Due Process Considerations in Hospital Staff Privileges Cases

*by Barbara Cray**

Introduction

Staff privileges[1] at a hospital have become an important part of the modern doctor's practice of medicine. Due to the many technical advances in medical science and the increased use of sophisticated and expensive equipment in the diagnosis and treatment of illness, most medical specialists would be effectively precluded from practicing their profession if they were not allowed to rely on the resources of a hospital.[2]

Yet at the same time that the physician's need for access to hospital facilities has increased, hospitals have become more selective in their granting of privileges to the physician. A hospital can be held liable for injuries to patients resulting from physician malpractice where the hospital was negligent in allowing the delinquent physician to remain on the staff.[3] This theory of hospital liability, in an era of increasing medical malpractice litigation, has forced the hospital to become more selective in its appointment and reappointment of physicians to its staff and more active in its revocation of privileges from staff members it feels may become a liability.

This tension between the increased demand for staff privileges on the one hand and the restraint in granting privileges on the other has led to frequent controversy between the physician deprived of privi-

---

* B.A., 1976, Wellesley College; J.D., 1979, Hastings College of the Law, University of California. Member California Bar.

1. Staff privileges are the way in which physicians are afforded the use of hospital facilities. Hospitals grant doctors the use of their hospital in exchange for their business of bringing in patients. They are termed "privileges" because there is no absolute right to practice medicine in a hospital; rather there is discretion in the hospital's governing body as to who may so practice. Hayman v. City of Galveston, 273 U.S. 414, 416-17 (1927).

2. *See* Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959). *See also* Parts II and III, *infra*.

3. Darling v. Charleston Com. Mem. Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966); *see also* Hanson & Stromberg, *Hospital Liability for Negligence*, 21 HASTINGS L.J. 1 (1969); Walkup & Kelly, *Hospital Liability: Changing Patterns of Responsibility*, 8 U.S.F. L. REV. 247 (1973); Note, *Independent Duty of a Hospital to Prevent Physicians' Malpractice*, 15 ARIZ. L. REV. 953 (1973); Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians*, 50 WASH. L. REV. 385 (1975).

leges and the hospital making that determination. Physicians are now resorting to the courts to insist that hospitals afford them procedural due process protections before being denied privileges. That physicians have begun to insist on their procedural due process rights in this context indicates an awareness of legal rights by a group of citizens who were, until recently, not highly concerned with the legal aspects of the practice of their profession. In the past, procedural due process protections relating to staff privileges were generally not afforded nor were such protections seriously in issue due to the medical profession's belief that physicians can best police themselves. This asserted special ability, and responsibility, has been recognized by the courts,[4] and peer review is still considered by the medical profession to be the essence of evaluating the physician's professional conduct.[5] That a physician is best qualified to adjudge the quality of care rendered by another physician is not open to challenge. But to assert that only a physician is suited to sit on a tribunal that will determine whether another physician is allowed to practice in the hospital, without certain legal protections being afforded the affected physician, is challengeable, and the crux of the controversy.

In order to adequately protect the physician it is necessary that the hospital follow formal procedures whenever staff privileges are in issue. These procedures are usually found in the hospital's bylaws, which represent the contract between the hospital and the physician.[6] The bylaws should set forth the precise procedures by which the physician's staff privileges may be revoked. Both the physicians sitting in judgment and the affected physician are, accordingly, apprised of the appropriate legal standard and procedural protections. If the bylaws procedure is not followed, a suit lies against the hospital for its breach. Where the bylaws do not contain procedural protections as required by law, a suit lies against the hospital for violation of the physician's due process rights.[7] What the law requires to be included in these bylaws is the subject of this note.

Procedural protections are afforded by the due process clauses of

4. "The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance . . . . Courts must not attempt to take on the escutcheon of Caduceus" Sosa v. Bd. of Managers of Val Verde Memorial Hosp., 437 F.2d 173, 177 (5th Cir. 1971); *see* Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.C. 1963), *aff'd*, 348 F.2d 70 (D.C. Cir. 1965).

5. In the introduction to the California Medical Association's GUIDING PRINCIPLES FOR PHYSICIAN-HOSPITAL RELATIONSHIPS it is stated that self-disciplinary features are stressed because "no one is better qualified to judge the quality of medical care than a physician." CMA, GUIDING PRINCIPLES 1 (1974).

6. Bylaws will be discussed in detail in Part V, *infra*.

7. 42 U.S.C. § 1983 (1974) authorizes a civil action for deprivation of rights secured by the Constitution and laws of the United States against a person acting under color of the state.

the Fifth and Fourteenth Amendments,[8] but only with respect to the deprivation of liberty or property under color of federal or state law. In the context of hospital review of physician privileges, the initial inquiry is whether the hospital is to be classified as "public" or "private". If it is public, its actions are subject to the same constitutional controls as any governmental entity and the due process clauses place limitations on the manner in which a physician can be excluded from the hospital's staff.[9] By contrast, if the hospital is classified as private, its actions are viewed as discretionary, and the decision of its managing authorities, who have the power to appoint and remove members at will, are final and not subject to judicial review.[10] The first section of this note examines the "state action" formulations of the United States Supreme Court, with an analysis of their effect on hospital staff cases. The process by which a hospital is to be classified as public or private is also discussed.

Of equal importance to due process protection is inquiry into whether a liberty or property interest is deprived by the hospital denial or revocation of staff privileges. Whether such a liberty or property interest is affected in such proceedings will determine if due process is required. The second section of this note examines recent Supreme Court decisions as to when a liberty or property interest can be found in physician staff privileges proceedings.

Where the action challenged for being procedurally improper is that of a private entity, or where there is no threatened deprivation of one of the constitutionally protected interests, there will be no due process procedural protection. Because the Fourteenth Amendment is applicable only in instances of state action, private groups in America are able to wield vast powers and make numerous and often arbitrary decisions affecting the individual without any private equivalent of due process.[11] In addition, in recent decisions the Supreme Court has narrowed the finding of state action in private activities, limited the scope of liberty and property interests and circumscribed the procedural protections required even where constitutional due process is applied.[12] All this means less and less protection from private (as well as governmental) decisionmaking. Therefore, in most situations the physician's staff privileges are largely unprotected. A few state courts, most nota-

8. U.S. CONST. amend. V, amend. XIV.

9. Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33, 35 (6th Cir. 1968).

10. Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 63 (D.C. 1963), *aff'd* 348 F.2d 70 (D.C. Cir. 1965): *see also* Annot., 37 A.L.R. 3d 645, 659-60 (1971) for a listing of states and cases that follow this rule.

11. *See* Traynor, *"Better Days in Court for a New Day's Problems,"* 17 VAND. L. REV. 109, 120-21 (1963).

12. *See* Parts I, II, and IV, *infra.*

bly the courts of California, have recognized the interest of the physician in staff privileges and have fashioned common law procedural protections of physician staff privileges through expanded judicial review of hospital decisions and a right of fair procedure to be followed in staff privilege determination proceedings. The third section of the note discusses this judicially developed solution.

Finally, given that some due process, or a fair procedure, is constitutionally required, particular and practical procedures must be developed. The last section of this note deals with the process which is due under both the due process and fair procedure approaches. After analyzing the basic requirements, some actual and suggested[13] hospital bylaws are examined to determine whether they do in fact provide the protection developed and required by present law.

I. Requirements to be Met in Order to Invoke Fourteenth Amendment Due Process—State Action

By its terms, "nor shall any state deprive any person of life, liberty, or property, without due process of law,"[14] the Fourteenth Amendment extends its procedural due process protections only to conduct attributable to the state, and not to that of private persons.[15] However, such state action is not so strictly defined as to be linked to governmental entities; it is often extended to seemingly private activities.[16] Therefore, for purposes of applying Fourteenth Amendment procedural protection to given conduct, the initial task is to determine when private conduct becomes state action.[17]

---

13. The special role that hospital accrediting organizations are now taking in requiring bylaws that supply due process protections, and the model bylaws they suggest, will be explored in this section.

14. U.S. CONST. amend. XIV, § 1.

15. "Since the decision of the *Civil Rights Cases*, 109 U.S. 2 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U S. 1, 13 (1948). The Court cites United States v. Harris, 106 U.S. 629 (1883) and United States v. Cruikshank, 92 U.S. 542 (1876), which antedate the *Civil Rights Cases* but contain similar language concerning state action.

16. "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966).

17. *See generally* Antoun, *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO N.U. L. REV. 722 (1975); Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146 (1976); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

A. Supreme Court Decisions

Modern Supreme Court decisions finding state action in private activities begin with *Burton v. Wilmington Parking Authority*.[18] In that case the State of Delaware, through its agency the Wilmington Parking Authority, owned and operated a parking building. To secure long-term construction financing of the facility, the Parking Authority leased storefront space in the garage building to a private party for restaurant use. The restaurant refused to serve the plaintiff Burton solely because he was black. Burton sued the state agency alleging a violation of the equal protection clause of the Fourteenth Amendment. The United States Supreme Court rejected the finding of the Supreme Court of Delaware that the restaurant was acting in "a purely private capacity" and thus not subject to the equal protection clause guarantee.[19] Although noting the impossibility of stating a "precise formula" to determine whether state action is present in a formally private activity, Mr. Justice Clark, writing for the Court' concluded that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[20] "Significant" involvement of the state was found in the public ownership of the land and building used by the restaurant, the receipt by the authority of public funds for the costs of construction and maintenance, and the mutual benefits derived by both the private restaurant and the public parking garage in providing each other with business customers.[21] The Court also placed special emphasis on the fact that the restaurant was operated as an integral part of the public facility, concluding that the state has "elected to place its power, property and prestige behind the admitted discrimination."[22] After looking at the "facts and circumstances" of this case, Justice Clark decided that "[t]he state has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[23]

The *Burton* Court was careful to limit its holding to the facts of the case,[24] but its rationale has been frequently used as the standard for

18. 365 U.S. 715 (1961).
19. *Id.* at 716-19.
20. *Id.* at 722.
21. *Id.* at 723-24.
22. *Id.* at 724-25.
23. *Id.* at 725.
24. "Specifically defining the limits of our inquiry what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscription of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726.

finding state action, both for purposes of the equal protection and due process clauses of the Fourteenth Amendment.[25] Indeed, the *Burton* standard is quite loose—by including consideration of all facts or activities by which the state is related to the private entity, it offers little or no guidance as to which facts are significant for the purposes of determining state action.

In *Moose Lodge v. Irvis*[26] the Court had occasion to narrow the broad test set forth in *Burton. Moose Lodge* involved a private club which received a liquor license from the State of Pennsylvania, but refused service to a black guest solely on the basis of his race. Mr. Irvis sued under § 1983[27] of the Civil Rights Act of 1974, alleging that the licensing of Moose Lodge by the state agency amounted to state involvement in the club's activities and its discriminatory practices were forbidden by the equal protection clause of the Fourteenth Amendment.[28] The Court, in an opinion written by Mr. Justice Rehnquist, failed to find the "symbiotic relationship", as he termed the *Burton* requirement, placing special importance on the facts that the Moose Lodge owned its own land, was a private club and served no state function or service. In sum, "while Eagle [the restaurant in *Burton*] was a public restaurant in a public building, Moose Lodge is a private social club in a private building."[29]

The decision in *Moose Lodge* can, of course, be harmonized with the *Burton* "significant involvement" test. After all, any legal criterion that weighs factors only within the context of a particular case avoids, on its face, any question of decision to decision consistency. But rather than perpetuate the *Burton* doctrine by basing its decision in *Moose Lodge* on differences between fact situations (and quite possibly value judgments of the Justices), the Court narrowed the *Burton* test and established an additional requirement to a finding of state action. The Court observed that there can be no automatic finding of state action where a private entity receives "any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever".[30] Such a finding would "utterly emasculate the distinction between private as distinguished from state conduct" traditionally adhered to by the Court in interpreting the Fourteenth Amendment.[31] Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,'

25. As to the use of this rationale in hospital staff privileges cases see discussion in notes 50-60 *infra*.

26. 407 U.S. 163 (1972).

27. 42 U.S.C. § 1983 (1974).

28. 407 U.S. at 171.

29. *Id.* at 175.

30. *Id.* at 173.

31. *Id.*

. . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."[32]

It is evident that *Moose Lodge* has greatly reduced, if not eliminated, the relevance of state regulation of a private entity to any finding of state action.[33] In its analysis of the particular regulation involved in *Moose Lodge*, the Court observed that however detailed the regulation might be, if it "cannot be said to in any way foster or encourage racial discrimination," or "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise", a finding of state action cannot be supported.[34] Again, there must be a real connection between the regulation and the discriminatory practice: general regulation is not enough.[35]

The most recent case to deal with the state action problem, and to further limit *Burton*, is *Jackson v. Metropolitan Edison Co.*[36] In that case the Court (again in an opinion written by Justice Rehnquist), refused to find state action in the activities of a privately owned and operated corporation which was exclusively empowered by the state to deliver electrical service.[37] The firm discontinued Jackson's residential service without any notice or hearing, or even an opportunity to pay amounts found due.[38] The utility's action in terminating the service was allowed under a provision of its general tariff filed with the state Utility Commission.[39] The Court did not require the utility to comply

32. *Id.* (citation omitted).

33. *See* Note, *supra* note 17, at 688.

34. 407 U.S. at 176-77.

35. Relating this to the facts, the Court held that with one exception, the "Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor." *Id.* at 175. The one exception recognized by the Court is consistent with the *Moose Lodge* rationale. The Court enjoined enforcement of a Liquor Control Board regulation requiring that "every club licensee shall adhere to all of the provisions of its Constitution and By-Laws" where the constitution and bylaws involved racial discrimination. The result of applying the regulation would be to "invoke the sanctions of the state to enforce a concededly discriminatory private rule." *Id.* at 179. Therefore, only where application of a state regulation specifically results in an outcome not permitted under the Fourteenth Amendment will a finding of state action result.

The dissent of Mr. Justice Brennan (joined by Justice Marshall) rejected this connection between the complained of activity and the state involvement, believing that the State's liquor regulation 'significantly intertwined' the State with the operation of the club and lent " 'its authority to the sordid business of racial discrimination.' " *Id.* at 186. These two Justices continued to adhere to the *Burton* test.

36. 419 U.S. 345 (1974).

37. Metropolitan Edison Company held a private certificate of public convenience issued by the Pennsylvania Utility Commission empowering it to deliver electricity. *Id.* at 346.

38. *Id.* at 346-48.

39. The provision provided that Metropolitan had the right to discontinue service to a customer on "reasonable notice of non-payment of bills." *Id.* at 346 (footnote omitted).

with Fourteenth Amendment procedural protections despite the fact that Metropolitan Edison was subject to extensive regulation.

The *Jackson* Court made three important state action determinations in response to arguments that the procedural due process rights of Mrs. Jackson were violated. First, the Court held that the fact that Metropolitan Edison is a state sanctioned monopoly[40] operating in the public interest[41] does not entail a finding that its termination of service was state action for Fourteenth Amendment purposes.[42] The Court also rejected the argument that the state had authorized the termination practice because such practice was permitted by Metropolitan Edison's general tariff filed with the Public Utility Commission, reasoning that although the practice may have been approved by the commission, "where the commission has not put its own weight on the side of the proposed practice by ordering it"[43] the practice does not become transmuted into that of the state.[44] Secondly, and notwithstanding the claim of the *Jackson* majority to the contrary, the Court proceeded by serially analyzing and distinguishing the three factors of monopoly, regulation and public function.[45] This is a substantial departure from the rule of *Burton* which requires that all the factors are looked at together in making the state action determination. Lastly, and most importantly, the Court in *Jackson* emphasizes that the state must actually be involved in the particular activity that is challenged: i.e., the termination practices in *Jackson*. The Court, by its own language, suggests a new and highly restrictive test for the finding of state action: "the inquiry

40. Monopoly status was assumed by the Court for the sake of argument, though there was question whether Metropolitan Edison was granted or guaranteed a monopoly by the state. *Id.* at 351.

41. Under the "public function" doctrine, state action is present because the private entity provides an essential public service—the private entity exercising powers traditionally reserved to the state. However in this case the Court explained, "Pennsylvania Courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty." *Id.* at 352-53.

The Court concluded that simply because the business of Metropolitan Edison is affected with a public interest, its actions are not converted into those of the state. "Doctors, optometrists, lawyers, [and] Metropolitan . . . are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." *Id.* at 354.

42. *Id.* at 351-54.

43. *Id.* at 357.

44. This is more restrictive than *Moose Lodge*. In the one exception to the Court's refusal to find state action in *Moose Lodge*, the Court enjoined enforcement of a state regulation that required the Lodge to adhere to its bylaws where the bylaws of the Lodge were discriminatory. *See* Moose Lodge v. Irvis, 407 U.S. 163, 179 and note 33, *supra*. The type of state action struck down in *Moose Lodge* is analogous to the state authorization of Metropolitan Edison's termination of services practices in *Jackson*. However, the *Jackson* court held that such authorization was not state action for Fourteenth Amendment purposes. 419 U.S. at 357.

45. 419 U.S. 345, 362-72 (Douglas, J., dissenting); *see* Quinn, *supra* note 17 at 163.

must be whether there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the latter may be fairly treated as that of the State itself."[46]

In his dissent, Justice Douglas recognized the change in the test made by the majority. He examined the factors of state involvement in the aggregate, which is consistent with the theory of "general involvement" in the private entity, to support a finding of state action as articulated in *Burton*. He also examined state involvement in the termination procedure separately, consistent with the theory of state involvement in the challenged activity, to justify a finding of state action as developed by the majority in *Moose Lodge* and *Jackson*.[47] Douglas warned against the change in approach by the court, and explained that "[t]hough the Court pays lip service to the need for assessing the totality of the State's involvement in this enterprise . . . its underlying analysis is fundamentally sequential rather than cumulative."[48] Thus the Court makes a significant departure from previous treatment of the state action issue.

The facts of *Jackson*, involving monopoly power, extensive state regulation and an essential public service, combine to make the strongest showing of state action in the entire line of state action cases. Accompanied by the rationale developed in *Burton*, the *Jackson* facts appear ideally suited for subjecting the private entity involved to the state action doctrine and the accompanying Fourteenth Amendment requirements. But the *Burton* theory of general involvement seems to have been replaced by the *Jackson* decision's theory of involvement by the state in the specific activity complained of, and under *Jackson* it has become much more difficult to subject a formally private activity to Fourteenth Amendment requirements.

B. Finding state action in the hospital: the public-private distinction

In determining whether state action exists in a hospital's activities, the crucial inquiry is whether the hospital is to be classified as "public" or "private". Although there is no precise definition of what makes a hospital public such that its actions are subject to the precepts of the Fourteenth Amendment, a general definition of the public-private distinction was set forth by the court in *Shulman v. Washington Hospital*

46. 419 U.S. at 351.

47. It was Justice Douglas' opinion that under either theory a finding of state action was supported. He explained that Metropolitan Edison's actions and its termination of service provisions "are sufficiently intertwined with those of the State, . . . to warrant a holding that . . . [Metropolitan's] actions in terminating this householder's service were 'state action' for the purpose of giving federal jurisdiction over . . . [Metropolitan] under 42 U.S.C. § 1983." *Id.* at 362 (Douglas, J., dissenting).

48. *Id.* at 362-63 (Douglas, J., dissenting).

Center:[49]

> A public hospital, as its very name implies, is one owned, maintained and operated by a governmental unit . . . and supported by governmental funds. . . . A private hospital is one that is owned, maintained and operated by a corporation or an individual without any participation on the part of any governmental agency in its control."[50]

This definition represents the absolutes: the publicly operated hospital and the strictly private one. Yet, in this modern era of technical and therefore expensive health care, it is almost impossible for a hospital to be completely private in its ownership, operation and funding. Government grants are necessary for the survival of the modern hospital and the concommitant regulation by government is increasingly pervasive. It is this local, state and federal assistance and involvement with formally private hospitals that provides the basis on which a court could decide that public involvement has become so great that the private hospital should be subjected to public treatment.[51] The remainder of this section is concerned with determining when such public involvement is present.

1. A selective look at how the federal courts have dealt with Supreme Court state action decisions

In *Mulvihill v. Julia L. Butterfield Memorial Hospital*,[52] decided prior to *Moose Lodge* and *Jackson*, the court for the Southern District of New York applied a nexus test as applied by the Supreme Court in *Jackson*. Faced with a physician's claim of denial of due process in nonreappointment to hospital staff privileges, the court stated that,

> [i]t is true that the state has 'insinuated itself' [Burton test] into some aspects of the functioning of . . . [the hospital]. But there is no charge here that the state in any way encouraged, promoted, supported, or associated itself with the hospital's rules and methods for choosing physicians. The State did not approve the hospital's internal bylaws; nor did any state nominee sit on the hospital's board of trustees."[53]

The court thus found no involvement by the state in the particular conduct in issue.

In *Barrett v. United Hospital*,[54] decided after *Moose Lodge* but

49. 222 F. Supp. 59 (D.C. 1963), *aff'd*, 348 F.2.d 70 (D.C. Cir. 1965).

50. *Id.* at 61.

51. The problem being dealt with in this section is when the private hospital has sufficient governmental involvement to term its actions those of the state for Fourteenth Amendment purposes. Hospitals run by governmental entities are clearly public and will not be discussed further.

52. 329 F. Supp. 1020 (S.D.N.Y. 1971).

53. *Id.* at 1024.

54. 376 F. Supp. 791 (S.D.N.Y.), *aff'd*, 506 F.2d 1395 (2d Cir. 1974).

prior to *Jackson*, the same district court, now supported in its *Mulvihill* decision by the Supreme Court, decided to go further and developed a strict three pronged test, each element of which must be met before private conduct is subject to constitutional limitations: (1) the state's involvement with the private institution must be "significant", (2) the state must be involved with the activity that caused the injury, and (3) "the State's involvement must aid, encourage or connote approval of the complained of activity."[55] The first prong is the *Burton* test, the second is the nexus requirement and the third is an additional requirement that the involvement be specifically supportive of the challenged activity.[56]

In the 1976 case of *Briscoe v. Brock*,[57] the Court of Appeals for the Eighth Circuit followed the *Jackson* nexus approach.[58] Although the hospital in *Briscoe* received federal and other public funds, enjoyed a tax exempt status and was subject to state regulation, the court refused to find state action. "[T]here is no such nexus between the state's relationship to the Hospital's operation and the dismissal of the plaintiff as to justify attribution of the challenged action of the Hospital to the State."[59]

Not all courts have decided to follow the Supreme Court trend. The district court for the District of Connecticut in *Schlein v. Milford Hospital*[60] rejected the strict *Jackson* test and followed the rationale of *Burton*. The court found state action by virtue of a license given to the hospital by the state which permitted the hospital authority to determine the scope of the license required of a physician.[61] After noting the *Jackson* and *Moose Lodge* decisions Judge Newman stated: "I am not persuaded that they (these cases) make resolution of the state action issues in this case automatic. It is 'only by sifting facts and weighing circumstances (that) the nonobvious involvement of the State in private

55. *Id.* at 797.

56. The language of this third test seems similar to the Court's statement in *Jackson* that the fact that the termination procedure was included in the general tariff approved by the state was not sufficient to connect it to the challenged activity because the state had not ordered it. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) and discussion connected with note 42 *supra*.

57. 540 F.2d 392 (8th Cir. 1976).

58. The court emphasized the *Jackson* rationale that there is no required finding of state action merely because the corporation is chartered by the state, is a state conferred monopoly, is regulated by the state, or performs functions of public convenience and necessity. Rather, there must be a nexus between the state and the challenged action of the entity. *Id.* at 395.

59. *Id.* at 395-96. *See* Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 73 (N.D. Ill. 1975).

60. 423 F. Supp. 541 (D. Conn. 1976).

61. *Id.* at 543. *See also* the first district court decision of the same case, Schlein v. Milford Hosp., 383 F. Supp. 1263, 1264 (D. Conn. 1974).

conduct can be attributed its true significance.' "[62]

With the possible exception of *Hill-Burton* funding, which will be discussed in the following subsection, the courts generally agree that no particular factor by itself leads to a finding of state action, although a combination of factors may lead to such a finding. Automatic findings of state action have not been made when a hospital receives compensation for indigents,[63] Medicare funds,[64] or other governmental financial assistance.[65] These holdings are consistent with the *Moose Lodge* and *Jackson* approach. However, a court following the *Burton* approach would examine these factors cumulatively and it might decide that they form a sufficient basis for finding state action. Also, following *Jackson*, courts have held that the mere existence of state regulation does not convert the action of the hospital into that of the state without a specific connection between the challenged act and the form of state regulation.[66] Finally, the argument that because a hospital performs a public function its actions are attributable to the State, has been accepted by at least one court which relied solely upon this doctrine to find state action where the hospital was the only one in the area.[67] Other courts have not been so generous in this regard, holding that a hospital is neither a public utility nor a public calling.[68] In light of the language in *Jackson* that the mere "status" of performing a public function does not of itself convert private actions into those of the state,[69] it is doubtful that the public function theory retains enough weight to warrant a finding of state action by an otherwise private hospital for Fourteenth Amendment purposes. It is, however, a factor that can combine with others previously mentioned to support such a finding.

2. Hill-Burton funding

The greatest amount of litigation concerning the question of when a hospital is deemed to be public has revolved around the effect that the receipt of funds under the Hospital Survey and Construction Act has

62. 423 F. Supp. at 542 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)).

63. Shulman v. Washington Hosp. Center, 222 F. Supp 59, 61 (D.D.C. 1963).

64. Ward v. St. Anthony Hosp., 476 F.2d 671, 675-76 (10th Cir. 1973); Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 74 (N.D. Ill. 1975); Slavcoff v. Harrisburg Polyclinic Hosp., 375 F. Supp. 999, 1003-04 (M.D. Pa. 1974).

65. Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 74 (N.D. Ill. 1975).

66. *Id.* at 73; Barrio v. McDonough Dist. Hosp., 377 F. Supp. 317, 320 (S.D. Ill. 1974); Barrett v. United Hosp., 376 F. Supp. 791, 796 (S.D.N.Y. 1974); Mulvihill v. Butterfield Mem. Hosp., 329 F. Supp. 1020, 1022 (S.D.N.Y. 1978) 1971).

67. Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33, 35 (6th Cir. 1968).

68. *See* Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 62 (D.D.C. 1963).

69. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354 (1974); Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 74 (N.D. Ill. 1975).

on private hospitals.[70] The purpose of the legislation, popularly known as the Hill-Burton Act, is to provide states with money to assist in the construction and modernization of public and private hospitals, develop new and improved medical facilities and promote research.[71] Under the Act the state submits its plan for use of the federal funds based on federal regulations which set forth the priority of projects to be funded.[72] A state agency receives and administers the funds according to federal regulations and recipient hospitals must comply with federal standards of operation which are enforced by the state.[73] Thus Hill-Burton funding involves both federal and state regulation, as well as federal and state financial aid.

Although courts have determined that the receipt of Hill-Burton funds is relevant to a finding of state action and, accordingly, certain Fourteenth Amendment rights, "the Act itself", in the words of one court, "creates no personal rights or causes of action as such, nor does it confer jurisdiction on federal courts of controversies involving civil or other personal rights."[74] Therefore, the receipt of the funds does not justify a finding of state action in a hospital.

The Fourth Circuit has been adamant in its view that mere receipt of Hill-Burton funds constitutes sufficient state action to require otherwise private hospitals to act in conformity with the Fourteenth Amendment. *Simkins v. Moses H. Cone Memorial Hospital*,[75] the first major case to so hold, involved discrimination by two hospitals in denying the use of staff facilities to black physicians and dentists solely on the basis of race. Both hospitals financed certain projects with Hill-Burton funds.[76] The court concluded that "the necessary 'degree of state [in the broad sense, including federal] participation and involvement' is present as a result of the participation by the defendants in the Hill-Burton program. The massive use of public funds and extensive state-

70. Hospital Survey and Construction Act, 42 U.S.C. §§ 291-291m (1974). *See generally* Cronin, *Private Hospitals that Receive Public Funds Under the Hill-Burton Program: The State Action Implications*, 12 NORTHEASTERN L. REV. 525 (1977) for a thorough discussion of the effect of Hill-Burton funds on finding state action in all of the federal circuits.

71. 42 U.S.C. §§ 291(a)-291(c) (1974).

72. The regulations are promulgated by the Surgeon General with the approval of the Federal Hospital Council and the Secretary of Health, Education and Welfare. 42 U.S.C. § 291c (1974).

73. 42 U.S.C. § 291d (1974).

74. Don v. Okmulgee Mem. Hosp., 443 F.2d 234, 235 (10th Cir. 1971). The Act itself expressly states: "[N]othing in this subchapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility with respect to which any funds have been or may be expended under this subchapter." 42 U.S.C. § 291m (1974).

75. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S 938 (1964).

76. *Id.* at 963.

federal sharing in the common plan are all relevant factors."[77] The court noted that not all forms of governmental involvement automatically amount to state action; rather, it is the character and functioning of the Hill-Burton program that requires the finding of state action.[78] Using language parallel to that employed in *Burton*, the Court found significant contact and the requisite degree of state participation in the hospitals' activity; these hospitals "operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health."[79]

In *Sams v. Ohio Valley General Hospital Association*,[80] the Fourth Circuit reaffirmed its *Simkins* position. Physicians had been denied staff privileges due to a hospital rule that required staff physicians to practice and have an office within the county.[81] The court found that the rule was unjustly discriminatory and required the hospital, on account of its receipt of Hill-Burton funds, to comply with constitutional requirements in setting forth rules for staff admission.[82]

---

77. *Id.* at 967 (footnote omitted).

78. *Id.*

79. *Id.*

80. 413 F.2d 826 (4th Cir. 1969).

81. *Id.* at 827.

82. The court explained: "[S]ubstantial Federal moneys invited and flowing into the defendant hospitals under the Hill-Burton Act entail, in return, obligations of observance of Federal constitutional mandates. Disregard of them is State action, for the act trusts the State to maintain a fair and just governance of these hospitals accepting the aid of the legislation." *Id.* at 828. A second feature of the *Sams* decision is that it extended a state action finding, due to mere receipt of Hill-Burton funds, to a case where the involved discrimination was not racial. It has been observed that the courts seem to require a lesser degree of state involvement to support a finding of state action in racial discrimination cases. The United States Supreme Court has rejected this view. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting). However, the court in *Barrett v. United Hosp.* 376 F. Supp. 791, 797-98 (S.D.N.Y.) *aff'd* 562 F.2d 1395 (2nd Cir. 1974), recognized this double standard when finding state action in the Second Circuit. In *Sams*, the court announced that the constitutional principles set forth in *Simkins* were to apply "in full strength" to non-racial issues. 413 F.2d at 828. The reasoning of the district court in the *Sams* case was emphatic on this point, explaining that there is "no logical reason for distinguishing . . . a case where non-Negroes seek redress for the possible deprivation of their Fourteenth Amendment rights . . . . If a hospital's involvement in the Hill-Burton program denotes 'state action' in the one case, then, as this Court has determined, it must also do so in the other. In neither case does the finding of 'state action' rest upon what group the plaintiffs are members or of what 'state action' discrimination they specifically complain." Sams v. Ohio Valley General Hosp. Ass'n, 257 F. Supp. 369, 371 (N.D.W. Va. 1966).

In the subsequent case of Mulvihill v. Julia Butterfield Mem. Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971), the court tried to distinguish both *Simkins* and *Sams*. This case involved denial of due process in nonreappointment of a physician in accordance with the hospital's bylaws. The court explained that both of the Fourth Circuit cases dealt with "state support to a hospital which arbitrarily denied its facilities to a segment of the population." *Id.* at

Finally, in *Christhilf v. Annapolis Emergency Hospital Association*,[83] the Fourth Circuit found state action due to receipt of Hill-Burton funds and required a hospital to apply the Fourteenth Amendment procedural protections to a physician whose privileges were terminated without affording him due process.[84]

Notwithstanding the unequivocal position of the Fourth Circuit, several theories have been used to find that the receipt of Hill-Burton funds is not sufficient in itself to constitute state action in the hospital. Initially, some courts refuse to find state action due merely to receipt of the funds because there is an insufficient "nexus" between regulation due to such receipt and the internal policy decisions in medical staff selection procedures.[85] Moreover, a few courts suggest, even in the absence of a direct nexus between governmental regulation and staff selection procedures, that Hill-Burton funding in combination with other

---

1023-24. The court hypothesized that there would not have been a finding of state action if the hospitals involved had discharged an employee without notice of a hearing, as opposed to an arbitrary discrimination against a certain group of people. The *Sams* lower court opinion made it clear that this is not a valid distinction, holding that the Hill-Burton program denotes state action irrespective of the group complaining or the discrimination complained of. Sams v. Ohio Valley General Hosp. Ass'n, 257 F. Supp. 369, 371 (N.D.W. Va. 1966).

83. 496 F.2d 174 (4th Cir. 1974).

84. *Id.* The Fourth Circuit has held fast in its Hill-Burton theory. *See* Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975) (anti-abortion policy); Duffield v. Charleston Area Medical Center, 503 F.2d 512 (4th Cir. 1974) (improper withdrawal of hospital staff privileges). *But see* Large v. Reynolds, 414 F. Supp. 45 (W.D. Va. 1976) where the Fourth Circuit's decisions were questioned. "The Court finds state action on this basis [Hill-Burton funding], although such a funding seems tenuous in light of the recent Supreme Court Decision in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974). Nevertheless, the Supreme Court recently failed to resolve the dispute between the Circuit Courts over this issue, *Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975), cert. denied*, 423 U.S. 1000, . . . (1975) (*See* dissent to denial of cert., J. White), therefore, Fourth Circuit Pronouncements on on this issue are still binding on this court." *Id.* at 46.

The First Circuit seems to have followed the Fourth Circuit holding, Bricker v. Sceva Speare Mem Hosp., 339 F. Supp. 234, 237 (D.N.H. 1972). A district court in the Third Circuit at first followed the Fourth Circuit precedent in Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 307 (E.D. Pa. 1970). But this district has subsequently come to the opposite conclusion. *See* Holton v. Crozer-Chester Medical Center, 419 F. Supp. 334 (E.D. Pa. 1976); Sament v. Hahnemann Medical College and Hosp., 413 F. Supp. 434 (E.D. Pa. 1976). *See also* Slavcoff v. Harrisburg Polyclinic Hosp., 375 F. Supp. 999 (M.D. Pa. 1974); Ozlu v. Lock Haven Hosp., 369 F. Supp. 285 (M.D. Pa. 1974).

85. *See* Briscoe v. Brock, 540 F.2d 392, 395-96 (8th Cir. 1976); Ascherman v. Presbyterian Hosp., 507 F.2d 1103, 1105 (9th Cir. 1974) (The court said: "The appellant cites us to no regulation . . . that authorizes the State of California or the federal government to participate in the appointment of medical doctors to the staff . . ."); Barrett v. United Hosp., 376 F. Supp. 791, 801 (S.D.N.Y. 1974) (the Court said: "In the case at bar the financial aid is directed toward promoting construction of new hospital wings and has no nexus with the employment and termination policies applied with regard to staff.").

factors, such as those mentioned earlier in this section, might be sufficient for a state action finding.[86]

Lastly, at least one court has relied upon sections of the Hill-Burton Act itself to preclude a finding of state action. In *Stanturf v. Sipes*[87] the court states that § 291m of the Hospital Survey and Construction Act[88] was written purposefully, and it very clearly establishes that the Federal Government did not intend to have any influence whatsoever in the operation of any hospital . . . [receiving Hill-Burton funds]. Had it been otherwise, unquestionably the Congress would have said so."[89]

In conclusion, the criterion for finding state action in the formally private hospital is far from certain.[90] There is uncertainty as to which test to apply: a general involvement or a "nexus" test, as well as uncertainty as to the extent of governmental involvement required under either test. Despite the uncertainties that remain, the trend of the Supreme Court is to require a direct, albeit causal, connection between the activities of the state and the challenged activity of the private entity. Increasingly, the physician will find it difficult to prove state action by a private hospital in order to invoke Fourteenth Amendment procedural protections of his staff privileges. The physician who practices in a public hospital operated by a governmental entity receives

86. *See* Don v. Okmulgee Mem. Hosp., 443 F.2d 234 (10th Cir. 1971); Berrios v. Mem. Hosp., 403 F. Supp. 1222 (E.D. Tenn. 1975); Barrio v. McDonough Dist. Hosp., 377 F Supp. 317 (S.D. Ill. 1974); Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963).

87. 224 F. Supp. 883 (W.D. Mo. 1963), *aff'd*, 335 F.2d 224 (8th Cir. 1964), *cert. denied*, 379 U.S. 977 (1965).

88. 42 U.S.C. § 291m (1974).

89. 224 F. Supp. at 891. The theory is of dubious merit. The Church Amendment, 87 Stat. 91 § 401 (1973), specifically prohibits a finding of state action due to Hill-Burton funding in abortion and sterilization cases. It can be argued that by singling out abortion cases Congress implicitly approved judicial decisions finding state action due to Hill-Burton funding in the staff privilege context.

90. The conflicts in the district and circuit courts have been recognized by Justice White, who believes that the Supreme Court should grant certiorari to a Hill-Burton case and establish a uniform role. *See* Taylor v. St. Vincent's Hosp., *cert. denied*, 424 U.S. 948 (1976) (White, J., dissenting); Greco v. Orange Mem. Hosp. Corp., *cert. denied*, 423 U.S. 1000 (1975) (White, J., dissenting). In his dissent to the denial of cert. in *Taylor*, Justice White said, "[H]ospitals receiving Hill-Burton funds in the Fourth Circuit are subject to very different rules as a matter of federal law than are similar hospitals in at least four other Circuits. [6th, 7th, 9th and 10th]. This Court, should not, consistent with a responsible exercise of its certiorari jurisdiction, permit such conflicts on important points of federal law to remain unresolved." 424 U.S. at 949 (White, J., dissenting). *Greco* dealt with the right to abortions. Due to vociferous public opinion on both sides of the abortion issue, it may be that the Court is denying certiorari in Hill-Burton cases because a finding of state action would force the otherwise private hospital to perform elective abortions, contrary to a moral belief of its governing body. A hospital staff privileges case brought to the Court for determination of the state action issue would be a better candidate for Supreme Court acceptance.

full due process protection of his staff privileges, while the physician practicing in the private hospital despite public funding and regulation of its operation, has no such protections.

II. Requirements to be Met in Order to Invoke Fourteenth Amendment Due Process—Liberty or Property Interest

The Fourteenth Amendment due process protections do not extend to all state actions, but only to those that can be said to deprive "life, liberty, or property."[91] The types of liberty and property interests that courts have found deserving of protection extend far beyond the normal meanings of the terms: freedom from physical restraint and ownership of physical objects and real property.[92] In the context of Fourteenth Amendment considerations, these terms now include, "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference."[93] Judicial interpretation of liberty and property interests as they relate to the physician's staff privileges is the subject of this section.

A. Liberty Interest

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[94] Thus the Supreme Court in the leading case of *Board of Regents v. Roth*[95] included an individual's personal reputation within the liberty interest protected by the Fourteenth Amendment. In *Roth* a nontenured teacher at a state university was not rehired, allegedly in retaliation for his open criticism of school

91. U.S. CONST. amend. XIV, § 1.

92. "The Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972) citing Connell v. Higginbotham, 403 U S. 207, 208 (1971) (employment conditional on swearing to oath); Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits). "By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process." Board of Regents v. Roth, 408 U.S. 564, 572 (1972), citing Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation); Stanley v. Illinois, 405 U.S. 645 (1972) (fitness as parent). *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Comment, *The Growth of Procedural Due Process Into A New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in our Economic System"*, 66 NW. L. REV. 502 (1971).

93. Greene v. McElroy, 360 U.S. 474, 492 (1959).

94. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

95. 408 U.S. 564 (1972).

policies. The court dealt with the issue of whether Roth had such a liberty or property interest at stake that due process would be required prior to a non-reappointment decision.[96]

The Court ruled that infringement of a liberty interest would require the possibility of seriously damaging the individual's standing and associations in his community or an imposition of a stigma or other disability that would foreclose his freedom to take advantage of other employment opportunities.[97] Since the University made no charge against Roth that would damage his standing or reputation in the community and no stigma limited his possibilities for future employment, the Court found no liberty interest at stake. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[98]

In *Paul v. Davis*,[99] the Court held that a reputation alone is not protected within the liberty concept of the Fifth and Fourteenth Amendments.[100] In *Paul* the plaintiff's name and picture were included in a police flyer of "active shoplifters." His suit alleged that the defamation was a deprivation of liberty protected by the due process clause of the Fourteenth Amendment.[101] In holding that reputation alone is not constitutionally protected, the Court stated that such protection may be offered only if a previously recognized right or status "was distinctly altered or extinguished" as a result of state action.[102] The Supreme Court appears to be narrowing the scope of the liberty interest entitled to protection and as a result of *Paul v. Davis*, injury to reputation must be coupled with a more tangible loss of a right or a status in order to constitute a liberty interest protected by the Fourteenth Amendment.

Under the *Roth* definition, infringement of a liberty interest requires an individual to be the victim of an action which may seriously damage his standing or associations in his community or impose a stigma limiting his possibilities for future employment. Because professional standing is intimately tied to the practice of medicine, a liberty interest could be found to be at stake in staff privileges cases

96. *Id.* at 574.

97. *Id.* at 573.

98. *Id.* at 575. The Court noted that non-retention of a job may make the individual "somewhat less attractive to some other employers", but that this "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty'." *Id.* at 574 n.13.

99. 424 U.S. 693 (1976). *See* Note, *Constitutional Law—Fourteenth Amendment Due Process—Availability of Federal Remedies—Reputation as a Protected Interest*, 60 MARQ. L. REV. 162 (1976).

100. 424 U.S. at 712.

101. *Id.* at 695-97.

102. *Id.* at 711.

involving charges that damage the physician's professional standing.[103]

Several lower federal courts have dealt with the physician's liberty interest in staff privileges determinations. In *Hoberman v. Lock Haven Hospital*,[104] the court held that an unspecified physician charged with conduct "incompatible with good medical care and acceptable professional behavior," was deprived of an interest protected by the Fourteenth Amendment.[105] The court concluded that due to the small size of the medical staff it was "well known that the memorandum [containing the charges] was directed towards him [the specific physician]."[106]

In *Schlein v. Milford Hospital*,[107] a rejection of application for privileges case, the court questioned the existence of a protected liberty interest where no direct charge was made. In that case, the physician alleged that the mere rejection of privileges was a "blemish" and "scar" upon his record that would limit his "liberty to pursue his occupation."[108] The court thus made a proper distinction; mere rejection of an application for privileges where no charges are directed against the physician does not affect the liberty interest. Rejection may be due to the fact that the hospital already has several doctors practicing the applicant's specialty or some other reason that would have no harmful effect on the physician's reputation and professional standing.

At least one court has dealt with the physician's liberty interest since the Supreme Court decision in *Paul v. Davis*. In *Stretten v. Wadsworth Veterans Hospital*,[109] the Ninth Circuit interpreted the *Davis* decision to mean that a liberty interest was not infringed when the only loss suffered is a "stigma" or damage to reputation. The court did not alter the *Roth* holding that "when the individual has suffered *a tangible loss* a liberty interest is implicated only when the state makes a 'charge against him that might seriously damage his standing and associations

103. Therefore the *Roth* statement that governmental charges against the individual that may seriously damage his standing and association in the community give rise to recognition of a liberty interest (408 U.S. at 573) is consistent with *Paul v. Davis*. In *Roth*, had defamation been shown, it would have been a defamation in the course of the decision to decline rehiring, which would have amounted to an injury to reputation coupled with the tangible loss of his employment status. If injury to one's reputation can be shown, the *Paul v. Davis* requirement will always be met where the damage to reputation is tied to an employment interest. *See also* Bishop v. Wood, 426 U.S. 341 (1976) in which no liberty interest existed where the reasons for discharge of the employee were not made public. There is no stigma in such a situation even though the charges or reasons were false. "The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 350.

104. 377 F. Supp. 1178 (M.D. Pa. 1974).

105. *Id.* at 1185.

106. *Id.*

107. 423 F. Supp. 541 (D. Conn. 1976).

108. *Id.* at 543 n.1.

109. 537 F.2d 361 (9th Cir. 1976).

in his community.' [quoting *Roth*, 408 U.S. at 573]. . . ."[110] Since deprivation of staff privileges would be a tangible loss, though not necessarily a protected property interest, the *Paul v. Davis* decision should present no barrier to the physician's claim.[111]

B. Property Interest

The *Roth* case also sets forth the standards for finding a property interest in connection with employment. The theory behind *Roth* is that the "Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."[112] Therefore, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[113] The Court explained that the creation and scope of the property interest is defined by independent and existing understandings or rules that secure the benefits.[114] Thus, Roth's property interest was created and defined by his contract of employment with the university. Since its terms specifically provided that Roth's employment would terminate at the end of a year and there were no provisions for contract renewal, there was no interest in re-employment and no property interest sufficient to invoke the Fourteenth Amendment was found to exist.[115] Thus, inquiry into a property interest in employment begins with the terms of the employment agreement. The issue is whether there is a status, rule, policy or term that creates a legitimate claim of entitlement to continued employment.[116]

In *Arnett v. Kennedy*[117] six members of the Court, in separate opinions with none holding a majority,[118] concluded that a property interest

110. *Id.* at 365.

111. *Cf.* Note, *Constitutional Law—Fourteenth Amendment Due Process—Availability of Federal Remedies—Reputation as a Protected Interest*, 60 MARQ. L. REV. 162 (1976), which reasons that as a result of the *Paul v. Davis* decision "an injury to one's reputation must be tied to either a liberty interest in being free from . . . stigmatization or a property interest before it is cognizable under section 1983." *Id.* at 169.

112. Board of Regents v. Roth, 408 U.S. 564, 576 (1972).

113. *Id.* at 577.

114. *Id.*

115. *Id.* at 578.

116. In the companion case to *Roth* of Perry v. Sindermann, 408 U.S. 593 (1972), the Court found that although there was no formal tenure system and Perry was hired from year to year, he had a legitimate claim of entitlement to renewal of his contract due to a "*de facto* tenure program" based on rules and understandings fostered by the college administration. *Id.* at 599-601.

117. 416 U.S. 134 (1974).

118. Powell was joined by Blackmun concurring in part, White concurring in part and dissenting in part, Marshall dissenting, Douglas dissenting, and Brennan dissenting.

in employment was entitled to constitutional protection where the employee could only be discharged for "cause". The terms of the agreement therefore implied continued employment in the absence of cause for dismissal and that such dismissal must be accompanied by procedural due process protections.

In *Bishop v. Wood*[119] the *Roth* doctrine was applied to a case where the employee held his position " 'at the will and pleasure of the city.' "[120] The Court found no property interest in employment since the employment agreement allowed the city to arbitrarily terminate employment at any time.[121] Thus the employee had no expectation of continued employment.

Hospital bylaws normally provide that privileges are to be granted for a specified term, usually one or two years.[122] Therefore the physician has a legitimate claim of entitlement to staff privileges for this period of time, and he has a right not to be removed from the staff without procedural due process protections.[123] Revocation without due process being afforded would be a deprivation of a property interest.[124] Appointment and reappointment proceedings do not, however, require Fourteenth Amendment procedural protections. Since hospital bylaws provide that staff privileges shall last for a specified period, the physician has a legitimate claim of entitlement to privileges only for the term specified and failure to reappoint him after this term has elapsed does not constitute infringement of a property interest.[125]

Under *Roth* the physician has no property interest in initial appointment to staff privileges because he has no "legitimate claim of entitlement" to them. No such claim exists because there is no constitutional right to practice medicine in a hospital: hospital administrators are entitled to impose qualifications on those whom they select to practice within their hospital.[126] If refusal of privileges is arbitrary or unreasonable an action may lie against the hospital, but a court will

119. 426 U.S. 341 (1976).

120. *Id.* at 345 n.8.

121. *Id.* at 345.

122. *See* Part III, *infra*, for detailed discussion of hospital staff bylaws.

123. *See* Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56, 60 (8th Cir. 1975).

124. *See* Don v. Okmulgee Mem. Hosp., 443 F.2d 234, 238 (10th Cir. 1971); Poe v. Charlotte Mem. Hosp., Inc., 374 F. Supp. 1302, 1312 (W.D.N.C. 1974).

125. *Contra* Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971). "Once having become a member of the hospital surgical staff Dr. Woodbury had a right to reappointment until the governing authorities determined after a hearing conforming to the minimum requirements of procedural due process that he did not meet the reasonable standards of the hospital." *Id.* at 842. The fact that the case was decided before *Roth* may leave doubt as to whether it would be decided the same way today.

126. Hayman v. City of Galveston, 273 U.S. 414, 416-17 (1927); Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971); Sosa v. Board of Managers of Val Verde Mem. Hosp., 437 F.2d 173 (5th Cir. 1971).

not interfere "so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations."[127]

In summary, a physician will be able to assert deprivation of a liberty interest protected by the Fourteenth Amendment whenever a charge is made against him that could adversely affect his professional standing in connection with determination of his staff privileges. The physician will be able to assert a property interest only where he is threatened with revocation of his privileges. Current constitutional law therefore leaves the physician's staff privileges largely unprotected under the Fourteenth Amendment. The Supreme Court requires an individual to have a legitimate claim of entitlement to a right before a property interest in that right may be asserted. This restrictive approach severely narrows application of the Fourteenth Amendment.

III. The California Approach

The California courts have been diligent in their protection of physicians' hospital staff privileges. These courts have expanded the scope of judicial review of staff privileges decisions and have developed a common law right of fair procedure that must be followed in the course of staff privileges determinations. The California approach is a sensible one, offering an excellent alternative to the complications involved in attempting to invoke constitutional due process. This section will discuss the development and present scope of these doctrines, as well as the reasons which indicate the approach is a sound alternative.

The first case to deal with hospital staff privileges determinations in California was *Wyatt v. Tahoe Forest Hospital District*.[128] In *Wyatt*, the court discussed the theory that a body ascertaining facts that may affect the right to engage in a professional practice[129] performs a quasi-judicial function,[130] holding the theory applicable to hospitals. This rule originated in cases involving license grants, and the *Wyatt* court analogized a physician's staff privileges to a "special license" that must be obtained in order to practice in the hospital.[131] Due to the quasi-judicial character of a staff privilege proceeding it must be fair, unarbitrary and based on sufficient evidence. Thus the applicant for staff privileges "has the right to a hearing to determine whether or not his

127. Sosa v. Board of Managers of Val Verde Mem. Hosp., 437 F.2d 173, 177 (5th Cir. 1971).

128. 174 Cal. App. 2d 709, 345 P.2d 93 (1959).

129. The court placed special emphasis on the fact that in modern society "a physician or surgeon who is not permitted to practice his profession in a hospital is as a practical matter denied the right to fully practice his profession." *Id.* at 715, 345 P.2d at 97.

130. *Id.* at 716, 345 P.2d at 97.

131. *Id.*

qualifications meet the requirements established by law."[132] Certain due process protections must, therefore, be afforded the applicant for staff privileges in a public hospital. The *Wyatt* rule was extended to private hospitals in *Willis v. Santa Ana Community Hospital Association*.[133] In this case the California Supreme Court rejected the contention that private hospitals have absolute discretion to exclude doctors from membership "without possibility of a suit for damages resulting from the exclusion."[134]

The landmark California case was *Ascherman v. San Francisco Medical Society*[135] [hereinafter cited as *Ascherman I*]. Dr. Ascherman sued four hospitals alleging that they either dismissed him from their staff, refused him admission to their staff, or refused him use of hospital facilities, without affording him due process of law or following their own bylaws.[136] The defendant hospitals asserted as their defense the general rule that a private hospital may use its discretion to exclude a physician from its staff, as long as the decision is not arbitrary or capricious.[137] The Court of Appeal did not accept this argument and held that a physician may not be deprived of staff privileges without minimal due process protection, regardless of whether the hospital is public or private.[138] The court abolished the public-private state action distinction in California basing its decision on two theories. First, the court compared the California Health & Safety Code sections governing public hospitals with the Business & Professions Code sections governing private hospitals.[139] The similarity of these statutes led the

132. *Id.*

133. 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962).

134. *Id.* at 810-11, 376 P.2d at 570-71, 26 Cal. Rptr. at 642-43. The court reasoned that the "burden of defending suits cannot warrant denial of relief to one injured by wholly unjustifiable conduct . . . ."

135. 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1974).

136. *Id.* at 629-31, 114 Cal. Rptr. at 683-85. Dr. Ascherman also sued others, including the San Francisco Medical Society, alleging conspiracy to interfere with his practice.

137. *Id.* at 640-41, 114 Cal. Rptr. at 691. *See also* Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 810-11; 376 P.2d 567, 570-71; 26 Cal. Rptr. 640, 642-43 (1962).

138. Ascherman I, 39 Cal. App. 3d at 648, 114 Cal. Reptr. at 696.

139. Public hospitals are governed by the Local Hospital District Law, CAL. HEALTH & SAFETY CODE §§ 32000-32492 (West 1970). Section 32128 provides that rules to govern the operation of the hospital be established by the board of directors and include (1) provision for the organization of physicians who are permitted to practice in the hospital into a formal medical staff, with officers and bylaws and staff appointment on an annual or biennial basis, (2) provision for procedure of appointment and reappointment, and (3) rules of the hospital shall meet standards not less than the rules and standards of private or voluntary hospitals within the same district.

CAL. BUS. & PROF. CODE § 2392.5 (West 1973) governs the private hospital and is practically the same as § 32128 of the Health & Safety Code. It provides that it is unprofessional not to have rules goverining the operation of a hospital having five or more physicians. The provisions that must be included are almost identical to § 32128, except that § 2392.5 adds that membership is restricted to physicians competent in their respective fields, worthy in

court to conclude that the California legislature intended public and private hospitals to be governed by the same criteria and in an identical manner. Second, the Court applied the rule of *Pinsker v. Pacific Coast Society of Orthodontists*[140] [hereinafter cited as *Pinsker I*] that a private entity "does not have absolute discretion to deprive a person of a substantial right."[141]

In *Pinsker I*, which was explained and expanded in *Pinsker v. Pacific Coast Society of Orthodontists*[142] [hereinafter cited as *Pinsker II*] the California Supreme Court held that membership in the defendant orthodontic society was a practical necessity for a dentist wishing to specialize in orthodontics. The court found a public interest in the membership decisions of the society due to its "virtual monopoly" in establishing membership standards. Thus, the court observed that the society had a fiduciary responsibility in accepting or rejecting membership applications. The court reasoned that "an applicant for membership has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process."[143] As *Pinsker II* explains, this is a right found at common law.[144] It began as a principle of judicial review of *expulsions* from membership[145] and was extended to *exclusions* from membership in private associations which monopolized their field of employment in such a way that membership was an "economic necessity."[146]

character and in professional ethics. *See* Ascherman I, 39 Cal. App. 3d at 646-47, 114 Cal. Rptr. at 695-96.

140. 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).

141. Ascherman I, 39 Cal. App. 3d at 647, 114 Cal. Rptr. at 696. *See also* Randone v. Appellate Dept., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972) where a unanimous Supreme Court noted that "California courts have long preserved the individual's right to notice and a meaningful hearing in instances in which a significant deprivation is threatened by a *private* entity, as well as by a governmental body." *Id.* at 550-51 n.11, 488 P.2d at 22 n.11, 96 Cal. Rptr. at 718 n.11 (emphasis in original).

142. 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

143. Pinsker I, 1 Cal. 3d at 166, 460 P.2d at 449, 81 Cal. Rptr. at 627.

144. "Thus, *Pinsker I* constitutes only the latest development in a century-old progression of common law decisions establishing the proper role which courts should play with respect to membership decisions reached by private associations. Throughout this progression, the authorities indicate that once it is determined that judicial scrutiny of a particular decision is justified to protect against arbitrary action, such overview includes an evaluation of both the substantive and procedural aspects of the association's decision." Pinsker II, 12 Cal. 3d at 552, 526 P.2d at 261, 116 Cal. Rptr. at 253.

145. This doctrine was recognized in California as early as 1888. *See* Pinsker II, 12 Cal. 3d at 550-51 n.8, 526 P.2d at 260 n.8, 116 Cal. Rptr. at 252 n.8, for a historical survey of the cases in California.

146. *Id.* at 551, 526 P.2d at 260, 116 Cal. Rptr. at 252. Much of the court's historical data is gathered from Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 A.2d 791 (1961), the first important state decision to grant judicial review of a professional association's rejection of an application for membership. In making its decision it canvassed the historical development of judicial decisions in the field, and is a helpful reference in tracing

Thus, *Pinsker I* did not limit procedural fairness requirements to *expulsion* from private association membership but extended those protections to *exclusions* from such memberships where the test of economic necessity is met. Under this test, the private association must have the power to affect the individual's right to practice his profession as a result of its membership decisions.

Ascherman I significantly expanded the *Pinsker I* theory. First, the doctrine that an organization exercises a quasi-judicial function and so its membership decisions are subjected to minimal due process[147] was extended to the hospital staff privileges decision, for both public and private hospitals.[148] Second, *Ascherman I* narrowed the requirement of showing a monopoly of employment by the association. In *Ascherman I* the defendant hospitals argued that since no monopoly was involved there should be no requirement that their bylaws provide a right to a hearing before a physician can be deprived or denied staff privileges. They argued that past California cases dealt only with professional societies which exerted a monopoly power over the applicant's right to practice his profession. Such professional societies were quite unlike the defendant hospitals, it was argued, which exercised no monopolistic control over Dr. Ascherman's right to practice his profession. They were only four of many hospitals in the city.[149] The court specifically rejected the notion that pervasive monopoly power need be shown. It stated that the evidence showed that Dr. Ascherman suffered economic loss due to his exclusion from staff privileges and he was

---

the origin of the doctrine. *Falcone* relied heavily on the California case of James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944) which held that a union that has attained a monopoly of the supply of labor occupies a quasi-public position in that its right to choose members affects the fundamental right to work for a living and it has corresponding obligations not to exercise its power arbitrarily or unreasonably, applying the common law principles of fair procedure to a private association's exclusion from membership actions. *Id.* at 731-32, 155 P.2d at 335. *Falcone* applied the *Marinship* doctrine and rationale to a medical society with a virtual monopoly over the use of local hospital facilities, such that judicial review of rejection of a membership application was proper and the grounds for exclusion cannot be arbitrary or unreasonable. Falcone v. Middlesex County Medical Society, 34 N.J. at 598, 170 A.2d at 800. *See* Pinsker II, 12 Cal. 3d at 551-5, 526 P 2d at 260-61, 116 Cal. Rptr. at 253.

147. *Pinsker II* adopts the term "fair procedure" which is continued in subsequent cases. The court is careful to point out that the basis of fair procedure is not constitutional. "It is important to note that the legal duties imposed . . . arise from the common law rather than from the Constitution as such; although *Pinsker I* utilized 'due process' terminology in describing defendant associations' obligations, the 'due process' concept is applicable only in its broadest, nonconstitutional connotation." Pinsker II, 12 Cal. 3d at 550 n.7, 526 P.2d 259 n.7, 116 Cal. Rptr. at 251 n.7. The court substitutes the words "fair procedure" for "minimal due process" to avoid further confusion.

Of course the "essence of due process is fair procedure," as will be seen in Part IV *infra*.

148. Ascherman I, 39 Cal. App. 3d at 649-50, 114 Cal. Rptr. at 697-98.

149. *Id.* at 650, 114 Cal. Rptr. at 698.

therefore entitled to fair procedure.[150]

In *Ascherman v. Saint Francis Memorial Hospital*[151] [hereinafter cited as *Ascherman II*], the Court of Appeal had the advantage of the decisions of both *Pinsker* cases and *Ascherman I* to guide it in another staff privileges case. In *Ascherman II*, a formally private hospital denied the same Dr. Ascherman appointment to the staff without the minimal common law standards of fair procedure.[152] The court reaffirmed that it would not distinguish between a public and private hospital as to procedural protections required in determining staff privileges cases.[153] The court also clarified what showing was necessary regarding the power exercised by the association over the practice of the individual's profession in order to require common law fair procedure. It held that "economic necessity" was not the criterion, but rather whether "denial of membership would effectively impair the applicant's right 'to fully practice his profession' ".[154] The court restated its position that the mere existence of other hospitals in the area may not prevent a deprivation of a substantial economic advantage and categorically concluded "that denial of staff membership would effectively impair the physician's right to fully practice his profession."[155] Therefore, the rule in California is that whenever a hospital is making a determination as to staff privileges it must utilize common law fair procedure protections.

In *Ascherman I* the court spoke of the policy behind abolishing the public-private distinction as it related to hospitals in staff privileges cases. Citing from the Hawaii Supreme Court case of *Silver v. Castle Memorial Hospital*[156] the court stated: "if the proposition that any hospital occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve is accepted, then the rationale for any distinction between public, 'quasi public' and truly private breaks down and becomes meaningless, especially if the hospital's patients are considered to be of primary concern."[157] This statement affirms the soundness of the California approach to the public-private distinction. A hospital's primary concern is patient care and the quality of that care is based primarily on the capabilities of treating physicians. Whether a hospital is public or private should not enter into the determination of

150. *Id.* Note that *Ascherman I* was approved in *Pinsker II*.

151. 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975).

152. *Id.* at 514, 119 Cal. Rptr. at 511.

153. *Id.* at 512-13, 119 Cal. Rptr. at 510.

154. *Id.* at 511, 119 Cal. Rptr. at 509.

155. *Id.*

156. 53 Haw. 475, 497 P.2d 564, *cert. denied*, 409 U.S. 1048 (1972). A significant part of the *Ascherman I* decision is taken from this Hawaii case which abolished the public-private distinction as it relates to hospital staff privileges and applied a fair procedure right to both situations.

157. Ascherman I, 39 Cal. App. 3d at 645, 114 Cal. Rptr. 694-95. *See* Silver v. Castle Mem. Hosp., 53 Haw. 475, 482; 497 P.2d 564, 570 (1972).

a physician's ability to practice in the hospital. According to the California courts there is no legitimate need for such a distinction.

In *Anton v. San Antonio Community Hospital*,[158] a physician was not reappointed to the staff of the hospital. He alleged a denial of fair procedure in his hearing by the hospital's judicial review committee, whose decision was sustained by the hospital board of directors. One issue before the California Supreme Court was whether the trial court could employ the broader review under the administrative mandate, § 1094.5 of the California Code of Civil Procedure,[159] rather than under the traditional mandate.[160] In holding that California Code of Civil Procedure § 1094.5 was applicable, the Court noted that minimal common law procedures are required for physician staff privileges determinations.[161] The *Anton* decision reaffirms the requirement that fair procedure must accompany a hospital staff privileges determinations for both public and private hospitals, and it greatly expands the judicial review of such determinations.

In *Strumsky v. San Diego County Employee's Retirement Association*,[162] the court stated that if the challenged decision "substantially affects a fundamental vested right, the court, . . . must exercise its independent judgment on the evidence and find and abuse of discretion if the findings are not supported by the weight of the evidence."[163] However, when no fundamental right is at stake, the scope of review is limited to determining whether the findings are supported by substantial evidence in light of the whole record.[164] This is the so called Bixby-Strumsky rule. Thus the *Anton* court had the opportunity to deal with the nature of a physician's rights to staff membership in determining

158. 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977).

159. CAL. CIV. PROC. CODE § 1094.5 (West 1974). This section is to be used in all cases "Where the writ [of mandate] is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. . . . "[I]nquiry in such a case shall extend to questions . . . whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." CAL. CIV. PROC. CODE § 1094.5(a), (b) (West 1974). CAL. CIV. PROC. CODE § 1094.5(c) (West 1974) allows the reviewing court to use its own independent judgment in review of certain situations.

160. CAL. CIV. PROC. CODE § 1085 (West 1974).

161. Anton v. San Antonio Com. Hosp., 19 Cal. 3d 802, 815; 567 P.2d 1162, 1168; 140 Cal. Rptr. 442, 448 (1977).

162. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

163. *Id.* at 44, 520 P.2d at 40, 112 Cal. Rptr. at 816.

164. *Id.* at 44-45, 520 P.2d at 40, 112 Cal. Rptr. at 816. *See also* Bixby v. Pierro, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). These two cases are collectively referred to as the Bixby-Strumsky rule.

the scope of judicial review under § 1094.5. The court found that the right to staff privileges was "clearly fundamental," thus satisfying the Bixby-Strumsky rule and allowing the broader scope of judicial review.[165] The court rejected the defendant hospital's contention that the right is not vested since appointment is made either on an annual or biennial basis[166] and that reappointment is therefore subject to review by the hospital.[167] This is in essence the *Board of Regents v. Roth* argument and was vociferously rejected by the *Anton* Court:

> [t]his contention, we believe, wholly ignores the realities of the situation confronting us . . . the admission of a physician to medical . . . staff membership establishes a relationship between physician and hospital which, although formally limited in duration by force of law, gives rise to rights and obligations. . . . The previously admitted physician . . . may not be denied reappointment to the medical staff absent a hearing and other procedural prerequisites consistent with minimal due process protections. . . a hospital board, through its act of initially admitting a physician to medical staff membership, has thereby, in the exercise of its discretion, necessarily determined his fitness for such membership at the time of admission *and granted him full rights of membership*. The fact that review of this appointment is made mandatory on an annual or biennial basis . . . can by no means be said to render it probationary or tentative in effect. . . . In short, the full rights of staff membership *vest* upon appointment, subject to divestment upon periodic review only after a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements.[168]

California rejects the approach of United States Supreme Court decisions which hold that there is no vested right to reappointment, treating appointment as membership in an association. Once admitted, the individual cannot be ousted without the protection of a fair procedure even though membership may be subject to periodic review.

The *Anton* court points out that in reality, review procedures are quite similar for both public and private hospitals due to pressures to

165. Anton v. San Antonio Com. Hosp., 19 Cal. 3d at 823, 567 P.2d at 1174, 140 Cal. Rptr. at 454. The rule of *Anton* was changed by the legislature in 1978 in California Code of Civil Procedure section 1094.5(d).

166. CAL. BUS. & PROF. CODE § 2392.5 (West 1974).

167. In a footnote the court here makes it clear that the same procedural protections are applied to the physician seeking appointment or reappointment. But when determining whether there is a vested interest for purposes of 1094.5 review, appointment and reappointment review is not the same, as the interest of the physician in initial appointment to staff privileges is clearly not vested. Anton v. San Antonio Com. Hosp., 19 Cal. 3d at 824, n.22, 567 P.2d at 1174, n.22, 140 Cal. Rptr. at 454, n.22.

168. *Id.* at 824-25, 567 P.2d at 1174-76, 140 Cal. Rptr. at 454-55 [emphasis in original, footnotes and citations omitted]. *Cf.* Klinge v. Lutheran Charities Ass'n, 523 F.2d 56, 61 (8th Cir. 1975); Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971).

conform to standards set by national and state accrediting organizations which are prerequisites for hospital accreditation.[169] The court concluded that the use of the "same judicial procedure for reviewing the adjudicatory decisions of all such hospitals is peculiarly appropriate."[170] This observation is crucial. "[I]t is clear . . . that the practical necessity of securing JCAH [Joint Commission on Accreditation of Hospitals] accreditation has the effect of insuring that substantially all hospitals in this state, whether public or private, have bylaws governing hearing and appellate procedures which are designed to comply with JCAH standards and which, in most cases, are based either on the 1971 JCAH Guidelines or the more recent CMA-CHA [California Medical Association-California Hospital Association] Uniform Code of Hearing and Appeal Procedures."[171] The same trend will be true in hospitals throughout the country which seek JCAH accreditation.[172] Since the accrediting organizations require procedural protections of the physician's staff privileges, as the hospitals adopt these standards litigation involving staff privileges should decrease significantly. The only controversies remaining will be whether the procedures set forth by the accrediting organizations and adopted by the hospitals are constitutionally sufficient (or fair procedurally) and suits determining whether the hospital has followed the procedures set forth in its bylaws.

In conclusion, the California courts have been the most enlightened in the country in arriving at protections for the physician's staff privileges.[173] The California approach offers a viable solution to the

169. The Joint Commission on Accreditation of Hospitals is a national body responsible for accreditation of hospitals. JCAH sets forth accreditation standards and guidelines, including guidelines as to medical staff appointment, reappointment and disciplinary actions requiring hearing and appeal procedures. JCAH, ACCREDITATION MANUAL FOR HOSPITALS (1976); JCAH, GUIDELINES FOR THE FORMULATION OF MEDICAL STAFF BYLAWS, RULES AND REGULATIONS (1971).

The California Medical Association and California Hospital Association also have accreditation functions and publish similar guidelines with similar protection. CMA, GUIDING PRINCIPLES FOR PHYSICIAN-HOSPITAL RELATIONSHIPS (1974) which includes the UNIFORM CODE OF HEARING AND APPEAL PROCEDURES (1971).

170. 19 Cal. 3d at 820, 567 P.2d at 1172, 140 Cal. Rptr. at 452 (footnote omitted).

171. *Id.* at 820, 567 P.2d at 1171, 140 Cal. Rptr. at 451. California in fact requires its public hospitals to provide for appointment and reappointment of the medical staff as provided by the JCAH standards. Local Hospital District Law, CAL. HEALTH & SAFETY CODE § 2128 (West 1973).

172. The importance of accreditation will be discussed in greater detail in Part V, *infra*.

173. Ezekial v. Winkley, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977) dealt with the common law fair procedure principal. The case involved a surgical resident dismissed from the hospital without notice of charges and an opportunity to be heard. The Supreme Court of California reaffirmed the *Pinsker*, *Ascherman* and *Anton* principles, and further decreased the power necessary to be exercised by the private entity before fair procedure is required. Invoking fair procedure "does not depend on the existence of 'monopoly' power" but rather whether "the practical power of the entity" is such as "to affect substantially an important economic interest." *Id.* at 277, 572 P.2d at 38-39, 142 Cal. Rptr. 424-25.

difficulties in invoking Fourteenth Amendment due process.[174]

IV. The Process Which is Due

In evaluating an individual's constitutional claim under the due process clause, the courts often employ a two-step analysis.[175] The first step involves the threshold issues: is there state action[176] and has a liberty or property interest[177] been denied. If these requirements are satisfied, the second step is to determine what procedural protections are required under the due process clause. This section will deal with the process which is due the physician in protecting his staff privileges under both the constitutional due process and the common law fair procedure approaches. Following with this discussion, selected hospital bylaws and model bylaws of accrediting organizations will be analyzed as to the sufficiency of the protections they afford.

A. Federal Due Process

There are no specifically defined procedural requirements for a proceeding governed by the due process clause. Rather, the procedural protections required of a particular proceeding depend upon a complex of factors.[178] Although the Supreme Court did find it necessary to spell out some specific requirements as essential to procedural protection in its 1970 decision, *Goldberg v. Kelley*,[179] subsequent Supreme Court decisions show that the usual view of the Court is that the particular institutional and factual context will be considered in deciding what specific procedural protections are required under the Fourteenth Amendment.[180]

This course is shown in the recent Supreme Court case of *Mathews*

---

174. Cases in other states to adopt similar doctrines are: Blender v. Maricopa County Medical Soc'y, 96 Ariz. 240, 393 P.2d 926 (1964); Silver v. Castle Mem. Hosp., 53 Hawaii 475, 497 P.2d 564 (1972); Bricker v. Sceva Speare Mem. Hosp., 111 N.H. 276, 281 A.2d 589 (1971); Sussman v. Overlook Hosp. Ass'n, 95 N.J. Super. 418, 231 A.2d 389 (1967); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 250 N.E. 2d 892 (1969); Woodward v. Porter Hosp., 125 Vt. 419, 217 A.2d 37 (1966).

175. *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365 (9th Cir. 1976). *Cf.* Perry v. Sindermann, 408 U S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

176. *See* Part I, *supra*.

177. *See* Part II, *supra*.

178. Hannah v. Larche, 363 U.S. 420, 442 (1960).

179. 397 U.S. 254 (1970), where the Court held that a pre-termination hearing was required before welfare payments could be rescinded. The Court stated the specific requirements to be: a hearing "at a meaningful time and in a meaninqful manner", opportunity of confrontation and cross-examination of witnesses, a right to an attorney if desired, and a decision based on the legal rules and evidence offered at trial, by an impartial decision maker with reasons stated for the decision. *Id.* at 267-71.

180. Suckle v. Madison Gen. Hosp., 362 F. Supp. 1196, 1211, (W.D. Wis. 1973), *aff'd*, 499 F.2d 1364 (7th Cir. 1974) referring to the United States Supreme Court decisions of

v. Eldridge,[181] wherein the Court states the current test used to establish the specific due process requirements. Three factors must be considered:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[182]

The constitutional necessity of a specific procedure is determined by weighing these three factors.

In modern society much of the practice of medicine is performed in the hospital, and for practitioners of certain specialties, medical technology has developed to the point where procedures and equipment can only be supplied by a hospital.[183] In assessing the severity of a hospital's denial of staff privileges to a physician, as the first *Mathews* factor, it is necessary to consider the physician's access to other hospitals. If there are few alternatives in the locality of the physician's practice, exclusion from a hospital's staff may preclude the physician from practicing medicine altogether or at least cause him to lose significant income where his practice is limited to care that can be rendered outside the hospital.[184] Another element in determining the physician's interest under the *Mathews v. Eldridge* formula is whether the charge or action taken against the physician will damage his reputation and professional standing. Such damage can lead to loss of referrals, loss of other staff privileges and can affect malpractice insurance coverage. If such a charge or action will seriously affect one of these elements of the physician's practice, then significant procedural protections may be required.[185]

The second *Mathews* factor has been explained by one court as whether "the risk of an erroneous decision prejudicial to the plaintiff

---

Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrisey v. Brewer, 408 U.S. 471 (1972) as examples.

181. 424 U.S. 319 (1975).

182. *Id.* at 335.

183. The interest of the physician in hospital staff privileges is parallel to his liberty and property interest in hospital privileges and practicing his profession. For more complete discussion of these interests see Part II, *infra*.

184. Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33, 36 (6th Cir. 1968).

185. *See generally* Strettan v. Wadsworth Veterans Hosp., 537 F.2d 361, 368 (9th Cir. 1976); Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33, 36 (6th Cir. 1968). Required procedural protectors will depend on the action taken by the hospital. Where privileges are merely restricted, but not denied, the physician's interest in staff privileges is less affected. Citta v. Delaware Valley Hosp., 313 F Supp. 301, 309 (E.D. Penn. 1970).

under the procedures employed" is greater than "the probable reduction of error which might result from a more elaborate or differently timed set of procedures."[186] In *Strettan v. Wadsworth Veterans Hospital*,[187] the Ninth Circuit grappled with a situation involving a hospital resident who was allegedly terminated without due process protections. The court reviewed the challenged procedure in light of the second *Mathews* factor and determined that a full adversary hearing was unlikely to be more useful than less elaborate procedures in preventing injustice against the terminated resident.[188] Under this approach the appellate court inspects the facts revealed by the record of the lower court and compares these to the facts revealed by the challenged proceeding. It then decides whether a procedure with greater protections would have better preserved the physician's privileges. The appellate court can thus decide that even if the physician had been afforded all the formal procedural protections, his staff privileges should still have been suspended. In such a case, the challenged hearing may be held sufficient despite procedural deficiencies.

In weighing the third *Mathews* factor, the hospital, which stands in the shoes of the state, "has an overwhelming interest in maintaining the highest standards of medical care for its patients . . ."[189] and obviously seeks to achieve the greatest quality of medical care possible. This is true from the standpoints of both patient care and the practicalities of insurance coverage and liability for negligent care rendered by staff physicians.[190] It is unclear whether procedural protections of staff privileges will interfere with the hospital's ability to provide excellent care to the patient,[191] but it must be assumed that procedural protections do not hide the true facts of a physician's negligence or incompetence. Rather they protect the physician from a decision rendered on rumor or personal prejudice of the other physicians sitting in judgment. The only justification for not providing such protection is the administrative

186. Strettan v. Wadsworth Veterans Hosp., 537 F.2d 361, 369 (9th Cir. 1976).

187. *Id.* Note that while Veterans Administration hospitals are specifically governed by statute to provide a full adversary hearing to physicians (38 U.S.C. § 4110 1976), this case involved a medical resident and thus involves the usual constitutional analysis in determining procedural protections due under the due process clause. Although medical residents are not the subject of this note, the constitutional issue as to the second factor of the *Mathews* test is relevant to this note.

188. *Id.* at 368-69.

189. Citta v. Delaware Valley Hosp., 313 F. Supp. 301. 309 (E.D. Penn. 1970).

190. *Id.*

191. "The survival of patients often depends upon the presence of competent physicians. The interest of the hospital in enlarging the prospects of survival of patients weighs in favor of due process procedures which will minimize the risk of the continued employment of an incompetent doctor, so long as these procedures are consistent with the notions of fundamental fairness." Strettan v. Wadsworth Veterans Hosp., 537 F.2d 361, 368 (9th Cir. 1976) (footnote omitted).

cost or burden involved, which consists primarily of the cost of the physicians' time who must judge the case in the more lengthy adversary hearing. It is unlikely that this burden could ever justify the significant deprivation of rights that might occur as a result of a proceeding without sufficient procedural protections.

B. The Common Law Approach

California has recognized a similar balancing of interests in order to support the application of common law fair procedures to hospital staff privileges cases. Under the common law approach it is the power that the association is able to exert over the economic necessities of the individual applicant that mandates minimal procedural protections accompanying the association's decisions. In *Wyatt*, the first case in California to deal with staff privileges, the court acknowledged that a disallowance of staff privileges means, realistically, a denial of the right to practice.[192] The hospital board making staff privileges decisions performs, the court held, a quasi-judicial function and it must afford certain procedural protections to the staff applicant.[193] In *Wyatt* the procedural protection required was a simple hearing for the physicians.

In *Ascherman I* the court of appeal held that the interests of the doctor, hospital and public must all be considered in hospital privilege proceedings[194] and quoted from the *Silver v. Castle* decision which set

192. Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 709, 715; 345 P.2d 93, 97 (1959). "In this day of advanced medical knowledge and advanced diagnostic techniques much of what a physician or surgeon must do can only be performed in a hospital. In many instances only a hospital has the facilities necessary for proper diagnosis or treatment." *Id.* at 715, 345 P.2d at 97.

193. *Id.* at 716, 345 P.2d at 97. *See also* Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 598, 375 P.2d 431, 25 Cal. Rptr. 551 (1962).

194. Ascherman I, 39 Cal. App. 3d at 647-49, 114 Cal. Rptr. at 696-97; text accompanying notes 155-57, *supra*. *See also* Ascherman II, 45 Cal. App. 3d at 511, 119 Cal. Rptr. at 509, where the court said, "We conclude, therefore, that denial of staff membership would effectively impair the physician's right to fully practice his profession" and so required the hospital to use fair procedure in dealing with staff privileges applications. In Ezekial v. Winkley, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977) the court reiterated the *Wyatt* statement as to the interest of a physician in practicing in a hospital and made clear that although *Wyatt* involved a public hospital, the common law of fair procedure as to this interest of practicing in a hospital has been extended to public hospitals. Also, it appears from *Ezekial* that California goes far in recognizing the interests of the physician in staff privileges. The court spoke of its sensitivity to the "difficulty and danger, on the one hand, of any undue restrictions on the essential ability of a hospital to discipline its professional staff thereby controlling its professional performances, while, on the other hand, malpractice liability is imposed on the hospital for its failure to exercise such control." But the court concluded: "[w]e emphasize, however . . . [that hospitals] are not precluded from dismissing . . . for incompetence. We hold only that, in doing so, they must afford . . . rudimentary procedural and substantive fairness." *Id.* at 278, 572 P.2d at 39, 142 Cal. Rtpr. at 425.

forth specific procedural requirements.[195] However, subsequently in *Pinsker II*, the California Supreme Court set forth only the basic procedural standards to be followed, holding that "the associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the 'charges' against him and a reasonable opportunity to respond."[196] The court was careful to point out that the common law fair procedure requirement does not mandate "formal proceedings with all the embellishments of a court trial" or adherence to "a single mode of process." Rather, a variety of procedures will satisfy the requirement as long as they provide the opportunity for the individual applicant to present his position.[197] Thus the key elements of a "fair procedure" are notice to an applicant of the reason for the proposed rejection with reasonable opportunity to defend himself.[198]

In effect, California fair procedure and federal constitutional due process are really not all that different. This is not surprising since the United States Supreme Court has stated that the essence of due process is fair procedure.[199] Accordingly, fair procedure and due process will be referred to together henceforth, except where they may specifically differ and such instances will be made clear in the text.

---

195. Ascherman I, 39 Cal. App. 3d at 648-49, 114 Cal. Rptr. at 697; Silver v. Castle Mem. Hosp., 53 Hawaii 475, 484-85, 497 P.2d 564, 571-72 (1972). The protections included a hearing, notice to adequately prepare a defense, a written statement of specific charges or reasons for the application being denied, a right to call witnesses, a discretionary right to counsel, a basis for decision of substantive evidence produced at the hearing and a written decision including the basis of decision so there is an adequate record for judicial review.

196. Pinsker II, 12 Cal. 3d at 555-56, 526 P.2d at 263-64, 116 Cal. Rptr. at 255-56. The court decided that the procedure followed by the hospital did not meet the minimum standards required under the common law since the applicant was not given an opportunity to respond to the charges raised against him.

197. *Id.* at 555, 526 P.2d at 265, 119 Cal. Rptr. at 255. The court's guide to the drafters of such procedures is that "the organization should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an applicant to present his position." *Id.* at 555-56, 526 P.2d at 263-64, 11 Cal. Rptr. at 255-56 [emphasis in original]. The court noted that the association retained discretion, but that the courts remain available for abuse of that discretion. *Id.*

198. *Id.* at 555, 526 P.2d 263, 116 Cal. Rptr. at 255. This concept seemed to be applied at its minimum in *Anton* where the court said that the proceedings were fair procedure as required under the common law since the procedure in question provided "adequate notice of charges and a 'fair opportunity [for the affected party] to present his position.' Our *Pinsker* decision requires no more than this." 19 Cal. 3d at 830, 567 P.2d at 1178, 140 Cal. Rptr. at 458. The *Pinsker II* statements were reaffirmed in Ezekial v. Winkley, 20 Cal. 3d at 279, 142 Cal. Rptr. at 425-26.

199. *See* Hannah v. Larche, 363 U.S. 420 (1960). *See also* Poe v. Charlotte Mem. Hosp., Inc., 374 F. Supp. 1302, 1304 (W.D.N.C. 1974).

V. Hospital Bylaws in Regard to Specific Procedural Protections

The internal rules of a hospital take the form of bylaws, rules generally adopted by the governing body of the hospital to control its operation. Specific bylaws are adopted either voluntarily or by statutory requirement.[200] Bylaws are important to the physician because they detail the various procedures the hospital has adopted and chosen to follow when dealing with appointment, reappointment and revocation of staff privileges. If the hospital fails to follow its adopted bylaw procedures, it decisions are subject to judicial review.[201]

In an effort to assist hospitals in complying with accreditation standards, accrediting organizations have developed manuals, guidelines and model bylaws for hospitals to follow when writing or revising their bylaws.[202] As the California Supreme Court noted in *Anton*, the pressures of accreditation have resulted in hospitals largely adopting the guidelines set forth by the accrediting organizations with the resulting effect of standardizing hospital procedures. The purpose of accreditation[203] is to develop national (or statewide) standards of structure, function, staffing and procedure for hospitals, all directed toward the

200. For example, CAL. BUS. & PROF. CODE § 2392.5 (West 1974) requires private corporate hospitals to provide for bylaws to organize the medical staff.

201. This is the exception to the general rule that a private hospital has a right to exclude a physician for whatever reason, the decision of the hospital authorities not being subject to judicial review. In the event of "a case in which there is a failure to conform to procedural requirements set forth in its [the hospital's] constitution by-laws, or rules and regulations," the "extent of judicial review is to require compliance with the prescribed procedure." Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 63, *aff'd*, 348 F.2d 70 (D.C. Cir. 1963). *See also* Berberian v. Lancaster Osteopathic Hosp. Ass'n, 395 Pa. 257, 263, 149 A.2d 456, 459 (1959), where the court said that the hospital had voluntarily restricted its freedom of discretion by its bylaws. The bylaws functioned as a contractual obligation which must be followed when removing a physician. *See also* Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy*, 1966 WASH. U. L.Q. 485, 494.

202. The JCAH has an ACCREDITATION MANUAL FOR HOSPITALS (1976) [hereinafter cited as ACCREDITATION MANUAL] which sets forth standards for the operation of the hospital with accompanying interpretations to serve as a guide for those implementing them; and GUIDELINES FOR THE FORMULATION OF MEDICAL STAFF BYLAWS, RULES AND REGULATIONS (1971) [hereinafter cited as JCAH, Guidelines] which set forth actual acceptable bylaws and comments thereto. The California Medical Association publishes a GUIDING PRINCIPLES FOR PHYSICIAN-HOSPITAL RELATIONSHIPS (1974) [hereinafter cited as CMA, GUIDING PRINCIPLES] which are guidelines for formulating medical staff bylaws, including the CMA-CHA UNIFORM CODE OF HEARING AND APPEAL PROCEDURES (1974) [hereinafter cited as UNIFORM CODE]. The CMA has also published MODEL MEDICAL STAFF BYLAWS (1965).

203. National accreditation of hospitals is by the Joint Commission on Accreditation of Hospitals (consisting of the American College of Surgeons, the American College of Physicians, the American Hospital Association and the American Medical Association). State medical associations often accreditate hospitals, as do the California Medical Association and the California Hospital Association.

"provision and maintenance of the optimal quality of patient care" in the hospital.[204] Although accreditation is ostensibly voluntary, it is a practical necessity and is actively sought.[205] The remainder of this note will examine specific procedural protections in relation to the JCAH and CMA standards to determine if hospitals are adequately protecting the physician's right to staff privileges. It is especially important to analyze the protection afforded by the standards of these two accrediting organizations[206] since it is these standards which are uniformly followed in hospitals throughout California and across the nation.

A. Right to Counsel

Neither the JCAH *Guidelines* nor the CMA *Guiding Principles* provide for a right to legal representation at the staff privileges hearing.[207]

---

204. ACCREDITATION MANUAL, *supra* note 202, at "forward," and "introduction-purpose."

205. For example, the Medicare Act refers to the standards of the JCAH in its conditions for hospital participation in the program and hospitals accredited by the JCAH are automatically deemed to be in compliance with the conditions of participation and eligible to participate in the Medicare program and receive Medicare funds. *See* ACCREDITATION MANUAL, *supra* note 202, at 8. *See also* Anton v. San Antonio Community Hosp., 19 Cal. 3d at 818-20, 567 P.2d 1171-72, 140 Cal. Rptr. at 451-52.

206. It is quite evident that the JCAH and the CMA have reacted to the extensive litigation in this area by raising and promoting their standards as to review of physician's privileges to include due process procedural protections. Section 6.8 of the PRINCIPLES OF MEDICAL ETHICS in the OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL OF THE AMA (1977) [hereinafter cited as OPINIONS AND REPORTS] states that the "basic principles of a fair and objective hearing should always be accorded to the physician whose professional conduct is being reviewed." OPINIONS AND REPORTS at 37. It states the fundamental aspects of a fair hearing to be: listing of specific charges, notice, right to a hearing, right to be present, to rebut evidence and to present a defense. The principle further speaks to physicians who judge others by saying "[a]ll physicians are urged to observe diligently these fundamental safeguards of due process whenever they are called upon to serve on a committee which will pass judgment on physicians." Finally: "[m]edical societies and hospital medical staffs are urged to review the constitution and bylaws of the society or hospital medical staff to make sure that these instruments provide for such procedural safeguards." OPINIONS AND REPORTS at 37.

In California the CMA, MODEL MEDICAL STAFF BYLAWS (1965) dealt extensively with the requirement for hearing due to the great concern generated by the courts and the legislature. The document was designed to assure "due process," explaining that these concepts will be new to many medical staffs.

In 1974 the UNIFORM CODE OF HEARING AND APPEAL PROCEDURES was written because "the courts of this state have rendered significant decisions in the area of the right of a practitioner to due process when his medical staff privileges are under review. These decisions have created a need for more formal, detailed procedures in the area of the physician's right to a hearing and appeal." CMA, GUIDING PRINCIPLES, *supra* note 202, at 6.

207. JCAH, GUIDELINES, *supra* note 202, art. VIII (Hearing and Appellate Review), § 5j: "neither the affected practitioner, nor the executive committee of the medical staff or the governing body, shall be represented at any phase of the hearing procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by counsel." However, the "affected practitioner shall be entitled to be accompanied by and/or

The omission of counsel serves the purpose of peer review: "[t]he hearing provided for in these bylaws [is] for the purpose of resolving, on an intra-professional basis, matters bearing on professional competency and conduct."[208] This is consistent with the medical tradition of peer review acknowledged in the introduction to the CMA's *Guiding Principles*: "[t]he self-disciplinary features are stressed because no one is better qualified to judge the quality of medical care than a physician."[209]

Under the *Mathews* formulation, the hospital's interest in maintaining peer review is balanced against the physician's interest in maintaining staff privileges and the risk that denying a right to counsel will result in an erroneous deprivation of the physician's interest.[210] The physician's interest in staff privileges, especially in reappointment and revocation proceedings, is extremely important. It is apparent that the presence of an attorney would play a significant part in preserving the rights and interest of the physician in the staff privileges proceeding. The individual physician may not adequately defend himself in a complex proceeding or insist that the bylaw procedures be strictly followed. Quite often the accused practitioner, having his privileges reviewed for the first time, will be unfamiliar with the mode of proceeding and be at a distinct disadvantage. The question becomes whether medical professionals should be allowed to restrict an important right of another professional, the interest in staff privileges, without being required to observe certain procedural protections, such as assistance of counsel. Do the benefits of counsel outweigh any increase in the formality of the staff privilege hearing? Certainly this question should be resolved in favor of the physician. After all, peer review is not dispensed with when the accused physician is allowed to have counsel represent him; it is simply more formalized.

Although the CMA and JCAH model bylaws do not afford counsel as a matter of right, they do provide that it is within the hospital's discretion to specify when the physician will be allowed counsel.[211] In California, the CMA and JCAH guidelines on the question of discre-

represented at the hearing by a member . . . of his local professional society." JCAH, GUIDELINES, *supra* note 202, art. VIII, §5e. This does not preclude any of the parties from seeking counsel for assistance in preparing for the hearing or appeal. JCAH, GUIDELINES, *supra* note 202, art. VIII, § 5j. UNIFORM CODE, *supra* note 202, § 3b is substantially the same.

208. JCAH, GUIDELINES, *supra* note 202, art. VIII, § 5j. A substantially identical statement is in CMA, GUIDING PRINCIPLES, UNIFORM CODE, *supra* note 202, § 3b.

209. CMA, GUIDING PRINCIPLES, *supra* note 202, at 1. *See also* OPINIONS AND REPORTS, *supra* note 206, § 6.61 (1976): "forms of peer review have been long established by organized medicine to scrutinize physicians' professional conduct. . . . They are . . . recognized and accepted. They are necessary."

210. *See* notes 181-91 and accompanying text, *supra*.

211. ACCREDITATION MANUAL, *supra* note 202, art. VIII, § 1(j); CMA, MODEL MEDICAL STAFF BYLAWS.

tionary allowance of presence of counsel, have been specifically approved by the *Anton* court as meeting the minimal due process standards.[212] This protection, however, is offset by the JCAH and CMA provision for appointment of a hearing officer, who can be an attorney and who has the responsibility to advise the review committee.[213] By permitting the committee to consult an attorney, the model bylaws work an unfair disadvantage to the accused physician who is denied the right of legal representation. This is especially the case in the CMA, Guiding Principles which allow the legal counsel of the hospital to be the hearing officer. The hospital's legal counsel traditionally represents the hospital administration in legal matters. He might very well bring a conflict of interest, if not an unfair prejudice, to the accused physician's hearing.

In summary, the hospital's interest in maintaining peer review and discouraging legal formalism is not sufficient to deprive the physician of his right to counsel at a staff privileges hearing. Although the *Anton* court has approved the discretionary allowance of counsel at such proceedings, due to the important interest of the physician in maintaining his staff privileges, an abuse of discretion in failing to allow the physician counsel at the hearing should be readily found in all but the more simple cases. An abuse of discretion should be automatically found where the physician was denied counsel but there was a hearing officer who was an attorney since such a denial is patently unfair. The bylaws should provide that when a hearing officer is requested who is an attorney, the right to counsel is removed from the discretion of the hearing committee and the accused physician is automatically entitled to counsel.

212. "[W]e find that the rule here in question—rendering representation by counsel a matter within the discretion of the judicial review committee—is not offensive to the standard of 'minimal due process' which is applicable in proceedings of this kind." Anton v. San Antonio Community Hosp., 19 Cal. 3d at 827, 567 P.2d at 1177, 140 Cal. Rptr. at 457. The *Ascherman I* decision also placed the right to counsel within the discretion of the hospital board. Ascherman I, 39 Cal. App. 3d at 648, 114 Cal. Rptr. at 697 (citing Sivler v. Castle Mem. Hosp., 53 Hawaii at 484-85, 497 P.2d at 571-72).

213. CMA, GUIDING PRINCIPLES, *supra* note 202, § 3(d): "At the request of the person who requested the hearing, the executive committee, the judicial review committee or on its own request, the governing body may appoint a hearing officer who may be an attorney at law to preside at the hearing. Such hearing officer may be legal counsel to the hospital, provided he acts during the hearing in accord with this Code. He must not act as a prosecuting officer, as an advocate for the hospital, governing body or executive committee, or body whose action prompted the hearing. If requested by the judicial review committee, he may participate in the deliberation of such body and be a legal advisor to it, but he shall not be entitled to vote." JCAH, GUIDELINES, *supra* note 202, art. VIII, § 5j, also says that a hearing officer may be utilized and may be an attorney at law and, in the comment following, that he can participate in the deliberations and act as an advisor, though he may not vote.

B. Impartiality

Due process requires a fair hearing before an impartial tribunal.[214] A fair hearing is often impossible where those who sit in judgment are either biased as to the outcome, or have participated in other stages of the proceeding such as prosecution or investigation.[215] One problem that exists in medical staff cases is that the physicians who judge the allegedly delinquent physician are usually his staff colleagues and have heard about the physician's problems before proceedings have been initiated. The strong danger of forming a prejudgment or being biased as to the outcome of the decision involving the physician's staff privileges is obvious. Notwithstanding this risk of prejudice, the Eight Circuit, in *Klinge v. Lutheran Charities Association of St. Louis*,[216] has stated that although the physician is entitled to have his case judged by fair-minded doctors using good faith objectivity, the physician "was not entitled to a panel made up of outsiders or of doctors who have never heard of the case and who know nothing about the facts of it or what they supposed the facts to be."[217] The court recognized that it was probable that the affected physician's problems had come to the attention of those who practiced with him at the hospital, but that "[i]t does not follow, however, that the members of the panel were disqualified from sitting or that they were unable to and did not give the case fair and impartial consideration in the context in which it was presented to them. A panel of doctors does not ordinarily vote to expel a colleague from a hospital staff for trivial causes or where lesser sanctions or restrictions would serve the purpose."[218] The court assumes a good faith decision by doctors absent a specific showing of bias. Under the *Mathews* factors this seems a reasonable approach. It would be virtually impossible for the hospital to place doctors on the hearing committee who know nothing of the case; and the burden on the hospital to provide such a panel would be tremendous. Absent a showing of bias, the hospital's interest in not having to search for doctors unfamiliar with the case clearly outweighs the accused physician's interest in a completely impartial tribunal.

Another aspect of the problem of impartiality involves the validity of permitting the same body or agency to perform both investigative and adjudicative functions. The Supreme Court, in *Withow v. Larkin*,[219] has said that it is not necessarily a violation of due process

214. Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (per curiam). *See also* Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974).

215. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.01 (1958). *See generally id.* ch. 12, 13.

216. 523 F.2d 56 (8th Cir. 1975).

217. *Id.* at 63.

218. *Id.*

219. 421 U.S. 35 (1975).

for the same agency to perform both functions. Moreover, administrative fact finders are not necessarily disqualified from participating in an adversary hearing. If there is no showing to the contrary, then men are assumed to be of conscience and intellectual discipline, and capable of fairness.[220] In *Suckle v. Madison General Hospital*[221] the court held that the presence of 21 members of the investigating committee among the 144 member medical staff, which was to decide whether to reappoint an accused physician, would not "render the proceedings unconstitutional" as it was not conclusive that a measure of deference would be given to their opinions merely because they had participated in investigative activity.[222] The court left open the question of whether such persons were constitutionally permitted to vote.[223]

In *Duffield v. Charleston Area Medical Center, Inc.*[224] impartiality was challenged where members of the governing board who accepted and adopted the surgery department's recommendation that the physician's hospital privileges be withdrawn also sat on the Joint Conference Committee, which made final disposition of the case. The court held that the governing board members were not disqualified to sit and vote as members of the Joint Conference Committee since the action upon which the affected physician based his claim of bias "had no 'extrajudicial source' but represented simply a step, largely a procedural one at that, in the administrative resolution of the proceedings involving . . . [the physician]. . . . [t]he decision taken was purely tentative and conditional . . . ."[225] Similarly, in *Woodbury v. McKinnon*,[226] "[t]he consideration on a previous occasion of the . . . [physician's] qualifications would not demonstrate such bias as to constitute a denial of due process."[227]

The JCAH and CMA provisions go far beyond judicial decisions in protecting the physician from partiality. The JCAH Guidelines provide that "[n]o staff member who has actively participated in the consideration of the adverse recommendation shall be appointed a member of this hearing committee unless it is otherwise impossible to select a representative group due to the size of the medical staff."[228] CMA's Guiding Principles provides that the review committee shall be composed of medical staff members "who shall not have actively par-

220. *Id.* at 55. *See also* Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56, 63 (8th Cir. 1975).

221. 362 F. Supp. 1196 (W.D. Wis. 1973), *aff'd*, 499 F.2d 1364 (7th Cir. 1974).

222. *Id.* at 1219.

223. *Id.*

224. 503 F.2d 512 (4th Cir. 1974).

225. *Id.* at 518-19.

226. 447 F.2d 839 (5th Cir. 1971).

227. *Id.* at 845.

228. JCAH, GUIDELINES, *supra* note 202, art. VIII, § 4a.

ticipated in the consideration of the matter involved at any previous level."[229] But the provision continues to recognize the existence of the problem in the *Klinge* case: "Knowledge of the matter involved shall not preclude a member of the active medical staff from serving as a member of the judicial review committee."[230] Thus, JCAH and CMA provisions adequately protect the physician in a staff privileges proceeding from the danger of partiality.

C. Notice

Due process requires an individual to receive sufficient notice of charges made against him so that he can adequately prepare a defense to the charges. Abuses can occur both where the notice is not given far enough in advance to allow preparation of a defense and where the notice is so substantively incomplete that it inadequately informs the individual of the charges against him. The first situation, was addressed in *Suckle v. Madison General Hospital*[231] where a physician seeking reappointment was given only a few minutes notice of his opportunity to meet with the committee which ultimately recommended his nonreappointment. The court found that this was insufficient notice as it did not give him "a minimally adequate opportunity to respond."[232]

A common problem in physician staff privileges cases is the second situation mentioned above. Where the basis for denial of privileges is inadequate patient care, there is a dilemma as to the specificity required in the notice. For example, must the hospital specify every act of the physician which it finds objectionable, or only aver to general situations? In *Woodbury v. McKinnon*[233] the physician was furnished with the names of specific cases in connection with a charge of lack of competence and judgment to perform surgery, but he was not given the exact nature of the fault in each case as requested. The Fifth Circuit held that the physician, "as a professional person, was sufficiently notified of the basis upon which the medical staff was considering his competence for surgical privileges."[234] However, in *Suckle* the court found that a physician received insufficient notice despite being furnished with a list of ninety-six cases in connection with proceedings for his reappointment, which was ultimately denied. The court found the notice to be constitutionally inadequate because the cases to be actually discussed were not specified and the physician was denied access to

229. CMA, GUIDING PRINCIPLES, *supra* note 202, § 2e.
230. *Id.*
231. 362 F. Supp. 1196 (W.D. Wis. 1973).
232. *Id.* at 1213.
233. 447 F.2d 839 (5th Cir. 1971).
234. *Id.* at 844.

copies of the hospital records of the cases. The court stated that such action "was neither to give him an adequate statement of the grounds upon which any possible sanction was being considered, nor to give him a minimally adequate opportunity to respond to any grounds which . . . [he] might have guessed to be under consideration."[235]

The JCAH and CMA bylaws effectively provide for notice in this situation. The CMA principle states that as part of the notice of a hearing, the hospital must provide "in concise language, the acts or omissions with which the medical staff member is charged, [and] a list of charts under question, by chart number . . . ."[236]

An example of a hospital bylaw where notice would likely not be sufficient is bylaw 6.2(A)(5) of the Medical Staff Bylaws of Stanford University Hospital. It provides that notice shall consist of "the investigative body's recommendation and the grounds therefor."[237] Under such a bylaw grounds could simply be "incompetence" and it would be almost impossible for the physician to adequately defend himself. More specificity, such as to charts and cases, is required and the model guidelines and bylaws so provide.

D. Summary action

Hospitals contend that there are certain times that the hospital must be able to immediately revoke a physician's staff privileges without benefit of a hearing. This would occur in the extreme situation where the hospital felt that the physician might do immediate harm to the patient unless suspended from the staff and barred from practice at the hospital. This is an ideal situation for invoking the *Mathews* balancing test. In *Citta v. Delaware Valley Hospital*[238] the court recognized the interest of the physician in staff privileges and the life and death interest of the patient. The court struck the balance in favor of summary action with the proviso that "the affected physician is given an adjudicatory hearing within a reasonable time after his privileges are restricted."[239] The interest of the hospital in preserving the life of the patient where there is an immediate threat of harm due to the alleged incompetence of the physician certainly outweighs his interest in a prior hearing. This is a proper balance, especially when one consid-

235. Suckle v. Madison Gen. Hosp., 362 F. Supp. at 1212.

236. CMA, GUIDING PRINCIPLES, *supra* note 202, at 10. The JCAH model bylaw states that "[t]he notice of hearing shall state in concise language the acts or omissions with which the practitioner is charged, a list of specific or representative charts being questioned, and/or the other reasons or subject matter that was considered in making the adverse recommendation or decision." JCAH, GUIDELINES, *supra* note 202, at 23, art. VII, § 3b.

237. MEDICAL STAFF BYLAWS—STANFORD UNIVERSITY HOSPITAL 9, art. 6.2, § A-5 [hereinafter cited as STANFORD BYLAWS].

238. 313 F. Supp. 301 (E.D. Pa. 1970).

239. *Id.* at 310 (footnote omitted).

ers that the physician will receive a hearing soon after his privileges are suspended.

The JCAH has integrated this balancing process into its applicable bylaws.[240] The bylaws provide that a physician can be summarily suspended "whenever action must be taken immediately in the best interest of patient care in the hospital."[241] Thus, before the physician can immediately lose his staff privileges by summary suspension the hospital must have balanced the interests and determined that the welfare of his patient(s) is clearly in danger. The bylaws further provide that after his privileges have been suspended, the physician is "entitled to request that a . . . hearing [be held] on the matter within . . . [a] reasonable time period. . . ."[242] A hearing, though after suspension, is guaranteed.[243]

E. Considerations in determining staff membership

Qualifications of the physician to be considered in determining staff membership must be related to the purpose of providing adequate medical care. In *Schlein v. Milford Hospital*,[244] the court stated the rule that though "hospitals must have considerable discretion to determine the necessary qualifications of doctors applying for staff privileges, they must be careful to consider applicants only on grounds that are reasonably related to the purpose of providing adequate medical care."[245] In *Schlein* the court found it reasonable for the committee to base its decision to reject the physician's application for staff privileges on his inability to get along with others. The court reasoned that "it is entirely consistent with due process for a hospital, in deciding whether to grant staff privileges, to evaluate those personal qualities of a physician that reasonably relate to his ability to function effectively within a hospital environment. A doctor's ability to work well with others, for instance, is a factor that could significantly influence the standard of care his patients received. Due process does not limit the hospital's considera-

240. JCAH, GUIDELINES, *supra* note 202, at 20, art. VIII, § 2(a)-2(d).

241. *Id.* art. VIII, § 2(a).

242. *Id.* art. VIII, § 2(b).

243. The CMA bylaw explains this balancing process best: "In grave and unusual cases where the governing board, the executive committee of the medical staff or the chief of the applicable section, determines that immediate action must be taken to protect the patient's life or welfare, the chief of staff, department head, cognizant staff committee, or governing board, may summarily suspend a member of the medical staff. In such cases, the aggrieved party may request an immediate hearing before the executive committee to determine whether such suspension shall be continued pending a hearing before the appropriate committee." CMA, MODEL MEDICAL STAFF BYLAWS 11.

244. 423 F. Supp. 541 (D. Conn. 1976).

245. *Id.* at 544. *See* Sosa v. Board of Managers of Val Verde Mem. Hosp., 437 F.2d 173, 176-77 (5th Cir. 1971).

tion to technical medical skills."[246]

Words that recur in the bylaws as qualifications for staff membership are "character," "ethics," "standing" and "competence."[247] These are very evasive terms and they are not accompanied by standards to guide those who determine staff privileges. Despite the apparent ambiguity of these terms, courts have upheld their validity as reasonably related to the operation of the hospital.[248] In *Sosa v. Board of Managers of Val Verde Memorial Hospital*, the Fifth Circuit explained:

> "[a]dmittedly, standards such as 'character qualifications and standing' are very general, but this court recognizes that in the area of personal fitness for medical staff privileges precise standards are difficult if not impossible to articulate. . . . The subjectives of selection simply cannot be minutely codified. The governing board of a hospital must therefore be given great latitude in prescribing the necessary qualifications for potential applicants. . . . So long as the hearing process gives notice of the particular charges of incompetence and the ethical fallibilities, we need not exact a précis of the standard in codified form."[249]

The selection of physicians for hospital staff privileges is necessarily subjective. Thus, the hospital's interest in not having to define rigid precise selection criteria that might exclude qualified physicians, outweighs the physician's interest in a specific, well defined selection process. Professional, ethical and character qualifications are related to the

246. Schlein v. Milford Hosp., 423 F. Supp. at 544.

247. JCAH, ACCREDITATION MANUAL, *supra* note 202, at 108: "The medical staff must establish a procedure to ensure a fair evaluation of the qualifications and the competence of each applicant for appointment, and for periodic reappointment, to the medical staff. Whatever the procedure, it should be objective, impartial, and fair, broad enough to recognize professional excellence and strict enough to safeguard patients. The selection of persons to be recommended for appointment shall depend upon a thorough study of the qualifications of each applicant." JCAH, GUIDELINES, *supra* note 202, 6-7: "Only physicians . . . licensed to practice . . . who can document their background, experience, training and demonstrated competence, their adherence to the ethics of their profession, their good reputation, and their ability to work with others, with sufficient adequacy to assure the medical staff and the governing body that any patient treated by them in the hospital will be given a high quality of medical care, shall be qualified for membership on the medical staff." (Art. III, § 2(a)). BYLAWS AND RULES OF THE MEDICAL AND DENTAL STAFF, SEQUOIA HOSPITAL DISTRICT 2 (1970): "The Credentials Committee shall investigate the character, competence, ability, background, experience, training and prior hospital staff experience of all applicants, and shall submit a written report recommending approval, deferral, or rejection of the application after the committee has received sufficient information to competently judge the qualifications of the applicant." *Cf.* CMA, MODEL MEDICAL STAFF BYLAWS, *supra* note, at 3: "Only licensed physicians and surgeons whose total background, experience and training assures . . . that any patient admitted to or treated in . . . [the] Hospital, will be given the best possible care and professional skill, shall be and remain qualified for membership to the medical staff."

248. Sosa v. Board of Managers of Val Verde Mem. Hosp., 437 F.2d 173, 177 (5th Cir. 1971).

249. *Id.* at 176 (citations omitted).

operation of the hospital[250] and the physician's interest in staff privileges is safeguarded in that he will have the opportunity to respond to the specific objections of the selection body at a hearing.

An example of a bylaw which deals with information not reasonably related to the operation of the hospital or delivery of medical care is a Stanford University Hospital bylaw which requires the applicant for staff privileges, if requested, to furnish information as to whether any general liability insurance coverage has ever been restricted in any way or involuntarily cancelled.[251] Although medical malpractice insurance coverage[252] is related to the purpose of providing medical care, the past history of the applicant's car, home, fire and other insurance has no such relation and is clearly an inappropriate consideration in determining hospital staff privileges.

In conclusion, the CMA and JCAH guidelines for formulation of hospital staff bylaws are generally adequate in supplying procedural due process to physicians in staff privileges proceedings. Right to counsel is the one major area where the physician can be said not to be sufficiently protected. The *Anton* case upheld the discretionary policy expressed in the guidelines that the right to an attorney is within the discretion of the review committee as meeting minimal due process. This discretionary power should be found to be easily abused. Where an attorney is present for any purpose at the hearing, such as to be the hearing officer or to assist the review committee, the accused physician's right to an attorney should be mandatory. Given the important interest of the physician, especially in reappointment or removal cases, and the minimal interest of the hospital of maintaining peer review and minimizing legal formalism, an attorney should be allowed at the hearing to represent the interests of the physician in most cases. In another problem area, bylaws must be scrupulously overseen to provide against qualification factors being imposed for staff membership that are not related to the purposes of providing adequate medical care and operating the hospital. The CMA and JCAH guidelines have been quite responsive to judicial changes and demands, and their adoption by hospitals will no doubt provide the physician with greater procedural protections of his interest in staff privileges.

Conclusion

The prerequisite findings of state action and an affected liberty or property interest needed to invoke constitutional due process are increasingly stumbling blocks to the physician seeking to invoke Four-

250. *Id. See* Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968).

251. STANFORD BYLAWS, *supra* note 237, at 4, art. 4.1 (A)(6).

252. Information as to medical malpractice insurance status is also required under the bylaw. *Id.*

teenth Amendment due process to protect his staff privileges. California offers an alternative solution by finding a common law right to fair procedure that is required in the contexts of appointment, reappointment and revocation of staff privileges.

A realistic appraisal of the situation may be the *Anton* court's observation that accrediting organizations, by requiring due process in their accrediting standards, will have the effect of standardizing due process protections in hospitals throughout the country. Since accrediting organization guidelines and model bylaws are largely constitutionally sufficient and often go beyond the minimal most litigation involving staff constitutional requirements, privileges would be limited to the issue of whether the hospital has followed its own bylaws. Nevertheless, given the immense interest of the physician in having staff privileges and the relatively minimal burden on the hospital in providing the elements of due process in procedures dealing with those privileges, the physician should be afforded procedural protection of his staff privileges in all situations.