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This survey will be divided into four parts. To begin with, we shall consider the rights of public employees—including free speech. Continuing on with freedom of speech, we shall discuss some recent problems involving defamation. Thirdly, we shall look into some aspects of obscenity law ("dirty movies at drive-ins"). Last, but by no means least, we shall exhaustively consider problems involving secured transactions.

I. Public Employees

During the past year, the Seventh Circuit decided five cases dealing with the constitutional problems of dismissed public employees. To adequately discuss the decisions in these cases, it is first necessary to review some prior Supreme Court cases dealing with similar problems.

Briefly, the problem may be initially divided into its substantive and procedural components:

A. First of all, may a public employee be dismissed for publicly criticizing his employer? Herein, we look to *Pickering v. Board of Education*.¹

B. If so, is a dismissed State public employee entitled to the protection of the fourteenth amendment's right to due process of law, including notice and a fair hearing? Herein, we look to *Board of Regents v. Roth*² and *Perry v. Sindermann.*³

A. Substance

*Pickering v. Board of Education*, quite clearly stands for the proposition that a teacher may not be dismissed for exercising his first

². 408 U.S. 564 (1972).
³. 408 U.S. 593 (1972).
amendment right to speak freely on matters of public concern. Marvin Pickering, a high school teacher in one of Chicago's suburbs, sent a letter to a local newspaper to make known his views concerning a proposed tax rate increase after it had been rejected by the voters. The letter criticized the school board's allocation of funds between the educational and athletic programs and otherwise attempted to provide an answer to the board's one-sided campaign for the increase. Although his letter was greeted by the community "with massive apathy and disbelief", the Board fired Pickering after a hearing in which it found (1) that the letter contained numerous false statements and (2) that the publication of the letter was detrimental to the efficient operation of the school district.

The hearing and dismissal were reviewed by the Will County, Illinois, Circuit Court, which determined only that the Board's findings were supported by substantial evidence and that the facts were such that the Board could have reasonably concluded that the letter was detrimental to the best interests of the school. On appeal, the Illinois Supreme Court affirmed. The United States Supreme Court reversed.

The Court said the first amendment right to free speech is not an absolute right. Rather, it is hedged with qualifications for the good of society. Defamatory speech is not protected because it is considered better for society to prevent its members' reputations from being smeared needlessly, than for individuals to have an unchecked right to free speech. It is the role of the Supreme Court to weigh the interests of the individual in having unfettered rights against the interest of the State in placing a restriction upon the right, such as punishing the speaker to inhibit such socially dangerous speech.

In the instant case, the Supreme Court was faced with an individual who was punished for writing a false critical letter. The Court weighed the interests of the teacher, balancing them against the school district; to arrive at a decision based upon the opposing deciderata it discerned.

First, the Court considered the claim of the school board that Pickering's letter contained false statements and as such wasn't "speech" protected by the first amendment. Pickering, on the other

4. 391 U.S. at 570.
5. The Illinois School Code of 1961 provides that school boards have the power "to dismiss a teacher . . . whenever, in its opinion, the interests of the schools require it . . ." ILL. REV. STAT. ch. 122, § 10-22-4 (1963). This provision is still in effect.
6. 36 Ill. 2d 568, 225 N.E.2d 1 (1967).
hand, claimed protection under the *New York Times v. Sullivan*\(^7\) rule that statements about public figures\(^8\) are protected speech unless made "with knowledge of their falsity, or with reckless disregard for their truth or falsity."\(^9\) After an independent examination of the record, the Court found that Pickering's statements contained in the letter were substantially correct, containing only minor errors committed without malice or knowledge of their falsity.

Therefore, the Court noted that if Mr. Pickering were a member of the general public, his letter would be protected. It was further determined that the "fact of employment is only tangentially and insubstantially involved in the subject matter,"\(^10\) so Pickering should still be considered to be a member of the general public. As such, his speech is protected under the *New York Times* rule.

Secondly, the Court considered, in the words of Justice Marshall, "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."\(^11\) Herein, the Court again applied a balancing test. Applying as against the teacher's statements, criteria such as harmony among co-workers, the need for confidentiality and loyalty, and the efficient operation of the school on a day-to-day basis, the Court could not discern any damage to the school district resulting from Pickering's letter. Hence, applying our general proposition, the teacher prevailed.

**B. Procedure**

In the cases of *Board of Regents v. Roth*\(^12\) and *Perry v. Sindermann*,\(^13\) announced the same day, the Supreme Court ruled that non-tenured teachers do not have a right to due process prior to being "fired" by non-retention.

1. **Board of Regents v. Roth**

In 1968, David Roth was hired for one academic year by the Wisconsin State University at Oshkosh to be an assistant professor of

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9. 391 U.S. at 573.
10. *Id.* at 574.
11. *Id.* at 568.
political science. While rated by the faculty as an excellent teacher, Roth had publicly criticized the university administration for suspending a group of 94 black students without determining individual guilt. Shortly thereafter, Roth was notified that he would not be rehired for the next academic year. No reasons were given, nor was Roth given an opportunity to challenge the decision at any sort of hearing.

Wisconsin statutory law provided that instructors in state universities shall be granted tenure after four years of teaching, and a tenured teacher may be discharged only for cause upon written charges and pursuant to certain procedures. According to the Rules of the Board of Regents, a non-tenured teacher may have an opportunity for a review of his case prior to dismissal during the school term. Roth, however, was not dismissed; rather, he was notified of his non-retention for the coming year. Neither the State law nor the university rules provided any procedure or standards for non-retained, non-tenured teachers.

Roth brought suit in federal district court, alleging that his termination of future employment possibilities without a hearing violated his (1) right to due process, and (2) right to freedom of speech. The district court granted summary judgment on the procedural issue, ordering the university to provide him with reasons and a hearing. The Seventh Circuit affirmed.

The Supreme Court, however, noted that the right to due process did not apply to Roth's case because he was not deprived of any liberty or property within the meaning of the fourteenth amendment.

Liberty, in the context presented by Roth, is a two-fold concept. First, it includes the right to have a good name protected against serious charges by the state. If the university made "any charge against him that might seriously damage his standing and associations in his community," such as basing the nonrenewal on a charge of dishonesty or immorality, Roth would have been deprived of his liberty. The other facet of liberty is the closely related right "to take advantage of other employment opportunities." The Court did not consider

16. 446 F.2d 806 (7th Cir. 1971).
17. "(N)or shall any State deprive any person of life, liberty or property, without due process of law..." U.S. CONST. amend. XIV, § 1.
18. "For where a person's good name, reputation, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 408 U.S. at 573.
19. Id. at 574.
Roth's non-retention to be either an attack on his good name, or such a "stigma or other disability" as to prevent future employment as a teacher. Thus, it held that he was not deprived of his liberty.

A deprived property interest will also activate the due process requirement of the fourteenth amendment. Herein, the Court noted that a "property interest" must be something more than "an abstract need" or a "unilateral expectation." Rather, there should be a "legitimate claim of entitlement." In the instant case, Roth did not have any such contractual right or other proprietary interest in teaching the following year; but merely a legally insufficient unilateral expectation.

Justice Stewart, speaking for the Court, could find no deprivation of liberty or property; therefore, the due process clause did not apply. Hence—the "rule": a non-retained, non-tenured teacher need not be afforded the notice and hearing requirements of due process.

2. Perry v. Sindermann

Robert Sindermann, like David Roth, found himself "non-retained" for the coming academic year after a run-in with his university's administration. Further, like David Roth, he was not afforded an opportunity to challenge the decision. The significant difference between the two cases was that Sindermann had been teaching in the state college system for ten years, under successive one-year contracts, and the university encouraged its instructors to "feel as if they were tenured" after seven years, even though the system did not have a tenure program. Initially, the Court looked for the deprivation of liberty or property needed to trigger the fourteenth amendment under Roth. Although he didn't have a formal property right in teaching the next year, the Court found that Sindermann was deprived of property. He was not merely suffering from the "unilateral expectation" of future employment that plagued Roth. Rather, there was a "mutually explicit understanding" of his future employment which qualifies as "property" for purposes of the fourteenth amendment. Therefore, the

20. Id.
21. At 408 U.S. 574 n.13, the Court explains its decision. There was no proof in the record to suggest how non-retention might affect Roth's future employment prospects. This highly unrealistic holding drew sharp criticism from Justice Douglas: "Non-renewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State." Id. at 585. See 7 U. RICH. L. REV. 357, 360 n.19 (1972).
22. 408 U.S. at 577.
23. Id. at 577.
24. Id. at 601 quoting Roth.
Court concluded, in such a case (i.e., with the "aroma" of tenure), the fourteenth amendment applies, and the teacher should be afforded the protection of due process—the opportunity for a fair hearing to challenge the charges brought against him.

C. Current Seventh Circuit Cases

Having reviewed the leading Supreme Court cases, we now turn to the Seventh Circuit's recent decisions.

1. Lipp v. Board of Education of City of Chicago25

David Lipp was employed by the Chicago Board of Education as a full-time substitute teacher with temporary certification. At the end of the school year, his principal filed an evaluation of his performance with the Board of Education that contained a satisfactory rating. However, the evaluation further stated that he "has a negative attitude towards the school as an institution," and that "he has an extreme anti-establishment obsession." Lipp was not given a copy of his rating.

When Lipp learned of these unfavorable comments, he demanded a hearing so he could confront the evaluator and challenge his statements. Unfortunately for Mr. Lipp, the procedures established by the Board of Education and the Chicago Teachers' Union for such challenging did not apply to temporarily certified teachers. Therefore, the Board did not grant him an opportunity for a hearing on the removal of the comments from his record.

Lipp filed a class action in the District Court for Northern District of Illinois, asking for a declaration that the rating procedure violated teachers' due process rights, an injunction against continued use of the rating procedures, and the removal of the comment from his record. The late Judge Alexander Napoli dismissed the complaint for failure to state a claim upon which relief could be granted.

On appeal, the Seventh Circuit straight-forwardly applied Roth and Sindermann. The court indicated that since the plaintiff was not deprived of liberty or property, there could not be any denial of due process. Noting that liberty, as defined in Roth, is a two-pronged concept: (1) the protection of a good name, reputation, honor, and integrity, and (2) the freedom to take advantage of other employment opportunities, Senior Judge Castle26 opined that Lipp wasn't deprived

25. 470 F.2d 802 (7th Cir. 1972).
26. Chief Judge Swygert and Judge Pell agreed.
of liberty because the report that he was "anti-establishment" standing by itself was insufficient to be defamatory or otherwise destroy Lipp's good name; as well as noting that he wasn't deprived of future employment because the Board of Education actually rehired him for the following year.

2. Donahue v. Staunton

Father Joseph Donahue, a Roman Catholic Priest, was appointed Catholic Chaplain at a state mental hospital in 1966, serving the spiritual needs of the hospital as well as making public relation speeches explaining the hospital's operations.

In 1969, Father Donahue publicly criticized the hospital administration for its failure to operate the institution properly. He cited examples of improprieties, such as neglect in preparing funerals for dead patients, lack of efforts to prevent escapes, delays in medical care for seriously ill patients, and acquiescence to patients' illicit sexual activities.

Although Father Donahue's similar public statements a few years earlier led to a state investigation of the hospital, this time the results were different. He was fired. The administration claimed that Father Donahue made his alarming statements without checking into the facts, unduly exciting the hospital community; and that because of his stand, it was in the best interests of the hospital to dismiss him.

Father Donahue brought suit in the Northern District of Illinois against the hospital administrators, claiming that he was discharged in abrogation of his right of free speech. At trial, Judge Austin found for the plaintiff. Relying on Pickering, the Seventh Circuit affirmed.

In determining whether the hospital's interests in public efficiency outweighed Father Donahue's right to free speech without reprisals, the court began with Father Donahue's statements themselves and found that even if they were false, they were "reasonably believed to be true... and were not knowingly false and recklessly made." 27

Next, the court analyzed and discussed the factors to be considered in the weighing process. The hospital argued that Father Donahue's statements impeded the proper performance of his daily duties, and further, his statements were hard to counter because he was a priest. The court flatly rejected these arguments.

27. 471 F.2d 475 (7th Cir. 1972), cert. den., 93 S. Ct. 1419 (1973).
28. Manteno State Hospital, Illinois Department of Mental Health.
29. 471 F.2d at 479 (applying the New York Times rule).
First of all, Father Donahue's job performance was not impeded. Although his job included public relations duties which would ordinarily mean that the State's interest would prevail, since he couldn't perform this job properly, this is not the case where free speech is involved. Here, the court found that the Chaplain's public relations duties weren't a substantial part of his job," as to give the State a strong enough interest to interfere with the plaintiff's free speech rights."30 To prevent what it felt would be an injustice, the court looked to the essence to the Chaplain's duties, the religious and spiritual counseling of the patients, and found that he had not breached his duties to the hospital so as to lose his first amendment protection.

Acknowledging that Father Donahue's statements could have been given greater credence by the general public because he was a priest, the court noted that the hospital wasn't prevented in any way from countering his statements; "in fact, at several points they specifically chose not to respond."81 Clearly, the free debate contemplated by the first amendment would have cleared up the issue. The court's conclusion as to the constitutional issue accurately portrays its philosophy: "We conclude and hold in the case at bar that the interest of society in the uninhibited and robust debate on matters of public concern such as mental health care outweigh those of the State as an employer."32

Chief Judge Swygert, however, dissented because he thought the Chaplain's actions did substantially disrupt the hospital's operation. Realizing that the "task of balancing the conflicting interests . . . is admittedly a difficult one,"33 he would nonetheless hold that the State had a compelling and justified reason for terminating Father Donahue's employment.

3. Hostrop v. Board of Junior College District No. 515 34

Richard Hostrop was employed as the President of Prairie State Junior College in Chicago Heights, Illinois, under contracts which ran until June, 1972. In 1970, he prepared a confidential memo on a sensitive subject for circulation among his administrative staff for discussion at a future staff meeting. An unknown person leaked the contents of the memo to the public and some Board members promptly questioned Hostrop's right to make such proposals. Shortly thereafter,
the Board met and terminated his contract without giving him notice of the charges against him, or any hearing or opportunity to speak in his defense.

Dr. Hostrop filed suit in the District Court for the Northern District of Illinois, claiming that his first amendment right to free speech and fourteenth amendment right to due process were abrogated by the Board's summary action. Judge Austin, who rendered judgment earlier for Father Donahue, held that Dr. Hostrop's complaint did not state a claim upon which relief could be granted. The district court applied the two-pronged Pickering analysis. The statement itself did not pose a defamation-type problem to raise the New York Times question; and in the balancing test, the Pickering Court suggested that employees in personal and intimate working relationships may be dismissed if they undermine the effectiveness of the relationship by publicly criticizing the employer, even by the publication of true statements. Judge Austin found that this statement from Pickering applied perfectly to the relationship between the Board and Dr. Hostrop, and that if the Supreme Court's comment was to have any application, it was in this case.35

The Seventh Circuit36 reversed. First of all, Dr. Hostrop was working under a contract that would run for another two years. For the State to deprive him of a contract right, which clearly qualifies as property under the fourteenth amendment, it would have to conform to the dictates of due process. Therefore, the court noted that Dr. Hostrop must be given notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before an impartial tribunal, a chance to present witnesses and the opportunity to confront adverse evidence at the hearing.

The court faced more of a problem when it considered the first amendment claim. The Pickering rule, on one hand, seemed to dictate that Dr. Hostrop did not have a right to free speech in this instance because of his position; but on the other hand, the court clearly wanted to prevent the erosion of individual rights such as the freedom of speech. Therefore, in this regard, the court found that although Dr. Hostrop's statement could be interpreted as a sign of disloyalty to the Board, there was no proof that the statement actually caused a sub-

34. 471 F.2d 488 (7th Cir. 1972), cert. den., 93 S. Ct. 2150 (1973).
substantial or serious impairment to the relationship between Hostrop and his employer such as would merit dismissal "merely for making the suggestions." Without the substantial impedence of the employer's function by the employee's statements, the Pickering balancing test concludes in favor of the employee. Furthermore, the court noted that Dr. Hostrop's statement was a constructive statement much the same as Mr. Pickering's letter, and to silence an exchange of ideas "in the formulation of educational policy would certainly be contrary to the spirit of the Pickering decision," which protects the right to free speech.

4. *Clark v. Holmes*

L. Verdelle Clark was employed by Northern Illinois University as a non-tenured temporary substitute teacher beginning in the fall semester of 1962, teaching an introductory health survey course in the Department of Biological Sciences. In the spring, Clark was offered a position for the next academic year but was warned about "certain deficiencies in his professional conduct," such as extensive personal counselling of students to the derogation of the University's counselling service, over-emphasizing sex education in the health course, and disparaging other staff members in discussions with students. In discussions with his superiors, Clark said he would continue operating in his style. He taught during the fall semester of 1963 but was notified that his temporary contract terminated at the end of the academic year and he was not to teach any classes during the spring term.

Mr. Clark sought relief in the District Court for the Northern District of Illinois. The complaint alleged that Clark was merely exercising his first amendment right to freedom of speech, when the defendants made false charges concerning his conduct to the University, which then led to termination of his employment. Clark, in effect, contended that he had a right to make such statements, and that he was being penalized for making them. Also, at no time before termination was Clark afforded the due process right to defend himself against the charges placed with the University. The trial court refused to give an instruction on the first amendment rights of public school teachers, contrary to the request of the plaintiff. He had sought such an instruction so that the jury could find that his speech was

37. 471 F.2d at 492.
38. *Id.* at 493.
40. 474 F.2d at 930.
protected. The jury returned a verdict for the defendants and the plaintiff appealed, claiming as error the court's failure to give the first amendment instruction to the jury.

The Seventh Circuit affirmed the district court. The court noted the balancing factors, and concluded that the analysis totally favored the State. For example, the court noted that in *Pickering*, the teacher was concerned about a matter of public concern—taxation—whereas Mr. Clark, was involved “in disputes with his superiors and colleagues about course content and counselling”, which were not matters of public concern, and involved him “as a teacher rather than as an interested citizen.”

5. *Illinois State Employees Union, Council 34 v. Lewis*  

Paul Powell, a Democrat, died while in office as Illinois Secretary of State. Richard Ogilvie, the Republican Governor of Illinois, appointed Republican John W. Lewis to fill the unexpired term. Upon accepting the position, Lewis terminated the services of many Democrats employed in the Secretary of State's office. Lewis said he did so to preserve the efficiency of his office, but the plaintiffs in this case, some of the fired employees, claim that their dismissals were motivated solely by political considerations. Furthermore, some plaintiffs allege that they were told they could keep their jobs if they would change over to the Republican Party. The employees filed suit in the District Court for the Southern District of Illinois claiming that their discharges violated their rights under the first and fourteenth amendments, and sought reinstatement with back pay. The district court granted summary judgment for the defendants, and the plaintiffs appealed.

Although political patronage has been the rule in this nation for at least a century and a half, the Court of Appeals for the Seventh Circuit accepted the challenge to put political favoritism in its proper subordinate position to the first amendment right to free association.

The decision was structured similarly to those in the prior cases, e.g., it looked first to identify the first amendment claim of the employee and then to the interests of the state which seek to counterbalance the right. In addition, the court considered arguments of justiciability and the legislative-judicial question.

41. 474 F.2d at 931. Per Curiam, Swygert, C.J., Pell, J., and Stevens, J.  
42. 473 F.2d 561 (7th Cir. 1972), *cert. den.*, 93 S. Ct. 1364 (1973).  
43. 473 F.2d at 568 n.14.
A basic principle of constitutional law is that the government may not punish an individual for exercising his constitutional rights. In *Pickering*, for example, the Supreme Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"\(^{44}\) because to do so would be to punish and inhibit free speech.

In the instant case, the exercise of the first amendment right to associate in political activities was under attack by the state's coercive tactics which caused the plaintiffs to be discharged. Consequently, the court held that "such interference with constitutional rights is impermissible"\(^{46}\) and moved on to the question of balance.

It is certain that the State may prohibit certain individual conduct if there is a strong enough state interest. In *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*\(^{46}\), the Supreme Court held that a civilian cook could be summarily excluded from a naval gun factory on the grounds that the security needs of the installation outweighed the interest of the cook in working there. In *Pickering* and its progeny, the interests of the State in good order were weighed against the rights of the teacher to comment on matters of public concern, and the teacher prevailed in the appropriate circumstances as noted earlier. In this case, Judge Stevens' opinion for the court held that although a state interest may involve some curtailment of first amendment rights if justified, in this case the State was asking for the "abject surrender"\(^{47}\) of the plaintiffs' rights without proving why it would be necessary to do so. Without such justification, the individual rights prevail. The opinion raised an issue as to whether the effective operation of the government through its executives demands that broad discretion be vested in those who hire and fire. Realizing that, because of the Constitution, the government doesn't have the complete freedom of action enjoyed by a private employer, the opinion forcefully stated: "The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost."\(^{48}\)

\(^{44}\) 391 U.S. at 574.
\(^{45}\) 473 F.2d at 571.
\(^{47}\) 473 F.2d at 572.
\(^{48}\) Id. at 575.
In addition to the balancing approach arguments, the State proposed a number of other arguments in its behalf:

1. This controversy is a non-justiciable political question that does not merit the federal government meddling in the affairs of a state. The court flatly rejected this argument because it implies that a state may routinely discriminate against members of a particular race or religion in addition to political membership in its employment policies. All three types of discrimination are constitutionally interdicted, and besides, the political question doctrine does not protect the government from civil suits for damage caused by so-called political action.49

2. Federal judges may not impose a civil service system upon a state government or otherwise interfere with its employment because such a right would saddle governments with universal employment of its citizenry. Rather, public employment is correctly categorized as a privilege, revocable at the convenience of the grantor. In recent years, however, the Supreme Court has ruled that even benefits may not be withdrawn to the derogation of protected rights,50 so in this case, the state may not discharge its employees for the exercise of their rights to association.51 The judicial review of this problem does not establish civil service, pre-empting legislative rights; rather, it only preserves individual rights under the first amendment.

3. The spoils system is so firmly established that it may not be removed by judicial fiat. In a footnote, the court rejected this argument by stating that “if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.”52

4. Those who live by the political sword must be prepared to die by the political sword; this idea is known as the waiver theory. The court rejected the waiver defense on the grounds that a waiver of constitutional rights will not be lightly assumed and there is no evidence of waiver in the record.

5. Political affiliation, Judge Stevens proposed, may be a relevant and proper qualification for certain positions. This argument may have

51. This argument was presented in two contexts. First to argue that the courts shouldn't hear the case, and second to argue that the state was justified in discharging the employees.
52. 473 F.2d at 568 n.14.
validity when applied to the selection of policy making officials where loyalty and shared ideas are essential to the operation of the government, but has no application when discussing such ministerial positions as janitor, elevator operator, teacher, or driver's license examiner.

The plaintiffs' due process arguments were handled by Judge Stevens in a long footnote. Property deprivation under Roth did not occur here because the plaintiffs did not have an expectation of retaining their jobs, nor was there a deprivation of liberty because nobody's reputation was smeared. This smacks of the waiver defense, but it is to be remembered that the waiver of constitutional rights must be shown to have been conscious, willing, and made upon a full knowledge of the facts. Although the plaintiffs may have had a strong notion concerning future employment after their party left office, the opinion implies that the notion did not rise to the level of a waier.

The opinion ended by saying that "while the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the first amendment."53

The significance of Lewis is that the Court of Appeals for the Seventh Circuit has stepped into the cloudy and tradition-ridden area of the patronage spoils system54 to establish the rights of ministerial public employees to job security and the freedom of political expression. Other jurisdictions have held differently, maintaining the patronage system until the legislatures decide to extend the civil service laws to cover all public employees. For example, Alomar v. Dwyer,55 from the Second Circuit and American Federation of State, County and Municipal Employees, AFL-CIO v. Shapp,56 from the Supreme Court of Pennsylvania, decided to preserve the system, and drew a glowing respect from Circuit Judge Kiley in his Lewis dissent, as well as more than a casual note from District Judge Campbell in his concurrence. There is a decisive split in the law which may not be settled by the United States Supreme Court for quite some time, if at all.

We are witnessing what may be the rebirth of American politics on the national level. The upper crust administrators come and go in this time of change, yet the day-to-day business of the federal gov-

53. Id. at 576.
54. For a complete analysis of the field, see Note, A Constitutional Analysis of the Spoils System—The Judiciary Visits the Patronage Palace, 57 IOWA L. REV. 1320 (1972).
55. 447 F.2d 482 (2nd Cir. 1971), cert. den., 404 U.S. 1020 (1972).
ernment continues without interruption because the Civil Service Commission has insulated most employees from the pressures of politics, as has the Hatch Act. Yet on the state level, the patronage system continues without respite and the real losers are the members of the public for whose benefit the whole show is in operation. As a general rule, patronage workers remain in office under the auspices of their party, insulated from the pressures of efficient operation because as long as they are good party members, their jobs are secure. The rule should be inverted to allow and perhaps encourage the discharge of incompetent politicos.

The Court of Appeals for the Seventh Circuit's decision was couched in the legalistic terms of the first amendment, quick to dismiss the contrary arguments. To some, this may signify a predeliction merely to justify its holding against patronage, but upon examination of the other cases in the area of public employees, it seems that the first amendment reasoning and concern is a genuine expression of liberal constitutionality directed toward the preservation of individual rights. A court that does not care about first amendment rights, deciding *Lewis* only on the patronage issue, would not have used the language of the Seventh Circuit in *Donahue, Hostrop,* or *Lewis,* praising the protected rights of public employees as American citizens. There is no doubt that the Seventh Circuit Court of Appeals is on the frontiers of constitutional law, blazing a new trail of freedom through the thickets of restricting tradition.

II. Freedom of Speech Continued—Recent Developments Involving Defamation

*Gertd v. Robert Welch, Inc.***

Patrolman Nuccio of the Chicago Police Department was tried and convicted for the murder of a 17-year old boy named Nelson. Elmer Gertz, an eminent Chicago lawyer, was retained by the Nelson family to press a civil claim for damages against Nuccio. A short while later, the John Birch Society's *American Opinion* magazine published an article concerning the trial that attempted to portray the entire affair as part of a national conspiracy to discredit the police and lay the groundwork for a totalitarian national police force. In the article, Elmer Gertz was called a "communist-fronter", "Leninist," and a participant in various "Marxist" and "Red" activities. Also, he was purported to be part of the conspiracy.

Gertz filed suit in the District Court for the Northern District of Illinois for libel against the publishers of the article. The jury returned a verdict of $50,000 for the plaintiff, but Judge Decker entered judgment for defendant notwithstanding the verdict, concluding that even if Gertz was a public figure, the subject matter of the article was of public interest, and that the evidence presented at trial was insufficient to support a finding of actual malice or a reckless disregard for the truth. Gertz appealed.

As mentioned earlier, the rule derived from *New York Times v. Sullivan*, is that even a statement that is libelous *per se* will be protected speech under the first amendment if (1) made about a public figure, and (2) made without either knowledge of its falsity or made with reckless disregard for the truth. The primary issue in the instant case was whether or not Elmer Gertz was a public figure. If so, the article was protected by the first amendment; if not, an action for libel could be maintained. A secondary issue was whether or not sufficient evidence was introduced to prove either knowledge of falsity or reckless disregard for the truth. The Seventh Circuit Court of Appeals affirmed the district court's judgment, finding for the defendant on both of the above noted issues.

*New York Times* itself referred only to a public official in his official conduct. Its progeny have expanded the concept of "public official" to include "public figures." *Curtis Publishing Co. v. Butts* dealt with a statement in the *Saturday Evening Post* accusing Butts, the athletic director of the University of Georgia, of conspiring to fix a football game. The companion case, *Associated Press v. Walker*, involved the false report from the Associated Press that General Walker (Ret.) had led rioters at the University of Mississippi disturbances when a black man, James Meredith, came on campus as a student. Although both Butts and Walker were not public officials, the Supreme Court decided that each was a public figure, who had thrust his "personality into the vortex of an important public controversy." Furthermore, each "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements." Such a position is tantamount to being a public official, so the statements were held to be protected by the first amendment.

60. *Id.* at 155.
61. *Id.*
Further, Rosenbloom v. Metromedia, Inc.\(^6\) involved a statement concerning the publisher of allegedly obscene materials. A claim of defamation arose. Therein, the Court reasoned that since the publisher involved himself in obscenity matters, and since obscenity is a public issue deserving of robust public debate under the first amendment, the involvement of a "private person" in obscenity does not remove the discussion from constitutional protection. Therefore, a "private person" involved in matters of such public concern becomes a "public figure" for purposes of the *New York Times* rule.

The Court of Appeals for the Seventh Circuit recognized that Elmer Gertz is a well-known lawyer, author, lecturer, and "participant in matters of public import," and therefore probably is a "public figure." But assuming, arguendo, that he is a "private person," his involvement in the trial of a Chicago police officer, or the alleged nationwide conspiracy described in the articles were matters of such significant public concern that Gertz became a public figure through his involvement in public matters.

Secondarily, the court also held that there was insufficient evidence concerning the deliberateness or recklessness of the falsehood to remove the *New York Times* protection. In this regard, of considerable interest is the court's refusal to take judicial notice of matters not in evidence concerning the pattern of reckless name-calling on the part of the John Birch Society. The court noted that although a judge may have a "sympathetic reaction" to the individual involved, the court cannot "apply a fundamental protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society. Whether we are moved to applaud or despise what is said, our duty to defend the right to speak remains the same."\(^6\)

The United States Supreme Court granted certiorari on February 20, 1973\(^6\) and oral arguments should be in the late fall of 1973. A decision is expected in the Spring of 1974.

Although not of great future significance, another recent Court of Appeals for the Seventh Circuit case of some interest is *Wheeler v. Glass*,\(^6\) which involved an action, by two mentally retarded youths

\(^6\) 403 U.S. 29 (1971).
\(^6\) 431 F.2d at 805.
\(^6\) 93 S. Ct. 1355 (1973).
\(^6\) 473 F.2d 983 (7th Cir. 1973).
institutionalized in a state mental hospital, against the administrators of the institution. The boys claimed that the defendants summarily bound them to their beds in spread-eagle fashion for 77 1/2 hours after an alleged consensual homosexual act between the boys. Furthermore, they allege that they were forced to scrub walls for more than ten consecutive hours while dressed only in backless hospital gowns. The plaintiffs claimed that these actions by the defendants violated their rights to due process of law under the fourteenth amendment, and their rights to be free from cruel and unusual punishment under the eighth amendment.

The plaintiffs, therefore, sought a declaratory judgment and an injunction against such future acts, as well as money damages. The District Court for the Northern District of Illinois dismissed the complaint, noting that even if the acts complained of may have been excessive, they did not constitute cruel and unusual punishment; nor was there a violation of due process because "being in the custody of various state departments charged with the treatment of youthful offenders does not entitle one to the full procedural safeguards of a criminal defendant."67

The Court of Appeals for the Seventh Circuit68 reversed, holding that the punishment was cruel and unusual, and the acts complained of violated the due process rights of the plaintiffs. In discussing the boundaries of the eighth amendment, Circuit Judge Sprecher avoided a furthering of the dispute as to what rights a felon in a penitentiary has, concluding that in this case, the treatment of two mentally retarded boys was neither usual, in reference to usages in other places, or "consistent with public opinion regarding evolving standards of decency in a human society."69 Being cruel and unusual punishment, such acts violated the eighth amendment. Next, addressing himself to the due process issue, Judge Sprecher wrote that the officials entrusted with the care and training of youths must have "latitude in disciplining their charges,"70 but not as much latitude as evidenced by this case, which alleges that there was no hearing whatsoever. Such a situation is "constitutionally impermissible,"71 and violated the plaintiffs' rights to due process.

66. Elgin State Hospital.
67. Quoted in the court's opinion, 473 F.2d at 984.
68. Circuit Judges Stevens and Sprecher, and District Judge Gordon.
69. 473 F.2d at 983.
70. Id.
71. Id. at 987.
III. Obscenity—Herein, "Dirty Movies at Drive-ins"

Cinecom Theaters Midwest States Inc. v. City of Fort Wayne

The plaintiffs, owners of two drive-in motion picture theaters in Fort Wayne, Indiana, challenged the constitutionality of a local obscenity ordinance. The statute makes it unlawful to exhibit certain types of material in drive-in movie theaters if the material can be seen from any public street or highway. The proscribed material included any exhibit in which "bare buttocks or the bare female breasts of the human body are shown." The District Court for the Northern District of Indiana upheld the constitutionality of the abovementioned ordinance, and the plaintiffs appealed. The Court of Appeals for the Seventh Circuit reversed, holding the ordinance to be unconstitutional because of its overbreadth.

The concept of "variable obscenity" is simply a recognition that some matter may be obscene to one person (e.g., a child) or in one context (e.g., pandering), whereas, that same matter would not be obscene to another person (e.g., an adult) or in another context (e.g., clinically). Because a drive-in movie is a unique form of communication, i.e., people outside the confines of the theater can view the presentation, the Supreme Court has indicated that a community may take this unique aspect into consideration in protecting its children from viewing matters obscene to them.

In application of these concepts to the instant case however, the Court of Appeals for the Seventh Circuit indicated that such rights to restrict are not absolute. Herein, the court noted that if the material involved would be obscene to everyone, then it may be totally proscribed. On the other hand, if only under variable obscenity, it would be obscene only to young children, it may be restricted, but such restrictions must consider the rights of older children and/or adults to view the material. In the instant case, the ordinance was worded so that in some instances, it prevented the showing of material that all had a right to view; and in other instances, it prevented the viewing of material by some who had a right to see it. Thus, being too broadly worded, the court held the ordinance to be unconstitutional.

72. 473 F.2d 1297 (7th Cir. 1973).
73. Id. at 1299.
74. Portions of the ordinance prohibiting "strip-tease, burlesque, or nudist-type scenes" in movies were struck down by the district court as being impermissibly vague.
75. 390 U.S. 629 (1968).
76. The court cited Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th
The court also rejected the defendant City's contention that the exhibition of the matter on the outdoor screen amounted to an "assault upon individual privacy." This argument was rejected because, "passing motorists were able to see the screen for only a short moment. The disruption of traffic, or traffic accidents were simply not probable. Nor was there any evidence that the visual presentations were so obnoxious to those walking in the area so as to preclude their avoidance simply by averting their eyes."

Thus, unlike the U.S. Supreme Court's recent attitude of "protecting society" against harmful or obscene material, the Court of Appeals for the Seventh Circuit continues to "protect the individual" in his exercise of free speech. Only time will tell which interest is more in need of protection.

SECURED TRANSACTIONS

A very exciting constitutional dispute has arisen in the area of secured transactions. Quite a few courts, including two district courts within the Seventh Circuit, have dealt with the practice of repossession or closely related problems. The following discussion shall provide a detailed overview of the topic so that the local cases can be understood in both a national and constitutional context.

Repossession by self-help is a time-honored practice by which a creditor can assure himself of the security of his outstanding loan to a debtor. At the time of the loan, the creditor asks for, and receives from the debtor, a security interest in an item of collateral so that if the debtor defaults in repaying the loan the creditor may utilize this second remedy and sell the collateral securing the debt. Repossession is the means by which the secured creditor himself (without judicial assistance), takes possession of the collateral in order to sell it.

Uniform Commercial Code § 9-503 provides the legal requirements for repossession. It allows the secured party to help himself

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Cir. 1966), for the proposition that "a child's freedom of speech is too important to be overridden by an ordinance expressing the community's view of what it considers as material harmful to its youth." 473 F.2d at 1302.


78. 473 F.2d at 1303.


80. **UNIFORM COMMERCIAL CODE § 9-503 states:**
"Unless otherwise agreed a secured party has on default the right to take pos-
to the collateral if two conditions are met. First, the debtor must be in default on the loan, and second, the actual taking of the collateral must not cause a breach of the peace. A constitutional question arises because it is claimed that such a taking of property without the niceties of due process, *i.e.*, hearing notice, etc., constitutes a violation of the fourteenth amendment.\(^8\)

In the preceding section on public employees, it was noted that an individual must show a deprivation of either "property" or "liberty" by the state to meet the threshold requirement necessary to activate the due process clause of the fourteenth amendment.\(^8\) Similarly, the disputes over the constitutionality of repossession, the decisions utilize the same concept of the threshold analysis to trigger the due process clause, using these and other conditions precedent for application of the fourteenth amendment. Since repossession involves a creditor depriving an individual of his property without a hearing, the relevant concepts for an individual seeking the protection of due process are "deprivation", "property", and "state action".

In the past few years, the Supreme Court jumped into the field of debtor-creditor relationships in determining whether creditors must afford debtors the rights of due process before taking away their property. The major cases which have seen this recent Supreme Court activity are *Sniadach v. Family Finance Corp. of Bayview*,\(^8\) striking down pre-judgment wage garnishments, and *Fuentes v. Shevin*,\(^8\) which declared indiscriminate prejudgment replevin procedures to be unconstitutional.

1. **Sniadach v. Family Finance Corp. of Bayview**\(^8\)

   Mrs. Sniadach allegedly owed $420 on a promissory note to Family Finance, and to collect the debt Family Finance instituted a garnishment action. Under Wisconsin law, Sniadach's employer was required

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\(^2\) Board of Regents v. Roth, 408 U.S. 564 (1972).
to withhold one-half of her wages pending a court determination of the case. Mrs. Sniadach attacked this prejudgment garnishment provision as violative of the due process requirement of the fourteenth amendment. The Supreme Court of Wisconsin rejected Mrs. Sniadach’s contention, but the United States Supreme Court reversed, finding the Wisconsin scheme unconstitutional. In analyzing Sniadach in terms of the fourteenth amendment’s prohibition of state deprivation of “life, liberty, or property, without due process of law,” three issues can be discerned: (1) Is there an action of the state? (2) Is there a deprivation of property? and (3) Is due process satisfied?

First, the requirement of “state action” is met when the action has as its source a person or an agency formally identifiable as a state instrumentality, regardless of the position of the particular officer or agency in the governmental hierarchy. Sniadach, the prejudgment garnishment statute was enforceable only through the action of the state court, so it must be said that state action was present.

Second, prior to Sniadach, it was commonly accepted that “deprivation of property” went to the title of the property. If a property owner had been permanently deprived of the use of his property because his title was seized, there was a deprivation. In the prejudgment garnishment proceedings, the wages were only temporarily frozen, and if the garnishee prevailed at trial, all of the wages would be returned. It was reasoned that such a deprivation of property was only temporary and that a true deprivation had not occurred.

Sniadach upset the traditional deprivation arguments by holding that even a temporary freezing of wages was a deprivation under the fourteenth amendment. Rather than holding outright that any temporary deprivation of property by a state is forbidden, the decision adhered to the traditional meaning of deprivation, but carved an exception for wages. The Court characterized wages as “a specialized type of property presenting distinct problems in our economic system”, so that even the temporary deprivation of wages under the prejudgment

86. Wis. Laws, Ch. 507, § 267.18(2)(a), .07(1) (1965). A portion of this enactment is presently in effect. Wis. Stat. § 267.07(1) (Supp. 1972). The Wisconsin law allowed a plaintiff creditor seeking a prejudgment garnishment against a debtor to serve a summons and complaint on the debtor within ten days after service on the person holding debtor’s wages. Therefore, prejudgment garnishments could be obtained without notice to the debtor and without a hearing. Wis. Stat. § 267.01(1) (Supp. 1972).
89. 395 U.S. at 339.
90. Id. at 340.
wage garnishment statute was deemed to constitute a deprivation of property contrary to the fourteenth amendment.\textsuperscript{91}

Third, the general rule of due process is that a person must be given notice that will apprise him of the pendency of an action and afford an opportunity for hearing to present objections before he may be deprived of life, liberty, or property.\textsuperscript{92} The concept of procedural due process is rooted in the spirit of fundamental fairness to the individual subject only to the needs of society in extraordinary situations requiring deference to the state.\textsuperscript{93}

Mr. Justice Douglas, writing for the \textit{Sniadach} Court, acknowledged the need for summary procedures in some unusual instances, but noted that the facts in \textit{Sniadach} did not present a situation requiring special protection to either the state or the creditor; in addition, the Wisconsin statute was not narrow enough to meet any such unusual condition.\textsuperscript{94} Finally, in personam jurisdiction was possible in \textit{Sniadach} because the debtor was a resident of the state and was amenable to personal service. Thus, since none of the exceptions to the due process rule applied, the Court held that the debtor must be afforded notice and an opportunity for a hearing before her wages could be seized.

\textit{Sniadach} was followed by \textit{Goldberg v. Kelly},\textsuperscript{95} a case that rested upon the premise that welfare payments were a specialized type of property, closely akin to wages, requiring due process to be met before deprivation.\textsuperscript{96} Subsequently, the lower courts were faced with the problem of interpreting \textit{Sniadach} and \textit{Goldberg}. Some courts construed \textit{Sniadach} and \textit{Goldberg} as being confined to their own facts and upheld other summary prejudgment remedies that involved types of property other than wages.\textsuperscript{97} Other courts, however, construed \textit{Sni-
adach and Goldberg broadly, striking down all summary prejudgment remedies except in extraordinary circumstances. The Supreme Court was afforded the opportunity to choose between the narrow and broad interpretations when it considered *Fuentes v. Faircloth*, which involved a narrow interpretation of *Sniadach*.

2. *Fuentes v. Shevin*

At the same time Mrs. Sniadach learned of the action pending against her, she also discovered that her wages were frozen. So it was with Margarita Fuentes, a resident of Florida, who learned of an action against her when a deputy sheriff arrived at her home to seize her stove and stereo. She had purchased the stereo and stove under a conditional sales contract from a local retailer, and according to the contract, she was entitled to possession until she defaulted on the monthly payments. Mrs. Fuentes claimed that the stove did not work, but the retailer disregarded her complaint about the stove. She then stopped paying on the stove, but payed off the balance due on the stereo. The retailer, however, treated the stereo pay off as if it were a prepayment on the entire contract. The retailer claimed that she defaulted, initiated a suit, posted a bond equal to twice the value of the goods, and submitted to the court clerk a form asking for a writ of replevin. The writ was summarily issued, and later that day the goods were seized. Had there been a hearing before the seizure, Mrs. Fuentes could have prevented the taking of the stereo by explaining the situation to a court, which could have found her to be rightfully in possession of the stereo.

The facts of *Fuentes* demonstrate the state action required for application of the fourteenth amendment. The sheriff's seizure of property in the possession of a person upon the application of another was clearly the act of an agent of the state under color of state law.


As to "deprivation of property," the Court in *Sniadach* had not considered whether the deprivation there was permanent or temporary or the effect, if any, of the distinction. The *Fuentes* Court attacked the problem methodically, discussing types of ownership, types of property, and duration of deprivation. First, it expanded the concept of property ownership from earned wages in *Sniadach* to include those properties in which the debtor has less than full title. Mrs. Fuentes was the purchaser of goods under a conditional sales contract in which the title rested with the vendor until the last installment of the purchase price was paid. Under traditional property notions, her interest might not have been protected as "property" under the fourteenth amendment. The Court in *Fuentes*, however, expressly held that the deprivation of even a possessory interest was within the protection of the fourteenth amendment because it was "a significant property interest."

*Sniadach* apparently carved out an exception from the traditional rule to allow the fourteenth amendment to apply to "a specialized type of property" under the theory that wages were essentials of life. Similarly, in *Goldberg* the Court reasoned that welfare payments required due process before deprivation. Nevertheless, some courts held to the "necessity of life test" and refused to require due process for nonessential items. *Fuentes*, according to the district court, was such a case because the stereo set was not a necessity of life. The Supreme Court in *Fuentes* disregarded the necessities of life test and stated that the fourteenth amendment speaks of "property" in general; whatever the property acquired, it is subject to the requirements of due process prior to seizure.

Finally, *Fuentes* briefly considered the length of time necessary for a deprivation. Coincident to the holding that the deprivation of any significant property interest fell within the scope of the fourteenth amendment, the Court held that the length of a deprivation was inconsequential:

The Fourteenth Amendment draws no bright lines around three-day,
10-day, or 50-day deprivations of property. Any significant tak- ing of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the ap- propriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.107

In Sniadach the concept of due process was confined to balancing the right of an individual to due process prior to a seizure against the needs of society in certain extraordinary instances to provide due process after the seizure. Fuentes refined the due process issue further by breaking it down into the balancing analysis and the hearing analy- sis.

Balancing the rights of individuals against the needs of society did not give the Sniadach Court much difficulty, because no compelling state interest was presented and the seizure was not necessary to secure jurisdiction over the debtor. Fuentes repeated this analysis and con- cluded that some extraordinary situations may require the summary seizure of goods; since the replevin statutes under consideration were indiscriminate and overly broad, however, they were unconstitutional. The Court noted that “there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.”108 Accordingly, it would be constitutional to allow a state official to review such a situation before a lawful sei- zure.

Procedural due process requires that parties whose rights are af- fected are entitled to a hearing. To enjoy that right they must be notified “at a meaningful time and in a meaningful manner.”109 The replevin statutes at issue in Fuentes authorized a hearing after the sei- zure, prompting the question of whether a hearing after seizure was at a meaningful time so as to prevent an arbitrary deprivation of prop- erty. Justice Stewart, writing for the majority in Fuentes, rejected the validity of a post-seizure hearing, noting that the purpose of due process was to prevent arbitrary takings, not to provide a remedy after the fact:

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 depri- vation can still be prevented. At a later hearing, an individual’s possessions can be returned to him if it was (sic) unfairly or mis- takenly taken in the first place. Damages may even be awarded

108. Id. at 2000-01.
109. Id. at 1994.
to him for the wrongful deprivation. But no later hearing and no
damage award can undo the fact that the arbitrary taking that
was subject to the right of procedural due process has already
occurred.\textsuperscript{110}

The question of whether Mrs. Fuentes had waived her right to
due process also was raised. The seller contended that Mrs. Fuentes
waived her due process rights by signing an agreement that provided
"in the event of default of any payment or payments, Seller at its option
may take back the merchandise. . . ." The Court noted that the
terms were part of a printed form contract in small type, with little
explanation of their meanings. In addition the parties were unequal
in bargaining power. Weighing the above factors, the Court concluded
that there was no waiver.

Since the \textit{Fuentes} Court found no waiver of due process, the due
process clause to the fourteenth amendment applied, and due process,
therefore, had to be afforded to the debtor before there would be a
valid prejudgment replevin of his property. The Court quoted from
\textit{Sniadach}:

\begin{quote}
(D)ue process if afforded only by the kinds of 'notice' and 'hear-
ing' which are aimed at establishing the validity, or at least the
probable validity, or the underlying claim against the alleged
debtor \textit{before} he can be deprived of his property. . . .\textsuperscript{111}
\end{quote}

The \textit{Fuentes} dissent\textsuperscript{112} can be analyzed in terms of the balancing
approach to due process. Due process is a flexible concept, protecting
individual rights against the state wherever it is necessary or desirable
to do so. Mr. Justice White's dissent set forth the proposition that
the debtor was being protected enough to satisfy due process because
as a practical matter most prejudgment takings are justified. The dis-
sent concluded that it it was not worth the trouble to require creditors
to protect the rights of a few debtors against arbitrary takings when
there was no permanent damage rendered. After all, Justice White
noted, "dollar and cent considerations weigh heavily against false
claims of default as well as against precipitate action that would allow
no opportunity for mistakes to surface and be corrected."\textsuperscript{113} Additionally, the dissent argued that since the Permanent Editorial Board for
the Uniform Commercial Code had not recommended a change in re-

\textsuperscript{110} \textit{Id.} at 1994-95.
\textsuperscript{111} \textit{Id.} at 2002-03, (quoting \textit{Sniadach v. Family Fin. Corp.}, 395 U.S. 337, 343
(1969) (Harlan, J., concurring)).
\textsuperscript{112} The dissenters were Chief Justice Burger, Justice White, and Justice Blackman,
92 S. Ct. at 2003.
\textsuperscript{113} \textit{Id.} at 2004.
gard to remedies upon default the Court should defer to those who have struggled with the default problems throughout the years.\textsuperscript{114}

It should be pointed out that Mr. Justice Powell and Mr. Justice Rehnquist did not participate in \textit{Fuentes}. Had they participated, there is no real doubt in the mind of this writer that they would have agreed with the dissent, making the result a five-four decision in favor of replevin rather than a four-three decision against it.

\textit{The Constitutionality of UCC Section 9-503}

Following \textit{Sniadach}, lower courts were faced with the problem of interpreting its "specialized type of property" holding. Diverse holdings among the circuit courts culminated in \textit{Fuentes}, which, with the specificity of its holding, ended all conjecture as to due process and deprivations of property. \textit{Fuentes} allowed a little latitude whenever a court faced a similar case that involved a creditor's prejudgment seizure of property. Nevertheless, cases challenging the validity of UCC 9-503, which allows summary repossession upon default by a secured creditor without a breach of the peace,\textsuperscript{115} have met with varying reactions in the courts. The main issue in such cases has been whether there is sufficient state action in the deprivation of a person's property to invoke the fourteenth amendment, and the following is a brief summary of the arguments utilized in the cases.

State action in its most patent form involves direct action by the state, such as a uniformed law officer's going to someone's house and seizing property. In such a case, the state is acting directly because the agent's actions do not have to be authorized. The fact that the agent was being clothed with apparent authority suffices to involve the state under the fourteenth amendment. Repossession, however, is quite a different matter, because the secured party ordinarily acts by himself, without the assistance of a state officer. Some courts dealing with the problem have failed to find the direct or active state action which triggers the due process clause, as opposed to the passive state action which will not.

In \textit{Greene v. First National Exchange Bank},\textsuperscript{116} for example, the court held that repossession was not a direct state action and concluded that the fourteenth amendment guarantees did not apply.

\textsuperscript{114} Id. at 2006.
\textsuperscript{115} See note 72, supra.
The Fourteenth Amendment can control only the actions of states, not private individuals. Therefore, because the operation of the statute involved does not require the aid, assistance, or interaction of any state agent, body, organization, or function, the state has not deprived the plaintiff of his property.\footnote{117}

Similarly, the Oregon Supreme Court failed to find such direct state action in \textit{Brown v. United States National Bank of Oregon}.\footnote{118}

Indirect state action poses a much greater problem. Over the years, state action, as applied under the equal protection clause, has evolved in Supreme Court decisions to include an increasing number of individually committed, racially discriminatory acts. Under the old traditional concept, it was thought that state action was only present where the state was directly involved. Today, however, state action is held to exist if a private individual conspires with an agent of the state,\footnote{119} if the actions of an individual may be summarily enforced by the state as if part of an overt conspiracy,\footnote{120} or if the state clothes an individual with the authority of state law by issuing a special police officer's badge to a private investigator.\footnote{121}

The mere enactment of a statute has been regarded as state action if it encourages, authorizes, or permits an individual to perform an act that would be contrary to due process or equal protection but for the state action. In \textit{Reitman v. Mulkey},\footnote{122} California voters amended their constitution to overturn state laws that prohibited discrimination in the sale of residential real estate. The Supreme Court of California ruled that the amendment was unconstitutional, holding that rather than merely repealing antidiscrimination laws, the amendment encouraged racial discrimination and as such constituted state action.\footnote{123} The United States Supreme Court affirmed, finding that the amendment made the right to discriminate a basic state policy. Furthermore, stated the Court, since the Supreme Court of California believed that the amendment would significantly encourage and involve the state in private discrimination, the amendment constituted state action.

There is a persuasive analogy between the \textit{Reitman} case and the case of an ordinary automobile repossession. In \textit{Reitman}, a state con-

\footnotesize{
\begin{itemize}
\item \footnote{117} \textit{Id.} at 675.
\item \footnote{118} \textit{CCH Secured Transactions Guide} ¶ 52, 126, 12 UCC REP. SERV. 549 (Ore. Sup. Ct., Apr. 19, 1973).
\item \footnote{120} \textit{Adickes v. S.H. Kress & Co.}, 398 U.S. 144, 152 (1970).
\item \footnote{121} \textit{Williams v. United States}, 341 U.S. 97 (1951).
\item \footnote{123} \textit{64 Cal. 2d} 529, 413 P.2d 825, 831-32, 50 Cal. Rptr. 881, 887 (1966).
\end{itemize}}
Constitutional amendment was found to be state action because its effect caused outright involvement of the state in the encouragement of discrimination. Similarly, in a repossession case, the secured creditor repossesses the auto without due process under the authority of Section 9-503 of the UCC: In both cases, the state's enactment has encouraged individuals to commit acts that they may have refrained from doing in the absence of a statute authorizing their actions. It is reasonable to believe that one would hesitate to break into another's car unless he knew both that he had a statutory right to do so and that such a right would shield him from arrest as a car thief.

That argument was presented in *Adams v. Egley*, the first case to hold summary repossession by self-help to be unconstitutional. Relying almost exclusively on the *Reitman* decision, District Court Judge Leland Nielson of the Southern District of California ruled that the California enactment of UCC Section 9-503 sets forth a state policy condoning repossession and that security agreements merely embody that policy. The statute, therefore, constituted a state action sufficient to involve the fourteenth amendment. Since the taking was a state action depriving an individual of his property without due process of law, the California counterpart of UCC Section 9-503 was held unconstitutional.

The *Adams* decision failed to meet with the approval of the other California court that has faced the identical issue. *Oller v. Bank of America*, a case in the Northern District of California, declined to find state action by distinguishing *Reitman* as a racial discrimination case to which the fourteenth amendment and the Civil Rights Acts were designed to apply. Reasoning that repossession was not the type of evil at which the fourteenth amendment had been directed, the court found that the "historical, legal, and moral considerations" that were paramount in extending federal jurisdiction to meet racial injustices simply did not exist in *Oller*.

In addition to the racial discrimination argument, courts have

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127. 342 F. Supp. at 23.
128. *Colvin v. Avco Financial Services of Ogden, Inc.*, CCH SECURED TRANSAC-
distinguished *Reitman* in two other respects. First, *Reitman* represented a change in the existing law, and there had been no change in the law of repossession. Secondly, *Reitman* involved an intentional circumvention of the civil rights laws, whereas repossession was a straightforward procedure not designed to maneuver around any other law, past or present.

In addition to not finding direct state action or distinguishing *Reitman* on its facts, courts have declined to find state action in repossession cases because repossession statutes merely codify the common law, and the repossession arises from the contractual agreement between the parties.

In *Messenger v. Sandy Motors, Inc.*, the court first distinguished *Reitman* and then concluded that merely codifying a common law practice dating back centuries did not take the action out of the private area and make it state action subject to the fourteenth amendment. The same conclusion was reached in four other cases dealing with repossession, *Greene v. First National Exchange Bank*, *Northside Motors of Florida, Inc. v. Brinkley*, *Shelton v. General Electric Credit Corp.* and *Giglio v. Bank of Delaware*; these courts all holding repossession constitutional for the reason that mere codification of the common law does not constitute state action.

Yet, another court deciding a similar problem dealing with the constitutionality of a distraint statute has decided otherwise. In *Hall v. Garson*, the court was faced with the question of validity of the Texas distraint statute, which grants to the operator of any apartment a lien upon certain personal property found within a tenant's dwelling for all rents due and unpaid by the tenant. Furthermore the statute grants to the operator the right to enforce such liens by preemptory seizure and retention of the tenant's property until the rent due has been paid. In addition, there is no provision for any kind of prior hearing in the statute, although the tenant may replevy distrained goods and bring an action in trespass for an improper seizure. The court...
held that since the distraint procedure authorized the landlord to use
the traditional power of the state to execute a lien, such a delegation
of power amounted to state action.

In the Seventh Circuit, a district court held the Illinois Innkeepers' Lien Law\textsuperscript{138} to be unconstitutional in \textit{Collins v. Viceroy Hotel Corp.}\textsuperscript{137} Parallel to the Texas distraint law, a hotel proprietor was granted a lien upon the property brought into his hotel by a guest, as well as the power to summarily enforce the lien by seizing the property and selling it upon non-payment of charges by the guests, all without an opportunity for the guest to contest the proprietor's claim. The late Judge Alexander Napoli held that the state acted affirmatively by passing the statute, constituting the state action necessary to find that a person has acted "under color of state law" to involve the Civil Rights Act of 1871, 42 U.S.C. \textsection 1983.

These procedures are almost identical with repossession procedures under UCC Section 9-503. Distraint, innkeepers' lien laws, and repossession by self-help existed at common law to provide for a summary disposition of outstanding debts. All three allow an individual to take the property in possession of another without a prior hearing and all three allow the taker to be the judge of whether a seizure should take place. In the event of an improper seizure, distraint and repossession allow for damages, and all three have been codified in state statutes. The differences between them are that they deal with separate and distinct legal relationships. Repossession may be seen to arise from a contractual relationship, although the other two procedures could be made contractual by including them in formal agreements, such as leases or waivers to be signed by guests registering in hotels. Since the three procedures are of the same nature, it is incongruous for courts to decide the cases differently, summarily finding state action in two but not in the third.

A final argument employed to avoid finding state action in repossession by self-help is that since the secured creditor's right to recover the goods upon default arises from the security agreement, it cannot be said that the state has acted in a private contract between individuals.\textsuperscript{138} After all, if the contract recites the right to repossession upon

default without a breach of the peace, the state has not acted in the matter at all.

A few lower courts besides the district court in Adams v. Egley have overcome the state action problem of repossession under UCC Section 9-503. In Michel v. Rex-Noreco Inc., Chief Judge Holden of the Vermont Federal District Court granted a preliminary injunction to halt the threatened repossession of a mobile home. He found state action to be present under the Hill v. Garson rationale and proceeded to demonstrate that repossession violates due process. Of particular note in the decision is the court's utilization of Fuentes arguments, rather than merely echoing the holding. The court intimated that repossession would be allowed upon a showing of extraordinary circumstances or immediate danger to the collateral, but in the absence of such a showing, an injunction would issue to prevent the unlawful taking. Also, it was held that the creditor had not waived her right to due process by signing the security agreement which permitted repossession by self-help. As in Fuentes, the court referred to the signing of this fine printed agreement, holding that it does not constitute a valid and knowing surrender of the constitutional right to due process. Similarly, a district court in Mississippi followed Fuentes and


140. In regard to due process, Fuentes is fairly particular in its holding that before an individual can be deprived of his property by an action of the state, he must be given reasonable notice of the action and afforded a hearing prior to the seizure at which he may voice his objections. Some of the cases holding repossession constitutional, however, have distinguished Fuentes to avoid following its dictates. Messenger v. Sandy Motor, Inc., 295 A.2d 402, 121 N.J. Super. 1 (1972), for example, held that due process was satisfied, apparently on a theory of waiver, Fuentes had refused to allow a waiver, but the Messenger court distinguished car and stereo possessions inasmuch as everyone who buys a car on time knows that it will be repossessed if the payments aren't made.


141. See Fuentes, 92 S. Ct. at 1999-2001. The spirit of Sniadach and Fuentes compels a conclusion that such a holding is valid. If a creditor had reasonable grounds to believe that the debtor will destroy or conceal the collateral, he could obtain a court order authorizing seizure, thus eliminating the need for summary repossession.


held UCC Section 9-503 unconstitutional in *James v. Pinnix.*

Perhaps the most novel holding was that of a New York trial court faced with the traditional case of a creditor suing a debtor for a deficiency judgment after the repossessed car's sale failed to cover the amount of the loan. In *Chrysler Credit Corp. v. Dinitz,* Judge Cooper denied recovery of the deficiency judgment because the secured party failed to afford the debtor the constitutional right of due process before seizure as set forth in *Fuentes.*

Although many district and state courts have decided the constitutional question of repossession, at this time only one United States circuit court has considered the matter on appeal. As mentioned earlier, the district courts in northern and southern California came to opposite conclusions. The split was mended when the Court of Appeals for the Ninth Circuit heard *Adams* on appeal *sub. nom. Adams v. Southern California First National Bank.* Reversing, the Ninth Circuit held repossession under UCC Section 9-503 constitutional because it could not find significant state action to trigger the fourteenth amendment due process clause and establish a federal cause of action. Circuit Judge Trask's opinion hammered upon the arguments utilized in the prior cases, always demonstrating that in the opinion of the Ninth Circuit, state action means *significant* state action, not *any* state action, as argued by the plaintiffs, in which the state is involved only through the passive codification of a statute. It seems as though the "significant" v. "any" state action question will be raised in future cases on repossession because it frames the issue in terms of "relative" rather than "absolute" so well.

The Supreme Court will certainly hear a case on repossession within the next few terms. At least two possible alternatives logically present themselves. First, the Supreme Court could determine that there is no, or an insignificant amount of state action involved, and dismiss the case for failure to state a claim upon which relief can be granted. The second alternative would be to find state action, and then analyze repossession in light of *Fuentes.* *Fuentes,* it should be remembered, did not strike down all prejudgment replevin statutes. It could well mean that the replevin statutes under consideration were

145. For an explanation of the deficiency judgment controversy, see Spak, *Secured Transactions,* 22 DEPAUL L. REV. 177, 188 (1972), especially n.20.
too broad. A proper replevin procedure, according to the majority opinion, would have a pre-seizure hearing except in those cases involving “extraordinary situations”, such as those cases “in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.”149 In those cases, the creditor can have the property summarily seized.

Illinois enacted a new replevin law150 to conform to Fuentes. It provides that a defendant in a replevin action be given five days notice of a hearing to contest the issuance of a writ of replevin. Also in conformance with Fuentes, it provides that a plaintiff may appear before a court in an ex parte hearing and a writ of replevin may summarily issue upon a showing by the plaintiff that he will suffer “im-

149. 92 S. Ct. at 2001.
150. P.A. 78-287, effective August 13, 1973, amending ILL. REV. STAT. ch. 119, §§ 1-21. The relevant sections are § 4a and § 4b. ILL. REV. STAT. ch. 119, § 4a:
The defendant shall be given 5 days written notice in the manner required by Rule of the Supreme Court, of a hearing before the Court to contest the issuance of a writ of replevin. No writ of replevin may issue nor may property be seized pursuant to a writ of replevin prior to such notice and hearing except as provided in Section 4b.
As to any particular property, the right to notice and hearing established in this Section may not be waived by any consumer. As used in this section, a consumer is an individual who obtained possession of the property for personal, family, household, or agricultural purposes.
Any waiver of the right to notice and hearing established in this Section must be in writing and must be given voluntarily, intelligently, and knowingly.

ILL. REV. STAT. ch. 119, § 4b:
Notice to the defendant is not required if the plaintiff establishes and the court finds as a matter of record and supported by evidence that summary seizure of the property is justified by reason of necessity to:
(a) protect the plaintiff from an immediately impending harm which will result from the imminent destruction or concealment of the disputed property in derogation of the plaintiffs’ rights in the property;
(b) protect the plaintiff from an immediately impending harm which will result from the imminent removal of the disputed property from the state, taking into consideration the availability of judicial remedies in the event of the removal;
(c) protect the plaintiff from an immediately impending harm which will result from the perishable nature of the disputed property under the particular circumstances at the time of the action;
(d) protect the plaintiff from an immediately impending harm which will result from the imminent sale, transfer or assignment of the disputed property to the extent such sale, transfer or assignment is fraudulent or in derogation of the plaintiff’s rights in the property;
(e) recover the property from a defendant who has obtained possession by theft.
At an ex parte hearing to determine if notice is not required, the court shall examine the evidence on each element required by this section or any written waiver of rights presented by the plaintiff. If the court finds that notice is not required, or that the waiver is in accordance with law, it shall order a hearing as soon as practicable on the issuance of the writ of replevin.
Of interest is the provision in § 4a that a consumer may not waive his right to notice and a hearing.
immediately impending harm", such as by destruction, concealment, removal from the state, perishing, or sale of the disputed property. Thus, in a procedure similar to that required for the granting of a search warrant, a writ of replevin may be summarily granted and still not violate due process.

A political Supreme Court could certainly apply the *Fuentes* decision to repossession by self-help and still not terminate the right of repossession. The Supreme Court could decide that UCC Section 9-503 violates due process, because of its "overbreadth" inasmuch as it allows indiscriminate prejudgment repossessions. Then, the way would be open for states to pass laws allowing repossessions only in cases where, such as in the words of the Illinois replevin statute, "immediately impending harm" would ensue. In those situations, the secured creditor could appear before a judge *ex parte* to prove that the collateral is in danger and should be seized by self-help immediately, or provisions could be made for the posting of a bond by the repossession to protect the debtor in the event of mistake by the repossession. In any event, a post-seizure hearing would be held to determine title, exactly the same as the old replevin action. In all other situations, the secured creditor could proceed under the new replevin action, providing notice of a pre-seizure hearing.

The advantages of the modified repossession scheme are compelling, especially in the light of what the *Fuentes* dissent labeled "the practical considerations involved." In the usual default situation, the secured creditor seeks satisfaction before he decides to repossess the collateral. In many cases, the debtor realizes his inability to pay and tells the creditor to take the goods away. In *Messenger v. Sandy Motors, Inc.*, the court related the testimony of a witness who said that out of 235 repossessions by his bank, 120 were voluntary. It is safe to assume that the voluntarily repossessed debtors would not contest a replevin action; in fact, there would be no need for a hearing if they surrendered the collateral.

Out of the remaining 115 debtors who did not voluntarily surrender the collateral upon default, it can be assumed that at least two different types of debtors can be discerned. First, there will be some who will be prone to conceal, sell, or otherwise dispose of the collateral. The secured creditor would already know the identity of these problem accounts, so he could summarily repossess upon default, according to

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the modified scheme. Second, the remaining type of debtor may not voluntarily return the collateral, but he will not actively prevent its repossession. In these cases, there is no danger in the debtor remaining in possession for the week or so until the hearing can be held.

As noted, repossession of collateral by self-help need not be exercised indiscriminately. Rather, the same results could be obtained by reserving its use for those cases where there is a danger of loss to the collateral. In all other cases, the debtors could be given the opportunity for a pre-seizure hearing without loss to the creditors.

In passing, it is relatively certain that "Illinois' own" Mojica v. Automatic Employees Credit Union\(^1\) decided by a federal three-judge panel in the Northern District of Illinois, will not be the repossession case heard by the Supreme Court. Therein, the plaintiffs alleged that their autos were seized while they were not yet in default. Therefore, the panel's memorandum opinion dismissed the complaint because it asked the court to determine the validity of a statute improperly applied. Had the complaint alleged that the plaintiffs were in default, the panel consisting of Chief Circuit Judge Swygert and District Judges Austin and McGarr probably would have heard the case on its merits and then the case could have moved swiftly to the Supreme Court for a decision.

**Conclusion**

In the recent past, the protection of due process was not available to debtors in many instances. With the landmark decisions in Sniadach and Fuentes, the Supreme Court has sought to prevent wrongful takings by requiring notice and a hearing before the seizure of property from debtors by creditors. The final frontier is repossession by self-help as authorized by UCC Section 9-503, which is presently being challenged in the lower courts without much success. Hopefully, the Supreme Court will continue the trend and strike down arbitrary repossession by secured creditors without the benefits of due process. This hope, however, should be tempered by an understanding of the composition of the Court.\(^2\)

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2. It should be noted that Justices Powell and Rehnquist, who did not sit for Fuentes, may very well join the Fuentes dissent in holding repossession to be constitutional.