William & Mary Law Review

Volume 17 | Issue 1 Article 3

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ANALYZING THE DEBTOR'S DUE PROCESS INTEREST

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In recent years, the Supreme Court has decided a number of cases challenging the constitutionality of creditors' prejudgment remedies. It would seem that this proliferation of factually distinguishable cases would have provided the Court with the opportunity to refine and systematize the debtor due process concepts which were first articulated in *Sniadach v. Family Finance Corp.*[1] The latest in the trilogy of post-*Sniadach* decisions of the Court,[2] however, indicates that systematic due process analysis has reached an apparent dead end. In his dissent in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[3] Mr. Justice Blackmun regretted the Court's abandonment of intelligible due process analysis in favor of a "sparse comparisons" approach, recognizing that this adulterated approach destroys doctrinal purity and casts statutory remedies for creditors into a constitutional netherworld.[4] Justice Blackmun's analysis of the majority's opinion in *North Georgia* appears to be entirely correct. This article contends, however, that despite the Court's failure to do so, the decisions can be reconciled, and that systematic due process adjudication is not only possible, but, if a rational and socially responsive jurisprudence is to be created, necessary.

Proper analysis is the key to due process, and this analysis should be undertaken in a progression of steps. Since the fourteenth amendment protects life, liberty, and property from adverse action without due process, the necessary initial question is whether the challenged procedure adversely affects one of those constitutionally cognizable interests. After some early confusion,[5] a majority of the Court rejected a balancing test and adopted a test based upon definition of the interest involved to determine the existence of a constitutionally cognizable interest. In *Goss v. Lopez*,[6] one issue was whether a student who had been

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1. 395 U.S. 337 (1969).

2. As discussed *infra*, the post-*Sniadach* trilogy is Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975).

3. 95 S. Ct. 719 (1975).

4. *Id.* at 726.

5. *Compare* Morrissey v. Brewer, 408 U.S. 471, 480-82 (1972) (grievous loss balancing test) *with* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (test based upon definition of the interest involved).

6. 95 S. Ct. 729 (1975).

suspended from school for ten days had an interest of sufficient magnitude to compel due process.[7] The Court rejected the contention that the issue should be resolved by determining whether the suspension was long enough to be a "severe detriment or grievous loss." [8] Rather than engaging in such a balancing process, the Court defined the interest and found both a liberty interest in reputation and a property interest in the opportunity to be educated.[9] Thus, the Court held that the student's interest in being free from suspension exceeded de minimis, was constitutionally cognizable, and required procedural protection.[10] The Court relegated the length of the suspension to a factor bearing on the form of process due.[11]

If no constitutionally cognizable interest is found, analysis obviously ceases, since the fourteenth amendment mandates due process only in the case of deprivations of those specific interests. If the Court finds a cognizable interest present and adversely affected, then it proceeds to the second question: What process is due?[12] Normally, one private citizen cannot use state power to affect another private citizen's property interest absent notice and an opportunity to be heard. In determining the process due, the Court balances factors ignored in the initial defining process, such as the pragmatic value of the procedure suggested, the state's interest, and the severity of the deprivation.[13] Thus, at the first stage, the Court defines the citizen's interest to determine whether it is

7. *Goss* does not deal with conventional "property." Historically, due process forbade a plaintiff from employing the legal process to deprive a defendant of an ownership interest without advance notice. The Court has recognized less palpable interests. *See* Schroeder v. City of New York, 371 U.S. 208 (1962) (value of bordering river impaired by government); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (beneficiary's right to sue trustee for breach of trust). But courts and legislatures, fearing that defendants who received notice would dissipate or secrete assets, allowed plaintiffs to affect property interests "temporarily" without notice. *Cf. id.* at 314. Due process decisions which culminated in *North Georgia* brought the heretofore unexamined definition of property out of the realm of abstract conjecture and into one where immediate and practical answers are inevitable.

8. 95 S. Ct. at 736-37.

9. *Id.* at 736.

10. *Id.* at 737.

11. "Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind." *Id.* The form of process due is a subsequent step in the due process analysis. *See* text following note 34 *infra.*

12. Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

13. *See* notes 33-34 *infra* & accompanying text.

constitutionally cognizable; at the second, it weighs to determine how the state may affect that interest.

In determining the presence of a constitutionally cognizable interest, the Court, in *Sniadach v. Family Finance Corp.*,[14] expanded traditional concepts of protected interests to include a "use" interest. Ms. Sniadach's wages were garnished without notice pursuant to a Wisconsin statute.[15] The majority characterized wages as "a specialized type of property" and noted that wage garnishment may "drive a wage-earning family to the wall." [16] In his concurring opinion, Justice Harlan characterized the defendant's property interest more generally: "The 'property' . . . is the *use* of the garnished portion of her wages during the interim period between garnishment and the culmination of the main suit . . . [T]his deprivation cannot be characterized as *de minimis*. . . ." [17] Thus, due process proscribed any statute which allowed a plaintiff to affect the defendant's use interest without notice and a hearing.

Fuentes v. Shevin[18] further explicated the "use" concept of property by invalidating statutes which allowed a plaintiff to require a state official to seize items from a defendant without advance notice. It was argued that the statutes were constitutional because these items, as distinguished from the wages in *Sniadach*, were less than necessities of life, were only taken temporarily, and also because plaintiff was an unpaid seller who retained a security interest in the property. In short, the argument favoring constitutionality was that the debtor's interest was of insufficient weight. The majority responded, however, that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause";[19] the Court examined the nature, not the weight, of the interest.[20] Thus, *Fuentes* established that due process protects "luxuries" as well as necessities, and that although defendants may lack full "title" their contractually established interest in possessing and using the items between purchase and final payment was significant enough to be constitutionally cognizable.[21]

14. 395 U.S. 337 (1969).

15. Plainly, taking part of the defendant's income when the plaintiff filed the suit improved the plaintiff's settlement leverage, interfered with the defendant's consumption, and increased the chance that the defendant would default.

16. 395 U.S. at 340-42.

17. *Id.* at 342.

18. 407 U.S. 67 (1972).

19. *Id.* at 86.

20. *Id.* at 89-90.

21. Lower court decisions have further expanded the list of constitutionally cognizable interests in the use of property. Although not displacing a debtor's "possession," attach-

ment of a bank account was subject to procedural protections due constitutionally cognizable "properties." *See, e.g.*, Stuckers v. Thomas, 374 F. Supp. 178, 180 (D.S.D. 1974); Lynch v. Household Finance Corp., 360 F. Supp. 720, 723 (D. Conn. 1973); Schneider v. Margossian, 349 F. Supp. 741, 745 (D. Mass. 1972). Similarly, although other prejudgment attachments merely create a lien, allowing the owner to continue use of the property, these liens cloud titles and hinder the owner's efforts to sell or mortgage the property. *See, e.g.*, Hutchison v. Bank of North Carolina, 392 F. Supp. 888, 894 (M.D.N.C. 1975); Bay State Harness Horse Racing & Betting Ass'n. v. PPG Indus., Inc., 365 F. Supp. 1299, 1305 (D. Mass. 1973); *In re* Northwest Homes of Chehalis, Inc., 363 F. Supp. 725, 730 (W.D. Wash. 1973); Gunter v. Merchants Warren Nat'l. Bank, 360 F. Supp. 1085, 1090 (D. Me. 1973).

Although the owner may have already mortgaged the property, the equity of redemption may be his only significant asset and it may be entitled to protection. *See, e.g.*, Turner v. Blackburn, 389 F. Supp. 1250, 1259 (W.D.N.C. 1975); Law v. United States Dept. of Agric., 366 F. Supp. 1233, 1238 n.6 (N.D. Ga. 1973). *But see In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974) (rejecting interest in free alienation).

Other lien interests in real estate, like mechanics' and artisans' liens, allow the owner to continue to possess, but deter sales and mortgages. The artisan presumably added labor and materials roughly equivalent in value to the amount of the lien. If the lien attaches to the value added by the artisan's work and material, interference with the owner's interest may be de minimis. *See* Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974); Cook v. Carlson, 364 F. Supp. 24, 27 (S.D.S.D. 1973). *See also* Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974) (interference with right freely to alienate property not constitutionally protected).

In mechanics' liens on movable property, the owner relinquishes possession, the artisan presumably adds labor and materials, and the claim relates to the item. The common law possessory lien allows an innkeeper, artisan, or carrier to retain the item until the owner pays. Statutes typically allow the artisan to keep the item and ultimately to sell it to satisfy the debt. Courts have held that the owner lacks a constitutionally cognizable interest which would allow him to prevent the artisan from detaining the item without notice and a hearing. *See* Caeser v. Kiser, 387 F. Supp. 645, 649-50 (M.D.N.C. 1975); Cockerel v. Caldwell, 378 F. Supp. 491, 498 (W.D. Ky. 1974); Adams v. Dept. of Motor Vehicles, 11 Cal. 3d 146, 155, 520 P.2d 961, 966, 113 Cal. Rptr. 145, 150 (1974). *But see* Straley v. Gassaway Motors Co., 359 F. Supp. 902 (S.D.W. Va. 1973) (detention unconstitutional). Two factors appear to bear on this: the owner gave up possession, and the lienor has an interest in the labor and materials he presumably added. Adams v. Dept. of Motor Vehicles, *supra* at 154-55, 520 P.2d at 966, 113 Cal. Rptr. at 150. To state this another way, the artisan and the owner have dual interests in the improved property. This lien differs from attaching property which is unrelated to prior dealings between the parties. The prior dealings may guarantee the genuineness of the asserted debt. Procedure must accommodate both the owner and the improver; notice and an opportunity to be heard before the lien attaches may be too inflexible for these dual interests. Courts therefore draw the due process line at retaining possession. Because a sale extirpates the owner's ownership or title interest, the lienor cannot, absent notice and an opportunity to adjudicate the debt, sell to satisfy the "debt." Caeser v. Kiser, 387 F. Supp. 645, 649-50 (M.D.N.C. 1975); Cockerel v. Caldwell, 378 F. Supp. 491, 498 (W.D. Ky. 1974); Adams v. Dept. of Motor Vehicles, *supra* at 152, 520 P.2d at 967-68, 113 Cal. Rptr. at 151-52.

Allowing the lienor to keep the item but preventing him from selling it returns own-

Mitchell v. W. T. Grant Co.[22] distinguished *Fuentes* and approved Louisiana statutes which allowed a credit seller to cause government officials to repossess household items from a credit buyer without prior notice. Difficulties confront one who would reconcile *Fuentes* and *Mitchell.* Justice Powell thought that *Mitchell* withdrew significantly from *Fuentes* and that, to some extent, *Mitchell* overruled *Fuentes.*[23] Justice Brennan noted in dissent that *Fuentes* required a different result in *Mitchell.*[24] Justice Stewart, author of *Fuentes,* dissented, arguing that *Mitchell* was "constitutionally indistinguishable" from *Fuentes* and was "unmistakably overruled" because the composition of the Court had changed.[25]

Properly understood, *Mitchell* turns on the answers to the multistep analysis. To the first question, whether there was a cognizable property interest, the majority replied that *both* the installment buyer, who had paid in part, and the installment seller, who was not fully paid, had cognizable interests.[26] Because the Court found antagonistic parties, both of whose interests lay somewhere between ownership and de minimis, the second inquiry into what process is due, became more difficult. The majority, "with this duality in mind," concluded that the Louisiana procedure accommodated the adverse interests adequately.[27] Thus, where the interests are dual, the use interest in a chattel becomes less compelling.

Mitchell appears to govern written purchase money security interests in real property.[28] The opinion dismissed *Sniadach* as involving a creditor without a prior interest in the garnished property,[29] mentioned that

ers and lienors to prestatutory common law. R. BROWN, THE LAW OF PERSONAL PROPERTY § 119 (2d ed. 1955).

For a discussion of the application of the evolving due process analysis to possessory liens, see Note, *Possessory Liens: The Need for Separate Due Process Analysis,* 16 WM. & MARY L. REV. 971 (1975).

As a tactical matter, the lienor retains considerable leverage along with the item, but the owner cannot lose the item completely and may force the matter before an adjudicating body.

22. 94 S. Ct. 1895 (1974).

23. *Id.* at 1908-09.

24. *Id.* at 1914.

25. *Id.* at 1910-14.

26. *Id.* at 1898.

27. *Id.* at 1899. The statute required the secured creditor to allege specifically the transaction and default before a judicial officer, and allowed the debtor to dissolve the writ and recover damages if the creditor was unable to prove the grounds upon which the writ was issued. *See also id.* at 1904-05.

28. Catz & Robinson, *Due Process and Creditors Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond,* 28 RUTGERS L. REV. 541, 557-59 (1975).

29. 94 S. Ct. at 1904.

a "mortgage or lien holder" obtains the writ,[30] and distinguished the "fault" standard in *Fuentes* from the "narrowly confined" issues of vendor's lien and default, finding the latter more appropriate for ex parte and documentary proof.[31] Beyond installment contract interests in personal property and perhaps real property,[32] it is unclear what the Court will include in the dual interest category.

Perhaps, then, the apparent conflict between the *Fuentes* and *Mitchell* decisions can be resolved. *Mitchell* merely refines the due process multistep analysis by inserting an inquiry as to the nature of the interest, sole or dual, between the determinations of the existence of the constitutionally cognizable interest and of the process due.

If the cognizable interests are dual, additional factors must be considered in determining the process due: verification, specificity, judicial decision, and an opportunity to dissolve. The presence of one or more of these factors, in the context of dual interests, increases the likelihood of a finding of satisfaction of due process requirements.[33] If, on the other hand, the plaintiff is only a general or contract creditor or a potential judgment creditor, the interests are not dual. In such a case, the defendant has the sole interest, and *Fuentes* controls. Absent emergency, due process mandates notice and a hearing to affect a cognizable interest.[34]

There are significant differences between a secured creditor and a potential judgment creditor. The secured creditor has a debt plus contractually created rights in specific property; his relationship to the defendant may legitimately be called that of creditor to debtor. Even so, it is incorrect to refer to the "defaulting" debtor for this assumes the conclusion that a hearing is designed to reach. Many attachment cases, however, do not grow out of ongoing contractual relationships, and to call these defendants debtors is to assume the conclusion that they owe debt. This is the subject of which lawsuits are made. Even if a commercial relation exists, the debtor's general property is not a fund for collection of the debt unless the parties have taken the measures neces-

30. *Id.*

31. *Id.* at 1905.

32. *Cf.* Turner v. Blackburn, 389 F. Supp. 1250, 1259-60 (W.D.N.C. 1975); Garner v. Tri-State Development Co., 382 F. Supp. 377, 380-81 (E.D. Mich. 1974).

33. As in *Mitchell,* courts will uphold statutes striking a sufficient protective balance. If statutes provide insufficient protection for the debtor, courts will invalidate them. Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975); Garner v. Tri-State Development Co., 382 F. Supp. 377 (E.D. Mich. 1974).

34. *See, e.g.,* Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975).

sary to create a consensual security interest. While the unsecured creditor relies on the debtor's assets, the prudent creditor does not count on an unimpeded first crack at those assets. In addition to doctrinal dual interest consistency, then, pragmatic considerations may lead to different constitutional treatment. Since a contract and default are easy to prove, the prior dealings may be a guarantee that the claim is genuine. This rationale for dispensing with notice and a hearing does not apply, however, when the plaintiff attaches property unrelated to prior dealings in order to adjudicate a controversy unrelated to the property.

It seems, therefore, that *Sniadach*, *Fuentes*, and *Mitchell* can be integrated to create a three step due process analysis: 1) Does the debtor possess a constitutionally cognizable interest in the disputed property? 2) Are the interests in the property sole or dual? 3) Considering the nature of the interests, what process is due? If the interest is determined to be a sole interest, the strict procedural requirement of *Fuentes* would be mandated. If the interest is determined to be dual, the presence of some combination of the *Mitchell* ameliorative factors would allow a less rigorous procedure to pass constitutional scrutiny.

North Georgia Finishing, Inc. v. Di-Chem, Inc.[35] could have been decided in a manner consistent with this three step due process analysis. The challenged statute allowed a plaintiff to garnish a defendant's debtor upon the filing of an affadavit stating the amount claimed and that, absent garnishment, the plaintiff had "reason to apprehend the loss of the same or some part thereof." [36] Pursuant to this statute, the plaintiff corporation had attached the defendant corporation's bank account. Without extended analysis, Justice White's majority opinion invalidated the statute on the authority of *Fuentes* and summarily distinguished *Mitchell*, evoking Justice Stewart's comment: "It is gratifying to note that my report of the demise of Fuentes v. Shevin . . . seems to have been greatly exaggerated." [37] The Court could have avoided such confusion by articulating the three step due process analysis evidenced by prior decisions and by integrating *North Georgia* into this systematic approach. The Court rejected the argument that due process prevented only consumer garnishments, replying that the due process clause did not "distinguish among different kinds of property." [38] In answer to the first of the three due process inquiries, then, the Court concluded that the debtor corpo-

35. 95 S. Ct. 719 (1975).
36. *Id.* at 720-21.
37. *Id.* at 723.
38. *Id.*

ration had a constitutionally cognizable interest in the use of its bank account.[39]

Instead of proceeding to the second step and analyzing for duality, the majority merely mentioned that factors which were present in *Mitchell* were absent in *North Georgia*: specific allegations, a judicial decision, and an immediate postseizure hearing.[40] As discussed above, however, these factors accommodate dual interests; unless the interests *are* dual, these factors may be ignored.[41] In *Mitchell*, the interests in the property taken ex parte were dual since both the buyer and the seller had an established interest. In *North Georgia*, however, the plaintiff seized property in which the interests were not dual. Unlike personal property sold by installment contract, the plaintiff lacked a tangible prior interest in the defendant's bank account. Adversary process was therefore due.

Thus, the *North Georgia* majority failed satisfactorily to integrate *North Georgia* with prior decisions.[42] Justice Blackmun's dissent reflects the intellectual discomfort many feel. More importantly, this doctrinal dead end may stunt further articulation and development of due process for, by ignoring the three step analysis, the majority may recede from full protection under due process. Utilizing the *North Georgia* "sparse comparisons" approach, the Court might uphold a statute which allows a plaintiff to affect the owner's use interest in property unrelated to prior dealings simply because the statute requires various *Mitchell* ameliorative factors: specific, verified allegations, a judicial decision, and a prompt opportunity to dissolve. This would repudiate the idea that an owner has a cognizable interest in using property,[43] a concept which, beginning with Justice Harlan's concurrence in *Sniadach*, forms a uniform thread throughout due process analysis.[44]

39. *Id.* at 722.

40. *Id.* at 722-23.

41. *See* notes 33-34 *supra* & accompanying text.

42. Questions abound. Did *Mitchell* dilute *Fuentes?* Did Justice White, the dissenter in *Fuentes* and the author of *Mitchell*, become converted to *Fuentes* in *North Georgia?* Did Justice White understand what dual interests imply? If Justice Stewart applied the two step analysis in *Fuentes*, why did he fail to explain it in either *Mitchell* or *North Georgia?*

It should be noted that although this article contends that existence of a sole interest mandates the procedural protections of *Fuentes*, *see* text following note 33 *supra*, it is not alleged that *Fuentes* is an example of a sole interest. To this extent, *Mitchell* can be read as a retreat from *Fuentes*.

43. This appears to be Justice Powell's view. See 95 S. Ct. at 724 (concurring opinion).

44. If there is no general interest in using property, then there may be social class lines in determining who is entitled to due process. Justice Powell, 95 S. Ct. at 724,

The Court in *North Georgia* could have avoided this problem by simply finding no duality of interests and by striking down the statute for failure to comply with *Fuentes*-type due process. The Court, instead, appeared to examine the procedure, and then, stating that it looked more like *Fuentes* than *Mitchell*, invalidated the statute. Lower court cases have followed *North Georgia's* "sparse comparisons" approach. They fail to follow the three step analysis and erroneously consider the presence in the disputed procedure of *Mitchell* ameliorative factors when the interest affected is a sole interest.[45]

If the *Mitchell* factors are considered where the interests are not dual, courts may strain to approve procedures which allow plaintiffs to affect an interest in using property without notice to the defendant and an opportunity to be heard.[46] A three judge district court, for example, recently upheld a Tennessee statute which authorized the attachment or garnishment of the assets of a defendant who could not be found to be served.[47] After a deputy sheriff returned in personam notice five times stating that the defendant could not be found after search, the plaintiff without notice garnished the defendant's wages.[48] Since no dual interest appears, the court should have upset the procedure without pursuing the

Justice Blackmun, 95 S. Ct. at 728-29. *See also* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

45. Bunton v. First National Bank, 394 F. Supp. 793 (M.D. Fla. 1975); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975); Jonnet v. Dollar Savings Bank, 392 F. Supp. 1385 (W.D. Pa. 1975); Hutchison v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C. 1975); Douglas Research and Chemical, Inc. v. Solomon, 388 F. Supp. 433 (E.D. Mich. 1975); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); Sugar v. Curtis Circ. Co., 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted*, 43 U.S.L.W. 3545 (U.S. April 15, 1975).

46. *See* Hutchison v. Bank of North Carolina, 392 F. Supp. 888 (M.D.N.C. 1975). Also, if a court disapproves a statute merely because the statute lacks an immediate postseizure hearing, the result is correct but the legislature may remedy only that defect.

47. Maxwell v. Hixson, 383 F. Supp. 320 (E.D. Tenn. 1974).

48. Yet the defendant both lived and worked in the county. *Id.* at 321-22. Thus, the problem was created by lack of official diligence, not a fleeing or hiding defendant. The proper course of wisdom is to encourage the sheriff to do better in the future, not to seize defendant's assets without adversary procedure. *See* Wyatt, *Amercement of Sheriffs*, 10 WAKE FOREST L. REV. 237 (1974) (discussion of statutory penalty for failure to execute and return writs and processes). Nor is seizure the answer to the general problem of the absconding or simply missing defendant; a discerning application of the rules of in personam service will solve almost all problems. Louis, *Modern Statutory Approaches to Service of Process Outside the State*, 49 N. CAR. L. REV. 235 (1971). *See also* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 287-88.

Mitchell analysis. Rather, it read *Mitchell* to limit *Sniadach* and *Fuentes* and to strengthen the earlier rule which approved ex parte attachment when necessary to acquire jurisdiction. It noted that it was "somewhat of an anomaly" to require notice where the defendant cannot be found.[49] Other courts have upheld attachment to secure jurisdiction over a nonresident's assets, reasoning that the ex parte attachment both secures jurisdiction and immures a fund to satisfy some or all of the plaintiff's judgment.[50]

Perceptive commentators have soundly condemned quasi in rem jurisdiction or attaching or garnishing assets to adjudicate unrelated claims. Such jurisdiction is, they argue, superannuated, mechanical, and profoundly unfair.[51] Quasi in rem jurisdiction, by allowing a plaintiff without notice to immure property unrelated either to the controversy or to prior dealings between the parties, is clearly a violation of the due process analysis established, although not articulated, by the Supreme Court in decisions culminating in *North Georgia*.[52]

The Supreme Court will again have an opportunity to articulate this three step due process analysis in an upcoming review of an attachment case. In granting review of *Sugar v. Curtis Circulation Co.*,[53] the question decided to be heard was: "Does such statute satisfy due process to extent it permits attachment of property in which plaintiff does not have vendor's lien or similar statutory lien?" [54] If the Court employs the three step analysis, it will conclude that due process, properly understood, precludes a plaintiff from sequestering a defendant's assets merely to obtain jurisdiction.

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49. 383 F. Supp. at 325. "Suffice it to say a public officer's dereliction in performing his statutory duties does not thereby render the statute unconstitutional." *Id.*

50. Usdan v. Dunn Paper Co., 392 F. Supp. 953 (E.D.N.Y. 1975); Stanton v. Manufacturers Hanover Trust Co., 388 F. Supp. 1171 (S.D.N.Y. 1975); Balter v. Bato Co., 385 F. Supp. 420 (W.D. Pa. 1975).

51. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 142-47 (1971); Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

52. An alternative to such due process violations exists. As courts striking down exercises of quasi in rem jurisdiction recognize, in personam jurisdiction is almost always available through a long arm statute. *See, e.g.*, Welsh v. Kinchla, 386 F. Supp. 913 (D. Mass. 1975); *In re* Law Research Services, Inc., 386 F. Supp. 749, 755 (S.D.N.Y. 1974). While *Sniadach, Fuentes,* and *Mitchell* contain citations to earlier attachment cases, a trenchant note reveals the narrow historical basis for these earlier decisions and destroys their continuing intellectual foundation. Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973).

53. 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted*, 43 U.S.L.W. 3545 (U.S. April 15, 1975).

54. Curtis Circ. Co. v. Sugar, 43 U.S.L.W. 3545 (U.S. April 15, 1975).

CONCLUSION

Courts cannot substitute haphazard comparisons for systematic reasoning and create a rational and socially responsive jurisprudence. This article contends that proper due process analysis employs a three step approach. The first inquiry is whether the interest affected is constitutionally cognizable as property. If it is not, analysis ceases and the interest may be affected absent due process protections. If a constitutionally cognizable interest is found, the nature of the interest must be examined. If the interest is sole, the Constitution compels advance notice and an opportunity to be heard before the interest is affected. If the interests are dual, then the *Mitchell* ameliorative factors are analyzed to determine if the challenged procedure strikes a sufficient protective balance to accommodate the interests of both debtor and creditor. If due process is to attain its intellectual potential and carry out its social function, courts should repudiate the sparse comparisons approach and follow the three step, dual interest analysis.