provides for flexibility of action. The other two procedural due process safeguards involving bond requirements would not only have a detrimental effect upon the interests of the innkeeper, but would also be of little beneficial value to a guest. Posting a surety bond, which "indemnifies" the guest against any damages he might suffer because of wrongful use of the writ, would not give any real protection to the guest. The requirement would not discourage the filing of frivolous claims by innkeepers because the cost of such a bond would in many cases be negligible;[109] clearly, a bond

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.

419 U.S. at 619.

[105] *See* notes 98-100 and accompanying text *supra*.

[106] A provisional writ is a protective device which enables the innkeeper to have the property temporarily detained prior to a judgment on the merits of the controversy. It assures the plaintiff in a civil action that the property will not be dissipated while action is pending.

[107] *See* notes 72-74 and accompanying text *supra*.

[108] *See* Note, *supra* note 90, at 919:

Factual affidavits may serve to deter the filing of fraudulent or spurious affidavits, but the deterrence is lost if the affiant is not promptly put to his proof. Properly administered, the post-seizure hearing may be the most effective device to prevent injustice . . . .

[109] At least one state, South Carolina, requires in the case of attachment that the "retention" bond for the defaulting party be double that of the amount claimed by the creditor. S.C. CODE ANN. § 10-931 (1962). A research project in Florida disclosed that although a replevin creditor could post a bond for as little as 1% of its total cost, the current market rate for a bond for the debtor was likely to be the full value of the property. *See* Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 982 (1972). The United States Supreme Court has apparently never allowed the posting of a surety bond to defeat a constitutional claim. *See* Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U.L. REV. 158, 180-81

requirement would not discourage the innkeeper from exercising the lien when he had a mistaken belief as to the facts or legal merits of his claim. In addition, there are many guests who would not be aided by such a provision because they lack the financial ability to acquire a surety and therefore retain their possessions prior to a hearing.

The recent array of Supreme Court decisions examining procedural due process concepts introduces an element of uncertainty into the area of prejudgment seizures and compels a reassessment of the innkeeper's lien. Examining the quality and efficacy of the various safeguards found in a prejudgment statute, rather than the quantity, would protect the guest's interest while also accommodating the creditor interest of the innkeeper.

V

"ALTERNATIVES" TO THE INNKEEPER'S LIEN

Whether a guest may validly waive his constitutional rights by contract, thereby rendering himself vulnerable to summary attachment procedures, is central to any consideration of the due process problems in the innkeeper's lien cases. Certain language in *Fuentes* indicates that one may waive his constitutional right to notice and a prior hearing if such waiver is made explicitly, voluntarily, and knowingly.[110] However, the availability and effectiveness of waivers in the hotel industry is questionable.[111] The well-recognized presumption against the waiver of a constitutional right imposes a

(1970). The bonding requirements have recently been challenged on constitutional grounds as a denial of equal protection. *See, e.g.*, Sanks v. Georgia, 401 U.S. 144 (1971) (appeal dismissed due to changed circumstances); Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 724-25 (N.D.N.Y. 1970) (issue not decided since replevin statute found unconstitutional on other grounds). The Court in Fuentes v. Shevin, 407 U.S. 67 (1972), however, seems to have robbed the bond requirement of any constitutional foundation:

> 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.

Id. at 83.

[110] 407 U.S. at 94-96, *citing* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

[111] The *Blye* court did not mention waiver or alternative procedures that might be employed by the innkeeper to preserve his creditor interests. For a discussion of the "effectiveness" of waivers, see Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of sixth amendment rights), and *Fuentes* in 407 U.S. at 94 (waiver provisions of conditional sales contract held ineffective in permitting summary replevin). In the civil as well as the criminal area, "courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). *See also* Cedar Rapids Eng'r Co. v. Haenelt, 39 App. Div. 2d 275, 277, 333 N.Y.S.2d 953, 956 (1972).

"heavy burden" on the innkeeper seeking to use a waiver agreement in the lien context. Furthermore, such a waiver must be "an intentional relinquishment or abandonment of a known right or privilege."[112] A guest would probably be unaware of the existence of such a provision in a contract, and in any event would not have a full appreciation of its legal significance even if he were aware of it.[113] Furthermore, whether a purported waiver was both knowing and intentional would itself require judicial determination at an adversary hearing before a guest's property could be expropriated.[114]

Because the difficulty of demonstrating the validity of the waiver could be greater than that involved in proving the validity of the innkeeper's underlying claim, the practical effect of utilizing the waiver device would be to dilute the lien law of all meaning; a waiver found to be infirm would, in most situations, permanently deprive the innkeeper of his security even if the underlying claim were, in fact, legitimate. A guest may have defaulted in his payments thereby entitling the innkeeper to exercise a lien in accordance with the waiver agreement. Yet, if the waiver were executed improperly, the guest would be allowed to regain possession of his property. The guest would then be free to abscond with his baggage precluding any subsequent hearing on the merits. It is also questionable whether courts would allow themselves to be put in the onerous position of supervising the "voluntariness" of the waiver in every agreement. The burden on the innkeeper would be equally great as the high turnover of guests in hotels would discourage any attempt to ensure full compliance with the standards that support a waiver. Finally, the innkeeper has a special creditor interest justifying summary seizure apart from reliance on the waiver.

The right of an innkeeper to require payment in advance for the accommodation of a guest would also be ineffective as a practical means of protecting the innkeeper. Although payment in advance has been suggested as an alternative to the innkeeper's lien,[115] this argument has also been rejected as impractical because of uncertainty as to the anticipated length of the guest's stay and as contrary to the convenience sought by travelers.[116] Demanding payment in advance would be a time-consuming burden upon the innkeeper and his guest who would be required not only to pay prior to each

[112] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[113] *Cf.* Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

[114] Osmond v. Spence, 327 F. Supp. 1349, 1359 (D. Del. 1971).

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

[116] Waters & Co. v. Gerard, 189 N.Y. 302, 321, 82 N.E. 143, 150 (1907).

day's lodging but also to pay immediately for all meals and phone calls. Many hotels view distastefully any such requirement since the effect would be to intimidate the guest and possibly cause him to seek accommodations elsewhere. Although payment in advance could work to the advantage of all hotels, the competitive atmosphere pervading the hotel industry[117] would inevitably lead to certain inns disregarding the requirement, with the net effect of abandonment of the policy by most hotels.

VI

Accommodating Creditor and Debtor Interests Through a Narrowly Drawn Statute

The development of the innkeeper's lien at common law has been essentially a process of equating the interests of the innkeeper with those of the guest-property owner, while at the same time accommodating the requirements of a changing and expanding society.[118] The detention of property without notice and hearing has been held to violate procedural due process; but the right of the innkeeper to compensation for services rendered to his guest is at least equally compelling. Hence, even if presently enacted innkeeper's lien statutes are not able to survive judicial scrutiny, a narrowly drawn statute (one that would protect the innkeeper's overriding interests while securing certain basic rights for his guest) should survive constitutional attack.[119]

Any proposal to change the lien law requires an examination of modern exigencies because certain of the conditions that existed when the lien was born have changed. The hazardous traveling conditions prevalent in earlier times have disappeared[120] with the result that the innkeeper is now less of a guardian, the potential monetary liability of an innkeeper for the goods of his guest has been reduced,[121] and the guest has additional methods of protection such as insurance. The solution therefore lies in restricting the lien

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[117] *See* Laventhol, Krekstein, Horwath & Horwath, Lodging Industry: 42nd Annual Report on Hotel and Motor Hotel Operations (1974 ed.). Competition stems from both new lodging facilities and other segments of the shelter industries (families building second homes) as well as from increased price-sensitivity brought about by the advent of the "budget motel."

[118] *See* Hogan, *supra* note 6, at 47.

[119] The *Klim* court intimated that the innkeeper's statute might be upheld if it were more narrowly drawn so as not to allow seizure of all the lodger's property. 315 F. Supp. at 123-24.

[120] *See* notes 5 & 25 *supra*.

[121] *See* note 28 *supra*.

in a manner consistent with the limitation on the responsibility of the innkeeper.[122]

First, the innkeeper's lien should attach to all property within the possession of the guest for charges incurred; otherwise, the innkeeper could easily be defrauded by a relative or other person claiming ownership of the items within the possession of the guest.[123] The innkeeper should be obligated to deposit the debtor's property within the custody of a court to satisfy the creditor's claim should he obtain a judgment.

Second, there should be a procedure permitting the guest to challenge immediately either the factual bases of a prejudgment seizure or the legitimacy of the creditor's claim. "The necessity for allowing a summary challenge to both the seizure and the claim is evident. Even though grounds for the summary seizure may exist (*e.g.*, the debtor is a nonresident or personal jurisdiction is not obtainable), the creditor's claim may be unfounded."[124] A hearing should be made available within a reasonable time and the burden of initiating judicial proceedings should be placed upon the innkeeper. These provisions would effect a compromise with the proponents of a right to a prior hearing.[125]

Third, the statute should provide exemptions for certain types of property of the guest. Those items that have no monetary value to the innkeeper and the loss of which would cause a great hardship to the guest or adversely affect his earning capacity should not be subject to the lien. The effect of failing to provide for exemptions would be to thrust the allegedly defaulting guest out onto the street

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[122] Note, *supra* note 24, at 183-86.

[123] This proposition assumes that the innkeeper has no knowledge that the property belongs to a third party. Otherwise, a lien would probably not be permitted. *See, e.g.*, Covington v. Newberger, 99 N.C. 523, 6 S.E. 205 (1888); Cook v. Prentice, 13 Ore. 482, 11 P.226 (1896).

A number of cases involving a lien on the property of a third party brought into a hotel by a guest have been found to be constitutional. Brown Shoe Co. v. Hunt, 103 Iowa 586, 72 N.W. 765 (1897); Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N.W. 56 (1893); L.E. Lines Music Co. v. Holt, 332 Mo. 749, 60 S.W.2d 32 (1933).

[124] Smith, *Sniadach and Summary Procedures: The Constitution Comes to the Marketplace*, 5 IND. L.F. 300, 319-20 (1972).

[125] The dissenting judges of the Wisconsin Supreme Court in *Sniadach* acknowledged that a defendant may be constitutionally deprived of his property "for a limited period of time so that the creditor can be certain that the assets are there to satisfy its judgment when once obtained." 37 Wisc. 2d at 182, 154 N.W.2d at 269. Neither Justice Douglas's nor Justice Harlan's opinion, however, mentioned the length of time required under the Wisconsin procedure for disposition of a prejudgment garnishment proceeding. The Court did not provide any guidelines concerning what constitutes a "limited period" during which a debtor could be deprived of his property.

with no possessions other than those he can manage to carry on his person.[126]

Finally, any future lien law should be consistent with the common-law doctrine and permit *only* innkeepers the right to a lien. Lodginghouses, boardinghouses, and apartment hotels are not within the ambit of the common-law innkeeper's lien,[127] yet statutory enactments now permit the operators and proprietors of such establishments to enjoy essentially the same rights and privileges that innkeepers possess at common law.[128]

A procedure incorporated into the New York statute that was struck down in *Blye* might also be appropriate as an additional safeguard for the guest.[129] Under that statute an innkeeper was obligated to give notice of his claim by publication and could enforce the sale of the property only after a specified period of time. Prior to the expiration of that period, the guest had a right to redeem his property by paying the reasonable charges of his lodging and the expenses incurred by the innkeeper in attempting to enforce his lien.

The procedure described above would be equitable. It would provide the debtor with prompt judicial relief, and obviously essential items could not be held under the lien. Simultaneously, the innkeeper's creditor interests would be recognized, and he would not be substantially prejudiced by the debtor's nonresidence. Concededly, there is the possibility of hardship to the guest in that some

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[126] Klim v. Jones, 315 F. Supp. 109, 123-24 (N.D. Cal. 1970). The court in *Klim* concluded that CAL. CIV. CODE § 1861 (West 1971) was unconstitutional because it did not exempt from the operation of the lien property that was essential for the health, safety, and well-being of the owner prior to a satisfactory hearing. 315 F. Supp. at 123.

The lien does not cover property exempt from execution under federal law. As a general rule, property belonging or relating to the operations of the United States Government is not subject to seizure by a creditor. The clothing of a seaman, for example, "shall be exempt from attachment, and . . . any person who shall detain such clothing when demanded by the owner shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than six months or fined not more than $500, or both." 46 U.S.C. § 563 (1970).

[127] *See* 40 AM. JUR. 2d *Hotels, Motels, and Restaurants* § 187, at 1050 (1968); 49 AM. JUR. 2d *Landlord and Tenant* § 675, at 641 (1970).

[128] Proprietors of boardinghouses were not viewed in the same light at common law as were innkeepers. J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 475 (9th ed. 1878). *See also* note 32 *supra*.

[129] In codifying the innkeeper's lien, the New York legislature did not intend to adversely affect the common-law right to the lien. *Cf.* note 12 *supra*. The New York innkeeper's lien statute recognizes the traditional relationship existing between the innkeeper and the guest, "on account of [the guest's] accommodation, board, room and lodging, and such extras as are furnished at [the guest's] request," (N.Y. LIEN LAW § 181 (McKinney 1966)) and accordingly grants the innkeeper the right to retain all of the goods brought by a guest as security for the payment of expenses incurred by the guest.

of his goods might be temporarily detained. Moreover, certain items that should properly be exempted from the force of the lien might be unreasonably withheld by the innkeeper. Any injustice consequently endured by the guest could, however, be mitigated by imposing a penalty on the innkeeper for unreasonably detaining particular assets of the guest.

CONCLUSION

The innkeeper's conduct appears to fall within the realm of private activity rather than under the guise of state action. Consequently, execution of the lien does not enable a guest to seek legal redress on the basis that his constitutional rights have been infringed. However, even should state action be found, it is exactly the kind of extraordinary creditor interest held by an innkeeper that prompted the Court in *Sniadach* and *Fuentes* to provide for an exception to the normal rule requiring preseizure procedural due process safeguards. The guest's immediate possessions are often the only assets the creditor-innkeeper can seize to satisfy any eventual judgment, and the removal of these items by the guest will almost invariably render the ultimate judgment uncollectible.

Decisions construing the requirements of the fourteenth amendment's due process clause have had a long and involved history in American judicial thinking and the long-standing exclusion of the innkeeper's lien from these provisions should be sustained. By superimposing the requirements of prior notice and opportunity to be heard upon the innkeeper's lien, the *Blye* court thoroughly disassociated the lien from its common-law form. Yet public policy considerations recognized at common law require that it retain its full potency.

The New York Court of Appeals reversed an historical doctrine, brought to America by the English settlers as part of their heritage, without giving any consideration to the duties and obligations imposed by law upon the innkeeper. The *Blye* court engaged in a form of judicial legislation, undermining the objectives of section 181 of the New York Lien Law, thereby sounding its deathknell. The separate interests of the innkeeper and the guest, and the delicate process of accommodating their divergent views, indicate that the court should have upheld that part of the New York Lien Law applicable to innkeepers, thereby confining its ruling to boardinghouses and lodginghouses. In revising the statute to conform

with the court's decision, the New York legislature should address itself to the policy considerations underlying the present-day status of the innkeeper-guest relationship and accordingly enact a narrowly drawn innkeeper's lien law.

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