

# DUE PROCESS AND VERMONT'S ABUSE PREVENTION STATUTE

## INTRODUCTION

One aspect of the societal self-examination which has accompanied recent women's movements has been the acknowledgment of the extent and seriousness of family violence<sup>1</sup> in this country. While family violence is an age-old problem, it is only recently that serious efforts have been made by social service agencies and the legal system to understand it and address it in a meaningful fashion. Vermont recently joined the growing ranks of states which have responded to family violence by enacting family abuse prevention statutes.

Vermont's statute is entitled Abuse Prevention<sup>2</sup> and its operating mechanism is the subject of this note. After a brief discussion of the history, extent, and nature of the family violence problem in this country and in Vermont, this note will evaluate the emergency relief provision<sup>3</sup> of the statute to determine its compliance with due process requirements under the United States Constitution.<sup>4</sup> In doing so, some recent trends in procedural due process doctrine will be outlined, and some of the implications of these trends for courts and lawmakers will be discussed.

## I. THE PROBLEM OF FAMILY VIOLENCE

It is probable that family violence has been part of the human condition since the advent of marriage as a human arrangement.<sup>5</sup> There is some tendency to think of family violence as a new problem; this is most likely due to the increased focus placed on the problem as a result of the changing status of women in society. What is indeed new is the public acknowledgment and disclosure

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1. For the purposes of this note, the term "family violence" will be used to refer primarily to wife beating. Although the general usage encompasses all forms of physical abuse among family members, wife beating and child abuse occur more frequently than other forms. Child abuse is not emphasized in this note because the statutory prohibitions most effective for child abuse prevention are found in provisions other than the Abuse Prevention Statute. See VT. STAT. ANN. tit. 13, §§ 1351-1356 (Supp. 1980).

2. VT. STAT. ANN. tit. 15, §§ 1101-1107 (Supp. 1980).

3. *Id.* § 1104.

4. U.S. CONST. amend. XIV, § 1.

5. Commentators on the problem have uncovered evidence of wife beating as a social problem as early as Roman times. Note, *Wife Beating: Law and Society Confront the Castle Door*, 15 GONZ. L. REV. 171, 173 (1979).

of family violence by the victims, the criminal justice system and the perpetrators. Until recently, very few batterers or battered wives publicly disclosed their problems, and, when they did, the legal system was unable to respond appropriately.<sup>6</sup>

Despite the fact that, even today, many incidents of family violence go unreported,<sup>7</sup> estimates based on the number of reported incidents, and on the incidence of other crimes which result from family violence, place the number of battered women in the United States as high as 28 million.<sup>8</sup> While violent crime is traditionally associated with urban centers, there is evidence that family violence is not necessarily confined to those areas. In Vermont, for example, over fourteen percent of the female population aged fifteen years or older have been characterized as "at risk" of abuse.<sup>9</sup> The extent of family violence in our society can be grasped indirectly by examining homicide statistics collected both nationally and locally. In this country, nineteen percent of all homicide victims were related to the offenders.<sup>10</sup> In some cities the proportion of victims related to offenders is as high as 31 percent.<sup>11</sup>

Given the extent and seriousness of the family violence problem it is understandable that considerable effort is now being expended to aid battered wives and to deter their batterers. Because of the nature of the problem, however, protecting battered wives has proven to be an extremely frustrating and difficult task. Although the causes and characteristics of family violence have not been fully identified, researchers now believe that family violence does not occur constantly or at random intervals but repeats itself in a cyclical behavior pattern.<sup>12</sup> Episodes of extreme violence are

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6. For some of the reasons why disclosure does not occur, see *id.* at 173-74. The inadequacy of legal remedies such as divorce, rape laws, and other criminal prosecution has been discussed by several commentators. See, e.g., *id.* at 194-99; Note, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MAR. J. PRAC. & PROC. 549 (1978).

7. It has been suggested by some researchers that women fail to report incidents of battering because of a sense of shame or guilt, and a fear of retribution. See Note, *supra* note 5, at 174. Cyclical patterns of abuse and reconciliation also deter women from reporting incidents of abuse. See *infra* text accompanying notes 12-16.

8. Note, *supra* note 5, at 174.

9. State of Vermont Department of Health Planning file statistics (available from the Governor's Commission on the Status of Women, Montpelier, VT.) See also Marquardt & Cox, *Violence Against Wives: Expected Effects of Utah's Spouse Abuse Act*, 5 J. CONTEMP. L. 277, 278 (1979) for Utah statistics regarding use of shelters.

10. Buzawa & Buzawa, *Legislative Responses to the Problem of Domestic Violence in Michigan*, 25 WAYNE L. REV. 859, 859-60 (1979).

11. *Id.* at 860.

12. L. WALKER, *THE PSYCHOLOGY OF THE BATTERED WOMAN* 55 (1979).

characteristically followed by contrition, affection, and kindness toward the battered wife by the batterer.<sup>13</sup> This behavior compounds the hesitance of the battered wife to seek assistance.<sup>14</sup> By maintaining a barrage of loving behavior and pleas for forgiveness, the batterer fosters hopes that the violent episodes will not reoccur.<sup>15</sup> It is during contrition, when pressure to forgive is strongest that the traditional criminal justice remedies are presented to the battered wife.<sup>16</sup>

In order to be of any assistance to the battered wife, the criminal justice system must negate the pressures applied by the contrite batterer or fortify the battered wife against them. Historically, the remedies presented by the criminal justice system failed to take these pressures into account.<sup>17</sup> As a result, at the time when the battered wife most needs quick, effective protection and isolation from her batterer, the criminal justice system either attempts to affect a reconciliation<sup>18</sup> or insists on the application of cumbersome and inappropriate remedies which do nothing to mitigate the pressures from the batterer.<sup>19</sup>

With the increased attention focused on family violence, statutes have been enacted which are more responsive to the pressures caused by the cyclical character of family violence.<sup>20</sup> The purpose of these statutes is to provide immediate shelter for the battered wife and protection from direct contact with her batterer. The thresholds for protective action by courts were lowered and the de-

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13. *Id.*

14. *Id.* at 66.

15. *Id.* at 67-68.

16. *See Note supra* note 5.

17. Even more striking than the inadequacy of such remedies as divorce or separation proceedings is the historical obstacle of interspousal tort immunity. *See Note, Wife Abuse: The Failure of Legal Remedies*, 11 J. MAR. J. PRAC. & PROC. 549 (1978).

18. *Note, The Battered Wife—The Legal System Attempts to Help*, 48 CIN. L. REV. 419, 424 (1979).

19. *Id.* at 424-25.

20. Examples of statutes which include *ex parte* order provisions similar to the Vermont provision are: ARIZ. REV. STAT. ANN. § 13-3602 (Supp. 1980); CAL. CIV. CODE § 4359 (West Supp. 1981); CONN. GEN. STAT. ANN. § 46b-38 (West Supp. 1977); D.C. CODE ANN. § 1004(c) (1973); HAWAII REV. STAT. §§ 585-1 to 585-4 (Supp. 1980); KAN. STAT. ANN. § 60-3105, 60-3106 (Supp. 1980); MINN. STAT. ANN. § 518B.01 subd. 7 (West Supp. 1980); NEB. REV. STAT. § 42-925 (1978); NEV. REV. STAT. § 33.020 (Supp. 1980); N.H. REV. STAT. ANN. § 173-B.6 (Supp. 1979); N.C. GEN. STAT. § 50-13.2(c) (Supp. 1979); N.D. CENT. CODE § 14-07.1-03 (Supp. 1979); OHIO REV. CODE ANN. § 3113.31(D) (Baldwin 1979); PA. STAT. ANN. tit. 35, § 10188 (Purdon 1977); TEX. FAM. CODE ANN. § 71.15 (Vernon Supp. 1980-81); UTAH CODE ANN. § 30-6-5 (Supp. 1981).

lays in the response time of the legal system were reduced. This was accomplished by provision for emergency orders which granted custody of children and possession of the home to the battered wife and restrained the batterer from harassing her.

Vermont's Abuse Prevention Statute is one example of such a statutory response to the vexing and tragic problems posed by family violence. In addressing these problems, however, the Abuse Prevention Statute raises questions of its own. One such question is whether the emergency relief provision of the Statute unacceptably interferes with the due process rights of the batterer. Another is whether such considerations as humane treatment of the batterer should be taken into account by lawmakers and courts when responding to the problem of family violence.

## II. THE VERMONT ABUSE PREVENTION STATUTE

The purpose of the Abuse Prevention Statute is "to permit the district and superior courts to grant *immediate* relief for abuse within the family."<sup>21</sup> Viewed in the context of existing statutes relating to child abuse,<sup>22</sup> the apparent purpose of the Statute is to provide some solution to the quandary of the battered wife<sup>23</sup> by creating a mechanism to give immediate protection from her batterer.

The basic forms of relief provided under the statute are protective orders restraining the batterer in one way or another. Orders may be obtained restraining the batterer from further acts of abuse,<sup>24</sup> awarding the plaintiff exclusive possession of the premises,<sup>25</sup> and awarding the plaintiff sole custody of the children.<sup>26</sup> These orders may be issued only after notice to the batterer and a hearing.<sup>27</sup> Upon taking effect, they may continue for up to a year and may at that time be renewed.<sup>28</sup> Either party may obtain a

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21. H.R. 401 (Bien. Sess. 1979) (sponsors statement of purpose).

22. In Vermont child abuse is a crime, punishable under VT. STAT. ANN. tit. 13, §§ 1351-1356 (Supp. 1980). See *supra* note 1.

23. It is worth noting that the definition of "family member" in the statute comprehends only spouses, former spouses, and children. Consequently, a woman living with a man but not married to him is not protected in her own right, though any mutual children probably are. VT. STAT. ANN. tit. 15, § 1101(2) (Supp. 1980).

24. VT. STAT. ANN. tit. 15, § 1103(a)(1) (Supp. 1980).

25. *Id.* § 1103(a)(2).

26. *Id.* § 1103(a)(3).

27. *Id.* § 1103(b).

28. *Id.*

modification of these orders at any time upon a showing of a substantial change of circumstances.<sup>29</sup>

These orders do not provide protection for the battered wife from the time she initiates action; there is still a time during which her batterer knows she has taken action but no protective orders are in effect. The emergency relief provision is designed to extend protection to the battered wife from the moment that she begins to act. The orders issued under the emergency relief provision are issued *ex parte* without notice or adversary hearing.<sup>30</sup> Under the emergency relief provision, there are three types of orders available, each issuable upon different findings by the court. Upon finding that there is "immediate danger of further abuse" the court may order the batterer to refrain from abuse or to refrain from restraining the plaintiff's liberty, or both.<sup>31</sup> Upon finding that the plaintiff will be without shelter because she has been forced from the home, the court may order the batterer out of the home and award sole possession of the home to the plaintiff.<sup>32</sup> Finally, upon finding that the children are in immediate danger of abuse, the court may award the plaintiff sole custody.<sup>33</sup> The court shall schedule a hearing "as soon as reasonably possible [but no] more than 10 days from the issuance of the order[s]."<sup>34</sup> The batterer must be promptly notified of the hearing.<sup>35</sup> At the hearing, the plaintiff must prove her allegation by a preponderance of the evidence for the orders to be continued.<sup>36</sup>

It is the second kind of order under the emergency relief provision, the order that the batterer vacate the premises, which presents the potential for a procedural due process problem. In determining the constitutionality of these orders the questions must be: (1) whether there are any permissible justifications and conditions for depriving him, albeit temporarily, of the possession of his home without notice or opportunity to be heard; and (2) if there are justifications and conditions, whether they are satisfied by the language of the emergency relief provision.

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29. *Id.*

30. *Id.* § 1104(a).

31. *Id.* § 1104(a)(1).

32. *Id.* § 1104(a)(2).

33. *Id.* § 1104(a)(3).

34. *Id.* § 1104(b).

35. *Id.*

36. *Id.*

### III. THE DUE PROCESS PROBLEM

To better understand the underlying due process problem it will be necessary first to discuss procedural due process theory. Secondly, some United States Supreme Court cases dealing with ex parte deprivations will be discussed. The principles which can be extracted from these cases will be used to compose an analytical framework which will then be applied to the emergency relief provision.

#### A. Background and Rationale

The Fourteenth amendment of the United States Constitution reads, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."<sup>37</sup> In numerous cases which presented opportunities to interpret the procedural due process clause, the Supreme Court determined that two effects of the due process requirement were to create a right to be notified<sup>38</sup> and to be heard at a meaningful time before deprivation of any significant life, liberty or property interest.<sup>39</sup> The question of what constitutes a hearing at a meaningful time in each situation has proved to be a difficult one to resolve. Professor Laurence Tribe has attempted to impose some order on the resulting opinions,<sup>40</sup> and some of his terminology and analysis has been adopted here.

According to Professor Tribe, the ambiguities of the Supreme Court's determination of what constitutes a hearing at a meaningful time stem from the existence of "alternative conceptions of the primary purpose of procedural due process. . . ."<sup>41</sup> Tribe calls these conceptions *intrinsic* and *instrumental*.<sup>42</sup>

Under the intrinsic view of due process, as set forth by Tribe, the right to be heard guarantees those persons whose rights will be affected by government action "the chance to participate in the

37. U.S. CONST. amend. XIV, § 1.

38. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *In re Oliver*, 333 U.S. 257, 273 (1943), *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 267 (1870); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 234 (1863).

39. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Brinkerhoff-Paris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

40. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7 (1st ed. 1978).

41. *Id.* at 502.

42. *Id.* § 10-7.

process by which those decisions are made, an opportunity that expresses their dignity as persons."<sup>43</sup> Tribe characterizes this view as intrinsic because, if the goal of due process is to preserve human dignity, then the process so guaranteed is "intrinsically significant, the very *essence* of justice."<sup>44</sup>

In contrast to the intrinsic view, the instrumental view emphasizes the consequences of procedural rules.<sup>45</sup> The purpose of due process requirements according to this view is to insure that grievances are correctly adjudicated and that individuals receive the benefits to which they are entitled.<sup>46</sup> The instrumental conception admits more balancing of interests; if the personal interest at stake is not high and the risk of an inaccurate determination is not great under a particular procedure, then it complies with due process.<sup>47</sup>

In many respects, the Supreme Court has adopted the instrumental viewpoint in making determinations of the amount of process required.<sup>48</sup> A strong undercurrent of the intrinsic view remains, however,<sup>49</sup> and it is in the analysis of the question of what constitutes a meaningful and timely hearing that the tension between the two views is intensely apparent. In order to appraise the current state of these requirements and to develop a framework in which to apply them to the emergency relief provision, it is necessary to analyze the major cases in which the issues of timely notice and a hearing were addressed: the prejudgment repossession and garnishment cases.<sup>50</sup>

The principles articulated by the Supreme Court in these cases are important for the present analysis because the significant characteristics of the challenged statutes bear strong similarities to those of the emergency relief provision. Before proceeding to a discussion of the individual cases, however, it is worth noting certain

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43. *Id.* at 502.

44. *Id.* at 503.

45. *Id.*

46. *Id.*

47. *Id.* at 506.

48. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976). In that case, the Court adopted a tripartite instrumental calculus for determining the amount of process required for deprivations in an administrative context.

49. *See, e.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), discussed *infra* at text accompanying notes 51-66.

50. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

common factors which justify the reliance on these cases.

The prejudgment garnishment and repossession cases all dealt with challenges to statutes which permitted either the prejudgment garnishment or prejudgment repossession of property from a party. Under all of these statutes, the deprivation was permissible, upon application or demonstration of a legitimate claim or need, prior to any hearing or notice to the defendant. Under some statutes the defendant could obtain a hearing as soon as possible; under others there was no provision for a hearing at any time. The issue before the Court in all of these cases was the legitimacy of the *ex parte* deprivations. This is the same issue presented by the emergency relief provision.

Certain significant differences also exist among these statutes and between the statutes and the emergency relief provision. As with any analogy, there are limitations which will be acknowledged during the following discussion. The prejudgment garnishment and repossession cases represent the Court's most recent and comprehensive attempt to explicate the principle that, where a judicial deprivation of property is ordered, a hearing should be granted at a meaningful time. They are, therefore, of central importance to any analysis of the constitutionality of the *ex parte* deprivations of property sanctioned by the emergency relief provision.

### B. *The Prejudgment Garnishment and Repossession Cases*

The Supreme Court addressed the requirement of a predeprivation hearing in *Sniadach v. Family Finance Corp.*<sup>51</sup> In *Sniadach* the loan company obtained a garnishment of the petitioner's wages to insure repayment of a loan.<sup>52</sup> It did so under a Wisconsin statute which provided that, upon application to a court clerk, a summons could be obtained freezing the defendant's wages.<sup>53</sup> This garnishment was obtainable without prior notice to the defendant<sup>54</sup> and with no opportunity for the defendant to challenge the garnishment at a hearing prior to an action on the merits.<sup>55</sup> Justice Douglas,<sup>56</sup> writing for the Court, held that the statute

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51. 395 U.S. 337 (1969).

52. *Id.* at 337-38.

53. *Id.* at 338.

54. *Id.*

55. *Id.* at 339.

56. The authorship of this opinion and the opinions of the cases following is important because of the alleged effect of the change in Court composition on the doctrinal shifts

violated due process requirements.<sup>57</sup> Douglas based his holding on several considerations.

Firstly, he distinguished the statute from one which would provide for the taking of property in extraordinary circumstances.<sup>58</sup> Douglas listed the circumstances he regarded as extraordinary: 1) awarding "special protection to a state or creditor interest,"<sup>59</sup> and 2) obtaining personal jurisdiction.<sup>60</sup> In *Sniadach*, personal jurisdiction was otherwise obtainable.<sup>61</sup> Douglas gave no examples of a state or creditor interest worthy of protection by ex parte deprivations, but the cases he cited involved, among other things, seizures to prevent a bank failure<sup>62</sup> and to protect the public from misbranded drugs.<sup>63</sup>

Secondly, Douglas engaged in a truncated instrumental analysis of the possibilities of abuse and unjust hardship brought about by the lack of safeguards and the unequal position of debtor and creditor.<sup>64</sup> Douglas justified his summary analysis of the statute by reliance on the traditional intrinsic conception of due process.<sup>65</sup> In his concurrence, Justice Harlan relied exclusively on an instrumental conception of due process. "I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity . . . of the underlying claim against the alleged debtor *before* he can be deprived . . ."<sup>66</sup>

An opportunity to develop further the analysis begun in *Sniadach* was presented to the Court by *Fuentes v. Shevin*.<sup>67</sup> In *Fuentes*, the Florida and Pennsylvania statutes under review were similar in several respects.<sup>68</sup> Each statute authorized summary replevin of goods by a state agent.<sup>69</sup> The party applying for such a seizure

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evidenced in the cases. See *infra* text accompanying notes 91-93.

57. 395 U.S. at 342.

58. *Id.* at 339.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Fahey v. Mallonee*, 332 U.S. 245, 253-54 (1947).

63. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600 (1950).

64. 395 U.S. at 340.

65. *Id.* at 342.

66. *Id.* at 343. (Harlan, J., concurring).

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

68. *Id.* at 69.

69. *Id.* Replevin is "[a]n action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." BLACK'S LAW DICTION-

was required to post a bond and to claim, but only in a conclusory and routine manner, a right to the seized goods.<sup>70</sup> In each case the seizure was made without notice to the defendant and there was no opportunity for a hearing prior to the seizure.<sup>71</sup> One statute provided for a post deprivation hearing on the merits of the repossession; the other provided no opportunity for a hearing at any time.<sup>72</sup> In both cases the writs were obtainable from court clerks without any action by a judge.<sup>73</sup>

Justice Stewart, writing for the Court, adopted Justice Harlan's instrumental view from *Sniadach*. "The purpose . . . is not only to ensure abstract fair play to the individual. [It is] . . . to minimize substantively unfair or mistaken deprivations of property . . ."<sup>74</sup> However, he also reaffirmed the intrinsic reasoning of the Court in *Sniadach* by asserting a presumption that a hearing was required before any significant taking of property.<sup>75</sup>

Stewart, like Douglas in *Sniadach*, found no extraordinary circumstance to justify the deprivation.<sup>76</sup> Stewart refined the test for extraordinary circumstances by describing three essential characteristics: 1) a need to secure an important governmental or public interest, 2) a need for prompt action, and 3) strict control by the government of its monopoly on the use of force.<sup>77</sup> He did not further refine these but found them absent from the particular circumstances under review.<sup>78</sup> In the absence of such extraordinary circumstances and without any opportunity for defendants to test the creditor's claims in a prior hearing, the statutes violated due process requirements.<sup>79</sup> Justice White dissented on the grounds that the statutes effected protection of antagonistic property interests of the buyers and sellers in the same object; hence a hearing was not required.<sup>80</sup>

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ARV 1168 (rev. 5th ed. 1979) (citing *Jim's Furniture Mart, Inc. v. Harris*, 42 Ill. App. 3d 448, 356 N.E.2d 175, 176 (1976)).

70. 407 U.S. at 69-70.

71. *Id.* at 70.

72. *Id.* at 74-77.

73. *Id.*

74. *Id.* at 80-81.

75. *Id.* at 80. See *supra* text accompanying note 65.

76. 407 U.S. at 91-92. Stewart cited the same cases relied upon by Douglas in *Sniadach*. *Id.* at 92 nn.26-27. See *supra* notes 62 and 63 and accompanying text.

77. *Id.* at 91.

78. *Id.* at 91-93.

79. *Id.* at 96.

80. *Id.* at 99-100 (Burger, C.J., and Blackmun, J., joining).

It was Justice White who wrote for the Court in *Mitchell v. W. T. Grant Co.*<sup>81</sup> The case involved a Louisiana statute which permitted judicial sequestration<sup>82</sup> of an item purchased under a conditional sales contract without notice to the defendant or an opportunity for a prior hearing.<sup>83</sup> White distinguished *Mitchell* from *Sniadach* on the grounds that both the creditor and the debtor had property interests in an item purchased under a conditional sales contract.<sup>84</sup> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor."<sup>85</sup>

White further distinguished *Mitchell* from both *Sniadach* and *Fuentes* because under the Louisiana statute the seizure order was obtained from a judge instead of from a clerk or court functionary.<sup>86</sup> The judge in this case issued his order based on a clear factual showing by the creditor rather than on routine conclusory allegations.<sup>87</sup> Furthermore, the showing was stronger in the case of conditional sales contracts because "documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default."<sup>88</sup> The rationale for these factual distinctions is purely instrumental; "[t]here is thus far less danger here that the seizure will be mistaken . . ."<sup>89</sup> Finally, the statute provided an opportunity for an immediate postseizure hearing upon motion by the debtor, at which time the creditor was put to his proof and the debtor had an opportunity to dispute the seizure.<sup>90</sup>

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

82. Sequestration is "[a] species of deposit which two or more persons, engaged in litigation about anything, make of the thing in contest with . . . [a court, which restores it,] . . . when the issue is decided, to the party to whom it is adjudged to belong." BLACK'S LAW DICTIONARY 1225 (rev. 5th ed. 1979) (citing LA. CODE PROC. ANN. art. 2973 (West 1961)). Compare with the definition of replevin, *supra* note 69.

83. 416 U.S. at 603-04.

84. *Id.* at 614-15. White was harder pressed to reconcile *Mitchell* with *Fuentes* on logical grounds. This led Justice Stewart to complain that "[t]he only perceivable change that has occurred since *Fuentes* is in the makeup of this Court." *Id.* at 635 (Stewart, J., dissenting).

85. *Id.* at 604.

86. *Id.* at 615-16. Actually, the statute permitted court clerks to execute writs of sequestration, but the case originated in the Parish of Orleans, for which there was an exception restricting the authority to issue orders to judges. *Id.* at 620 (appendix to the opinion of the Court).

87. 416 U.S. at 617-18.

88. *Id.*

89. *Id.* at 618.

90. *Id.*

Despite the majority's efforts to arrive at factual distinctions between *Mitchell* and *Fuentes*, Justice Powell, in a concurring opinion,<sup>91</sup> and Justice Stewart, in a dissent,<sup>92</sup> argued that *Mitchell* had overruled *Fuentes*. Including the Justices who joined Justice Stewart, five of the nine Justices considered *Mitchell* to have overruled *Fuentes*. The fifth vote would come from Justice Brennan who dissented in a separate opinion in which he stated simply that *Fuentes* called for the opposite result.<sup>93</sup>

Because of this result, the opinion in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,<sup>94</sup> again authored by Justice White, is particularly striking. By its reliance on *Fuentes*, the Court, in a plurality opinion, apparently resuscitated *Fuentes*, at least for some purposes. The garnishment statute under review<sup>95</sup> in *North Georgia Finishing* required only conclusory affidavits, as distinguished from the more factual affidavits required in *Mitchell*. The statute did not guarantee an immediate hearing<sup>96</sup> and the party seeking the garnishment did not have to allege more than its own pecuniary loss to obtain the order.<sup>97</sup> The Court also noted as important the absence of the guarantees relied upon in *Mitchell*, notably the issuance of the order by a judge, the requirement of affidavits and documents creating a factual basis for the allegation, and the requirement of a guaranteed hearing immediately after, if not before, the deprivation of the property.<sup>98</sup> Surprisingly, the Court reemphasized the language of *Fuentes* that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause."<sup>99</sup>

In the Court's opinion, the statute in *North Georgia Finishing* allowed seizures to be carried out without notice or opportunity for a prior hearing "or other safeguard against mistaken repossession."<sup>100</sup> Therefore the statute violated due process. In a concurrence, Justice Stewart noted with approval the continued existence

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91. *Id.* at 623.

92. *Id.* at 635 (Douglas, and Marshall, J.J., joining).

93. *Id.* at 636.

94. 419 U.S. 601 (1975).

95. *Id.* at 605-06.

96. *Id.* at 603.

97. *Id.* at 604.

98. *Id.* at 606-07.

99. *Id.* at 606 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972)).

100. 419 U.S. at 606.

and validity the holding in *Fuentes*.<sup>101</sup>

This series of confused, sometimes contradictory, opinions leaves a legacy of ambiguity regarding current doctrine. Much of the ambiguity is attributable to the coexistence of the alternative conceptions, intrinsic and instrumental, which underly the reasoning in these opinions. Nonetheless, by rendering explicit these conceptions, it is at least possible to begin to identify the current doctrine on the hearing requirement and its timing.

### C. *The Analytical Framework*

In *Sniadach* and *Fuentes*, the Court affirmed a presumption that a hearing of some sort was generally required prior to deprivation of a significant property interest.<sup>102</sup> While it appeared to a majority of the Court that this presumption was abandoned in *Mitchell*,<sup>103</sup> the Court revived it, albeit in a slightly limited form, by its reemphasis of the *Fuentes* language in *North Georgia Finishing*.<sup>104</sup> This presumption is based upon Tribe's intrinsic conception of due process<sup>105</sup> in that it establishes the preeminence of the hearing process before consideration of the risks of mistaken deprivation under any particular statute.

Not incompatible with this presumption is the exception alluded to, but not relied upon, in some of the cases: that is, the exception for extraordinary circumstances. Extraordinary circumstances as envisaged by the Court in *Sniadach*<sup>106</sup> and refined in *Fuentes*<sup>107</sup> seemed to encompass only those seizures absolutely necessary to protect an important public or governmental interest, such as preventing the failure of a bank, collecting taxes, or obtaining jurisdiction.<sup>108</sup> The Court seemed willing to expand the protectable interests in *Mitchell* to include private antagonistic interests in the seized property,<sup>109</sup> but failed to find the private debtor interest in *North Georgia Finishing* sufficiently worth pro-

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101. *Id.* at 608 (Stewart, J., concurring).

102. See *supra* text accompanying note 75. This affirmation continued the historical line of cases adopting the intrinsic presumption of a hearing requirement. See *supra* notes 34 and 35 and accompanying text.

103. See *supra* text accompanying note 90.

104. See *supra* text accompanying note 101.

105. See *supra* text accompanying notes 39 and 40 for a discussion of Tribe's thesis.

106. See *supra* text accompanying notes 59-63.

107. See *supra* text accompanying notes 76-78.

108. *Id.* See also *supra* notes 62-63.

109. See *supra* text accompanying notes 84-85.

tecting despite the potential magnitude of the loss.<sup>110</sup> The Court in *Fuentes* imposed additional restrictions on the characteristics of seizures under extraordinary circumstances: that prompt action be necessary, and that government retain its monopoly on the use of force.<sup>111</sup> These restrictions have survived unchanged.<sup>112</sup>

The conceptual confusion occurs when the standards derived from the instrumental analysis employed in *Mitchell* are integrated into the framework of intrinsic analysis. Apparently, the conditions imposed by the statute under review in *Mitchell* constitute sufficient alternative safeguards to overcome the intrinsic presumption that a hearing is required. The conditions are: 1) a joint or common interest in the seized property, 2) affidavits setting out clearly the factual basis for each claim, 3) facts which lend themselves to a documentary presentation, 4) an order issued by a judge rather than a clerk, 5) a guaranteed hearing immediately following the seizure at which the party deprived of the property may test the claim of the complaining party.

After *North Georgia Finishing* it is not clear whether all of these conditions must still be met. The Court in *North Georgia Finishing* distinguished the statute under review by virtue of its failure to require affidavits based on personal knowledge of the facts, an order issued by a judge, and a hearing immediately following the deprivation.<sup>113</sup> Compliance with these conditions remains necessary, while the nature of the relative interests in the seized property was not emphasized.

The Court's reliance on a rationale based on the instrumental conception of due process, while affirming the intrinsic presumption of a right to a hearing, creates a tension in the standards to be employed in reviewing a statute. Given the Court's statements in *Mitchell*<sup>114</sup> and *North Georgia Finishing*,<sup>115</sup> that the existence of adequate alternative procedural safeguards is sufficient, it is tempting to conclude that the Court should abandon the presumption that the due process clause mandates a hearing prior to any

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110. The amount in question in that case was in excess of \$50,000. *North Georgia Finishing*, 419 U.S. at 604.

111. See *supra* text accompanying note 70.

112. Extraordinary circumstances are not discussed in *Mitchell* or *North Georgia Finishing*.

113. See *supra* text accompanying notes 91-95.

114. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 618 (1973).

115. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975).

deprivation. The Court has indicated a willingness to do so in other areas, notably in administrative deprivations where the deprived party has a remedy of damages for abuse or erroneous deprivation.<sup>116</sup> Abandoning the presumption in favor of a hearing before property deprivations by court order, however, eliminates the potential for recovery against the government official issuing the order.<sup>117</sup> Where recovery cannot be had by subsequent remedies, the rationale for abandoning the hearing requirement in administrative deprivations is inapplicable. Nonetheless, the question remains how much weight is to be accorded to the hearing requirement in the case of judicially ordered deprivations.

The line of cases from *Sniadach* through *Fuentes* to *Mitchell* may be viewed as an erosion of the intrinsic presumption in favor of a prior hearing and the substitution of an analysis based on alternative procedural safeguards. This progression culminates in *Mitchell*. *North Georgia Finishing* reestablishes the tension between the two conceptions, a tension which makes it unlikely that the law as established in *North Georgia Finishing* will be the final resting point. It remains to be seen, however, whether the Court will further revive the intrinsic presumption, limiting or overruling *Mitchell*. If not, *North Georgia Finishing* could be only a temporary lapse in the transitional process, leading to a fully instrumental conception based on adequate procedural safeguards, as already appears to be the case in administrative settings.<sup>118</sup>

#### D. Application To The Emergency Relief Provision

The first question which arises with respect to the Vermont emergency relief provision is: What is the nature of the property interest which is being deprived by the relief orders? The extent of the interest in possession of the house by the batterer will vary with each situation. A spectrum of interests exists, ranging from sole legal title and ownership by the batterer to sole legal title and ownership by the battered wife, with a variety of common or joint tenancies and leasehold arrangements falling between these two. It

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116. *E.g.*, *Ingraham v. Wright*, 430 U.S. 651 (1977). In this case the Court upheld a statute permitting corporal punishment in schools without a prior hearing, based on "the low incidence of abuse . . . and the common law safeguards that already exist . . ." *Id.* at 682. (*Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (judicial remedies for *ex parte* termination of utility service held inadequate).

117. Actions against officials for damages resulting from civil rights deprivations are permitted under 42 U.S.C. § 1983, (1976).

118. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

is a characteristic of almost all of these arrangements that the extent of the interest of the batterer decreases as that of the battered wife increases. This being true, in the situation where the battered wife has sole legal title and ownership of the house, an order restoring her to possession and ordering her batterer to vacate is not likely to constitute a deprivation of his property interest.

The situation where the batterer has sole legal title and ownership poses the greatest threat to the requirements of procedural due process. For this reason, in considering the constitutionality of the statute, the situation where the batterer has sole legal title is the most likely to warrant a challenge. Assuming the batterer's sole ownership, the alternative conceptions of the hearing requirement yield different analyses of the constitutionality of the statute.

The emergency relief provision appears to withstand a challenge on procedural due process grounds, assuming that the adequacy of alternative procedural safeguards, as set forth by the Supreme Court in *Mitchell*, represents the current state of the law. This is true despite whatever limitations may be imposed on the *Mitchell* holding by the subsequent decision in *North Georgia Finishing*.<sup>119</sup>

Virtually all of the safeguards cited in *Mitchell* are present or implied in the emergency relief provision.<sup>120</sup> The first safeguard or condition is a joint or common interest in the seized property. While the battered wife has no legal title to the property, some interest is recognized by the Vermont Legislature and the courts. Upon divorce, the Legislature has empowered the courts to transfer interests in property held solely by one party to the other,<sup>121</sup> and the courts have exercised this power.<sup>122</sup> This power is based upon the recognition of the interest a spouse acquires in property by virtue of the state-conferred marital status.<sup>123</sup> When a battered wife is forced from the home<sup>124</sup> this property interest becomes antagonistic to that of the husband, as it would upon divorce. While it is not clear after *North Georgia Finishing* that the allegation of an interest in the property by the complaining party is an impor-

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119. See *supra* text accompanying note 100.

120. *Mitchell v. W. T. Grant*, 416 U.S. 600, 604.

121. VT. STAT. ANN. tit. 15, § 751 (1974).

122. See, e.g., *Lafko v. Lafko*, 127 Vt. 609, 256 A.2d 166 (1969).

123. See *Loeb v. Loeb*, 118 Vt. 472, 114 A.2d 518 (1955).

124. This is one triggering condition for the order under the emergency relief provision, VT. STAT. ANN. tit. 15, § 1104(a)(2) (Supp. 1980).

tant condition for allowing the ex parte deprivation,<sup>125</sup> this latent property interest would probably suffice. Furthermore, this condition would be more than satisfied in any situation where the battered wife had some legal interest, for example as a joint tenant, or co-tenant.

The emergency relief provision also satisfied the second condition set forth in *Mitchell*: the need for affidavits setting out clearly the factual basis for the claim.<sup>126</sup> The statute requires not merely conclusory allegations by the plaintiff, but "findings by the court."<sup>127</sup> This phrase may be taken to mean, at the least, affidavits clearly setting forth the factual basis for the claim: the standard in *Mitchell*. While in a particular instance a judge might require less than this to issue his finding, a reading of the statute to require anything less is unwarranted.

It is unclear the extent to which the third condition in *Mitchell*, the need for facts which lend themselves to documentary presentation<sup>128</sup> is satisfied. Unlike the situation in *Mitchell*, where the facts required for the court to make its findings were allegedly susceptible to documentation and, therefore, easily verified by the court, the evidence required to make a finding of abuse may be ephemeral in some cases. Even if the evidence of abuse is palpable injuries, all that connect these injuries to the conclusion that the batterer committed acts of abuse are the allegations by the battered wife. The court must base its findings, in large part, on these allegations, in affidavits or testimony, and must rely almost wholly on them to support an additional finding that the battered wife has been forced from the home. Such reliance on necessarily conclusory allegations differs considerably from the required factual support for the findings under the statute reviewed in *Mitchell*.<sup>129</sup>

A closer inspection of the situation in *Mitchell* reveals that the documentary proof found to be satisfactory there may be no more complete than the proof required under the emergency relief provision. Although, as the Court indicated in *Mitchell*, a conditional sales contract and a record of payments constitute a fairly complete factual documentation,<sup>130</sup> the inference must still be drawn

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125. The Court in *North Georgia Finishing* did not discuss the plaintiff's interest.

126. *Mitchell v. W. T. Grant Co.*, 416 U.S. 601, 617-18 (1973).

127. VT. STAT. ANN. tit. 15, § 1104(a) (Supp. 1980).

128. 416 U.S. at 617-18.

129. See *supra* text accompanying notes 82 and 83.

130. 416 U.S. at 617-18.

by the judge that there was in fact no payment, and if payments were missed, that there were no valid reasons to withhold payment, such as a warranted defect in the item purchased.<sup>131</sup> Such inferences are not dissimilar to those made by the court in finding that the battered wife was forced from the home because of abuse, based on the battered wife's affidavit and testimony, and any medical evidence of injuries. Since, in both cases, inferences must be drawn by the judge, the condition set forth in *Mitchell* is met by the emergency relief provision.

The final two conditions set forth in *Mitchell*, that the order be issued by a judge and that a guaranteed hearing be provided as soon as possible, are expressly complied with in the emergency relief provision.<sup>132</sup> As a result, if evaluated under the standards set forth in *Mitchell*, the emergency relief provision appears to be constitutional.

After *North Georgia Finishing*, some attention should be paid to the rationale of the pre-*Mitchell* decisions, particularly *Fuentes*. While the Court, here and in other areas of due process analysis, seems to be moving toward the wholly instrumental approach typified by *Mitchell*, *North Georgia Finishing* at least demonstrates that the Court will not easily discard its long historical attachment to the intrinsic approach.<sup>133</sup> The emergency relief provision, while probably constitutional, does not satisfy a hearing requirement based on the intrinsic approach.

The intrinsic conception of due process dictates that a hearing is required unless there are "extraordinary circumstances." Protection of the interests of the battered spouse does not rise to the level of extraordinary circumstances as articulated in the historical due process cases.<sup>134</sup> First, providing a remedy for battered wives, while a desirable result, is not a vital public or governmental interest<sup>135</sup> on par with preventing a bank collapse or protecting the public from misbranded drugs.<sup>136</sup> In those situations a single deprivation or a closely related series of deprivations were permitted in

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131. A. L. CORBIN, CORBIN ON CONTRACTS 645-47 (one volume ed. 1952).

132. "Every order . . . shall be signed by the judge . . . [The hearing] shall be scheduled as soon as reasonably possible." VT. STAT. ANN. tit. 15, § 1104(b) (Supp. 1980).

133. See *supra* cases cited notes 29-30.

134. See *supra* text accompanying notes 62-63.

135. See *supra* text accompanying note 77.

136. See *supra* text accompanying notes 62-63.

order to prevent serious harm to a large segment of the public.<sup>137</sup> They did not extend to systematic, codified deprivations of one party's property to advance the interests of another party. That, however, is the effect of the emergency relief provision.<sup>138</sup>

Second, unlike those cases which were characterized as extraordinary circumstances, there is no necessity for prompt action.<sup>139</sup> To find such a necessity there must be no alternative available to achieve the goal other than by the deprivation. There exists, however, at least one alternative to the relief obtainable under the emergency relief provision; shelters funded by public or private sources and staffed by social workers can provide counseling, and protection to the battered wife while she proceeds against her batterer. Such shelters are not now widespread and for them to become so would cost considerable money, but they do represent an alternative to the emergency relief provision which does not involve *ex parte* deprivation of property.

While the third requirement, strict government control of the use of force, is implicitly satisfied by the filing provision of the Prevention of Family Abuse Act, the emergency relief provision does not fall within the extraordinary circumstances exception to the hearing requirement because it does not satisfy the first two conditions.

Therefore, although the emergency relief provision is constitutional under the Fourteenth amendment as it is currently interpreted by the Supreme Court, and although this interpretation is unlikely to change significantly in the foreseeable future, serious questions are raised regarding the intrinsic fairness of the *ex parte* deprivations of property under the provision.

#### CONCLUSION

Lawmakers and social reformers faced with serious widespread social problems may not have the luxury of weighing considerations of fairness beyond the constitutionally required minimum when they propose social legislation. Without question, family violence is a cancer; it is spreading and every effort must be made to stop it. Legislation similar to the Prevention of Family Abuse Act has been adopted in many states. With some degree of sympathy

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137. See *supra* text accompanying note 77.

138. *Id.*

139. VT. STAT. ANN. tit. 15, § 1107 (Supp. 1980).

on the part of the judges involved, the emergency relief provision can be an effective tool for lowering the barriers for battered wives seeking protection. The Supreme Court, by permitting *ex parte* deprivations of property when conditions are designed to minimize error are met, has made possible the effective protection of battered wives from the moment they decide to act.

There are legitimate reasons, however, for even the most energetic social reformers and legislators to consider seriously the ramifications of enacting laws which permit *ex parte* deprivations. Family violence, and other social evils, may well be symptomatic of underlying feelings of frustration and disconnection on the part of the perpetrators. If that is the case, enacting laws which do not allow people to state their positions to impartial government authority, before being deprived of fundamental interests, is likely to breed further frustration and exacerbate the problem of family violence.

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