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THE ABOLITION OF SELF-HELP REPOSSESSION: THE POOR PAY EVEN MORE

JAMES J. WHITE*

In the past two years more than a dozen courts[1] have considered the constitutionality of section 9-503[2] of the Uniform Commercial Code. That provision authorizes a secured creditor to seize the collateral from the debtor upon default without judicial process, provided the creditor can do so without breach of the peace. In one of those cases, *Adams v. Egley*,[3] the trial court found that the section was unconstitutional as a denial of due process to the debtor. The most prominent case holding to the contrary is *Oller v. Bank of America*,[4] a case decided in the Northern District of California, in which the court found no state action in the self-help repossession, thus denied jurisdiction, and in effect upheld the constitutionality of the section.

A recent Supreme Court case, *Fuentes v. Shevin*,[5] gives added importance to these cases, for it indicates that at least four members of the current Supreme Court regard the analogous process of replevin (at least as commonly practiced in the typical consumer context) to be a violation of the due process clause. Undoubtedly *Adams v. Egley* or one of the other cases cited in footnote 1 will come before the Supreme Court within the next year or two.

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1. *See, e.g.*, Greene v. First Nat'l Exchange Bank, 348 F. Supp. 672 (W.D. Va. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed sub nom.*, Adams v. Southern Cal. First Nat'l Bank, No. 72-1484, 9th Cir. Mar. 15, 1972; McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Kipp v. Cozens, Cty. No. P22038 (Cal. Super. Santa Clara Cty., June 26, 1972); Messenger v. Sandy Motors, Inc., Civil No. C929-71 (N.J. Super. Ct., Union Cty., Sept. 29, 1972); Kosches v. Nichols, 10 UCC REP. SERV. 147 (N.Y. Civ. Ct. 1971).

2. UNIFORM COMMERCIAL CODE § 9-503 reads as follows:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusuable, and may dispose of collateral on the debtor's premises under Section 9-504.

3. 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed sub nom,* Adams v. Southern Cal. First Nat'l Bank, No. 72-1484, 9th Cir., Mar. 15, 1972.

4. 342 F. Supp. 21 (N.D. Cal. 1972).

5. 407 U.S. 67 (1972).

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In this paper I propose to identify possible ways in which a court could uphold the constitutionality of section 9-503 without an explicit rejection of *Fuentes v. Shevin*. It is my thesis that *Fuentes v. Shevin* is probably an undesirable outcome, and that the application of the same doctrine to self-help repossession is certainly undesirable and would constitute due process gone berserk. My arguments will not be novel; each has been suggested by the courts that have considered this matter, or by the briefs of the lawyers who have argued these cases. I cannot even claim to have collected the data upon which I rely in the last part of the paper; that task was accomplished by Professor Robert Johnson, who has presented it as an appendix[6] to an amicus brief in *Adams v. Egley*.

There are at least three ways in which a court could leave section 9-503 and self-help repossession essentially intact without explicitly rejecting *Fuentes v. Shevin*. First, a court could do what the district court did in *Oller v. Bank of America*: Find that there is no state action and thus no violation of the due process clause. Second, a court could leave section 9-503 essentially intact by finding that any requirement for a judicial repossession can be waived by a conspicuous clause in the security agreement. Third, a court could arrive at that result by a more thorough and careful balancing of the due process interests than the Supreme Court undertook in *Fuentes v. Shevin*. I devote brief comment to the first two methods of avoiding *Fuentes v. Shevin*; the bulk of the paper deals with the third question, how the due process factors should be balanced.

I. STATE ACTION

Tracing the postwar development of the state action doctrine is like following a forest trail that meanders in an unpredictable way to an unseen stopping point. Although the Court is careful to make each decision apparently consistent with the last, one finds himself unable to predict the next case until it has been decided, and one might argue that the outcomes are dictated largely by unarticulated reasons. Indeed historians may look back upon the Warren Court's expansion of the state action doctrine as a response to subterfuges that had been erected by whites to avoid racial integration.[7]

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6. R. Johnson, Denial of Self-Help Repossession: An Economic Analysis, in Brief for Permanent Editorial Board for the Uniform Commercial Code as Amicus Curiae, Appendix, Adams v. Southern Cal. First Nat'l Bank, No. 72-1484 (9th Cir., filed Mar. 15, 1972).

7. The court in Oller v. Bank of America, 342 F. Supp. 21, 23 (N.D. Cal. 1972), explicitly suggests that possibility:

> *Reitman*, which dealt with racial discrimination in violation of the due process clause, clearly presented a compelling factual situation to which the Civil Rights Acts and their jurisdictional counterparts were designed to apply. The historical, legal and moral considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case.

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The modern doctrine consists of a string of judicial decisions running roughly from *Shelly v. Kraemer*[8] to *Moose Lodge No. 107 v. Irvis*.[9] Perhaps the most arrogant of all the cases is *Reitman v. Mulkey*[10] In that case the Court found that the people of California did not have the power to revoke an open housing act, at least if they also inhibited their legislature from reenacting such an act. There is no majority opinion in that case and one can find few academic advocates for the reasoning set forth in the *Reitman* opinions.[11]

The trial court in *Adams v. Egley* placed considerable reliance on *Reitman v. Mulkey*. The *Adams* court found that California's enactment of section 9-503 of the UCC was an involvement of the state in the repossession process sufficient to render the act of self-help repossession subject to constitutional control. Assuming arguendo that *Reitman v. Mulkey* is good law, one can nevertheless distinguish *Adams v. Egley*. First the legislature's enactment of section 9-503 did not foreclose a subsequent repeal of that same section. At least on its face *Mulkey* rests on the proposition that repeal of an existing statute by means of an amendment to a state constitution constitutes more than permissible state neutrality on an issue; it is impermissible state action that involves the state in the activity it seeks to forbid. One legislature has effectively repealed section 9-503 in consumer cases.[12] Nor did the enactment of section 9-503 encourage an act (repossession) which was not and could not already have been done under the law of almost all of our states.[13] One who looks at the history can trace for

8. 334 U.S. 1 (1948).
9. 407 U.S. 163 (1972).
10. 387 U.S. 369 (1967).
11. There are evidently few commentators even willing to attempt to untangle the *Reitman* opinions. For two who did try, see Black, *The Supreme Court, 1966 Term Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Horowitz & Karst, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39. Note that Black, in his article, would use a broad definition of state action, but would limit the use to problems involving racial disputes.

A cynic might argue that the case stands for the proposition that the constitutional law operates like a ratchet. That is, one need not have an open housing law, but once he has enacted it he cannot take it back. The opinions in that case attempted to escape such a proposition by stating that the recall did more than simply withdraw the act; it also prohibited the legislature from further action.

12. *See* the recently enacted Wisconsin Consumer Act, WIS. STAT. §§ 421-27 (1971).
13. Examples of cases upholding a seller's common law right to repossess on default include: Sallwan v. Miller, 224 Ala. 395, 140 So. 606 (1932); Fulton v. Fraser, 76 Colo. 125, 230 P. 600 (1924); Lee v. National Furniture Stores, Inc., 163 S.C. 204, 161 S.E. 450 (1931) (all involving repossession pursuant to chattel mortgages). Other examples include: Silverstein v. Kohler & Chase, 181 Cal. 51, 183 P. 451 (1919); Zeff v. Harvey Smith Oldsmobile Co., 154 Cal. App. 2d 1, 315 P.2d 371 (1957); Salinger v. General Exc.

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several centuries the right of the creditor to self-help repossession.[14] Indeed it appears that in most of our states a secured creditor could engage in self-help repossession even though there was no clause explicity giving him that right in the security agreement and even though there was no statute that authorized his repossession.[15] So well-entrenched was the idea of self-help repossession that a person who argued in 1954 that the enactment of section 9-503 was unconstitutional would have been met with amazement on the part of the draftsmen.

If the courts choose to find impermissible state action in the enactment of section 9-503, where is the stopping place? Does such a decision mean that a probate statute, which gives the decedent the capacity to discriminate in favor of his church, his race, or his sex, is unconstitutional? Does it mean that the common law, which authorizes a lessor to seize property from a lessee, is also unconstitutional? And how does one distinguish the whole of Article 9 of the Uniform Commercial Code and the rest of property law? These laws permit the transfer of property rights without the intrusion of the courts, without due process. Perhaps they too are unconstitutional; perhaps no deed should be effective and no security agreement recognized until it has received judicial sanction and each party has been given an opportunity to show that he was acting of his own free will, not under mistake or undue influence. Of course such suggestions are preposterous and presumably the deed and security agreement cases can be distinguished on the ground that the transferor gives his contemporaneous agreement and that this is an effective waiver of any due process right or obviates the need for it. But what if empirical research were to show that the typical debtor in fact understands and expects that the creditor will repossess when the debtor defaults, and that in all but an insignificant minority of the repossession cases the debtor is in fact seriously in default at the time of repossession? Should we not recognize this expectation as tantamount to a contemporaneous agreement to transfer?

In any event I conclude that a finding of state action here would be a further unwise step beyond the unwise conclusion of *Reitman v. Mulkey*. Yet one who attempts to fit the repossession case into a

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Ins. Corp., 217 Iowa 560, 250 N.W. 13 (1939); Mendelson v. Irving, 139 N.Y. 1065, 155 App. Div. 114 (1913); Shelby v. Hudelburg Chevrolet, Inc., 361 P.2d 275 (Okla. 1961).

14. *See, e.g.*, 2 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 856-58 (4th ed. with analysis by T. Cooley 1899); L. JONES, CHATTEL MORTGAGES 516 (1881); 2 F. POLLOCK & W. MAITLAND, THE HISTORY OF ENGLISH LAW 574 (2d ed. 1968). Early American cases include O'Fallon v. Elliott, 1 Mo. 364 (1823); Hall v. Snowhill, 14 N.J.L. 8 (1833); Moody v. Haseldon, 1 S.C. 129 (1869).

15. *See, e.g.*, Ellis v. Smithers, 206 Ark. 247, 174 S.W.2d 568 (1943); Harvey v. Anacone, 134 Me. 245, 184 A. 889 (1936); Burtis v. Bradford, 122 Mass. 129 (1877); Wendell v. N.H. Bank, 9 N.H. 404 (1838).

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rational pattern that consists of *Shelley v. Kraemer*,[16] *Evans v. Abney*,[17] *Burton v. Wilmington Parking Authority*,[18] and *Moose Lodge v. Irvis*[19] will not succeeed. This case does not fit the pattern of those cases, and none clearly dictates the outcome here. One hopes only that the Court will follow the pattern that it may have established in *Moose Lodge v. Irvis*, a pattern of greater hesitance to turn every issue into a constitutional case.

If the Court finds no state action here and thus upholds the constitutionality of section 9-503, the outcome can coexist comfortably with *Fuentes v. Shevin*. In that case there was undisputed and extensive state action. One must pay a filing fee to start his replevin action, file his pleadings, and invoke the action of the court before anything can happen.[20] Commonly the writ of replevin is served by an officer of the state, and the property is seized and held by an officer of the state.[21] In short, the state is fully and

16. 334 U.S. 1 (1948).
17. 396 U.S. 435 (1970).
18. 365 U.S. 715 (1961).
19. 407 U.S. 163 (1972).
20. Florida's replevin statute, which was declared unconstitutional in *Fuentes*, reads as follows:

> Right to Replevin. Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond.

FLA. STAT. § 78.01 (1969).

Michigan has replaced its replevin provisions with the following law, characterized as a "claim and delivery" statute:

> (1) A civil action may be brought to recovery any goods or chattels which have been unlawfully taken or unlawfully detained and to recover damages sustained by the unlawful taking or unlawful detention, except as provided below.
>
> (a) No action may be maintained under this provision for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine in pursuance of any statute of this state.
>
> (b) No action may be maintained under this provision to recover goods or chattels seized by virtue of any execution or attachment at the suit of the defendant in the execution or attachment unless the goods or chattels are exempted by law from execution or attachment.
>
> (c) No action may be maintained under this provision by any person who does not at that time have a right to possession of the goods taken or detained.
>
> (3) If the merchant repossesses or accepts voluntary surrender of goods which were not subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the amount owing at the time of default was $1,000 or less, the customer is not personally liable to the merchant for the unpaid balance of the debt arising from the sale, and the merchant's duty to dispose of the collateral is governed by the provisions on disposition of collateral under chs. 401 to 409.

MICH. COMP. LAWS § 600.2920 (1948).

21. Florida's provisions relating to the execution of the writ of replevin

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deeply involved in the typical replevin action in a way in which it is not involved in self-help repossession.

II. WAIVER

In the dissenting opinion in *Fuentes v. Shevin,* Justice White suggested that the creditor could avoid the impact not only of that decision but also of any similar subsequent ruling on section 9-503 by the inclusion of a waiver clause in its security agreement. He argued as follows:

> The Court's rhetoric is seductive, but in the end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession . . . without resort to judicial process at all.[22]

Such a clause currently included in one bank's security agreement reads as follows:

> Buyer is aware of the right to a judicial hearing before legal process to retake possession of the good may be issued and buyer waives such hearing. On default, seller or its assignee may obtain a replevin warrant or other process without notice to buyer and without a prior hearing.

Of course it is settled that one can waive his constitutional rights. Even if he is accused of a crime and therefore entitled to the highest measure of constitutional protection, a knowing and uncoerced waiver will be effective.[23] Surely no one would complain in the car repossession case if the debtor called up and instructed the

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are as follows. FLA. STAT. § 78.08 (1969):

> WRIT; FORM; RETURN.—The writ shall command the officer to whom it may be directed to replevy the goods and chattles in possession of defendant, describing them, and to summon the defendant to answer the complaint.

Id. § 78.13 provides:

> WRIT; DISPOSITION OF PROPERTY LEVIED ON.—The officer executing the writ shall deliver the property to plaintiff after the lapse of three days from the time the property was taken unless within the three days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant.

22. Fuentes v. Shevin, 407 U.S. 67, 102 (1972) (White, J., dissenting).

23. *See, e.g.,* North Carolina v. Alford, 400 U.S. 25 (1970) (waiver of right to trial); Stoner v. California, 376 U.S. 483 (1964) (consent to a search); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (waiver of right to counsel). In the noncriminal area it has been held that one may waive the right to actual notice: National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). The most recent relevant case is D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), in which the Supreme Court held that the confession of judgment provisions in the cognovit notes there before it did not violate the due process clause.

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creditor to come and get his automobile. But the question remains, is the waiver clause included in the security agreement tantamount to a knowing and contemporaneous waiver?

I suspect that Justice White is too facile. Nothing in the majority opinion suggests that those four Justices are willing to go along on a waiver argument in consumer replevin cases. Indeed when they speak of waiver, they add a number of other conditions.[24] To say that self-help repossession is unconstitutional when there is no waiver clause, but that even a prominent waiver clause renders it constitutional, is to be excessively cynical. How many of us read the agreements that we sign? Even among law students and lawyers—those most acutely aware of contract liability—how many read the agreements that they sign as consumers? Though I know of no reliable empirical data on the subject, my guess is that few of us read form agreements and many who do read them do not understand their import. In short, I dispute the proposition that one who has signed a security agreement containing a waiver clause, even a clause in big and colorful print, is really in a different position than is one who has signed a security agreement that contains no such waiver clause.

It may be that consumers understand more about repossession than lawyers and judges do, and that in fact they expect that an automobile will be repossessed if they cease payments, but my guess is that a clause in a security agreement, even a clause that must be separately initialed and printed in red, does little to increase that understanding. As a practical matter I would class such persons together with those who have signed an agreement that did not contain such a waiver.

Thus if my empirical judgments are right, accepting waiver as a way around *Adams v. Egley* is an essentially dishonest route to the proper end.[25] Because such clauses will appear overnight in

24. The majority opinion in *Fuentes* rejected the contention that Mrs. Fuentes had waived her right to assert any defenses when she signed the sales contract. The Court readily distinguished the factual situation in *Fuentes* from that in *Overmyer* and suggested several criteria for a valid waiver:

> The facts of the present cases are a far cry from those of *Overmyer*. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

407 U.S. at 95. In addition, the Court found that the language contained in the contract in *Fuentes* did not constitute a valid waiver because such language "must, at the very *least*, be clear" and must, "on its face, amount to a waiver." *Id.* (emphasis in original).

25. Some imaginative creditor-lawyers known to me have suggested several provisions to their clients that may in fact communicate the necessary information to the debtor and, in combination with other proced-

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the appropriate size, shape, and color in the boiler plate of every consumer security interest in the country, their acceptance as a sufficient constitutional answer is tantamount to a reversal of the *Fuentes* case.

III. DUE PROCESS

The Supreme Court has frequently acknowledged the proposition that a due process judgment requires a court to balance the supposed benefits to the individual that would arise from due process against the public costs arising from the institution of the proposed procedure. Although it has continued to pay lip service to this balancing proposition in the creditor-debtor cases, in fact it has given short shrift to the creditors' balancing arguments. In its most recent statement in *Fuentes v. Shevin*, the Court finds that "notice and an opportunity for hearing" may be postponed, but only in situations that are "truly unusual."[26] The Court then cites several circumstances under which seizure of property will be permitted without a prior hearing or notice, *i.e.*, cases in which the individual's right is outweighed by the public cost. Among these are seizures on behalf of the United States for the collection of taxes,[27] to meet the needs of a national war effort,[28] to prevent a bank failure,[29] and to protect the public from misbranded drugs and contaminated food.[30] In addition the Court recognizes that property may be seized "to secure jurisdiction in state court."[31] In the

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ures, may overcome the objections even of the majority in the *Fuentes* case. One lawyer has proposed first that his client have the debtor sign a waiver on a separate sheet of paper. The waiver is explicit and it states on its face the signing of the waiver is not a condition to procuring the loan. Second, he has advised his creditor-client to give the debtor written notice of a prospective repossession and to send him a stamped self-addressed card with instructions for the debtor to return the card with any explanation he might have for his failure to pay. This procedure seems as careful as one can devise; still I am skeptical about the significance of any document signed at the time of purchase. My guess is that the typical consumer is so anxious to drive away in his new car that even the slightest suggestion that failure to sign the waiver might hold up the process will cause him to sign such a waiver. In these circumstances, his waiver may be knowing but it is not likely to be bargained for. In short, I remain unconvinced by the waiver aspect of the procedure described above. More intriguing is the notice of prospective repossession and the request for explanation of nonpayment. Perhaps in the hands of a good faith lender that procedure should be accepted as a substitute for a judicial hearing.

26. 407 U.S. at 90.

27. *Id.* at 92 n.24, *citing* Phillips v. Commissioner, 283 U.S. 589 (1931).

28. 407 U.S. at 92 n.25, *citing* United States v. Pfitsch, 256 U.S. 547 (1946); Stoehr v. Wallace, 255 U.S. 239 (1922); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921).

29. 407 U.S. at 92 n.26, *citing* Fahey v. Mallonee, 332 U.S. 245 (1946).

30. 407 U.S. at 92 n.27, 28, *citing* Erving v. Mytinger v. Casselberry, Inc., 339 U.S. 594 (1949); North Am. Storage Co. v. Chicago, 211 U.S. 306 (1908).

31. 407 U.S. at 91 n.23, *citing* Ownbey v. Morgan, 256 U.S. 94 (1921).

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footnotes the Court finds that the costs to the public in time, effort, and expense of holding hearings are "rather ordinary costs" that "cannot outweigh the constitutional right."[32] It goes on in a subsequent footnote further to demean the public interest by describing it as the "private gain at stake in repossession actions."[33]

It is my thesis that the Court's weighing of the factors in *Fuentes v. Shevin* is not properly done, and that the Court's characterization of one party's interest as "private gain" and of the costs as "rather ordinary" suggests either that the Court's economics is weak or that it is blinded by its bias in favor of the consumer. The labels that the Court puts on the costs and the benefits of "ordinary" and "private" may well be misleading on both scores. As we shall see, the costs of doing away with self-help repossession and of substituting some form of replevin will be unquestionably significant, perhaps enormous. If the adjective "private" is meant to convey the idea that any changes here will not go beyond the creditors' profit and loss statements, the Court is probably wrong. Rather, these costs will ultimately be borne by the consumer class itself, a class presumably to be benefited by the added protection. It is time that the Court ceased due process balancing simply by assigning appropriately pejoriative labels to the losers and instead engaged in a serious attempt to measure the costs and the benefits.

How should the Court measure the costs and the benefits? At least on the California market, there is considerable information at hand, and with the help of an assumption or two one can make some reasonable guesses about the nationwide costs and benefits. In an attempt to evaluate the costs I would ask at least the following questions:

(1) In what percentage of all the secured loans does the creditor attempt to repossess by self-help?

(2) How effective is self-help repossession in acquiring possession of the car by comparison with judicial repossession?

(3) How does the cost of self-help repossession compare with the cost of judicial repossession?

(4) To the extent that there are added costs, who will bear them?

(5) If creditors had to go to court to repossess, would they seek deficiency judgments more frequently than they do now?

(6) Are private repossessors more or less likely to disturb the privacy and upset the life of the debtor than are official repossessors?

On the other side of the ledger are some questions the answers

32. 407 U.S. at 90 n.22.
33. *Id.* at 92 n.29.

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to which will illustrate the benefit to individual debtors of due process hearings:

(1) How often are goods repossessed from debtors who are not in default?

(2) Among those debtors in default at the time of repossession, how many have defenses that they could assert at a hearing which would cause a judge to allow them to keep the car pending the outcome of the trial on the deficiency or debt?

(3) Among these debtors with such defenses, how many will assert them?

To set the stage for an analysis of the data, consider first the two polar scenarios of what might occur following a finding that self-help repossession is unconstitutional. The creditors' scenario is likely to go as follows: Virtually all of our repossessions were done by self-help. Almost all of those repossessions will have to be done judicially now and that will increase our costs on a massive scale. In the first place, we now repossess nearly one out of 10 cars; many debtors skip and a prerepossession court notice will cause others to skip. We will have to pay not only a court entry fee, a service fee, and a sizable lawyer's fee, but we will also have to pay to send a witness to court for a hearing and to send an employee along with the sheriff to tow the car in. In addition we will have to pay a towing company and pay the sheriff mileage and time. Since the court process will inevitably be delayed, we will have a considerable opportunity cost in that we will not get our money back as quickly as we would otherwise. Our experience indicates that one debtor out of a thousand will come to court and that one debtor out of 2,000 will have some meritorious defense. The rest may have some complaint that might conceivably give them a setoff against the judgment, but will not allow them to retain the car. Moreover since we will already have paid the entry fee and be in court we will seek a deficiency judgment in every case (now we seek a deficiency in only two out of nine cases). On the other hand we will welcome the sheriff's right to break down the doors to get at the collateral, a right that we have not formerly enjoyed because our repossessions have not been under color of law. We will pass on the added costs in several ways. First of all we will raise the interest charges; second, we will require considerably higher down payments and thus force some new car buyers into the used car market where we can typically charge considerably higher interest rates; and we eliminate credit to some of the lower class, unskilled workers who are marginal credit risks.

The debtors' scenario might go as follows: The limitation on private repossession will prevent dishonest creditors from repossessing a car from a debtor who is not in default. Moreover it will give a debtor, who has a good cause of action against the

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seller, an opportunity to present that cause of action at a hearing and to prove that after the setoff he is not in default and thus has no obligation to give up the automobile. It will keep the private repossessors from doing nasty things like luring people out of their houses so that their cars can be snatched. And of course it will enable us to keep our cars, cars which we need to get to work, and which are in fact our life's blood. Moreover the creditors will find ways of conducting cheap replevins, and procedures can be designed to minimize the costs of replevins.

To assess which of these scenarios is closer to the truth, one can examine the answers to the questions posed above.

A. *The Costs of Judicial Repossession*

1. IN WHAT PERCENTAGE OF ALL SECURITY INTERESTS DOES THE CREDITOR ATTEMPT TO REPOSSESS BY SELF-HELP?

If creditors either rely exclusively on judicial repossessions or if they repossess in only one loan out of 500,000, self-help is doubtless unimportant to them, and denial of the right of self-help would not significantly increase their costs. In the first place, it appears that when one speaks of self-help repossession he is talking mostly of automobiles and that virtually all repossession of automobiles is done by self-help.[34] That is, creditors who choose to repossess washing machines, refrigerators, and other household goods must usually resort to judicial repossession in any event because the crossing of the threshold uninvited will constitute a breach of the peace and is therefore not permitted by section 9-503 of the Uniform Commercial Code.[35] On the other hand, snatching a car off the street at night does not constitute a breach of the peace[36] and is the common method of picking up cars.[37] The Johnson study showed the number of replevins of cars to be infinitesimal.[38] Seven banks responding to a consumer bankers association report disclosed only 15 replevins during 1971. A major finance company reported that replevins amounted to less than one percent of its total United States repossessions, excluding Louisiana.[39] Thus repossession of a car is likely to be by self-help, not by replevin.

34. R. Johnson, *supra* note 6, at 18.

35. *See* Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1915) (furniture from debtor's restaurant); Cecil Baber Elec. Co. v. Brier, 183 Okla. 541, 83 P.2d 598 (1938) (refrigerator from "premises"); Lark v. Cooper Furniture Co., 114 S.C. 37, 102 S.E. 786 (1920) (furniture from home). *See generally* White, *Representing the Low Income Consumer in Repossessions, Resales, and Deficiency Judgment Cases,* 64 NW. U. L. REV. 808 (1970).

36. *See, e.g.,* King v. General Motors Acceptance Corp., 140 F. Supp. 259 (M.D. N.C. 1956); McWaters v. Gardner, 37 Ala. App. 418, 69 So.2d 724 (1954); General Motors Acceptance Corp. v. Sheuy, 243 Ky. 74, 47 S.W.2d 968 (1932). *See also* cases cited in Annot., 146 A.L.R. 1331 (1943).

37. White, *supra* note 35.

38. R. Johnson, *supra* note 6, at 18.

39. *Id.*

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It is still possible that there are so few repossessions per 1,000 loans that creditors could stand a considerable increase in cost per repossession without incurring any substantial aggregate increase in costs. The Johnson study indicates that about 5.5 percent of the new California car contracts and about 10.5 percent of the used California car contracts ultimately result in repossession. An earlier study had shown a slightly higher nationwide repossession rate.[40] If one extrapolates from the more recent Johnson figures and assumes that they are a fairly representative image of the nationwide market, he concludes that there were approximately 960,000 total repossessions of automobiles in the United States last year, a considerable number by any standard. Thus if the costs per repossession of changing from a self-help to a judicial repossession method is anything but modest, the aggregate costs will be great indeed, for that cost per repossession must be multiplied by 960,000.[41]

2. HOW EFFECTIVE IS SELF-HELP REPOSSESSION IN COMPARISON WITH JUDICIAL REPOSSESSION?

Some argue[42] that the service of a complaint on the debtor that discloses he is about to lose his car will cause him to skip and will

40. P. McCRACKEN, J. MAO & C. FRICKE, CONSUMER INSTALLMENT CREDIT AND PUBLIC POLICY 129 (1965).

41. The figures in Federal Reserve Board Release No. A-56 (June, 1972) reveal $38,762,000,000 in automobile paper outstanding at the end of March, 1972. Federal Reserve Board figures also reveal that the average contract outstanding is $1606. Telephone conversation with Robert W. Johnson. Using these figures, one can derive the total number of contracts outstanding in the United States—approximately 24.1 million contracts.

Johnson's figures indicate that in California 4.8% of all contracts outstanding result in repossessions. This figure is probably slightly too high for a national average. Ford Motor Company officials testifying in Messenger v. Sandy Motors, Inc., Civil No. C929-71 (N.J Super. Ct., Union Cty., Sept. 29, 1972), estimate that repossessions nationally constitute 4% of all contracts outstanding. Multiplying 4% by the total number of contracts outstanding in the United States (24.1 million as of March, 1972) results in the figure of approximately 960,000 repossessions.

If the Federal Reserve Board figure of $1606 is inaccurate, all of our calculations are thrown out of line. The figure is consistent with the comparable figure provided for the year 1971 by Ford Motor credit. The average principal amount of the contracts outstanding with Ford at the end of 1971 was $1949.17. The fact that the Ford figure is higher is probably attributable to the fact that a larger percentage of all of Ford's contracts are written on new cars than is true nationwide. Letter from Ford Motor Credit Co. to James J. White.

The estimate of 960,000 repossessions is probably still slightly high. As the costs to the creditors go up because they are denied self-help repossession, creditors will surely add some part of those costs to the price of the cars in the form of higher down payments or higher interest payments. These added costs will result in a somewhat smaller number of sales of cars on credit and accordingly will cause at least a modest reduction in the total number of repossessions.

42. R. Johnson, *supra* note 6, at 32.

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thus move the car out of the creditor's reach and so effectively bar him from recovering the value of the automobile. In the face of Professor Johnson's facts concerning creditor contacts with the debtor prior to repossession, it seems unlikely that a debtor who will stick around and stand up to standard private collection efforts will skip on the receipt of court papers. The Johnson study shows that the average repossession is preceded by no fewer than 30 contacts between the creditor and the debtor.[43] Some of these contacts may have occurred on delinquencies that did not cause repossession but which were worked out, yet it appears that most debtors are willing to stay put and hold on to the car in the face of two dozen increasingly aggressive and forceful collection contacts. As these collection efforts rise to their crescendo, it must be apparent even to the stupid debtor that he is on the verge of losing his car, and that if he wishes to keep it he had better skip. I am unpersuaded that a debtor who can withstand that kind of private collection effort will be motivated to skip by the receipt of court papers.

If some debtors are motivated to skip by the receipt of court papers, others may be motivated to pay by receipt of such papers. Some creditors apparently think that the receipt of court papers causes the debtors to pay up, for in several cases known to me[44] creditors have designed their collection notices to look like pleadings.

3. HOW DOES THE COST OF SELF-HELP REPOSSESSION COMPARE WITH THE COST OF JUDICIAL REPOSSESSION?

Professor Johnson identifies two costs not present in self-help repossession that will arise in judicial repossession cases. First are court costs: The entry fee, the attorney's fee, service fee, and the cost of sending a witness to the initial hearing to establish a prima

43. A survey by Consumers Bankers Association in Washington, D.C., on pre-repossession activity in 1971 revealed the following average activity preceding each repossession:

Number of Written extensions or rewrites	3.6
Delinquency notices sent	10.3
Telephone calls	12.2
Personal contacts	7.9
Total	34.0

R. Johnson, *supra* note 6, at 17. Johnson suggests that, because this information was taken from a group of small banks, the average number of personal contacts in this study may be higher than the national average of all pre-repossesson activity.

44. In several cases that have passed through the Washtenaw County Legal Aid Office in Ann Arbor, Michigan, the debtor brought in a dunning notice that was designed to look like a complaint. At the top left corner of the notice the debtor's name was printed and below that was the creditor's name with the letters "vs." between them. The apparent intention was to lead the debtor to believe that he was receiving not just a routine dunning letter, but a complaint that had been filed in court.

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facie case. Second are the costs resulting from the delay in repossession that will inevitably arise from having to go through a judicial proceeding. To the extent that these latter costs are quantifiable, they arise from the continuing depreciation in the value of the automobile and from the opportunity cost of being deprived of the sum the automobile will bring on resale for an additional period of time. He estimates the quantifiable costs as follows:[45]

	New Cars	Used Cars
Initial Entry Fee		
Legal fees and court costs (rough estimate)	$150	$150
Costs of 30-day delay:		
Depreciation in value	$ 57	$ 31
Opportunity cost	$ 24	$ 8
Other	+	+
	$231+	$189+
Marginal Replevin Costs		
Legal fees, court costs, and sheriff	$250-300	$250-300
Cost of 30-day delay	$ 81 +	$ 39 +
Totals	$331-381+	$289-339+

The top set of costs labelled "Initial Entry Fee" assumes that a complaint will be filed, and a hearing date set; those costs make no provision for the cost of the hearing or seizure. The bottom set labelled "Marginal Replevin Costs" assumes that one will not only file, but that a representative of the creditor will go to the hearing and give testimony to prove a prima facie case and get some form of default judgment. The bottom set assumes that repossession will be made promptly by the sheriff or other state official and that the debtor will raise no defenses. These figures omit consideration of the so-called nonquantifiable costs, costs attributable to the fact that a finance company or bank employee may accompany the sheriff to identify the car, that the car may be towed instead of driven away, that it will be stored, not at the bank or finance company's lot, but at a state lot where a fee must be paid, and that a bond may have to be put up to indemnify the debtor against injury done him in the course of the repossession. There is also the cost to the taxpayers of conducting these repossessions in the courts—clerks, judges, and bailiffs do not work for free.

Are Professor Johnson's estimates plausible? His estimates of attorney's fees come from an actual experience in Louisiana (where there is no self-help repossession[46]) and from estimates by Califor-

45. R. Johnson, *supra* note 6.

46. *See* LA. REV. STAT. §§ 9:4562-9:4564, 13:3851 (1951) and cases such as Brandeson v. International Harvester Corp., 66 So.2d 317 (La. 1953), and

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nia law firms. He estimates that the legal fees and court costs involved in drafting the complaint, filing it, paying the entry fee and the service fees would be approximately $150 per case. It seems unlikely that one can file the suit and serve the complaint for much less than $30.[47] That leaves $120 for the lawyer, who by hypothesis will do nothing here but draft the complaint. That is, here we assume that the lawyer never appears in court and has to prepare no witnesses or testimony, for we are first considering the cases in which the debtor voluntarily gives up the car before the hearing but after he is served. If the lawyer in question is a collection expert, he will have a battery of highly trained secretaries and he may use form complaints. It is likely that these secretaries can turn out complaints on the basis of the files furnished by the client and that the only lawyer time involved will be his signing of the complaint.[48] Surely this service is not worth $120 and consumer creditors are not likely to pay an inflated value for lawyer service. Indeed it is possible to conceive of an operation in which an hour of lawyer's work charged at $35 to $50 would produce 10, or perhaps 20 complaints and that the total amount billed in such cases would be only five dollars per complaint. Thus it is hard to understand where Professor Johnson got his California estimates which range from $165 to $220 and how the lawyers effectively charge a minimum of $75 and a maximum of $150 for that service in 45 actual cases that he studied in Louisiana. Since those cases were taken from a number of parishes throughout Louisiana, it is possible that they were handled in a more traditional fashion and not by a mass producer of the kind that more commonly work as collection lawyers for a consumer finance organization. At least for cases in which the creditor has an experienced collection lawyer who is dealing in bulk, it is possible that Professor Johnson has substantially overestimated the legal fees. If one assumes that half of

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Morelock v. Morgan & Bird Gravel Co., 174 La. 658, 141 So. 368 (1932), for a listing of the seller's rights under Louisiana law.

47. Filing fees to initiate a suit for replevin of course vary from state to state. For example, in Michigan the filing fee is $12 if the amount in controversy is over $50 and five dollars if not. MICH. COMP. LAWS § 600.8371 (1948). In New Jersey, the court fees for filing are eight dollars if the amount in controversy does not exceed $500 and $10 if it does. N.J. REV. STAT. § 22A:2-37 (1969).

Fees for utilizing the sheriff's services vary greatly from state to state. In New York City the sheriff's fee for serving a summons is $5 and for the actual levy is $25 plus mileage at 10 cents a mile. In New Jersey the cost of the summons and writ varies with the amount in controversy and whether or not the writ is served with the summons. It can be as little as $9.50 if the value of the goods is under $500 and the writ is served with the summons. It can be as much as $17.50 if the amount exceeds $500 and the writ is issued subsequent to the summons. The sheriff's mileage must be paid at 10 cents a mile. N.J. REV. STAT. §§ 22A:2-37 to 38 (1969).

48. Indeed I know of some operations under which the lawyer signs a bundle of uncompleted form complaints and gives them to the client for his clerical help to file after they have filled them in.

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all the cases are handled on a production line basis at $10 per complaint and that the others are handled in a more conventional fashion at $75 to $100 per complaint, he might reduce the aggregate rough estimate of legal fees from $150 to $80 or perhaps even to a figure as low as $70 or $60.

The remainder of Professor Johnson's assumptions set forth in the table above are less readily challenged. To arrive at the depreciation in value he assumes that the judicial proceedings postpone the repossession beyond the self-help time by an average of 30 days. This seems a reasonable assumption. When the creditor decides to repossess he must file his complaint, serve it, and then wait the statutory period for an answer. Of course neither the filing nor the service will occur on the same day the creditor decides to repossess, and default day at the local court will not necessarily fall on the exact date when the answer is due. Thus it would seem to me that this 30-day estimate is conservative and that, if anything, judicial repossession is likely to cause more than 30 days of delay.[49]

The creditor's quickness might change this result. That is, if a creditor knew that he would have a 30-day delay, he might commence judicial proceedings earlier than he would have repossessed. Working against this is the fact that money spent on judicial proceedings is irretrievable, and the creditor is not likely to put up this filing and legal fee simply as a bargaining ploy with the thought that the suit can be readily dropped. The acute cost consciousness of the typical consumer creditor is likely to keep him from filing a complaint and incurring the costs of filing, service, and lawyer's fees until he is confident that he cannot work out an arrangement with the debtor. Thus, in my judgment Professor Johnson's estimate of 30 days is sound and probably conservative.

To reach his conclusion on depreciation Professor Johnson estimates the average cash price of a new car ($4,320), a down payment of $800, and an unpaid balance of $3,520. He then assumes that the car depreciates 5 percent of its value in the first month after the sale and thereafter depreciates two percent each month. Using the available data on the time when cars are most commonly repossessed and weighting the amounts accordingly, he then concludes that on the average, new cars will depreciate $57 in the 30-day

49. In Michigan the statutory period for an answer is 15 days after service of process. MICH. GEN. CT. R. 108.1. In Wisconsin, under the newly passed Wisconsin Consumer Act, a consumer buyer is afforded at least 75 days after first missing a payment before the collateral may be repossessed. The 75-day period would occur as follows: default is defined as taking place 40 days after missing a payment in most cases. WIS. STAT. § 425.103 (1971). Further, the seller must then give notice to the consumer-buyer giving him 15 days to cure the default. *Id.* § 425.104. If the buyer does not cure, the seller may then commence an action. *Id.* §§ 425.105, 425.205(6). Then the consumer-buyer would have 20 days to answer the complaint. *Id.* § 263.05. Adding time for service, the period will probably be 90 days or longer.

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period and used cars will depreciate $31.[50] Of course, this approach is filled with assumptions, but his assumptions seem generally accurate and conservative. One assumption with which a person could argue is his use of the retail value as a basis for depreciation. In fact the typical repossessor will sell the car on the wholesale market[51] and in the 30 days during which he will be deprived of the automobile he will not lose two percent of the retail value, but two percent of the wholesale value. It seems likely therefore that the depreciation figure will be somewhat lower than the $57 and $31 for new and used cars, respectively.[52] Using wholesale figures then, a closer approximation would be $48 and $26 for new and used cars, respectively. To a certain extent Professor Johnson's questionable use of the retail as opposed to the wholesale value is offset by the fact that cars about to be repossessed probably depreciate more rapidly than those not in jeopardy. As he points out, a hard-pressed debtor who knows that his car is on the verge of repossession will probably not maintain and repair it as carefully as will one whose car is not about to be repossessed.

I cannot quarrel with Professor Johnson's calculation of the opportunity costs. He concludes that the average new car will ultimately produce $2,160 on resale by the repossession, that the creditor will forego the opportunity to reinvest this amount for 30 days, and that he will so lose an average of $15 per new car. The similar computation for used cars produces only $8 because the typical used car has a lesser value.

To arrive at the aggregate incremental expense in California from instituting an exclusively judicial repossession method, Professor Johnson has to make certain assumptions about the proportion of new and used cars that are sold and repossessed. Professor Johnson assumes a repossession rate of 5.5 percent on new cars and 10.5 percent on used cars (*i.e.*, five or six out of every 100 new cars financed will be repossessed). Assuming that each of the 66,000 estimated repossessions in California in 1971 arose only after the commencement of a replevin suit, he estimated the total incremen-

50. R. Johnson, *supra* note 6, at 43.

51. UNIFORM COMMERCIAL CODE § 9-507, Comment 2 reads in part: "One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales." For a study of the problem of secured creditor's selling below market value in the wholesale market, see Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969).

52. Figures taken from the NATIONAL MARKET REPORTS, REDBOOK (1972) reveal that wholesale prices average $400 to $500 less than retail for medium-priced cars less than 4 years old. For example a 1972 Pontiac Catalina had a retail value in November of 1972 of $2875, but a wholesale value of $2350. A 1971 Oldsmobile in November of 1972 retailled for $2475, but had a wholesale value of $2075. A 1970 Pontiac Delta had a retail value of $2050, but a wholesale value of $1525.

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tal cost of instituting judicial repossession to be $13,500,000. To arrive at that figure, he assumes that a default hearing would have to be held in about 40 percent of the cases and that in those cases a state official would seize the car and tow it in. He assumes that the debtor would give up the car before the hearing in the other 60 percent of the cases. On those assumptions he concludes that the total marginal cost, not only of instituting but also of going through with the hearings and repossessions in 40 percent of the cases, would have exceeded $16,000,000 for the year 1971. At least on a nationwide basis it is unclear whether Professor Johnson's assumptions about the costs of having a hearing are correct. In the *Fuentes* opinion the Court explicitly states that there is no constitutional requirement for a court hearing when the debtor defaults.[53] Some states now require the plaintiff to give testimony in open court before he procures a default; other states permit the plaintiff to take a default on an affidavit and without a court appearance. At least in those states which authorize defaults without court appearance, the costs per repossession in those cases in which the debtor does not voluntarily give up the car before a hearing will be less than those estimated by Professor Johnson.

Professor Johnson assumes that no car will be repossessed without the institution of legal proceedings. Under *Adams v. Egley* it is not clear where one draws the line between an impermissible self-help repossession and the voluntary, and therefore permissible, return of the car by the debtor to the creditor. Even under *Adams v. Egley* a debtor who decides that he cannot make his payments would be permitted to return his car. In such circumstances a creditor would not have to undertake judicial proceedings. How far a creditor can go to stimulate a "voluntary" return under *Adams v. Egley* is unclear. Can he ask that the debtor return the car? Can he send a couple of 250-pound gorillas to the debtor's residence to request the return of the car? Presumably at least a fraction of the repossessions that are now characterized as voluntary by Professor Johnson could be undertaken without the institution of judicial proceedings even under *Adams v. Egley*. To that extent his estimate of the costs is overstated. On the other hand he assumes that the debtor would give up his car after the institution of proceedings and before a hearing in six out of ten repossession cases. That asumption may be too generous to the debtors; it is equally plausible that many of these debtors will keep their cars until the hearing date has passed and someone comes for the car.

If one assumes that (1) repossessions occur on four percent of the outstanding contracts nationwide; and (2) the total number of outstanding contracts in the country is 24.1 million, and applies our estimates to the nationwide market, the nationwide incremental

53. 407 U.S. at 92 n.29.

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cost of replacing self-help repossession with replevin for 1971 would have been approximately $143 million.[54]

Of course these estimates do not take into account the costs that are certainly present but are much more difficult to quantify: costs of the hearing when the debtor does not default, cost of sending a man along to locate the car, storage fees, bond, cost of towing. On the other hand, Professor Johnson gives no offsetting credit for the cost now incurred that will not have to be incurred in the replevin case, namely, the cost of the private repossessor. It is possible that the cost will not be saved, but will be equaled in replevin cases by the towing charge, but it seems likely that the creditor will enjoy some savings.

One should not be misled by what I have done above. I quarrel with none of Professor Johnson's fundamental points; I quarrel only with some of his assumptions. Even if one makes the most conservative estimates of added costs—if he assumes that sheriffs work for little, that each creditor can find a highly efficient and inexpensive collection lawyer, that the cars will not depreciate as greatly as Professor Johnson has assumed—one still comes out with a tremendous cost. According to our calculations the annual incremental cost of substituting standard replevin for self-help repossession is certainly not less than $9.5 million for California or

54. Approximately one-third of all repossessions are new cars and two-thirds are used cars. *See* Messenger v. Sandy Motors, Inc., Civil No. C929-71 (N.J. Super. Ct., Union Cty., Sept. 29, 1972); P. MCCRACKEN, J. MAO, & C. FRICKE, *supra* note 40; R. Johnson, *supra* note 6. Using the estimate of 960,000 repossessions computed in note 41, *supra*, as a national figure, this would mean about 320,000 new cars repossessed and 640,000 used cars. Johnson's table as to "Initial Entry fees," that is, the fees that a plaintiff-company would have to pay to repossess even if the debtor voluntarily surrendered his car, could be revised downward to the following figures:

	New Car	Used Car
Legal fees and court costs	$60	$60
Costs of 30 day delay:		
Depreciation in value	48	26
Opportunity cost	20	6
Totals	$128	$92

Multiplying these figures by our national data (320,000 × $128) and (640,000 × $92.00) yields a result of about $100 million ($40,960,000 + $58,888,000 = $99,840,000). This means that even if *every* debtor surrendered his car after an action of replevin was filed against him, the added expense would be 100 million dollars.

Assuming, however, that Johnson's figures are correct in that 38% of the debtors will not surrender the cars, but will force creditors to replevy them (R. Johnson, *supra* note 6, at 36), then this additional expense must be added on. If, as Johnson assumes, each additional actual replevin would add $125 in costs, then the formula to determine this additional expense is 960,000 × .38 × $125.00. This yields a result of $43,350,000. Added to the costs of the initial entry fees, this means that, as a conservative estimate, forcing creditors to use replevins would add about $143 million in cost.

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$143 million for the nation as a whole.[55] Under any analysis the cost of depriving the creditor of self-help repossession is considerable.

4. TO THE EXTENT THAT REPLEVIN CAUSES ADDED COSTS, WHO WILL BEAR THEM? CAN THEY BE AVOIDED?

Creditors do not absorb additional significant costs without making strenuous efforts to pass them on to others. Faced with added costs, the creditors in the automobile market will have a variety of options open to them. First they may simply raise their interest rates and pass on the cost to the debtor car-buyer. If in some states the usury limitations or the competition keeps them from raising their interest rates,[56] they may attempt to reduce their losses by denying credit to those most likely to default or by reducing the likelihood of default by requiring a higher downpayment. Indeed Professor Johnson points out the ironic way in which this may work. The least creditworthy are typically unskilled workers who have been on the job for only a short period of time. The probability of nonpayment, even by the poorest credit risks, goes down as the downpayment goes up.[57] Since such a person will have only limited funds for a downpayment, the requirement of a higher downpayment may force him to buy a less expensive used car or to borrow the money for the down payment from another source. The other source is likely to be a consumer finance company that lends not at 11 or 12 percent but at 24 or 36 percent, and if the customer must trade down to a used car he will probably have to pay a significantly higher rate of interest than he would

55. Scaling down Johnson's cost figures for new cars from $231 to $128, and for used cars from $189 to $92, means that the total cost of repossession will drop from his estimate of 16 million to our estimate of 9.5 million (23,384 new car repossessions in California × $128 = $2,993,132; 42,616 used car repossessions × $92 = $3,920,652. Add to these figures his estimate of $2,640,000 in added marginal replevin costs and the result is $9,553,784 in total expense.)

56. "At present, thirty-five states regulate finance charges on the instalment sale of motor vehicles . . . ." Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81, 87 (1967). In some states lenders are already lending at the maximum permitted rate, but there are an equal or larger number where that is not so, at least as to new cars.

57. In one study, G. MOORE & P. KLEIN, THE QUALITY OF CONSUMER INSTALMENT CREDIT 82 (1967), the authors concluded: "High down-payment ratios have been consistently associated with a smaller degree of subsequent collection difficulty." P. MCCRACKEN, J. MAO, C. FRICKE, *supra* note 40, at 136-39, also found that the higher the down payment, the lower the repossession rate. *See also* White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New Car Buyers and Auto Loans*, 69 MICH. L. REV. 1207 (1971) which discusses loan officer utilization of this fact to keep default and hence repossessions at a low rate.

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on a new car.[58]

There are other options which Professor Johnson points out. In some cases sellers may raise the cash price of automobiles to offset the loss of earnings on credit sales. Where the usury limit has been reached on one form of loan, the creditors may raise their rates on other forms of loans to pay the cost of replevin. Each of these latter creditor solutions is particularly offensive since it causes the shift of the cost that should properly be borne by credit buyers of cars to cash buyers or to credit buyers of other goods.

Of course it is possible that creditors can avoid some of the costs by a more careful selection of their debtors. It is conceivable that creditors under a new system would find it in their interest to refuse to lend to their lowest stratum of debtor and thus save themselves the cost of replevin in a significant number of cases. One should note the difficulties with such an approach however. No creditor can identify in advance any debtor that will surely default. Rather, he makes his loans on the basis of a profile made up of income, debts, obligations, length of time on the job, etc. He knows from experience that certain groups will contain a larger number of defaulters than will other groups. In order to minimize his defaults he must either spend a greater amount in an attempt to refine his classifications, or he must eliminate seven or eight debtors who would pay in order to avoid two or three who would not pay. Neither Professor Johnson nor anyone else that I know of offers data on the utility of a more intensive credit check, or on the ability of the automobile lenders to maintain their volume by diverting funds to other kinds of loans. If, as may well be the case, the marginal costs for substantially improving his power to discriminate among defaulting and nondefaulting debtors is great, and if his capacity to maintain his volume by making loans in other markets is limited, the creditor will surely seek other ways of maintaining his volume as long as he can make a decent return

58. The Michigan rates on new and used cars afford an interesting comparison:

> A seller licensed under the provisions of this act shall have the power and authority to charge, contract for, receive or collect a finance charge, as defined in this act, on any installment sale contract covering the retail sale of a motor vehicle in this state which shall not exceed the rates indicated for the respective classification of motor vehicles as follows:
>
> Class I. Any new or used motor vehicle designated by the manufacturer by a year model of the same or 1 year prior in which the retail sale, then being financed, is made, $6.00 per $100.00 per year.
>
> Class II. New or used motor vehicles of a model designated by the manufacturer by a year not more than 2 years prior to the year in which the sale is made, $9.00 per $100.00 per year.
>
> Class III. New or used motor vehicles of a model designated by the manufacturer by a year more than 2 years prior to the year in which the sale is made, $12.00 per $100.00 per year.

MICH. COMP. LAWS § 492.118 (1948).

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rather than refusing to lend to a significant group of those to whom he now lends. Nevertheless one can criticize Professor Johnson's study for giving only limited consideration to the possibility that creditors will find inexpensive ways of discovering and eliminating prospective defaulters.

To the extent that creditors are unable to minimize the costs, exactly who will bear them is uncertain. Surely the creditors will leave no stone unturned in their attempt to pass on the costs to their debtors. It seems likely that by hook or by crook they will be successful in passing on these costs.

5. IF CREDITORS HAD TO GO TO COURT TO REPOSSESS, WOULD THEY SEEK DEFICIENCY JUDGMENTS MORE FREQUENTLY THAN THEY DO NOW?

Professor Johnson's data show that automobile creditors seek deficiency judgments in only two out of every nine repossessions.[59] Doubtless this failure in certain cases to seek deficiency judgments represents an economic judgment on the part of the creditor that the likely net proceeds from such an action will not equal the lawyer's fee, the entry fee, and the service and collection fees. However if he is foreclosed from self-help repossession and, upon repossession by replevin, finds himself already in court having paid a lawyer's, a service, and a filing fee, it may be economical for him to go after a deficiency judgment in seven or eight out of 10 cases.

Strictly speaking, that result is not an added cost of the abolition of self-help repossession and, theoretically at least, it reduces the cost discussed above.[60] However the study conducted by Professor Shuchman indicates that there are substantial flaws in the deficiency process and suggests that a debtor who is made to pay a deficiency in fact pays more than he should under the circumstances because the car is typically sold for less even than its wholesale value, yet the deficiency is calculated by substracting the amount due from the amount at which it is sold.[61] If Professor Shuch-

59. The data were taken from a study of repossessions in the District of Columbia by the National Commission on Consumer Finance. *See* Johnson, *Creditors' Remedies and Rate Ceilings Some Study Results of the National Commission on Consumer Finance*, 26 PERSONAL FINANCE L. Q.R. 65 (1972).

60. Professor Johnson concludes that the revenue derived from additional deficiencies is likely to be small. Certainly that is consistent with my experience in representing legal aid defendants. If the debtor has refused to pay or been unable to pay in the face of threatened and ultimately actual repossession of his automobile, who is to say that he has the cash available to pay a deficiency judgment? One plausible explanation for the fact that the creditors choose to pursue deficiencies in only two out of nine cases is that they make the correct economic judgment that in the other seven cases their prospective return will be less than the cost of going forward to judgment. Neither Professor Schuchman's article nor any other study known to me holds out the prospect of grand returns on deficiency suits.

61. *See* Shuchman, *supra* note 51, at 31-34.

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man's conclusions about the Hartford market accurately portray the market elsewhere, any due process procedure that stimulates creditors to seek deficiencies has not done a favor for the debtor. In fact it has left him with a collection agency hounding him on a judgment that shows he owes more than he actually should. In effect it magnifies an abuse that Professor Shuchman and a few state legislatures[62] believe is the most troublesome aspect of the whole auto repossession and collection business.

6. ARE PRIVATE REPOSSESSORS MORE OR LESS LIKELY TO DISTURB THE PRIVACY AND UPSET THE LIFE OF THE DEBTOR THAN ARE OFFICIAL REPOSSESSORS?

The Uniform Commercial Code permits self-help repossession only if there is no breach of the peace. Typically the courts have interpreted this section to mean that a creditor can snatch the car off the street at night but that he may not confront the debtor, go into his home, or secure the car by misrepresentation.[63] Neither the number of reported cases nor debtor-creditor folklore indicates that a significant percentage of self-help repossessions have involved breach of the peace.

Official repossessions are not limited by similar breach of the peace restrictions. In Michigan for example the sheriff may use reasonable force;[64] if the debtor refuses to give up the car, presumably the sheriff may get out his gun and threaten the debtor

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62. Wisconsin has greatly altered its procedure for dealing with resale and has considerably restricted deficiency judgments at least in the used car market:

> If the merchant repossesses or accepts voluntary surrender of goods which were not the subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the amount owing at the time of default was $1,000 or less, the customer is not personally liable to the merchant for the unpaid balance of the debt arising from the sale, and the merchant's duty to dispose of the collateral is governed by the provisions on disposition of collateral under chs. 401 to 409.

WIS. STAT. § 425.209(3) (1971).

Washington has effectively abolished deficiencies in many consumer cases:

> Notwithstanding any other provision of this Code, in the case of a purchase money security interest in consumer goods taken or retained by the seller of such collateral to secure all or part of its price, the debtor shall not be liable for any deficiency after the secured party has disposed of such collateral under RCW 62A.9-504 or has retained such collateral in satisfaction of the debt under subsection (2) of RCW 62A.9-505.

WASH. REV. CODE ANN. § 62A.9-501 (1966).

63. *See, e.g.,* Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934); Dominick v. Rea, 226 Mich. 594, 198 N.W. 184 (1924); Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Civ. App. 1968). *See also* cases cited in note 36 *supra*, and Annot., 99 A.L.R.2d 350 (1965).

64. *See, e.g.,* MICH. COMP. LAWS § 600.7351 (1948) (sheriff's powers to seize goods).

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or remove him from the car with whatever force is necessary. Conceivably the sheriff can even arrest a troublesome debtor. A repossession by state officials is likely to occur in the daytime, perhaps in the presence of the neighbors. Some may argue that it is better to have a car repossessed in midday in the presence of everyone than to wake up in the morning and find it gone. *Quaere* what the typical debtor would say about that? It is not clear to me that the public seizure and towing and the possible threat to one's family are to be preferred over the private repossessor with his jump wire. Indeed if I were to balance the scale, I would conclude that there is a greater likelihood of a disturbance of the debtor's privacy in the official repossession case than there is in the prototype of the private repossession case.

So much for the potential costs to society and to the debtor. The first four questions revealed costs to society of instituting an exclusively judicial repossession process. The last two questions deal with added costs to the debtor himself that might result from this institution of a judicial repossession system. Presumably the balancing system must not only weigh the cost to society but, in determining the individual benefit, should conduct a subsidiary weighing and net those parts of the procedure which are good for the individual against those which are not.

B. *The Benefits of Judicial Repossession*

1. HOW OFTEN ARE GOODS REPOSSESSED FROM THE DEBTOR WHO IS NOT IN DEFAULT?

If goods are repossessed from debtors who are in fact current on their payments in a significant percentage of the cases, and debtors lose the goods as a result of this repossession, that is surely an intolerable circumstance and it should be remedied. However, both Professor Johnson's data and the experience in the reported cases[65] indicate quite the opposite.

Professor Johnson's California data show that on the average each contract from which a repossession arises has been rewritten

65. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed sub nom.*, Adams v. Southern Cal. First Nat'l Bank, No. 72-1484, 9th Cir., Mar. 15, 1972), represents two consolidated cases. In *Adams* plaintiff Adams had received six letters and numerous phone calls demanding payment between the time of default and repossession. By the time of repossession, Adams was over 4 months delinquent in his payments. In the companion case, Posadas v. Star & Crescent Federal Credit Union, 338 F. Supp. 614 (S.D. Cal. 1972), plaintiff Posadas was over 3 months delinquent in his payments when his truck was repossessed by the defendant.

In Messenger v. Sandy Motors, Inc., Civil No. C929-71 (N.J. Super. Ct., Union Cty., Sept. 29, 1972), plaintiff Messenger had been more than 10 days late with 12 payments out of a total of 14 before his car was repossessed. The defendant-bank, which repossessed the car, claimed it attempted to contact the plaintiff by telephone and by mail prior to repossession.

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or extended between three and four times.[66] Moreover, on the average they show almost 30 telephone calls, delinquency notices, or personal contacts with the debtor before repossession.[67] These data are inconsistent with the proposition that cars are often repossessed from debtors who are current in their payments. His data confirm the creditor folklore that the creditor stands to lose money on each repossession and that it is in his selfish economic interest to consider a variety of alternatives prior to repossession.[68] Moreover I know of no other data nor have I heard even the most zealous consumer advocates argue that repossession from debtors not actually in default is a serious problem.

2. HOW MANY OF THOSE DEBTORS IN DEFAULT AT TIME OF REPOSSESSION HAVE DEFENSES THAT WOULD CAUSE A JUDGE TO ALLOW THEM TO KEEP THE CAR PENDING THE OUTCOME OF TRIAL?

If the debtor has a complete setoff and so has a right to keep his car without payment, he may be grievously injured by a repossession and resale of the automobile. If, on the other hand, his setoff or counterclaim is one for $50 or $100 which would not wipe out his $500 in arrearages, the self-help repossession of the automobile does not deny him the right to the car in circumstances in which the due process hearing would give it to him. Even if his claim were meritorious, it would not entitle him to possession of the automobile, and his right to a hearing would not enable him to keep his car.

In her brief before the Ninth Circuit in *Adams v. Egley*, Professor Mentschikoff argues first that a debtor must give notice in order to have a right to set off under section 2-717 of the Uniform Commercial Code, and second that most purchasers of new cars have given up the right to set off by their agreement on the sales contract[69] to accept repair or replacement of the car.

Although Professor Mentschikoff may overstate her case somewhat,[70] her analysis of the Uniform Commercial Code is theoreti-

66. R. Johnson, *supra* note 6, at 17.
67. *See* note 43 *supra*.
68. *Id.*
69. Brief for Permanent Editorial Board for the Uniform Commercial Code, *supra* note 6.
70. Some courts have found clauses that limit the buyer's remedies to be invalid. For example in Orange Motors v. Dade County Dairies, 10 UCC REP. SERV. 325 (Fla. 3d Dist. Ct. App. 1972) and Rehurek v. Chrysler Credit Corp., 10 UCC REP. SERV. 988 (Fla. 2d Dist. Ct. App. 1970), the courts held the clauses invalid because they were not conspicuous. In Russo v. Hilltop Lincoln Mercury, 10 UCC REP. SERV. 768 (Mo. Ct. App. 1972), where a car was totally destroyed in a fire as a result of defective wiring, the seller's clause in the contract attempting to limit the buyer's remedy to repair and replacement did not bar a suit for damages, since there was no car to repair. Jacobs v. Metro Chrysler-Plymouth, 125 Ga. App. 462 (1972) held that once a seller has refused to repair, or unsuccess-

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cally correct. However it seems likely that any debtor with a bona fide and sizable setoff will be able to negotiate a reduction in the total price and to get his car back. At least if the debtor can make newly agreed payments for the balance, Professor Johnson's data show that the creditor is most likely to accept the adjustment. If, as a practical matter, the judicial hearing will permit the debtor to keep his car, it is no answer that the judge should not give his car back or that the creditor has no legal obligation to return it. If the judicial proceeding offers him an opportunity to present this argument to the creditor and if a significant number of debtors will do so, but if those same debtors will not present their arguments if the car is simply taken, then the hearing has given him a substantial benefit. This is so notwithstanding the fact that he may have no legal right to return of the car.

The question then becomes, how many debtors have bona fide claims of substance that they could assert? We have no data on this question. Professor Johnson makes a variety of assumptions about people, but I am skeptical of them. He concludes that, since 60 percent of the people give up the car when the creditor asks for repossession, those debtors have no defenses. It is equally plausible that they have no lawyer, that they are not confident of their own ability to present the defense, or that they are cynical about the court's willingness to listen to a defense. Thus I find Professor Johnson's data on this point unpersuasive. However that is not to say that I believe that a large number of debtors whose cars are repossessed have significant bona fide claims to assert against their sellers. Indeed my guess would be the opposite and my anectdotal experience in legal aid practice suggests that with a little lawyer stimulation most debtors can think up a complaint or two, but rarely do these amount to significant bona fide objections of the kind that would cause a creditor to forego any significant part of his claim. My guess, therefore, is that Professor Johnson is correct, although I know of no data that support his conclusion.

3. HOW MANY DEBTORS AMONG THOSE WITH SUCH DEFENSES WILL ASSERT THEM?

If 999 debtors out of 1,000 whose cars were repossessed had good defenses to the claims of default by their creditors, but if none of them would present those claims at a replevin hearing, there would be no need for the replevin hearing and they would not benefit by it. My guess, as indicated above, is that far fewer than 999 out of 1,000 have such defenses and my further guess is that among those with such defenses, only an insignificant minority would come to

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fully repaired, this clause is no longer effective as a limitation of remedies. But see also Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Ct. Civ. App. 1972) where such a clause was upheld.

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court in a replevin suit to present them. On this question there are some data.

Professor Johnson quotes a study of the National Commission on Consumer Finance to the effect that, in cases in which the creditor is a bank, 65 percent of the defendants in deficiency cases default, while in cases in which the creditor is a finance company, 47 percent of the defendants default.[71] Those data are consistent with my experience. All data that are known to me suggest that a large number of consumer defendants always default. Of course it is conceivable that their behavior could be changed by an aggressive education process. But it is more likely that the bulk of consumer defendants will continue to default. Many will do so because they have no effective defense; others because they are afraid or ignorant. In any event it is likely that any prerepossession hearing will be sparsely attended by defendants and will therefore do little to enable debtors to keep their cars.

C. *The Balance of Costs and Benefits*

When one has put all the data on the scale and made his best guesses about facts unknown, how does the due process scale tip? Does it call for the elimination of self-help repossession? In the face of Professor Johnson's data no one can seriously dispute that the removal of self-help repossession will substantially increase car lenders' costs. Professor Johnson's conclusion that these costs will come to rest on the shoulders of the debtor class is more speculative, but it is greatly in the creditors' self-interest to pass the costs on, and nothing suggests that the creditors cannot do so. Thus on one side of the scale I find a heavy cost borne principally by the consumer debtor class.

What are the benefits to the individual? Surely some debtors who now lose their cars to repossessors will present defenses and save their cars under a prehearing system. An occasional tricky repossession would be foreclosed. But there are some potential costs even to the individual—official repossession may be more forceful and is likely to be more notorious than private repossession. Finding themselves in court to replevy, creditors who now do not pursue deficiencies may choose to do so under a replevin only system. One can only guess about how many out of 1,000 debtors might benefit from a compulsory judicial repossession system. For the reasons given above, my guess is that only a handful in a thousand would benefit. If one assumes that two or a half dozen in a thousand who now lose their cars to self-help repossession would be able to keep them in a compulsory replevin case, how does he come out? Are 120 or 360 cars worth $16 million? Are

71. R. Johnson, *supra* note 6, at 44, *citing* a National Commission on Consumer Finance Press Release, May 5, 1972.

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a few thousand cars worth $143 million? I conclude not; for me the balance tips against the requirements of a prerepossession hearing.

If one assumes that the costs and benefits are as I have suggested above, he can distinguish this case from *Fuentes* on a due process basis. First, the additional direct costs that the *Fuentes* decision causes are not as great as those that would be caused by a denial of self-help repossession. By hypothesis in the *Fuentes* case, the creditor has already instituted a court action and has procured service of the complaint and summons. Thus he has already paid the entry fee, the service fee, and the initial lawyer's fee. That case added only the cost of delay and the cost of a hearing.

It is likely that *Fuentes* is different from automobile repossession in a second and more fundamental way. All the available evidence suggests that replevin is used almost exclusively for furniture and other nonautomobile consumer goods, whereas self-help repossession is used almost exclusively for seizing cars and not for seizing other kinds of consumer goods. If one believes the folklore that cars are the only widely held consumer goods that have any significant resale value and that creditors take security interests in furniture, hunting dogs, and such, not for their resale value, but for the *in terrorem* effect that the threat of repossession will have on the debtor, he can conclude that the creditor has much more at stake in procuring speedy repossession of cars than of other consumer goods. This is true for several reasons. For one thing by hypothesis the opportunity costs of waiting for 30 days or 60 days is marginal if the ultimate replevin will produce only the greasy arm chair with no resale value. If the true goal of instituting replevin proceedings in such cases is to maintain the credibility of the creditor's threat of repossession, that goal is as easily achieved and perhaps better achieved by a procedure which contains a hearing requirement as it is by one which does not contain such a requirement. Although no one has been kind enough to collect the data with respect to the replevin cases that Professor Johnson has collected with respect to self-help cases, I believe it likely that the additional costs which the creditor must assume because of the *Fuentes* case are small indeed by comparison with those he would be made to assume if *Adams v. Egley* were the law of the land. Thus the Court could rationally conclude that the due process clause does not require the abolition of self-help repossession in *Adams v. Egley* and yet find that *Fuentes v. Shevin* remains good law.

IV. CONCLUSION

There are three ways then in which a court could decide *Adams v. Egley* in favor of the creditor without a direct attack on *Fuentes v. Shevin*. First, easist and cleanest is the position adopted by the court in *Bank of America v. Oller*; namely, to find there is no im-

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permissible state action in self-help repossession. A second possibility is the one suggested by Justice White in his dissent in *Fuentes v. Shevin*; namely, to find that there is a constitutional right, but to hold that the creditor and debtor can waive that right by a provision contained in the security agreement. As I have indicated above, I find this an essentially dishonest route to the correct result. Finally the Court can engage in a more careful weighing of the interests than it did in *Fuentes v. Shevin*. If it does such a weighing, I hope that it will conclude that there is no violation of the due process clause by self-help repossession. The costs of abolishing self-help repossession are great; the benefits for the individual debtor are uncertain and are probably small. In *Fuentes* it is probable that both the costs and the benefits were small, and thus a court might reasonably find the scales tipped one way in *Fuentes* and another way in this case.

In our demands for more and greater due process we lawyers have sometimes behaved like engineers gone berserk. Just as an engineer or an architect commissioned to do a job must be reined in and made to consider the costs, so the lawyer and judge must be made to measure the costs to society of these additional due process requirements. Moreover the lawyer's and judge's role is a more subtle one than the architect's, for due process, unlike a new building, is nothing in and of itself. It has value only to the extent that it produces sounder and better results. That not all persons share the lawyer's love of due process as an independent value is well illustrated by a recent *New Yorker* cartoon. In that cartoon one convict reponds to his cell mate by saying, "What's so good about due process? Due process is what got me ten years."

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