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# The New Due Process: Rights and Remedies

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# The New Due Process: Rights and Remedies

By DOUG RENDLEMAN\*

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### *Introduction*

This article discusses the "new" due process. Perhaps new is a misnomer. Due process was not discovered recently. It has been around a long time protecting varying interests from arbitrary action. The discovery called the "new" due process is merely that procedural protections are not so limited as previously thought. This article will examine the interests encompassed by the new due process and the remedial apparatus now being developed to protect those interests.

### PART I—RIGHTS

In recent years, the Supreme Court has decided a number of cases construing the due process clause of the fourteenth amendment. These appeals have dealt with procedures for seizing chattels purchased by time payments,<sup>1</sup> garnishing wages before judgment,<sup>2</sup> suspending a driver's license,<sup>3</sup> evicting a tenant,<sup>4</sup> terminating public assistance<sup>5</sup> or public employment,<sup>6</sup> depriving a person of local access to alcoholic beverages<sup>7</sup> and removing children from their parents' home.<sup>8</sup> Additionally

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\* Associate Professor of Law, College of William and Mary; Visitor at University of North Carolina School of Law 1974-75. Gary F. Roth contributed to the research and assisted with the footnotes herein. Shortly after I began this article, I realized that I had taken on an imposing task. A lot of law existed; more law was being made. As the advance sheet cases piled up, the law, I concluded, was so volatile that anything written was obsolete before it could be published. Events, however, ameliorated this conclusion; the due process doctrine began to match previously developed remedial doctrine, and the new cases increasingly replicated previously developed points.

I completed a "final" draft in June 1974. Since then the editors in Lexington and the author in Williamsburg and Chapel Hill have added cases and other matter. In general, we think this was successful. But the burgeoning law created two consequences and a caveat. First, it was difficult to arrive at a "final" draft: several things came unraveled between the summer of 1974 and 1975. Second, because of the time-distance problem, changes may have occurred which the article fails fully to reflect. That it is difficult to publish anything completely current on this topic does not mean that one should refrain from trying.

<sup>1</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1973).

<sup>2</sup> *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

<sup>3</sup> *Bell v. Burson*, 402 U.S. 534 (1971).

<sup>4</sup> *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>5</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1969).

<sup>6</sup> *Perry v. Sindermann*, 408 U.S. 593 (1972).

<sup>7</sup> *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

<sup>8</sup> *In re Gault*, 387 U.S. 1 (1967). *See also Stanley v. Illinois*, 405 U.S. 645 (1972);

there have been many such cases in state appellate courts.<sup>9</sup> Procedures recently assailed include impounding trespassing cattle<sup>10</sup> and "abandoned" automobiles,<sup>11</sup> sterilizing mental retardates,<sup>12</sup> applying for a chauffeur's license,<sup>13</sup> withdrawing patients from a nursing home,<sup>14</sup> terminating township poor relief,<sup>15</sup> destroying a public nuisance without notice to the mortgagee<sup>16</sup> or compensation to the landowner,<sup>17</sup> impounding allegedly infringing articles,<sup>18</sup> ejecting a tenant from public housing,<sup>19</sup> terminating disability benefits,<sup>20</sup> expelling a student from West Point Military Academy,<sup>21</sup> terminating unemployment compensation,<sup>22</sup> excluding a person from a college campus,<sup>23</sup> and requiring a bond for costs in a personal injury lawsuit.<sup>24</sup> Creditors' remedies assailed include the mechanic's lien,<sup>25</sup>

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Newton v. Burgin, 363 F. Supp. 782 (W.D. N.C. 1973).

<sup>9</sup> See, e.g., Arnold v. Knettle, 460 P.2d 45 (Ariz. Ct. App. 1969); C.V.C. v. Superior Ct., 106 Cal. Rptr. 123 (Ct. App. 1973); Inter City Motor Sales v. Szymanski, 201 N.W.2d 378 (Mich. Ct. App. 1972); Jones Press, Inc. v. Motor Travel Serv., Inc., 176 N.W.2d 87 (Minn. 1970); Lucas v. Stapp, 487 P.2d 250 (Wash. Ct. App. 1972).

<sup>10</sup> McVay v. United States, 481 F.2d 615 (5th Cir. 1973); Jones v. Freeman, 400 F.2d 383 (8th Cir. 1968).

<sup>11</sup> Graff v. Nicholl, 370 F. Supp. 974 (N.D. Ill. 1974).

<sup>12</sup> Wyatt v. Aderholdt, 368 F. Supp. 1382 (M.D. Ala. 1973).

<sup>13</sup> Freitag v. Carter, 489 F.2d 1377 (7th Cir. 1973); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) (driver's license); Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974).

<sup>14</sup> Ross v. Wisconsin Dep't of Health & Social Serv., 369 F. Supp. 570 (E.D. Wisc. 1973).

<sup>15</sup> Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973).

<sup>16</sup> Pioneer Sav. & Loan Co. v. City of Cleveland, 479 F.2d 595 (6th Cir. 1973).

<sup>17</sup> Traylor v. City of Amarillo, 492 F.2d 1156 (5th Cir. 1974).

<sup>18</sup> Jondora Music Publ. Co. v. Melody Recordings, Inc., 362 F. Supp. 494, 499 (D.N.J. 1973).

<sup>19</sup> Caulder v. Durham Housing Auth., 433 F.2d 998 (4th Cir.), *cert. denied*, 401 U.S. 1003 (1970).

<sup>20</sup> Williams v. Weinberger, 360 F. Supp. 1349 (N.D. Ga. 1973).

<sup>21</sup> Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Brown v. Knowlton, 370 F. Supp. 1119 (S.D.N.Y. 1974).

<sup>22</sup> Crow v. California Dep't of Human Resources Dev., 490 F.2d 580 (9th Cir. 1973); Pregent v. New Hampshire Dep't of Employment Sec., 361 F. Supp. 782 (D.N.H. 1973).

<sup>23</sup> Braxton v. Municipal Court, 514 P.2d 697, 109 Cal. Rptr. 897 (1973).

<sup>24</sup> Nork v. Superior Court, 109 Cal. Rptr. 428 (Ct. App. 1973).

<sup>25</sup> Ceasar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975); Cook v. Carlson, 364 F. Supp. 24 (S.D.S.D. 1973); Mason v. Garriss, 360 F. Supp. 420 (N.D. Ga.), *modified*, 364 F. Supp. 452 (1973); Adams v. Department of Motor Vehicles, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

landlord's lien,<sup>26</sup> banker's lien,<sup>27</sup> garnishment,<sup>28</sup> attachment,<sup>29</sup> foreclosure,<sup>30</sup> *lis pendens*,<sup>31</sup> attachment of real estate,<sup>32</sup> distress,<sup>33</sup> *detinue*,<sup>34</sup> possessory liens,<sup>35</sup> and wage assignment.<sup>36</sup>

Several features strike one who considers changes in due process in the last few years. Probably most important among these is the concept's burgeoning expansiveness—due process has been extended into many spheres which had previously escaped its influence. Part I of this article will trace that extension and develop a comprehensive pattern for judging due process interests. In addition to broadening the application of due process constraints, the deluge of liability opinions has brought remedial issues out of the region of abstractions and into the realm of reality, where basic decisions are inevitable. As the opportunities for legal *ex parte* procedures dwindle, remedies must be fashioned to vindicate those deprived of due process; Part II of this article will deal with those remedial issues. The

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<sup>26</sup> *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972); *Adams v. Joseph F. Sanson Inv. Co.*, 376 F. Supp. 61 (D. Nev. 1974); *Stots v. Media Real Estate Co.*, 355 F. Supp. 240 (E.D. Pa. 1973); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>27</sup> *Kruger v. Wells Fargo Bank*, 521 P.2d 441, 113 Cal. Rptr. 449 (1974).

<sup>28</sup> *Stackers v. Thomas*, 374 F. Supp. 178 (D.S.D. 1974); *Union Barge Line Corp. v. Marble Cliff Quarries Co.*, 374 F. Supp. 834 (S.D.W. Va. 1974); *Morrow Elec. Co. v. Cruse*, 370 F. Supp. 639 (N.D. Ga. 1974); *Lynch v. Household Fin. Corp.*, 360 F. Supp. 720 (D. Conn. 1973); *Raigoza v. Sperl*, 110 Cal. Rptr. 296 (Ct. App. 1973).

<sup>29</sup> *Harrison v. Morris*, 370 F. Supp. 142 (D.S.C. 1974); *In re Northwest Homes of Chehalis, Inc.*, 363 F. Supp. 725 (W.D. Wash. 1973); *Clement v. Four North State St. Corp.*, 360 F. Supp. 933 (D.N.H. 1973); *McClellan v. Commercial Credit Corp.*, 360 F. Supp. 1013 (D.R.I. 1972), *aff'd*, 409 U.S. 1120 (1973); *Randone v. Appellate Dep't*, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

<sup>30</sup> *Garner v. Tri State Development Co.*, 382 F. Supp. 377 (E.D. Mich. 1974); *Northrip v. Federal Nat'l Mtg. Ass'n*, 372 F. Supp. 594 (E.D. Mich. 1974); *Johnson v. Glenn's Furniture Co.*, 372 F. Supp. 56 (N.D. Ga. 1974); *Law v. United States Dep't of Ag.*, 366 F. Supp. 1233 (N.D. Ga. 1973).

<sup>31</sup> *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085 (S.D. Me. 1973).

<sup>32</sup> *Bay State Harness Horse Racing & Breeding Ass'n, Inc. v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973).

<sup>33</sup> *Shaffer v. Holbrook*, 346 F. Supp. 762 (S.D.W. Va. 1972); *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971).

<sup>34</sup> *Yates v. Sears Roebuck & Co.*, 362 F. Supp. 520 (M.D. Ala. 1973).

<sup>35</sup> *Huber v. Union Planters Nat'l Bank*, 491 F.2d 846 (6th Cir. 1974); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973); *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974). *See also Cockerel v. Caldwell*, 378 F. Supp. 491 (W.D. Ky. 1974).

<sup>36</sup> *Bond v. Dentzer*, 362 F. Supp. 1373 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974).

focus will be on the interplay between the theory of due process and various remedial devices.

Section 1983 of the Civil Rights Act,<sup>37</sup> sometimes known as the Ku Klux Klan Act, is the major vehicle for due process suits. Coupled with § 1343(3), it provides federal jurisdiction in such actions.<sup>38</sup> The Civil Rights Act is a versatile tool which has had a vast civilizing influence, reaching beyond due process to encompass *any* situation in which a person has been deprived of a constitutional right under color of law.<sup>39</sup> Nevertheless, a study of due process is inevitably a study of the Civil Rights Act. In addition, federal jurisdiction problems and overlapping state common law and statutory remedies often arise in the due process context and will be dealt with as they appear.

A short review of recent legal history is useful in understanding the new due process. Lawyers have always known that a court should not constrict liberty or take property without notice and a hearing. Yet in many provisional and nonjudicial procedures, the interests protected were hazy and the procedure required was unknown. In the late 1960's, the Supreme Court began to consider these interests.

The intellectual foundation of the new due process was laid in the late Justice Harlan's concurring opinion in *Sniadach v. Family Finance Corp.*<sup>40</sup> There, the majority opinion, stressing the particular issues in the appeal, struck down a wage garnishing scheme which allowed the plaintiff to seize wages from the defendant's employer without notice and a hearing. Justice Harlan, meanwhile, formulated some general principles. First, he identified the interest affected as a "property" interest protected by the due process clause of the fourteenth amendment in "the use of the garnished portion of her wages during the interim period between the garnishment and the

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<sup>37</sup> 42 U.S.C. § 1983 (1970).

<sup>38</sup> 28 U.S.C. § 1343(3) (1970). Sections 1983 and 1343(3) will be referred to hereinafter as the Civil Rights Acts.

<sup>39</sup> For an excellent recent article with more general analysis of the Civil Rights Act, see McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1 (1974). See also C. ANTIEAU, *FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE* (1971).

<sup>40</sup> 395 U.S. 337, 342 (1969).

culmination of the main suit."<sup>41</sup> This interest was not "*de minimus*." There was no "vital governmental interest" which would allow the state, in an emergency, to take property "by summary administrative action taken before hearing."<sup>42</sup>

Having found that due process applied, Justice Harlan discussed what due process required. He stated it in a sentence: "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."<sup>43</sup> When the threshold interest and the requirement of due process were established, it made no difference that the loss was not permanent, that interim relief was possible, or that notice was received when the property was taken. If a constitutionally cognizable interest in the use of property was affected, prior notice and an opportunity for a hearing were required.

After *Sniadach*, the advance of due process marked the steady encroachments of a rising tide. The Supreme Court defined constitutionally cognizable interests in liberty and property in a variety of situations.<sup>44</sup> The lower courts absorbed wave after wave of lawsuits.

The new due process reached intellectual fullness in *Fuentes v. Shevin*,<sup>45</sup> which like *Sniadach*, was a debtor-creditor case. In that action a due process attack was mounted against statutes which allowed a plaintiff, without notice and a hearing, to secure an order requiring a state official to seize property from a defendant. Notice and an opportunity for a hearing were necessary, it was argued, to protect individual privacy and property. For, absent these protections, the adversary system cannot sort valid from invalid seizures. The state must hear both sides first because the applicant may be mistaken, overzealous or dishonest. Due process, in short, prevents litigants from misusing state machinery.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 343.

<sup>43</sup> *Id.*

<sup>44</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Bell v. Burson*, 402 U.S. 535 (1971).

<sup>45</sup> 407 U.S. 67 (1972).

The majority of the Court, persuaded by this logic, invalidated the statutes. In so doing, it articulated the intellectual underpinning of the new due process in response to several arguments in favor of the statutes. To the proposition that the statutes were permissible because if property were wrongfully taken, damages could be awarded, the Court stated that after-the-fact damages were insufficient. Undoing a consummated wrong was not enough especially when notice and a hearing before the taking could prevent that wrong from occurring in the first place. Similarly, the applicant's bond was an inadequate check—the decision to use state power still turned on the applicant's possibly biased judgment.<sup>46</sup>

The proponents of the statutes also argued that an emergency obviated notice and a hearing. The Court, however, held that emergency cases dealt with more importunate matters than defaulting installment buyers, matters such as spoiled or mislabeled food and bank failures. The cases before the Court interposed state power into private disputes and, because there was not notice to one disputant, the state acted without adequate information.<sup>47</sup>

To the argument that the installment buyers had waived their right to due process, the Court tendered two responses. First, the agreement was an unexplained, small-type form and difficult to elevate to an informed waiver. Second, the form said merely that the seller might retake the merchandise but did not say how. This, said the Court, did not constitute a conscious waiver of a legal right to notice and a hearing.<sup>48</sup>

Finally, it was asserted that the statutes were constitutional because: (1) the taking was not final, (2) the conditional-seller applicants had financial interests in the items, and (3) the property was not a necessity of life. The Court rejected each of these interrelated arguments. First, it declared, due process is necessary before the state disturbs *any* significant property interest. Second, installment buyers have a constitutionally cognizable property interest, established by contract, in possessing the property. Third, even though the taking was temporary, the interest protected was in *using* the property. Even a

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<sup>46</sup> *Id.* at 80-86.

<sup>47</sup> *Id.* at 73-94.

<sup>48</sup> *Id.* at 94-97.



"temporary" taking disturbed that interest. Last, there are no degrees of property interests; instead, due process protects all property interests, luxuries as well as necessities.<sup>49</sup>

The *Fuentes* majority owed a palpable intellectual debt to Justice Harlan's concurrence in *Sniadach*.<sup>50</sup> If an interest is defined at the threshold as constitutionally cognizable, due process mandates notice and an opportunity to be heard before the state, at a private party's behest, disturbs that interest. Moreover, the Court marshalled prior cases to show the thrust of due process, and that more recent developments were in the mainstream of due process.<sup>51</sup>

Justice White, dissenting, rejected the Harlan-Stewart method of delimiting constitutionally cognizable interests by defining property. Instead, he adduced a different analysis of fourteenth amendment property interests: "[I]n the typical installment sale of personal property both the seller and the buyer have interests in the property until the purchase price is fully paid . . . ."<sup>52</sup> Thus, Justice White narrowed the issue to secured consumer transactions and perceived the interests to be less clearcut. The questioned procedures accommodated the interests of both parties to the transaction: "[T]he buyer loses use of the property temporarily but is protected against loss; the seller is protected against deterioration of the property but must undertake by bond to make the buyer whole in the event the latter prevails."<sup>53</sup> To invalidate these procedures, Justice White observed, "represents no more than ideological tinkering with state law."<sup>54</sup>

It may be argued that *Fuentes*' principles apply only to "property" interests, but that limited view is difficult to conceive.<sup>55</sup> "Liberty" is difficult to distinguish from "property" and if the two can be distinguished, it is incongruous to exalt one over the other.<sup>56</sup> The idea underlying *Fuentes*, simply

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<sup>49</sup> *Id.* at 85-91.

<sup>50</sup> The short concurrence is cited for at least four major points. See 407 U.S. 67, 85 n.15, 86, 90 n.21, 91 n.23, 97 (1972).

<sup>51</sup> *Id.* at 88-89.

<sup>52</sup> *Id.* at 99.

<sup>53</sup> *Id.* at 100.

<sup>54</sup> *Id.* at 102.

<sup>55</sup> Cf. Murphy, *Free Speech and the Interest in Local Law and Order*, 1 J. PUB. L. 40, 58 (1952).

<sup>56</sup> See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972):

stated, is that it is alien to our political and legal traditions for people to be governed in their daily lives by decisions in which they have had no voice. This idea springs from an increasing awareness of individual dignity and worth and of the value of citizens participating in the process of government. As this idea advances, whim, caprice and secrecy will decline. Procedural fairness is, above all, a conservative doctrine because it exacts cautious, deliberate decision-making and serves as a brake on rapid change. At the same time, fair procedure insures rule by law. "The history of liberty," Justice Frankfurter wrote, "has largely been the history of observance of procedural safeguards."<sup>57</sup>

*Fuentes*, a four to three decision by a court of seven, hung by a thread for almost two years. The tide of lower court cases became a torrent. Then in December of 1973, attorneys argued *Mitchell v. W. T. Grant Co.* before the Supreme Court. *Mitchell* concerned the constitutionality of repossessing consumer collateral by sequestering the property under the Louisiana vendor's privilege. The assailed procedure varied only in detail from the replevin statutes struck down in *Fuentes* but counsel for the seller argued that *Fuentes* could be distinguished without being overruled.<sup>58</sup>

The decision in *Mitchell*<sup>59</sup> was ultimately rendered in May of 1974. Justice White authored the majority opinion; Justice Powell wrote a concurring opinion; Justice Stewart dissented for himself and two others; and Justice Brennan dissented separately. The Louisiana procedure, the Court held, did not deny due process. *Fuentes* was not overruled but distinguished. Nev-

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Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

See also *Kenyon v. City of Chicopee*, 70 N.E.2d 241 (Mass. 1946); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815-16 (1935).

<sup>57</sup> *McNabb v. United States*, 318 U.S. 332, 347 (1943).

<sup>58</sup> Arguments before the Court: *Installment Sales*, 42 U.S.L.W. 3345 (U.S. Dec. 11, 1973).

<sup>59</sup> 416 U.S. 600 (1974).

ertheless, as is always true when a case is "distinguished" in a later decision by a dissenter in the original case, both opinions must be examined carefully to determine whether the earlier opinion's continuing vitality is real or merely apparent.<sup>60</sup>

The *Mitchell* majority opinion, properly conceived, turns on a narrow question. In a consumer credit transaction, does the debtor-buyer or the creditor-seller have a right to the secured property? Under state law, the majority stated "both the seller and buyer had current real interests in the property."<sup>61</sup> Under Louisiana law, the debtor-buyer may transfer the property to a bona fide purchaser and if the transferee takes possession of the property, the creditor-seller loses his vendor's lien or privilege against the property, retaining only an in personam right against the debtor-buyer.<sup>62</sup>

Given the dual interests and the ease with which the debtor-buyer might prejudice or destroy the creditor-seller's rights by transferring the property to a bona fide purchaser, hiding it or destroying it, the constitutional question was whether the procedural scheme accorded due process to the debtor-buyer. Several factors strengthened the majority's conclusion that it did. Even though the provisional writ issued upon ex parte application, the creditor-applicant was required to post a bond and allege specific facts. Further, the issues—debt, default, and possession—were capable of documentary proof; a judge issued the writ; the sheriff retained the property for ten days; the debtor could apply immediately to dissolve the writ; and if the writ were improperly issued, the debtor would be entitled to damages, attorney's fees, and the property.<sup>63</sup>

How *Mitchell* will affect *Fuentes* remains to be determined, especially since *Mitchell* rests on the premise that Justice White expressed in his *Fuentes* dissent. Since in a secured transaction both the debtor and the creditor have a property interest in the secured property, the procedures involved must accommodate both these interests. *Fuentes* rests on the thresh-

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<sup>60</sup> See *id.* at 623 (Powell, J., concurring).

<sup>61</sup> *Id.* at 604.

<sup>62</sup> *In re Trahan*, 283 F. Supp. 620 (W.D. La.), *aff'd per curiam*, 402 F.2d 796 (5th Cir. 1968), *cert. denied sub nom. Berhard v. Beneficial Fin.*, 394 U.S. 930 (1969).

<sup>63</sup> 416 U.S. 600, 604-06 (1974).

old premise that the debtors contractual right to *possess* the property is a constitutionally cognizable property interest and the mere possession cannot be disturbed without notice and a hearing. Particular procedural protections may vary depending on the interests at stake, but notice and an opportunity for a hearing are mandated before this interest may be disturbed.<sup>64</sup>

There is, it is true, a basis in legal reality to distinguish Louisiana law from that of the other 49 states. In Louisiana, the vendor's privilege is defeated when a bona fide purchaser possesses the secured property. In jurisdictions which have enacted the Uniform Commercial Code, an installment seller who files properly does not lose his security interest in the property even though the transferee from the debtor possesses it.<sup>65</sup> Thus, in Louisiana, as distinguished from commercial code jurisdictions, the interests are truly dual. However, Justice White first developed his dual interest analysis in *Fuentes* which did not involve Louisiana personal property law. Therefore, while the creditor's rights against the secured property possessed by third parties is a factor in *Mitchell*, it is not the sole basis for the decision.

The principal doctrinal difference between *Mitchell* and *Fuentes*, however, flows from the way this threshold interest is conceived. Doctrinally, *Mitchell* only affects due process in repossessing secured personal property. Justice Stewart, dissenting, stated that "the deprivation of property in this case is identical to that at issue in *Fuentes*."<sup>66</sup> He criticized the majority for approving factors in *Mitchell* which were disapproved in *Fuentes*: the allegations were specific but nonetheless could not be contradicted; a judge is required but unless both sides are heard the act is not considered; and the issues are relatively simple but that is irrelevant to notice and a hearing.<sup>67</sup> But the result appears to flow from the majority's view that the interests in secured property were dual, an issue which Justice Stewart does not confront.

The majority can be criticized for a more fundamental

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<sup>64</sup> *Fuentes v. Shevin*, 407 U.S. 67, 82, 87 n.18, 90 n.21 (1972).

<sup>65</sup> UNIFORM COMMERCIAL CODE § 9-307(2) (1972 text). See also LA. REV. STAT. § 9:5354 (1950)(comparable protection by chattel mortgage).

<sup>66</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 631 (1974) (Stewart, J., dissenting).

<sup>67</sup> *Id.* at 631-34.

reason. From Justice Harlan's concurrence in *Sniadach* through *Fuentes*, the Supreme Court's due process analysis entailed a two-step inquiry. The first question was whether there was a constitutionally cognizable interest. If the answer to the first question was yes, the Court then asked the second question: What procedural protections does due process require? But under the approach in *Mitchell*, if the interests are dual, the Court must combine the two questions<sup>68</sup> and weigh the interests against one another. This dilutes *Fuentes*' "first define, then balance" approach and may diffuse analysis of due process interests.

In future decisions, *Mitchell* may be read broadly or, alternatively, confined to its rather narrow and unique set of facts—sequestration of personal property-security by means of judge-issued writs in Orleans Parish. If the former, then *Mitchell* may well sound a requiem for the new due process; a signal to lower courts and legislatures that the due process tide has turned. On the other hand, if the latter more nearly approximates reality, *Mitchell* may become no more than a mere aberration, little affecting the two-step<sup>69</sup> *Fuentes* "constitutionally cognizable interest" due process analysis. The observer can only speculate.<sup>70</sup> This article, though advocating a broad construction of *Fuentes* and due process, proceeds in the face of uncertainty, and attempts to limn prior cases and discern the trend of the future. The recent case of *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>71</sup> suggests that *Mitchell* was not in fact the death knell of *Fuentes*. There, in an opinion by Justice White, author of the *Mitchell* opinion, the Court relied upon *Fuentes* to hold a prejudgment garnishment invalid. *Mitchell* was distinguished because the supportive affidavit was merely conclusory in form, and there was no judge to over-

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<sup>68</sup> See, e.g., *id.* at 624, 625 (Powell, J., concurring).

<sup>69</sup> *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

<sup>70</sup> Early commentary on *Fuentes* emphasized the financial situations of the parties. See, e.g., Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973); Note, *Cumulative Remedies Under Article 9 of the Uniform Commercial Code: An Answer to Fuentes v. Shevin*, 14 WM. & MARY L. REV. 213 (1972). But obviously the case meant much more. Perhaps like *Fuentes*, early commentary on *Mitchell* might focus upon the wrong issues.

<sup>71</sup> 95 S. Ct. 719 (1975).

see the entire matter. Thus, while there still is uncertainty in the area, it is too early to sound the requiem for the new due process.

To understand the new due process it is necessary to examine several threshold ideas. Before due process guarantees attach, there must be state action which affects a constitutionally cognizable interest. In addition, only liberty and property interests may not be affected without due process. There is also an exception. Even though there is state action which affects a recognized interest, due process is not required in an emergency. It thus becomes crucial to consider liberty, property, state action and emergency.

#### A. *Constitutionally Cognizable Interests: Liberty and Property*

It is difficult to include the social and economic meaning of liberty and property within the ambit of a word formula. Liberty comprehends more than freedom from bodily restraint, while property encompasses more than conventional real and personal property. Both are growing and mobile concepts.<sup>72</sup> Older definitions of liberty tend to be circular and are not particularly helpful. In 1923, the Supreme Court defined liberty as the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>73</sup> Thirty years later the Court said "liberty under law extends to the full range of conduct which the individual is free to pursue."<sup>74</sup> The "property" interest is easier to grasp for it turns on the "paper" record and mutually held, objectively discernable understanding.<sup>75</sup> But forty years ago, Felix Cohen taught that "property" as a legal conclusion is useless.<sup>76</sup> Perhaps imprecision is salutary. It allows courts the requisite flexibility to adopt the concepts to a changing so-

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<sup>72</sup> Board of Regents v. Roth, 408 U.S. 564 (1972).

<sup>73</sup> Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

<sup>74</sup> Bolling v. Sharpe, 347 U.S. 479, 499 (1954). See also Grosjean v. American Press Co., 297 U.S. 233, 244 (1935); Richards v. Thurston, 424 F.2d 1281-85 (1st Cir. 1970); Madiera v. Board of Educ., 386 F.2d 778, 783-84 (2d Cir. 1967).

<sup>75</sup> Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

<sup>76</sup> Cohen, *supra* note 56, at 814-17. See also Note, *Entitlement Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89 (accurate description: questionable prescription).

ciety's needs and aspirations. Nevertheless, the outside boundaries of the terms liberty and property are murky.

Some uncertainties may be summarized. It is not clear whether certain conduct or interests are liberty or property, nor is it clear whose interest is protected. For example, *In re Gault*<sup>77</sup> requires due process before a child is committed as a juvenile delinquent. Yet it is not certain whether the interest protected is the child's interest in being free from restraint or the parents' interest in retaining custody of the child. It is, moreover, not certain whether a posited interest is sufficient to be constitutionally cognizable. *Mitchell v. W. T. Grant Co.* introduced yet another complicating factor, dual property interests. Liberty, it has been frequently stated, varies with the setting.<sup>78</sup> Even if the interest is constitutionally cognizable, it is not clear what, in practical terms, due process requires.<sup>79</sup> A major source of uncertainty is that ours is a complex, pluralistic and changing society; the problems litigated deal with fundamental values. Due process aims to control private abuse of public power and to reconcile individual freedom with the social service state. It seems inevitable, then, that major differences of opinion and periodic changes in emphasis will be encountered. But, as time passes, more clarity may be anticipated. The generalizations already available will become more precise as the decided cases place fact patterns in and out of the categories.

The above-discussed uncertainties notwithstanding, some general conclusions about liberty and property interests can be drawn. "Liberty" refers to status and conduct. Liberty interests are the leftovers, those not protected under the Bill of Rights or fourteenth amendment "life" or "property." The liberty concept is currently growing because of due process and other lawsuits postulating intangible and novel interests against the state or other citizens. The difficulty of developing an intelligible frame of reference around the liberty concept is apparent. Still more apparent is the necessity of so doing, for

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<sup>77</sup> 387 U.S. 1 (1967). See also *Stanley v. Illinois*, 405 U.S. 645 (1972); *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973); *McGee v. Moyer*, 60 F.R.D. 578 (W.D. Va. 1973); *C.V.C. v. Superior Ct.*, 106 Cal. Rptr. 123 (Ct. App. 1973).

<sup>78</sup> See, e.g., *Lansdale v. Tyler Junior College*, 470 F.2d 659, 662 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1973).

<sup>79</sup> *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 90-91 (1972).

liberty is vital to our notion of a limited government and our preference for individual decision-making, unfettered by governmental constraints.<sup>80</sup>

Where liberty interests are involved, there are three possible results, the differences in which flow from the varied magnitude of the interests the citizens postulate as liberty. In the first class, the citizens interest is so significant that the government cannot interfere at all. This is where Judge Clark, quoting Faulkner, said "the Law stops and just people starts."<sup>81</sup> This class now includes such disparate interests as a pregnant female's interest in terminating a pregnancy during the thirteen weeks following conception<sup>82</sup> and a college student's interest in remaining unshorn.<sup>83</sup> Procedural due process is not involved in this class of liberty interests.

The second class of liberty interests is generic. It includes economic, expressive and locomotive conduct. Examples are boycotting, picketing and demonstrating. These interests must be protected as liberty because it is generally held that they are not entitled to full fledged first amendment status.<sup>84</sup> This second class also includes other interests such as freedom from government action which attaches a stigma, restrains personal freedom or works a hardship. Examples are branding a person a drunk, committing an individual as mentally ill and impos-

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<sup>80</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>81</sup> *Lansdale v. Tyler Junior College*, 470 F.2d 659, 662 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973).

<sup>82</sup> *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (constitutional privacy founded upon fourteenth amendment liberty). See also Justice Stewart concurring *id.* at 167-71. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 299-311 (1973).

<sup>83</sup> *Lansdale v. Tyler Junior College*, 470 F.2d 659, 662 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973); See also *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (patrolman); *Black v. Rizzo*, 360 F. Supp. 648 (E.D. Pa. 1973) (fireman); *Harris v. Kaine*, 352 F. Supp. 769, 775-77 (S.D.N.Y. 1972) (army reserve haircut; wearing wig at reserve meetings); *Smith v. Sampson*, 349 F. Supp. 268 (D.N.H. 1972) (pretrial detainee's haircut); *Chambers v. California Unemployment Ins. Appeals Bd.*, 109 Cal. Rptr. 413 (Ct. App. 1973) (mechanic unemployed for length of hair could continue receiving unemployment even though continued unemployment caused by refusal to cut hair).

<sup>84</sup> See, e.g., *Mims v. Duvall County School Bd.*, 350 F. Supp. 553 (M.D. Fla. 1972); *Sumbry v. Land*, 195 S.E.2d 228, 234 (Ga. Ct. App. 1972); *Board of Educ. v. Kankakee Fed. of Teachers Local 886*, 264 N.E.2d 18, 21 (Ill. 1970), cert. denied, 403 U.S. 904 (1971).



ing discipline in prison. In this class, the state may regulate after according procedural due process.

In the third group of cases in which a liberty interest is asserted, the claim is rejected. The interest is so small, the court holds that no liberty is involved. Therefore, the person has no constitutionally cognizable interest and the state may proceed without concern for procedural due process.

Fourteenth amendment *property* interests are also expanding. The courts are developing the concept of property in a novel way, a type of "new property."<sup>85</sup> The "new property" is analogous to the second class of liberty interests and perhaps overlaps somewhat. But this overlap creates few problems, because if an interest in either liberty or property is found the result is the same. The interests may be affected only after extending procedural due process. There is also a class of property cases where, as in the third class of liberty cases, a property interest is asserted but rejected. Here, too, the state may proceed without due process.

In *Board of Regents v. Roth*<sup>86</sup> and *Perry v. Sindermann*,<sup>87</sup> the Court examined the minimum interest in both liberty and property. The question in each was whether a college teacher's employment could be terminated without a hearing. Both district courts decided the teacher's claim without a plenary hearing on motion for summary judgment. In both cases the Court first considered the property issue, *i.e.*, whether the teachers had a reasonable expectancy of continued employment. In *Perry* the Court found an arguable de facto tenure policy, and this interest could be sufficiently cognizable as property. Though Robert Sindermann had not been extended tenure, the school officials may have created a reasonable expectancy of continued employment. Since Mr. Sindermann alleged a cognizable property interest, that interest could not be dismissed without according Sindermann an opportunity to prove de facto terms. Though a liberty interest had been asserted, the

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<sup>85</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1972); *Brooks v. Center Township*, 485 F.2d 383 (7th Cir. 1973); *In re Ming*, 469 F.2d 1352, 1355-56 (7th Cir. 1972); *Ross v. Wisconsin Dep't of Health and Social Serv.*, 369 F. Supp. 570 (E.D. Wis. 1973). See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>86</sup> 408 U.S. 564 (1972).

<sup>87</sup> 408 U.S. 593 (1972).

Court found it unnecessary to pursue that issue. But in *Roth*, the teacher had been explicitly employed for a single academic year and had no promise of reemployment. The Court predictably found no sufficient expectancy of continued employment to amount to property, and then went on to consider the asserted "liberty" interest. The issue was whether any reasons were given for the failure to reemploy which would be stigmatic enough to interfere with the teacher's search for future employment. At the summary judgment stage in the litigation, the Court found none. But *Roth* was remanded to build a record on that issue. Thus, both cases were sent back to district court.

In deciding whether due process was compelled, the Court looked to the presence, not the magnitude, of the citizen interest. It refused to balance state and citizen interests, observing "[W]e must look not to the 'weight' but to the *nature* of the interest at stake."<sup>88</sup> Of course, the demonstration of liberty or property is a question of fact,<sup>89</sup> and if either is shown, the state cannot act without due process.<sup>90</sup> Once it has been determined that due process applies, *i.e.*, that there is a cognizable liberty or property interest, the Court will "weigh" the citizen and state interests to determine what particular procedures due process requires.<sup>91</sup>

In *Roth*, the Court explicitly repudiated the "wooden" distinction between "rights" which give rise to procedural protections and "privileges" which do not.<sup>92</sup> Fundamentally the *Roth*-

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<sup>88</sup> *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). This threshold interest test was followed in *Fuentes v. Shevin*. The majority found a contractual interest in possessing the property which was a constitutionally cognizable property interest under the fourteenth amendment. 407 U.S. 67 (1972). But *Mitchell v. W.T. Grant Co.* found dual interests in a similar secured transaction. *Goss v. Lopez*, 95 S. Ct. 729, 739 (1975) (grievous loss test rejected by majority of five). See also *Morrissey v. Brewer*, 408 U.S. 471, 480, 482 (1972) (grievous loss balancing test); *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973) (*Roth-Perry* analysis suggested); *Ross v. Wisconsin Dep't of Health and Social Serv.*, 369 F. Supp. 570, 571 (E.D. Wis. 1973); *McCormack*, 60 VA. L. REV. 1, 65 (1974).

<sup>89</sup> *Moore v. Knowles*, 482 F.2d 1069, 1072 (5th Cir. 1973).

<sup>90</sup> See *McDowell v. Texas*, 465 F.2d 1342, 1347-50 (5th Cir. 1971), *cert. denied*, 410 U.S. 943 (1972).

<sup>91</sup> *Morrissey v. Brewer*, 408 U.S. 491, 492 (1972). See also *Graham v. Knutzen*, 351 F. Supp. 652, 664-66 (N.D. Ill. 1972). Cf. *Arnett v. Kennedy*, 416 U.S. 134, 151-58 (1974).

<sup>92</sup> 408 U.S. 564, 573 (1972). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); K. DAVIS,

*Perry* idea is that if there is a cognizable liberty or property interest, the authorities are compelled to accord due process before the interest may be affected. If, however, there is no interest, the government may proceed without due process even though the individual is adversely affected.<sup>93</sup> The liberty-property test, it may be argued, resurrects the repudiated right-privilege distinction in a new guise. The *Roth-Perry* analysis and the right-privilege dichotomy do in fact have one thing in common: both formulate a cut-off. If the interest postulated does not meet this minimum, it is wasteful to require a hearing. The *Roth-Perry* test, however, is an advance over the right-privilege distinction because it is a fresh start. The "learning" accumulated around the right-privilege doctrine can be discarded and the courts can begin anew to sort out those interests felt to be important enough for due process.

Like *Perry* and *Roth*, many recent liberty-property cases have arisen in educational settings. In fact, several recent opinions have applied the *Roth-Perry* test to teacher terminations and found no cognizable interest.<sup>94</sup> Typically, a contract for a term is not renewed and no opprobrious reasons are given. In such cases, there is neither an objective expectancy of continued employment nor an interference with future employment prospects. The teacher lacks recourse unless the decision turned on an impermissible basis such as dismissal due to the

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ADMINISTRATIVE LAW TEXT §§ 7.12-7.14 (3d ed. 1972). Cases rejecting the distinction include, *e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (parole revocation); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (government employment); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (public assistance); *Sands v. Wainwright*, 357 F. Supp. 1062, 1079 (M.D. Fla. 1973) (prison discipline).

<sup>93</sup> See *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972):

It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. . . . Mere proof, for example, that his record of nonretention in one job taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty.

<sup>94</sup> See, *e.g.*, *Bradford v. Tarrant County Jr. College Dist.*, 492 F.2d 133 (5th Cir. 1974); *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1 (7th Cir. 1974); *Robbinson v. Jefferson County Bd. of Educ.*, 485 F.2d 1381 (5th Cir. 1973); *Lipp v. Board of Educ.*, 470 F.2d 802 (7th Cir. 1972); *Fisher v. Snyder*, 476 F.2d 375 (8th Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir.), *cert. denied*, 410 U.S. 955 (1972); *Watts v. Board of Curators*, 363 F. Supp. 883 (W.D. Mo. 1973); *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (W.D.N.C. 1973).

exercise of first amendment rights.<sup>95</sup> Even so, freedom to speak out may be construed narrowly to advance a presumed interest in harmony.<sup>96</sup> A teacher, finally, has an insufficient interest to compel a hearing upon failure to promote.<sup>97</sup>

The property cases from educational institutions are fairly straightforward. If an objectively discernable, mutual understanding of continued employment based on a "paper" record of some kind is found, the teacher has a constitutionally cognizable property interest.<sup>98</sup> Statutory tenure is an adequate expectancy of continued employment,<sup>99</sup> and since property grows out of both contractual arrangements and implied mutual understandings,<sup>100</sup> *de facto* tenure has been recognized as a property interest.<sup>101</sup> In contrast, a unilateral, subjective hope is an insufficient property interest.<sup>102</sup> In the absence of a contract, understanding or statutory tenure, there is no property interest.<sup>103</sup> Due process requirements attach not only to dismissal or

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<sup>95</sup> See, e.g., *Fisher v. Snyder*, 476 F.2d 375 (8th Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir.), *cert. denied*, 410 U.S. 955 (1972); *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1087 (W.D.N.C. 1973). *But see* *Amburgey v. Cassady*, 370 F. Supp. 571 (E.D. Ky. 1974).

<sup>96</sup> See *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973); *Vanderzanden v. Lowell School Dist. No. 71*, 369 F. Supp. 67 (D. Ore. 1973). See also *Rowe v. Forrester*, 368 F. Supp. 1355, 1357 (M.D. Ala. 1974); *Abbott v. Tetford*, 354 F. Supp. 1280 (M.D. Ala. 1973).

<sup>97</sup> *Olson v. Trustees of Cal. State Univ.*, 351 F. Supp. 430 (C.D. Cal. 1972). See also *Schwartz v. Thompson*, 497 F.2d 430 (2d Cir. 1974) (merely failing to promote, with no discharge or demotion, does not affect liberty or property); *Green v. Board of Regents*, 474 F.2d 594 (5th Cir. 1973); *Rowe v. Forrester*, 363 F. Supp. 1355 (M.D. Ala. 1974) (teaching assignment); *Zumalt v. Trustees of Cal. State Colleges*, 107 Cal. Rptr. 573 (removal of department chairman), *aff'd*, 109 Cal. Rptr. 344, 351 (Ct. App. 1973).

<sup>98</sup> See, e.g., *Ortwein v. Mackey*, 358 F. Supp. 705, 710-11 (M.D. Cal. 1973).

<sup>99</sup> See, e.g., *Lyman v. Swartley*, 385 F. Supp. 661, 665 (D. Idaho 1974); *Peacock v. Board of Regents*, 380 F. Supp. 1081, 1087 (D. Ariz. 1974); *Bowing v. Board of Trustees of Green River Com. Col.*, 521 P.2d 220, 225 (Wash. Ct. App. 1974).

<sup>100</sup> *Soni v. Board of Trustees of the Univ. of Tenn.*, 376 F. Supp. 289 (E.D. Tenn. 1974) (professor allowed to exercise rights and privileges ordinarily only given to tenured faculty, told he would be recommended for tenure upon attaining citizenship); *Thomas v. Ward*, 374 F. Supp. 206 (M.D.N.C. 1974) (language in teacher's handbook could lead teacher to believe tenure automatic after 3 years).

<sup>101</sup> *Huntley v. North Carolina Bd. of Educ.*, 493 F.2d 1016, 1021 (4th Cir. 1974); *Pelisek v. Trevor State Graded School Dist. No. 7*, 371 F. Supp. 1064 (E.D. Wis. 1974); *Chung v. Park*, 369 F. Supp. 959 (M.D. Pa. 1974); *Ward v. Board of Regents*, 360 F. Supp. 1179 (E.D. Ky. 1973); See also *Anderson v. Denny*, 365 F. Supp. 1254, 1260 (W.D. Va. 1973) (custom of tenant permanency).

<sup>102</sup> *Schultz v. School Dist.*, 367 F. Supp. 467, 471 (D. Nev. 1973).

<sup>103</sup> *McNeill v. Butz*, 480 F.2d 314, 320 (4th Cir. 1973); *Hirsch v. Green*, 368 F.

failure to rehire. A demotion also affects a property right, and the procedure used to demote must comply with due process.<sup>104</sup>

The "liberty" interest is more difficult. Liberty as used here embodies two similar ideas.<sup>105</sup> The first is the citizen's interest in relations with the community at large,<sup>106</sup> which is injured by damage to good name, reputation, honor and integrity.<sup>107</sup> In *Perry*, the Supreme Court defined "liberty" in such a way as to closely parallel the Restatement of Torts definition of defamation. At § 559, the Restatement says that a statement defames if it will "deter third parties from . . . dealing" with the object of the statement. The second is the interest in economic or employment relations which is injured by events or disparagement which hamper freedom to take advantage of economic opportunities.<sup>108</sup> The clearest injury to community and economic relations is to be accused of dishonesty.<sup>109</sup> Teachers are particularly vulnerable to charges of sexual improprieties.<sup>110</sup> Others are conclusory charges of racism, disloyalty, misconduct, improper conduct, insubordination, or hostility.<sup>111</sup>

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Supp. 1061 (D. Md. 1973); *Velger v. Cawley*, 366 F. Supp. 874, 877-78 (S.D.N.Y. 1973); *Snead v. Department of Social Serv.*, 355 F. Supp. 764, 771 (S.D.N.Y. 1973). Cf. *Johnson v. Fraley*, 470 F.2d 179 (4th Cir. 1972) (29 years service gives rise to something); *Perkins v. Regents*, 353 F. Supp. 618 (C.D. Cal. 1973) (7 years).

<sup>104</sup> *Davis v. Barr*, 373 F. Supp. 740 (E.D. Tenn. 1973) (tenured teacher-coach removed from coaching position, though remaining on faculty as teacher).

<sup>105</sup> Cf. Green, *Basic Concepts: Persons, Property, Relations*, 24 A.B.A.J. 65 (1938) in LITIGATION PROCESS IN TORT LAW 413 (L. Green ed. 1965).

<sup>106</sup> *Pelisek v. Trevoe Graded School Dist.*, 371 F. Supp. 1064 (E. D. Wis. 1974).

<sup>107</sup> Lengthy service alone is not enough; some stigma must attach. *Cannady v. Person County Bd. of Educ.*, 375 F. Supp. 689 (M.D.N.C. 1974). There the plaintiff had been teaching in the school system for 19 years. The stated reason for the removal was ineffectiveness in team teaching. The court analyzed the case on the issue of denial of liberty, and held that in order to be a denial there must be a stigma or other disability attaching to the dismissal, or injury to the teacher's good name, which was lacking in this case. *Id.* at 699-700.

<sup>108</sup> *Manos v. City of Green Bay*, 372 F. Supp. 40 (E.D. Wis. 1974); *Velger v. Cawley*, 366 F. Supp. 874, 878 (S.D.N.Y. 1973).

<sup>109</sup> *Huntley v. North Carolina Bd. of Educ.*, 493 F.2d 1016, 1019 (4th Cir. 1974); *McNeill v. Butz*, 480 F.2d 314, 319-20 (4th Cir. 1973); *Hirsch v. Green*, 368 F. Supp. 1061 (D. Md. 1973); *Schunemann v. United States*, 358 F. Supp. 875 (N.D. Ill. 1973). See also *Hostrop v. Board of Junior College*, 471 F.2d 488, 494 (7th Cir.), *cert. denied*, 412 U.S. 939 (1972) (veracity).

<sup>110</sup> *Drake v. Covington County Bd. of Educ.*, 371 F. Supp. 974 (M.D. Ala. 1974); *Dause v. Bates*, 369 F. Supp. 139, 149 (W.D. Ky. 1973).

<sup>111</sup> *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 158 (8th Cir. 1973); *Wilderman v. Nelson*, 467 F.2d 1173, 1176 (8th Cir. 1972); *Amburgey v. Cas-*

General accusations such as "lack of performance in the functional program" and "failure to contribute to general program" are sufficiently stigmatic to impinge on liberty.<sup>112</sup> Likewise, a charge of mental illness diminishes employment opportunities<sup>113</sup> and impairs economic prospects. The charge made need not be specific—summary firing plus factual testimony that the teacher was unable to secure employment may be adequate.<sup>114</sup> Moreover, even scheduling a "probable cause" hearing may "dampen the reputation of an educator."<sup>115</sup> And, as one lawsuit demonstrated, actions may speak louder than words. In that case, a department chairman who had no "property" interest in continuing in office was removed without written reason. Subsequent to his departure, campus policemen changed the locks and sealed the filing cabinets. The court found interference with a constitutionally cognizable interest, stating "the show of force implied that force was necessary: resort to locks implied that locks were necessary."<sup>116</sup>

Other courts construe liberty differently. For example, a single charge by a superior of being "anti-establishment" not accompanied by further action was not considered sufficiently damaging to impair the charged teacher's liberty.<sup>117</sup> Also, "failure to coordinate efforts,"<sup>118</sup> "general ineffectiveness as an

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sady, 370 F. Supp. 571 (E.D. Ky. 1974); *Larkin v. Withrow*, 367 F. Supp. 796 (E.D. Wis. 1973); *Buggs v. City of Minneapolis*, 358 F. Supp. 1340, 1343 (D. Minn. 1973).

<sup>112</sup> *Ortwein v. Mackey*, 358 F. Supp. 705, 713 (M.D. Fla. 1973).

<sup>113</sup> *Lombard v. Board of Education of the City of New York*, 502 F.2d 631 (2d Cir. 1974); *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973); *Snead v. Department of Social Serv.*, 355 F. Supp. 764, 771 (S.D.N.Y. 1973).

<sup>114</sup> *Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500, 510-11 (E.D. Pa. 1973). See also the factual testimony in *Ortwein v. Mackey*, 358 F. Supp. 705, 713 (M.D. Fla. 1973).

<sup>115</sup> *Haines v. Askew*, 386 F. Supp. 369, 373 (M.D. Fla. 1973).

<sup>116</sup> *Zumwalt v. Trustees of the Cal. State Colleges*, 109 Cal. Rptr. 344, 353 (Ct. App. 1973).

<sup>117</sup> *Lipp v. Board of Educ.*, 470 F.2d 802, 805 (7th Cir. 1972). Compare *Snead v. Department of Social Serv.*, 355 F. Supp. 764, 771 (S.D.N.Y. 1973). Some courts give rather short shrift to the issue of denial of liberty. In *Frazier v. Curators of the Univ. of Mo.*, 495 F.2d 1149 (8th Cir. 1974), the court turned the case on the lack of tenure, saying that a non-tenured professor can be dismissed for any reason that is not constitutionally impermissible. This resulted even though a letter to Dr. Frazier, included in her file, was severely critical of her emotional stability and scholarly ability.

<sup>118</sup> *Shrick v. Thomas*, 486 F.2d 691 (7th Cir. 1973), *aff'd*, 408 U.S. 940 (1973). See also *Irby v. McGowam*, 380 F. Supp. 1024 (S.D. Ala. 1974) (charge of being "noncooperative" does not deprive individual of liberty without further proof of injury to reputation).

employee,"<sup>119</sup> "insufficient academic performance,"<sup>120</sup> and other serious professional criticism<sup>121</sup> were held not to injure the employee's liberty interest. Allegations that future employment prospects were impaired were held to be insufficient.<sup>122</sup> These cases extend the statement in *Roth* that being less desirable for employment because of "nonretention" is not, standing alone, a constitutionally cognizable interest.<sup>123</sup> Yet they are difficult to reconcile with the decisions in the preceding paragraphs which place primary emphasis upon the effect that the charges have upon future employment possibilities.

To some courts, an opprobrious basis for possible adverse action *in the future* is sufficient to require due process.<sup>124</sup> If there are letters in the "file" which may be based on false information, and which may diminish future opportunities, due process attaches.<sup>125</sup> If this interest is to be meaningful, there should be a supporting right to examine that "file."<sup>126</sup> This approach is not without merit. Secrecy's decorous equivocation is without virtue to those who feel that secrecy may be a mask for callous exploitation.<sup>127</sup> They assert that the authorities "only concealed what they would have blushed to disclose"<sup>128</sup> and feel that honest people do not keep cards up their

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<sup>119</sup> *Robinson v. Jefferson County Bd. of Educ.*, 485 F.2d 1381 (5th Cir. 1973). See also *Pavlov v. Martin*, 381 F. Supp. 707 (D. Del. 1974), which held that a charge of "incompetence" does not damage the individual's good name, and thus constitute a denial of liberty.

<sup>120</sup> *Jablon v. Trustees of Cal. State Colleges*, 482 F.2d 997 (9th Cir. 1973), cert. denied, 414 U.S. 1163 (1974).

<sup>121</sup> *Schultz v. School Dist.*, 367 F. Supp. 467, 473 (D. Neb. 1973). See also *Blair v. Board of Regents*, 496 F.2d 322 (6th Cir. 1974), which held that damage to reputation arising from dismissal due to failure to meet minimum requirements for a teacher's professional relationships with students does not violate due process.

<sup>122</sup> *Perkins v. Regents*, 353 F. Supp. 618, 622-24 (C.D. Cal. 1973).

<sup>123</sup> *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972).

<sup>124</sup> *Buggs v. City of Minneapolis*, 358 F. Supp. 1340, 1343 (D. Minn. 1973). But cf. *Whatley v. Price*, 368 F. Supp. 336, 339, (M.D. Ala. 1973); *Kennedy v. Engle*, 348 F. Supp. 1142, 1148 (E.D. N.Y. 1972).

<sup>125</sup> *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 158 (8th Cir. 1973); *Bottcher v. Florida Dep't of Ag. & Cons. Servs.*, 361 F. Supp. 1123, 1129 (N.D. Fla. 1973).

<sup>126</sup> *Norlander v. Schleck*, 345 F. Supp. 595 (D. Minn. 1972).

<sup>127</sup> *Sparrow v. Goodman*, 361 F. Supp. 567, 585-86 (W.D.N.C. 1973); Wickham, *Let the Sun Shine In*, 68 NW. U.L. REV. 480 (1973).

<sup>128</sup> 1 E. GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE*, 452 (Modern Lib. Ed. 1963).

sleeves. Some, on the other hand, think that a certain amount of decorum may occasionally be mandated.<sup>129</sup>

Non-employment cases also refine the interest necessary to require due process. For example, a citizen's interest in the length of his hair, it seems, is not property but rather liberty.<sup>130</sup> This is true even though the sheriff who promulgated the rule is named Sampson.<sup>131</sup> A tenant in a government housing project has a sufficient property interest to compel notice and a hearing before failing to renew.<sup>132</sup> In prisons, forfeiture of "good time" or any significant time in "segregation" constricts liberty sufficiently to require due process.<sup>133</sup> If a student is to be suspended from school for 10 days or more, his interest in securing an education is affected and the authorities must accord a prior hearing.<sup>134</sup> A student's liberty is also interfered with if he is dismissed from an honor society for misconduct, and the dis-

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<sup>129</sup> *Haines v. Askew*, 368 F. Supp. 369, 376 (M.D. Fla. 1973). But the mere lodging of unfavorable memoranda in a file is not alone sufficient to give rise to a constitutionally cognizable grievance. There must be allegations that the entry of these memoranda has or is likely to lead to disciplinary action or sanctions; will delay or prevent later favorable action; chill the exercise of first amendment rights; or in some other way damage or threaten to damage the complainant. *Collins v. Wolfson*, 498 F.2d 1100, 1104 (5th Cir. 1974); see also *Sims v. Fox*, 505 F.2d 857, 863-64 (5th Cir. 1974).

<sup>130</sup> *Dwen v. Barry*, 483 F.2d 1126, 1130 (2d Cir. 1973); *Black v. Rizzo*, 360 F. Supp. 648, 651 (E.D. Pa. 1973); *Harris v. Kaine*, 352 F. Supp. 769, 775-76 (S.D.N.Y. 1972); *Chambers v. California Unemployment Ins. App. Bd.*, 109 Cal. Rptr. 413, 415 (Ct. App. 1973); *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 526-27 (Ct. App. 1967). But cf. *Rinehart v. Brewer*, 360 F. Supp. 105, 112 (S.D. Iowa 1973), *aff'd*, 491 F.2d 705 (8th Cir. 1974). The Seventh Circuit of the United States Court of Appeals has taken a position that will perhaps make dismissals due to the personal appearance of the employee not cognizable in federal courts. In *Miller v. School District No. 167, Cook County, Illinois*, 495 F.2d 658 (7th Cir. 1974), the court held that even if the plaintiff could prove that dislike for his appearance was a factor in the school board's decision to dismiss him, such claim did not allege a violation of deprivation of liberty forbidden by the due process clause of the fourteenth amendment. The court said that the board had a legitimate interest in protecting the image projected by school teachers, and to protect the students from being subjected to teachers whose appearance they deemed harmful. Additionally, the court suggested that the board's discretion would not be over-turned unless it was acting without good faith.

<sup>131</sup> *Smith v. Sampson*, 349 F.2d 1236 (4th Cir. 1973).

<sup>132</sup> *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973).

<sup>133</sup> *Braxton v. Carlson*, 483 F.2d 933, 937 (3d Cir. 1973); *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974); *Diamond v. Thompson*, 364 F. Supp. 659, 664-65 (M.D. Ala. 1973); *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 944 (E.D. Pa. 1973).

<sup>134</sup> *Goss v. Lopez*, 95 S. Ct. 729 (1975); *Strickland v. Inlow*, 485 F.2d 186, 190 (8th Cir. 1973), *vacated and remanded sub nom. Wood v. Strickland*, 95 S. Ct. 992 (1975).



missal procedure does not conform to due process requirements. This dismissal is a blackmark on his educational record that is an injury to his integrity and good name and can adversely affect his future.<sup>135</sup> Similarly, liberty is hindered when a driver's license application is denied without reasons.<sup>136</sup> The California Court of Appeals held that prospective adoptive parents have an interest in the custody of an adoptable child sufficient to compel notice and a hearing before the child is taken.<sup>137</sup> In addition, serious charges against a physician impinge upon a constitutionally cognizable interest and give rise to due process.<sup>138</sup> Finally, the next of kin of soldiers "missing in action" have a cognizable interest in proceedings which may deprive them of statutory benefits and, accordingly, have a right to due process.<sup>139</sup>

*Mitchell's* view that both the buyer-debtor and the seller-creditor have an interest in secured personal property may create difficulties in defining constitutionally cognizable "old" property interests. Litigants have questioned various legally and statutorily created liens. After *Fuentes*, many courts followed the Harlan-Stewart analysis and found that an owner or one entitled to possession has a constitutionally cognizable interest in using and alienating property and that this interest is sufficient to compel notice or an opportunity to be heard before possession or liquidity is circumscribed.<sup>140</sup> *Mitchell's* dual in-

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<sup>135</sup> *Warren v. National Ass'n of Secondary School Principals*, 375 F. Supp. 1043 (N.D. Tex. 1974).

<sup>136</sup> *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973); *Raper v. Lacey*, 488 F.2d 748, 752 (1st Cir. 1973).

<sup>137</sup> *C.V.C. v. Superior Court*, 106 Cal. Rptr. 123 (Ct. App. 1973).

<sup>138</sup> *Suarez v. Weaver*, 484 F.2d 678 (7th Cir. 1973); *Larkin v. Withrow*, 368 F. Supp. 796 (E.D. Wis. 1973); *Suckle v. Madison Gen. Hosp.*, 362 F. Supp. 1196, 1209 (W.D. Wis. 1973). Additionally, a physician's staff privileges in a hospital are a constitutionally cognizable interest, and the procedures used for denying or rescinding them must meet due process requirements. *Christhilf v. Annapolis Emergency Hosp. Ass'n*, 496 F.2d 174 (4th Cir. 1974); *Poe v. Charlotte Mem. Hosp., Inc.*, 374 F. Supp. 1302 (W.D.N.C. 1974).

<sup>139</sup> *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974).

<sup>140</sup> *Graff v. Nicholl*, 370 F. Supp. 974 (N.D. Ill. 1974); *Bay State Harness Horse Racing & Breeding Ass'n Inc. v. PPG Industries, Inc.*, 365 F. Supp. 1299, 1304-05 (D. Mass. 1973); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085, 1090 (S.D. Me. 1973); *Lynch v. Household Fin. Corp.*, 360 F. Supp. 720, 723 (D. Conn. 1973); *Mason v. Garriis*, 360 F. Supp. 420, 423 (N.D. Ga. 1973), *modified*, 364 F. Supp. 452 (1973); *Nork v. Superior Court*, 109 Cal. Rptr. 428, 432 (Ct. App. 1973). *But cf. Harri-*

terest analysis leaves these cases in doubt. In answer to counsel's concern that affirming *Mitchell* "would set off a rip tide," the Court stated that "our decision will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords."<sup>141</sup> But the Court also noted that it "had unanimously approved prejudgment attachment liens effected by creditors without notice, hearing or judicial order."<sup>142</sup>

The better course of decision is to resolve these incongruous statements by limiting *Mitchell*'s dual interest analysis to consensually created written security interests.<sup>143</sup> The owner or possessor should have a cognizable, due process interest in using or alienating property unless the property was subject to a consensual security agreement. Attaching property to accomplish jurisdiction may have been acceptable before in personam jurisdiction was expanded by long-arm statutes. Today, however, personal jurisdiction is almost always available.<sup>144</sup> Attachment accomplishes jurisdiction but may also cause the defendant to lose a sale or require him to borrow money. Also, when a creditor moves to foreclose a consensual security agreement, the written agreement itself is some evidence of the debt. But when property previously unrelated to the controversy is attached at the beginning of a lawsuit, the plaintiff's allegations are the only evidence of the claim's validity.<sup>145</sup>

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son v. Morris, 370 F. Supp. 142 (D.S.C. 1974); Cook v. Carlson, 364 F. Supp. 24 (S.D.S.D. 1973) (mechanics lien de minimis because value of property enhanced by improvement).

<sup>141</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 620 n.14 (1974).

<sup>142</sup> *Id.* at 613.

<sup>143</sup> UNIFORM COMMERCIAL CODE § 9-203(1)(a) (1972 text). (Written agreement required to create a security interest unless the secured party possesses the collateral).

<sup>144</sup> Note, *Quasi In Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023, 1032-36 (1973).

<sup>145</sup> *Fuentes v. Shevin*, 407 U.S. 67, 94 (1972). This was the type of analysis used by Judge Lasker in *Sugar v. Curtis Cir. Co.*, 377 F. Supp. 1055 (S.D.N.Y. 1974), when he held that *Mitchell* did not foreclose a constitutional attack on a statute that admittedly closely resembled the Louisiana statute procedurally, but allowed attachment of property on other bases than a security interest in the property. Judge Lasker cited language from *Mitchell* for his position that the dual interest test in *Mitchell* arises when the creditor has an actual possessory interest in the attached property, such as is given by a security interest. *Id.* at 1062-63. See also *North Georgia Finishing, Inc. v. D. Chem, Inc.*, 95 S. Ct. 719 (1975) (garnishment of bank account invalidated along with statute without relying on the attachment of property unrelated to a security

Additional problems of discerning a constitutionally cognizable interest appear in possessory liens. The owner has surrendered possession to a repairman or creditor, normally under a contractual arrangement. Under a repairman's lien, the creditor has added material and labor to the property, something the repairman has a right to possess. Furthermore, he has enhanced the property's value. Thus, the owner no longer has a possessory interest in the *Fuentes* sense and the "property" in the item is dual in the *Mitchell* sense. The holder of the property may retain it without notice and a hearing, but the owner has a constitutionally cognizable interest in not being permanently deprived of the property. Therefore the property cannot be sold under the lien without prior notice and a hearing.<sup>146</sup>

Various liens must be examined to determine where the constitutionally cognizable interest lies. For example, an artisan or mechanic who improves the owner's property adds value but the owner continues in possession. May the artisan file a lien against the property without notice to the owner? The lien affects the owner's right to sell or mortgage. One court, nevertheless, has allowed the lien to attach without prior notice, saying that the owner's interest was *de minimus* because the value of the property was enhanced by the improvements.<sup>147</sup> Even though a tenant's property may technically be in the

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interest feature of the statute); *Welch v. Kinchla*, 386 F. Supp. 913 (D. Mass. 1975); *In re Law Research Services, Inc.*, 386 F. Supp. 749 (S.D.N.Y. 1974). *But see* *Balter v. Bato Co., Inc.*, 385 F. Supp. 420 (W.D. Pa. 1975).

<sup>146</sup> This was precisely the view of the court in *Cockerel v. Caldwell*, 378 F. Supp. 491 (W.D. Ky. 1974). It was the first case to deal with *Mitchell's* implications for possessory liens. There the court decided that the portion of the Kentucky garageman's lien statute that authorized sale of the automobile to liquidate the claim was unconstitutional. This completely extinguished the owner's rights in the automobile. But the portion of the statute authorizing the garageman to hold the automobile as security for his claim was upheld, because of his property interest in the chattel. The court in *Cockerel* relied upon and adopted the views expressed in *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974); *see* *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 383-86 (2d Cir. 1973) (Timbers, J., concurring); *Ceaser v. Kiser*, 387 F. Supp. 645 (M.D.N.C. 1975); *Mason v. Garriss*, 364 F. Supp. 452, 360 F. Supp. 420 (N.D. Ga. 1973); R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 119 (2d ed. 1955); Clark & Landers, *Sniadach, Fuentes, and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 383-91 (1973); *but see* *Straley v. Gassoway Motor Co.*, 359 F. Supp. 902 (S.D.W. Va. 1973) (entire scheme unconstitutional); *Quebec v. Buds Auto Service*, 105 Cal. Rptr. 677 (Super. Ct. 1973) (garageman cannot retain property).

<sup>147</sup> *Cook v. Carlson*, 364 F. Supp. 24, 27 (S.D.S.D. 1973).

landlord's possession, courts have struck down landlord's liens, apparently because the landlord's or innkeeper's lien violates the core values of due process. It allows one private party to use state power to take another private party's unsecured property before the controversy is examined by a state official.<sup>148</sup> When a bank and a debtor-depositor have a controversy, the bank may seize the depositor's account under a banker's right to set-off. The bank's possession or "ownership" of a demand account is technical, while the depositor and his creditors have a palpable interest in liquidity. To allow summary seizure is to appoint the bank the judge in its own case.<sup>149</sup>

While there are numerous other security devices such as pledges, liens for storage and statutory liens, enough has been said to indicate the topic's variety and to posit a solution. Two factors should be considered. First, to assert that the property is enhanced in value, or that the property interest is mixed or dual frequently begs the question. That question is the genuineness of the putative creditor's claim. Allowing that claim to attach without disinterested review may lend the state's credence to an unfounded or disputed claim.<sup>150</sup> One primary pur-

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<sup>148</sup> See, e.g., *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>149</sup> Stillwater, *The California Banker's Lien Law: A Reappraisal of a Creditor's Remedy in a New Economic Context*, 27 BUS. LAWYER 777 (1972); *Kruger v. Wells Fargo Bank*, 107 Cal. Rptr. 133 (Ct. App. 1973), *rev'd*, 531 P.2d 441, 113 Cal. Rptr. 449 (1974) (no state action). See generally R. BROWN, *supra* note 146, at § 117, at 577-81; Clark and Landers, *supra* note 146, at 400-402. But see Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment III*, 47 S. CAL. L. REV. 1, 33-43 (1973); Note, *Bank Credit Cards and the Right of Setoff*, 26 S. CAL. L. REV. 89, 108 (1974), where the author notes that summary banking setoff is very similar in practicality to constitutionally prohibited practices, but is not unconstitutional because of lack of state action. The author suggests legislative treatment.

<sup>150</sup> For example, in most litigated garageman liens, the existence or amount of the debt was in question. See *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 381 (2d Cir. 1973); *Cockerel v. Caldwell*, 378 F. Supp. 491 (W.D. Ky. 1974); *Mason v. Garris*, 360 F. Supp. 420, 422 (N.D. Ga. 1973); *Straley v. Gassoway Motor Co.*, 359 F. Supp. 902 (S.D. W. Va. 1973); *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974). In contrast, most § 9-503 plaintiffs have admitted failure to make payments. See, e.g., *Shirley v. State Nat'l Bank*, 493 F.2d 739, 741 (2d Cir. 1974). This causes "welfare Cadillac" tirades in some circles. See, e.g., R. HENSON, *HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* §§ 10-18 (1973). For almost a century it has been clear that the substantive validity of the claim and the truth of the alleged facts have no relevance when due process is denied. *Pennoyer v.*

pose of due process is to sort spurious from real claims, and the *Mitchell* dissenters were unwilling to extend this credence to the creditor's claim absent notice and a hearing. Yet the *Mitchell* majority felt that the security agreement was a sufficient guarantee of genuineness to allow the Court to conclude that the property interest was dual. This willingness to accept the secured creditor's word is the principal practical difference between the majority and the dissent. Unless the dual analysis is confined to written, consensual security agreements, the mixed interest analysis may destroy the new due process. Even in consensual security agreements, *Mitchell* allows the creditor to beg the default question. But the practical reasons to allow this, such as the creditor's desire for future business, are absent in many nonconsensual liens.

The second factor to be considered grows out of the property issue. Property as an unexamined conclusion may create serious analytical difficulties.<sup>151</sup> In *Roth* and *Mitchell*, the Court stated that fourteenth amendment property is to be defined under state law.<sup>152</sup> But the Court in both *Mitchell* and *Sniadach* distinguished particular kinds of property as deserving additional protection.<sup>153</sup> State definitions of property should be followed generally but not adhered to slavishly. In dealing with a similar problem, the question of what passes to the bankruptcy trustee under Bankruptcy Act § 70(a)(5), a federal definition of property was developed.<sup>154</sup> *Lines v. Fredrick*<sup>155</sup> defines vacation pay accrued on the date of bankruptcy to be outside of § 70(a)(5)'s definition of property. Thus a federal definition of property advances a social welfare purpose. In dealing with questionable or hazy state property inter-

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Neff, 95 U.S. 714 (1877); *Lopez v. Williams*, 372 F. Supp. 1279, 1302 n.17 (S.D. Ohio 1973), *prob. juris. noted*, 415 U.S. 912 (1974). But it is unrealistic to assume that these social facts will be ignored in deciding, in the first instance, whether due process is required.

<sup>151</sup> Cohen, *supra* note 56, at 815-16.

<sup>152</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>153</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Sniadach v. Family Fin. Co.*, 395 U.S. 337, 340-42 (1967). *See also* *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.8 (1970). *But cf.* *Fuentes v. Shevin*, 407 U.S. 67, 88-89 (1972) (disapproving this branch of *Sniadach*).

<sup>154</sup> *Segal v. Rochelle*, 382 U.S. 375 (1966).

<sup>155</sup> 400 U.S. 18 (1970).

ests, the social welfare purpose is an analytical variable with a sounder basis in reality than chameleon conclusions like possession.<sup>156</sup> In many lien questions which raise issues of whether there is a constitutionally cognizable fourteenth amendment property interest, courts might well adopt the *Lines* approach.

Thus, a line-drawing process is taking place. As interests are posited, courts analyze their magnitude in terms of liberty and property.<sup>157</sup> If the interest is minimal, courts refuse to interfere: administrative discretion is preserved and expensive hearings are avoided.<sup>158</sup> If the interest is defined as liberty or property, the authorities must respect the citizen to the extent of according due process.

#### B. *Affecting Constitutionally Cognizable Interests Without Due Process*

Constitutionally cognizable citizen interests can be affected in several ways without notice and a hearing. The government may act in a non-adjudicatory fashion, it may act in an emergency, there may be a finding that the interest was affected without state action, or the defendant may not be a "person" within the meaning of the Civil Rights Acts, thus barring federal jurisdiction.

##### 1. *Legislation versus Adjudication*

The distinction between adjudicatory and legislative action results from the doctrine of separation of powers.<sup>159</sup> The government, without individual notice or an adjudicatory hearing, may affect citizen interests in a myriad of ways. The legislature can increase taxes, lower transfer payments, declare a type of business to be a public nuisance or extend subsidies.<sup>160</sup> Still, there are limits on legislative action; the statutory and

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<sup>156</sup> Cf. *Graff v. Nicholl*, 370 F. Supp. 974 (N.D. Ill. 1974) (impounding "abandoned" automobiles).

<sup>157</sup> *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973).

<sup>158</sup> *Adams v. Walker*, 492 F.2d 1003 (7th Cir. 1974).

<sup>159</sup> K. DAVIS, *supra* note 92, at §§ 7.03, 7.05.

<sup>160</sup> See *Traylor v. City of Amarillo*, 492 F.2d 1156 (5th Cir. 1974); *Trager v. Rea-body Redev. Auth.*, 367 F. Supp. 1000 (D. Mass. 1973); *Whitefield v. King*, 364 F. Supp. 1296, 1301-02 (M.D. Ala. 1973); *Amen v. City of Dearborn*, 363 F. Supp. 1267, 1280 (E.D. Mich. 1973).

constitutional procedure applicable to the legislature must be followed. A legislative hearing generally includes advance warning and a chance to state a position. But the testimony need not be sworn and there may be no cross-examination and no transcript. In comparison, when dealing with individual cases rather than general policy, the government must follow adjudicative due process. The government cannot, for example, without notice and opportunity for an adjudicative hearing, raise the assessed value of a particular piece of property or enjoin a particular business.

The courts apply a practical analysis to determine whether government action is legislative or adjudicative. If a court is functioning as a legislature, the legislative rules govern the procedure.<sup>161</sup> If the legislature is adjudicating, it must follow adjudicative procedure.<sup>162</sup> This is a more realistic approach than classifying a governmental body as either a legislative or an adjudicative body and reasoning that all the action of a legislature is legislative and all the action of a court is adjudicative. Moreover, it is the only workable approach in some areas, such as local government, where separation of powers is at best an obscure and elusive concept.

*Burr v. New Rochelle Municipal Housing Authority*<sup>163</sup> illustrates the difference between legislation and adjudication as well as the due process consequences flowing from the distinction. *Burr*, which ultimately established the procedure necessary for a public housing authority to increase rent, originated when the deficit-plagued Authority imposed a "service charge" of \$2 per month on all tenants. Since the service charge affected the tenant's property interest, they filed suit, charging a violation of due process and requesting the court to compel a hearing. The district court found that due process was violated, and ordered written notice, a public hearing, oral evidence, assistance of counsel for the tenants, an opportunity to adduce contrary evidence, a verbatim transcript and a written decision

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<sup>161</sup> *In re Oliver*, 452 F.2d 111, 113-14 (7th Cir. 1971).

<sup>162</sup> *Groppi v. Leslie*, 404 U.S. 496 (1972); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

<sup>163</sup> 479 F.2d 1165 (2d Cir. 1973). *Burr* was followed in *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1974), wherein it was held "that the tenants of public housing constructed under the National Housing Act are entitled under that statute to an opportunity to be heard before rents are increased." *Id.* at 639.

based on the record. On appeal the court of appeals considered the administrative burden on the Authority, the lack of individual issues of fact, and the need for an expert weighing of complex economic data. The Authority, the court of appeals held, could increase charges without a full adversary hearing. Notice, an opportunity to submit material, and a statement of reasons were enough to protect the tenant's interests. The district court decision appears to grow out of a conclusion that the decision to impose the charge was adjudicatory. The court of appeals rejected that conclusion and held that the decision was legislative. Safeguards, nevertheless, were required to ensure that the issues were properly examined and to prevent the Authority from acting in ignorance.<sup>164</sup>

## 2. *State Action and Private Conduct*

A second limit on due process stems from the principle that the fourteenth amendment only limits state action.<sup>165</sup> Likewise, plaintiffs asserting denials of due process under the Civil Rights Act must allege that action was taken under color of law,<sup>166</sup> a concept similar, if not identical to, the fourteenth amendment state action concept.<sup>167</sup> The issue may be stated simply: what is sufficient state action or action under color of law to give rise to due process? Nonetheless, the problem is complex. As will be seen, this difficulty is at least partially generated by the fact that both state action and color of law are expanding concepts.

At the outset, it is clear that adjudicative procedures applied to resolve purely private disputes must follow due pro-

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<sup>164</sup> K. DAVIS, *supra* note 92, at §§ 7.02, 7.05. See also *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). But see *Keller v. Kate Maremount Foundation*, 365 F. Supp. 789, 802-04 (N.D. Cal. 1972), *aff'd sub nom. Geneva Towers Tenants' Organization v. Federated Mortgage, Inc.*, 504 F. 2d 483 (9th Cir. 1974).

<sup>165</sup> See generally P. KAUPER, *CONSTITUTIONAL LAW: CASES AND MATERIALS*, 779-831 (1972); McCormack, 60 VA. L. REV. 1, 19-28 (1974).

<sup>166</sup> See, e.g., *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

<sup>167</sup> *Palmer v. Columbia Gas*, 479 F.2d 153, 161 (6th Cir. 1973); *Joy v. Daniels*, 479 F.2d 1236, 1239 (4th Cir. 1973); *Trapper Brown Const. Co. v. Electromech, Inc.*, 358 F. Supp. 105, 106 (D.N.H. 1973); *Commonwealth ex rel. Rafferty v. Philadelphia Psychiatric Cent.*, 356 F. Supp. 500, 506 (E.D. Pa. 1973). But cf. *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, 757 (3d Cir. 1973), *aff'd*, 95 S. Ct. 449 (1974) (state action and color of law may not be congruent).



cess.<sup>168</sup> Limits on the state action-color of law concepts, however, cause the other dispute-settling environments to be less clear-cut. Neither New York University, the Brooklyn Law School, Chatham College, nor the Miami Woman's Club acts with "color of law" even though all have tangible connections with the government.<sup>169</sup> On the other hand, a federal district court in New York held that a privately owned utility, Consolidated Edison, was engaged in state action and could not terminate a patron's electricity without some kind of "due process."<sup>170</sup> The Fifth Circuit decided that the Montgomery, Alabama YMCA acted under "color of law" when it refused to accept applications for membership.<sup>171</sup> Most earlier state action cases dealt with equal protection, but equal protection is related to due process. The equal protection question refers to access. May the YMCA exclude these people? The due process question refers to termination. If the YMCA board decides to expel the new members, must it give them notice and hold a hearing? Thus, the equal protection question must be answered affirmatively before the due process question can arise.

The contours of the "new" due process are not clear but the direction is apparent. Due process is expanding into places which have heretofore been considered sacrosanct and escaped its influence. Today a serious argument for state action and due process can be mounted against any defendant who has a continuing relationship to a governmental body and is carrying on a function with a general public interest or concern.<sup>172</sup> This

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<sup>168</sup> See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>169</sup> *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Pendrell v. Chatham College*, 370 F. Supp. 494 (W.D. Pa. 1974); *Solomon v. Miami Womans' Club*, 359 F. Supp. 41 (S.D. Fla. 1973). But see *Rackin v. University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974).

<sup>170</sup> *Bronson v. Consolidated Edison*, 350 F. Supp. 443 (S.D. N.Y. 1972). See also *Limuel v. Southern Union Gas Co.*, 378 F. Supp. 964 (W.D. Tex. 1974); *Salisbury v. Southern New Eng. Tel. Co.*, 365 F. Supp. 1023 (D. Conn. 1973). But see *Edwards v. Philadelphia Elec. Co.*, 371 F. Supp. 1313 (E.D. Pa. 1974); *Jackson v. Metropolitan Edison*, 483 F.2d 754 (3d Cir. 1973), *aff'd*, 95 S. Ct. 449 (1974); *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

<sup>171</sup> *Smith v. YMCA*, 462 F.2d 634 (5th Cir. 1972).

<sup>172</sup> *Associated Students v. NCAA*, 493 F.2d 1251, 1254-55 (9th Cir. 1974); *Rackin v. University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974); *Golden v. Biscayne Bay Yacht Club*, 370 F. Supp. 1038 (S.D. Fla. 1973); *Anderson v. Denny*, 365 F. Supp. 1254, 1258-59 (W.D. Va. 1973); *Keller v. Kate Maremount Foundation*, 365 F. Supp.

is especially true when the function is also carried out by the state.<sup>173</sup>

Several decisions in which plaintiffs attacked repossessions under § 9-503 of the Uniform Commercial Code are highly relevant to the issue of state action. These cases emerge from a common factual and legal pattern. Initially, a purchaser enters into an installment contract for a consumer purchase. The contract allows the seller or the holder of the debt to repossess the purchased item upon a default, usually failure to make periodic payments. Pursuant to the contract and § 9-503, the "self-help" section of the commercial code, the consumer loses the chattel. Next the purchaser sues, charging that due process was ignored because there was no notice before the item was taken. In defense, the sellers argue that there was no state action and no federal jurisdiction under the Civil Rights Act. The purchasers reply that there is state action because the statute allows the seller or financier to repossess through self-help. They agree that no state official stamps papers, serves process or tows the car, but contend that statutory permission to repossess lends the required "color" of law. Notice and a hearing are thus required.<sup>174</sup> To date, however, such arguments have been largely unpersuasive; several courts have accepted the seller's private action defense<sup>175</sup> and, only a few have found

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798, 800-01 (N.D. Cal. 1972), *aff'd sub nom.* Geneva Towers Tenants' Organization v. Federated Mortgage, Inc., 504 F.2d 483 (9th Cir. 1974); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 438 (E.D. Pa. 1973); Suckle v. Madison Gen. Hosp., 362 F. Supp. 1196, 1199, 1209 (W.D. Wis. 1973).

<sup>173</sup> The educational institution cases are admittedly an anomaly. See, e.g., Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Broderick v. Catholic Univ., 365 F. Supp. 147 (D.D.C. 1973); Furumoto v. Lyman, 362 F. Supp. 1267, 1267-80 (N.D. Cal. 1973). They may be explained by the tradition of excellence in private education, deference to academic expertise, fear of a barrage of lawsuits and lack of compelling facts.

<sup>174</sup> See generally Note, *Constitutional Torts: Section 1983 Redress for the Deprived Debtor*, 14 WM. & MARY L. REV. 627 (1973).

<sup>175</sup> Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Gary v. Darnell, 505 F.2d 741 (6th Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974); Bowman v. Chrysler Credit Corp., 496 F.2d 1322 (5th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974); McDuffy v. Worthmore Furn., Inc., 380 F. Supp. 257 (E.D. Va. 1974); Mayhugh v. Bill Allen Chevrolet, 371 F. Supp. 1 (W.D.

state action.<sup>176</sup>

The arguments against finding state action in self-help repossession are varied. Courts have found that there was no state action because no government official participated<sup>177</sup> and because governmental process was not used.<sup>178</sup> In one recent suit, the buyer argued that the official act of issuing a "repossessed title" to the buyer of the vehicle was sufficient state action. The court held, however, that issuing the title was ministerial and adequately severed from the repossession and sale. There was, therefore, no state action.<sup>179</sup> One court stated that the statute creates "passive" state action but held that there must be "active" state action before due process is required.<sup>180</sup> Courts rejecting due process have also cited history and the common law<sup>181</sup> as well as the need for efficient and economical

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Mo. 1973); *Calderon v. United Furn. Co.*, 371 F. Supp. 572 (S.D. Tex. 1973); *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 437 (E.D. Tenn. 1973); *Shelton v. General Electric Credit Corp.*, 359 F. Supp. 1079 (M.D. Ga. 1973); *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Nev. 1972); *Green v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972) (the leading case); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971). See also *Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974) (mechanic's lien); *Fletcher v. Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927 (1st Cir. 1972) (bank set off is not state action); *Parks v. "Mr. Ford"*, 386 F. Supp. 1251 (E.D. Pa. 1975) (mechanic's lien); *Smith v. Bekins Moving & Storage Co.*, 384 F. Supp. 1261 (E.D. Pa. 1974) (warehouse lien); *Leisure Estates of America v. Carmel Dev. Co.*, 371 F. Supp. 556 (S.D. Tex. 1974) (repossession via deed of trust not state action); *Bichel Optical Labs, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973), *aff'g* 336 F. Supp. 1368 (D. Minn. 1971) (bank seizure of account and accounts receivable); *Kruger v. Wells Fargo Bank*, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (bank setoff); *Giglio v. Bank of Delaware*, 307 A.2d 816 (Del. Ch. 1973) (state decision of no state action).

<sup>176</sup> *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974); *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974). See also *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594, 597 (E.D. Mich. 1974) (mortgage foreclosure); *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (mechanic's lien).

<sup>177</sup> *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

<sup>178</sup> *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118, 121 (D. Neb. 1972).

<sup>179</sup> *Nichols v. Tower Grove Bank*, 362 F. Supp. 374, 377-78 (E.D. Mo. 1973). But cf. *Garner v. Tri-State Development Corp.*, 382 F. Supp. 377, 379 (E.D. Mich. 1974) (ministerial enough); *Ceaser v. Kiser*, 387 F. Supp. 645, 647-48 (M.D.N.C. 1975) (issuing title enough).

<sup>180</sup> *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672, 674-75 (W.D. Va. 1972).

<sup>181</sup> *Shirley v. State Nat'l Bank*, 493 F.2d 739, 742 (2d Cir. 1974); *Adams v. South-*

business operations.<sup>182</sup> Prior cases finding state action in similar circumstances are distinguished as arising from race discrimination, not due process.<sup>183</sup> Finally, cases finding state action and lack of due process in statutory liens are distinguished because the lien was created by statute alone and not by both the statute and a contract.<sup>184</sup>

The premise that self-help repossession lacks state action is stoutly defended in scholarly quarters.<sup>185</sup> The scholarly arguments are neither doctrinal nor constitutional, usually consisting of unsupported and perhaps unsupportable assumptions about individual and business motivation and the economic result of a decision striking down the code section.<sup>186</sup> The casual reader should be able to discern the alliance between these

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ern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir., *cert. denied*, 95 S. Ct. 325 (1974)); Shelton v. General Electric Credit Corp., 359 F. Supp. 1079, 1081 (M.D. Ga. 1973); Kirksey v. Theilig, 351 F. Supp. 727, 730 (D. Colo. 1972); Kruger v. Wells Fargo Bank, 521 P.2d 441, 113 Cal. Rptr. 449 (1974); Messenger v. Sandy Motors, Inc., 295 A.2d 402 (N.J. Super. 1972).

<sup>182</sup> Mayhugh v. Bill Allen Chevrolet, 371 F. Supp. 1 (W.D. Mo. 1973); Kirksey v. Theilig, 351 F. Supp. 727, 730-31 (D. Colo. 1972).

<sup>183</sup> Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S.Ct. 325 (1974); Mayhugh v. Bill Allen Chevrolet, 371 F. Supp. 1 (W.D. Mo. 1973); Shelton v. General Electric Credit Corp., 359 F. Supp. 1079, 1081 (M.D. Ga. 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 121 (D. Nev. 1972); Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972). *See also* Kruger v. Wells Fargo Bank, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (statute allowing setoff recognized but did not create right).

<sup>184</sup> Shelton v. General Electric Credit Corp., 359 F. Supp. 1079, 1081 (M.D. Ga. 1973); Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

<sup>185</sup> R. HENSON, *supra*, note 150, at § 10-18; Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973). *See also* Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment, Parts I & II*, 46 S. CAL. L. REV. 1003 (1973); *Part III*, 47 S. CAL. L. REV. 1 (1973). These creditor's briefs are well researched, well written, well reasoned and *wrong*. Stripped of doctrine, the authors take the economic royalist-small government position. Their position is that the government should not intercede in existing economic-social power relationships; that generally, freedom for the trout is death for the minnow, which is good.

<sup>186</sup> *See* R. HENSON, *supra* note 150, at 265: "The patent absurdity of finding unconstitutional a provision appearing in a statute promulgated by the American Law Institute and The National Conference of Commissioners on Uniform State Laws. . . . In essentially all instances where self help repossessions are used, there is no question of the debtor's being in default. . . ." *See also id.* at 263-64; Mentschikoff, *supra* note 185: "With notice of impending repossession, the dishonest debtor tends to disappear so that the collateral in fact relied on in making the loan is gone." *Id.* at 779.

academicians and the financing interests and to discount the argument accordingly.<sup>187</sup> The economic argument, as Professor White demonstrated, is overstated.<sup>188</sup> Professor Wallace has stated the other side of the economic argument<sup>189</sup> with contrary arguments that are equally compelling. Due process seeks to be protective and, perforce, is expensive and time consuming.<sup>190</sup> Constitutional questions, however, should not be decided solely for economic reasons. This is especially true when a plausible argument can be mounted for the other side.<sup>191</sup> All the values which will be advanced and retarded should be tested in a factual crucible.

The district courts in *Boland v. Essex County Bank & Trust Co.*,<sup>192</sup> *Adams v. Egley*<sup>193</sup> and *Gibbs v. Titelman*<sup>194</sup> found state action. The *Adams* court first recognized the self-executing private contracts and distinguished taking property solely under the statute.<sup>195</sup> *Reitman v. Mulkey*<sup>196</sup> was held to be

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<sup>187</sup> Cf. Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and Proposed Salvation*, 51 ORE. L. REV. 302, 306-08 (1972). Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952).

<sup>188</sup> White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WISC. L. REV. 503. Professor White, although sound in what he assails, is mischievous in some of what he accepts. See also Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973); Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973); Johnson, *A Response to Dauer and Gilhool: A Defense of Self-Help Repossession*, 47 S. CAL. L. REV. 151 (1973) (the full debate).

<sup>189</sup> Wallace, *The Logic of Consumer Credit Reform*, 82 YALE L. J. 409 (1973). See also *Gibbs v. Titelman*, 369 F. Supp. 38, 55-57 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974).

<sup>190</sup> *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972); see also *Bell v. Burson*, 402 U.S. 535, 540-41 (1971).

<sup>191</sup> See Clark & Landers, *supra* note 146, at 377-83. Professors Clark and Landers conclude that there is sufficient state involvement to invoke the fourteenth amendment in § 9-503 cases. They say that it could be found to be so under the "state functions" theory (private individuals doing what state officials would ordinarily do, with the distinction blurred in the consumer's mind); or the "entwinement" theory (that the UCC is *not* a neutral legislation, considered in totality, but is rather creditor-oriented; and the state's enactment of it inextricably involves the state in a repossession case).

<sup>192</sup> 361 F. Supp. 917 (D. Mass. 1973).

<sup>193</sup> 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974).

<sup>194</sup> 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974).

<sup>195</sup> *Adams v. Egley*, 338 F. Supp. 614, 617 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974).

<sup>196</sup> 402 U.S. 608 (1971).

decisive on the issue of state action. In *Reitman*, the Supreme Court struck down a state constitutional provision which interdicted the government from regulating the sale or rental of real property. The constitutional provision, in the particular ambience, placed a governmental imprimatur on "private" discriminatory conduct. If the discrimination were performed by the government, it would be unconstitutional. The Court found in this the requisite state action to bring the equal protection clause into play and to void the provision. The *Adams* court applied *Reitman* to self-help repossession. Since the contract allowing the secured party to take and the later taking were authorized by § 9-503, and because "the right is created by state law," the property was taken under "color of law" and the court had jurisdiction to hear and determine the due process issue.<sup>197</sup>

Other courts have developed state action reasoning further. In *Boland v. Essex County Bank & Trust Co.*,<sup>198</sup> the court suggested a state action theory in self-help repossessions. There might be, the court said, "a close working arrangement between reposseors and the police and court officials . . ."<sup>199</sup> This arrangement needed to be explored. In *Gibbs v. Titelman*,<sup>200</sup> the court faced the historical and passive-ministerial arguments. Self-help repossession's historical antecedents were located, traced, found slim and rejected as inapplicable to the present day.<sup>201</sup> The court rejected the argument that the state was only passively involved as begging the

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<sup>198</sup> 387 U.S. 369 (1967).

<sup>197</sup> *Adams v. Egley*, 338 F. Supp. 614, 618 (S.D. Cal. 1972), *rev'd sub nom.* *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974). *See also* *Central Sec. Nat'l Bank v. Royal Homes, Inc.*, 371 F. Supp. 476 (E.D. Mich. 1974); *Gibbs v. Titelman*, 369 F. Supp. 38, 49 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974); *Tunheim v. Bowman*, 366 F. Supp. 1395, 1396 (D. Nev. 1973); *Bond v. Dentzer*, 362 F. Supp. 1373, 1379-81 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974); *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917, 920-21 (D. Mass. 1973); *Klim v. Jones*, 315 F. Supp. 109, 114 (N.D. Cal. 1970); *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

<sup>198</sup> 361 F. Supp. 917 (D. Mass. 1973).

<sup>199</sup> *Id.* at 921.

<sup>200</sup> 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974).

<sup>201</sup> *Id.* at 45-47. *See also* *McCall, The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973). The article narrowly and legalistically traces legal terms without referring to social context. Judge Bechtel views self-help as a stage in social evolution and as a feudal anachronism.

question. By looking at the actions of the state at the time of the repossessions, the real thrust of state action is overlooked. The thrust is the power to do the acts that deny due process, and the state action comes when that power is delegated.<sup>202</sup>

*Blye v. Globe-Wernicke Realty Co.*<sup>203</sup> and *Bond v. Dentzer*<sup>204</sup> posit a similar state action theory in due process cases. The litigation in *Blye* attacked a seizure under an innkeeper's lien law and in *Bond* a wage assignment agreement. State conduct was absent in both procedures, yet in each the court found state action. In *Blye* the court focused upon the actions taken, and held that even when a traditionally public function such as execution or attachment is performed by private persons, the conduct is sufficiently state action to compel due process.<sup>205</sup> In *Bond*, the court found state action under another theory, reasoning that the wage assignment scheme merged "state power and private economic interests," and that the state, by delegating the power, became a "silent business partner with private interest."<sup>206</sup>

In yet another case, *Cockerel v. Caldwell*,<sup>207</sup> the court found state action even though the statute involved merely

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<sup>202</sup> *Gibbs v. Titelman*, 369 F. Supp. 38, 47-48 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974). For an interesting and novel approach to the delegation argument, see Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 PENN. L. REV. 954, 962-63 (1974). There Professor Yudof concludes that there is sufficient precedent for a court to find state action if it is so inclined. He concludes that the power to repossess should not be delegable to private parties, absent the restrictions that would be placed on the state. Thus, under this approach, private parties could not have power to repossess without the attendant procedural requirements, or the delegation of the power itself violates due process and is unconstitutional.

<sup>203</sup> 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>204</sup> 362 F. Supp. 1373 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974).

<sup>205</sup> *Bond v. Dentzer*, 362 F. Supp. 1373, 1381 (N.D. N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974); *Blye v. Globe-Wernicke Realty Co.*, 347 N.Y.S.2d 170, 174-75 (1973). See also *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 690-98 (1974).

<sup>206</sup> *Bond v. Dentzer*, 362 F. Supp. 1373, 1378-79 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974); *Shirley v. State Nat'l Bank*, 493 F.2d 739, 745-47 (2d Cir. 1974) (Kaufman, C. J., in dissent argues that there is state action because the statute delegates the state monopoly of dispute settlement); *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594, 597 (E.D. Mich. 1974) (statute allows foreclosure). See also *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917, 921 (D. Mass. 1973); Countryman, *supra* note 70, at 553.

<sup>207</sup> 378 F. Supp. 491 (W.D. Ky. 1974).

codified the common law. In *Cockerel*, the defendant sold the plaintiff's automobile to satisfy his claim for a repair and storage bill, pursuant to a Kentucky garageman's lien statute. The court held that the sale of the automobile violated due process where no procedural requirements were met and the fact that the statute merely restated decisional law was held to be immaterial. Where a statute confers upon an individual the right to act in derogation of the fourteenth amendment, then the necessary element of state action is present.<sup>208</sup> The court considered the state action question, and determined that because the statute gives the garageman the means of extinguishing the owner's right in the automobile, there is sufficient state action. But as to the garageman's authority to retain the automobile, this only preserved the garageman's possessory interest in the improvements made, and only delays the owner's rights until an adjudication is possible, rather than extinguishing them.<sup>209</sup> Thus when the legal arguments against state action are examined in depth, they are reduced in force.

The weakness of the "no state action" position in § 9-503 repossession is further illustrated by an examination of the analytical approach taken by its adherents. They view the basic issue as, ". . . whether all conduct authorized by a statute is state action."<sup>210</sup> This states the question so broadly that it raises the specter of expanded governmental power and increased judicial business. The issue needs to be stated more precisely and realistically. The question as ordinarily stated also ignores part of the problem. Unjustified interference with a possessory right in personal property is conversion, an ancient and well recognized tort.<sup>211</sup> Property normally cannot be taken

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<sup>208</sup> *Id.* at 494. But it should be pointed out that only the statute authorizing the garageman to sell the automobile was invalidated. The statute authorizing its detention was upheld. See Motion to Alter and Amend Order, *id.* at 496-98. See also Ceaser v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

<sup>209</sup> 378 F. Supp. at 498.

<sup>210</sup> White, *supra* note 188, at 506; Horowitz and Karst, *The California Supreme Court and State Action Under the Fourteenth Amendment: The Leader Beclouds the Issue*, 21 U.C.L.A. Rev. 1421 (1974).

<sup>211</sup> W. PROSSER, TORTS § 15 (1971); Cf. Klim v. Jones, 315 F. Supp. 109, 114 (N.D. Cal. 1970); see Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 666 n.59 (1974), where the author points out that the draftsmen of the fourteenth amendment intended for it to apply to state statutes changing the common law.



without procedural due process.<sup>212</sup> Both conversion and due process are intended to prevent misuse of power and to protect private property. The tort protects the citizen from private overreaching, and due process prevents abuse of public power. If a litigant takes another's property without proper procedure, due process is denied. If a private person takes another's property, it is converted. Section 9-503 *legalizes* conduct which is a tort if privately done and a denial of due process if publicly done.<sup>213</sup>

*Fuentes v. Shevin* sheds additional light on the complex state action question. In *Fuentes* it was unnecessary to discuss the state action issue, since, under the procedure attacked, officials processed the paper which set the taking in motion.<sup>214</sup> The concern in *Fuentes*, *i.e.*, to prevent private persons from abusing public power, was expressed by the Court:

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek the writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.<sup>215</sup>

To prevent potential misuse, the Court required an adversary hearing as a check to determine whether the applicant's claim is valid before the possessory interest is disturbed. The process is designed to identify both debtors' and creditors' false conclusions.

Under *Fuentes*, then, the amount of concern over possible overreaching should be inversely proportional to the amount of official inquiry into the private taking. When property is taken by private initiative without filling out any forms and without any state official participating in the process, the potential for abuse is greater than when pleadings, certification and service are required. The argument against state action in § 9-503

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<sup>212</sup> *Robinson v. Hanrahan*, 409 U.S. 38 (1972).

<sup>213</sup> *McCormack*, 60 VA. L. REV. 1, 27 (1974).

<sup>214</sup> *Fuentes v. Shevin*, 407 U.S. 67, 74-75 (1972).

<sup>215</sup> *Id.* at 93.

repossession asserts that the smaller the governmental inquiry into a private person's using statutory power, the less reason to be concerned. But this is palpably contrary to the thrust of the due process cases.<sup>216</sup> Under due process theory, self-help repossession is, therefore, more clearly unconstitutional than *ex parte* replevin.<sup>217</sup> Protecting the possessor's interest from the completely unchecked use of publicly endorsed power is more compelling than the specious state action issue. The argument against state action in § 9-503 cases stressed the absence of state involvement. But focusing on the amount of action taken by the state poses one grave risk. It allows the protections stated by the Court in *Mitchell* to be important (*e.g.* approval by a judge, posting of a bond) to be whittled away because the court is only looking to the issue of whether agents of the state were involved, not to the more fundamental issue of due process protections. Government power will not expand except to insure that private disputes are settled fairly and to stunt the growth of private tyranny. The courts should be willing to find state action to ensure public control over repossession, to give the state control over *all* coercive interference with a possessory interest.<sup>218</sup> Focusing judgment on § 9-503 as a delegation of state power to private persons and following the analysis in *Fuentes* yields only one conclusion—that § 9-503 self-help repossession denies due process.<sup>219</sup>

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<sup>216</sup> *Gibbs v. Titelman*, 369 F. Supp. 38, 48 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974).

<sup>217</sup> Countryman, *supra* note 70, at 551-52. Chief Judge Kaufman's state action analysis of debtor creditor cases is similar. State action exists, he argues, when a statute delegates to a creditor the state's dispute resolving or adjudicative function. Thus, when a creditor asserts default and seizes property pursuant to statute, state action is present. See *Bond v. Dentzer*, 494 F.2d 302, 312-14 (2d Cir. 1974) (dissent); *Shirley v. State Nat'l Bank*, 493 F.2d 739, 745-47 (2d Cir. 1974) (dissent). This argument would appear to include a taking by bank setoff, as an "adjudicative" function, but this is contrary to the views of many commentators. See, *e.g.*, Clark & Landers, *supra* note 146, at 400-02.

<sup>218</sup> Yudof, *supra* note 202.

<sup>219</sup> The *Mitchell v. W.T. Grant* majority explicitly refrained from ruling on § 9-503. 416 U.S. 600, 618 n.13 (1974). In addition, the majority stressed judicial control as a factor in affirming *ex parte* repossession. But there is reason to think that self-help repossession will be approved. First, in article 9 repossessions, the property interest may be called "dual" because of the security interest. Second, Justice White has expressed willingness to defer to legislative judgment. *Fuentes v. Shevin*, 407 U.S. 67, 103 (1972) (dissent). Third, Justice White stressed the cost of procedural protections

The fact that a contract is involved in no way alters this conclusion, though it may have a practical effect on the outcome of a particular case. In the repossession cases, the sales and financing agreement allows the seller to repossess,<sup>220</sup> and § 9-503 creates and endorses the right to so agree. The Court in *Adams v. Egley* correctly holds the agreement irrelevant to the state action question.<sup>221</sup> The agreement, however, raises a separate issue: whether the right to notice and a hearing has been waived.<sup>222</sup> Waiver is a factual and pragmatic issue which turns on disclosure, knowledge and equality.<sup>223</sup> In a consumer transaction, significant barriers to waiver are present. The merchant-consumer relationship connotes unequal sophistication and bargaining power: consideration may be lacking and, in any event, standardized forms normally are used. Moreover, in view of the great number of such transactions, it is safe to assume that these forms are seldom read or understood, since few people will knowingly place their property at another's mercy.<sup>224</sup> If, however, the buyer has an opportunity to compre-

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while almost ignoring their value. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 n.13 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972).

<sup>220</sup> See, e.g., *Nichols v. Tower Grove Bank*, 362 F. Supp. 374, 376 (E.D. Mo. 1973); *Giglio v. Bank of Delaware*, 307 A.2d 816, 818 (Del. Ch. 1973).

<sup>221</sup> *Adams v. Egley*, 338 F. Supp. 614, 618 (S.D. Cal. 1972), *Rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank* 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974).

<sup>222</sup> *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972); *Overmyer v. Frick*, 405 U.S. 174 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972). Professor White states that waiver is an "essentially dishonest" solution in self-help repossession cases. White, *supra* note 188, at 508-09.

<sup>223</sup> See, e.g., *Garner v. Tri State Development Corp.*, 382 F. Supp. 377, 381 (E.D. Mich. 1974); *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594, 599 (E.D. Mich. 1974); *Law v. United States Dep't of Ag.*, 366 F. Supp. 1233, 1239-40 (N.D. Ga. 1973); *Klein v. New Castle County*, 370 F. Supp. 85, 89-91 (D. Del. 1974). If the waiver issue grows out of an "adhesion" contract, the courts are less willing to find waiver and may decide the issue on "social facts." See *Gonzalez v. County of Hidalgo*, 489 F.2d 1043, 1049-50 (5th Cir. 1973); *Gibbs v. Titelman*, 369 F. Supp. 38, 57-58 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974) ("A buyer's signature to a contract of this type does not amount to a knowing and intelligent waiver of his constitutional rights"). But see *W.T. Grant Co. v. Mitchell*, 269 So. 2d 186, 191 (1972) (finding knowledge and relinquishment from signing agreement), *aff'd*, 416 U.S. 600 (1974) (waiver not mentioned).

<sup>224</sup> *Gonzalez v. County of Hidalgo*, 489 F.2d 1043, 1049-50 (5th Cir. 1973); *Gibbs v. Titelman*, 369 F. Supp. 38, 57-58 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974); *Bond v. Dentzer*, 362 F. Supp. 1373, 1387-88 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974).

hend what is at stake, to consider the alternatives, and to reject his right to due process, then despite the presence of state action, notice and a hearing may be waived.<sup>225</sup> There may also be a cost which must be either absorbed by the enterprises or passed on to the consumers,<sup>226</sup> but these expenses might be reduced by notice providing for waiver and by attenuated hearings.<sup>227</sup> If in most cases the creditor's grievance is legitimate, waivers and brief hearings should be the rule rather than the exception.<sup>228</sup> Finally, the need to repossess can be lessened by increased care in extending credit.<sup>229</sup>

An additional consideration bearing on the § 9-503 state action issue can be summarized as follows: if the argument that state action is absent in self-help repossession is upheld, there will be an effect far beyond § 9-503. As due process has advanced, a variety of ex parte statutory procedures have been called into question. Many statutes allowed private persons to take property without any governmental restraint. The cases include utility terminations,<sup>230</sup> landlord's liens on tenant's property,<sup>231</sup> landlord's liens on tenant's property plus ejectment from the leased premises,<sup>232</sup> confession of judgment,<sup>233</sup> trustee judgments<sup>234</sup> and bankers' liens.<sup>235</sup> In striking down these stat-

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<sup>225</sup> Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 78 Com. L.J. 283, 288 (1973); *Law v. United States Dep't of Ag.*, 366 F. Supp. 1233, 1239-40 (N.D. Ga. 1973).

<sup>226</sup> *But cf.* Wallace, *supra* note 189.

<sup>227</sup> *Fuentes v. Shevin*, 407 U.S. 67, 94 (1972); *Lindsey v. Normet*, 405 U.S. 56, 64 (1972).

<sup>228</sup> *Bond v. Dentzer*, 362 F. Supp. 1373, 1388 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974).

<sup>229</sup> Wallace, *supra* note 139.

<sup>230</sup> *Palmer v. Columbia Gas*, 479 F.2d 153 (6th Cir. 1973); *Edwards v. Philadelphia Elec. Co.*, 371 F. Supp. 1313 (E.D. Pa. 1974); *Bronson v. Consolidated Edison Co.*, 350 F. Supp. 443 (S.D.N.Y. 1972). *But see* *Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974).

<sup>231</sup> *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972); *Gross v. Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *Shaffer v. Holbrook*, 346 F. Supp. 762 (S.D.W. Va. 1972); *State ex rel. Payne v. Walden*, 190 S.E.2d 770 (W. Va. 1972).

<sup>232</sup> *Barber v. Rader*, 350 F. Supp. 183 (S.D. Fla. 1972); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>233</sup> *Osmond v. Spence*, 359 F. Supp. 124 (D. Del. 1972).

<sup>234</sup> *Trapper Brown Constr. Co. v. Electromech, Inc.*, 358 F. Supp. 105 (D.N.H. 1973).

<sup>235</sup> *Kruger v. Wells Fargo Bank*, 107 Cal. Rptr. 133 (Ct. App. 1973), *rev'd*, 521 P.2d 441, 113 Cal. Rptr. 449 (1974).

utes, the courts have found state action in the statutory permission to perform an otherwise illegal act.<sup>236</sup> Because they bestow on one person the unbridled power to take another's property, the statutes are unconstitutional.<sup>237</sup> By and large, these statutes are indistinguishable from § 9-503 in allowing one private citizen to take another private citizen's property.<sup>238</sup> The sphere of conduct permitted under them was broad. For example, it was legal to enter a home,<sup>239</sup> to expel a citizen from his home,<sup>240</sup> to seize unsecured property,<sup>241</sup> and even to confiscate property from people unrelated to the controversy.<sup>242</sup> The statutory schemes, moreover, were less protective than the Uniform Commercial Code. Often no remedy other than an unnamed tort was provided, while under the Code, breaches of the peace are forbidden and a commercially reasonable resale is required.<sup>243</sup> In short, the ex parte statutes presented a wide field for overreaching, and there were thus compelling reasons

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<sup>236</sup> See, e.g., *Hall v. Garson*, 468 F.2d 845, 848 (5th Cir. 1972). See also *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>237</sup> See, e.g., *Hall v. Garson*, 468 F.2d 845, 848 (5th Cir. 1972); *Barber v. Rader*, 350 F. Supp. 183, 185 (S.D. Fla. 1972). *Palmer v. Columbia Gas*, 479 F.2d 153, 161-65 (6th Cir. 1973); *Salisbury v. Southern New Eng. Tel. Co.*, 365 F. Supp. 1023 (D. Conn. 1973).

<sup>238</sup> *Gibbs v. Titelman*, 369 F. Supp. 38, 50 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974). In two § 9-503 cases *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972), which invalidated landlords lien statutes, was distinguished as a permissible finding of state action. In *Hall*, the courts said that the taking was under statute alone, while under § 9-503 the taking was pursuant to both statute and agreement. *Shelton v. General Electric Credit Corp.*, 359 F. Supp. 1097, 1081 (M.D. Ga. 1973); *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972). But § 9-503 allows the parties to agree. The agreement may relate to waiver but is irrelevant to state action. Another § 9-503 case distinguished *Hall* by saying that there was state action because the landlord could enter the tenant's home and seize property unrelated to the debt. *Calderon v. United Furniture Co.*, 505 F.2d 950 (5th Cir. 1974). Whether the interest in the seized property is dual may relate to what due process requires. See *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974). But it seems irrelevant to the state action issue.

<sup>239</sup> *Palmer v. Columbia Gas*, 479 F.2d 153 (6th Cir. 1973); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>240</sup> *Barber v. Rader*, 350 F. Supp. 183, 185 (S.D. Fla. 1972); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>241</sup> See, e.g., *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *Kruger v. Wells Fargo Bank*, 107 Cal. Rptr. 133 (Ct. App. 1973), *rev'd*, 521 P.2d 441, 113 Cal. Rptr. 449 (1974); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

<sup>242</sup> *Gross v. Fox*, 349 F. Supp. 1164, 1165-66 (E.D. Pa. 1972).

<sup>243</sup> UNIFORM COMMERCIAL CODE § 9-503, § 9-504(3) (1972 text).

to abolish them. If, however, it is held that there is no state action under § 9-503, it is questionable whether these statutes were properly abolished on due process grounds. Thus, the ultimate effect of finding no state action in § 9-503 repossessions may be to validate procedures far more opprobrious in their operation than any available under the Uniform Commercial Code.

There is, finally, an alternative to repossessing. In consumer finance cases, the creditor has a legitimate interest in either being paid or recovering the collateral. For this reason the debtor should be prevented from selling the collateral, removing it from the jurisdiction, or hiding it. But *Fuentes* held that the creditor cannot disturb the debtor's contractual right to possession without notice and a hearing,<sup>244</sup> and this makes it more difficult to recover secured property from defaulted debtors. A creditor may justifiably fear that a debtor will destroy, hide, remove or sell the property upon receiving notice of an impending repossession hearing. If so, a creditor can secure an ex parte order that does not disturb the debtor's possessory interest but interdicts destruction, sale or removal.<sup>245</sup> Then the creditor can give notice and repossess. This remedy has the obvious drawbacks of possible expense for the extra hearing, and the loss to the creditor of the leverage of summary taking of the property. But it backs the creditor's contractual rights with the threat of contempt.<sup>246</sup> So long as this less onerous alternative is available, creditors can protect their legitimate interests without interfering with debtors' property rights.

As the foregoing discussion demonstrates, a great deal has been written on the state action issue in self-help repossession and other due process cases. The heart of the matter can be simply stated. *Fuentes* and other leading due process cases struck down statutes because they allowed one private citizen to affect another private citizen's constitutionally protected interest without adequate government control. Private power was subjected to a judicial scrutiny. The argument against

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<sup>244</sup> *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). If *Mitchell* dilutes or changes *Fuentes* by finding dual interests in secured personal property, this paragraph is less relevant than it was before *Mitchell* was decided.

<sup>245</sup> FED. R. CIV. P. 65(b); VA. CODE ANN. § 8-614 (1950).

<sup>246</sup> *Cf. Chrysler Credit Corp. v. Waegle*, 105 Cal. Rptr. 914 (Ct. App. 1972).

state action converts the defect into a virtue by allowing the absence of any governmental restraint to become a reason to deny relief completely. This logical flaw reveals the irony of accepting the argument that statutory permission to repossess is not state action. The state action line must be drawn somewhere. It should be drawn to embrace conduct which, except for statutory permission, is a common law tort.<sup>247</sup> The opinions which refuse to find state action should suffer the same fate as those which read *Sniadach v. Family Finance* narrowly. They should be disapproved.<sup>248</sup>

### 3. "Persons" and Other Defendants

The Civil Rights Act limits defendants to "persons" acting under color of law who cause plaintiffs to be deprived of constitutional rights.<sup>249</sup> As might be expected, this limitation, though based upon sound policies, creates both practical and conceptual difficulties. The person concept is related to personal<sup>250</sup> and sovereign immunity.<sup>251</sup> The personal immunities were borrowed from the common law where they were designed to protect government officials who erroneously but legitimately exercised official discretion.<sup>252</sup> The personal immunity concepts will be treated extensively below, but the primary concern here is with sovereign immunity to which the discussion will return after focusing upon some preliminary background matters.

Governmental liability to a Civil Rights Act plaintiff was debated by Congress in 1871 and omitted from the Civil Rights Act.<sup>253</sup> Thus, in 1961 the Supreme Court held that the City of Chicago was an improper defendant in a Civil Rights Act dam-

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<sup>247</sup> Note, *supra* note 211. Since interruption of possession without permission was a tort of common law, and § 9-503 authorizes the creditor to do so legally, the draftsmen of the fourteenth amendment would have intended to include this change from the common law by statute within the concept of state action.

<sup>248</sup> *Fuentes v. Shevin*, 407 U.S. 67, 69 (1972).

<sup>249</sup> See generally McCormack, 60 VA. L. REV. 1, 28-34 (1974). The plaintiffs are not so limited. A corporation may be a § 1983 plaintiff. *Trapper Brown Construction Co. v. Electromech, Inc.*, 358 F. Supp. 105, 106-07 (D.N.H. 1973). See also *Undergraduate Student Ass'n v. Peltason*, 359 F. Supp. 320 (N.D. Ill. 1973).

<sup>250</sup> McCormack, 60 VA. L. REV. 1, 11-17 (1974).

<sup>251</sup> *Id.* at 36-52.

<sup>252</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>253</sup> The legislative history is discussed in *Monroe v. Pape*, 365 U.S. 167, 188-92 (1961).

age action.<sup>254</sup> In *Moor v. County of Alameda*,<sup>255</sup> the Court considered the impact of § 1988 which, if federal law is incomplete in a Civil Rights Act suit, allows federal courts to use state law to fill gaps. The state had abrogated county damage immunity. Plaintiff argued that when dealing with the § 1983 claim, § 1988 authorizes the district court to pick up the state cause of action against the county. The Supreme Court, citing the plain language of the Civil Rights Act and legislative history, rejected plaintiff's argument and affirmed the decision to grant the county's motion to dismiss.<sup>256</sup>

*Moor* was extended in *City of Kenosha v. Bruno*.<sup>257</sup> In that case licensees had sued the city charging that a refusal to renew their licences denied them due process, asking only declaratory and injunctive relief. There was some previous thought that cities could be proper defendants in a Civil Rights Act case seeking only equitable relief. The Supreme Court, however, held that a district court lacks Civil Rights Act jurisdiction over a city even though no damages are asked.<sup>258</sup>

*Moor* and *Kenosha* should not create many serious problems. The governmental defendants will merely be dismissed.<sup>259</sup> Prior cases against governmental defendants<sup>260</sup> will be treated as aberrational. As has always been true in damage actions, plaintiffs must sue the responsible color of law defendants. Injunction cases offer a little more difficulty, because relief is prospective and officers change. But Federal Rule of Civil Procedure 25(d) has been held to bind a successor to public office to obey an injunction granted against his prede-

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<sup>254</sup> *Id.* at 191-92.

<sup>255</sup> 411 U.S. 693 (1973).

<sup>256</sup> *Id.* at 710.

<sup>257</sup> 412 U.S. 507 (1973).

<sup>258</sup> *Id.* at 512-13. Justice Douglas dissented, arguing that the legislative history did not support a bar to equitable relief against a local government entity. *Id.* at 516-20.

<sup>259</sup> See, e.g., *Freitag v. Carter*, 489 F.2d 1377, 1384 (7th Cir. 1973); *Harper v. Kloster*, 486 F.2d 1134, 1137-38 (4th Cir. 1973); *Monos v. City of Green Bay*, 372 F. Supp. 40 (E.D. Wis. 1974); *Edwards v. Philadelphia Elec. Co.*, 371 F. Supp. 1313 (E.D. Pa. 1974); *Tilli v. City of Northampton*, 370 F. Supp. 459 (E.D. Pa. 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Downs v. Department of Pub. Welfare*, 368 F. Supp. 454, 460-61 (E.D. Pa. 1973); *Nyberg v. City of Virginia*, 361 F. Supp. 932, 937 (D. Minn. 1973).

<sup>260</sup> See, e.g., *Pioneer Sav. & Loan Co. v. City of Cleveland*, 479 F.2d 595 (6th Cir. 1973); *Dailey v. City of Lawton*, 425 F.2d 1037, 1038-39 (10th Cir. 1970).



cessor.<sup>261</sup> Thus, the injunction will continue to be an effective remedial tool under the Civil Rights Acts. Even so, conceptual problems appear because citing Rule 25(d) focuses attention on the fictional nature of the inquiry. Rule 25(d) substitutes a successor in office only when the predecessor is a party "in his official capacity." But only "persons" can be defendants. Tension lurks in the personal-official dichotomy.

*Ex Parte Young*<sup>262</sup> held that a federal court could enjoin a state officer from enforcing an unconstitutional state act. The *Young* result is ostensibly incongruous with the doctrine of sovereign immunity expressed in the eleventh amendment. Reconciling this incongruity in an intellectually satisfactory fashion is difficult. The Court handled the problem by looking at the state official's act as simply illegal if pursuant to an unconstitutional statute. In such instances, the official is deprived of sovereign immunity as a defense. He is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."<sup>263</sup>

*Ex Parte Young* solves the sovereign immunity problem with a legal fiction.<sup>264</sup> Since the fourteenth amendment only bars state action, most lawsuits of this sort are, in fact, against a governmental policy rather than an individual or person. Yet, only persons may be sued. *Ex Parte Young*'s person fiction, however, allows the federal courts to avoid sovereign immunity's potentially serious injustice, preserve judicial review and maintain federal supremacy while simultaneously paying symbolic obeisance to the role of states in the federal system. Under Rule 25(b) a successor to office may be substituted as a defendant when his predecessor was sued officially. Yet, under *Young* a state official can only be sued individually. Thus, as if to further expose the person fiction, Rule 25(d) appears to bind the office in addition to the individual.<sup>265</sup>

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<sup>261</sup> *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd*, 328 F.2d 892 (5th Cir. 1964).

<sup>262</sup> 209 U.S. 123 (1908).

<sup>263</sup> *Id.* at 160.

<sup>264</sup> K. DAVIS, *supra* note 92, at § 27.03. C. WRIGHT, *FEDERAL COURTS* § 48 (2d ed. 1970). Craven, *Paeon to Pragmatism*, 50 N.C.L. REV. 977, 984-88 (1972) is an excellent and incisive discussion of the fictional nature of *Ex Parte Young*.

<sup>265</sup> See O. FISS, *INJUNCTIONS* 702 (1972).

The person concept in the Civil Rights Act anticipates the *Ex Parte Young* person fiction. The problem did not become apparent until the Act became a litigation tool in the 1960's. Some Civil Rights Act actions are run-of-the-mill tort cases brought against an official who has behaved aberrationally.<sup>266</sup> In most Civil Rights Act suits, however, a governmental policy, a statute, an administrative regulation or practice is attacked. The official is a defendant only as a formality. In these cases, even though the conduct is mandated or general, *Moor* and *Kenosha* compel the plaintiff to name individuals as defendants.<sup>267</sup>

In a damage case, the Civil Rights Act plaintiff is deprived of the governmental entity as a solvent defendant. The Act's language is clear, and has not been amended even though it may be based on superannuated notions of sovereign immunity.<sup>268</sup> As a policy matter, limiting a plaintiff to individual defendants could be supported by a desire to punish the individual malefactor's fault. Also, depriving the plaintiff of the entity as a defendant could be supported by a desire to protect the general public purse.<sup>269</sup> These factors coupled with the comity inherent in federalism might be sufficient to outweigh the plaintiff's need for the entity as a defendant. The final result, however, is that a plaintiff may be deprived of damages simply because the responsible defendant is impecunious.<sup>270</sup>

The person concept and the accompanying fictions have additional consequences in Civil Rights Act cases. Courts lacking an understanding of the underlying fictions hold that an action against named individuals is "really" against the government and extend sovereign immunity's injustice.<sup>271</sup> *Krause v. Rhodes*,<sup>272</sup> which grew out of the May 1970 Kent State shoot-

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<sup>266</sup> See, e.g., *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (police officer allegedly stripped plaintiff and forced her to pose for indecent photographs).

<sup>267</sup> *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973).

<sup>268</sup> The legislative history is quoted in *Moor v. County of Alameda*, 411 U.S. 693, 708 n.24 (1973). See K. DAVIS, *supra* note 92, at §§ 26.01-27.07.

<sup>269</sup> This point is made in Justice Douglas' dissent in *City of Kenosha v. Bruno*, 412 U.S. 507, 516-20 (1973).

<sup>270</sup> Note *Vicarious Liability Under Section 1983*, 6 IND. L. REV. 509, 515 (1973).

<sup>271</sup> K. DAVIS, *supra* note 92, at § 27.03.

<sup>272</sup> 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom.* *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

ings, reveals this tendency. *Rhodes* is a wrongful death case brought against several officials by the victim's parents. The court of appeals, affirming the district court's dismissal, said that although individuals were named defendants, the lawsuits "are in substance and effect actions against the State of Ohio" and were "prohibited by the Eleventh Amendment."<sup>273</sup> The blunder is apparent when it is remembered that the doctrine of *Ex Parte Young* and the Civil Rights Acts were designed to allow lawsuits which are "in substance and effect actions against the state."

The Supreme Court rejected the notion that the officials were protected by sovereign immunity.<sup>274</sup> Applying *Ex Parte Young*, the Court held that sovereign immunity is "no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law."<sup>275</sup> The Court refused to distinguish between damages and the injunction in *Young*, observing that "in some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another."<sup>276</sup> Had a sensitive and highly charged controversy like the Kent State shootings been dismissed at the pleading stage because of sovereign immunity, the courts would have taken a step in the direction of abrogating the Civil Rights Acts. Instead, the Kent State litigation will be decided on the merits. If the courts apply the requisite personal immunity to the function and facts involved,<sup>277</sup> legitimate official discretion will be adequately protected.

Nevertheless, while holding that damages were available to the shooting victim's parents, the Court reaffirmed sovereign immunity's continued vitality. This was compelled by *Edelman v. Jordan*<sup>278</sup> in which the Court held that sovereign immunity barred a suit for retroactive welfare benefits. Future difficulties were created by these opinions because, at least on

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<sup>273</sup> *Krause v. Rhodes*, 471 F.2d 430, 442 (6th Cir. 1972). See also *Williams v. Eaton*, 443 F.2d 422, 429 (10th Cir. 1971) for similar conclusions.

<sup>274</sup> *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

<sup>275</sup> *Id.* at 237.

<sup>276</sup> *Id.* at 238.

<sup>277</sup> The Court generally accepted the dissent in the Court of Appeals. See 471 F.2d at 447-68. The personal immunities are discussed at length in Part II below.

<sup>278</sup> 415 U.S. 651 (1974).

a verbal level, the differences between *Edelman* and *Rhodes* are elusive. In *Rhodes*, the Court said that sovereign immunity "bars suits not only against the state when it is the named party but when it is the party in fact."<sup>279</sup> But, while a plaintiff may not seek damages from the public treasury, the Kent State plaintiffs were not barred by sovereign immunity because ". . . they are seeking to impose individual and personal liability on the *named defendants* for what they claim . . . was a deprivation of federal rights by these defendants under the color of state law."<sup>280</sup>

*Edelman* involved "a very substantial amount of money which should have been paid, but was not."<sup>281</sup> The Court appeared to hold that retroactive payments were interdicted by sovereign immunity because the award "must be paid from public funds in the state treasury" and the action was, therefore, "in essence" against the state.<sup>282</sup> This conclusion appears to flow from the size of the damages. "These funds will obviously not be paid out of the pocket of petitioner *Edelman*"; "the funds to satisfy the award in this case must inevitably come from the [state's] general revenues."<sup>283</sup> But to distinguish sovereign immunity from potential liability on amount at issue is to place a premium on doing evil in large portions. Moreover, the Kent State plaintiffs asked \$11,000,000,<sup>284</sup> a sum that "obviously" will not be paid out of most defendant's pockets.

Also, while the "prospective" relief asked in *Ex Parte Young* may be distinguished from the "retroactive" relief asked in *Edelman*, these verbal categories do not serve to distinguish *Rhodes* and *Edelman*. The court system cannot extend either retroactive or prospective relief to dead children's parents, therefore money damages are substituted. The best that can be said for this analysis is that where the wrong has stopped, as in *Rhodes*, money damages will be extended. But where the wrong continues, as in *Edelman*, the defendant will be merely

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<sup>279</sup> *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The Court appeared, therefore, to reject McCormack's analysis. See McCormack, 60 VA. L. REV. 1, 36-52 (1974).

<sup>280</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974).

<sup>281</sup> 415 U.S. 651, 664 (1974).

<sup>282</sup> *Id.* at 663.

<sup>283</sup> *Id.* at 664, 65.

<sup>284</sup> *Krause v. Rhodes*, 471 F.2d 430, 433 (6th Cir. 1972).

ordered to cease. Now the inquiry is back where it began because this places a premium on continuing to do the wrong.

There are several verbal categories, such as legal-equitable, compensatory-remedial, and substitutionary-prospective; and the categories can be manipulated at leisure. But one thing is palpably clear. None provide an intellectual fabric which is responsive to underlying social reality. Sovereign immunity is a jumble too impenetrable even to be entertaining.<sup>285</sup> Realistically, sovereign immunity's effect can be obviated from the date of the decision into the future. *Edelman* holds that the courts may force a state to do what it should do, but may not force a state to do what it should have done. Thus, the proper tactical course is to sue early and to request immediate preliminary relief.

#### 4. *Extraordinary Circumstances and Nonemergencies*

Several cases decided before *Fuentes* allowed the government to affect significant citizen interests without notice and a hearing.<sup>286</sup> These incongruous opinions existed parallel to the developing new due process theories. In *Fuentes*, Justice Stewart formulated standards to explain and distinguish the earlier opinions. He went on to define the conditions for exercising the government's power on private interests in extraordinary circumstances without notice and a hearing. There are three requirements:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.<sup>287</sup>

This is a significant advance over earlier attempts to distin-

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<sup>285</sup> See the extensive citations and lucid discussion in McCormack, *supra* 60 VA. L. REV. 1, 36-52 (1974).

<sup>286</sup> See, e.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (drugs misbranded); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated food).

<sup>287</sup> *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

guish the summary seizure opinions.<sup>288</sup> Following Justice Stewart's reasoning, these cases are satisfactorily reconciled with developing ideas of due process.<sup>289</sup>

Almost all court actions are extraordinary situations, resulting from breakdowns in the usual social processes. If the emergency exception is allowed to expand, notice and a hearing might be obviated in almost every instance. The lower courts have, however, been careful to carry out the spirit of the "extraordinary situations" exception. Creditors, because only individual interests are at stake, have advanced the emergency argument without success. In *MacQueen v. Lambert*,<sup>290</sup> amicus argued that a landlord's lien could be summarily enforced against a tenant's property "under the recognized emergency exception." The court rejected the argument. "Emergency," the court wrote, "is the cry of intuition rather than reason. It should accordingly be used as an excuse for summary procedures only sparingly . . . ."<sup>291</sup> In *Gibbs v. Titelman*<sup>292</sup> defendants argued that the "general public interest" allowed them to repossess without notice and that requiring notice would raise the cost of credit to all and prevent some consumers from obtaining credit.<sup>293</sup> The court was unconvinced. Because hearings might be waived, it reasoned that only the opportunity to be heard was at issue. Further, it noted that, if due process is to be protective, it inevitably will involve some expense.<sup>294</sup> Several other courts have summarily rejected the "cry" of emergency as an excuse to proceed without notice.<sup>295</sup> The courts, it

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<sup>288</sup> *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969).

<sup>289</sup> Quasi in rem seizure to attain jurisdiction over a nonresident continues to be somewhat incongruous with developing ideas of due process. Compare *Lebowitz v. Forbes Leasing & Fin. Co.*, 456 F.2d 979 (3d Cir.), cert. denied, 409 U.S. 843 (1972); *Balter v. Bato Co.*, 385 F. Supp. 470 (W.D. Pa. 1975); *Central Sec. Nat'l Bank v. Royal Homes, Inc.*, 371 F. Supp. 476 (E.D. Mich. 1974); *Banks v. Superior Court*, 102 Cal. Rptr. 590 (Ct. App. 1972); with *Welsh v. Kinchla*, 386 F. Supp. 913 (D. Mass. 1975); *In re Law Research Services, Inc.*, 386 F. Supp. 749 (S.D.N.Y. 1974). See note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973).

<sup>290</sup> 348 F. Supp. 1334 (M.D. Fla. 1972).

<sup>291</sup> *Id.* at 1337-38.

<sup>292</sup> 369 F. Supp. 38 (E.D. Pa. 1973), rev'd, 502 F.2d 1107 (3d Cir. 1974).

<sup>293</sup> *Id.* at 56.

<sup>294</sup> *Id.* at 55-57. A trenchant note hints that "[c]reditors may never qualify . . . on . . . creditor status alone." Note, *supra* note 289, at 1027.

<sup>295</sup> *Gonzalez v. County of Hidalgo*, 489 F.2d 1043, 1050-51 (5th Cir. 1973); *Graff*

appears, are rejecting generalized emergencies and are requiring both statutorily defined and factually importunate situations. For example in *Newton v. Burgin*,<sup>286</sup> the court applied the extraordinary situations exception scrupulously to a child neglect case and found that the requirements were met. Thus, so long as the courts analyze the proper factors, *Fuentes'* emergency exception appears to be safe.<sup>297</sup>

One significant anomaly remains. The procedure for granting an ex parte temporary restraining order or preliminary injunction is significantly less restrictive than the "extraordinary situations" exception in *Fuentes*. Many state rules governing ex parte restraining orders are even less restrictive than the federal rule.<sup>298</sup> Under Federal Rule 65(b), the applicant must present sworn documents to a judge showing an "immediate and irreparable injury" that would result before the defendant can be heard. The applicant must also either give reasons for proceeding without notice or show unsuccessful efforts to reach the defendant. An important public or governmental interest is not required. Nor is it necessary for the state, acting within well defined guidelines, to retain strict control of the proceeding.<sup>299</sup>

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v. Nicholl, 370 F. Supp. 974, 982 (N.D. Ill. 1974); *Morrow Elec. Co. v. Cruse*, 370 F. Supp. 639 (N.D. Ga. 1974); *Roscoe v. Butler*, 367 F. Supp. 574 (D. Md. 1973); *Bay State Harness Horse Racing & Breeding Ass'n v. PPG Industries, Inc.*, 365 F. Supp. 1301, 1306 (D. Mass. 1973); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 720, 723 (D. Conn. 1973); *Commonwealth ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500, 511-12 (E.D. Pa. 1973); *Geisinger v. Voss*, 352 F. Supp. 104, 110 (E.D. Wis. 1972); *Bronson v. Consolidated Edison Co.*, 350 F. Supp. 443, 448 (S.D.N.Y. 1972); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974); *C.V.C. v. Superior Court*, 106 Cal. Rptr. 123, 127 (Ct. App. 1973); *Cf. Braxton v. Municipal Court*, 514 P.2d 697, 700, 109 Cal. Rptr. 897, 907 (1973). *But see Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (government seizure); *United States v. One 1967 Porsche*, 492 F.2d 893 (9th Cir. 1974) (crime); *Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598 (E.D. Pa. 1974) (government seizure); *Cook v. Carlson*, 364 F. Supp. 24, 28-29 (S.D.S.D. 1973) (incorrect); *W.T. Grant Co. v. Mitchell*, 269 So. 2d 186, 190-91 (1972), *aff'd on another point*, 416 U.S. 600 (1974). The exception is discussed in Note, *supra* note 289, at 1026-32.

<sup>286</sup> *Newton v. Burgin*, 363 F. Supp. 782, 786-88 (W.D.N.C. 1973).

<sup>287</sup> *But see Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598, 604 (E.D. Pa. 1974) (apparently applying a balancing test).

<sup>288</sup> Compare FED. R. CIV. P. 65(b) with VA. CODE ANN. §§ 8-610-26 (1950).

<sup>289</sup> The due process problems in ex parte injunctions and temporary restraining orders were considered in earlier articles by the author. Rendleman, *More on Void Orders*, 7 GA. L. REV. 246 (1973); Rendleman, *Toward Due Process in Injunction Procedure*, 1973 U. ILL. L.F. 221 (1973). Due Process attaches, I concluded, when the

Recent opinions have considered the constitutional issues involved in the granting of such temporary relief. In *Chrysler Credit Corp. v. Waegele*,<sup>300</sup> a creditor obtained an ex parte order forbidding a debtor from disposing of automobiles which were security for a loan. The debtor sold the automobiles, was held in contempt and appealed. He argued that the ex parte order violated due process. The court held that the ex parte order was constitutional and affirmed. It sought a "situation requiring special protection to a state or creditor interest" and found that in serving the interest of the plaintiff, the ex parte order "serves the interest of the state in the power of the courts to preserve the status quo as a necessary adjunct to their ability to render an effective judgment."<sup>301</sup> The standard the court applied was whether the plaintiff would suffer "great or irreparable injury" without the order. These words, the court said, "have been used often in our law and are capable of accurate judicial application. Their presence in this statute represents a significant 'narrowing' of the court's discretion in authorizing summary relief."<sup>302</sup> Finally, to grant an ex parte order, the court held, is "judicial" as opposed to "ministerial" and the order was only for a limited time. Thus, the *Waegele* court upheld ex parte restraining orders generally against a due process attack.

*Waegele* may be criticized. First, it can be said that to affirm the contempt it was unnecessary to hold the statute valid against a due process attack in all cases. In *Fuentes* the replevin interfered with a contractual right to possess, and in *Mitchell* both the plaintiff creditor and the defendant debtor had an interest in the secured property. But the *Waegele* order differs in three respects from the creditor's remedy in either of

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defendant has a constitutionally cognizable interest in his conduct. This interest is sufficiently affected when the order or injunction has "practical finality." Several arguments that due process does not mandate notice and a hearing were stated, examined and rejected. The arguments are that the order is not final, that the plaintiffs' need for speed and efficiency should prevail, that the standard provides adequate guidance, and that an improperly enjoined defendant may recover on the injunction bond. *Toward Due Process in Injunction Procedure, supra*, at 241-45, n.109-28. Injunctions and restraining orders are discussed here because of decisions which were published too late to add fully to those articles.

<sup>300</sup> 105 Cal. Rptr. 914 (Ct. App. 1972).

<sup>301</sup> *Id.* at 918.

<sup>302</sup> *Id.* at 917.



those cases: it did not lead to a seizure, the defendant's privacy was not invaded, and he was not ordered to do anything except to follow the contract.<sup>303</sup> Thus, the *Waegle* court might have held that the ex parte order was permissible because it did not impinge on any constitutionally cognizable interest.<sup>304</sup>

Secondly, *Waegle* reads the due process cases narrowly and fails to consider or apply *Fuentes*' extraordinary situations test for summary procedure. The Court in *Fuentes* specifically rejected a restricted reading of prior due process opinions stating that they were "in the mainstream of past cases . . . establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect."<sup>305</sup> In *Geisinger v. Voss*<sup>306</sup> an order that required a husband to vacate his home which was granted without notice or a hearing was assailed on due process grounds.<sup>307</sup> The *Geisinger* order was designed to protect the applicant's physical safety rather than, as in *Waegle*, the applicant's property. The *Geisinger* order constricted the defendant's conduct more drastically than the *Waegle* order. In *Geisinger*, the court applied *Fuentes*' "extraordinary situations" test. The relief sought, the court found, was private and did not advance "an important governmental or general public interest." Because of delay between granting and serving the order, the court did not discover any "special need for very prompt action." Even if there was such a need, the court did not understand why the applicant should summarily order the defendant to abandon his home. There was an alternative. The applicant could leave the home voluntarily. Finally, because a conclusory, standardized form was used without a factual inquiry, the court saw no need for ex parte procedure in the "particular instance."

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<sup>303</sup> *Waegle* was not the type of case considered in *More on Void Orders*, *supra* note 299, and *Toward Due Process in Injunction Procedure*, *supra* note 299. The order in *Waegle* related to property, not conduct. There was a bond to protect the defendant. And, there was no "practical finality;" rather the order protected a legitimate status quo. See *Toward Due Process in Injunction Procedure*, *supra* note 299, at 242 n.112.

<sup>304</sup> Cf. *Cook v. Carlson*, 364 F. Supp. 24, 27 (S.D.S.D. 1973).

<sup>305</sup> *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972).

<sup>306</sup> 352 F. Supp. 104 (E.D. Wis. 1972).

<sup>307</sup> *Id.* at 109. The order, granted by a family court commissioner, was analogous to an injunction. The issue was whether to convene a three judge court and the court discussed whether success was probable, not the ultimate merits.

When due process reasoning is applied to ex parte orders, the other branches of *Waegle* are undermined. The *Waegle* court stressed the presence of a judge and the "great or irreparable injury" standard. Judicial control was emphasized by the Court in *Mitchell* as a factor in approving ex parte repossession of secured property,<sup>308</sup> but that should not be read too broadly. Many injunctions circumscribe conduct or fourteenth amendment liberty. The *Mitchell* court was careful to approve only those ex parte orders which involve property.<sup>309</sup> In addition, the great or irreparable harm standard appears to be similar to the "broad fault standard" which in a "liberty" or conduct case is particularly inappropriate for documentary proof and which is appropriate for notice and a hearing. This is because that standard is "inherently subject to factual determination and adversarial input."<sup>310</sup> Unsupported allegations are no substitute for a hearing. The "great or irreparable injury standard" may be insignificant when the defendant has no right to be heard. Allegations "test no more than the applicant's belief in his rights" and because "private gain is at stake . . . the danger is all too great that his confidence in his own cause will be misplaced."<sup>311</sup>

The judicial act allowing ex parte relief is frequently not a deliberated one. The *Geisinger* court condemned the lack of a factual inquiry and the use of a conclusory, standardized form.<sup>312</sup> Forms for a variety of ex parte temporary injunctions are readily available,<sup>313</sup> and the drafting process may be no more than filling in blanks.<sup>314</sup> The order may be granted almost automatically.<sup>315</sup> When the applicant asks to circumscribe lib-

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<sup>308</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616 (1974).

<sup>309</sup> *Id.* at 611.

<sup>310</sup> *Id.* at 617.

<sup>311</sup> *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972).

<sup>312</sup> *Geisinger v. Voss*, 352 F. Supp. 104, 110 (E.D. Wis. 1972).

<sup>313</sup> See, e.g., Forms for injunctions to stop a student demonstration, INSTITUTE OF CONTINUING LEGAL EDUCATION, LAW AND DISCIPLINE ON CAMPUS 317-19 (G. Holmes ed. 1971); INSTITUTE OF CONTINUING LEGAL EDUCATION, STUDENT PROTEST AND THE LAW 269-326 (G. Holmes ed. 1968); PRACTICING LAW INSTITUTE, THE CAMPUS CRISIS REVISITED 40-68 (1970).

<sup>314</sup> STUDENT PROTEST AND THE LAW, *supra* note 313, at 152. While the *Mitchell* opinion stresses the requirement that specific facts be alleged, 416 U.S. 600, 605 (1974), the application in that case was on a form. See *Arguments Before the Court: Installment Sales*, 42 U.S.L.W. 3345, 3346 (Dec. 11, 1973).

<sup>315</sup> *Appalachian Volunteers v. Clark*, 432 F.2d 530 (6th Cir. 1970) (injunction

erty under a vague standard, Justice Stewart's dissenting remarks in *Mitchell* are apt: "Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after which the issuance of the summary writ becomes a simple ministerial act."<sup>316</sup>

It is not a sufficient justification to note that the order is "temporary." After all, the *Geisinger* order required a person to abandon his home.<sup>317</sup> "That a wrong can be done because it can be undone"<sup>318</sup> has been rejected. "Due process is afforded only by the kinds of 'notice' and hearing which are aimed at establishing the validity or at least the probable validity of the underlying claim . . . before he can be deprived of his property."<sup>319</sup> Thus, if an injunction or restraining order affects a cognizable interest in liberty or in many property interests, *Fuentes* and *Mitchell* compel notice and a hearing unless there is an "emergency."

The result suggested above is possible under existing statutes and rules.<sup>320</sup> For example, the Washington Court of Appeals recently construed the Washington statute authorizing temporary restraining orders to include the *Fuentes v. Shevin* "extraordinary situations" exception.<sup>321</sup> The Washington stat-

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granted by clerk of the circuit court); *Geisinger v. Voss*, 352 F. Supp. 104, 110 (E.D. Wis. 1972); *Lynch v. Snapp*, 350 F. Supp. 1134, 1136 (W.D.N.C. 1972), *rev'd*, 472 F.2d 769 (4th Cir. 1973); *UMW Union Hosp. v. UMW Dist. 50*, 275 N.E.2d 231 (Ill. Ct. App. 1971), *rev'd*, 288 N.E.2d 455 (Ill. 1972) (complaint filed at 5:33 A.M.—order granted at 5:33 A.M.); Note, *Equity on Campus: The Limits of Injunctive Regulation of University Protest*, 80 YALE L.J. 987, 988-89 nn.11-14, 1024 n.27 (1971).

<sup>316</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 632-33 (1974).

<sup>317</sup> *Geisinger v. Voss*, 352 F. Supp. 104, 111 (E.D. Wis. 1972): "There is an old saw that a man's house is his castle. If modern times will not permit him moats and battlements, it still remains, I strongly suspect, that the constitution insists that he be allowed except in exceptional circumstances, a few words before the sheriff escorts him out the door."

<sup>318</sup> *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

<sup>319</sup> Justice Harlan concurring in *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969), *quoted in Fuentes v. Shevin*, 407 U.S. 67, 97 (1972); *See also Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (property); *Pervis v. La Marque Ind. School Dist.*, 466 F.2d 1054, 1057 (5th Cir. 1972).

<sup>320</sup> *Cf. More on Void Orders*, *supra* note 299, at 305; N.C. GEN. STAT. § 1-474.1 (Supp. 1974).

<sup>321</sup> *Corning and Sons, Inc. v. McNamara*, 506 P.2d 1328, 1330-31 (Wash. 1973). *See* 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 505-06 (1973) (Rule 65(b) valid as written).

ute is phrased in terms of "emergency," but the same result should be possible under "irreparable harm" or similar language. This standard plus care in defining liberty-property interests and complete appellate scrutiny should be adequate to accommodate preliminary injunctions and temporary restraining orders to the new due process.<sup>322</sup>

### C. *Conclusions and Generalizations—Part I*

The new due process can be summarized. The threshold question is whether the affected individual has a constitutionally cognizable interest. The importance of this issue has been purposefully stressed.<sup>323</sup> In *Fuentes*, the property right which gave rise to the interest was a contractual right to possess the property. The *Roth* and *Perry* cases expand and clarify the liberty-property analysis. *Mitchell* develops the property analysis further when an interest is security for a debt. At the interest-identifying stage, there is no judicial balancing. Due process applies when the government acts adjudicatively to affect a constitutionally cognizable interest. If sufficient state action or color of law is found in ostensibly private action, notice and an opportunity to be heard are required. The second step is to determine precisely how much process is due; it is here that the courts consider and balance the interests of all affected persons and the government. But to all the above there is one exception. If extraordinary or emergency measures are necessary, the action may proceed without due process.

Some will argue that as due process advances, society's progress will be clogged by excessive hearings. Due process, in this view, is an impediment to efficient government. Justice Stewart answered this in *Fuentes* by noting that avoiding "ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right."<sup>324</sup> If, moreover,

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<sup>322</sup> More on *Void Orders*, *supra* note 299; *Toward Due Process in Injunction Procedure*, *supra* note 299.

<sup>323</sup> The two step analysis as outlined here has also been recognized and commented upon. 87 HARV. L. REV. 1190, 1271 (1974). In its essentials, it can be briefly stated. First, there must be determined whether liberty or property is being affected. Only after that is decided does the balancing begin, in determining what due process requires. See *Goss v. Lopez*, 95 S. Ct. 729, 739 (1975).

<sup>324</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92 n.29 (1972). See also *id.* at 90 n.22; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

as the opponents of due process uniformly contend, the issues are easy, then hearings will be waived or attenuated.<sup>325</sup> Finally, the argument reveals that the proponents are ideologically predisposed to accept the authority's word. They simply overlook the present arrangement's conspicuous failure to safeguard the public from serious and inherent defects. In many reported cases, the seething arrogance of unchecked official power completely refutes the argument.<sup>326</sup> The reader, no doubt, can supply his own examples. There are, of course, many trustworthy officials; still, Jeremy Bentham's rejoinder will suffice:

In every public trust, the legislator should, for the purpose of prevention, assume the trustee disposed to break his trust in every imaginable way in which the breach of it would be to his personal advantage. This is the principle on which public institutions ought to be formed; and when it is applied to all men universally, it is injurious to none. The practical inference is to oppose to such possible breaches of trust every bar that can be opposed consistently with the power that is requisite to the efficient discharge of the trust. Indeed, these arguments, drawn from the supposed virtues of men to power, are opposed to the first principles on which all laws proceed.<sup>327</sup>

Considering the evils of irresponsible power, due process should not involve readjustments too burdensome to be tolerated.

What does the new due process mean? Due process embodies the simple idea that no one may be the judge in his own case. The due process trend vindicates notice and a right to be heard as an indispensable cornerstone of our legal and political tradition.<sup>328</sup> Notice and a hearing before adverse governmental action protect privacy and property.<sup>329</sup> The authorities are pre-

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<sup>325</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92 n.29 (1972): "[W]e deal here only with the right to an opportunity to be heard." See also *Bond v. Dentzer*, 362 F. Supp. 1373, 1388 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974).

<sup>326</sup> See, e.g., *Palmer v. Columbia Gas Co.*, 479 F.2d 153, 168 (6th Cir. 1973); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971) (prison); *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973); *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973) (prison); *Acree v. Drummond*, 336 F. Supp. 1275 (S.D.Ga.), *modified*, 458 F.2d 486 (5th Cir. 1972), *cert. denied*, 409 U.S. 1006 (1972).

<sup>327</sup> J. BENTHAM, *HANDBOOK OF POLITICAL FALLACIES* 82 (H. Larabee ed. 1952).

<sup>328</sup> See 1 RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 97, 104 (1971); RESTATEMENT OF JUDGMENTS § 6, comment *a* at 36, 511, comment *b* at 66, § 11 (1942); F. JAMES, *CIVIL PROCEDURE* §§ 11.5-.8 (1965); Rosenberg, *Devising Procedures That Are Civilized to Promote Justice That is Civilized*, 69 MICH. L. REV. 797, 802 (1971).

<sup>329</sup> "So viewed, the prohibition against the deprivation of property without due

cluded from condescending to permit "no more than an opportunity for oral importunities aimed at a *fait accompli*."<sup>330</sup>

Notice and a hearing also advance two primary goals of any functioning political system: legitimacy and effectiveness.<sup>331</sup> If all affected by a decision participate in making it, there is less chance that it will be wrong.<sup>332</sup> This advances the pragmatic interest in effectiveness or efficiency.<sup>333</sup> Due process does not abolish authority but reduces it from judge to accuser. Thus, controversies are more likely to be decided on the merits instead of according to relative power.<sup>334</sup> This deters unconsidered, erroneous and arbitrary action.<sup>335</sup>

The legitimacy goal is advanced when the governed feel or believe that the institutions of government are proper and appropriate. If due process is observed and affected persons have an opportunity to state their position, the losers, while not relishing the defeat, will more readily accept the decision.<sup>336</sup> On the other hand, if affected persons are denied access to decision-making institutions, they may feel that the institutions are not the appropriate ones to govern the society.<sup>337</sup> This is the

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process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

<sup>330</sup> *C.V.C. v. Superior Court*, 106 Cal. Rptr. 123, 129 (Ct. App. 1973). See also *Wagner v. Little Rock School Dist.*, 373 F. Supp. 876 (E.D. Ark. 1973), which gives an excellent exposition of the underlying reason for the new due process requirement of hearing *before* official action. There Judge Eisele explains that it is an attempt to place the individual in as equal a position to assert his rights as is possible; to prevent the individual from having to bear the burden of overcoming the bureaucratic inertia after an action is taken. Thus the individual "should not have to bear the burden of persuading the decision-maker to reverse a *fait accompli* . . ." *Id.* at 882.

<sup>331</sup> S. LIPST, *POLITICAL MAN* 64-67 (1963).

<sup>332</sup> *Carroll v. President and Comm'r of Princess Anne*, 393 U.S. 175, 182-84 (1968); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 385 (1970); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 635 (1970).

<sup>333</sup> *United States ex rel. Miller v. Twome*, 479 F.2d 701, 715 (7th Cir. 1973); *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 951 (E.D. Pa. 1973).

<sup>334</sup> *Bond v. Dentzer*, 362 F. Supp. 1373, 1385 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir. 1974); *Rinhart v. Brewer*, 360 F. Supp. 105, 114 (S.D. Iowa 1973), *aff'd*, 491 F.2d 705 (8th Cir. 1974).

<sup>335</sup> *C.V.C. v. Superior Court*, 106 Cal. Rptr. 123, 128 (Ct. App. 1973).

<sup>336</sup> T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 12-13 (1966); Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 587-92 (1961); Wickham, *Let the Sun Shine In! Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 489 (1973).

<sup>337</sup> F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 52-53, 130-133, 188

theoretical underpinning of the adversary system.

Due process assures that affairs are conducted with more consideration for the interests of all concerned. Formerly closed lines of communication may be opened. Conflicting interests will be reconciled in the open. As authorities become obliged to give account, irrational, immature or incompetent officials will be exposed to public view. The corrupt will be revealed or find it more difficult to operate. Thus may due process function as a potent educational and corrective force. More importantly, the new due process will enable citizens to achieve a stronger voice in decisions governing their daily lives. As such, it represents a long-overdue realization that it is foreign to our political traditions for the lives and fortunes of many to depend upon the arbitrary decisions of a few.

As due process advances, *ex parte* procedure declines. This accompanies the waning of paternalism, *ex cathedra* power and authoritarian relationships.<sup>338</sup> Established institutions no longer evoke absolute, unquestioned obedience. Leaders must deign to persuade and influence. Power, it is believed, vitiates honest human relationships and degrades both the powerful and the powerless. Influence and persuasion, however, allow rational choices between alternatives.<sup>339</sup> Due process, the working out of better ways to do justice, is part of the struggle to create a more humane society. The new due process cases mark the trend and accelerate its development.

On the other hand, even if due process is mandated, it may simply challenge the ingenuity of the unscrupulous. More adroitly but no less effectively, they may conduct sham hearings, affect to listen, dissemble actual motives, and substitute pretenses for reasons. Such a hearing is better than no hearing at all. A hearing exposes the institutional thought process to outside scrutiny and allows those interested in the result to speak their piece. In addition, a hearing may reveal unconstitutional reasons and lay the foundation for judicial relief.<sup>340</sup> But,

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(1930); S. LIPSIT, *POLITICAL MAN* 64-67 (1963). Cf. *Morrissey v. Brewer*, 408 U.S. 471, 483-84 (1972); *Winters v. Miller*, 446 F.2d 65, 71 (2d Cir. 1971); *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 951 (E.D. Pa. 1973); *Landman v. Royster*, 333 F. Supp. 621, 655 (E.D. Va. 1971).

<sup>338</sup> B. SKINNER, *THE TECHNOLOGY OF TEACHING* 57 (1971).

<sup>339</sup> R. SAMPSON, *THE PSYCHOLOGY OF POWER* 233 (1966).

<sup>340</sup> See, e.g., *Lusk v. Estes*, 361 F. Supp. 653 (N.D. Tex. 1973).

hearings will eliminate only some of the graver abuses. Due process is only part of the effort to build a better society. Due process cannot protect as well as common decency, a simple willingness to hear both sides and to decide on the facts. When common decency is absent, law may not be much assistance; when it is present, law may not be necessary.

## PART II—REMEDIES

The remainder of this article will be concerned with remedies for breach of the new due process. One recurring problem, both practically and doctrinally, is the backward reach of a decision that a procedure is contrary to due process. This is the first issue before a court, and it must be resolved before the court can move to the specific remedial issue. In keeping with that analysis, the problem of retrospective application will first be considered, under the voidness concept and the retroactivity analysis. The new due process cases will be divided into practical categories: property, public employment, mental health commitments and prison discipline. In each of these categories, the application of both traditional legal theories and the Civil Rights Act will be evaluated, and the gamut of injunctive relief, damages, and newer remedial tools will be analyzed. However, the precise requirements of the type of procedure that is required in each instance will not be treated in detail because the courts generally do not spell out procedural requirements specifically. In this regard one must remember that due process is outspokenly experimental; procedural forms will be tried, modified and discarded. Thus, in assessing the following analysis the proper attitude to be maintained is an open mind, above all avoiding dogmatism.

### A. *Voidness and Retroactivity*

Few propositions are better established in traditional due process than that if a court lacks jurisdiction, its judgment is void.<sup>341</sup> Jurisdiction, for present purposes, takes two forms: jurisdiction of the subject matter and jurisdiction of the person. Subject matter jurisdiction means that the court has constitu-

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<sup>341</sup> See, e.g., T. COOLEY, CONSTITUTIONAL LIMITATIONS 499 (1878).



tionally and statutorily defined competence to hear a particular class of cases. Personal jurisdiction means that the court has power over the defendant and that the proper means were utilized to bring him before the court. A court's decision in the absence of jurisdiction is a nullity and has no effect.<sup>342</sup> The decision may be repudiated and is subject to collateral attack in any subsequent proceeding.<sup>343</sup> At the same time, so long as a court has jurisdiction, it has the power to decide the case, even if its decision is erroneous.<sup>344</sup> If the judgment is erroneous but not void, (*i.e.* within the court's jurisdiction) it binds the parties.<sup>345</sup> Error must be corrected by direct attack. If an erroneous judgment is not directly attacked, it is binding on collateral attack. Thus, a merely erroneous judgment is entitled to *res judicata* and full faith and credit.

Many cases involving void judgments turn on a failure to serve proper notice.<sup>346</sup> Notice is basic to a right to be heard. A proceeding purportedly commenced without notice is seriously defective and a perversion of the adversary system.<sup>347</sup> Some cases observe a failure to accord proper procedural protections and refuse to inquire further.<sup>348</sup> Under traditional due process, the substantive validity of the claim is not relevant. If due process has been ignored by a failure to give effective notice, it

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<sup>342</sup> RESTATEMENT OF JUDGMENTS § 11, comment *f* at 68; § 93, comment *c* at 462; § 115, comment *j* at 561 (1942).

<sup>343</sup> See, *e.g.*, *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Polansky v. Richardson*, 351 F. Supp. 1066 (E.D.N.Y. 1972). *But cf.* cases applying *res judicata* to jurisdictional issues: *Durfee v. Duke*, 375 U.S. 106 (1963) (subject matter); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932) (personal).

<sup>344</sup> *United States v. Fidanian*, 465 F.2d 755, 758-59 (5th Cir.), *cert. denied*, 409 U.S. 1044 (1972); *Brown v. Jacobs*, 12 N.E.2d 10, 11-12 (Ill. 1935); Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 348 (1950); F. JAMES, *CIVIL PROCEDURE* 534 (1965).

<sup>345</sup> T. COOLEY, *supra* note 341, at 510-11.

<sup>346</sup> *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Hanson v. Denkla*, 357 U.S. 235 (1958); *Mullane v. Central Hanover*, 339 U.S. 306, 320 (1950); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Polansky v. Richardson*, 351 F. Supp. 1066 (E.D.N.Y. 1972); RESTATEMENT OF JUDGMENTS § 6, comment *a* at 36 (1942). Some turn on lack of subject matter jurisdiction. *Ex parte Bryant*, 485 S.W.2d 719 (Tex. 1956).

<sup>347</sup> RESTATEMENT OF JUDGMENTS § 6, comment *a* at 36 (1942).

<sup>348</sup> See, *e.g.*, *A Quantity of Books v. Kansas*, 378 U.S. 205, 212-13 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 738 (1961); *Shafer v. Stephens Adamson Mfg. Co.*, 183 N.E.2d 575, 578 (Ill. Ct. App. 1962); RESTATEMENT OF JUDGMENTS § 6, comment *f* at 39 (1942).

is as if nothing had happened.<sup>349</sup>

The voidness concept has also been applied in new due process litigation. In a recent school discipline case, for example, the principal suspended students without a hearing. A school board hearing months later affirmed the principal. The district court held that failure to hold a pre-suspension hearing "may be cured by a valid subsequent hearing." The court of appeals, reversing, held that "punishment cannot be imposed before a hearing is given" and ordered the school to expunge the record of the suspensions.<sup>350</sup> Thus, to the extent legally possible, the court extirpated the effect of the suspensions. Yet, not even the court's equitable powers could return the missed school days, a fact which underscores the finite scope of judicial power in dealing with many of the interests asserted in new due process cases. This limitation could also raise the question of money damages to substitute for the students' loss.

As an alternative to the traditional voidness remedy, a court may resolve the problem under the retroactivity doctrines developed in criminal procedure cases.<sup>351</sup> For example, in *Weaver v. O'Grady*,<sup>352</sup> the court held that it was unconstitutional to suspend a driver's license without an opportunity for a hearing.<sup>353</sup> Applying traditional due process reasoning, nothing legally cognizable had happened and all purported prior suspensions were void. Instead, the court noted that the holding was not totally unexpected in view of past practices and developing notions of due process. Mailing notice to the plaintiff group would be expensive, but, in view of the imperative nature of due process and the state's administrative capabilities, mailed notice was not impossible. Hence, the court held that the decision was retroactive and required the state to send notice to the affected licensees within 90 days.<sup>354</sup> Under traditional due process, the notice might have stated that the pre-

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<sup>349</sup> RESTATEMENT OF JUDGMENTS § 11, comment *f* at 68; § 93, comment *c* at 462; § 115, comment *j* at 561 (1942). See *Pennoyer v. Neff*, 95 U.S. 714 (1877). See also *Polansky v. Richardson*, 351 F. Supp. 1066 (E.D.N.Y. 1972).

<sup>350</sup> *Pervis v. LaMarque Ind. School Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972). See also *Lopez v. Goss*, 372 F. Supp. 1279, 1302 (S.D. Ohio 1973), *aff'd*, 95 S. Ct. 729 (1975).

<sup>351</sup> See, e.g., *Wainwright v. Stone*, 414 U.S. 21 (1973).

<sup>352</sup> 350 F. Supp. 403 (S.D. Ohio 1972).

<sup>353</sup> *Id.* at 408.

<sup>354</sup> *Id.* at 410-12.

vious "suspension" was legally ineffective. Under retroactivity, however, licensees were notified of their right to request a due process hearing.<sup>355</sup>

In *Rios v. Cozens*,<sup>356</sup> a similar case, the plaintiff asked the court to reinstate illegally suspended licenses. The Supreme Court of California directed the license department to extirpate the order suspending the named plaintiff's license pending notice and a hearing.<sup>357</sup> The court, though refusing to vacate suspension orders entered against the other members of the plaintiff class did require the department to hold a hearing if requested by one whose license had been previously suspended without due process.<sup>358</sup> Nevertheless, the court rejected the named plaintiff's claim for money damages.<sup>359</sup>

The concept of retroactivity will be developed more fully in succeeding sections. Still, even the scant overview presented by the foregoing cases yields some important conclusions. Under the retroactivity analysis, the court has considerable flexibility to consider various factors to determine whether a decision is to be retroactive or prospective. Once it is decided that a decision is retroactive, the court has discretion in shaping a remedy.<sup>360</sup>

Clearly the voidness concept and the retroactivity analysis are alternative approaches to retrospectivity in due process cases. If, under the voidness concept, the assailed procedure denied due process, nothing legally cognizable happened.<sup>361</sup> The truth of the facts asserted is immaterial.<sup>362</sup> But someone has been deprived of due process and frequently property, liberty or employment as well. May he then use the legal system to recover money damages? In many of the major new due process cases, plaintiffs have asked that the practice be declared illegal and that it be enjoined.<sup>363</sup> This equitable and

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<sup>355</sup> *Id.* at 411.

<sup>356</sup> 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated and remanded*, 410 U.S. 415 (1973), *reaffirmed on state ground*, 509 P.2d 696, 107 Cal. Rptr. 784 (1973).

<sup>357</sup> *Id.* at 985, 103 Cal. Rptr. at 305.

<sup>358</sup> *Id.* at 984, 103 Cal. Rptr. at 304.

<sup>359</sup> *Id.* at 985, 103 Cal. Rptr. at 305.

<sup>360</sup> *Cf. Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972) (justice of the peace trials illegal but \$1,200,000 fines not refunded).

<sup>361</sup> *Pennoy v. Neff*, 95 U.S. 714 (1877).

<sup>362</sup> *Landman v. Royster*, 354 F. Supp. 1302, 1311 (E.D. Va. 1973).

<sup>363</sup> *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 71 (1972); *Hall v. Garson*, 468 F.2d

prospective relief ends the practice without facing all the remedial implications. In other new due process cases, affirmative relief has been asked for denials of due process. Thus it appears that in redressing due process violations courts are pressed to scan the entire spectrum of possible remedial alternatives. The discussion that follows will focus on the widely varying responses to that pressure.

### B. Remedies for "Property" Due Process Violations

The property decisions reveal a pattern which occurs in each category of cases. First, some courts recognize that due process exists but refuse to accord remedial effect, while others extend due process to the granting of a remedy. In analyzing these cases, serious remedial questions must be faced. Is it intellectually honest to strike down a statute without giving any benefit to the winning litigant? If the defendant has followed a procedure which had not been previously questioned, is it fair to require him to respond in damages? Should the magnitude of the property or other interest asserted affect the remedy?

The vehicle primarily used to vindicate due process rights in property cases is conversion,<sup>364</sup> a tort action designed to protect a *possessory* interest in property.<sup>365</sup> The conversion occurs when the defendant exercises dominion or control over the plaintiff's property; and the converting act can be any conduct inconsistent with the plaintiff's possessory interest. Examples of converting acts include a refusal to surrender possession to one so entitled, and taking property under illegal process. Taking property under a statute unconstitutional because of failure to accord notice and a hearing also appears to be a conversion.<sup>366</sup> The conversion theory may be useful in many *ex parte* transfers of property including replevin, distraint and attachment. The following cases should better illustrate both the legal and factual context in which the property cases arise and are resolved.

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845, 847 (5th Cir. 1972).

<sup>364</sup> W. PROSSER, *LAW OF TORTS* § 15 (4th ed. 1971). See also *Boston Educ. Research Co. v. American Mach. & Foundry Co.*, 488 F.2d 344, 348 (1st Cir. 1973).

<sup>365</sup> W. PROSSER, *LAW OF TORTS* § 15 (4th ed. 1971).

<sup>366</sup> *Quebec v. Bud's Auto Service*, 105 Cal. Rptr. 677 (Super. Ct. 1973).

In *Thorp Credit Inc. v. Barr*,<sup>367</sup> personal property had been purchased on installment payments. The buyer fell behind, and the seller, following the local statute, replevied without notice to the buyer. At trial, the seller established his right to the property. On the defendant's appeal, the court declared the replevin statute unconstitutional, following *Fuentes v. Shevin*. But, because the record supported the seller's right to possession, the court affirmed the lower court decision for the seller.<sup>368</sup> Two factors must be considered to ameliorate the impact of the criticism which follows. First, the defendant-buyer was held to have "waived" prior procedural defects by appearing generally rather than entering a special appearance to contest jurisdiction.<sup>369</sup> Second, *Barr* had been decided by the trial court and argued to the appellate court when *Fuentes* was decided.

If due process reasoning is applied to *Barr*, several substantial criticisms appear. Because of the lack of effective prior notice, no jurisdiction was attained.<sup>370</sup> The unconstitutional taking was a legal non-event. Thus, no credence should be accorded to the fact-finding. Indeed, in such situations, the defendant may be entitled to the property and perhaps, upon a proper counterclaim, a judgment for conversion. *Barr*, however, appears to hold that even though the trial court obtained no jurisdiction over the defendant, the plaintiff wins the lawsuit.

There are additional criticisms. The *Barr* court, as noted above, held the statute unconstitutional. If a litigant who successfully asserts that a statute is unconstitutional attains no benefit, there is no incentive to attempt to void an arguably unconstitutional statute or practice.<sup>371</sup> If merchants are allowed to retain property unconstitutionally taken, it is fair to ask whether the statement that the statute is unconstitutional is holding or dictum.<sup>372</sup> This paradox could be avoided by an in-

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<sup>367</sup> 200 N.W.2d 535 (Iowa 1972), *cert. denied*, 410 U.S. 919 (1973).

<sup>368</sup> *Id.* at 537.

<sup>369</sup> RESTATEMENT OF JUDGMENTS § 9 (1942).

<sup>370</sup> *State ex rel. Williams v. Berrey*, 492 S.W.2d 731, 735-36 (Mo. 1973).

<sup>371</sup> See *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89 (Ill. 1959), *cert. denied*, 362 U.S. 968 (1960) (governmental tort immunity overruled prospectively except for plaintiff who was allowed a cause of action to encourage the beneficial activity of assailing superannuated law). See also *Willis v. Department of Conserv. & Econ. Dev.*, 264 A.2d 34, 37-38 (N.J. 1970).

<sup>372</sup> In *Molitor*, the court noted that unless the new rule applied to plaintiff, "such

junction requiring the defendant to return the property and proscribing future unconstitutional takings.<sup>373</sup> The court in *Barr*, however, did not even enjoin the defendant. The dissent takes the better view: "Surely that which developed in the instant case after pursuit by plaintiff of unconstitutional seizure cannot effectively eliminate the inceptual taint of invalidity."<sup>374</sup>

*Quebec v. Bud's Auto Service*<sup>375</sup> shows a marked contrast to *Barr*. *Quebec*, a conversion case, grew out of a repair controversy. The automobile owner alleged that after the repairman repaired the automobile, it failed. The repairman took the vehicle to his shop and performed additional repairs. Then, the repairman invoked a statutory garageman's lien without notice or a hearing, and refused to relinquish the automobile until the owner paid additional money.

In holding that the owner's complaint for conversion stated a cause of action, the court had to resolve the issue of the constitutionality of the lien statute. This is because possession under a valid lien is a defense to conversion, while holding under a defective lien is not. The court held that the lien statute was no defense, giving full effect to the broad sweep of *Fuentes* and holding the lien statute unconstitutional: "[p]rejudgment remedies not providing notice and hearing violate due process except in extraordinary situations. . . . No justification has been advanced why a private citizen should be allowed unilaterally to invoke the power of the state to retain the property of another without notice and the opportunity for a prior hearing."<sup>376</sup> Thus, the owner has a chance to prove conversion and may in the end be entitled to damages.<sup>377</sup>

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announcement would amount to mere dictum." 163 N.E.2d at 97.

<sup>373</sup> See *Yates v. Sears Roebuck & Co.*, 362 F. Supp. 520 (M.D. Ala. 1973); *Mason v. Garris*, 360 F. Supp. 420, 424, *modified*, 364 F. Supp. 452 (N.D. Ga. 1973); *State ex rel. Williams v. Berrey*, 492 S.W.2d 731, 736 (Mo. 1973).

<sup>374</sup> *Thorp Credit Inc. v. Barr*, 200 N.W.2d 535, 538 (Iowa 1972), *cert. denied*, 410 U.S. 919 (1973).

<sup>375</sup> 105 Cal. Rptr. 677 (Super. Ct. 1973).

<sup>376</sup> *Id.* at 679-80. In *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), the Supreme Court of California held that retaining a car under a garageman's lien did not violate due process but that selling a car without notice and a hearing was unconstitutional. Thus, *Quebec's* precise holding is repudiated.

<sup>377</sup> *Cf. Graff v. Nicholl*, 370 F. Supp. 974 (N.D. Ill. 1974) (owner of "abandoned" car has sufficient property interest to require notice and a hearing before towing);

*Quebec* may be criticized for overlooking the possibility that the defendant had reasonably relied on the continuing legality of an established practice.<sup>378</sup> If the garageman did rely, an injunction requiring him to return the car may be more appropriate than damages.<sup>379</sup> Even so, a good argument can be put forward for allowing damages when property is taken without due process. In the long run, the damage remedy may work significant changes in relationships. An unscrupulous garageman who deals with an unsophisticated customer might not be deterred by the thought of an injunction requiring him to return the property. The prospect of also paying damages for conversion may therefore have a salutary deterring effect. On the other hand, *Quebec* may also make it harder to collect repair bills from unscrupulous automobile owners, by depriving the garageman of the practical leverage of informally retaining possession. It is significant to note that California's supreme court, in a *Quebec*-type case, evidently found these factors as well as the mixed possessory and property interests worthy of consideration; as a result it held that a garageman may retain an automobile under a garageman's lien without notice and a hearing, but that due process was required before the car was sold.<sup>380</sup>

Alternate torts available when a *non-possessory* property interest is taken without due process are abuse of process and wrongful attachment.<sup>381</sup> These actions have not been fully de-

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Murrell v. Trio Towing Serv., Inc., 294 So.2d 331 (Fla. Ct. App. 1974) (court held that towing company that declined to relinquish control of automobile without payment for towing was not entitled to lien on vehicle, and was guilty of conversion for failing to relinquish control); Fendler v. Texaco Oil Co., 499 P.2d 179 (Ariz. Ct. App. 1972) (plaintiff's 1970 Chrysler Imperial towed out of "no parking" zone: conversion suit rejected).

<sup>378</sup> Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1974) held that it is inappropriate to grant damages for acts occurring prior to the declaration of the statute's unconstitutionality, unless they would be proper under the analogous common law tort. There the analogous tort was malicious prosecution which required a showing of bad faith. Thus in the absence of a showing of bad faith, damages were not warranted. *Id.* at 1315. See Rios v. Cessna Fin. Corp., 488 F.2d 25, 28 (10th Cir. 1973).

<sup>379</sup> McCormack, *Federalism and Section 1983—Limitations on Judicial Enforcement of Constitutional Protections I*, 60 VA. L. REV. 1, 26-27 (1974) [hereinafter cited as McCormack]; Wellington, *Notes on Adjudication*, 83 YALE L.J. 221, 254-57 (1973).

<sup>380</sup> Adams v. Department of Motor Vehicles, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

<sup>381</sup> Leesburg v. Builder's Plumbers Supply, 149 N.W.2d 263 (Mich. Ct. App. 1967); Brown v. Guaranty Estates Corp., 80 S.E.2d 645, 649-51 (N.C. 1954).

veloped in non-possessionary due process litigation, and several factors appear to be influencing the courts in shaping the prospective and retrospective relief necessary to effectively remedy the abuses involved. A review of the cases will perhaps best illustrate these factors.

In *Schneider v. Margossian*,<sup>382</sup> the court dealt with Massachusetts' trustee process. The action was brought to enjoin the use of an ex parte procedure whereunder several civil actions had been initiated by attaching the defendant's property. While in each instance the defendant received notice soon after the attachment, it was impossible to contest it before the property was frozen. The court held that the use of property was taken and that due process was violated. The court extended prospective relief by enjoining all future ex parte attachments, but retroactive relief presented more difficulty. The plaintiff sued as a class representative, the class being all persons whose property had been attached by ex parte trustee process. The court refused to allow the class and held that, except for the named plaintiff, the decision would not affect any lawsuit commenced before the effective date of the instant decree.<sup>383</sup> To justify this attenuated relief, the court said, "a retrospective judgment would cast doubt on the validity of all civil actions now pending . . . that were started by way of trustee process."<sup>384</sup> The theory of prospective relief found in *Schneider* was approved on appeal, and has attracted a wide following in lower courts.<sup>385</sup>

The observer might speculate that the plaintiff's decision to seek class relief could bear on the court's decision not to extend retroactive relief. The plaintiff class causes the court to

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<sup>382</sup> 349 F. Supp. 741 (D. Mass. 1972).

<sup>383</sup> *Id.* at 745.

<sup>384</sup> *Id.*

<sup>385</sup> *Schneider v. Margossian*, 349 F. Supp. 741 (D. Mass. 1972), *aff'd sub nom.* Ruotolo v. Gould, 489 F.2d 1324 (1st Cir. 1974). For lower courts following the prospective theory, *see, e.g.*, *Gibbs v. Titelman*, 369 F. Supp. 38, 58-59 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974) (relief prospective from date of order); *Roscoe v. Butler*, 367 F. Supp. 574, 583 (D. Md. 1973); *Bay State Harness Horse R. & B. Ass'n v. PPG Indus., Inc.*, 365 F. Supp. 1299, 1307 (D. Mass. 1973) (parties, amicus curiae and pending cases in the district to receive retroactive benefit; order otherwise effective on filing); *Clement v. Four North State Street Corp.*, 360 F. Supp. 933, 936 (D.N.H. 1973); *Trapper Brown Constr. Co. v. Electromech, Inc.*, 358 F. Supp. 105, 107-08 (D.N.H. 1973).



consider the massive disruption of such sweeping relief, and to thereby overlook injustice to one person. The request for injunctive relief, the observer may speculate, might also affect the decision's backward reach. For an injunction is prospective and the court may concentrate on improving future practices rather than on repairing past injuries. In any event, *individual* plaintiffs suing for specific or damage relief have successfully attained retroactive relief.<sup>386</sup>

An additional factor is that the procedure followed in *Schneider* did give notice to the defendant. It seems more likely that a lawsuit begun with an attachment would be defaulted, but the defendant did have the opportunity to defend. In contrast, the procedure condemned in *Pennoyer v. Neff*<sup>387</sup> allowed no opportunity to defend; the property was attached only after judgment was entered. While both deny due process, there is more reason to extend broad retroactive relief when rights are affected without any opportunity to participate in the process. Furthermore, a retroactive decision may affect more than pending cases. If a judgment is void for lack of due process, it may be collaterally attacked at any time.<sup>388</sup> Thus, an unqualified holding of retroactive unconstitutionality might upset many prior trustee process judgments. This would create, at the very least, administrative burdens on the courts.<sup>389</sup> To give due process some credence, however, defendants who have defaulted in attachment cases prior to the decision should be allowed to reopen those cases and to contest the merits.<sup>390</sup>

That the attaching party may have relied on the apparent legality of existing practice appears to be an important factor in denying retroactivity. In *Osmond v. Spence*,<sup>391</sup> the court dealt with a combined confession-of-judgment/wage-

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<sup>386</sup> *Straley v. Grossway Motor Co.*, 359 F. Supp. 902 (S.D.W. Va. 1973) (reserving damages); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *Scoggin v. Schrunck*, 344 F. Supp. 463 (D. Ore. 1971). See also *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975).

<sup>387</sup> 95 U.S. 714 (1877).

<sup>388</sup> *Misco Leasing v. Vaughn*, 450 F.2d 257 (10th Cir. 1971); *Bass v. Hoagland*, 172 F.2d 205 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949); *Polansky v. Richardson*, 351 F. Supp. 1066 (E.D.N.Y. 1972); J. MOORE, *FEDERAL PRACTICE* ¶ 60.25[4] (1974).

<sup>389</sup> *Osmond v. Spence*, 359 F. Supp. 124, 127 (D. Del. 1972).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

garnishment scheme. The procedure was found to deny due process because there was no showing of waiver before execution issued. While the court refused to void all prior confessed judgments, the decision was afforded some retroactive effect. Money held under confessed judgments combined with wage garnishment was returned to the debtors, the court observing that this procedure was "a form of the prejudgment garnishment [previously] declared unconstitutional in *Sniadach* . . . ."<sup>392</sup>

But even if reliance is an important factor, it is difficult to determine what reliance is reasonable. One court held that attachments before the decision date in *Fuentes* were not vulnerable to a *Fuentes* attack.<sup>393</sup> The reasons were fourfold: (1) *Fuentes* "was not clearly foreshadowed"; (2) retroactivity "would frustrate the legitimate expectations of many Massachusetts State litigants; (3) it would invite confusion and uncertainty in the conduct of continuing litigation; and (4) it might, in the case of property sold pursuant to real estate attachments, create serious title problems."<sup>394</sup> To others, however, the answer has not been so clearcut. Justice Stewart in *Fuentes* felt that the result was clearly anticipated by prior cases,<sup>395</sup> and lower courts have applied *Fuentes* to facts which occurred before it was decided.<sup>396</sup> Nonetheless, the Second Circuit held in *Tucker v. Maher*, that there can be no damages awarded for a taking that occurred prior to the statute being declared unconstitutional.<sup>397</sup> The court appeared uncertain as to whether this was a result of immunities granted by the Civil Rights Act itself, or because of the "closely analogous wrong" of malicious prosecution, which was declared to be the essence of the claim, which itself requires a showing of bad faith.<sup>398</sup>

While the passage of time reduces the importance of the specific retroactivity issue, the basic problem of enforcing due

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<sup>392</sup> *Id.* at 128.

<sup>393</sup> *Higley Hill, Inc. v. Knight*, 360 F. Supp. 203 (D. Mass. 1973).

<sup>394</sup> *Id.* at 205-06.

<sup>395</sup> *Fuentes v. Shevin*, 407 U.S. 67, 71 (1972).

<sup>396</sup> *Bay State Harness R. & B. Ass'n v. PPG Indus., Inc.*, 365 F. Supp. 1299, 1307 n.7 (D. Mass. 1973) (*Higley Hill* disapproved); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085, 1091-92 n.17 (D. Me. 1973) (same).

<sup>397</sup> *Tucker v. Maher*, 497 F.2d 1309 (2d Cir. 1974).

<sup>398</sup> *Id.* at 1315.

process remains. Within this there are two major points of concern. First, when will a person be relieved from an unconstitutional taking? Second, when may the victim of an unconstitutional taking be awarded damages? If the taker's knowledge is to bear on the second issue, then the next question is, how specific must knowledge be? Is it sufficient that a similar procedure has been invalidated by the Supreme Court? Or, must the identical procedure be invalidated? Must the decision be a specific holding on the precise statute? Must there be something more to bring knowledge home than constructive knowledge from a judicial opinion? For a damage remedy, must the taker have been a defendant in the case striking the statute down?

Answers to these questions can vary depending on the remedy asked. Courts find it easier to upset attachments than to award damages. But, merely dissolving existing attachments may not deter future attachments; if the practices are to be stopped, a deterrent, such as a damage remedy, is needed. Damage remedies may influence conduct, especially institutional conduct, by penalizing the wrongdoer. And if the damage remedy is to be a meaningful deterrent, the courts must define the knowledge requirement in such a way as to prevent any premium that might be derived from remaining ignorant.

### C. *Loss of Employment*

The government employment cases are superficially similar to the ordinary property cases.<sup>399</sup> A person is deprived of a significant interest without an opportunity to participate in the process. In both, there is a significant threshold barrier. In the usual property cases, the courts have struggled with state action and color of law. While state action is clear in government employment cases, the employee faces the threshold problem of showing an interference with a protectable interest in liberty or property. When government employment is terminated without due process, the remedial response appears to be af-

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<sup>399</sup> If there is a protected interest found, it can possibly be a "property" interest. But employment cases are treated independently because of their sometimes unique remedial problems, and because the interest protected might be either property or liberty.

fects by additional complicating factors: the absence of a single legal theory, the high order of the asserted citizen interest and the desire to preserve administrative discretion.

There are several legal theories, including both tort and contract actions, available to one deprived of government employment. While there is no single tort which is universally applicable, several tort theories are useful in certain cases.<sup>400</sup> The basic tort remedy is money damage for the harm caused. Damages, of course, may also be a contract remedy.<sup>401</sup> The contract theory allows recovery for the money benefit of the breached obligation. Notwithstanding the importance of these traditional common law bases of action, discussion here will concentrate on more recently developed constitutional theories. It has become well established that a government employee cannot be discharged because of an exercise of the first amendment freedoms.<sup>402</sup> Also, government employment cannot be terminated in a way that violates either equal protection<sup>403</sup> or due process.<sup>404</sup>

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<sup>400</sup> See *Foltz v. Moore McCormack Lines, Inc.*, 189 F.2d 537 (2d Cir. 1951) (malicious deprivation of a gainful position); *Hardy v. Vial*, 311 P.2d 494 (Cal. 1957) (malicious prosecution); *Ranous v. Hughes*, 141 N.W.2d 251 (Wisc. 1966) (defamation); W. PROSSER, *LAW OF TORTS* § 129 (4th ed. 1971) (interference with contractual relations).

<sup>401</sup> *Collins v. Parsons College*, 203 N.W.2d 594 (Iowa 1973); *Development, Academic Freedom*, 81 HARV. L. REV. 1099-1100 (1968). There are significant complicating doctrines in suing on a contract of employment with the government. See *Starsky v. Board of Trustees*, 109 Cal. Rptr. 822 (Ct. App. 1973); *Megee v. Barnes*, 160 N.W.2d 815 (Iowa 1968).

<sup>402</sup> *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Rainey v. Jackson State College*, 481 F.2d 347 (5th Cir. 1973); *Dause v. Bates*, 369 F. Supp. 139, 147-48 (W.D. Ky. 1973); *Commonwealth ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (E.D. Pa. 1973); *Nebraska Dep't of Roads Employees' Ass'n v. Department of Roads*, 364 F. Supp. 251 (D. Neb. 1973); *Fisher v. Snyder*, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973); *Local 594, Teamsters Pub. Emp. Union v. City of West Point*, 338 F. Supp. 927 (D. Neb. 1972). David Roth, who was held to have had neither a liberty nor a property interest in continued employment in *Board of Regents v. Roth*, 408 U.S. 564 (1973), charged at trial that he was discharged for exercising his first amendment freedoms. The jury awarded Roth \$5,246 compensatory damages and \$1,500 punitive. See *Chron. Higher Educ.*, Nov. 26, 1973, at 3.

<sup>403</sup> *Sparks v. Griffin*, 460 F.2d 433 (5th Cir. 1972); *Lee v. Macon County Bd. of Educ.*, 453 F.2d 1104 (5th Cir. 1971).

<sup>404</sup> *Perry v. Sindermann*, 408 U.S. 593 (1972); *Buggs v. City of Minneapolis*, 358 F. Supp. 1340 (D. Minn. 1973).

### 1. *Basic Remedial Alternatives and Underlying Considerations*

The remedial issues can be examined by analyzing three recent cases. Each concerns the remedy for a teacher who was fired without due process, yet the remedy differs significantly from case to case. In *Skehan v. Board of Trustees of Bloomsburg State College*,<sup>405</sup> the court found that the plaintiff was denied due process because he should have been given a hearing before being dismissed. He received judgment for one dollar.<sup>406</sup> In *Karstetter v. Evans*<sup>407</sup> there had been two purported hearings. The plaintiff's salary ceased after the first hearing. The first hearing, the court held, did not comport with due process but the second hearing did. The facts were the same at both hearings but "not having been accorded a hearing which met procedural due process, plaintiff was entitled to remain in her status . . . until action was taken by the Board at a hearing meeting procedural due process."<sup>408</sup> Because the second termination was effective, plaintiff could not be reinstated but she was "entitled to receive back wages equal to the amount she would have received . . . less her earnings, if any, in the interim."<sup>409</sup> In *Starsky v. Williams*,<sup>410</sup> the plaintiff had been fired, but a review of the record revealed a lack of substantial evidence of a constitutionally permissible basis for the decision. The decision to terminate, therefore, violated due process and was ineffective. "The defendants," the court held, "have a duty to reinstate plaintiff to his position with all of its emoluments and perquisites *as if termination had never occurred*."<sup>411</sup>

These three cases run the gamut. In *Skehan*, the court does not give any remedial effect to the denial of due process except to vindicate plaintiff symbolically. In *Karstetter*, the court af-

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<sup>405</sup> 358 F. Supp. 430 (M.D. Pa. 1973), *vacated and remanded*, 501 F.2d 31 (2d Cir. 1974).

<sup>406</sup> *Id.* at 436 (plaintiff also received costs).

<sup>407</sup> 350 F. Supp. 209 (W.D. Tex. 1971). *See also* *Commonwealth ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (E.D. Pa. 1973).

<sup>408</sup> *Karstetter v. Evans*, 350 F. Supp. 209, 212 (W.D. Tex. 1971).

<sup>409</sup> *Id.* The same situation resulted in the same remedy in *Davis v. Barr*, 373 F. Supp. 740 (E.D. Tenn. 1973).

<sup>410</sup> 353 F. Supp. 900 (D. Ariz. 1972), *aff'd in part, rev'd in part, remanded*, 512 F.2d 109 (9th Cir. 1975).

<sup>411</sup> *Id.* at 928 (emphasis supplied).

forded some effect but did not order full pay for the period in which plaintiff had not been fired. In *Starsky*, the court held that because due process was not followed, nothing had happened. Each remedial alternative will be discussed in terms of doctrinal consistency and practical considerations.

In *Skehan*, the court justified the one dollar award by pointing to plaintiff's delay in suing and "the Court's finding that the Plaintiff was not discharged for exercising his constitutional rights."<sup>412</sup> Both reasons can be criticized. Delay in suit should affect due process cases as it does all cases. There is an applicable statute of limitations.<sup>413</sup> If the statute has run, suit should be barred. But delay short of the statutory bar should not be interposed to attenuate the remedy. If this reasoning were attempted in a tort or contract case, it would be repudiated immediately. If it appears that plaintiff, aware that he was illegally fired, delayed suit to increase the damages, then the mitigation principle may be applied.<sup>414</sup>

*Skehan* was awarded nominal damages because he "was not discharged for exercising his constitutional rights."<sup>415</sup> This assumes dismissal, which appears to be a constitutionally impermissible conclusion. If plaintiff's interest was constitutionally cognizable, he was entitled to due process *before* being discharged. Employment is not legally terminated until a legal hearing is conducted.<sup>416</sup> The right to a hearing prior to a deprivation, in the words of Justice Stewart,

has long been recognized by this court under the Fourteenth and Fifth Amendments. Although the court held that due

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<sup>412</sup> *Skehan v. Board of Trustees*, 358 F. Supp. 430, 435 (M.D. Pa. 1973), *vacated and remanded*, 501 F.2d 31 (2d Cir. 1974).

<sup>413</sup> *Boshell v. Alabama Mental Health Bd.*, 473 F.2d 1369 (5th Cir. 1973) (one year); *Taliaferro v. State Council of Higher Educ.*, 372 F. Supp. 1378, 1383-84 (E.D. Va. 1974).

<sup>414</sup> If the employer proves that the wrongfully discharged employee could, by reasonable effort, have obtained a suitable job, the employee is charged with the income he could have obtained. *See, e.g., McAleer v. McNally Mfg. Co.*, 329 F.2d 273 (3d Cir. 1964).

<sup>415</sup> *Skehan v. Board of Trustees*, 358 F. Supp. 430, 435 (E.D. Pa. 1973), *vacated and remanded*, 501 F.2d 31 (2d Cir. 1974).

<sup>416</sup> This was essentially the court of appeal's view on vacating the district judge's opinion. *Skehan v. Board of Trustees*, 501 F.2d 31 (2d Cir. 1974). *Klein v. New Castle County*, 370 F. Supp. 85, 91 (D. Del. 1974); *Karstetter v. Evans*, 350 F. Supp. 209, 212 (N.D. Tex. 1971).

process tolerates variance in the *form* of a hearing "appropriate to the nature of the case" . . . and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any] . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."<sup>417</sup>

To make the constitutional right to a prior hearing meaningful, legally ineffective procedures should not be granted remedial effect. Allowing the unconstitutional hearing to reduce the remedy is a back door method of allowing a deprivation to take effect without a constitutionally permissible procedure.<sup>418</sup> That the evidence presented at an illegal hearing may have supported discharge at a legal hearing is, therefore, irrelevant to the remedy. It is accordingly submitted that *Skehan* and similar cases<sup>419</sup> are inconsistent with the remedial aims of due process. A wrongfully discharged employee is entitled to more than a symbolic vindication.

In *Karstetter*, the court conferred credence upon due process by ordering payment of wages for the period between the illegal termination of salary and the due process hearing. Interim earnings were allowed as evidence to reduce or mitigate damages, which is consistent with the mitigation principle as generally applied in public employee cases.<sup>420</sup> Some courts go farther than subtracting actual earnings from the back pay

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<sup>417</sup> *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (citations omitted). *But cf.* *Arnett v. Kennedy*, 416 U.S. 134 (1974) (apparently allowing the federal government, operating under statute and administrative regulation, to give notice of discharge and an opportunity to submit written material before separation from service but to delay the adversary hearing until after the employee is terminated).

<sup>418</sup> The court in *Skehan* gave additional reasons for the one dollar award: 1) Plaintiff had failed to request a "hearing by the college on the reasons for his dismissal," and 2) he did not "participate in the post dismissal . . . hearing . . . ." *Skehan v. Board of Trustees*, 358 F. Supp. 430, 435 (M.D. Pa. 1973). Both also assume the dismissal conclusion. *See* the court of appeals opinion remanding, *Skehan v. Board of Trustees*, 501 F.2d 31, 40-41 (2d Cir. 1974).

<sup>419</sup> *Johnson v. Netterville*, 355 F. Supp. 921 (M.D. La. 1973); *Abbott v. Thetford*, 354 F. Supp. 1280 (M.D. Ala. 1973).

<sup>420</sup> *See, e.g., Williams v. Albemarle City Bd. of Educ.*, 485 F.2d 232 (4th Cir. 1973); *United States v. Chesterfield County School Dist.*, 484 F.2d 70, 76 (4th Cir. 1973); *Adamian v. University of Nevada*, 359 F. Supp. 325, 831 (D. Nev. 1973); *Buggs v. City of Minneapolis*, 358 F. Supp. 1340, 1344 (D. Minn. 1973); *Monte v. Flaherty*, 351 F. Supp. 1136 (W.D. Pa. 1972).

award and reduce back pay by "earnings from any actual or reasonably available employment."<sup>421</sup> Few will quarrel with reducing back pay by actual earnings; the spectacle of a wind-fall is not pleasant to contemplate. Reducing the back pay award by *imputed* interim earnings, however, is arguably inconsistent with the magnitude of the affected interests. The mitigation principle was designed for breaches of private contracts and is supported by a policy of preventing economic waste. The public employee cases grow out of a different environment: because the *government* is the defendant and is charged with breaking the law, plaintiff, it may be said, is acting as a private attorney general<sup>422</sup> insisting that the government must obey the law, a social policy of a high order.

Further, the policy of preventing waste is diminished when there were no actual earnings. Much of the plaintiff's time will be consumed in preparing his case. But under the Federal Back Pay Act,<sup>423</sup> it has been held that the mitigation principle is applicable, even though not expressly provided for.<sup>424</sup> This allows an employer to reduce the back pay by the amount the employee could have earned if reasonable efforts to locate other employment had been made.<sup>425</sup> Finally, under traditional due process the courts are accustomed to holding that a procedurally defective proceeding involving private litigants is void and has no effect. These ideas can be adapted to employee cases. If accepted, a former government employee who feels he has been wrongfully discharged may take his own chances. He will be allowed to pursue his remedy diligently without fear that back pay will be cut back for "might-have-been" employment.

The courts are reluctant to extend a complete remedy to a government employee who has been wrongfully discharged. Several additional factors must be considered to understand

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<sup>421</sup> *United States v. Chesterfield County School Dist.*, 484 F.2d 70, 76 (4th Cir. 1973). The limits on required mitigation are stated in *Jackson v. Wheatley School Dist.*, 464 F.2d 411 (8th Cir. 1972). The court held that it was unreasonable for a married couple to live apart to reduce damages "caused by the unlawful actions of the school board." *Id.* at 413. See also *Williams v. Albemarle Bd. of Educ.*, 508 F.2d 1242 (4th Cir. 1974).

<sup>422</sup> Cf. *Newman v. Piggy Park Ent.*, 390 U.S. 400 (1968).

<sup>423</sup> 5 U.S.C. § 5596 (1967).

<sup>424</sup> *Urbina v. United States*, 428 F.2d 1280, 1287 (Ct. Cl. 1970).

<sup>425</sup> *White v. Bloomberg*, 501 F.2d 1379, 1382 (4th Cir. 1974).



this reluctance. The cases just discussed were decided by federal courts, under federal constitutional law. But many cases arise from state employment, and state regulatory and statutory schemes.<sup>426</sup> This is especially true when a plaintiff asserts a property interest under state law.<sup>427</sup> Federal judges understandably hesitate before interposing their judgment in these delicate areas of state policy. Due process litigation may also originate in a complex collective bargaining environment. When employee-employer relations are structured by collective bargaining, the courts are more likely to require the parties to solve their problems without judicial interference.<sup>428</sup>

There are also several federal statutory schemes which deal with the remedy available to improperly discharged employees.<sup>429</sup> In shaping remedies under these statutes, the federal courts have attempted to avoid inflexible doctrine, instead rendering remedial decisions that are equitable and flexible.<sup>430</sup>

Several other factors appear to enhance remedial flexibility. Many lawsuits are brought against local governmental bodies. Since these bodies perform socially useful functions on limited budgets, the courts hesitate to impose excessive financial burdens on local school districts.<sup>431</sup> There is also the traditional

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<sup>426</sup> See, e.g., *Sheelhouse v. Woodbury Cent. Com. School Dist.*, 488 F.2d 237 (8th Cir. 1973); *Nebraska Dep't of Roads Employees Ass'n v. Department of Roads*, 364 F. Supp. 251 (D. Neb. 1973); *Buggs v. City of Minneapolis*, 358 F. Supp. 1340 (D. Minn. 1973); *Johnson v. Netterville*, 355 F. Supp. 921 (M.D. La. 1973); *Monte v. Flaherty*, 351 F. Supp. 1136 (W.D. Pa. 1972). *Poschmen v. Dumke*, 107 Cal. Rptr. 596 (Ct. App. 1973) was decided on state law in state court but § 1983 supplied one of the theories of liability. *Id.* at 603.

<sup>427</sup> *Schultz v. School Dist.*, 367 F. Supp. 467 (D. Neb. 1973); *Buhr v. Buffalo School Dist.*, 364 F. Supp. 1225 (D.N.D. 1973).

<sup>428</sup> *Lipp v. Board of Educ.*, 470 F.2d 802 (7th Cir. 1972).

<sup>429</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h(6)(1970); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1970); Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1970).

<sup>430</sup> See, e.g., *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240 (3d Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 141-42 (4th Cir. 1973), *vacated and remanded*, 43 U.S.L.W. 4880 (U.S. June 25, 1975) (under Title VII absence of bad faith not a sufficient reason to deny back pay); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969); *Tea v. Cone Mills Corp.*, 301 F. Supp. 97, 102 (M.D.N.C. 1969), *aff'd*, 438 F.2d 86 (4th Cir. 1971). See also *Harper v. City of Baltimore*, 359 F. Supp. 1187, 1216-17 (D. Md. 1973); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973).

<sup>431</sup> Cf. Judge Coleman concurring specially in decision to dissolve en banc panel, *McLaurin v. Columbia Mun. Separate School Dist.*, 486 F.2d 1049, 1050 (5th Cir. 1973). But cf. *Bradley v. School Board*, 416 U.S. 696 (1974).

judicial policy against ordering adverse litigants to work together, based on the idea that it is both undesirable and ineffective to force personal working relations.<sup>432</sup> The court can vindicate the employee by reinstating him, but the judicial process inevitably is time consuming and he may have gone on to something else.<sup>433</sup> Reinstatement cannot alter either the authority structure or the personal feelings of co-workers or superiors. Thus, if an employee and his supervisors are at loggerheads, the court will be reluctant to reinstate even though the discharge was unconstitutional. The employee must be content with money damages.<sup>434</sup> If, however, the working relationship is not so close that harmony and loyalty are required, reinstatement may be ordered.<sup>435</sup> Even so, the employee may be uncomfortable, so the court may allow another hearing. The defendants may seek new grounds to discharge, and having profited from reading the court's opinion, the officials are much more likely to discharge correctly the second time.<sup>436</sup> Thus, a wrongfully discharged employee should not consider the prospect of reinstatement to be a reason to cease looking for another job.

## 2. *Relationship Between Remedy and Interest Affected*

Of particular significance in employment cases is the relationship between the interest violated by the defendant and the remedy extended to the plaintiff. If a property interest in continued employment has been breached, the courts will respond remedially only enough to cover the period of expectancy. If the expectancy is indefinite, reinstatement is in order. Most employees, however, work under less than a lifetime appointment. In that circumstance, a court will order reinstatement and back

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<sup>432</sup> *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring); *Peacock v. Board of Regents*, 380 F. Supp. 1081, 1087 (D. Ariz. 1974); *Abbott v. Thetford*, 354 F. Supp. 1280, 1292 (M.D. Ala. 1973); D. DOBBS, *REMEDIES* 925, 929-30 (1972).

<sup>433</sup> The victorious litigant in *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972), *aff'd in part, rev'd in part, remanded*, 512 F.2d 109 (9th Cir. 1975), apparently appears again in *Starsky v. Board of Trustees*, 109 Cal. Rptr. 822 (Ct. App. 1973).

<sup>434</sup> *Zimmerer v. Spencer*, 485 F.2d 176, 179 (5th Cir. 1973).

<sup>435</sup> *Nebraska Dept. of Roads Employees Ass'n v. Department of Roads*, 364 F. Supp. 251, 254-55 (D. Neb. 1973).

<sup>436</sup> *Karstetter v. Evans*, 350 F. Supp. 209, 210-11 (N.D. Tex. 1971).

pay only for the period of the expectancy.<sup>437</sup> The effectiveness of reinstatement is limited by the inherent delay in the legal process. This is exemplified by a case in which a court in September of 1973 ordered the plaintiff reinstated for the academic year 1971-72.<sup>438</sup> In these cases, a prompt hearing and perhaps a preliminary injunction are in order.<sup>439</sup> This ensures that reinstatement will not be a hollow remedy and that the employer will not be required to pay back wages without receiving services in return.

When there is no property interest in employment, a court will not order reinstatement and back pay for an illegal discharge. If the discharge does not impinge upon any constitutionally cognizable interest, the former employee is not entitled to any remedy. If, however, the employee has no property interest in the employment, but the reasons given or the procedures used impinge upon the former employee's future employment prospects or present reputation, the court must fashion a remedy commensurate with the impaired interest. Often, an administrative hearing on the discharge is the remedy. The hearing is intended only "to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons."<sup>440</sup> In passing on public employee cases after *Roth*, the lower courts have distinguished liberty and property cases. In property cases, the remedy is reinstatement and back pay. In liberty cases, the remedy is a hearing to refute the charges.<sup>441</sup>

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<sup>437</sup> *Zimmerer v. Spencer*, 485 F.2d 176, 179 (5th Cir. 1973) (one year constructive tenure and one year's back pay).

<sup>438</sup> *Starsky v. Board of Trustees*, 109 Cal. Rptr. 822 (Ct. App. 1973).

<sup>439</sup> *Klein v. New Castle County*, 370 F. Supp. 85 (D. Del. 1974) (commendable celerity); *Fisher v. Snyder*, 346 F. Supp. 396 (D. Neb. 1972); *Local 594 Public Employees Union v. City of West Point*, 338 F. Supp. 929 (D. Neb. 1972). See also *Adams v. Walker*, 488 F.2d 1064 (7th Cir. 1973) (defendant's request for a stay on appeal denied, *final opinion affirming discharge*, 492 F.2d 1003 (1974)).

<sup>440</sup> *Board of Regents v. Roth*, 408 U.S. 564, 573 n.12 (1972).

<sup>441</sup> *Garcia v. Daniel*, 490 F.2d 290 (7th Cir. 1974); *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 156-57 (8th Cir. 1973); *Moore v. Knowles*, 482 F.2d 1069, 1075 (5th Cir. 1973); *Ferris v. Special School Dist. No. 1*, 367 F. Supp. 459, 465 (D. Minn. 1973); *Zumwalt v. Trustees of Cal. State Colleges*, 109 Cal. Rptr. 344, 354 (Ct. App. 1973) Cf. *Arnett v. Kennedy*, 416 U.S. 134, 156 (1974) (opinion of Justice Rhenquist, Chief Justice Burger and Justice Stewart).

The question of what process is due, then, is compelling in public employee-liberty cases. Since the process may be the only remedy, remedial implications weight the pragmatic procedural question.<sup>442</sup> Generally the problem has been solved as follows. If the reasons for dismissal impinge upon the employee's liberty interest, he is given a choice: He may accept the reasons and consider the matter closed, or he may demand a hearing. If the employee's choice is a hearing, certain procedural safeguards are required in order to give him a fair chance to vindicate himself. Fairly detailed notice of the charges is required before the hearing takes place; the decision must be made on the record by apparently impartial persons; and the employee has a right to retain counsel, to present oral evidence and to cross-examine adverse witnesses.<sup>443</sup>

Though the purpose of this hearing is to allow the employee to clear his name, the employer need not abide the result.<sup>444</sup> The hearing does, however, provide the basis for later judicial review of the administrative record for proper procedure. The ambit of judicial inquiry into the weight of the evidence is narrow, but the court will insist upon some evidence of a nonarbitrary reason to terminate.<sup>445</sup> If a reason is unrelated to employment or working relationships, trivial or unsupported in the record, it is arbitrary.<sup>446</sup> Because the administrative deci-

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<sup>442</sup> Due process is a flexible concept. In determining what procedure due process requires in a particular setting, the institutional and factual context is weighed. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Thus, requirements in one setting may not carry over into another.

<sup>443</sup> *McNeill v. Butz*, 480 F.2d 314, 322 (4th Cir. 1973); *Poddar v. Youngstown State Univ.*, 480 F.2d 192 (6th Cir. 1973); *Hostrop v. Board of Junior College*, 471 F.2d 488, 495 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); *Vanderzanden v. Lowell School Dist. No. 71*, 369 F. Supp. 67, 73-74 (D. Ore. 1973); *Lindsay v. Kissinger*, 367 F. Supp. 949, 953 (D.D.C. 1973); *Blunt v. Marion County School Bd.*, 366 F. Supp. 727 (M.D. Fla. 1973); *Lowrance v. Barker*, 347 F. Supp. 588, 591-93 (E.D. Tex. 1972), *aff'd*, 480 F.2d 923 (5th Cir. 1973); *Williams v. Board of Directors*, 519 P.2d 15 (Wash. Ct. App. 1974). *See also* *Arnett v. Kennedy*, 416 U.S. 134 (1974) (timing of hearing); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

<sup>444</sup> *Board of Regents v. Roth*, 408 U.S. 564, 573 n.12 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

<sup>445</sup> *Dause v. Bates*, 369 F. Supp. 139, 146-47 (W.D. Ky. 1973); *Bottcher v. Florida Dept. of Ag. & Cons. Serv.*, 361 F. Supp. 1123, 1130 (N.D. Fla. 1973) (no substantial evidence); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 804-05 (N.D. Iowa 1972) (no rule broken).

<sup>446</sup> *Wiehart v. McDonald*, 367 F. Supp. 530, 533 (D. Mass. 1973), *aff'd*, 500 F.2d 1110 (1st Cir. 1974).

sion is not reviewed factually, it is important to examine the composition of the administrative hearing panel. To preserve the integrity of the process, the decision-makers should have no prior connection with the controversy.<sup>447</sup> In addition to review for arbitrariness, the court will search the record for a constitutionally impermissible reason. If the employee was discharged because of race or an exercise of first amendment rights, the case involves exercise of constitutional rights rather than liberty and the employee is entitled to be reinstated with back pay.<sup>448</sup> One further reason for the hearing is the employee's entitlement to pay. Though the employer can terminate employment, procedurally improper efforts to terminate are legally ineffective. Thus, the employee is entitled to remain on the payroll until proper action is taken.<sup>449</sup>

The problem of relating the remedy to the interest affected has led to expungement orders. If no adverse action has been taken and there is merely an entry in a file, it is not clear whether the interest affected is liberty or property.<sup>450</sup> Since the information remains in the file unless someone removes it, it may be disseminated in the future and may injure either employment opportunities or reputations. Thus, when file

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<sup>447</sup> *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Duke v. North Texas State Univ.*, 469 F.2d 829, 841-48 (5th Cir. 1972) (Godbold, C.J., dissenting), *cert. denied*, 412 U.S. 932 (1973); *Lake Mich. Col. Fed. of Teachers v. Lake Mich. Com. Col.*, 390 F. Supp. 103, 132-34 (W.D. Mich. 1974); *King v. Caesar Rodney School Dist.*, 380 F. Supp. 1112 (D. Del. 1974); *Wagner v. Little Rock School Dist.*, 373 F. Supp. 876 (E. D. Ark. 1973). *Contrast Suckle v. Madison Gen. Hosp.*, 362 F. Supp. 1996, 1209-10, (W.D. Wisc. 1973) (hospital staff privileges).

<sup>448</sup> *Smith v. Losee*, 485 F.2d 334, 339 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Dause v. Bates*, 369 F. Supp. 139, 147-48 (W.D. Ky. 1973); *Ferris v. Special School Dist. No. 1*, 367 F. Supp. 459 (D. Minn. 1973); *Lusk v. Estes*, 361 F. Supp. 653, 664 (N.D. Tex. 1973); *Fisher v. Snyder*, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 805 (N.D. Iowa 1972); *Teamsters Local 594 v. City of West Point*, 338 F. Supp. 927 (D. Neb. 1972); *See also Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1972).

<sup>449</sup> *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 157 (8th Cir. 1973); *Klein v. New Castle County*, 370 F. Supp. 85, 91 (D. Del. 1974). *But see Arnett v. Kennedy*, 416 U.S. 134 (1974); *Skehan v. Board of Trustees*, 358 F. Supp. 430 (M.D. Pa. 1973), *vacated and remanded*, 501 F.2d 31 (2d Cir. 1974).

<sup>450</sup> *Ortwein v. Mackey*, 511 F.2d 696 (5th Cir. 1975) (not liberty); *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153 (8th Cir. 1973) (liberty); *Shrick v. Thomas*, 486 F.2d 691 (7th Cir. 1973) (neither); *Suarez v. Weaver*, 484 F.2d 678 (7th Cir. 1973) (not clear); *Bottcher v. Florida Dep't of Ag. & Cons. Serv.*, 361 F. Supp. 1123, 1129 (N.D. Fla. 1973) (property and liberty).

entries are false, courts have ordered the entries expunged.<sup>451</sup> To make this meaningful, one court ordered the file opened so that false information could be discovered and corrected.<sup>452</sup>

### 3. *Federal Civil Rights Actions: Remedial Ramifications of the "Person" Requirement*

In 1973, the Supreme Court clarified decisions under the Civil Rights Act. In *City of Kenosha v. Bruno*<sup>453</sup> and *Moor v. County of Alameda*,<sup>454</sup> the Court held that federal district courts had no jurisdiction to hear Civil Rights Act cases brought against local government defendants. The defendant must be a "person." In public employee cases, the person concept may create remedial difficulties which are more than merely symbolic. It will be necessary to discuss the remedial aspects of the person concept in public employee cases.

In *Monroe v. Pape*,<sup>455</sup> the Supreme Court decided that a city is not a "person" within the ambit of the Civil Rights Act, at least in a suit for damages. But many suits have been brought in *equity* under the Civil Rights Act to desegregate schools. Many of these suits were originally brought against the school districts as entities. In some, individuals were added as defendants.<sup>456</sup> The Fifth Circuit considered and resolved several procedural issues in *Harkless v. Sweeny Independent School District*.<sup>457</sup> Ten black former teachers sued, charging that their discharges were racially motivated. The suit was brought against the board and the superintendent under the

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<sup>451</sup> *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 156 (8th Cir. 1973); *Bottcher v. Florida Dep't of Ag. & Cons. Serv.*, 361 F. Supp. 1123, 1132 (N.D. Fla. 1973).

<sup>452</sup> *Norlander v. Schleck*, 345 F. Supp. 595 (D. Minn. 1973).

<sup>453</sup> 412 U.S. 507 (1973).

<sup>454</sup> 411 U.S. 693 (1973).

<sup>455</sup> 365 U.S. 167, 188-92 (1961).

<sup>456</sup> See, e.g., *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

<sup>457</sup> 427 F.2d 319 (5th Cir.), *cert. denied*, 400 U.S. 991 (1970) (The most recent decision in *Harkless*, rendered in light of *Kenosha*, is reported at 388 F. Supp. 738 (S.D. Tex. 1975). See also *McLaurin v. Columbia Mun. Separate School Dist.*, 478 F.2d 348, 353-54 (5th Cir.), *en banc panel dissolved*, 486 F.2d 1049 (1973); *McFerrien v. County Bd. of Educ.*, 455 F.2d 199 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972); *Smith v. Hampton Training School*, 360 F.2d 577, 581 n.8 (4th Cir. 1966); *Paxman v. Wilkerson*, 390 F. Supp. 442, 447 (E.D. Va. 1975).

Civil Rights Act. The district judge granted defendants' motion for a jury trial on the back pay issue. When jurors expressed unwillingness to hold the officials individually, plaintiffs dismissed the defendants as individuals. The trial proceeded against the school district as an entity as well as the trustees and superintendent in "representative capacities." After a jury finding that the discharges were in good faith and not racially motivated, the district court granted defendants' motion to dismiss.

On plaintiffs' appeal, the court of appeals resolved *Monroe's* impact on the jury trial question. First, the court read *Monroe* as limited to damage cases and held that the school district was "included within the meaning of 'person' in § 1983 for the equitable relief sought."<sup>458</sup> Second, the court held that the trustees and the superintendent were proper Civil Rights Act "persons" in both representative and individual capacities "for the purposes of the equitable relief sought here."<sup>459</sup> Finally, the court held that the defendants had no right to a jury trial on back pay and other factual issues because "the prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement."<sup>460</sup> Several

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<sup>458</sup> *Harkless v. Sweeny Ind. School Dist.*, 427 F.2d 319, 323 (5th Cir.), *cert. denied*, 400 U.S. 991 (1970). *Accord*, *Courtney v. School Dist. No. 1*, 371 F. Supp. 401 (D. Wyo. 1974). *But see* *Pelisek v. Trevor State Graded School Dist. No. 7*, 371 F. Supp. 1064 (E.D. Wis. 1974); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 806-07 (N.D. Iowa 1972) (school district not a person).

<sup>459</sup> *Harkless v. Sweeny Ind. School Dist.*, 427 F.2d 319, 323 (5th Cir.), *cert. denied*, 400 U.S. 991 (1970).

<sup>460</sup> *Harkless v. Sweeny Ind. School Dist.*, 427 F.2d 319, 324 (5th Cir.), *cert. denied*, 400 U.S. 991 (1970). *See also* *Wright v. Southeast Alabama Gas Dist.*, 376 F. Supp. 780 (M.D. Ala. 1974) where the jury was allowed to determine the issues as to the lawfulness of the termination, entitlement to reinstatement, and special damages. The question of back pay was decided by the judge independently. The jury trial issue has been treated recently in three excellent notes and an article which come to differing conclusions. *See McCormack*, 60 VA. L. REV. 1, 66-70 (1974) (historical analogy: *Harkless* approved); Note, *Monetary Claims Under Section 1983: The Right to Trial by Jury*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 613 (1973) (favoring a result similar to *Harkless*); Note, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV., 503 (1973) (favoring a jury trial in all "damage" cases); Note, *Congressional Provisions for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401 (1973) (no right to jury trial in some statutory civil rights action cases). In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that either party to a fair housing act suit could demand a jury trial but specifically declined to pass on the problem discussed here. *Id.* Some government employee termination cases are

speculative conclusions may be inferred from *Harkless*. If, under *Harkless*, the defendants in a wrongful discharge case are sued in their representative or official capacities along with the entity, it appears that the school district is responsible for the back pay rather than the individuals.<sup>461</sup> Also, under *Harkless*, the back pay award is equitable and appears to follow a finding of wrongful discharge. The immunities which can be interposed to insulate individual defendants from damages are irrelevant to back pay. Immunity, then, only protects defendants when either general or special damages are asked in addition to back pay.

*Moor* and *Bruno* taken together destroy *Harkless*' foundation, the idea that a school district is a Civil Rights Act "person." *Moor* held that a county is an improper Civil Rights Act defendant in a suit for damages.<sup>462</sup> *Bruno* held that a city is an improper Civil Rights Act defendant in a suit asking an injunction.<sup>463</sup> Both are grounded upon the word "person" in the act and the relevant legislative history. Thus, a federal district court appears to lack Civil Rights Act jurisdiction over a school district defendant.<sup>464</sup>

*Bruno*'s full remedial impact on school desegregation cases remains to be considered.<sup>465</sup> Are the federal courts abandoning

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tried to juries. See, e.g., *Jones v. Jefferson County Bd. of Educ.*, 359 F. Supp. 1081 (E.D. Tenn. 1972) (ruling on defendant's post trial motions). See generally F. JAMES, CIVIL PROCEDURE §§ 8.1-.11 (1965).

<sup>461</sup> *Gates v. Collier*, 489 F.2d 298, 302-03 (5th Cir. 1973) (instructive but not conclusive on this point). But see *Courtney v. School Dist. No. 1*, 371 F. Supp. 401 (D. Wyo. 1974) where the court stated that "the board may be vicariously liable for the actions of its agents." *Id.* at 404.

<sup>462</sup> 411 U.S. 693, 698-710 (1973).

<sup>463</sup> 412 U.S. 507, 509-11 (1973).

<sup>464</sup> *Adkins v. Duval County School Bd.*, 511 F.2d 690 (5th Cir. 1975); *Harkless v. Sweeny Ind. School Dist.*, 388 F. Supp. 738 (S.D. Tex. 1975); *Lopez v. Williams*, 372 F. Supp. 1279, 1294-95 (S.D. Ohio 1973), *aff'd*, 95 S. Ct. 729 (1974); *Vanderzanden v. Lowell School Dist. No. 71*, 369 F. Supp. 67, 71 (D. Ore. 1973); *Contra*, *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974) (correctional institution immune from suit). See also *Huntley v. North Carolina State Bd. of Educ.*, 493 F.2d 1016, 1017 n.2 (4th Cir. 1974) (state board of education is not a person); *Taliaferro v. State Council of Higher Educ.*, 372 F. Supp. 1378, 1381 (E.D. Va. 1974) (state council is not a person). In *Davis, An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703 at 720-21 (1974) he suggests that § 1983 be amended to allow suits against a local government for damages arising from deliberate torts by local officers. Professor Davis asserts that the present system is "almost completely ineffective as a deterrent . . . because the chances that an officer will have to pay a judgement . . . are too remote." *Id.* at 721.

<sup>465</sup> For an analysis of the impact of *Bruno* on *Harkless* see *Cason v. City of Jack-*



their historic effort to desegregate schools? Recently, the Fifth Circuit remanded a teacher's appeal in a case against a school district and other defendants in their official capacities: the district court was instructed to consider the jurisdictional question "in the light of *City of Kenosha v. Bruno*."<sup>466</sup> In another appeal, the Fifth Circuit held that the plaintiffs did not state a claim against a municipality and remanded for the district court to consider whether injunctive relief requiring affirmative action by municipal officials was proper "in light of *Kenosha*."<sup>467</sup> The Fourth Circuit has also expressed, by a per curiam opinion, that it does not consider a school board to be a "person;" in so doing it followed *Bruno* and remanded an award granted against a school board.<sup>468</sup>

Despite the seeming import of these decisions it must be remembered that fifteen days after *Bruno* the Supreme Court decided *Keynes v. School District No. 1*.<sup>469</sup> This was another Civil Rights Act case involving a governmental defendant, in which the Court discussed equitable relief at length without mentioning the jurisdictional bar in *Bruno*.<sup>470</sup> Moreover, unless *Ex Parte Young*<sup>471</sup> is overruled, a federal court's jurisdiction to enjoin a state official from interfering with a federal right continues unimpaired. This will prevent teachers from being remitted to less sympathetic state forums and will allow the courts to order reinstatement.

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sonville, 497 F.2d 949 (5th Cir. 1974) (injunction against city to enjoin the city from allowing admittedly white racist organization from renting civic auditorium for meeting vacated because city is not a "person"); *Thompson v. Madison County Bd. of Educ.*, 496 F.2d 682 (5th Cir. 1974) (remanded for argument and briefs regarding availability of back pay award from board of education); *Howell v. Winn Parish School Bd.*, 379 F. Supp. 816 (W.D. La. 1974) (school board is not a "person" as contemplated by Civil Rights Act); *Thomas v. Ward*, 374 F. Supp. 206 (M.D.N.C. 1974) (*Bruno* denies award of damages against school board).

<sup>466</sup> *Campbell v. Masur*, 486 F.2d 554, 556 (5th Cir. 1973). The issue was resolved in *Adkins v. Duval County School Bd.*, 511 F.2d 690 (5th Cir. 1975).

<sup>467</sup> *Jenkins v. Patterson*, 488 F.2d 436, 441 (5th Cir. 1974).

<sup>468</sup> *Singleton v. Vance County Bd. of Educ.*, 501 F.2d 429 (4th Cir. 1974).

<sup>469</sup> 413 U.S. 189 (1973).

<sup>470</sup> This argument was considered and rejected in *Adkins v. Duval County School Bd.*, 511 F.2d 690, 694-95 (5th Cir. 1975). See also *Bradley v. School Bd.*, 416 U.S. 696 (1974); *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974); *Moore v. Knowles*, 482 F.2d 1069, 1075-76 (5th Cir. 1973) (post-*Kenosha* case seemingly holding that the school board as a corporate body was an indispensable party).

<sup>471</sup> 209 U.S. 123 (1908).

If, however, the "person" requirement does prevent actions against the employing governmental bodies, and if, as *Harkless* held, the equitable remedy of reinstatement includes back pay, the court can still extend full relief in three ways. First, the court can manipulate the fiction of suing individual defendants *in their official capacities*. This serves the symbolism of *Young* and *Kenosha*, yet allows the defendants to be named in their official or representative capacities. Then, following the inference from *Harkless*, the immunity is avoided and the entity may be liable for back pay awards.<sup>472</sup> If, however, *Kenosha* repudiates *Harkless*, this fiction may be too much to bear. Thus, the back pay award may be remedially severed from reinstatement in Civil Rights Act cases.<sup>473</sup>

The second alternative for the wrongfully discharged public employee is to sue under the 1972 amendments to Title VII of the 1964 Civil Rights Act.<sup>474</sup> If the local governmental employer is guilty of "an unlawful employment practice" after March 24, 1972, the court may order the employee reinstated with back pay.<sup>475</sup> Unlawful employment practices are defined as hiring or discharge decisions based on race, color, religion, sex or national origin.<sup>476</sup> Unfortunately, a discharge which denies due process is neither an unfair employment practice nor a basis for reinstatement and back pay. The statute is explicit: "no order . . . shall require . . . reinstatement . . . or back pay, if such individual was . . . discharged for any reason other than discrimination on account of race, color, religion, sex, or

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<sup>472</sup> *Lyman v. Swartley*, 385 F. Supp. 661, 665 (D. Idaho 1974). *But cf.* *Williams v. Eaton*, 443 F.2d 422, 429 (10th Cir. 1971) (money damages interdicted because defendants sued in individual capacity and action "in essence" to recover from the state which is immune); *Harkless v. Sweeny Ind. School Dist.*, 388 F. Supp. 738, 747 (S.D. Tex. 1975); *Klein v. New Castle County*, 370 F. Supp. 85, 91 (D. Del. 1974)(same); *O'Brien v. Galloway*, 362 F. Supp. 901, 905 (D. Del. 1973)(same).

<sup>473</sup> *Cf.* "We do not read *Ex Parte Young* . . . to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature." *Edelman v. Jordon*, 415 U.S. 651 (1974); *Nunn v. City of Paducah*, 367 F. Supp. 957 (W.D. Ky. 1973).

<sup>474</sup> 42 U.S.C. § 2000e(b) (1974).

<sup>475</sup> 42 U.S.C. § 2000e-5(g) (1974). *See also* *United States v. Chesterfield County School Dist.*, 484 F.2d 70 (4th Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973); *Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763 (8th Cir. 1971).

<sup>476</sup> 42 U.S.C. § 2000e-2(a)(1) (1974).

national origin . . . ."<sup>477</sup> Thus a public employee who is discharged without due process has no remedy against the entity unless the substantive reasons are interdicted by Title VII standards.<sup>478</sup> While it might have been hoped that a teacher's right to due process would not be less prominent under Title VII than under the Civil Rights Act,<sup>479</sup> the contrary appears to be true.

The third answer to the absence of Civil Rights Act jurisdiction over the entity is to ask for damages from the individual official.<sup>480</sup> In the damage part of the case, plaintiff merely sues the person who caused the discharge in his individual capacity. Plaintiff can additionally ask for an injunction to bind those currently in positions of authority.<sup>481</sup>

Suing the defendant individually for damages has advantages. If officials are individually responsible, wrongful discharges may occur less frequently. The individuals would likely be less willing to act unless they were positive their course was correct, and irresponsible behavior would be deterred. Suing individuals directly, however, entails difficulties. On one hand, an individual defendant may be charged damages for simply carrying out a governmental policy.<sup>482</sup> On the other, a wrongfully discharged employee may be deprived of recovery because an official is insolvent or deceased.<sup>483</sup> In addition, if the individuals are sued for damages, a major remedial difficulty arises from personal immunity.<sup>484</sup> There are two personal immunities,

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<sup>477</sup> 42 U.S.C. § 2000-5(g) (1974).

<sup>478</sup> *But cf.* Ward v. Kentucky State Univ. Bd. of Regents, 360 F. Supp. 1179 (E.D. Ky. 1973). Plaintiff combined § 1983 and Title VII, charging that his discharge violated due process and free speech as well as being racially motivated. Defendants moved to dismiss, asserting absence of color of law and lack of a constitutionally cognizable interest, and asking the court to abstain. The motion was denied.

<sup>479</sup> *Cf.* United States v. Chesterfield County School Dist., 484 F.2d 70, 73 (4th Cir. 1973).

<sup>480</sup> Paxman v. Wilkerson, 390 F. Supp. 442, 449 (E.D. Va. 1975); Puckett v. Mobile City Comm'rs, 380 F. Supp. 593 (S.D. Ala. 1974) (*Kenosha* prevents suit against entity; *Kenosha* allows damage suit against individuals; damages granted against commissioners in individual capacities).

<sup>481</sup> Less personal involvement is required to enjoin than to impose damages. *See* Schnell v. Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969).

<sup>482</sup> K. DAVIS, ADMINISTRATIVE LAW TEXT § 26.03 (1972).

<sup>483</sup> Landman v. Royster, 354 F. Supp. 1302, 1315 (E.D. Va. 1973).

<sup>484</sup> Some courts use the capacity fiction to confuse sovereign and personal immunities as follows: If an official is sued in his "official" capacity, it is, in reality, a lawsuit

absolute and qualified. The type of activity performed by the defendant determines whether an immunity applies and, if so, whether it is absolute or qualified. Judges, it is clear, are entitled to an absolute immunity while "lesser" officials must be contented with a qualified immunity.<sup>485</sup> Immunities are available only in damage actions; even a judge can be enjoined.<sup>486</sup> In Civil Rights Act cases, the immunities have a procedural effect. If the defendant is entitled to an absolute or judicial immunity, the trial judge will grant defendant's pre-trial motion either to dismiss or for summary judgment.<sup>487</sup> This results in the lawsuit being short-circuited before trial. In contrast, if the immunity is qualified, the plaintiff can allege enough to avoid a motion to dismiss<sup>488</sup> and show a triable issue of fact to avoid summary judgment.<sup>489</sup> In government employment cases, the courts uniformly protect legislative and administrative defendants with a qualified immunity because these officials exercise judgment and discretion.<sup>490</sup> Thus, a former employee who is asking damages can avoid pretrial dismissal and take his

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against the state and therefore barred by sovereign immunity. *Williams v. Eaton*, 443 F.2d 422, 429 (10th Cir. 1971); *Klein v. New Castle County*, 370 F. Supp. 85, 91 (D. Del. 1974); *O'Brien v. Galloway*, 362 F. Supp. 901, 905 (D. Del. 1973). This approach reveals a profound conservatism about awarding damages, a touching faith in the reality of fictional concepts and an inveterate belief in the propriety of established authority. It is well illustrated in Judge Barnette's separate opinion in *Smith v. Losee*, 485 F.2d 334, 345-51 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (concurring and dissenting). The Supreme Court recently reaffirmed sovereign immunity. *Edelman v. Jordan*, 415 U.S. 651 (1974). But this approach was categorically rejected in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The problem is discussed in Part I.

<sup>485</sup> *Pierson v. Ray*, 386 U.S. 547, 553-58 (1967). In *Scheuer v. Rhodes*, 416 U.S. 232 (1974) the qualified immunities were described as follows: "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." *See also Wood v. Strickland*, 95 S. Ct. 992, 1001 (1975).

<sup>486</sup> *See, e.g., Mitchum v. Foster*, 407 U.S. 225 (1971).

<sup>487</sup> *See, e.g., Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973).

<sup>488</sup> *See, e.g., Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973).

<sup>489</sup> *See, e.g., Adamian v. University of Nevada*, 359 F. Supp. 825, 831-34 (D. Nev. 1973).

<sup>490</sup> *See, e.g., Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973); *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).

claim to the fact-finder.<sup>491</sup>

It is more difficult to generalize about the effect of immunities upon the doctrinal standard or the burden of proof or persuasion. The officials, it may safely be said, are not liable for damages if they act in good faith but are liable if they act in bad faith.<sup>492</sup> At this point, diversity arises. In the First Circuit, plaintiff must show that defendants subjectively intended to deprive him of a constitutional right,<sup>493</sup> yet the neighboring Second Circuit has hinted that it is enough for the defendant to participate in depriving plaintiff of a constitutional right.<sup>494</sup> The Seventh Circuit apparently equates liability with lack of immunity: if the defendants prove that plaintiff was properly discharged, they are immune, but if the discharge was unjustifiable, defendants are not immune.<sup>495</sup> The Tenth Circuit seemingly requires something less than malice, recently holding that while board members who participate without wrongful intent are immune, a finding that administrators were malicious is ample to overcome whatever immunity existed.<sup>496</sup> On the other hand, a district court in Oregon said that breach of constitutional rights overcomes a board member's immunity but that the administrator could not be liable because he had no statutory power to hire and fire.<sup>497</sup> The Eighth Circuit specifically rejected specific intent-malice as compensatory damage thresholds for school officials' qualified immunity and held the good faith test to be objective.<sup>498</sup>

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<sup>491</sup> See, e.g., *Jones v. Jefferson County Bd. of Educ.*, 359 F. Supp. 1081 (E.D. Tenn. 1972).

<sup>492</sup> *Wood v. Strickland*, 95 S. Ct. 992, 1001 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Jones v. Jefferson County Bd. of Educ.*, 359 F. Supp. 1081 (E.D. Tenn. 1972).

<sup>493</sup> *Gaffney v. Silk*, 488 F.2d 1248, 1251 (1st Cir. 1973). See also *Nelson v. Knox*, 256 F.2d 312, 315 (6th Cir. 1958); *Klein v. New Castle County*, 370 F. Supp. 85, 92 (D. Del. 1974).

<sup>494</sup> *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971) (prison case).

<sup>495</sup> *McLaughlin v. Tilendis*, 398 F.2d 287, 291 (7th Cir. 1968). See also *Vanderzanden v. Lowell School Dist. No. 71*, 369 F. Supp. 67, 72 (D. Ore. 1973) ("if plaintiff's right to freedom of speech was violated it would justify a monetary award."). But cf. "Implicit in the idea that officials have some immunity . . . is a recognition that they may err." *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

<sup>496</sup> *Smith v. Losee*, 485 F.2d 334, 343-44 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974). See also *Dewell v. Lawson*, 489 F.2d 877, 882 (10th Cir. 1974).

<sup>497</sup> *Vanderzanden v. Lowell School Dist. No. 71*, 369 F. Supp. 67, 72, 75 (D. Ore. 1973). But see *McCormack*, 60 VA. L. REV. 1, 16-17 (1974).

<sup>498</sup> *Strickland v. Inlow*, 485 F.2d 186, 191 (8th Cir. 1973), *vacated and remanded sub. nom.* *Wood v. Strickland*, 95 S. Ct. 992 (1975).

In *Wood v. Strickland*,<sup>499</sup> the Supreme Court clarified a school board member's immunity. While the opinion dealt with expelling students rather than discharging teachers, it probably states the general ambit of the board member's immunity. Steering carefully between strict liability and subjective intent, the Court held:

that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the (official) action . . . would violate the constitutional right of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.<sup>500</sup>

This retains the good faith standard and contains elements of both objective and subjective.<sup>501</sup>

It is nearly impossible to reconcile the citizen's interest in his constitutional freedom with the court's desire to avoid curtailing legitimate exercises of governmental power. But the courts seek a word formula to focus judgment upon the critical issues, and the immunity concept is the best analytical tool the courts have. The malice-intent-good faith spectrum is, nonetheless, ambiguous and pliable.<sup>502</sup> One very unfortunate, yet inevitable, result of courts' development of doctrine is that it tends to petrify the law and prevent the courts from coming to grips with the facts of the individual case and the social environment.<sup>503</sup> In the public employee discharge cases, qualified immunity established a different standard for equitable relief (reinstatement) than for legal relief (back pay). Thus, if an official discharges an employee unconstitutionally but in good faith, the employee can be reinstated but denied back pay.<sup>504</sup>

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<sup>499</sup> 95 S. Ct. 992 (1975).

<sup>500</sup> *Id.* at 1001.

<sup>501</sup> *Id.*

<sup>502</sup> L. GREEN, *LITIGATION PROCESS IN TORT LAW* 63 (1965).

<sup>503</sup> *Id.* at 128-40.

<sup>504</sup> *Harkless v. Sweeny Ind. School Dist.*, 388 F. Supp. 738, 747-48 (S.D. Tex. 1975); *Klein v. New Castle County*, 370 F. Supp. 85, 92 (D. Del. 1974); *Nebraska Dep't of Roads Employees Ass'n v. Department of Roads*, 364 F. Supp. 251, 258 (D. Nev. 1973) (procedure ostensibly legal); *See also Westberry v. Fisher*, 309 F. Supp. 12 (S.D. Me. 1970). *But see Sterzing v. Fort Bend Ind. School Dist.*, 490 F.2d 92 (5th Cir.), *rev'g* 376 F. Supp. 657 (S.D. Tex. 1974). There the district court granted back pay but refused reinstatement. The court of appeals reversed, saying that refusal to reinstate

Because the employee is deprived of the governmental entity as a defendant, and because the officials are insulated by qualified immunity, a wrongfully discharged employee receives less than a full remedy. If constitutional rights are to be protected from illegal incursions, adequate remedies must be available. Reinstatement without back pay is inadequate to deter the callous and recalcitrant. In *Smith v. Losee*, Judge Doyle advocated an objective standard to determine whether the officials acted reasonably.<sup>505</sup> Because the citizen interests are both crucial and fragile, Judge Doyle's standard is commendable. His test seems also to protect official discretion for it allows the fact finder fully to evaluate official conduct from the viewpoint of an outside observer.

In addition to legal barriers to remedy, a discharged employee faces imposing proof barriers. When the case comes to trial, the authorities have spoken; and it is customary and convenient to believe them. The employee has, in all probability, been a dissenter; and troublemakers inevitably collect enemies. The fact finder must unravel a complex factual environment and deal with relationships and motives over an extended period of time.<sup>506</sup> Moreover, the authorities are often canny, secretive, and skilled in bureaucratic maneuver. This often results in facts being concealed or de-emphasized, and motives being dissembled. There is often an ambience of arbitrariness, nondisclosure, secret meetings, ostensible reasons, catch-all euphemisms, blanket conclusions and lies.<sup>507</sup> If this veil is to be

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because it would only revive antagonisms is improper. Apparently, the court ruled that if one's rights have been violated, he is entitled to a full remedy: back pay and reinstatement. *Lyman v. Swartley*, 385 F.2d 661 (D. Idaho 1974) (back pay and reinstatement because discharge wrongful; money damages from individuals denied because discharge in good faith); *Soni v. Board of Trustees*, 376 F. Supp. 289 (E.D. Tenn. 1974) (back pay from date of termination granted).

<sup>505</sup> *Smith v. Losee*, 485 F.2d 334, 352 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974). See also *Strickland v. Inlow*, 485 F.2d 186, 191 (8th Cir. 1973), *vacated and remanded sub nom. Wood v. Strickland*, 95 S. Ct. 992 (1975).

<sup>506</sup> *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973) *cert. denied*, 417 U.S. 908 (1974); *Klein v. New Castle County*, 370 F. Supp. 85 (D. Del. 1974); *Adamian v. University of Nevada*, 359 F. Supp. 825 (D. Nev. 1973); *Commonwealth ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (E.D. Pa. 1973); *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972), *aff'd in part, rev'd in part, remanded*, 512 F.2d 109 (9th Cir. 1975).

<sup>507</sup> *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973).

pierced, a sensitive fact finder is vital.

Due process decisions are remedial in the short run and preventative in the long run. The affected bodies must have some incentive to begin procedures which will open the decision-making process. Advance notice, hearing both sides, an opportunity to confront accusers and informers, and a decision on the record are central to a democratic decision-making process. These simple procedures advance the official body's legitimacy and efficiency. In *Board of Regents v. Roth*, Justice Marshall noted that "a requirement of procedural regularity at least renders arbitrary action more difficult" and that "proper procedures will surely eliminate some of the arbitrariness that results not from malice, but from innocent error."<sup>508</sup> Moreover, when embarrassing and institutional issues are discussed openly, the public interest is advanced. The obvious conclusion is that due process is in the best interest of both the public and the employer. But arbitrary power will not be surrendered without a struggle. To insure future compliance, remedial decisions in a particular case must consider both the specific defendant and other potential defendants. A damage verdict may encourage the authorities to comply.

The employee's interest presents additional reasons to consider a remedial decision's admonitory effect. Careers have been ruined by illegal, malicious or dishonest official misconduct. In addition, an illegal firing may cause the employee to suffer extreme emotional and financial hardship.<sup>509</sup> The employee must also bear the uncertainty and delay inherent in the litigation process. Obviously a hearing, reinstatement and a damage award cannot unring the bell;<sup>510</sup> the real goal should be to prevent similar misconduct. There is a growing body of case law which affirms the principles of due process by affording true remedial effect to denials of due process. As noted above when faced with unconstitutional discharges, many courts

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<sup>508</sup> *Board of Regents v. Roth*, 408 U.S. 564 (1972) (dissenting opinion). See also *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974) (Justice Marshall dissenting).

<sup>509</sup> See Harris, *A Scrap of Black Cloth*, *NEW YORKER*, June 17, 1974, at 37; June 24, 1974, at 37, discussing the case apparently reported as *James v. Board of Educ.*, 385 F. Supp. 209 (W.D.N.Y. 1974); Long, *A Reporter at Large: Love of Country*, *NEW YORKER*, July 30, 1973, at 35.

<sup>510</sup> *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).



have ordered the authorities to reinstate the employee with back pay.<sup>511</sup>

The remedial arsenal in due process cases also includes recovery for emotional and mental distress<sup>512</sup> as well as out-of-pocket loss<sup>513</sup> and punitive damages.<sup>514</sup> If incurred, damages for expenses such as job searches and moving expenses should be allowed. Plaintiffs, however, often fail to sue on available pendent causes of action for defamation<sup>515</sup> or do not prove impalpable damages satisfactorily.<sup>516</sup> Because attorney's fees are an imposing burden for an individual who is only awarded the income he should have received, the courts should award attorney's fees more frequently than they do.<sup>517</sup> When there are ac-

<sup>511</sup> *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974); *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 157 (8th Cir. 1973); *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973); *McNeill v. Butz*, 480 F.2d 314, 326 (4th Cir. 1973); *Vega v. Civil Service Comm'n*, 385 F. Supp. 1376 (S.D.N.Y. 1974); *Gonzalez v. Gonzalez*, 385 F. Supp. 1226 (D.P.R. 1974); *Young v. Hutchins*, 383 F. Supp. 1167 (M.D. Fla. 1974); *Sigmon v. Poe*, 381 F. Supp. 387 (W.D.N.C. 1974); *Dahleuger v. Town Bd.*, 381 F. Supp. 474 (E.D. Wis. 1974); *Parker v. Letson*, 380 F. Supp. 280 (N.D. Ga. 1974); *King v. Conservatorio de Muscia*, 378 F. Supp. 746 (D.P.R. 1974); *Wagner v. Little Rock School Dist.*, 373 F. Supp. 876 (E.D. Ark. 1973); *Dause v. Bates*, 369 F. Supp. 139, 150 (W.D. Ky. 1973); *Lusk v. Estes*, 361 F. Supp. 653, 664 (N.D. Tex. 1973); *Black v. Rizzo*, 360 F. Supp. 648, 653 (E.D. Pa. 1973); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973); *Adamian v. University of Nevada*, 359 F. Supp. 825, 831 (D. Nev. 1973); *Commonwealth ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500, 511 (E.D. Pa. 1973); *Snead v. Dep't of Social Servs.*, 355 F. Supp. 764, 773 (S.D.N.Y. 1973), *vacated*, 416 U.S. 977 (1974), *reaffirmed*, 389 F. Supp. 935 (S.D.N.Y. 1975); *Starsky v. Williams*, 353 F. Supp. 900, 928 (D. Ariz. 1972), *aff'd in part, rev'd in part, remanded*, 512 F.2d 109 (9th Cir. 1975); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 805 (N.D. Iowa 1972); *Poschman v. Dumke*, 107 Cal. Rptr. 596, 604 (Ct. App. 1973).

<sup>512</sup> See *Donovan v. Reinhold*, 433 F.2d 738 (9th Cir. 1970).

<sup>513</sup> See *Dause v. Bates*, 369 F. Supp. 139, 150 (W.D. Ky. 1973).

<sup>514</sup> See *Smith v. Losee*, 485 F.2d 334, 345 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Wall v. Stanly County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967). *Cf. Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). For a collection of cases, see Annot., *Punitive Damages for Violations of Federal Civil Rights Acts*, 14 A.L.R. Fed. 608 (1973).

<sup>515</sup> See, e.g., *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (no suit for defamation).

<sup>516</sup> See, e.g., *Jackson v. Wheatley School Dist. No. 28*, 489 F.2d 608, 612-13 (8th Cir. 1974); *Wright v. Southeast Alabama Gas Dist.*, 376 F. Supp. 780 (M.D. Ala. 1974) (reinstatement ordered but not entitled to back pay; failure to discharge burden of proof of lost income); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 806 (N.D. Iowa 1972) (loss of reputation, mental pain and anguish not proved).

<sup>517</sup> See, e.g., *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153, 157 (8th Cir. 1973); *Gonzalez v. Gonzalez*, 385 F. Supp. 1226, 1241-44 (D.P.R. 1974); *James v.*

tual losses, the court must do more than admonish the authorities to "go forth and sin no more."

#### D. *Deprivation of Liberty*

Under liberty two types of cases will be considered. First, ex parte mental health commitments will be analyzed under new and traditional due process. The cases fall into the same groups as the property and employment cases, some failing to recognize due process, others finding denials of due process but refusing to provide remedy and, finally, cases grappling with the remedial implications of a denial of due process. After the mental health cases, the discussion will turn to procedurally defective prison discipline and will discuss only remedial problems. In both mental health and prison cases, liberty is restricted by the official action denying due process. Also, the legal and remedial theories are similar. Moreover, in both mental health and prison cases there are two major hurdles in the path of remedy. They are the plaintiff's custodial status and the courts' apparent desire to protect official discretion through immunity doctrines.

##### 1. *Involuntary Commitment of the Mentally Ill*

Due process in mental health commitments has an almost circular history.<sup>518</sup> Earlier in American history there were relatively few commitments. When institutions became fashionable, strict procedural safeguards were written into the statutes; and several state courts applied a rigorous due process analysis.<sup>519</sup> Notice and a right to be heard, it was held, were imperative before a person could be deprived of his liberty. The operative fact of insanity had to be established before liberty was breached. Contrary arguments, the courts held, assumed the "insanity" conclusion which the judicial inquiry was designed

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Board of Educ., 385 F. Supp. 211, 217 (W.D.N.Y. 1974); *Klein v. New Castle County*, 370 F. Supp. 85, 92 (D. Del. 1974); *Lusk v. Estes*, 361 F. Supp. 653, 664 (N.D. Tex. 1973); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 807 (N.D. Iowa 1972).

<sup>518</sup> For an exhaustive work on involuntary commitment, see *Developments, Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

<sup>519</sup> See, e.g., *In re Lambert*, 66 P. 851 (Cal. 1901); *Allgor v. New Jersey State Hosp.*, 84 A. 711 (N.J. Eq. 1912); *Ex Parte Allen*, 73 A. 1078 (Vt. 1909).

to develop.<sup>520</sup>

Due process protections then receded. Three possible reasons for this development can be discerned. First, courts and legislatures began to defer to medical discretion. Second, in the early 20th century, the *parens patriae* doctrine enhanced state power to "help" the unfortunate. Finally, Supreme Court rulings eroded the earlier cases' due process foundation.<sup>521</sup> While a few states retained strict standards,<sup>522</sup> the trend was decidedly away from the earlier posture,<sup>523</sup> as noted by the Supreme Court in 1972, when it expressed surprise at the small amount of litigation in this area.<sup>524</sup> But, by that year, the tide was reversed. Medical expertise is no longer greeted with uniform approbation, and *parens patriae*, as a touchstone of state power to "help" the individual, is on the decline.<sup>525</sup> The Supreme Court began to construe due process in a variety of situations. Mental hospitals now face lawsuits based on numerous theories.<sup>526</sup>

Under the present state of mental health due process, people who present a danger to themselves or others may be committed immediately. Due process, it has often been said, only mandates a hearing before indeterminate commitment. This hearing may be held some time after the initial commitment.<sup>527</sup> *Phillips v. Giles*,<sup>528</sup> a recent Alabama case, is typical. The peti-

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<sup>520</sup> *In re Lambert*, 66 P. 851, 854 (Cal. 1901).

<sup>521</sup> See, e.g., *Chaloner v. Sherman*, 242 U.S. 455 (1917); *Simon v. Craft*, 182 U.S. 427 (1901).

<sup>522</sup> See, e.g., *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964).

<sup>523</sup> See, e.g., *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1970); *Whittington v. Johnson*, 201 F.2d 810 (5th Cir. 1953).

<sup>524</sup> *Jackson v. Indiana*, 405 U.S. 715, 736-39 (1972).

<sup>525</sup> See, e.g., *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975); *In re Ballay*, 482 F.2d 648, 650 (D.C. Cir. 1973); *Winters v. Miller*, 446 F.2d 65, 71 (2d Cir. 1971); *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 972 (M.D. Pa. 1971).

<sup>526</sup> See, e.g., *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974) (right to treatment: false imprisonment); *In re Ballay*, 482 F.2d 648, 654 (D.C. Cir. 1973) (state must prove insanity beyond a reasonable doubt); *Welsh v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) (due process requires that realistic opportunity to be cured or improve mental condition accompany involuntary commitment); *Wyatt v. Adubolt*, 503 F.2d 1305 (1974) (right to adequate treatment). Editor's note. In *O'Connor v. Donaldson*, 43 U.S.L.W. 4929 (U.S. June 26, 1975), the Supreme Court held that the state could not confine without treatment a person who is neither dangerous to himself nor others.

<sup>527</sup> See, e.g., *Anderson v. Solomon*, 315 F. Supp. 1192 (D. Md. 1970).

<sup>528</sup> 252 So. 2d 624 (Ala. 1971). Alabama's commitment statute was construed to

tioner, who had been in jail in Montgomery, was committed to the Veterans Administration Hospital in Tuskegee. The commitment order recited that three witnesses had been examined under oath by Judge Hooper. In fact, however, there was neither notice to the petitioner nor any formal commitment hearing. The order was signed by the chief clerk of the County Probate Court. The commitment was based on affidavits of the witnesses. The petitioner knew nothing about the commitment until he arrived at the hospital where he was placed in maximum security. The action was initiated by his petition for a writ of habeas corpus; the circuit court denied the petition and he appealed. The appeal presented a single due process issue: was the commitment order "void because it was made without prior notice to him and without giving him a hearing prior to commitment and an opportunity to defend at a prior hearing."<sup>529</sup> The court held that the commitment did not deny due process. The confined individual, the court said, "has the immediate right to test the legality of his detention in a habeas corpus proceeding."<sup>530</sup> In that proceeding, the petitioner is entitled to a jury trial in which the burden of proof on the issue of sanity is placed upon the authorities.<sup>531</sup>

The propriety of "confinement first, hearing later" is now seriously in question. Emergency commitments without notice and a hearing appear to be infirm under the new due process cases. First of all, the requisite citizen interest in his liberty cannot be seriously contested.<sup>532</sup> One who is confined in a mental hospital is, perforce, restrained bodily. He may be subject to drugging, electroshock, isolation and demeaning treatment.

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conform to *Lessard* in *Lynch v. Baxley*, 386 F. Supp. 578 (D. Ala. 1974). *See also* *Logan v. Arfeh*, 346 F. Supp. 1265, 1267-68 (D. Conn. 1972) (emergency commitment without notice and hearing did not violate due process because judicial review available before order becomes final).

<sup>529</sup> *Phillips v. Giles*, 252 So. 2d 624, 628 (Ala. 1971) (petitioner's sanity was alleged but, according to the majority, not tried).

<sup>530</sup> *Id.* at 629.

<sup>531</sup> *Id.* at 629-30. Four justices concurred specially finding that the sanity issue had been tried and found adversely to petitioner.

<sup>532</sup> *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975). Editor's note. While affirming the liberty interest in mental health commitments, the Supreme Court said, "We need not decide . . . by what procedures . . . a mentally ill person may be confined . . ." 43 U.S.L.W. at 4933.

A mental health "record" is also a stigma and may include a loss of civil rights.<sup>533</sup> If a constitutionally cognizable interest is present and there is not an "emergency," the interest cannot be impaired without due process, that is, before notice and a hearing.<sup>534</sup>

Emergency mental health commitments cannot be justified by asserting that because review is available soon after the commitment, the subject is merely deprived of liberty temporarily. First, "temporary" commitments may not be very temporary, some lasting as long as six months.<sup>535</sup> Second, there is no "temporary" exception to due process when one is deprived of other protected interests. If a property interest is taken, the hearing must precede the taking: "The Fourteenth Amendment draws no bright lines around three-day, 10 day or 50 day deprivations of property. Any significant taking of property is within the purview of the Due Process Clause."<sup>536</sup> To illustrate the Supreme Court's emphasis, in Division IV of *Fuentes*, the Court uses the word "before" four times; it is italicized three of those times.<sup>537</sup> The Court finally held "if the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented."<sup>538</sup> In *Stanley v. Illinois*, the Court said, "[T]his Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."<sup>539</sup>

Nor may ex parte commitments be defended by arguing that notice and hearing are unnecessary because commitment is therapeutic and for the subject's own good. In a democracy, the choice between freedom and confinement is the individual's, not the state's.<sup>540</sup> Thus, courts have disavowed *parens*

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<sup>533</sup> *Lessard v. Schmidt*, 349 F. Supp. 1078, 1088-89 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974). See also *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973).

<sup>534</sup> *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972).

<sup>535</sup> Roth, Daley & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAWYER 400, 414-15 (1973).

<sup>536</sup> *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). But cf. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (where property secured and interests dual, taking may precede notice); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (*semble*).

<sup>537</sup> *Fuentes v. Shevin*, 407 U.S. 67, 80-83 (1972).

<sup>538</sup> *Id.* at 81, 96-97; *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

<sup>539</sup> *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

<sup>540</sup> Cf. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). "[U]nder our free enterprise

*patriae* as a state interest,<sup>541</sup> the District of Columbia Court of Appeals stating recently that *parens patriae* as an interest "largely dissolves upon closer inspection."<sup>542</sup> Asserting a therapeutic purpose assumes two conclusions: that there is a need for therapy and that the state can decide without assistance. Finally, even assuming a benign purpose, the need for notice and a hearing is not obviated. Due process, the Court said in *Stanley v. Illinois*, was "designed to protect the fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."<sup>543</sup>

If *ex parte* mental health commitments are to be upheld at all, they must be upheld under the "extraordinary situations" or emergency exception. In *Lessard v. Schmidt*, the court allowed the authorities to detain a person without notice and hearing for two days if the "subject" threatens violence to himself or others.<sup>544</sup> In cases decided after *Fuentes* the emergency exception is being clarified by requiring two things: a statute which defines emergency realistically and narrowly, and an emergency on the particular facts.<sup>545</sup> Many statutes are defective on the first point, simply not defining an emergency.<sup>546</sup> Even if the statute is adequate, difficulty lurks in defining a factual emergency and maintaining state control over *ex parte* process. For, so long as an emergency can be found from one sided charges, there is a risk that private parties may employ state power to settle private grievances. The emergency is the matter at issue. Unless there is an adversary proceeding, that issue is determined without hearing the one to be confined. The most rigorous standard may degenerate

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system, an individual's choices in the market-place are respected however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices . . . ." *Id.*

<sup>541</sup> See cases cited *supra* note 525.

<sup>542</sup> *In re Ballay*, 482 F.2d 648, 650 (D.C. Cir. 1973).

<sup>543</sup> *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

<sup>544</sup> *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974). See also *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (7 days); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085, 1098 (E.D. Mich. 1974) (5 days).

<sup>545</sup> See, e.g., *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973).

<sup>546</sup> *Roth, Daley & Lerner, supra* note 535, at 412-16.

into a meaningless conclusion. "The state," in the words of Justice Stewart, "acts largely in the dark."<sup>547</sup>

Further doubts based on recent cases must be expressed. Is an important public or private interest advanced when the loser of a domestic squabble is hospitalized?<sup>548</sup> If the subject is confined in jail, is there any need for swift action?<sup>549</sup> When a commitment grows out of form affidavits and is approved by a clerk, does the state retain strict control over the procedure?<sup>550</sup> Thus, the emergency exception may justify some *ex parte* statutes and certain of the commitments, but many other *ex parte* commitments even under the proper statutes may still be unconstitutional.

Mental health commitments present a compelling case for due process. Both the legitimacy and the effectiveness functions of due process operate. If therapy is to take place at all, the individual should feel that the committing process is legitimate and rational. Chief Justice Cooley stated this cogently almost a century ago:

An insane person does not necessarily lose his sense of justice, or of his right to the protection of the law; and when he is seized without warning, and without the hearing of those whom he might believe would testify in his behalf and delivered helpless into the hands of strangers, to be dealt with as they may decide within the limits of a large discretion, it is impossible that he should not feel keenly the seeming injustice and lawlessness of the proceeding.<sup>551</sup>

If involuntary commitments are untherapeutic,<sup>552</sup> commitments both involuntary and *ex parte* are bereft of benefit to the person committed. If personal improvement is anticipated, it is difficult to conceive a process more self-defeating than government by ukase.

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<sup>547</sup> *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972); Roth, Daley & Lerner, *supra* note 535, at 424.

<sup>548</sup> See, e.g., *Maben v. Rankin*, 358 P.2d 681, 10 Cal. Rptr. 353 (Cal. 1961); *Stowers v. Wologzko*, 191 N.W.2d 355 (Mich. 1971).

<sup>549</sup> *Phillips v. Giles*, 252 So.2d 624 (Ala. 1971).

<sup>550</sup> *Id.*

<sup>551</sup> *Van Deusen v. Newcomer*, 40 Mich. 90, 130 (1879).

<sup>552</sup> S. HALLECK, *THE POLITICS OF THERAPY* 205 (1971); Developments, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV 1190, 1220 n.100 (1974) cites several authorities for the proposition that involuntary patients are less likely to benefit from treatment.

The other value advanced by due process is accuracy or efficiency. When the standards are vague and conclusory, the decision-maker should consider all available information. If the process is one-sided, the decision-maker may frequently be led into error by the malicious, over zealous or simply mistaken applicants seeking a certain result. "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring."<sup>553</sup> Observers have noted that the commitment process is inveterately inaccurate, with a pronounced tendency to over-predict and to commit excessively.<sup>554</sup> Adversary procedure will not end unnecessary commitments, but it might reduce the frequency.

In *Lessard v. Schmidt*<sup>555</sup> a three judge federal court contributed significantly to due process in mental health commitments. Several important points in *Lessard* can be summarized. The court held that involuntary confinement in a mental hospital is a "significant deprivation of liberty," and that notice must be given with some kind of hearing conducted within 48 hours. A full hearing must be held within 14 days.<sup>556</sup> Detailed notice is required; the subject must be informed of the legal standard, the reason for the hearing, the right to a jury trial and the names of all witnesses together with a summary of their anticipated testimony. At the hearing counsel is required, hearsay is forbidden, the privilege against self-incrimination may be claimed, proof must be beyond a reasonable doubt and less restrictive alternatives to commitment must be considered.<sup>557</sup>

*Lessard* breaks new procedural ground with the potential of affecting thousands of commitments. Though time must pass before the full impact can be determined, it is possible that the nation's mental hospitals could be held to be full of illegally detained people. Two matters must be noted. First, in

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<sup>553</sup> *Silver v. NYSE*, 373 U.S. 341, 366 (1963).

<sup>554</sup> Roth, Daley & Lerner, *supra* note 535, at 428-33, 440.

<sup>555</sup> 349 F. Supp. 1078, 1103 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974). See also *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 314 F. Supp. 1085 (E.D. Mich. 1974).

<sup>556</sup> *Id.* at 1103.

<sup>557</sup> See also *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973).



the abstract, to delay a hearing for two days after confinement appears to be inconsistent with *Fuentes* which requires a hearing *before* interfering with a constitutionally cognizable interest. In specific commitments under a properly drawn statute, the extraordinary situations exception may obviate notice. This apparent incongruity needs to be clarified. Second, on the defendants' appeal, the Supreme Court vacated the order in *Lessard*.<sup>558</sup> After the district court opinion, judgment was ordered "in accordance with the opinion heretofore entered." Thus, except for the opinion, no injunctive order existed. On plaintiff's motion to dismiss the appeal, the Supreme Court observed that the opinion merely told the defendants "not to enforce 'the present Wisconsin Scheme'" and held that the order must be vacated and the cause remanded because Rule 65(d) which requires specific terms in an injunction was not satisfied: "in the absence of specific injunctive relief, informed and intelligent appellate relief is greatly complicated, if not made impossible."<sup>559</sup> The district court later issued another order.<sup>560</sup>

*Lessard* and the foregoing analysis provide a sufficient basis to discuss remedy. The focus will be on release and damages. The *Lessard* court did hold that the plaintiff's commitment was constitutionally invalid. No notice was served on the plaintiff before she was confined.<sup>561</sup> Absent either notice and a hearing or a valid emergency, a mental health commitment is, it may be concluded, constitutionally defective. Under traditional due process, if no notice precedes adjudication, no jurisdiction over the person is secured. The proceeding is void even though the claim may be legitimate. In *Pennoyer v. Neff*, the Supreme Court said "the validity of every judgment depends upon the jurisdiction of the Court before it is rendered, not upon what may occur subsequently."<sup>562</sup> Thus, when a person is confined without notice, traditional due process appears to

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<sup>558</sup> *Schmidt v. Lessard*, 414 U.S. 473 (1974).

<sup>559</sup> *Id.* at 476-77.

<sup>560</sup> 379 F. Supp. 1376 (E.D. Wis. 1974).

<sup>561</sup> *Lessard v. Schmidt*, 349 F. Supp. 1078, 1081 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974).

<sup>562</sup> *Pennoyer v. Neff*, 95 U.S. 714, 728 (1877). See Justice Bloodworth concurring specially in *Phillips v. Giles*, 252 So. 2d 624, 630-31 (Ala. 1971); *The case of the Marshalsea*, 10 Co. Rep. 686, 77 E.R. 1027 (1613) (subject matter jurisdiction).

compel immediate release.<sup>563</sup> But Miss Lessard had been released earlier and the district court did not decide whether she was illegally confined. The court merely declared Miss Lessard's order "invalid" or "defective."

Plaintiff Lessard also represented a class: "all persons 18 years of age or older who are being held involuntarily pursuant to any emergency, temporary or permanent commitment provision of the Wisconsin involuntary mental commitment statute."<sup>564</sup> The court struck down the statute but did not require the authorities to release members of the plaintiff class; rather, ninety days were granted to the authorities to review procedures and individual cases. To justify continued involuntary confinement, the authorities were compelled to hold "new hearings . . . in conformity with this opinion."<sup>565</sup> The state was allowed the time because "a number of the patients are undoubtedly properly institutionalized, despite defective procedures."<sup>566</sup>

The idea that a proceeding which is not preceded by notice is void and ineffective has been disregarded in recent mental health commitment cases. The decisions do not annul the early commitments and command immediate release. Instead the courts allow the authorities to retain the person in custody and to commit under proper proceedings. This deprives due process of its full remedial thrust. It is difficult to distinguish cases voiding *ex parte* money judgements from *ex parte* mental health commitments. In both, the truth-seeking process is frustrated. Certainly liberty should be as fully protected as property. Yet, in contrast to the traditional due process cases, the mental health cases afford some effect to a decision reached

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<sup>563</sup> *Allgor v. New Jersey State Hosp.*, 84 A. 711 (N.J. Eq. 1912) (immediate release ordered). See also *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973) (sexual psychopath statute unconstitutional; incarcerated members of plaintiff class ordered released).

<sup>564</sup> *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974).

<sup>565</sup> *Id.* at 1104. See also *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (W.D. Mich. 1974); *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 973 (M.D. Pa. 1971) (60 days to discharge or recommit); *Barry v. Hall*, 98 F.2d 222, 230 (D.C. Cir. 1938) (five days to release or commence proper proceedings).

<sup>566</sup> *Lessard v. Schmidt*, 349 F. Supp. 1078, 1104 (E.D. Wis. 1973), *vacated and remanded*, 414 U.S. 473 (1974).

without notice. If there has been no valid adjudication of mental illness, it is difficult to understand why the person is not entitled to his liberty.

Why are the courts unwilling to extend a full remedial effect when due process is denied in a mental health commitment? First, tradition probably accounts for much of the reluctance. Legal analogy is powerful. In prisoner habeas corpus cases, where a convict is illegally confined under an invalid conviction, courts do not order unconditional release. Instead, if the conviction is illegal, a conditional release is ordered. The authorities are given a period of time to release or retry.<sup>567</sup> The prisoner cases, however, deal with procedural defects in the course of the proceedings, not with failure to give notice at all. In addition, prisoners, even unjustly convicted prisoners, seem to be both more dangerous and more likely to flee than people unconstitutionally confined in mental institutions.

Another reason may be mentioned. The courts in mental health cases afford the earlier illegal decision a credence which is not extended to an illegal money judgment because of the differences in the labeling process. A medical-legal label such as "mentally ill" or "insane" carries considerable stigma and causes the individual to be shunned as irrational and deviant.<sup>568</sup> Such a label is easy to affix but hard to erase. Even former mental patients suffer serious social disabilities. For example, note Senator Eagleton's short-lived 1972 vice-presidential campaign. In failing to order unconditional release, courts may reflect the social stigma which society attaches to the mentally ill. But the social stigma might well impel the courts in precisely the opposite direction. The label's seriousness should force the courts to scrutinize the process used to attach it. If the committing proceeding was *ex parte* and one-sided, the victim could be granted his liberty and the record of the illegal proceeding extirpated. If due process is to be meaningful and liberty is to be protected, an adequate equitable remedy for unconstitutional mental health commitments is

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<sup>567</sup> See, e.g., *Stump v. Bennett*, 398 F.2d 111, 123 (8th Cir. 1968), *cert. denied*, 393 U.S. 1001 (1968) (one year to retry). See also *State ex rel. Matalik v. Schubert*, 204 N.W.2d 13 (Wis. 1973) (incompetency to stand trial found unconstitutionally: 60 days to commit or release).

<sup>568</sup> S. HALLECK, *supra* note 552, at 111-20.

immediate release and expungement.

Equitable remedies, however, fail to recompense for the time spent in illegal confinement. Thus, it is necessary to turn to false imprisonment and money damages. The interest in freedom from restraint upon movement is protected by the tort of false imprisonment.<sup>569</sup> Confinements without legal authority are false imprisonments. Neither ill will nor spite is required; intent to confine is all that is necessary.<sup>570</sup> One can conclude that an improper mental health commitment is a false imprisonment.<sup>571</sup> The tort can be shown by proving a confinement without proper procedure.<sup>572</sup> False imprisonment is both a common law tort and a "constitutional tort": if the defendants acted under color of law to deprive plaintiff of a constitutional right, a false imprisonment is actionable under the Civil Rights Acts.<sup>573</sup> Detention in a mental hospital is a loss of liberty in the most fundamental sense.<sup>574</sup> Confinement without proper procedure raises due process issues. If the decision-making process of the state is used, commitments are under "color of law." Thus, an improper mental health commitment may be a Civil Rights Act false imprisonment.<sup>575</sup>

The false imprisonment tort, suprisingly, has not been a practical limit on questionable mental health commitments. The citizen interest is significant, and it appears that there are many unnecessary commitments.<sup>576</sup> In the false imprisonment

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<sup>569</sup> W. PROSSER, LAW OF TORTS § 11 (4th ed. 1971).

<sup>570</sup> Johnson v. Greer, 477 F.2d 101, 104 (5th Cir. 1973).

<sup>571</sup> Maben v. Rankin, 358 P.2d 681, 10 Cal. Rptr. 353 (1961); Stowers v. Wolodzko, 191 N.W.2d 355, 363-64 (Mich. 1971); see cases collected in Annot., 30 A.L.R.3d 523 (1970). But see Maniaci v. Marquette Univ., 184 N.W.2d 168 (Wis. 1971) (not false imprisonment but may be abuse of process). See also Winters v. Miller, 446 F.2d 65 (2d Cir. 1971) (battery); Stephen v. Drew, 359 F. Supp. 746 (E.D. Va. 1973) (malpractice); Annot., 30 A.L.R.3d 455 (1970). These and other relevant torts such as malicious prosecution are beyond the scope of this article.

<sup>572</sup> Maben v. Rankin, 358 P.2d 681, 10 Cal. Rptr. 353 (1961).

<sup>573</sup> Anderson v. Nosser, 438 F.2d 183, 194 (5th Cir. 1971), *modified en banc*, 456 F.2d 835 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972).

<sup>574</sup> In Stowers v. Wolodzko, 191 N.W.2d 355 (Mich. 1971), plaintiff was taken from her home by force without being allowed to use the telephone, placed for 6 days in a room bare except for a bed, forcibly injected with medication and told that if she tried to contact certain relatives, "you will never see your children again." See generally Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1151-68 (1972).

<sup>575</sup> Johnson v. Greer, 477 F.2d 101 (5th Cir. 1973).

<sup>576</sup> Morris & Luby, *Civil Commitment in a Suburban County: An Investigation*

cases, plaintiffs have encountered the usual gamut of tort difficulties,<sup>577</sup> from proximate cause<sup>578</sup> to legal protection of medical discretion.<sup>579</sup> Civil Rights Act cases have encountered two major difficulties. If state officials are defendants, judicial or prosecutorial immunity is a defense. If private citizens are defendants, there is no color of law.<sup>580</sup> Thus, there are only a few successful plaintiff's cases.<sup>581</sup>

Charging a private person with common law false imprisonment in a court of general jurisdiction presents only doctrinal problems. Consequently, the ensuing analysis will pass lightly over problems presented by ordinary tort law, concentrating instead on the problems encountered in suing official and private defendants in federal court under a constitutional tort-Civil Rights Act theory.<sup>582</sup> With regard to the former, suffice it to say that a person whose liberty is circumscribed by an unconstitutional proceeding has been falsely imprisoned. If an adequate defendant and a proper forum can be found, the victim may be entitled to damages.

The local governmental body itself is the most obvious and solvent defendant in a mental commitment civil rights action, but in many states, recovery from a governmental defendant is barred by sovereign immunity.<sup>583</sup> Moreover, under *Moor v.*

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by *Law Students*, 13 SANTA CLARA LAWYER 518 (1973).

<sup>577</sup> *Rawls v. Daughters of Charity*, 491 F.2d 141 (5th Cir. 1974).

<sup>578</sup> *Johnson v. Greer*, 477 F.2d 101 (5th Cir. 1973).

<sup>579</sup> *Maben v. Rankin*, 358 P.2d 681, 10 Cal. Rptr. 353 (1961); *Belger v. Arnot*, 183 N.E.2d 866 (Mass. 1962).

<sup>580</sup> See Annot. 16 A.L.R. Fed. 440 (1973). But cf. *Delatte v. Genovese*, 273 F. Supp. 654 (E.D. La. 1967) (coroner not immune).

<sup>581</sup> *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974) (ground-breaking case affirming a plaintiff's verdict for \$38,500), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975); *Stowers v. Wolodzko*, 191 N.W.2d 355 (Mich. 1971) (plaintiff's verdict for \$40,000 affirmed).

<sup>582</sup> The constitutional tort, the reader should bear in mind, is viewed within the framework of traditional tort liability. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Thus, while tort problems are ignored herein, they may be significant in a Civil Rights Act case. See, e.g., *Johnson v. Greer*, 477 F.2d 101 (5th Cir. 1973) (no proximate cause). See generally, Note, *Constitutional Torts: Section 1983 Redress for the Deprived Debtor*, 14 WM. & MARY L. REV. 627 (1973).

<sup>583</sup> *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974); *Fish v. Regents of Univ. of Cal.*, 54 Cal. Rptr. 656 (Ct. App. 1966); W. PROSSER, *LAW OF TORTS* 975-87 (4th ed. 1971). State sovereign immunity is changing rapidly. The particular jurisdiction's statutory and decision law should be reviewed carefully. See *Dennison v. New York*, 267 N.Y.S.2d 920 (Ct. Cl. 1966) (\$115,000 damages for erroneous commitment).

*County of Alameda*,<sup>584</sup> a local governmental body cannot be a Civil Rights Act defendant in a suit for damages because it is not a "person." Nor can § 1988 be used to add a state claim under a tort claim act.<sup>585</sup> Thus, a person who is wrongfully confined in a mental hospital cannot use the Civil Rights Act to sue a state or local government for damages,<sup>586</sup> but must choose persons as defendants.

The person sued under the Civil Rights Act, however, must have acted under "color of law." The conduct of a private person is not actionable.<sup>587</sup> Thus, Civil Rights Act cases against private physicians,<sup>588</sup> private hospitals<sup>589</sup> and attorneys,<sup>590</sup> have been dismissed for lack of color of law.<sup>591</sup> Still, there are several ways to escape this difficulty. First, private persons can be sued for the common law tort in a court of general jurisdiction.<sup>592</sup> Second, plaintiff may sue under § 1985(3) charging that private persons conspired with public officials to deprive him of a constitutional right.<sup>593</sup> The conspiracy is difficult: specific facts as well as at least one overt act must be pleaded and

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<sup>584</sup> 411 U.S. 693 (1973).

<sup>585</sup> *Id.*

<sup>586</sup> *Veres v. County of Monroe*, 364 F. Supp. 1327 (E.D. Mich. 1973).

<sup>587</sup> *Cook v. Advertiser Co.*, 458 F.2d 1119 (5th Cir. 1973); C. ANTIEAU, *FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE* § 36 (1971).

<sup>588</sup> *Bryne v. Kysar*, 347 F.2d 734 (7th Cir.), *cert. denied*, 383 U.S. 913 (1965), *rehearing denied*, 384 U.S. 914 (1965), *motion to file for rehearing denied*, 384 U.S. 994 (1965); *Joyce v. Ferrazzi*, 323 F.2d 931 (1st Cir. 1963); *Spampenato v. M. Burger & Co.*, 270 F.2d 46 (2d Cir.), *cert. denied*, 361 U.S. 944, *rehearing denied*, 361 U.S. 973 (1960); *Whittington v. Johnson*, 201 F.2d 810 (5th Cir.), *cert. denied*, 346 U.S. 867 (1953) (persuasive dissent which anticipates *Lessard v. Schmidt*).

<sup>589</sup> *Tennessee ex rel. Davis v. Hartman*, 303 F. Supp. 411 (E.D. Tenn. 1969).

<sup>590</sup> *Cooper v. Wilson*, 309 F.2d 153 (6th Cir. 1962); *Kenney v. Hatfield*, 132 F. Supp. 814 (W.D. Mich. 1955), *aff'd*, 232 F.2d 288 (6th Cir.), *cert. denied*, 352 U.S. 855 (1956).

<sup>591</sup> McCormack observes that the color of law cases may be better explained as turning on personal immunity. McCormack, 60 VA. L. REV. 1, 18 (1974).

<sup>592</sup> If a Civil Rights action is brought against public officials, pendent jurisdiction cannot be used to join the private defendants despite the "common nucleus of operative fact," C. WRIGHT, *FEDERAL COURTS* 65 (1970). If, however, all defendants are state officials, related state claims or theories may be joined to the Civil Rights Act claims. *Anderson v. Nossor*, 438 F.2d 183, 188-89 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835, *cert. denied sub. nom. Nossor v. Bradley*, 409 U.S. 898 (1972); *Whirl v. Kern*, 407 F.2d 781, 793 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969).

<sup>593</sup> *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972); *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966); *Curtis v. Peerless Ins. Co.*, 299 F. Supp. 429 (D. Minn. 1969).

proved.<sup>594</sup> Third, color of law does not always require a state officer. If a private citizen "willfully" acts in "joint activity" with a state agent, color of law may be upheld.<sup>595</sup> Finally, courts have found that private defendants who took advantage of a statutory procedure engaged in state action.<sup>596</sup> The color of law concept is similar to, if not broader than, state action.<sup>597</sup> If color of law were found when private individuals unconstitutionally confine a plaintiff, one of the principle purposes of due process is advanced. A remedy is provided for a person who, without notice and a hearing, is the victim of private abuse of state power.<sup>598</sup>

The next group of potential defendants includes police, hospital officials and administrators. All these groups are protected by personal immunity, either qualified or absolute. The cases which deal with the immunities available to court personnel, hospital officials and police are in utter disarray.<sup>599</sup> All, stated generally, may be protected by a qualified immunity. Unless the plaintiff shows lack of good faith, members of these groups may be exonerated from responding in damages. Thus, a custodian acting under apparently legal regulations may be forgiven from false imprisonment liability even though the reg-

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<sup>594</sup> See, e.g., *Lucas v. Kale*, 364 F. Supp. 1345, 1347 (W.D. Va. 1973); C. ANTIEAU, *supra* note 587, at §§ 105-06.

<sup>595</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Undergraduate Student Ass'n v. Peltason*, 359 F. Supp. 320, 322 (D. Ill. 1973) (private person in concert with state officials).

<sup>596</sup> See *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972); *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973); *rev'd*, 502 F.2d 1107 (3d Cir. 1974); *Gross v. Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973). *But see* cases holding "no state action" in § 9-503 self help repossessions: *Greene v. First Nat'l Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (M.D. Cal. 1972); *McCormick v. First Nat'l Bank of America*, 322 F. Supp. 604 (S.D. Fla. 1971); *Messenger v. Sandy Motors, Inc.*, 295 A.2d 402 (N.J. Super. 1972).

<sup>597</sup> See Part I(b)(2) *supra* for a comparison of these concepts.

<sup>598</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92-95 (1972).

<sup>599</sup> See *Johnson v. Greer*, 477 F.2d 101 (5th Cir. 1973); *Robinson v. McCorkle*, 462 F.2d 111 (3rd Cir. 1972); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965); *Joyce v. Ferrazzi*, 323 F.2d 931 (1st Cir. 1963); *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1973); *Wade v. Bethesada Hosp.*, 356 F. Supp. 380 (S.D. Ohio 1973); *Delatte v. Genovese*, 273 F. Supp. 654 (E.D. La. 1967). See generally *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

ulations are later declared unconstitutional.<sup>600</sup> So also, constitutional prescience is not exacted from a police officer.<sup>601</sup>

There is, however, contrary authority. In *Johnson v. Greer*,<sup>602</sup> the Fifth Circuit dealt with false imprisonment brought as a constitutional tort by a person who had been confined in a mental hospital. The defendant was the clinic administrator. The jury returned a verdict for the plaintiff, and the administrator appealed. The plaintiff, the court held, "need not show malice or ill will": if he was actually deprived of a constitutional right by state action, "good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify false imprisonment."<sup>603</sup> *Johnson* may be read several ways. First, it may merely reject *parens patriae* as a reason to confine. This is consistent with other recent authority.<sup>604</sup> Second, it may stand for a qualified privilege. If the defendant had a reasonable belief that the plaintiff is detained lawfully, the defendant need not respond in damages. Third, it may stand for absolute liability. If the plaintiff was illegally confined, false imprisonment is shown. There is Fifth Circuit authority for the proposition that absence of wrongful intent is not a defense to false imprisonment as a constitutional tort.<sup>605</sup>

The plaintiff, it can be argued, should be able to recover from a custodian if, at the time of confinement, the defendant could have known that the plaintiff was detained contrary to existing law.<sup>606</sup> This places the burden of knowing the applicable law on institutional custodians.<sup>607</sup> Under this rule, it is impossible to feign ignorance of present law but unnecessary to

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<sup>600</sup> See *Clarke v. Cade*, 358 F. Supp. 1156 (W.D. Wis. 1973).

<sup>601</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

<sup>602</sup> 477 F.2d 101 (5th Cir. 1973).

<sup>603</sup> *Id.* at 105.

<sup>604</sup> See cases cited *supra* note 525.

<sup>605</sup> *Donaldson v. O'Connor*, 493 F.2d 507, 527 (5th Cir. 1974), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975) (vacated and remanded to be reconsidered in light of qualified immunity); *Whirl v. Kern*, 407 F.2d 781, 788 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). Plaintiff was held in jail without legal authority. "Neither good faith nor non-negligence can exculpate" defendant. *Id.* at 790. A jury verdict for defendant was reversed and a directed verdict for plaintiff was ordered. *Id.* at 793.

<sup>606</sup> Cf. *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973).

<sup>607</sup> In *Wood v. Strickland*, 95 S. Ct. 992 (1975), the Court said "a school board member . . . must be held to a standard of conduct based . . . on knowledge of the basic, unquestioned constitutional rights of his charges." *Id.* at 1000-01.



anticipate future changes in the law.<sup>608</sup> Directors of custodial institutions may be under a statutory obligation to be sure that commitments are in order.<sup>609</sup> Tort liability for damages merely extends a remedy to one who suffers when this duty is breached. Good faith is an appropriate defense for a policeman who must make split-second decisions. But "a jailer, unlike a policeman, acts at his leisure."<sup>610</sup> Even so, to prevent remedy from being converted into revenge, if the confinement is illegal only in retrospect, the defendant is immune. Thus, the standard does not impose strict liability.

This standard considers the illegal restraint imposed upon the plaintiff. "Good faith may clear the conscience, but it does not redeem or purge the act."<sup>611</sup> In viewing the defendant's state of mind, the law should not ignore the plaintiff's loss of liberty and need for recompense. As Judge Goldberg wrote eloquently in *Whirl v. Kern*:

Unfortunately non-malicious restraint is no sweeter than restraint evilly motivated, and we cannot sanction chains without legal justification even if they be forged by the hands of an angel. Neither the sheriff's tears of regret nor explanations keyed the lock to unmanacle Whirl. Though we apply all the benign adjectives in our lexicon to Kern's watchmanship—these do not make Whirl a November to July free man.<sup>612</sup>

The suggested standard, which allows recovery from custodians if confinement was *currently* illegal, is preferable because it protects the interest in freedom from illegal restraint.

Another possible defendant is the committing judge who, if the plaintiff is confined without due process, could possibly be sued in a Civil Rights Act case. Here the most imposing barrier to success is judicial immunity. Following *Pierson v. Ray*, a state or local judge acting within his jurisdiction is

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<sup>608</sup> Again in *Wood*, the Court said "ignorance . . . of settled indisputable law, on the part of one entrusted with supervision . . . [cannot justify] an act violating a student's constitutional rights." *Id.* at 1000.

<sup>609</sup> See, e.g., VA. CODE ANN. § 37.1-68 (Cum. Supp. 1973).

<sup>610</sup> *Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

<sup>611</sup> *Id.* at 794.

<sup>612</sup> *Id.* at 794-95.

completely immune from damage claims.<sup>613</sup> But, applying some of the reasoning previously developed, an effective argument for damages can be mounted.

The immunity granted a judicial officer in exercise of his judicial function is intended to allow the judge to exercise that function without fear of lawsuits being brought by disappointed litigants. To effectuate this freedom from lawsuits alleging malice or corruption, the judge's privilege in a suit seeking damages is absolute. Ordinarily this allows a judge to end the litigation before it goes to trial;<sup>614</sup> and allegations of corruption and malicious motive are not sufficient to defeat that immunity. But this pervasive immunity *can* lead to injustice. A judge can use the perquisites of his office to carry out a personal vendetta<sup>615</sup> or can use the criminal arm of his court to advance his private debt collection business.<sup>616</sup> Oppressive and abusive conduct is an evil, but it is felt to be a lesser evil, with unredressed actual injustice being the price paid for judicial independence.<sup>617</sup>

Because immunity prevents recovery for an otherwise viable cause of action, courts confer it reluctantly and apply it sparingly.<sup>618</sup> Likewise, judicial immunity is limited to its proper purpose. A judge is not immune for his nonjudicial activities:

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<sup>613</sup> *Pierson v. Ray*, 386 U.S. 547, 554 (1967). *But see* *Pierson v. Ray*, 386 U.S. 547, 558-67 (1967) (Douglas, J., dissenting) (judge not immune for knowingly and willfully depriving plaintiff of constitutional right); *Huendling v. Jensen*, 168 N.W.2d 745, 752-53 (Iowa 1969) (Rawlings, J., dissenting) (judge not immune for malicious or corrupt act). A judge who interferes with civil rights may, however, be enjoined. *See, e.g.*, *Mitchum v. Foster*, 407 U.S. 225 (1972); *Littleton v. Berbing*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub. nom.* *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Doe v. Ceci*, 384 F. Supp. 7, 9 (E.D. Wis. 1974); *Larsen v. Gallogly*, 361 F. Supp. 305, 310-11 (D.R.I. 1973), *vacated and remanded*, 95 S. Ct. 819 (1975) (remanded with instructions to be dismissed as moot). *Sutton v. County Ct.*, 353 F. Supp. 716 (E.D. Wis. 1973); *Rosen v. North Carolina*, 345 F. Supp. 1364 (W.D.N.C. 1972). *See McCormack*, 60 VA. L. REV. 1, 11-14 (1974).

<sup>614</sup> *See, e.g.*, *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973). "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of a pleader . . ." *Barr v. Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion), *citing* *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

<sup>615</sup> *See* the allegations in *Boydston v. Perry*, 359 F. Supp. 48 (N.D. Miss. 1973).

<sup>616</sup> *Huendling v. Jensen*, 168 N.W.2d 745 (Iowa 1969).

<sup>617</sup> *Barr v. Matteo*, 360 U.S. 564, 576 (1969) (plurality opinion).

<sup>618</sup> *See, e.g.*, *Anderson v. Nossner*, 438 F.2d 183, 201-02 (5th Cir. 1971), *modified en banc*, 456 F.2d 835 (1972); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970).

"A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum either."<sup>619</sup>

In addition, judicial immunity arises only when the judge acts within his jurisdiction. Jurisdiction is a chameleon word which has various meanings in different contexts. In judicial immunity, jurisdiction appears to mean conventional jurisdiction to adjudicate, that is, jurisdiction over the subject matter of the action and the person of the defendant. Most of the reported opinions turn on jurisdiction over the subject matter: if the judge is deciding one of the general classes of cases within the constitutional and statutory capacity of his court, he will be absolutely immune from damage claims.<sup>620</sup> If, on the other hand, an act is not authorized by statute or constitution, the judge is not shielded by immunity.<sup>621</sup> Thus, if a person is committed to a mental hospital by an official who lacks authority to commit, the immunity barrier is avoided.

Jurisdiction over the person is more appropriate for the present inquiry. It has been argued that, following traditional due process, unless a person receives notice before he is confined in a mental hospital, there is no jurisdiction over his person. This procedural defect, it was asserted, voids the proceeding and compels immediate release. Does it also vitiate judicial immunity and render the committing judge amenable to damages? Many judicial immunity cases state that if the court had no jurisdiction over the person, a judge is not immune,<sup>622</sup> but jurisdiction over the person has rarely been a con-

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<sup>619</sup> *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970) (dicta).

<sup>620</sup> *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973); *Boyer v. Wisconsin*, 345 F. Supp. 564 (E.D. Wis. 1972); *Broom v. Douglas*, 57 So. 860 (Ala. 1912).

<sup>621</sup> See, e.g., *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972); *Manning v. Ketcham*, 58 F.2d 948 (6th Cir. 1932); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971), *reconsideration denied*, 356 F. Supp. 380 (S.D. Ohio 1973); *Joyce v. Hickey*, 147 N.E.2d 187 (Mass. 1958); *Hoppke v. Klapperick*, 28 N.W.2d 780 (Minn. 1947), Annot., 173 A.L.R. 802, 819. But see *Robinson v. McCorkle*, 462 F.2d 111, 113 (3d Cir. 1972) (statute repealed: judge nevertheless immune).

<sup>622</sup> *Ryan v. Scoggin*, 245 F.2d 54, 58 (10th Cir. 1957); *Thompson v. Herther*, 235 F.2d 176, 177 (6th Cir. 1956); *Link v. Greyhound Corp.*, 288 F. Supp. 898, 899 (E.D. Mich. 1968); *Fraley v. Ramey*, 239 F. Supp. 993 (S.D.W. Va. 1965); *Williamson v. Waugh*, 160 F. Supp. 72 (S.D.W. Va. 1958); *Pierce v. Caldwell*, 360 P.2d 992, 994

tested issue in recent judicial immunity cases.<sup>623</sup> There is, however, some precedent. In *Duncan v. Brothers*,<sup>624</sup> the judge tried plaintiff without notice, convicted him and ordered him imprisoned. The Kentucky Court of Appeals held that no personal jurisdiction was obtained and judicial immunity was not available to shield the judge against plaintiff's suit for false imprisonment.

Should this reasoning apply to an ex parte mental health commitment? Such a commitment is likely to be both inaccurate and untherapeutic. The person committed loses his liberty and is likely to be subjected to humiliating and degrading treatment. Personal possessions may be confiscated; he may be stripped, examined and reclothed in institutional garb; he may be denied normal amenities such as tobacco, water and telephones; and his mind may be muddled by drugs administered against his will.<sup>625</sup> Merely ordering the release of illegally committed persons may not deter future illegal confinements. Furthermore, since the hospital authorities are immune from liability if acting pursuant to ostensibly legal commitment, it is clear the deterrent posed by the possible imposition of damages is totally absent if the judge is protected by immunity. Judges control the committing process, and if the judge relies on currently knowable law, he would be protected by a qualified immunity. But an ex parte commitment is seriously defective procedurally and has extreme consequences for the victim. The law should provide a meaningful remedy. Traditional due process applied to judicial immunity is a doctrinal model to accommodate these interests reasonably.

## 2. *Prison Due Process*

A workable frame of reference for prison discipline is the *Landman* litigation, which involves four reported cases resulting from Landman's controversies with Virginia prison offi-

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(Idaho 1961). *But see* Williams v. Sepe, 487 F.2d 913 (5th Cir. 1973). "The test for the abrogation of judicial immunity is a *clear* absence of all jurisdiction over the subject matter." *Id.* at 914.

<sup>623</sup> Huendling v. Jensen, 168 N.W.2d 745, 749 (Iowa 1969).

<sup>624</sup> 344 S.W.2d 398 (Ky. 1961). *See also* Sukeforth v. Thegen, 256 A.2d 162 (Me. 1969) (committing physician did not obtain jurisdiction over the person). *But see* Quindlen v. Hirschi, 284 P.2d 723 (Okla. 1955).

<sup>625</sup> E. GOFFMAN, ASYLUMS 18-23 (1961).

cials.<sup>626</sup> In the last two opinions, Virginia officials were cited for contempt and required to pay damages, but while these orders were on appeal the litigation was settled. The state agreed to pay \$43,525.70 to Landman's attorney and to continue to extend due process. In return, the injunction, the contempt citation and the damage judgment were dissolved.<sup>627</sup> The *Landman* litigation allows the reader to examine the ambit of qualified immunities and to consider contempt as a remedy.

The application of due process concepts to prisoners while incarcerated is a recent development. Only ten years ago state prisoner litigation about prison conditions was almost laughed out of federal court.<sup>628</sup> This situation was dramatically reversed when, upon granting plenary hearings, the shocking and appalling conditions in many prisons became apparent.<sup>629</sup> Prisoner litigation today is extensive and volatile. Judge Lawrence of the Southern District of Georgia observed that "actions by state prisoners under § 1983 are the most prolific single source of civil litigation in this District."<sup>630</sup>

The due process scheme can be outlined briefly. Because of past unlawful conduct, a prison inmate's liberty is somewhat circumscribed. But this does not mean that he no longer has any constitutional rights. In determining the threshold question, whether due process is required, many courts ask whether the prisoner suffered a grievous loss.<sup>631</sup> This standard follows *Morrissey v. Brewer*,<sup>632</sup> a parole revocation case, rather than the "constitutionally cognizable interest in liberty or property" analysis set out in *Roth*, *Perry*, *Mitchell*, and *Fuentes*. Though the tests are thus stated differently, they do not appear to produce differing results in prison cases. Grievous loss appears

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<sup>626</sup> *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966); *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973); *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

<sup>627</sup> *Washington Post*, Nov. 24, 1973, at B1, col. 3.

<sup>628</sup> *Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963), *rev'd per curiam*, 378 U.S. 546 (1964).

<sup>629</sup> The seminal case is *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968). See also *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974).

<sup>630</sup> *Heard v. Caldwell*, 364 F. Supp. 419 (S.D. Ga. 1973).

<sup>631</sup> See, e.g., *Knell v. Bensenger*, 489 F.2d 1014, 1018 (7th Cir. 1973); *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974); *Diamond v. Thompson*, 364 F. Supp. 659, 664 (M.D. Ala. 1973) (Johnson, C.J.).

<sup>632</sup> 408 U.S. 471 (1972).

to mean changes in the "liberty" to come and go, with the result that generally due process attaches if confinement becomes more burdensome or privileges are withdrawn. For example, due process often is required to transfer,<sup>633</sup> to segregate or isolate and to revoke good time credits.<sup>634</sup> Likewise, when a prisoner is called before a prison discipline committee on charges of misconduct, it is a violation of his due process rights if he is not given notice of the charges *before* being called before the committee, or if he is not given a written statement by fact finders.<sup>635</sup> The lower courts differed on the question of what process is due, some spelling out requirements specifically,<sup>636</sup> others satisfied with more general formulas.<sup>637</sup> In 1974, the Supreme Court resolved the problem.<sup>638</sup>

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<sup>633</sup> See, e.g., *Preston v. Cowan*, 369 F. Supp. 14, 24 (W.D. Ky. 1973); *Ault v. Holmes*, 369 F. Supp. 288, 291-95 (W.D. Ky. 1973); *Diamond v. Thompson*, 364 F. Supp. 659, 664-65 (M.D. Ala. 1973); *White v. Gellman*, 360 F. Supp. 64, 66 (S.D. Iowa 1973). See generally Note, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 VA. L. REV. 333 (1974).

<sup>634</sup> See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Braxton v. Carlson*, 483 F.2d 933, 937-38 (3d Cir. 1973); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 714-15, 717 (7th Cir. 1973). But cf. *Ault v. Holmes*, 369 F. Supp. 288, 294 (W.D. Ky. 1973) (isolation less than 10 days does not require due process).

<sup>635</sup> *Fife v. Crist*, 380 F. Supp. 901 (D. Mont. 1974). Damages were denied based upon the officials' good faith and reliance on established prison practice. *Id.* at 911.

<sup>636</sup> *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 716 (7th Cir. 1973); (written advance notice, a hearing and opportunity to explain, right to call witnesses, factual decision by an impartial decision-maker); *Landman v. Royster*, 333 F. Supp. 621, 653-54 (E.D. Va. 1971) (opportunity to confront and cross-examine adverse witnesses and, in some instances, a lay advisor to assist the prisoner at the hearing). See also *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974); *Diamond v. Thompson*, 364 F. Supp. 659, 665 (M.D. Ala. 1973) (similar to *Landman*). *Inmate 24393 v. Schoen*, 363 F. Supp. 683 (D. Minn. 1973) (settlement: Prisoners abandoning retroactivity and damage claims in exchange for elaborate procedural protections); *Rinehart v. Brewer*, 360 F. Supp. 105, 115 (S.D. Iowa 1973), *aff'd*, 491 F.2d 705 (8th Cir. 1974); *White v. Gellman*, 360 F. Supp. 64, 66-67 (S.D. Iowa 1973); *Sands v. Wainwright*, 357 F. Supp. 1062, 1083-92 (M.D. Fla. 1973).

<sup>637</sup> *Braxton v. Carlson*, 483 F.2d 933, 940 (3d Cir. 1973) (facts rationally determined); *United States ex rel. Tyrell v. Speaker*, 471 F.2d 1197, 1203 (3d Cir.), *cert. denied*, 411 U.S. 921 (1973); *Gray v. Creamer*, 465 F.2d 165, 185 (3d Cir. 1972) (on remand, the district court found for defendants on the merits, finding no denial of due process. *Gray v. Creamer*, 376 F. Supp. 675 (W.D. Pa. 1974)); *Sostre v. McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971), *cert. denied*, 404 U.S. 1079 (1972). In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court considers the type of procedures necessary at length, and to that extent resolves the debate over what procedures are necessary.

<sup>638</sup> *Wolff v. McDonnell*, 418 U.S. 539 (1974). The Court required written notice of charges, a written statement of evidence and reasons, impartial fact finders and suggested an opportunity to present witnesses. But the Court rejected counsel for the prisoner and the right to cross-examine.

When due process is violated, courts typically attempt to fashion legal or equitable remedies that are most appropriate for the violation in question. Where the violation is of one particular prisoner's rights, such as when an inmate has been removed to solitary without due process, the simplest type of equitable order, affecting only that prisoner, can require his release into the general prison population. The order is often accompanied by an allowance to the authorities of a reasonable time to retry the charged infraction.<sup>639</sup> Improving the institution as a whole is a more difficult task. Realizing the limits of injunctive power and deferring to the expertise of the prison administrators, a court may disdain to rule on some matters.<sup>640</sup> If the court decides to act, it may issue a limited order and rely on the official's propriety to ensure compliance,<sup>641</sup> or it could make detailed findings and issue a complex and sweeping order.<sup>642</sup> Underlying a grant of such prospective injunctive relief is a purpose to improve prison procedure,<sup>643</sup> and in order to administer such a prospective injunction, a court may retain jurisdiction and require periodic reports,<sup>644</sup> or enter an order to close a facility unless a plan for elimination of unconstitutional conditions is submitted within a given time.<sup>645</sup>

Equitable relief may be retrospective. For example, if there is an illegal and damaging entry on a prisoner's record, the court may order the authorities to expunge it.<sup>646</sup> These paper changes do not disrupt prison routine in any meaningful sense. Similarly, good time credits shorten the time a prisoner is incarcerated. When good time credits have been taken with-

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<sup>639</sup> *Landman v. Royster*, 333 F. Supp. 621, 627 (E.D. Va. 1971).

<sup>640</sup> *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 713 (7th Cir. 1973); *Landman v. Royster*, 333 F. Supp. 621, 654 (E.D. Va. 1971).

<sup>641</sup> *White v. Gillman*, 360 F. Supp. 64, 67 (S.D. Iowa 1973).

<sup>642</sup> *See, e.g., Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974); *Jones v. Whittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972).

<sup>643</sup> *Landman v. Royster*, 333 F. Supp. 621, 645 (E.D. Va. 1971).

<sup>644</sup> *See, e.g., Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971); *Jones v. Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971).

<sup>645</sup> *Rhem v. Malcolm*, 377 F. Supp. 995 (S.D.N.Y. 1974) (order supplementing order in 371 F. Supp. 594), *aff'd on merits but vacated on remedy*, 507 F.2d 333 (2d Cir. 1974).

<sup>646</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 952 (E.D. Pa. 1973).

out due process, courts have ordered the authorities to restore them.<sup>647</sup>

*Preiser v. Rodriguez*<sup>648</sup> and *Wolff v. McDonnell*<sup>649</sup> alter this remedial scheme. Before *Preiser*, many state prison conditions cases were brought under the Civil Rights Act in federal district court. Plaintiffs were not required to exhaust available state remedies. In *Preiser*, the Court examined the tension between federal habeas corpus which compels a state prisoner to seek redress first in a state forum and the Civil Rights Act which does not. The Court held that challenges to the length of confinement fall "squarely within the traditional scope of habeas corpus."<sup>650</sup> The equitable remedy of restoring good time credits, the Court held, is inappropriate in a Civil Rights Act case. This is true whether the remedy is immediate discharge or an expunging order short of release. Thus, all state prisoner challenges to length of confinement brought in federal district court must be by habeas corpus, with the corollary that the petitioner must first exhaust state remedies.<sup>651</sup> *Preiser* was reaffirmed by *Wolff* wherein *Wolff* established the threshold interest for due process, and held that, under the procedural structures assailed (which were held defective), prior disciplinary records should not be expunged.<sup>652</sup> But *Wolff* did not deal with damages.

Several comments are in order. First, there must be an intelligible and discernible state remedy to exhaust.<sup>653</sup> If there is none, federal habeas corpus may be brought forthwith. Second, a state prisoner may still use the Civil Rights Act to challenge the conditions of his confinement or to sue for damages.<sup>654</sup> Alternatively, he may challenge both the length and the

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<sup>647</sup> *Sostre v. McGinnis*, 442 F.2d 178, 204 (2d Cir. 1971), *cert. denied*, 404 U. S. 1049 (1972); *Landman v. Royster*, 333 F. Supp. 621, 657 (E.D. Va. 1971).

<sup>648</sup> 411 U.S. 475 (1973).

<sup>649</sup> 418 U.S. 539 (1974).

<sup>650</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973).

<sup>651</sup> *Pryor v. Regan*, 370 F. Supp. 150 (S.D.N.Y. 1974); *Hard v. Boren*, 368 F. Supp. 1321, 1325, 1327 (E.D. Ark. 1974); *Mukmuk v. Commissioner*, 369 F. Supp. 245, 249 (S.D.N.Y. 1974).

<sup>652</sup> *Wolff v. McDonnell*, 418 U. S. 539 (1974).

<sup>653</sup> *Wilwording v. Swenson*, 404 U.S. 249 (1971).

<sup>654</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973); *Palmigiano v. Mullen*, 491 F. 2d 978 (1st Cir. 1973).



conditions of confinement in federal habeas corpus.<sup>655</sup> He may litigate a state challenge to length of confinement simultaneously with a federal challenge to conditions of confinement.<sup>656</sup>

The many possible combinations are patent. *Preiser*, as the dissent points out, will lead to duplicated and possibly conflicting adjudications.<sup>657</sup> Further, the decision may cause confusion, uncertainty and delay, and allow federal constitutional claims to be frustrated by unsympathetic state courts.<sup>658</sup> The dissent by Justice Brennan suggests that the majority has chosen the wrong variable; that the habeas corpus cases are based upon comity, which compels respect for the state judiciary, and that *comity* is the policy that should be advanced. To preserve comity, it is improper to classify on the basis of remedies. Rather, prisoner cases required to be brought as habeas corpus should be sorted from Civil Rights Act cases according to the decision-making body the prisoner assails. If it is a conviction (*i.e.* a state *judicial* decision) that is attacked, the plaintiff is remitted to habeas corpus which compels him to exhaust state remedies. If, however, a prison *administrative* decision is attacked, the plaintiff may proceed forthwith under the Civil Rights Act.<sup>659</sup>

The dissent thus exposes the majority opinion's critical defect—the majority confused comity with remedy. Comity mandates the federal district courts to defer to state courts. In suggesting that comity requires the federal court to withhold action when restoration of good time is asked, the Court ignores the fact that such restoration is merely a remedial device used in an action in which the federal district court has full jurisdiction. The federal district court has jurisdiction over questions of denial of constitutional rights by state authorities. In a suit where such is charged, the plaintiff merely asks that he be made whole. If from the facts proven the court concludes that plaintiff was indeed denied due process, it is incumbent upon the court to fashion a remedy. To recover damages, the plaintiff must first show that his rights were breached and that he

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<sup>655</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

<sup>656</sup> *Id.* at n.14.

<sup>657</sup> *Id.* at 500-25 (Brennan, J., dissenting).

<sup>658</sup> *Id.*

<sup>659</sup> *Id.* at 521.

suffered actual damage. Then he must overcome an immunity. Now *Preiser* precludes the court from restoring the illegally taken good time credits. The court can importune or suggest.<sup>660</sup> The court can tell the authorities not to do it again. But the court's remedial hands are partially tied: it cannot extend complete relief. If the federal district court can hear and decide questions about constitutional rights but not grant a complete remedy, is it functioning as a court?<sup>661</sup>

The majority's error is clearer when the result in *Preiser* is compared to the pendent jurisdiction doctrine. Under pendent jurisdiction, if federal jurisdiction exists, the district court may decide all the questions in the case. When a case is presented to the district court on a state and a federal theory and both theories "derive from a common nucleus of operative fact," the district court has discretion first to consider judicial economy, convenience and fairness to litigants, and then to discard the federal theory and decide the case on the state theory.<sup>662</sup> *Preiser* appears to be contrary to almost every policy exhibited by pendent jurisdiction. The theory of liability is exclusively federal, yet federal courts must defer to state remedies. Economy, convenience and fairness to litigants dictate a single proceeding when two remedies grow out of "a common nucleus of operative fact." Yet *Preiser* compels litigants to either delay or fragment federal remedies. The federal court has the expertise and the detachment but, under *Preiser*, is a remedial eunuch.

*Wolff's* impact on the material discussed herein is less clear. Damages were not at issue. The Court refused to expunge records of discipline imposed under the previous procedural scheme.<sup>663</sup> Yet the previous scheme, while informal, provided an opportunity to ventilate the truth of the charged infraction.<sup>664</sup> In addition, the Court limited the denial of retroactive expungement relief to the facts of the case: "we do not think that the error was so pervasive in the system under the old procedures to warrant this . . . ."<sup>665</sup> Thus, *Wolff's* implications for remedy may be limited.

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<sup>660</sup> *Heard v. Boren*, 368 F. Supp. 1321, 1327 (E.D. Ark. 1974).

<sup>661</sup> *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803).

<sup>662</sup> *UMW v. Gibbs*, 383 U.S. 715, 725-26 (1966).

<sup>663</sup> *Wolff v. McDonnell*, 418 U.S. 539, 573-74 (1974).

<sup>664</sup> *Id.* at 548-53.

<sup>665</sup> *Id.* at 574.

While injunctive relief may operate in either the future or the past, even a retrospective injunction cannot repair all the effects of prior deprivations of due process. Restoring good time does not return the time illegally spent in punitive segregation. Illegal isolation is much like false imprisonment. If there was no notice before confinement, it is, under traditional due process, a legal non-event. May the inmate recover money damages?

Several barriers to damages will be considered. The first set of reasons for judicial unwillingness to impose damages stems from general hesitancy to interfere in prison administration. Initially, the federal courts have a general reluctance to interpose the federal judiciary in state administration.<sup>666</sup> Moreover, prison administration is a specialist task. Judges hesitate before substituting their judgment for a specialist's expertise. Judges lack empirical evidence of the effect a change in the rules may have on the goals of the institution.<sup>667</sup> Finally, judicial decisions may mandate massive and expensive changes. The court does not control the source of the money.<sup>668</sup>

In Civil Rights Act cases, the courts have developed an immunity barrier to protect officials from unwarranted damage verdicts. Immunities are supported by sound policies. If officials were unprotected, the threat of personal liability might deter people from accepting positions in prison administration.<sup>669</sup> If officials were easily held liable, the risk of liability might inhibit vigorous policy making and innovation.<sup>670</sup>

When the immunity decisions are examined, a good deal of diversity appears. Many decisions set up a qualified immunity which, stated briefly, defeats personal liability for money damage when the act was done in good faith.<sup>671</sup> The gravamen

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<sup>666</sup> See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). But see *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974).

<sup>667</sup> *Sostre v. McGinnis*, 442 F.2d 178, 197 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Rinehart v. Brewer*, 360 F. Supp. 105, 113 (S.D. Iowa 1973), *aff'd*, 491 F.2d 705 (8th Cir. 1974). But cf. *Landman v. Royster*, 333 F. Supp. 621, 657 (E.D. Va. 1971).

<sup>668</sup> *Holt v. Sarver*, 442 F.2d 304, 309 (8th Cir. 1971).

<sup>669</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 952 (E.D. Pa. 1973).

<sup>670</sup> *Johnson v. Alldredge*, 488 F.2d 820, 824 (3d Cir. 1973); *Clarke v. Cady*, 358 F. Supp. 1156, 1164 (W.D. Wisc. 1973).

<sup>671</sup> *Palmigiano v. Mullen*, 491 F.2d 978 (1st Cir. 1974); *Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 719-21

of immunity appears to be reliance in good faith upon the ostensible legality of existing practice.<sup>672</sup> Other cases do not consider the immunity,<sup>673</sup> apparently do not allow the immunity<sup>674</sup> or reject good faith as a defense.<sup>675</sup> The Third Circuit applies an immunity which looks to the type of decision instead of the mental state of the official: if policy judgments are questioned, the first question is whether the official is responsible for making policy; if the decision is within the ambit of official discretion, immunity is established.<sup>676</sup> Thus, as long as an act of judgment is reasonably connected with official duties, the official is immune even though he may be activated by malice and the act may be unconstitutional.<sup>677</sup> This may be criticized as expanding absolute immunity beyond reasonable bounds, protecting officials unnecessarily and circumscribing the aggrieved plaintiffs' opportunity to recover compensatory damages. The Third Circuit test for routine tasks is different. If judgment is not exercised, the official is not immune from suit but may escape liability by showing good faith.<sup>678</sup>

Next to be examined is the good faith reliance standard. The question pursued is how reasonable it is to rely on the legality of an existing practice. It is also hoped that further generalizations will emerge concerning the law's progress in accommodating the compensatory purpose of damages with

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(7th Cir. 1973); *Clarke v. Cady*, 358 F. Supp. 1156, 1163 (W.D. Wis. 1973); *Jones v. Wittenberg*, 330 F. Supp. 707, 722 (N.D. Ohio 1971).

<sup>672</sup> See *Cox v. Cook*, 95 S.Ct. 1237, 1238-39 (1975); *Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 719 (7th Cir. 1973); *Fife v. Crist*, 380 F. Supp. 901, 911 (D. Mont. 1974). *United States ex rel. Bracey v. Rundle*, 368 F. Supp. 1186, 1190 (E.D. Pa. 1973); *Clarke v. Cady*, 358 F. Supp. 1156, 1163 (W.D. Wis. 1973). Chief Justice Burger stated qualified immunity this way: "It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

<sup>673</sup> *United States ex rel. Nial v. Walfe*, 346 F. Supp. 569, 576 (E.D. Pa. 1972) (immunity not considered). Cf. *United States ex rel. Motley v. Rundle*, 340 F. Supp. 807 (E.D. Pa. 1972) (damage hearing following defendant's default).

<sup>674</sup> *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (apparently not allowing immunity).

<sup>675</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 948-49 (E.D. Pa. 1973).

<sup>676</sup> *Johnson v. Alldredge*, 488 F.2d 820, 825-26 (3d Cir. 1973).

<sup>677</sup> *Id.* at 826. *But see Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974) (rejecting absolute executive immunity).

<sup>678</sup> *Johnson v. Alldredge*, 488 F.2d 820, 825 (3d Cir. 1973), *citing Pierson v. Ray*, 386 U.S. 547 (1967).

the discretion-protecting function of qualified immunity in a period of rapid social and legal change.

Immunity is easiest to justify when the prison officials have relied on a procedure which is later held to be unconstitutional. Future denials of due process may be enjoined but the officials responsible for the deprivation will not be required to pay damages to the aggrieved prisoner.<sup>679</sup> Like a police officer, a prison official is not "charged with predicting the future course of constitutional law."<sup>680</sup> But the surprise cases have already been written; and a decision that it is unconstitutional to remove an inmate to punitive segregation without notice and a hearing can no longer come like a bolt out of the blue. In addition to legal changes, it is generally understood that prisons are in an execrable state.<sup>681</sup> These factors tend to discount blanket claims of good faith reliance.

At present, most courts appear to reject "constructive" knowledge of due process from social and legal trends and to require actual knowledge that a practice was unconstitutional when the deprivation took place. For example, an Alabama inmate argued that the official's qualified immunity was nullified by a Pennsylvania decision two months before the unconstitutional act. The court upheld the immunity stating "there was no evidence that the order was called to [the official's] attention or otherwise could provide a warning to officials of the Alabama Prison System in such a short time."<sup>682</sup> A Fourth Circuit case is similar. Even though there was a precedent in the circuit, the court held that if, as a factual matter, the official reasonably and in good faith relies on the legality of existing practice, he will be immune from a damage award.<sup>683</sup> On the other hand, a Kentucky district court held that the

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<sup>679</sup> *Cox v. Cook*, 95 S. Ct. 1237 (1975); *Clarke v. Cade*, 358 F. Supp. 1156, 1163 (W.D. Wis. 1973). *Wolff* strengthens this conclusion. It holds that due process requirements will not be applied retroactively to require the officials to expunge procedurally defective prison discipline.

<sup>680</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973).

<sup>681</sup> See, e.g., *Holt v. Sarver*, 442 F.2d 304, 309 (8th Cir. 1971) (Lay, J., concurring); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972); *Hirschkop & Milemann, The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

<sup>682</sup> *Claybrone v. Thompson*, 368 F. Supp. 324, 327 (M.D. Ala. 1973).

<sup>683</sup> *Skinner v. Spellman*, 480 F.2d 539, 540 (4th Cir. 1973).

authorities did not show good faith in view of clear Supreme Court precedent. Given the authoritative statement of the law, the official did not prove a reasonable belief that the act was constitutionally permissible.<sup>684</sup> The Kentucky judge's approach approximates the Supreme Court's formulation in *Wood v. Strickland*.<sup>685</sup> The Court announced a mixed objective-subjective test with strong "should know" aspects. Ignorance of "settled, indisputable" law will not justify a constitutional violation; the official's standard of conduct includes "knowledge of the basic, unquestioned constitutional rights of his charges."<sup>686</sup> The key to the test is reasonableness. As time passes, courts will be increasingly justified in examining the factual basis for reliance. Since it is unlikely that there should be a premium on ignorance, at some point a court will be justified in holding that knowledge was pervasive and that the official *had* to know.

How specific must the law be to overcome this barrier and to constitute knowledge that a particular practice was unconstitutional when it took place? Generally, if the law is "unsettled" when the illegal deprivation takes place, the official will be immune; as the law becomes more specific, immunity is less likely to be afforded.<sup>687</sup> If *Wood* applies to prisons, the officials are required to be aware of what the constitution requires. But constitutional commands are sometimes less than crystal clear. Additional answers to this question are found in the *Landman* litigation.<sup>688</sup> It is useful to examine a related issue at the same time. That issue is the degree to which an official defendant must know of and participate in the unconstitutional deprivation before individual liability may be affixed.

District Judge Merhige, in ruling on liability earlier, concluded that conditions were appalling enough to merit broad

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<sup>684</sup> *Preston v. Cowan*, 369 F. Supp. 14, 18-19 (W.D. Ky. 1973) (authorities refused to post a series of letters; immunity depending on the state of the law as of the date of refusal).

<sup>685</sup> 95 S. Ct. 992 (1975).

<sup>686</sup> *Id.* at 1000-01.

<sup>687</sup> *Cox v. Cook*, 95 S. Ct. 1237 (1975); *Ault v. Holmes*, 369 F. Supp. 288, 293 (W.D. Ky. 1973); *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973). Dictum and later holdings do not refute immunity, but prior Supreme Court precedent refutes immunity. *Id.* at 18-19.

<sup>688</sup> *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973).

prospective relief.<sup>689</sup> At the hearing which led to the instant order, evidence was introduced on the issue of damages for deprivations which occurred before the prospective relief. The court found that one of the inmates was placed in isolation because he sued to desegregate the prison<sup>690</sup> and that Landman was the victim of "deliberate efforts . . . to de-humanize" him.<sup>691</sup> There were physical and psychic injuries of some magnitude.<sup>692</sup>

The first question on the immunity issue was whether the prison officials knew that the deprivations of constitutional rights were contrary to law. In holding that they did, the court looked to earlier litigation in which Landman had participated. In 1965, he had initiated a lawsuit charging that certain prison practices were cruel and unusual punishment. While the district court rejected the cruel and unusual theory and the court of appeals affirmed,<sup>693</sup> the affirming opinion was qualified throughout. The basis for the decision was the district judge's factual determinations, and the court of appeals could not hold these findings of fact to be clearly erroneous.<sup>694</sup> There was, moreover, in 1966 a dearth of prison law. Even so, the court of appeals discussed corrections theory and expressed a sympathetic and compassionate view. In the next to the last paragraph the court stated, "Where the lack of effective supervisory procedures expose men to the capricious impositions of added punishment, due process and Eighth Amendment questions inevitably arise."<sup>695</sup> Landman took the court's advice and brought the next case on a due process theory.<sup>696</sup> In dealing with the damage claim and the immunity, the court placed on the officials the burden of proving a reasonable belief that the practices were constitutionally permissible.<sup>697</sup> The director of the corrections division denied knowledge, but the court rejected his testimony. In view of "the clear words" in the 1966 court of

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<sup>689</sup> Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

<sup>690</sup> Landman v. Royster, 354 F. Supp. 1302, 1308 (E.D. Va. 1973).

<sup>691</sup> *Id.* at 1313 (the interested reader should consult the report for details).

<sup>692</sup> *Id.* at 1307, 1313.

<sup>693</sup> Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966).

<sup>694</sup> *Id.* at 139.

<sup>695</sup> *Id.* at 141.

<sup>696</sup> Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

<sup>697</sup> Landman v. Royster, 354 F. Supp. 1302, 1318 (E.D. Va. 1973).

appeals opinion, "ignorance of the law" was "incomprehensible."<sup>698</sup> In addition, some of the prison practices were found to "violate the lowest standards of decency" and to be "of such a shocking nature that no reasonable man could have believed they were constitutional."<sup>699</sup> Thus if a responsible defendant could be identified, plaintiffs were entitled to damages back to the statute of limitations.<sup>700</sup>

The inquiry next turns to the extent the defendant must know and participate to affix personal damage liability. Civil Rights Act liability is highly individualized, because damages are granted against officials in their "personal" capacity only. For, the court held, to allow recovery of damages against officials in their official capacity would be to grant recovery against the state.<sup>701</sup> The official must also be alive, the court held, because in Civil Rights Act cases charging an interference with "personal" rights the damage remedy fails to survive against the estate of a deceased defendant.<sup>702</sup> To affix damage responsibility the plaintiff must also prove the official's actual conduct. When an official is in a supervisory position, he may be liable either if he directs a deprivation or if he acquiesces in the deprivation with actual knowledge that it is taking place.

In *Landman*, the court held that the cabinet level supervisor was not liable because he was "too far removed" from the deprivation, did not control the illegal conduct, and lacked any

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<sup>698</sup> *Id.* Editor's note. In *Cox v. Cook*, a case that arose in Virginia, the Supreme Court said, "We do not regard the uncertain dicta in *Landman v. Peyton* . . . as laying down a rule binding on petitioners . . ." 95 S. Ct. 1237, 1239 n.3 (1975).

<sup>699</sup> *Id.*

<sup>700</sup> *Id.* at 1314-15. The court gave collateral estoppel effect to the 1965 case and held that, because the cumulative injury was caused by a continuing wrong, the statute of limitations did not begin to run until the defendant's wrongful conduct stopped. *Id.* See also *Donaldson v. O'Connor*, 493 F.2d 507, 528-29 (5th Cir. 1974), *vacated and remanded*, 43 U.S.L.W. 4929 (U.S. June 26, 1975).

<sup>701</sup> *Landman v. Royster*, 354 F. Supp. 1302, 1315-16 (E.D. Va. 1973).

<sup>702</sup> *Id.* at 1315. But see *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961) (Civil Rights Act silent on survival; § 1988 allows court to apply state law; action survived against administrator of deceased defendant). Cf. *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961) (widow allowed to pick up state survival statute to sue defendant for deprivation of deceased spouse's rights: "§ 1988 declares a simple, direct abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective?" *Id.* at 409). Both *Pritchard* and *Brazier* are cited in *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973). The Court states: "Properly viewed then, § 1988 instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts." *Id.* at 703.



real knowledge of it.<sup>703</sup> The director of the corrections division was, however, required to respond in damages. He denied responsibility for the deprivation, but the court found that he approved some of the policies, had specific knowledge of certain illegal confinements and encouraged what appeared to be a personal vendetta against one of the plaintiffs.<sup>704</sup> Thus it was unnecessary to consider other theories such as respondeat superior or negligent failure to supervise.<sup>705</sup> The director was required to pay three of the plaintiffs a total of \$21,265.45 compensatory damages.<sup>706</sup>

*Landman v. Royster* follows the proper approach to the damage issue. If sufficient knowledge that the acts are illegal and participation in the illegal conduct are found, the interest in protecting official discretion no longer exists. The dual interests in compensating over-reached inmates and deterring over-reaching officials become more prominent. A contrasting and incorrect approach to damages, the retroactivity analysis, will be examined next.

*United States ex rel. Jones v. Rundle* dealt with damages for an unconstitutional punitive segregation which took place in 1970.<sup>707</sup> A court of appeals opinion in 1972 held the discipli-

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<sup>703</sup> *Landman v. Royster*, 354 F. Supp. 1302, 1317 (E.D. Va. 1973).

<sup>704</sup> *Id.* at 1312-13. See also, *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 948 (E.D. Pa. 1973) (prison superintendent liable because he should have been aware of unconstitutional procedure; deputy superintendent liable because he was in charge and did not stop unconstitutional action). But cf. *Mukmuk v. Commissioner*, 369 F. Supp. 245, 249 (S.D.N.Y. 1974) (personal responsibility necessary); *Black v. Brown*, 355 F. Supp. 925 (N.D. Ill. 1973) (personal involvement must be alleged to state claim for damages), *aff'd in part, rev'd and remanded in part*, 513 F.2d 652 (7th Cir. 1975).

<sup>705</sup> Generally, knowledge and participation appear to be required. See, e.g., *Anderson v. Nossor*, 438 F.2d 183 (5th Cir. 1971), *modified en banc*, 456 F.2d 835 (5th Cir. 1972), *cert. denied*, 409 U.S. 848 (1972). The perplexing question is the requisite extent of knowledge and participation. See *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974); *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir.), *cert. denied*, 409 U.S. 1106 (1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); Note, *Vicarious Liability Under Section 1983*, 6 IND. L. REV. 509 (1973).

<sup>706</sup> *Landman v. Royster*, 354 F. Supp. 1302, 1319 (E.D. Va. 1973). This was a conservative figure. Under the extreme facts presented, the compensatory damages might have totaled \$200,000 and punitive damages may have been merited. In November of 1973, the *Landman v. Royster* litigation was settled for \$43,525.70. *Washington Post*, Nov. 23, 1973, at B1, col. 3. See also *Preston v. Cowan*, 369 F. Supp. 14, 18-19 (W.D. Ky. 1973) (\$25 for failing to mail legally-oriented letter).

<sup>707</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939 (E.D. Pa. 1973).

nary practices unconstitutional.<sup>708</sup> The *Jones* court, as part of the immunity issue, held that good faith was not a defense and thus did not consider whether officials relied on the ostensible legality of the practice at the time it occurred.<sup>709</sup> The court asked whether the 1972 opinion was to be applied retroactively or prospectively.<sup>710</sup> In this branch of the case, the court followed the retroactivity analysis from criminal cases under the Bill of Rights.<sup>711</sup> For damages, the *Jones* court decided that the 1972 opinion was not retroactive. The court stressed three things. First, the officials had reasonably relied on previous standards. Second, it is open-ended simultaneously to create new law and damage liability for past acts. Third, damage liability would affect both prison administration and administrators. "The consequence would be the end of the prison administration because any sensible prison administrator would immediately resign because it would be virtually impossible for him to protect himself from civil liability."<sup>712</sup> The *Jones* court applied the 1972 opinion retroactively for equitable relief ordering the authorities to expunge the solitary notation and to restore the lost good time.<sup>713</sup>

The retroactivity analysis is questionable for several reasons. First, procedural protections are intended to assure at least minimal accuracy in the fact-finding process. The Supreme Court has been almost categorical in holding that when a new constitutional rule improves fact-finding ability, it will be applied retroactively despite official reliance on the former practice and the new rule's severe impact on the administration of justice.<sup>714</sup> It follows that decisions requiring notice and a hearing before imposing prison discipline are, perforce, retroactive because notice and a hearing are so basic to accurate fact-finding.<sup>715</sup> In denying retroactivity to the 1972 decision, the

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<sup>708</sup> *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972).

<sup>709</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 949 (E.D. Pa. 1973).

<sup>710</sup> *Id.* at 949-52.

<sup>711</sup> *United States ex rel. Arizonica v. Scheipe*, 474 F.2d 720 (3d Cir. 1973).

<sup>712</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 952 (E.D. Pa. 1973).

<sup>713</sup> *Id.* See also *Adams v. Carlson*, 488 F.2d 619, 627 (7th Cir. 1973). *Wolff* prescribes expungement relief when the procedure followed was reliable but ultimately held to be unconstitutional. *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974).

<sup>714</sup> *Williams v. United States*, 401 U.S. 646, 653 (1971).

<sup>715</sup> *Adams v. Carlson*, 488 F.2d 619, 627 (7th Cir. 1973).

*Jones* court recognized improvement in fact-finding as a determining factor in retroactivity. But the court chose to apply the 1972 opinion only prospectively, because the aggrieved inmate may be partially protected by an injunction and because the consequences of an erroneous decision to impose discipline are not so severe as a criminal conviction.<sup>716</sup>

In *Adams v. Carlson*,<sup>717</sup> the Seventh Circuit also applied the retroactivity analysis. This case did not involve damages, but concerned the question of whether disciplinary hearings which arose out of a work stoppage in 1972 were to be governed by a 1973 circuit court decision. The court followed the retroactivity analysis and, emphasizing "the accuracy of the factual determination", held that the charged infractions must be reheard under the 1973 guidelines.<sup>718</sup> While *Adams v. Carlson* does not reach the damage question, the court deals correctly with the retroactivity variables. Thus, properly applied, the retroactivity analysis almost always leads to a retroactive application of the decision.

An additional reason to abjure the retroactivity analysis emerges from a review of the immunity concept. In *Jones*, the court determined that the 1972 decision was not retroactive. The court stressed the threat of personal liability and reliance on previous judicial decisions. These are precisely the factors other courts have emphasized in passing on immunity from damage. In *Skinner v. Spellman*, the Fourth Circuit held that the prison official had a qualified immunity in damage actions. This immunity turned on whether the official "was acting in reasonable good faith reliance on standard operating procedure."<sup>719</sup> In *Barr v. Matteo*, Justice Harlan upheld executive immunity from a defamation suit because "the threat of [damages] might appreciably inhibit the fearless, vigorous,

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<sup>716</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939, 951 (E.D. Pa. 1973). While the procedure condemned in *Wolff* did provide rudimentary notice, the Court refused retroactive expungement relief noting, (1) less is at stake in prison discipline than in a criminal trial; (2) officials relied on former practice; (3) retroactivity would have a significant impact on prison administration; and (4) the formerly prevailing system did not produce enough error to "warrant this cost or result." *Wolff v. McDonnell*, 418 U.S. 539, 544 (1974). Thus a procedure without notice might result in retroactive expungement relief because of inaccuracy.

<sup>717</sup> 488 F.2d 619 (7th Cir. 1973).

<sup>718</sup> *Id.* at 627.

<sup>719</sup> *Skinner v. Spellman*, 480 F.2d 539, 540 (4th Cir. 1973).

and effective administration of policies of government.”<sup>720</sup> Thus, had the *Jones* court considered reliance when analyzing immunity rather than as part of the retroactivity analysis, the result would almost certainly have been the same. Because of the ostensible legality of the practice at the time the illegal discipline occurred, the qualified immunity would bar damages.<sup>721</sup> Thus Chief Judge Lord in a similar case declined to follow the retroactivity analysis, applied qualified immunity, and held the official immune.<sup>722</sup> By stressing reasonable reliance on the apparent legality of the practice, the same result is reached without torturing the retroactivity analysis.

The retroactivity analysis, moreover, diffuses the inquiry. It may lead to misplaced emphasis and incorrect decisions. In *Black v. Brown*,<sup>723</sup> the court followed the retroactivity analysis. Good time credits had been taken, apparently without due process, but the court refused to restore the credits because it “would lead to needless and endless litigation.”<sup>724</sup> Several factors appear to compel an opposite result: inaccurate fact-finding is inescapable in ex parte proceedings; a file entry is relatively easy to change; and the inmate has a high stake in his liberty. This leads to the conclusion that good time credits could be restored, with the officials allowed a reasonable period to retry the charges. The rehearing would not be an unbearable burden because such rehearings are less complex than a criminal trial.<sup>725</sup> The threat of a deluge of prisoner litigation seems an unrealistic fear in view of the possibility of the use of class actions for plaintiffs and broad injunctive relief.<sup>726</sup> These factors appear to require equitable relief in some form.<sup>727</sup> But, in

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<sup>720</sup> *Barr v. Matteo*, 360 U.S. 564, 571 (1959) (plurality opinion).

<sup>721</sup> In *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973) the court held that the later opinion was retroactive to require rehearings but hinted that the immunities applied to a damage action. *Id.* at 629 n.16.

<sup>722</sup> *United States ex rel. Bracey v. Rundle*, 368 F. Supp. 1186, 1188-90 (E.D. Pa. 1973).

<sup>723</sup> 355 F. Supp. 925 (N.D. Ill. 1973), *aff'd in part, rev'd and remanded in part*, 513 F.2d 652 (7th Cir. 1975) (adopting views very similar to those stated in the previous textual paragraph).

<sup>724</sup> *Id.* at 927.

<sup>725</sup> *Adams v. Carlson*, 488 F.2d 619, 628 (7th Cir. 1973).

<sup>726</sup> *Cf. Preston v. Cowan*, 369 F. Supp. 14, 21-22 (W.D. Ky. 1973). *But see Wheeler v. Procunier*, 508 F.2d 888 (9th Cir. 1974).

<sup>727</sup> *United States ex rel. Jones v. Rundle*, 358 F. Supp. 939 (E.D. Pa. 1973), granted equitable relief and gave the grant of equitable relief as a reason to deny a damage remedy. *Id.* at 951-52.

applying the retroactivity analysis, the court may emphasize one factor over others. The court in *Black v. Brown* incorrectly stressed the effect on administration of justice of applying the decision retroactively. The retroactivity analysis, it may be concluded, creates theoretical and practical problems. The immunity analysis turns on a factual inquiry, analyzes the proper variables and better serves the interests of all concerned.

From the discussion above, one general conclusion is clear. The courts hesitate before awarding an inmate compensatory damages. When the law is non-existent or uncertain, this is justified under a qualified immunity. Compensatory damages will be awarded only in exacerbated instances.

Will inmates be awarded damages when the officials break law that is certain beyond doubt? To answer this question, we turn again to the *Landman* litigation.<sup>728</sup> In 1971 the district court ordered extensive changes in prison practices. Plaintiffs charged that the officials violated the injunction and asked the court to hold the officials in civil contempt.<sup>729</sup> The defendants could not assert that they relied on the ostensible legality of conduct which was contrary to an injunction that defined the law. The court found that the officials had violated the 1971 injunction, another injunction and "simple fairness." The officials, the court said, failed to recognize "that a prison administration is not a fief unto itself" and attempted to "envelop the system with a massive veil of secrecy."<sup>730</sup> The officials and their attorneys, the court speculated, either did not understand the injunction or intended to "thwart" it.<sup>731</sup> The officials failed to inform both the lower-level employees and the inmates of the order and its terms. They also refused to implement the procedural protections required by the order. Finally, the officials isolated inmates in high security areas both arbitrarily and without due process. These acts, the court held, constituted contempts.<sup>732</sup> The conduct may have been criminal contempt

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<sup>728</sup> See also *Preston v. Cowan*, 369 F. Supp. 14, 18-19 (W.D. Ky. 1973) (clear Supreme Court precedent: no immunity).

<sup>729</sup> *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973).

<sup>730</sup> *Id.* at 1299.

<sup>731</sup> *Id.*

<sup>732</sup> *Id.* at 1300. See generally Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).

and serious enough to impose a punitive fine.<sup>733</sup> The court classified the contempt as civil and imposed a coercive sanction.<sup>734</sup> It fined the named, living defendants \$25,000 but suspended the fine upon the condition that the injunction's terms be "carried out on every level of the prison system."<sup>735</sup> Even though this extensive coercive remedy was ordered, no remedial relief was ordered. The court doubted that there had been a quantifiable injury and noted that, in any event, there was no evidence of compensable loss.<sup>736</sup>

Contempt is a distinct remedy for denials of due process. For compensatory contempt there must be an injunction which binds the defendants, breach of the injunction, and damages. Remedial or compensatory damages may be awarded as part of the civil contempt sanction.<sup>737</sup> But, as illustrated by the contempt branch of *Landman*, it takes very compelling facts to overcome judicial reluctance. For this there are several reasons: contempt is both extraordinary and flexible; courts pause to think before finding contempt; finally, after contempt is found, courts mold the remedy carefully.<sup>738</sup> Federal courts, moreover, are disinclined to hold state and local government officials in contempt.<sup>739</sup> When a government official is found in contempt, courts tend to threaten sanctions in the future rather than to impose sanctions immediately.<sup>740</sup> One purpose of civil contempt is to coerce: to encourage the defendant to obey an injunction. A threat of future, tangible sanctions may ac-

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<sup>733</sup> Dobbs, *supra* note 732, at 235-49, 261-63. In *Landman v. Royster*, 354 F. Supp. 1292, 1300 (E.D. Va. 1973) the court found a lack of "willfulness." This is inconsistent with almost every other factual conclusion in the opinion.

<sup>734</sup> *Landman v. Royster*, 354 F. Supp. 1292, 1300-02 (E.D. Va. 1973).

<sup>735</sup> *Id.* at 1301-02. See Dobbs, *supra* note 732, at 244-45. This was dissolved along with the injunction when the case was settled. *Washington Post*, Nov. 23, 1973, at B1, col. 3.

<sup>736</sup> *Landman v. Royster*, 354 F. Supp. 1292, 1302 (E.D. Va. 1973).

<sup>737</sup> *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

<sup>738</sup> *Harthman v. Witty*, 480 F.2d 339 (3d Cir. 1973); *United States v. Swingline, Inc.*, 371 F. Supp. 37 (E.D.N.Y. 1974); *United States v. Greyhound Corp.*, 370 F. Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

<sup>739</sup> See, e.g., *United States v. Barnette*, 346 F.2d 99 (5th Cir. 1965); *Class v. Norton*, 376 F. Supp. 496 (D. Conn. 1974) (contempt citation not warranted though there was substantial and widespread noncompliance. But officer, in individual capacity, had to pay \$1,000 in attorney's fees to petitioner).

<sup>740</sup> See, e.g., *Woolfolk v. Brown*, 358 F. Supp. 524, 534-35 (E.D. Va. 1973); *Doe v. Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970).

comply with this purpose. But another purpose of civil contempt is to compensate. If compensation is merited, it should be awarded.

### E. Summary

Part II collects remedies available to one whose due process rights have been violated. It demonstrates that courts have adopted traditional legal and equitable remedies and applied them to due process cases. Significant problems, nevertheless, remain.

Equitable remedies include injunctions which may be broad or narrow. Defendants may be compelled to reform procedure in an entire institution or to reinstate a discharged employee. Injunctions are enforced by contempt or the threat of contempt. The equitable order to expunge should be particularly noted in a record-oriented society. If an entry is wrongfully placed in a file, the court may order it extirpated.<sup>741</sup>

The injunctive remedy has two drawbacks. First, many injunctions are prospective. They tell the defendant not to do it again<sup>742</sup> but the defendant pays no price for his illegal conduct and the plaintiff receives no compensation for his loss. The court can, however, order damages or substituted relief. Damage remedies comprehend nominal damages,<sup>743</sup> actual

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<sup>741</sup> See *Wellmer v. Minnesota State Junior College Bd.*, 487 F.2d 153, 156 (8th Cir. 1973); *Strickland v. Inlow*, 485 F.2d 186, 190 (8th Cir. 1973), *vacated and remanded sub nom. Wood v. Strickland*, 95 S. Ct. 992 (1975); *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Tatum v. Morton*, 386 F. Supp. 1308, 1315 (D.D.C. 1974); *Marin v. University of Puerto Rico*, 377 F. Supp. 613 (D.P.R. 1974); *Warren v. National Ass'n of Sec. Prin.*, 375 F. Supp. 1043 (N.D. Tex. 1974); *Lykken v. Vavreck*, 366 F. Supp. 585, 598 (D. Minn. 1973); *Dobbs*, *supra* note 732. Interestingly, in *Irby v. Gowan*, 380 F. Supp. 1024 (S.D. Ala. 1974), the court ordered an entry of "Dismissed—Non-Cooperative" expunged from teacher's personnel records even though the court held for the defendant school officials that the teacher was non-tenured, thus having no contractual right to remain employed; and the entry and dismissal were held not to impose a "stigma" in the *Roth* sense. The entry created no stigma because it was not publicized by the school officials. The court merely said that since a letter of resignation was subsequently accepted by the school system, the entry should be expunged "in the spirit of equity." *Id.* at 1031. The expungement remedy is broad indeed.

<sup>742</sup> Note, *Governmental Employee Liability*, 21 U.C.L.A.L. Rev. 624, 635-36 (1973).

<sup>743</sup> *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1973); *Berry v. Macon County Bd. of Educ.*, 380 F. Supp. 1244 (M.D. Ala. 1974); *Thonen v. Jenkins*, 374 F. Supp. 134

damages,<sup>744</sup> compensation for impalpable losses<sup>745</sup> and punitive or exemplary damages.<sup>746</sup> Damages may compensate *and* deter, and thus ameliorate some problems left by an injunction.

The injunction's second drawback is that it is difficult to administer. Rules 25(d) and 65(d) cast a responsibility net over successors, agents, employees and those "in active concert or participation." The court may be required to supervise carefully by retaining jurisdiction and calling for periodic reports. When, as is generally true in Civil Rights Act lawsuits, the injunction binds state or local government officials, the court is thrown into a political thicket. Generally, judges affix legal consequences to discerned past conduct and leave uniform, prospective rulemaking to the legislature. The broad injunction in a Civil Rights Act case strains this generalization.

The problems of administering equitable relief are anticipated by the problems of managing a class action. If the defendants are within the injunctive responsibility net, an injunction binding them will protect as adequately as a plaintiff class. But if both the plaintiffs and the defendants are diffused, defining the groups benefiting and bound presents excruciating problems.<sup>747</sup> In the consumer or "property" class actions, the defendants are not held together by agency or concert. This difficulty in defining and administering relief may be one practical reason for decisions finding an absence of state action in creditor conduct under *ex parte* statutes. When the groups are ill defined, a great deal of the decision's effect depends upon the defendant's propriety and good faith.<sup>748</sup> Per-

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(E.D.N.C. 1974) (\$100 nominal damages awarded); *Simmons v. Russell*, 352 F. Supp. 572, 580 (M.D. Pa. 1972). *Dobbs*, *supra* note 732, at 191.

<sup>744</sup> *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973).

<sup>745</sup> *Lykken v. Vavreck*, 366 F. Supp. 585, 596 (D. Minn. 1973); *Cf. Magnett v. Pelittier*, 488 F.2d 33 (1st Cir. 1973); *Gonzales v. Fairfax Brewster School, Inc.*, 363 F. Supp. 1200, 1205 (E.D. Va. 1973).

<sup>746</sup> *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974); *Lykken v. Vavreck*, 366 F. Supp. 585, 596 (D. Minn. 1973); For a collection of cases, *see* Annot., *Punitive Damages for Violations of Federal Civil Rights Acts*, 14 A.L.R. Fed. 608 (1973).

<sup>747</sup> O. FISS, *INJUNCTIONS* 500-04 (1972).

<sup>748</sup> *Compare Schneider v. Margossion*, 349 F. Supp. 741, 746 (D. Mass. 1972), *aff'd sub nom. Ruotolo v. Gould*, 489 F.2d 1324 (1st Cir. 1974) (clerks not certified as defendant class because it appeared that decision will be obeyed) *with Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972) (after supreme court affirmed case, state attorney



haps the better remedy from an invalidating decision is that it may stir an inactive legislature into action. Significant and general reform may result from an unwelcome dialogue.<sup>749</sup>

The damage remedy is intended to compensate and deter. But there are several barriers to damages in due process cases. First, many courts are hostile to any damage remedy in due process cases.<sup>750</sup> Not much can be said about these cases except that they are wrong.

Second, many due process-civil rights cases embody genuine measurement problems. Constitutional rights are valuable. When constitutional rights are impaired, damages may be inferred.<sup>751</sup> But when defendants exclude plaintiffs from a political speech they really do not care to attend, how are plaintiffs injured?<sup>752</sup> If a plaintiff is injured physically or mentally, arrested, confined, fired or subjected to bad publicity, damages can be awarded.<sup>753</sup> But when a "wholesale assault upon the civil rights and liberties of numerous citizens, in violation of the First, Fourth, Fifth and Fourteenth Amendments . . ."<sup>754</sup> causes no "injury," there is not much to compensate. The law, however, has always compensated intangible injuries, for example, false arrest and defamation.<sup>755</sup>

There is a lesson to be learned from copyright infringement cases. When infringement damages are difficult to measure or small, but part of a pattern of illegal behavior, the courts look beyond the particular case to the general purpose of damages. The damage award, in addition to restitution and compensation, is "designed to deter illegal conduct," thus, "even for uninjurious and unprofitable invasions of copyright, the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy."<sup>756</sup> Surely con-

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general apparently advised that opinion only applied to particular county: instant case necessary to attain an injunction against a defendant class).

<sup>749</sup> *Osmond v. Spence*, 359 F. Supp. 124 (D. Del. 1972).

<sup>750</sup> *See, e.g., Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971).

<sup>751</sup> *United States ex rel. Motley v. Rundle*, 340 F. Supp. 807, 810-11 (E.D. Pa. 1972).

<sup>752</sup> This is one of the problems Judge McMillan left for later in *Sparrow v. Goodman*, 361 F. Supp. 566 (W.D.N.C. 1973).

<sup>753</sup> *Lykken v. Vavreck*, 366 F. Supp. 585, 596 (D. Minn. 1973).

<sup>754</sup> *Sparrow v. Goodman*, 361 F. Supp. 566, 584 (W.D.N.C. 1973).

<sup>755</sup> D. DOBBS, *REMEDIES* § 7.13 (1973).

<sup>756</sup> *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

stitutional rights are as highly valued as copyright. In addition, assessing damages calls the government to account. But while the Copyright Act contains a minimum damage schedule,<sup>757</sup> the Constitution, unfortunately, does not. Surely this does not mean that the government can ignore the Constitution with impunity or that the government responds to a lower standard than a private person. Nonetheless, the idea of imposing minimum damages to deter illegal conduct might be adapted to constitutional violations.

Third, sovereignty's perquisites exacerbate the search for a solvent defendant. The immunities cannot be interposed to prevent a defendant from obeying an injunction,<sup>758</sup> but the law prevents plaintiffs from suing the entity at all<sup>759</sup> and attenuates liability except from actual participants and superiors who direct or acquiesce.<sup>760</sup> The policy of the personal immunities is to protect the official who legitimately but erroneously exercises official discretion.<sup>761</sup> The immunity decisions are characterized only by diversity.

*Scheuer v. Rhodes*<sup>762</sup> will bring needed clarity to the immunities. First, the Court rejected blanket claims of executive immunity. Second, it stated the factors to be analyzed in passing on personal or qualified immunity:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought

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<sup>757</sup> Copyright Act § 101, 17 U.S.C. § 101 (1952); *See also* 18 U.S.C. § 2520 (Supp. 1974) (civil damage schedule for illegal wiretap).

<sup>758</sup> *See, e.g.,* *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1973).

<sup>759</sup> *Edelman v. Jordan*, 415 U.S. 651 (1974) (sovereign immunity); *Moor v. County of Alameda*, 411 U.S. 693 (1973) (Civil Rights Act jurisdiction). Professor Kenneth Davis suggests that § 1983 should be amended to allow recovery against a municipality for deliberate torts committed by police officers. Davis, *supra* note 464.

<sup>760</sup> *Downs v. Department of Public Welfare*, 368 F. Supp. 454, 464 (E.D. Pa. 1973); *Lykken v. Vavreck*, 366 F. Supp. 585, 599 (D. Minn. 1973); *McGhee v. Moyer*, 60 F.R.D. 578, 586 (W.D. Va. 1973).

<sup>761</sup> *See, e.g.,* *Strickland v. Inlow*, 485 F.2d 186, 189-91 (8th Cir. 1973), *vacated and remanded sub nom.* *Wood v. Strickland*, 95 S. Ct. 992, 1001 (1975); *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1973); *McGhee v. Moyer*, 60 F.R.D. 578, 585 (W.D. Va. 1973).

<sup>762</sup> 416 U.S. 232 (1974).

to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct.<sup>763</sup>

This standard focuses judgment on the critical issues, good faith and legitimate discretion. It combines the "objective" and the "subjective" standards artfully enough to reach substantial justice in most cases and should eliminate both excessively broad and excessively narrow immunity decisions.

The immunity analysis is sufficiently serviceable to accommodate damage awards to legal change. The criminal law retroactivity analysis is a device to face the problem but shirk a solution. Granting or denying a class action leaves the retroactivity question unsolved and may conceal the real issues.<sup>764</sup> Injunctions and declaratory judgments change the rules prospectively without affecting past conduct.<sup>765</sup> But if it is necessary to evaluate the ostensible legality of past conduct, only the immunity formula allows the fact-finder to analyze the defendant's state of mind in light of the then available facts and law.<sup>766</sup>

The damage remedy, it must be concluded, is too often an aspiration rather than a policy. Even when the imposing legal barriers are surmounted, plaintiffs frequently cannot find a solvent, responsible defendant.<sup>767</sup> Nevertheless, even the possi-

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<sup>763</sup> *Id.* at 247-48. See also *Wood v. Strickland*, 95 S. Ct. 992, 1001 (1975): "we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."

<sup>764</sup> *Schneider v. Margossian*, 349 F. Supp. 741 (D. Mass. 1972), *aff'd sub nom. Ruotolo v. Gould*, 489 F.2d 1324 (1st Cir. 1974).

<sup>765</sup> *Doe v. Bolton*, 410 U.S. 719 (1973); *Roe v. Wade*, 410 U.S. 113 (1973) (declaratory judgment but no injunction assuming future obedience); *Marin v. University of Puerto Rico*, 377 F. Supp. 613 (D.P.R. 1974) (declared unconstitutional but not enjoined; court presumes that the university will heed declaratory judgment).

<sup>766</sup> See *Baxter v. Birkins*, 311 F. Supp. 222 (D. Colo. 1970) (no personal liability for conduct colorably legal but unconstitutional in retrospect).

<sup>767</sup> See, e.g., *SOUTHERN JUSTICE* 55-56 (L. Freedman ed. 1967) (case settled for costs); *Washington Post*, Feb. 22, 1974, at C1, col. 7-8. (jury awards inmates \$8,000 from guards: one guard no longer works at the jail; the other suspended without pay; appeal considered but money for legal fee lacking; neither jail nor city responsible).

bility of recovering damages may have several salutary, though noncompensatory, effects. First, when a damage remedy is known to be available, official behavior tends to become more civilized.<sup>768</sup> Second, once a lawsuit is commenced, the request for damages prevents the declaratory-injunctive part of the case from becoming moot.<sup>769</sup> Third, the media and professional organizations tend to pick up the fact of the judgment; and even though the judgment is uncollectable, it has an educational or socializing effect.

The non-utility of the damage remedy is palpably unsatisfactory. Two things may be suggested to invigorate damages as a remedial tool. The insolvent defendant problem can be ameliorated by allowing recovery on official bonds.<sup>770</sup> A more general and more satisfactory solution is for the governing body to purchase insurance for its employees.<sup>771</sup> Neither of these devices interfere unduely with sovereignty's perquisites because there is no "liability which must be paid from public funds in the state treasury."<sup>772</sup> Both will compensate for actual losses.

Today a victorious case seldom generates enough recovery to compensate the plaintiff, much less to remunerate his lawyer. Moreover, the plaintiff, generally represented by a private attorney, frequently faces a defendant represented by sophisticated government counsel.<sup>773</sup> Correcting denials of constitutional rights vindicates the public interest but, as observed above, often does little more.

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<sup>768</sup> Washington Post, Feb. 22, 1974, at C1, col. 7-8. Warden is quoted as saying that damage verdict for prisoners against guards "will help curb brutality of prisoners by guards who in the past have thought their word would automatically prevail over that of an inmate."

<sup>769</sup> *McGhee v. Moyer*, 60 F.R.D. 578, 585 (W.D. Va. 1973); *Blye v. Globe-Wernicke Realty Co.*, 300 N.E.2d 710, 714, 347 N.Y.S.2d 170, 174 (1973).

<sup>770</sup> *Whirl v. Kern*, 407 F.2d 781, 796 (5th Cir. 1969); *Gaston v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969); *City of Advance v. Maryland Cas. Co.*, 302 S.W.2d 28 (Mo. 1957).

<sup>771</sup> Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. Rev. 548, 558 (1972). After the *Landman* litigation was settled, the Virginia authorities purchased liability insurance for welfare and institution's employees. Washington Post, Feb. 22, 1974, at C4, col. 8.

<sup>772</sup> *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Professor Kenneth Davis has suggested a third alternative: to amend § 1983 to allow recovery of damages from a municipality for deliberate torts committed by municipal police officers. Davis, *supra* note 464.

<sup>773</sup> See, e.g., *Heard v. Boren*, 368 F. Supp. 1321 (E.D. Ark. 1974) (defendants sued as individuals but represented by state attorney general).

While winning plaintiffs occasionally recover attorney's fees,<sup>774</sup> the substantial although intangible public benefit is inadequately considered. Instead the courts focus on the defendant's conduct seeking, it seems, callous defiance. When a lawsuit is not fee-generating but advances the public interest in the government obeying the law, the plaintiff is acting as a "private attorney general." It follows that his attorney should be compensated, in order to make it financially possible for him to vindicate the public interest.<sup>775</sup>

In later Civil Rights Acts, Congress has recognized the above mentioned factors and provided for attorney's fees.<sup>776</sup> None, however, are mentioned in § 1983. Allowing attorney's fees more liberally under § 1983, which is now over a century old, would advance Congress' expressed policy to allow attorney's fees in civil rights cases.<sup>777</sup> In any event, Congress should consider amending § 1983 to bring it into line with more recent statutory statements of policy. Then the courts could focus on whether the law was clear and whether defendant's conduct was clearly unreasonable.

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<sup>774</sup> Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974) (award of attorney fees against defendant individually not barred by eleventh amendment); Comist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Strickland v. Inlow, 485 F.2d 186, 191 (8th Cir. 1973), *vacated and remanded sub nom.* Wood v. Strickland, 95 S. Ct. 992 (1975); Gilpin v. Kansas State High School Act. Ass'n, Inc., 377 F. Supp. 1233, 1244-53 (D. Kan. 1974); Sterzing v. Fort Bend Ind. School Dist., 376 F. Supp. 657, 663 (S.D. Tex. 1972); Warren v. National Ass'n of Sec. School Prins., 375 F. Supp. 1043, 1048 (N.D. Tex. 1974); Thonen v. Jenkins, 374 F. Supp. 134 (E.D.N.C. 1974); Diamond v. Thompson, 364 F. Supp. 659, 668 (M.D. Ala. 1973). *But see* Lykken v. Vavreck, 366 F. Supp. 585, 597-98 (D. Minn. 1973) (A.C.L.U. attorney); Griffin v. Jackson Parish School Bd., 60 F.R.D. 671 (W.D. La. 1973).

<sup>775</sup> Brandenburger v. Thompson, 494 F.2d 885, 888-89 (9th Cir. 1974). *See generally* Naussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973); Mause, *Winner Takes All: A Reexamination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); Note, *Awarding Attorney's Fees to the "Private Attorney General"*, 24 HASTINGS L.J. 733 (1973). Editor's note. The Supreme Court rejected the private attorney general theory of awarding attorney's fees in *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975).

<sup>776</sup> 20 U.S.C. § 617 (Supp. 1974) (school desegregation); 42 U.S.C. § 2000a-3(b) (Supp. 1974) (public accommodation); 42 U.S.C. § 2000e-5(k) (Supp. 1974) (employment discrimination).

<sup>777</sup> *Cf.* Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974). *But see* Fleishman Dist. Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) (comprehensive statutory trademark protection scheme without referring to attorney's fees provided for in parallel patent and copyright acts: attorney's fees precluded).

Two additional remedial-tactical issues remain to be considered. Most due process cases are class actions in federal courts. While both choices are sound in many cases, there are times when the proper course of action is to consider alternatives. The class action's utility cannot be denied. A class action allows the parties to aggregate small claims into an economical lawsuit and the court to concentrate on small injuries to many people. There is a concomitant risk, however, that a large plaintiff class will alter the focus from an individual grievance to the substantive principle's broad implications and the difficulties inherent in implementing wide spread relief. A defendant class should be examined more skeptically. When an agency or concert nexus ties the defendant group together, an injunction may do as well. When there is no nexus, the cost of notice may be prohibitive.

Due process plaintiffs almost always choose a federal forum. This is usually the correct choice, but for some cases a state forum might be considered. If plaintiff alleges a constitutional deprivation, federal jurisdiction appears to be clear. But the Civil Rights Act plaintiff must sue a "person" who acted "under color of law." Difficulties grow out of this near contradiction in both the property and the mental health cases. A state forum may avoid these problems; the litigation may concentrate on the alleged constitutional deprivation. For example, in many of the opinions holding against the plaintiff in self-help repossession cases, it is not certain whether the courts turn the case on lack of fourteenth amendment state action or on the absence of color of law depriving the court of Civil Rights Act jurisdiction. A state forum avoids the federal jurisdiction issue and focuses directly on the constitutional issue.

Plaintiff's attorneys have felt in the past that the federal bench is more amenable to due process interests. Exhibiting a touching faith in constitutional remedies, good tort theories have been passed up in favor of dubious constitutional claims.<sup>778</sup> The present course of Supreme Court decisions is to limit federal jurisdiction under the Civil Rights Act<sup>779</sup> and to

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<sup>778</sup> *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973). Compare *Johnson v. Horace Mann Mut. Ins. Co.*, 241 So.2d 588 (La. Ct. App. 1970).

<sup>779</sup> *Prieser v. Rodriguez*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha v. Bruno*, 411 U.S. 475 (1973).

cease expanding due process principles.<sup>780</sup> Some state courts may be more receptive to due process claims than federal courts.<sup>781</sup> If the lawsuit is to be brought in federal court, the plaintiff should bear in mind the common law torts and pendant jurisdiction.

### *Conclusion*

Michigan's Institute for Social Research reports that the public is cynical toward government and that this cynicism is rising sharply. In the fall of 1973, 66 percent of the sample responded that they trusted the government only "some of the time," an increase of 20 percentage points over a similar survey taken one year earlier. Fifty-three percent think that "quite a few" government officials are crooked, in contrast to 38 percent a year earlier. But between 1972 and 1973 confidence in the Supreme Court increased from 26 to 39 percent.<sup>782</sup>

The public respects the judicial system in part because of continuity and principled decisions, but this respect is fragile.<sup>783</sup> Also, law reaches the public through remedies. If a substantive theory is not realized in practice, the public may conclude that the law displays one set of values and uses another. Due process compels institutions to broaden participation in decision-making to those affected by the decisions. It exposes institutional contradictions and ameliorates their effect. But the court system cannot correct all institutional blunders: the vast majority of decisions must be made on an administrative level. This is the long term effect of a remedial decision in a due process case. It must be weighed when passing on a discrete lawsuit.

In the past twenty years, the educational system has probably been scrutinized more carefully than any other. Racial discharges are clearly illegal. Yet a southern regional confer-

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<sup>780</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

<sup>781</sup> Compare *Adams v. Department of Motor Vehicles*, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) with *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), cert. denied, 95 S. Ct. 325 (1974). But cf. *Kruger v. Wells Fargo Bank*, 520 P.2d 441, 113 Cal. Rptr. 449 (1974). See, Comment, *Scaling the Welfare Bureaucracy: Expanding Concepts of Governmental Employee Liability*, 21 U.C.L.A.L. REV. 624, 663 (1973).

<sup>782</sup> *Washington Post*, Jan. 8, 1974, at A7, col. 1.

<sup>783</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 629 (1974) (Stewart, J., dissenting).

ence on employment displacement in education estimates that 31,500 black teachers have lost their jobs because of school desegregation.<sup>784</sup> The advance sheets bring a steady stream of lies,<sup>785</sup> sexism,<sup>786</sup> violence,<sup>787</sup> psychiatric tyranny,<sup>788</sup> campaigns against dissenters,<sup>790</sup> class-room shouting matches,<sup>791</sup> police state tactics,<sup>792</sup> and bad grammar.<sup>793</sup> Discounting the peril of generalizing social or even legal trends from decided cases,<sup>794</sup> it may appear that the rising generation's minds are shaped in an atmosphere where conformity is mandated, free inquiry is stifled and eccentricity is squelched. Educational institutions, moreover, are ostensibly open institutions, in contrast to prisons and mental hospitals which are "total institutions"<sup>795</sup> where change might be expected to come more gradually.

Thus, one who seeks fundamental change concludes that due process is a cop-out. The reformer should aim his efforts at the substantive rules.<sup>796</sup> The impoverished tenant appreciates notice before being evicted. Notice allows him to get his

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<sup>784</sup> The black teaching force decreased from 21% of the total teaching force to 19% between 1954 and 1970 in seventeen southern and border states. Smith & Smith, *For Black Educators: Integration Brings the Axe*, 6 THE URBAN REV. No. 3 at 8 (1973).

<sup>785</sup> *Wellner v. Minnesota State Junior College Bd.*, 487 F.2d 153 (8th Cir. 1973); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

<sup>786</sup> *Johnson v. University of Pittsburg*, 359 F. Supp. 1002 (W.D. Pa. 1973).

<sup>787</sup> *Kota v. Little*, 351 F. Supp. 1059, 1064 (E.D.N.C. 1971), *aff'd*, 473 F.2d 1 (4th Cir. 1973).

<sup>788</sup> *United States v. Chesterfield County School Dist.*, 484 F.2d 70 (4th Cir. 1973); *Lee v. Macon County Bd. of Educ.*, 453 F.2d 1104 (5th Cir. 1971).

<sup>789</sup> *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973). *See generally* S. HALLECK, *supra* note 552.

<sup>790</sup> *Rampey v. Allen*, 501 F.2d 1090 (10th Cir. 1974); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Jablon v. Trustees of Cal. State Colleges*, 482 F.2d 997 (9th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974); *Rainey v. Jackson State College*, 481 F.2d 347 (5th Cir. 1973); *Lusk v. Estes*, 361 F. Supp. 653 (N.D. Tex. 1973).

<sup>791</sup> *Furumoto v. Lyman*, 362 F. Supp. 1267, 1272 (N.D. Cal. 1973).

<sup>792</sup> *Zumwalt v. Trustees of the Cal. State Colleges*, 109 Cal. Rptr. 344 (Ct. App. 1973).

<sup>793</sup> *Kota v. Little*, 351 F. Supp. 1059, 1063 n.6 (E.D.N.C. 1971).

<sup>794</sup> Shuchman, *An Attempt at A "Philosophy of Bankruptcy"*, 21 U.C.L.A.L. REV. 403, 405-09 (1973).

<sup>795</sup> E. GOFFMAN, *supra* note 625, at 1-12. B. ENNIS, *PRISONERS OF PSYCHIATRY* (1972) (an excellent book); Oran, *Judges and Psychiatrists Lock up Too Many People*, PSYCHOLOGY TODAY, August 1973, at 20; Goldfarb, *America's Prisons: Self-Defeating Concrete*, PSYCHOLOGY TODAY, January 1974.

<sup>796</sup> Cf. Note, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89, 116.



meager possessions together. But he would rather not be evicted at all. To paraphrase the late Professor Chafee: thirsty people don't want due process; they want beer.

Nonetheless, due process promotes sound and fair decisions under existing substantive rules. This advances both legitimacy and effectiveness. In addition, due process educates the participants, raising political consciousness. It prevents the groveling dependency mentioned by Orwell:

At the time I could not see beyond the moral dilemma that is presented to the weak in a world governed by the strong: Break the rules, or perish. I did not see that in that case the weak have the right to make a different set of rules for themselves; because even if such an idea had occurred to me, there was no one in my environment who could have confirmed me in it.<sup>797</sup>

Thus, if social change is viewed as an evolutionary process, due process performs a valuable office.

This virtue can be converted into a defect. Due process is a powerful instrument of conservative social control precisely because more participate. It requires change agents to channel efforts through existing institutions and holds out the hope that fundamental transformation is possible. Procedure is a waning majority's first line of defense. It trains conformity, stamps autocracy with legitimacy's imprimature, and leads only to delayed or cosmetic modifications. This method of varying authority's forms without altering power realities is called "formal co-optation."<sup>798</sup> The leaves fall, but the roots, the trunk and the branches stay the same.

The author cannot refute this argument. He merely replies that due process is only part of the effort to build a better society.

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<sup>797</sup> G. ORWELL, *A COLLECTION OF ESSAYS* 40 (Harbrace ed. 1953).

<sup>798</sup> P. SELZNICK, *TVA AND THE GRASSROOTS* 13-15 (1949) reprinted in *VITAL PROBLEMS FOR AMERICAN SOCIETY* 239-41 (J. Winter, J. Rabon, M. Chesler eds. 1968).