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NOTES

Civil Procedure—Trial Court Discretion in Rule 54(b) Certification: Extension of the Panichella Requirement of an Infrequent, Harsh Case

Under the common law the jurisdiction of an appellate court was based on the final disposition of the entire action by the lower court from which the appeal was taken.[1] Among the many devices[2] that have been used to circumvent this general rule of finality is Federal Rule of Civil Procedure 54(b).[3] The purpose of this rule was to avoid problems possibly developed under the Federal Rules of Civil Procedure by the new opportunities for liberal joinder of claims in multiple claims actions.[4] By allowing judgment to be entered on fewer than all of the claims in a multiple claims action, rule 54(b) solves the dilemma of delay in entry of judgment on one claim while adjudication is pending on an unrelated claim that is part of the same action.[5] This rule has evolved to operate in such a manner that entry of judgment under the rule is now granted at the discretion of the trial court.[6] This evolution has created the interrelated problems of determining within what bounds the trial

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1. Holcombe v. McKusick, 61 U.S. (20 How.) 552, 554-55 (1857); United States v. Girault, 52 U.S. (11 How.) 21, 31-32 (1850).

2. Other methods of appeal that do not require common-law finality as a condition include 28 U.S.C. §§ 1292 & 1651 (1970).

3. Rule 54(b) presently reads:

> **Judgment upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

4. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956). Among these rules are FED. R. CIV. P. 13, 14, 18 & 20.

5. 351 U.S. at 432-33; FED. R. CIV. P. 54(b), Notes of Advisory Comm. on 1946 Amendment.

6. *See* text accompanying notes 19-31 *infra*.

court may grant 54(b) certification and by what standards the appellate court may police the exercise of this discretion.[7] Both of these considerations were highlighted by *Allis-Chalmers Corp. v. Philadelphia Electric Co.*,[8] a decision in which the Third Circuit Court of Appeals added a new limitation to the district court's power to grant 54(b) certification.[9]

In *Allis-Chalmers*, the trial court granted summary judgment on the original claim for the price of goods purchased by Philadelphia Electric Company (PECO) from Allis-Chalmers Corporation (A-C). Despite a pending counterclaim for damages based on a dispute concerning defective goods A-C had previously sold to PECO,[10] 54(b) certification was granted on the original claim so that A-C could execute that judgment.[11] The appellate court found, however, that the trial court abused its discretion in this certification.[12] The Third Circuit established the rule that abuse of discretion exists when the district court gives no clear articulation of the reasons for the 54(b) certification.[13] While the court of appeals recognized that the district court had given its reason for the certification by finding that there was no factual integration of the adjudicated and unadjudicated claims, it considered the

7. *Cf.* text accompanying notes 32-42 *infra*. The district court has the discretion not to certify that which would otherwise be appealable. *See* B.B. Adams Gen. Contractors, Inc. v. Department of HUD, 501 F.2d 176 (5th Cir. 1974) (per curiam).

8. 521 F.2d 360 (3d Cir. 1975).

9. Although in this opinion there is found the initial requirement that the district court articulate the reasons for 54(b) certification, 521 F.2d at 364-65; *see* note 13 and accompanying text *infra*, the unprecedented holding is that there is *always* a presumption against certification when there exists a pending claim that may be set off against the adjudicated claims. 521 F.2d at 366; *cf.* notes 38 & 39 and accompanying text *infra*.

10. The counterclaim was based on the allegation that a switch gear manufactured by A-C for PECO malfunctioned due to the improper construction of circuit breakers. The major dispute, however, centered on conflicting warranty provisions in the contract form submitted by A-C and a subsequent purchase order form submitted by PECO. The timing of confirmation of the contract and the applicable warranties were among the controverted issues. Defendant's Motion for Summary Judgment on the Counterclaim at 2-6; Plaintiff's Memorandum in Opposition to Summary Judgment on the Counterclaim at 1-4.

11. Summary judgment was also entered on a claim for repair services by A-C for PECO. These services were also unrelated to the counterclaim. Allis-Chalmers Corp. v. Philadelphia Elec. Co., 64 F.R.D. 135 (E.D. Pa. 1974).

12. 521 F.2d at 367. In a subsequent proceeding the trial court reinstated the 54(b) certification. *See* note 59 *infra*. There was no appeal of the new entry of judgment since the claims were settled one week after the order for 54(b) certification was reinstated. *See* note 58 *infra*.

13. 521 F.2d at 364. It has, however, been twice suggested that the district court in granting 54(b) certification should facilitate better review of the proper exercise of discretion by giving a "brief reasoned statement in support of its determination." Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974); Schwartz v. Compagnie Gen. Transatlantique, 405 F.2d 270, 275 (2d Cir. 1968).

factual relationship between the claims to be only "one factor to be considered."[14] By determining that this factor alone was insufficient for entry of judgment because of the existence of the counterclaim that might allow PECO to recover all it owed A-C, the Third Circuit placed a new restriction on the district court's power to grant 54(b) certification.[15] A possibility of set-off required the party seeking certification to have proved economic or equitable harm by delay. The failure of the district court to consider those factors resulted in inadequate proof of the infrequent, harsh case[16] that some courts have required for the proper exercise of discretion in 54(b) certification.[17]

The *Allis-Chalmers* decision is the product of a rule that has developed from a problem-plagued statutory and case history. Rule 54(b) was designed to solve the problem of delay in the termination of parts of the new multiple claims actions, which were permitted by the liberal rules of joinder.[18] As originally written, the rule directed that a determination of all issues material to one of the multiple claims would allow that claim to be treated as final and appealable.[19] An order determining all such issues not only allowed appeal without delay; it also caused the time for appeal to run with regard to the settled claim.[20] Problems

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14. 521 F.2d at 365.

15. The court decided that a possibility of set-off "weighs heavily against the grant of 54(b) certification." *Id.* at 366. The court recognized that this case was distinguishable from previous set-off situations in that it involved permissible rather than compulsory counterclaims. But it viewed the undesirability of an award that might later be reimbursed to be the dominant factor. *Id. But see* cases cited notes 38 & 39 *infra.*

16. 521 F.2d at 366. For a discussion of the development of the requirement of the infrequent, harsh case for 54(b) certification, see notes 43-53 and accompanying text *infra.*

17. *See* cases cited note 43 *infra.*

18. *See* authorities cited note 4 *supra.*

19. Rule 54(b) as promulgated in 1939 read as follows:

> **Judgment at Various Stages.** When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. . . .

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433 (1956). The circularity in the rule's requirement of a "judgment disposing of [a] claim" may be one of the problems in determining what was final. This problem is demonstrated by the definition of "judgment" in rule 54(a). " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." FED. R. CIV. P. 54(a). It seems clear, however, that the problems in determining what is final are many. *Cf.* cases cited note 41 *infra*; Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

20. *E.g.*, Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950); Reeves v. Beardall, 316 U.S. 283 (1942).

arose because of the difficulty of the concept of determination of all material issues.[21] Counsel who erroneously believed that an order did not resolve all issues with regard to one claim would not appeal until completion of the entire action, only to find that the statute of limitations barred the appeal as to the previously terminated claim.[22] The natural development of such a possibility was that the careful attorney would appeal many orders that did not completely dispose of a claim for fear that the time for appeal would run. With the appellate courts being bombarded with unnecessary, but properly cautious appeals, the first of two amendments[23] to rule 54(b) was adopted. To protect parties against loss of appellate rights, the amended rule provided that the district court "may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[24] While the signal created by 54(b) certification gave clear notice of the termination of part of an action,[25] the new rule created additional questions about the undefined limits of the new powers that had been placed with the district court.

In *Sears, Roebuck & Co. v. Mackey*[26] the United States Supreme Court dealt with two issues created by the new rule: (1) whether the rule delegated an irrevocable power of certification to the district court,[27]

21. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2653 (1973).

22. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 434 (1956).

23. The second amendment in 1961 is not relevant here. That amendment expanded rule 54(b) explicitly to allow certification in cases involving multiple parties and one or more claims. *See* note 3 *supra.*

24. 351 U.S. at 434-35 (emphasis omitted).

25. *Id.*

26. 351 U.S. 427 (1956).

27. Although the Supreme Court's resolution of this issue seemed to assume the answer, *id.* at 436, there was considerable disagreement prior to the *Sears* decision. Some circuits felt that 54(b) certification could properly be granted only if the claim were separate and distinct (*i.e.*, met the previous standards of finality). Gold Seal Co. v. Weeks, 209 F.2d 802, 810-11 (D.C. Cir. 1954); Flegenheimer v. General Mills, Inc., 191 F.2d 237, 241 (2d Cir. 1951) (Learned Hand saying that "nowhere in [amended rule 54(b)] can be found a suggestion that the [trial] judge can make that 'final' which was not 'final' before."). Others felt that the only limitation on the discretion of the trial court was that the judgment be entered on a claim, at which point the 54(b) certification was conclusive of appellate jurisdiction. Bendix Aviation Corp. v. Glass, 195 F.2d 267, 269-70 (3d Cir. 1952); Pabellon v. Grace Line, Inc., 191 F.2d 169, 173-74 (2d Cir. 1951) (the *Flegenheimer* opinion indicates that there was disagreement within the Second Circuit). The *Bendix Aviation* court found the fact that the trial court "*may* direct the entry of a final judgment" (emphasis added) to be persuasive evidence that amended rule 54(b) granted almost complete discretion to that court. Judge Hand in *Flegenheimer* was, however, convinced that the rule was one of limitation because of the

and (2) whether the rule modified the prior standard of finality required for the district court's discretionary certification. The Court established that the district court's power of certification is not absolute and that the appellate court should dismiss an appeal pursuant to rule 54(b) if it finds "(1) that the judgment . . . was not a decision upon a 'claim for relief,' (2) that the decision was not . . . an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order."[28] With regard to the standard of finality under the amended rule, the Court held that the amended rule did "not relax the [28 U.S.C. section 1291] finality required of each decision."[29] It did, however, recognize that a final order on a claim could be entered under the amended rule although it would not have been appealable under the original rule. Application of this modification was permissible only "[i]f the District Court certifies a final order . . . and the Court of Appeals is satisfied that there has been no abuse of discretion."[30] The Supreme Court thus delegated to the district courts and courts of appeal the power of determining the specific fact situations that qualify for 54(b) certification.[31]

The guidelines for this determination, however, had been fixed by the Supreme Court in its recommendation that, to determine whether 54(b) certification should be granted, the inconvenience and costs of piecemeal review should be balanced against the danger of denying

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requirement of a "final judgment." Because of the circular definition of "final judgment" in rule 54(a), *see* note 19 *supra*, this reasoning does not appear sound. Judge Hand's understanding of the function of the rule in the judicial system is, however, demonstrated by the ability of the trial court to distort the function of the rule. Zangardi v. Tobriner, 330 F.2d 224 (D.C. Cir. 1964).

28. 351 U.S. at 436. The diminution of the trial judge's discretion was argued to be a poor decision for several reasons, including (1) the litigants will have to bear the expense of preparing their briefs and arguments with little or no idea that the court of appeals will hear their claim, Note, *Separate Review of Claims in Multiple Claims Suits: Appellate Jurisdiction Under Amended Rule 54(b)*, 62 YALE L.J. 263 (1953), and (2) since the district court judge is in the best position to understand the fairness to the parties, discretion, although open to abuse, is best delegated to that authority. Bendix Aviation Corp. v. Glass, 195 F.2d 267, 272 (3d Cir. 1952); *cf.* Note, *Federal Procedure—Judgment on Less Than All Multiple Claims is Appealable Under Amended Rule 54(b) Even if Claims Left Pending Arose from the Same Transaction*, 42 VA. L. REV. 982 (1956).

29. 351 U.S. at 435. This result was also supported by Justice Frankfurter in his dissenting opinion, *id.* at 444.

30. Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445, 452 (1956) (companion case to *Sears*).

31. Since the *Sears* opinion the Supreme Court has not reviewed a single 54(b) certification to determine its propriety.

justice to the parties.[32] In the application of this balancing process, several factors have been suggested for the trial court to consider in the proper exercise of its discretion.[33] Among these factors are the similarity of the adjudicated and unadjudicated claims[34] and the possibility that the appellate review of the terminated claim might be mooted by subsequent developments in the trial court.[35] Generally courts view either of the above situations as wasteful of appellate court time since, in the former, an early appeal is potentially duplicative of a later appeal on the unadjudicated claim, and, in the latter, an early appeal may be unnecessarily resolved.[36] On the other hand, efficiency of the trial court proceedings has occasionally warranted 54(b) certification despite the possible existence of duplicative appellate court proceedings.[37] An additional factor weighing against 54(b) certification is the existence of a counterclaim that may create a set-off against the adjudicated claim. It is considered unfair to the losing party to make an award that may be reduced by a subsequent judgment in favor of that party.[38] When the

32. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

33. Dilatory activities by one of the parties may be a consideration in the propriety of 54(b) certification against that party. United States v. Kocher, 468 F.2d 503 (2d Cir. 1972). For other factors not discussed in the text following this note, see notes 42 & 45 *infra*.

34. Spencer, White & Prentis, Inc. v. Pfizer Inc., 498 F.2d 358, 364 (2d Cir. 1974); McNellis v. Merchants Nat'l Bank & Trust Co., 385 F.2d 916, 919 (2d Cir. 1967); Rabekoff v. Lazere & Co., 323 F.2d 865, 866 (2d Cir. 1963); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 243 F.2d 795, 796 (2d Cir. 1957) (per curiam); *cf.* Levin v. Baum, 513 F.2d 92, 96 (7th Cir. 1975).

35. Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 943 (2d Cir. 1968); Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 243 F.2d 795, 796 (2d Cir. 1957) (per curiam).

36. *See* cases cited notes 34 & 35 *supra*.

37. Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1105 (10th Cir. 1973); Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F. Supp. 921, 922 (S.D.N.Y. 1955); *cf.* Brown Shoe Co. v. United States, 370 U.S. 294, 309 (1962).

38. The set-off factor has been given controlling weight *only* in circumstances in which the set-off had its basis in transactions that were also the basis of the claim that the set-off may reduce. Spencer, White & Prentis, Inc. v. Pfizer Inc., 498 F.2d 358, 364 (2d Cir. 1974) (the amount owing on the contract might be set off by alleged damages suffered in the execution of that contract); TPO Inc. v. FDIC, 487 F.2d 131, 134 (3d Cir. 1973) (cashier's checks might be set off by an alleged fraudulent scheme in which the checks played a part); Curtis Publishing Co. v. Church, Rickards & Co., 58 F.R.D. 594, 596-99 (E.D. Pa. 1973) (in an action in which damages for breach of the contract might be set off for debts owing under that same contract, the court granted 54(b) certification but recognized the equitable stance of the set-off claim by staying execution under FED. R. CIV. P. 62(h)); *cf.* Associated Hardware Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114, 121 (3d Cir. 1965) (the recovery for alleged fraud in obtaining the contract might be greater than the amount owing on the contract; the case did not involve a 54(b) certification); Schroeter v. Ralph Wilson Plastics, Inc., 49 F.R.D. 323, 326 (S.D.N.Y. 1969).

set-off possibility has occurred in the context of unrelated claims, however, one court has found that the alleged claim of set-off for the purpose of delaying payment for goods bought in a separate transaction was an unjust reason to delay entry of judgment.[39]

The great number of cases, which, "it must be conceded, are not altogether harmonious,"[40] demonstrate the difficulty of balancing the efficiency of the judicial process and justice for the parties in the determination of finality.[41] This difficulty may in part be caused by the tendency of the courts to develop generalities in some cases only to find those generalities inapplicable when a case is presented in which application of that general rule would create inequities.[42] Subsequent to the *Sears* decision, an influential generality was developed by the Third Circuit Court of Appeals in *Panichella v. Pennsylvania Railroad Co.*[43]

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39. "The merits of the antitrust action [based on a refusal by defendant to sell its products to plaintiff] have no effect on plaintiff's duty to pay for goods he ordered and received prior to the alleged antitrust violations by defendant." Almar Supply Co. v. Weber-Stephen Products Co., 15 FED. RULES SERV. 2d 54b.32 (E.D. Pa. 1971). This distinction on the basis of the relationship of the adjudicated and unadjudicated claims is further supported by a negative inference that may be drawn from TPO Inc. v. FDIC, 487 F.2d 131, 135 (3d Cir. 1973). In refusing 54(b) certification because of a set-off claim, that court said, "It is critical . . . that . . . [the party whose adjudicated claim is based on the checks is] the party which participated in the allegedly fraudulent transaction [the basis of the unadjudicated counterclaim] in which the checks played a part."

40. McGourkey v. Toledo & O. Cent. Ry., 146 U.S. 536, 545 (1892), *quoted in* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

41. *Compare* Panichella v. Pennsylvania R.R., 252 F.2d 452 (3d Cir. 1958), *with* Schwartz v. Compagnie Gen. Transatlantique, 405 F.2d 270 (2d Cir. 1968). *Compare* Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102 (10th Cir. 1973), *with* CBS v. Amana Refrigeration, Inc., 271 F.2d 257 (7th Cir. 1959).

42. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). "[W]e believe that our disposition . . . will make possible a more expeditious and just result for all parties." Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974). This court thus showed an inclination to examine the decision of the substantive appeal prior to a decision as to its appealability. By first resolving the issue of dismissal of the third-party defendant, the appellate court knew that an initial trial in the absence of this party would be inefficient, *see* cases cited note 37 *supra*. The reversal on the substantive claim also mooted the possibility of a repeated appellate review. This inefficiency, dominant in other circumstances, *see* note 45 *infra*, was irrelevant because the principal party not participating in the appellate proceeding was not adversely affected. In rejecting this generality, the court laid a foundation for another generality, the *Allis-Chalmers* requirement for articulation of dominant factors. *See* note 13 and accompanying text *supra*. *See generally* text accompanying notes 61-63 *infra*.

43. 252 F.2d 452 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960). The influence of this case is fairly clear, *e.g.*, Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1105 (10th Cir. 1973); Aetna Ins. Co. v. Newton, 398 F.2d 729, 734 (3d Cir. 1968); Luckenbach Steamship Co. v. H. Muehlstein & Co., 280 F.2d 755, 758-59 (2d Cir. 1960); Gass v. National Container Corp., 271 F.2d 231, 233 (7th Cir. 1959); Liquilux Gas Serv. v. Tropical Gas Co., 48 F.R.D. 330, 332-33 (D.P.R. 1969) (mem.). Prior to *Allis-Chalmers*, however, this author found no reference to the infrequent, harsh

The trial court had granted 54(b) certification on a summary judgment dismissing the third-party defendant, while the original claim on which the third-party claim was based remained unadjudicated.[44] This certification had the potential of producing an unnecessary burden for the appellate court since the issue of third-party liability might be mooted by failure of the underlying claim.[45] But the court of appeals in finding the certification to be an abuse of discretion created some inflammatory and misleading dicta. Searching through the notes of the committee that drafted the 1946 amendment, the Third Circuit discovered that the draftsmen had stated that the rule should be used only in the exercise of a discretionary power to afford a remedy in the infrequent, harsh case.[46] The natural implication of this statement is that satisfaction of the standard of 28 U.S.C. section 1291 finality is but one of two criteria for proper discretion in certification. The second criterion is the necessity of injustice to the party if there is delay in entry of judgment. The subsequent judicial adoption of the infrequent, harsh case standard has the effect of placing a burden of proof on the party seeking 54(b) certification.[47] And it is this burden of proof that led to misapplication of rule 54(b) in *Allis-Chalmers*.

The misapplication is clearly demonstrated by comparing the purpose of the amended rule and its interpretation in *Sears* with the holding in *Allis-Chalmers*. The history of the adoption of the amendment and all the comments of the advisory committee indicate that "[t]he obvious purpose [of the 1946 amendment to rule 54(b)] is to reduce as far as possible the uncertainty and hazard assumed by a litigant" who is unsure of the finality of a judgment.[48] In fact, the historical context of the amendment seems to indicate that the reference to the necessity of an infrequent, harsh case was inadvertent and was intended to reduce the exorbitant flow of appeals of non-final adjudications that had developed

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case requirement as grounds for denying 54(b) certification in the context of adjudicated and unadjudicated claims that had no similarity of facts or issues. *See* note 38 *supra*.

44. 252 F.2d at 454.

45. The court recognized two additional reasons indicating that preliminary appeal was an inefficient use of the judicial process. Because plaintiff was not a party to his appeal, a decision as to the issue of a release (the basis of the dismissal of the third-party defendant) could not be binding as between the principal parties. Thus there might be a need for an additional, inefficient appeal on the same issue. Second, the trial on the main claim below was being delayed. *Id.* at 455.

46. *Id.*

47. This burden of proof coincides with the interpretation of the court in *Allis-Chalmers*. 521 F.2d at 365.

48. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950).

under the former rule.[49] The advisory committee that drafted the 1946 amendment expressly "concluded that a retention of the older federal rule [which allowed termination and no delay in the appeal of a distinctly separate claim] was desirable . . . ."[50] In addition, although the Court in *Sears* allowed the court of appeals to review 54(b) certification for abuse of discretion, it clearly implied that adjudicated claims satisfying the requirements of rule 54(b) in its original form would also be appealable under the amended rule, provided the district court made the required certification.[51] Although the *Panichella* standard of infrequent, harsh case may be applicable in the case of judgments that would not have been final under the original rule 54(b), the extension to judgments that would have been final is unwarranted. *Allis-Chalmers*, with factually unrelated claims, clearly falls in the latter category.[52] Thus the "set-off which weighs heavily against 54(b) certification" might be properly limited to the context of a factually related, unadjudicated counterclaim.[53]

In this context, the efficiency of the judicial process and the equities between the parties would normally justify delay of appeal until completion of the entire action. There may be further developments in the trial of the unadjudicated counterclaim relevant to the adjudicated claim. A possibility that the appellate court may not have all information relevant to the claim indicates the potential inefficiency of early appellate review.[54] In cases in which the adjudicated and unadjudicated claims are not related and in which subsequent trial court proceedings will not moot the issues that are the subject of appeal, efficiency within the judicial process is not a factor since the issues before the

49. *See* text accompanying notes 18-24 *supra.*

50. FED. R. CIV. P. 54(b), Notes of Advisory Comm. on 1946 Amendment.

51. 351 U.S. at 436. In both *Sears, id.* at 428-29, and the companion case, *Cold Metal*, 351 U.S. at 446, each court of appeals had affirmed its 54(b) jurisdiction. Therefore, the ability of the appellate court to find abuse of discretion when the certified claim would have been appealable under the former rule 54(b) was not addressed in either opinion. The generally narrow scope of review for abuse of discretion would seem to indicate that there should be minimal bounds within which the district courts should have absolute freedom. Since the intent of the framers of the original rule was substantively adopted by the drafters of the amended rule, *see* text accompanying note 50 *supra*, a sensible boundary for absolute discretion might parallel the boundary of the original rule. Outside of that limitation the *Cold Storage* opinion definitely allows certification to be granted, subject to appellate review for the proper exercise of discretion.

52. *See* notes 10 & 11 and accompanying text *supra.*

53. *See* cases cited note 38 *supra.*

54. *See* cases cited notes 34 & 35 *supra.*

appellate court cannot be affected by subsequent developments at trial.[55] The only remaining question in this situation is thus the fairness to the parties in allowing the set-off to delay execution of the settled claim.[56] As in *Allis-Chalmers*,[57] when one party asserting a contested claim has created the uncontested claim of the adverse party by failing to pay for goods received, it may be inferred that this is an attempt to collect on the contested claim prior to its adjudication.[58] Under such circumstances the equities favor entry of judgment on the uncontested claim. When the adjudicated claim involves unsettled issues making reversal a real possibility or when the party seeking 54(b) certification is of questionable solvency so that satisfaction of the set-off claim may not be successful, fairness tends to favor delay of execution until completion of the entire action.[59]

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55. Almar Supply Co. v. Weber-Stephen Products Co., 15 FED. RULES SERV. 2d 54b.32 (E.D. Pa. 1971).

56. *See* text accompanying note 32 *supra.*

57. *See* text accompanying notes 10 & 11 *supra.*

58. Justice Gibbons, in his dissent to the *Allis-Chalmers* decision, clearly felt that resolution of 54(b) certification in these circumstances was partially based on which party would finance the liquidated debts. 521 F.2d at 367. A settlement of the entire action one week after judgment was entered on the original claim for the second time, *see* Docket of Proceedings, Allis-Chalmers Corp. v. Philadelphia Elec. Co. (E.D. Pa. 1973-75), seemed to support the contention that a basis for the counterclaim was delay of payment. This was, however, clearly not the case in the *Allis-Chalmers* action. Although Judge Newcomer, in granting 54(b) certification, noted the injustice of A-C financing the indebtedness, *see* note 59 *infra*, the party seeking certification felt that "recertification . . . had no real bearing on the settlement." Letter from Stephen Cozen, attorney for Allis-Chalmers Corp., to William Dannelly, author, Feb. 10, 1976, on file at U.N.C. Law Library. The settlement, approximately 50% of the counterclaim and 100% of the main claim, shows that the counterclaim was not specious, and the settlement was therefore probably based on a recognition that the counterclaim was likely to be tied up in the courts for several years. *Id.*

59. Following dismissal by the Third Circuit in *Allis-Chalmers*, Allis-Chalmers presented a motion for certification of its judgment in accordance with the standards suggested by the appellate court. After submission of briefs and oral arguments the trial court analyzed and balanced all of the factors suggested. Order Granting Final Judgment Under FED. R. CIV. P. 54(b) (E.D. Pa. Nov. 4, 1975) (unpublished).

The adjudicated and unadjudicated claims were found to have both unrelated facts and issues. For that reason an appeal from summary judgment on the debt would involve neither waste of time nor duplication of effort by the appellate court, *id.* at 2-3. Although the issue of indebtedness would not be mooted by completion of trial on the counterclaim, PECO cleverly argued that another issue would not need to be resolved. That issue was the contention by PECO that Pennsylvania law controlled on the point that summary judgment could not be entered during the pendency of a counterclaim. The court recognized this argument as specious. To allow the mootness of this issue to prevent 54(b) certification would permit a party to postpone execution simply by making the objection to summary judgment. Since this objection would always disappear upon adjudication of the counterclaim, the court of appeals would never have the opportunity to resolve the issue. Thus an issue that had the purpose of delaying execution could

Although the specific limits of permissible 54(b) certification are important, the effectiveness of its application is clearly dependent on the interaction of the district court and the court of appeals. Putting discretion in certification within the power of the district court is sensible because that court is familiar with the case.[60] As the bounds of finality and the purposes of the rule have proved to be sufficiently vague to subject the rule to misuse,[61] review of district court certification for proper discretion is clearly warranted.[62] For this reason the *Allis-Chalmers* requirement that the 54(b) certification be accompanied by articulation of the dominant factors is soundly premised. It is surely warranted that the affected parties be notified of the guidelines for the decision. Similarly, for the reviewing court to determine whether proper discretion was used, it must know the reasons for which judgment was entered.[63] However, the danger remains, as demonstrated by *Allis-Chalmers*, that the court of appeals in its review might stifle the effectiveness of rule 54(b) by imposing excessive restrictions on the district court's ability to issue certifications.[64]

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delay execution without resolution of the merits of the issue. An appellate decision on the question would solve this problem. The court further distinguished *Panichella* in that the mooted issue in that case involved the ultimate liability of a party, *id.* at 3-6. The court summarily rejected the possibility that the dismissed claim involved any issues that might necessitate a second appellate hearing on the same issue. The counterclaim set-off position was similarly rejected, *see* note 11 *supra*. In balancing the other factors, the court noted: (1) The certification would not affect trial on the counterclaim, since that trial was not being delayed; (2) A-C was denied the use of the money admittedly owed by PECO, while PECO had already been fully compensated by its insurance carrier for the damages that were the basis of the counterclaim. The insurance carrier was subrogated on the counterclaim; and (3) The solvency of A-C and the fact that A-C was insured guaranteed that, if liability were established, PECO's counterclaim would be satisfied. Since there were no judicial interests involved and the equitable interests favored entry of judgment, Judge Newcomer was satisfied that this was an infrequent, harsh case, *id.* at 6-8.

60. *See* note 28 *supra*.

61. Zangardi v. Tobriner, 330 F.2d 224 (D.C. Cir. 1964).

62. It should be noted, however, that the courts of appeals do not seem to be perfect in their review of proper discretion. *See* cases cited note 41 *supra*.

63. *See* cases cited note 13 *supra*.

64. *See* text accompanying notes 43-53 *supra*.

Constitutional Law—Bursey v. Weatherford: The Sixth Amendment Protection Against Secret Agents in the "Counsels of Defense"[1]

The right of a criminal defendant to have the assistance of counsel is secured by the sixth amendment to the United States Constitution. The Supreme Court has declared that "[t]his is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty."[2] Corollary to the right to counsel is the right to privacy in the attorney-client relationship,[3] which is essential for effective representation. As interpreted by one court:

> The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense.[4]

In *Bursey v. Weatherford*[5] the Fourth Circuit Court of Appeals focused on the right to counsel in the context of our adversary system of justice and held that any deliberate intrusion by the prosecution into the confidential relationship between defendant and his counsel constitutes a violation of the sixth amendment guarantee.[6]

The constitutional issue was raised in federal court when Brett Bursey brought suit under 42 U.S.C. section 1983[7] seeking damages

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1. *See* Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953).
2. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
3. Confidentiality is the basis of Canon four of the American Bar Association Code of Professional Responsibility and of the attorney-client privilege in the rules of evidence. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 201 (Tent. Draft 1970); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 87-97 (2d ed. E. Cleary 1972).
4. Caldwell v. United States, 205 F.2d at 881.
5. 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3738 (U.S. June 22, 1976).
6. *Id.* at 486.
7. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

from J. P. Strom, chief of the South Carolina State Law Enforcement Division, and Jack Weatherford, an undercover agent for that Division assigned to the University of South Carolina campus.[8] Bursey alleged that these officials, acting under color of state law, had invaded the confidences of his defense team and thus had deprived him of effective assistance of counsel in his prior criminal trial in state court.[9]

Bursey's civil suit arose out of an unusual chain of events. On March 20, 1970, Bursey and several others, including agent Weatherford, expressed their opposition to the war in Vietnam by throwing a brick through the window of the Richland County Selective Service Office in Columbia, South Carolina, and by defacing the building with red paint.[10] Later that day Weatherford arranged not only for Bursey's arrest but also for his own, and they were subsequently indicted as co-defendants for malicious destruction of property.[11] The purpose of Weatherford's arrest was to maintain his cover so that he could continue working as a secret agent in the university community.[12] Weatherford, with the approval of his superiors, perfected the ruse by retaining defense counsel and by feigning preparation for trial.[13]

During the period prior to trial, Bursey was completely deceived by the agent's tactics and continued to believe that Weatherford was his friend and "partner in crime."[14] On at least two occasions, Bursey and his attorney freely discussed the pending trial in the presence of Weatherford.[15] Subsequently, the agent's true status was discovered; and since he was no longer useful for undercover work, Strom permitted him to testify against Bursey.[16] Totally unprepared for Weatherford's incriminating eyewitness testimony, Bursey was convicted of malicious destruction of property. The court sentenced him to eighteen months in prison, and he served his time.[17] Thus an opportunity to appeal was no longer available to Bursey.

The federal district court held that the conduct of Weatherford and Strom did not violate Bursey's constitutional right to counsel. The

8. 528 F.2d at 484.
9. *Id.*
10. *Id.* at 485.
11. *Id.*
12. Brief for Appellee at 3, Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975).
13. 528 F.2d at 485.
14. *Id.*
15. Brief for Appellant at 9-12, Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975).
16. 528 F.2d at 485.
17. *Id.*

court based its opinion on two grounds: (1) there was no "gross" intrusion into the area protected by the sixth amendment because the specific intention of Weatherford and Strom was to preserve the agent's cover, not to spy on the defense team; and (2) since Weatherford did not communicate any information concerning trial strategy to the prosecution, Bursey was not prejudiced by the presence of the opposition at attorney-client conferences.[18] The Fourth Circuit Court of Appeals reversed the lower court decision and held that neither "gross" intrusion nor actual prejudice to defendant is required to sustain plaintiff's claim for damages for breach of his constitutional right to counsel.[19]

Before evaluating the court's decision, it is necessary to review the legal precedent established by judicial elaboration of the constitutional safeguard. Until the 1930's the essence of the right to counsel was merely the right of defendant to retain counsel.[20] However, in 1932, the United States Supreme Court in *Powell v. Alabama*[21] emphasized the fundamental character of the right to counsel and declared that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[22] Relying on the fourteenth amendment rather than the sixth, the Court held that at least in capital cases in which defendants are handicapped by ignorance, illiteracy, youth, and public hostility, failure to appoint effective counsel constitutes a denial of due process of law.[23]

The independent sixth amendment right to counsel was recognized for the first time in *Johnson v. Zerbst*,[24] a 1938 decision. In that case the Court looked to the nature of the offense and held that in every federal criminal case, both capital and non-capital, the accused who is unable to retain counsel must either have counsel appointed or must make "an intelligent and competent waiver."[25] Subsequent to *Johnson*, the Court gradually expanded the sixth amendment right to encompass various degrees of state offenses. The landmark decision of *Gideon v.*

18. *Id.* at 486.
19. *Id.* at 486-87.
20. M. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 181 (2d ed. 1973); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 599 (3d ed. 1858).
21. 287 U.S. 45 (1932).
22. *Id.* at 68-69.
23. *Id.* at 71. *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 229 (1955).
24. 304 U.S. 458 (1938).
25. *Id.* at 465. *See also* A. HARDING, FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 40 (1959).

Wainwright[26] in 1963 overruled the prior Court holding in *Betts v. Brady*[27] and incorporated the sixth amendment into the fourteenth,[28] thus securing the individual's right to counsel from infringement by state action. Since the Court found criminal defense attorneys to be "necessities, not luxuries,"[29] state courts were constitutionally required to appoint counsel for all indigents defending against felony charges. The right was recently extended in *Argersinger v. Hamlin*[30] to indigents defending in state courts against misdemeanors punishable by imprisonment.

In addition to judicial development of the right to counsel according to the nature of the offense, the Supreme Court has analyzed the sixth amendment protection in terms of critical stages in the criminal process. The scope of the sixth amendment protection has not been restricted to actual trial, but has been interpreted broadly so as to encompass every stage from the time of initial adversary proceedings[31] to post-conviction appeals.[32] In *Escobedo v. Illinois*[33] the right to counsel was found to attach as early as the moment the investigation had "begun to focus on a particular suspect."[34] However, prior to attachment,[35] the sixth amendment does not bar general undercover activity.[36]

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26. 372 U.S. 335 (1963). *See generally* TUFTS UNIVERSITY, THE COURTS MAKE POLICY: THE STORY OF CLARENCE EARL GIDEON (1969).

27. 316 U.S. 455, 461-62 (1942). *See also* I. BRANT, THE BILL OF RIGHTS 480 (1965).

28. 372 U.S. at 342.

29. *Id.* at 344.

30. 407 U.S. 25, 37 (1972).

31. Pre-trial proceedings at which the Supreme Court has held that the accused has a right to counsel include arraignment, Hamilton v. Alabama, 368 U.S. 52 (1961); lineups, United States v. Wade, 388 U.S. 218 (1967); and preliminary hearings, Coleman v. Illinois, 399 U.S. 1 (1970).

32. Douglas v. California, 372 U.S. 353 (1963). This case was limited to appeals of right by Ross v. Moffitt, 417 U.S. 600 (1974).

33. 378 U.S. 478 (1964).

34. *Id.* at 490.

35. In Kirby v. Illinois, 406 U.S. 682 (1972), the point of attachment was limited to the commencement of formal judicial proceedings. The Court distinguished *Escobedo* and refused to extend the right to counsel to lineups, which were prior to the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689.

36. "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." Lopez v. United States, 373 U.S. 427, 465 (1963). *See also* United States v. White, 401 U.S. 745, 752 (1971); Hoffa v. United States, 385 U.S. 293, 303 (1966); Lewis v. United States, 385 U.S. 206, 212 (1966); Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLO. L. REV. 261, 272-73 (1969).

Since the accused in *Bursey v. Weatherford* had been taken into custody and indicted, his constitutional guarantee was clearly operative.

Proof of intrusion into the sphere protected by the sixth amendment has been held a sufficient ground to overturn a conviction regardless of the presence or absence of actual prejudice to defendants. The United States Supreme Court in two cases, *Black v. United States*[37] and *O'Brien v. United States*,[38] vacated judgments in the absence of any showing that the information gleaned from monitored conversations had been used by the prosecution to the detriment of defendant.[39] These two decisions were consistent with an earlier declaration of the Court in *Glasser v. United States*:[40] "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[41]

The only Supreme Court decision that has deviated from the per se approach to encroachment upon the sixth amendment right to counsel is *Hoffa v. United States*.[42] In that case the Court affirmed the jury-tampering conviction of Hoffa even though a government agent, Partin, had infiltrated the defense team at Hoffa's prior trial, during which the bribe was offered. The Court adopted the "separate offense theory," finding that Hoffa's incriminating statements to which agent Partin testified in the later case "were totally unrelated in both time and subject matter to any assumed intrusion by Partin into the conferences of the petitioner's counsel in the [prior] trial."[43] The Court concluded that if Hoffa had been convicted in. the first trial, "the conviction would presumptively have been set aside as constitutionally defective"[44] on the ground of gross government infringement of the right to counsel. The presumption, however, was inoperative in a trial for a different offense.

In *Bursey v. Weatherford* the court correctly identified the "separate offense theory" as the basis of the *Hoffa* decision and rejected the prosecution's theory that *Hoffa* mandated a "grossness" test.[45] Indeed

37. 385 U.S. 26 (1966) (per curiam).
38. 386 U.S. 345 (1967) (per curiam).
39. 386 U.S. at 346 (Harlan, J., dissenting); 385 U.S. at 30-31 (Harlan, J., dissenting).
40. 315 U.S. 60 (1942).
41. *Id.* at 76.
42. 385 U.S. 293 (1966).
43. *Id.* at 309. The "separate offense theory" has been adopted by the lower federal courts. *E.g.*, Ellsberg v. Mitchell, 353 F. Supp. 515, 516-17 (D.D.C. 1973).
44. 385 U.S. at 307.
45. 528 F.2d at 486. *Accord*, United States v. Rispo, 460 F.2d 965, 976 (3d Cir. 1972).

two examples[46] of government misconduct, analogous to the activity of agent Partin, were characterized in *Hoffa* as intrusions of the "grossest kind."[47] However, the Court's dictum does not require classification according to the degree of offensiveness. Adoption of the "grossness" test would mean that the presumption of a fair trial could be rebutted only by showing government intrusion so egregious that the conviction was actually tainted.[48]

In order to avoid placing such a heavy burden of proof on the accused, the Fourth Circuit in *Bursey* proposed another test, under which the crucial determination is whether the conduct of the prosecution represents deliberate or inadverent action. Thus "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[49] Although the precise holding is limited by the civil posture of Bursey's case, this dictum is significant in that it proclaims the court's position on convictions as well as on civil damages.

The test adopted by the Fourth Circuit is notable in two respects. First, under the test, specific intent of the prosecution is immaterial since the mere presence of an authorized government informant for any purpose constitutes a violation of the right to counsel.[50] In our adversary system of justice, "learning the plans of one's opponent . . . is generally thought to be worthwhile."[51] Thus the "deliberateness" test protects the accused not only from the possibility of wilful infringement by the prosecution for the purpose of obtaining evidence but also from the subtle benefits derived from knowledge of the planned procedure and state of mind of defendant and his counsel.[52]

Secondly, the test eliminates actual prejudice as an essential element for sustaining a cause of action under 42 U.S.C. section 1983. Deprivation is the sole injury to which the statute refers. Thus plaintiff

46. The cases to which the Court refers are Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), and Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

47. 385 U.S. at 306.

48. *See* United States v. Rispo, 460 F.2d 965, 977 (3d Cir. 1972).

49. 528 F.2d at 486.

50. *Id.* The finding of liability under section 1983 without proof of specific intent is consistent with established authority. *E.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961); Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970); Basista v. Weir, 340 F.2d 74, 81 (3d Cir. 1965).

51. 528 F.2d at 487.

52. *Accord*, Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968).

need prove only that some person acting under color of state law deprived him of a right, privilege, or immunity secured by the constitution. Plaintiff is not statutorily required to establish a causal connection between deprivation and further injury.[53]

Implicit in the court's expression of the test in terms of civil relief is approval of the same approach to prejudice in the criminal context. Overturning a conviction for a deliberate sixth amendment violation without proof of actual harm is considered a more radical stance on the issue of prejudice and is therefore unacceptable to some courts. The Fifth Circuit in *United States v. Zarzour*[54] viewed "with a jaundiced eye the conduct of the government" but held that such activity alone would not vitiate the conviction.[55] The Second Circuit has concurred in this position.[56] Diametrically opposed is the absolute approach to the right to counsel that the District of Columbia Court of Appeals expressed in *Coplon v. United States*:[57] "This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner."[58] It appears from the allusion to the criminal law setting in the *Bursey* holding that the Fourth Circuit is more inclined to adopt the latter approach and hold that constitutional rights must be "scrupulously observed"[59] if a conviction is to stand.

The strength of the test proposed in *Bursey* is readily apparent. The obvious difficulties in satisfying either a specific intent or an actual prejudice requirement would severely restrict the sixth amendment protection. Although the Fourth Circuit test greatly alleviates the burden of proof placed on the accused, it fails to embrace fully the per se rule set forth in *Black v. United States* and *O'Brien v. United States*.[60] In the former, the prosecution unwittingly referred to notes that contained excerpts from monitored conversations,[61] and in the latter, the contents of the communications were not even transmitted to the prose-

53. Via v. Cliff, 470 F.2d 271, 275 (3d Cir. 1972); *cf.* Peters v. Kiff, 407 U.S. 493, 504 (1972). However, plaintiff is required to rebut a good faith defense. Pierson v. Ray, 386 U.S. 547 (1967); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

54. 432 F.2d 1 (5th Cir. 1970).

55. *Id.* at 3; *accord*, United States v. Cohen, 358 F. Supp. 112 (S.D.N.Y. 1973). *See generally* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 237-38 (1975).

56. United States v. Mosca, 475 F.2d 1052, 1061 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973).

57. 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

58. *Id.* at 759.

59. *Id.* at 760.

60. *See* text accompanying notes 37-39 *supra*.

61. 385 U.S. at 28.

cution in any form.[62] The weakness of the *Bursey* test is the court's apparent departure from the strict per se rule established in *Black* and *O'Brien* when the intrusion in question is inadvertent. The distinction turns solely upon a finding of "deliberateness," an imprecise criterion that requires a subjective evaluation of the state of mind of the prosecution. From the point of view of the accused, knowledgeable conduct may at times be as difficult to prove as gross activity.

The significance of *Bursey* lies in its impact on the administration of criminal justice. The court's analysis demonstrates a full appreciation of the ramifications of the right to counsel protection. Undistracted by peripheral issues such as "grossness" and actual prejudice, the court sought to achieve the fundamental objectives of the sixth amendment. The decision serves two functions that are essential in our adversary system of justice: (1) misconduct by the prosecution is deterred, and (2) privacy in the attorney-client relationship is preserved.

Official abuse of a constitutional right is reprehensible in itself. The fact that the prosecution does not actually benefit from intrusion into defense counseling does not excuse the violation.[63] Indeed the consequences of abuse for defendant are immaterial in light of the purpose of section 1983 to preserve constitutional freedoms by punishing the offending officials.

The second function of *Bursey* is equally crucial. Privacy is a prerequisite to an effective attorney-client relationship. Good legal advice depends upon full knowledge of the circumstances. Unless the accused feels free to confide in his attorney, the right to counsel is a hollow guarantee.[64]

Bursey represents a pragmatic approach to sixth amendment protection. The court fashioned a solution that reflects sensitivity to the foreseeable consequences for the accused and that gives substance to the constitutional maxim. The crux of *Bursey* is that the right to effective assistance of counsel remains intact, unfettered by judicial limitations, thus facilitating the proper administration of criminal justice.

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62. 386 U.S. at 346 (Harlan, J., dissenting).

63. United States *ex rel.* Cooper v. Denno, 221 F.2d 626, 628 (2d Cir.), *cert. denied*, 349 U.S. 968 (1955).

64. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966).

Contracts—Smith v. Ford Motor Company: Limitation on a Franchisor's Right To Interfere with Contracts Between a Franchisee and an Employee

The franchise[1] is an odd legal animal: the product of immense economic power and technical knowledge on one side and entrepreneurial desire and investment ability on the other.[2] As a result a franchisor has a great deal of power over a franchisee's operations.[3] However, the North Carolina Supreme Court in *Smith v. Ford Motor Co.*[4] held that there were limits to the power that a franchisor, Ford, could exert over its franchisee, Cloverdale Ford, under a claim by Ford of legal right to interfere with a contract between a franchisee and an employee. Essentially, Ford could not procure the termination of Cloverdale's general manager without good cause.

The claim of legal right has long been a sufficient defense in North Carolina to claims of tortious inducement of breach of contract.[5] *Smith v. Ford Motor Co.* signifies an important encouragement to claims of tortious inducement by marking a departure from automatic dismissal when a defense of legal right is entered and by increasing judicial inquiry into the merits of such a defense.

In *Smith* Ford Motor Company had a terminable at will franchise

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1. Attempts to define "franchising" have not resulted in a consensus. *See, e.g.*, Fels, *Franchising; Legal Problems and the Business Framework of Reference—An Overview*, in THE FRANCHISING SOURCEBOOK 3-9 (J. McCord ed. 1970); McGuire, *The Labor Law Aspects of Franchising*, 13 B.C. IND. & COM. L. REV. 215 n.1 (1971) [hereinafter cited as McGuire].

2. The imbalance is fostered by the fact that the franchisee alone has made the necessary capital investment; the franchisor has "nothing to lose." *See* Brown, *Franchising: Fraud, Concealment and Full Disclosure*, 33 OHIO ST. L.J. 517, 518-19 & n.13 (1972) [hereinafter cited as *Franchising*]. For a full discussion of automobile dealer franchises, see Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957) [hereinafter cited as Kessler].

3. Dealer vulnerability in this situation has been traced to the comparatively weak bargaining power and the "anomalous legal classification of the manufacturer-dealer relationship." Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 467-68. It is reinforced by policies such as those exposed in H. BROWN, FRANCHISING, TRAP FOR THE TRUSTING (1972). "The second largest auto factory guarantees the result of all conferences between its highly trained executives and the individual dealer by barring any talk whatsoever if the dealer appears with his attorney." *Franchising, supra* note 2, at 546.

4. 289 N.C. 71, 221 S.E.2d 282 (1976).

5. *See, e.g.*, Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964). *See generally* note 24 *infra*.

agreement with a reconstituted dealership known as Cloverdale Ford.[6] The previously failing franchise had become profitable since the employment of a new general manager, Jack Smith. Cloverdale Ford, the franchisee corporation, employed Smith as president and general manager under a contract terminable at will by Cloverdale. Additionally, the Smith-Cloverdale contract permitted termination for cause if, in the opinion of Ford Motor Company, Smith proved unsatisfactory "from the standpoint of profits earned or the manner of operation of the corporation."[7] Subsequently, Smith became active in the Ford Dealer Alliance, an association of dealers interested in protecting their position in factory-dealer transactions. Upon Ford's request Smith disaffiliated Cloverdale Ford from the Alliance, but refused to end his personal association with the organization. Ford exerted pressure on Cloverdale, apparently threatening termination of the franchise. Cloverdale responded by utilizing the at will clause in Smith's contract, terminating his employment.

Smith instituted suit against Cloverdale Ford, its majority stockholders and Ford Motor Company. The court of appeals approved the superior court's dismissal for failure to state a claim.[8] The North Carolina Supreme Court affirmed the dismissal of claims against Cloverdale Ford[9] and its majority stockholders[10] but held that the allegations were sufficient to state a claim against Ford Motor Company for tortious inducement of breach of contract, despite Ford's assertion of a right to interfere.[11]

Liability for inducing breach of contract is founded in Roman law in a master's action for the indirect injury done to him when his slave was injured.[12] The common law counterpart was an action in trespass

6. *See* § 17.(f) of the franchise agreement, 289 N.C. at 79, 221 S.E.2d at 287.

7. *Id.* at 82, 221 S.E.2d at 289.

8. 26 N.C. App. 181, 215 S.E.2d 376 (1975).

9. The dismissal was founded on the right of an employer to terminate an employee whose contract allows for termination at will. This "blinders" attitude toward the exercise of a termination right is also exhibited in cases of franchise termination. "[S]uch right to terminate was not subject to question . . . because of motive, intent or resultant detriment . . . . It is beyond the power of the judiciary to engraft conditions upon the exercise of such a contractual right." Martin v. Ford Motor Co., 93 F. Supp. 920, 921 (E.D. Mich. 1950).

10. There has been discussion of piercing the corporate veil and holding corporate officers and stockholders liable for any wrongful action. Avins, *Liability for Inducing a Corporation to Breach Its Contract*, 43 CORNELL L.Q. 55, 55-58 (1957).

11. 289 N.C. at 76, 221 S.E.2d at 285.

12. *See* Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928) [hereinafter cited as Carpenter]; Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 633 (1923) [hereinafter cited as Sayre]; Comment, *Inducing Breach of*

for the loss of the services of a servant.[13] In 1853, the scope of liability was emancipated from the master-servant limitation in *Lumley v. Gye*,[14] which marked the emergence of liability for tortious inducement of breach of contract.

The principle of liability for tortious inducement of breach of contract was first recognized in North Carolina in 1874 in *Haskins v. Royster*[15] when the court imposed liability for inducing a servant to leave his master. The principle was extended in *Jones v. Stanley*[16] when the theory in *Haskins* was extended to cover "every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts for service."[17]

In 1939 the Restatement of Torts defined one who would be liable for tortious inducement of breach of contract as "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another . . . ."[18] Comment *e* provides that "the actor must have knowledge of the business expectancy with which he is interfering."[19] But it was not until *Childress v.*

Contract: Herein of Contracts Terminable at Will, 56 NW. U.L. REV. 391 (1961) [hereinafter cited as *Inducing Breach*].

13. *See Inducing Breach, supra* note 12, at 391.

14. 118 Eng. Rep. 749 (Q.B. 1853). The court recognized that the employee was not a servant but liability was extended for inducement to breach any employment contract, despite a lack of statutory support. *See* Sayre, *supra* note 12, at 667-68.

15. 70 N.C. 601 (1874).

16. 76 N.C. 355 (1877).

17. *Id.* at 356 (emphasis in original). This extension to non-employment contracts antedates the English extension by sixteen years. *See Inducing Breach, supra* note 12, at 393-94. The principle of liability for inducement of breach of contract did not meet with continued receptivity. In Swain v. Johnson, 151 N.C. 91, 65 S.E. 619 (1909), the North Carolina Supreme Court repudiated *Jones* and limited *Haskins* to its facts; liability for inducing breach was limited to the master-servant relationship and to situations in which the means of procurement were tortious in themselves. Subsequent cases either accepted the limitation of *Haskins*, as in Minton v. Early, 183 N.C. 199, 111 S.E. 347 (1922), or avoided the discredited principle and relied on doctrines such as unfair trade practices, as in Smith v. Morganton Ice Co., 159 N.C. 151, 74 S.E. 961 (1912). The discreditation was furthered in Gibson Land Auction Co. v. Brittain, 182 N.C. 676, 110 S.E. 82 (1921), in which the court said, "In all events, if the plaintiffs be entitled to recover, they must recover in an action growing out of contract; and none has been shown *with the defendant*." *Id.* at 677, 110 S.E. at 83 (emphasis added). This dictum indicates a confusion between liability for breach of contract and liability for inducement of breach of contract.

18. RESTATEMENT OF TORTS § 766(1) (1939). The 1969 tentative draft alters the definition to "[o]ne who intentionally induces or otherwise intentionally causes a third person not to perform a contract with another, other than a contract to marry . . . ." RESTATEMENT (SECOND) OF TORTS § 766 (Tent. Draft No. 14, 1969).

19. RESTATEMENT OF TORTS § 766, comment *e* at 56 (1939).

Abeles[20] in 1954 that the North Carolina Supreme Court clearly enunciated the essential elements of the tort in this state: (1) a valid contract must exist between plaintiff and a third party;[21] (2) defendant must know that the contract existed;[22] (3) defendant must intentionally induce the third party to breach;[23] (4) defendant must act without justification;[24] and (5) the breach must cause plaintiff actual damages.[25]

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20. 240 N.C. 667, 84 S.E.2d 176 (1954).

21. 240 N.C. at 674, 84 S.E.2d at 181. The requirement of a valid contract was at issue in Henry v. Shore, 18 N.C. App. 463, 197 S.E.2d 270 (1973). An action for inducement of breach of contract was barred because the oral contract for the transfer of real estate was in violation of the Statute of Frauds. In Burns v. McFarland, 146 N.C. 382, 59 S.E. 1011 (1907), plaintiff's apparent abandonment of the contract estopped an action based on inducement of breach of a valid contract. The recognition of the tort of interference with prospective economic advantage in Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965), alleviated the necessity of proving a contractual relationship in some cases. The tortious conduct interfered with a relational interest. *See generally* Green, *Relational Interests*, 29 ILL. L. REV. 460, 1041 (1934). That relation can be contractual or pre-contractual. "Where the interference is with a contract, the privileges to interfere are somewhat more limited than in the case of interference with prospective dealings . . . ." RESTATEMENT (SECOND) OF TORTS § 766, comment *b* at 37 (Tent. Draft No. 14, 1969).

22. 240 N.C. at 674, 84 S.E.2d at 181. Notice and intent are linked. *See* Harper, *Interference with Contractual Relations*, 47 NW. U.L. REV. 873, 880-81 (1953). In Morgan v. Smith, 77 N.C. 37 (1877), the court did not impose liability on a defendant who hired plaintiff's employees because the requisite elements of notice and malicious intent had not been proven. The exigency of defendant's notice of plaintiff's contract is amply illustrated by the North Carolina court's response to the land and timber sales cases: Bruton v. Smith, 225 N.C. 584, 36 S.E.2d 9 (1945), in which the contract to sell was not duly registered; Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947), in which the contract to sell was registered; Eller v. Arnold, 230 N.C. 418, 53 S.E.2d 266 (1949), in which the realtor's exclusive right to sell was not registered; and Dulin v. Williams, 239 N.C. 33, 79 S.E.2d 213 (1953), in which a timber deed was not registered. The court held in each case that only inducement of breach of the registered contract was actionable. Registration was held to be equivalent to legal notice.

23. 240 N.C. at 674, 84 S.E.2d at 181. The necessity of proving intentional inducement is vital; North Carolina rejected negligent inducement of breach of contract in Thompson v. Seaboard Air Line Ry., 165 N.C. 377, 81 S.E. 315 (1914). The element of intent once required proof of malice as well. That requirement was altered by Coleman v. Whisnant, 225 N.C. 494, 35 S.E.2d 647 (1945), in which the court refined the definition of malice when it said, "The word 'malicious' used in referring to malicious interference with formation of a contract does not import ill will, but refers to an intereference with design of injury to plaintiff or gaining some advantage at his expense." *Id.* at 506, 35 S.E.2d at 656. *See also* McElwee v. Blackwell, 94 N.C. 261 (1886).

24. 240 N.C. at 674, 84 S.E.2d at 181. Various grounds justify actions that would otherwise create liability for inducement of breach of contract. Business competition and absolute right are acceptable justifications when the defendant is furthering his own interests. Protection of public health, morals and safety; disinterested advice; performance of duty; discipline and responsibility for the welfare of another; protection of character or reputation; interference with marriage contracts; interference with racial disputes; and interference prompted by patriotism are justifications when the defendant is furthering interests other than his own. For a discussion of justification see Carpenter, *supra* note 12, at 745-62; Note, *Torts: Inducing Breach of Contract: Justifications*, 27 CORNELL L. REV. 139 (1941). *See also* RESTATEMENT (SECOND) OF TORTS § 767 (Tent.

Draft No. 14, 1969), dealing with factors that determine privilege. In the business competition context, the interest of the actor or inducer is measured against the interest of the plaintiff in the contract in order to determine whether the actor has been justified. "If the act is done only for the protection of one of the actor's interests, it must be an interest of a value greater than, or at least equal to, that of the interest invaded, or if the interests are similar, the harm which the act is appropriate to prevent must be substantially equal to or greater than that which it is intended or likely to cause." Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Property and Personality*, 39 HARV. L. REV. 307, 314 (1926). *See also* Note, *Interference with Contracts at Will—A Problem of Public Policy*, 25 BROOKLYN L. REV. 73, 77-78 (1958). The justification of lawful competition as a successful defense to liability for inducement of breach of contract was introduced in Holder v. Atlantic Joint-Stock Land Bank, 208 N.C. 38, 178 S.E. 861 (1935). The justification was held to create an absolute right to interfere, however malicious the motive. The competition did, however, have to be lawful, which was not the case in Sineath v. Katzis, 218 N.C. 740, 12 S.E.2d 671 (1941), when defendant was held liable for inducing the former owner of a laundry to breach his noncompetition covenant with the present owner. The privilege of competition was sharply cut back in Bryant v. Barber, 237 N.C. 480, 483, 75 S.E.2d 410, 412 (1953), which held that the privilege did not justify interference with *existing* contractual relationships. "If contracts otherwise binding are not secure from wrongful interference by competitors, they offer little certainty in business relations, and it is security from competition that often gives them value." Carolina Overall Corp. v. East Carolina Linen Supply, Inc., 8 N.C. App. 528, 531, 174 S.E.2d 659, 661 (1970). This protection of existing contracts, which is the law today, was approved in Moye v. Eure, 21 N.C. App. 261, 204 S.E.2d 221, *cert. denied*, 285 N.C. 590, 205 S.E.2d 723 (1974). *See also* Sayre, *supra* note 12, at 686.

In the case of a business competition defense, defendant's freedom to compete and the societal interest in a competitive economic atmosphere are considered *more* important than any prospective economic advantage to plaintiff, but *less* important than the protection of existing contracts. It was implicit in the holding in Holder v. Cannon Mfg. Co., 138 N.C. 308, 50 S.E. 681 (1905), that an employment contract at will did not create a protectible right at all. The treatment of terminable at will contracts has changed since Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954).

The most common justification in North Carolina case law is the defense of acting under legal right. The defense of legal right or absolute right is a complete defense, whereas the defense of competition is a qualified privilege exercisable only under certain conditions. *See generally* Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). Insulation from liability resulted in Biggers v. Matthews, 147 N.C. 299, 61 S.E. 55 (1908), when the court issued the following broad dictum about an absolute right to interfere: "If a person does that which he has a legal right to do, violating no legal duty or obligation, the motive which prompts him is immaterial." *Id.* at 302, 61 S.E. at 57. The tentative draft of the second Restatement indicates a different attitude. Although "[i]ll will on the part of the actor toward the person harmed is not an essential condition of liability . . . [t]he presence or absence of ill will . . . may clarify the purposes of the actor's conduct and may be, accordingly, an important factor in determining the existence or non-existence of privilege." RESTATEMENT (SECOND) OF TORTS § 766, comment *r* at 48-49 (Tent. Draft No. 14, 1969). *See also* note 23 *supra*. *Biggers'* dictum was followed in Bell v. Danzer, 187 N.C. 224, 121 S.E. 448 (1924), then in Elvington v. Waccamaw Shingle Co., 191 N.C. 515, 132 S.E. 274 (1926), and was extended in Beane v. Weiman Co., 5 N.C. App. 279, 168 S.E.2d 233 (1969), when an employee was found to have a legitimate right to announce that his continued employment was conditioned on the firing of another employee of whose activities he did not approve. "Insider" status, which was invoked by the Ford Motor Company in *Smith v. Ford Motor Co.*, is apparently a legal right acquired through a contractual or fiduciary relationship.

25. 240 N.C. at 674, 84 S.E.2d at 182. There is a controversy in many jurisdictions over the appropriate measure of damages. *See generally* Comment, *Plaintiff's*

The dispute in *Smith v. Ford Motor Co.*[26] revolved around the acceptability of Ford's justification for interference: Ford's status as an "insider" to Smith's employment contract with Cloverdale. The terms "outsider" and "nonoutsider" were introduced in *Childress v. Abeles*,[27] were never defined, but were applied nonetheless by the courts of North Carolina in various situations.

Wilson v. McClenny[28] gave the court an opportunity to invoke the immunity of "insiders" from liability for inducement of breach of contract; stockholders and directors were held privileged to cause the corporation to breach its contract with plaintiff. However, the court did qualify the privilege in dictum: "As either directors or stockholders, they were privileged [per written agreement] purposely to cause the corporation not to renew plaintiff's contract as president if, in securing this action, they did not employ any improper means and if they acted in good faith to protect the interests of the corporation."[29]

The court of appeals in *Sawyer v. Sawyer*[30] suggested that had the complaint sufficiently stated the elements of the tort, the stepmother who had advised her stepdaughter and son-in-law to breach the terms of a consent judgment would have been liable. The court determined that the stepmother was an "outsider" as to her son-in-law even though the plaintiff had conceded that she "was an interested party to the performance of such consent judgment and a valuable consideration passed to her, namely, the relinquishing by the present plaintiffs of their efforts to set aside certain conveyances to the stepmother, defendant."[31]

Measure of Recovery for Tortious Inducement of Breach of Contract—Profits or Losses?, 19 HASTINGS L.J. 1119 (1968); Note, *Interference with Contractual Relations: A Common Measure of Damages*, 7 SANTA CLARA LAW. 140 (1966). In McElwee v. Blackwell, 94 N.C. 261 (1886), the court insisted upon actual damages before recovery could be allowed. For that reason a new contract or novation is a bar to an action for inducement of breach of the original contract according to the court in Fowler v. Nationwide Ins. Co., 256 N.C. 555, 124 S.E.2d 520 (1962).

26. 289 N.C. 71, 221 S.E.2d 282 (1976). The tentative draft of the second Restatement extends a defense of privilege to "[o]ne who has a financial interest in the business of another . . . if the actor (a) does not employ improper means, and (b) acts to protect his interest from being prejudiced by the contract or relation." RESTATEMENT (SECOND) OF TORTS § 769 (Tent. Draft No. 14, 1969). Comment *a* defines that requisite business interest as an "interest in the nature of an investment. A part owner of the business, as for example, a partner or stockholder, has at least such an interest. But a bondholder or other creditor may also have it." *Id.*, comment *a*, at 75-76.

27. 240 N.C. 667, 84 S.E.2d 176 (1954). "[A]n action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party." *Id.* at 674, 84 S.E.2d at 181.

28. 262 N.C. 121, 136 S.E.2d 569 (1964).

29. *Id.* at 133, 136 S.E.2d at 578.

30. 4 N.C. App. 594, 167 S.E.2d 471 (1969).

31. *Id.* at 599, 167 S.E.2d at 475.

The boundaries of the "insider"-"outsider" distinction are vital since an "insider" has a privilege to induce breach of a contract to which he is not a party, so long as he has a recognized interest.[32] In *Kelly v. International Harvester Co.*[33] the franchisor, Harvester, was held to be an "insider" to the employment contract of plaintiff as general manager for the franchisee corporation. The franchisor's "insider" status was apparently the result of several conclusions: that Harvester had a "legal right under the common law to protect and promote its own interests in the conduct and success of [the franchisee's] business;"[34] that according to the franchise contract Harvester had the right to terminate the franchise if "there is any change in the principal officers, directors, management, or stock ownership which in the opinion of the Company will effect a substantial change in the operation, management or control of the dealership"[35] and that such a change had occurred when plaintiff had been hired by the franchisee as general manager without Harvester's approval; that the franchise agreement giving Harvester these rights antedated the employment contract; that Harvester could reasonably believe that the employment of plaintiff as general manager of this dealership would pull trade from a Harvester dealership in plaintiff's hometown nearby; and that Harvester was acting in good faith in attempting to relocate plaintiff in a similar position elsewhere in the state.

The language of *Kelly v. International Harvester Co.* was malleable enough to allow the court in *Smith v. Ford Motor Co.* to find the claim sufficient *or* insufficient and still employ *Harvester's* language. The court in *Smith* chose to read the *Harvester* result as mandated by the *cumulative* effect of the conclusions above. International Harvester was held to be an "insider" not simply because it was the franchisor but because its actions were justified under the contract and were not suspect as to intent. Although Ford Motor Company might have had a "legal right . . . to protect and promote its own interest in the con-

32. An "insider" has some of the same characteristics as "one who has a financial interest" in Restatement language. *See* note 26 *supra*. "One who has a financial interest" is privileged to act to protect his interest unless he employs improper means. If proving "improper means" requires proof that the defendant acted in a manner that would be tortious, the qualification is meaningless since liability would exist independent of tortious inducement of breach of contract. The exact definition of "insider" is illusory, but it seems to require more than a third party beneficiary relationship.

33. 278 N.C. 153, 179 S.E.2d 396 (1971).

34. *Id.* at 165, 179 S.E.2d at 402.

35. *Id.* at 164, 179 S.E.2d at 402.

duct and success of [the franchisee's] business,"[36] the result in *Smith* indicates that this right alone is not now sufficient under North Carolina law to create an absolute right to interfere. The interference must be for a specific and lawful purpose.

Ford Motor Company's rights under the contract[37] were restricted or qualified in the same manner as International Harvester's.[38] By the language of Smith's employment contract with Cloverdale, Ford could request the termination of Smith's employment only if he proved unsatisfactory "from the standpoint of profits earned or the manner of operation of the Corporation."[39] The court in *Smith* pointed out that the expressed qualification "clearly indicates that dissatisfaction for the stated reasons was intended by the parties to be the *only* justification"[40] for Ford's interference. In *Harvester* there was a change in management that triggered Harvester's absolute right to interfere. In *Smith* plaintiff was not only satisfactory from the standpoint of profits and operation, he was exemplary, reversing the dealership from a losing franchise into a profitable one.

The court in *Harvester* concluded that because the franchise agreement antedated the employment contract, parts of the agreement that referred to operational policy and resulting franchisor rights were incorporated into plaintiff's employment contract.[41] The issue of incorporation of Cloverdale's franchise agreement into Smith's employment contract was not raised in *Smith* because the franchise agreement did not antedate the employment contract.[42] However, if the *Harvester* conclusion is extended, certain language in the franchise contract could have borne on Ford's defense. The franchise agreement term that Ford "solicits dealers to bring to its attention through their National

36. *Id.* at 165, 179 S.E.2d at 402.

37. The Lanham Act, 15 U.S.C. §§ 1051 *et seq.* (1970), which imposes upon Ford an affirmative duty to police the use of its trademark, may consequently give Ford a right to interfere that is not based upon contract. But since quality control and uniform use of the trademark are the apparent goals of the provision, Ford should not be able to justify interference with an efficient, productive operation.

38. Ford claimed an absolute right to interfere because of its status as an "insider." Justice Holmes' caveat regarding absolute rights is interesting in light of Ford's claim: "[T]he word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921). An examination of the premise of Ford's right reveals it to be a qualified right.

39. 289 N.C. at 82, 221 S.E.2d at 289 (emphasis omitted).

40. *Id.* at 85, 221 S.E.2d at 291.

41. 278 N.C. at 165, 179 S.E.2d at 402.

42. 289 N.C. at 76, 221 S.E.2d at 285-86.

Dealer Council organization any mutual dealer problems or complaints as they arise"[43] raised the obligation of Smith to utilize that forum rather than the Ford Dealer Alliance. However, the use of the word "solicits" and the "absence of any firm commitment on the part of Ford to abide by the decisions"[44] of the National Dealer Council indicate that the use of the grievance procedure set up by Ford is not, and should not be, mandatory. Furthermore, Smith did disaffiliate the franchisee, Cloverdale, as requested by Ford and maintained only his individual membership in the Ford Dealer Alliance.

Other franchise agreement language allowed termination of the franchise by Ford due to events controlled by the dealer, as in the case of "disagreement between or among any persons named in paragraph F [Smith and co-operator of the dealership and minority stockholder of the franchise, Davis], which in the Company's opinion tends to affect adversely the operation or business of the Dealer . . . ."[45] Even with incorporation, Ford should have been unable to justify its interference with reference to this language. Although Davis would have succeeded to Smith's stock interest upon termination of Smith's employment,[46] Smith did not join Davis as a defendant and no allegation of disagreement between Smith and Davis was made. Furthermore, this right to terminate the franchise was restricted to situations in which Ford reasonably believed the dealership was adversely affected. Such a belief in view of increased profits and operational stability would have been unreasonable.

It is clear that, aside from the disputed lack of justification, Smith alleged a prima facie case of tortious inducement of breach of contract. A valid contract clearly existed and was offered in support of the allegation.[47] Ford did not dispute that it had the requisite knowledge of the existence of Smith's employment contract; plaintiff as president of the corporation, Cloverdale, signed the franchise agreement.[48] Plaintiff alleged that when Ford learned of plaintiff's continued association with the Ford Dealer Alliance, "it 'wrongfully, maliciously, and unlawfully exerted pressure' upon the stockholders and directors of Cloverdale to terminate the plaintiff's employment."[49] The resulting dam-

43. *Id.* at 76, 221 S.E.2d at 286.
44. Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. IND. & COM. L. REV. 757, 815 (1971) [hereinafter cited as Brown].
45. 289 N.C. at 78, 221 S.E.2d at 286-87.
46. *Id.* at 82, 221 S.E.2d at 289.
47. *Id.* at 75-76, 221 S.E.2d at 285.
48. *Id.* at 77, 221 S.E.2d at 285-86.
49. *Id.* at 74, 221 S.E.2d at 284.

ages were at least the loss of the right to compensation. Except insofar as plaintiff alleged that the interference was "unlawful," there was no allegation that defendant acted without justification. The court apparently has modified *Childress*[50] by completely converting the justification obstacle to an affirmative defense, to be pleaded and proven by the defendant.[51]

The analogy of the Ford Dealer Alliance to early labor unions is difficult to avoid.[52] Ford backs the National Dealer Council as the grievance and bargaining panel in much the same way industrial employers once supported company unions whose allegiances, at best, were split.[53] Those who disagree with the policy are terminated.[54] When "a third party induced an employer to dismiss an employee before the expiration of his contract term of employment because the employee failed to support the cause of union labor[, r]ecovery was permitted."[55] Essentially the same situation occurred in *Smith* when Ford procured the termination of Smith because he supported a collective bargaining unit. Had Ford been allowed to claim the protection of an absolute right of a franchisor to interfere, the prohibition against collective association would be as complete as in the days of "yellowdog" contracts for workers.[56]

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50. 240 N.C. 667, 84 S.E.2d 176 (1954). *See* note 27 *supra.*

51. The plaintiff put forth a prima facie case without alleging lack of justification; the burden of proving justification rests with the defendant. Berry v. Donovan, 188 Mass. 353, 74 N.E. 603, *appeal dismissed,* 199 U.S. 612 (1905).

52. For a full discussion of the labor law aspects and implications, see McGuire, note 1 *supra.*

53. Company unions were disallowed under § 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2) (1970). Even company established grievance boards, similar to the Ford Dealer Council, were disallowed. NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959).

54. The practice of terminating dissenters was not new to Ford. During the depression in the 1930's, Ford instituted a controversial growth program:

> Fresh dealers were given contracts in droves. Experienced agents who opposed the new policies and spoke their minds frankly were replaced as rapidly as possible. Stressing the importance of weeding out "undesirables," the company reminded branch managers of their wide powers in cancelling franchises.

NEVINS & HILL, FORD: EXPANSION AND CHALLENGE 1915-1933 (1957), quoted in Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System,* 1965 WIS. L. REV. 483, 497 [hereinafter cited as Macaulay].

55. Weyrauch, *Third Parties and the Contract Relationship,* 32 BROOKLYN L. REV. 29, 45 (1951) *discussing* Berry v. Donovan, 188 Mass. 353, 74 N.E. 603, *appeal dismissed,* 199 U.S. 612 (1905). *See also* R & W Hat Shop, Inc. v. Sculley, 98 Conn. 1, 118 A. 55 (1922).

56. A yellowdog contract is an employment contract wherein the employee agrees to refrain from labor union membership and collective activity. An example of such a contract is contained in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

The same equities that favored collective bargaining for labor in the past support increased power for franchisees now.[57] One litigator who represents franchisees has suggested collective activity by franchisees as a protective measure against the disparate economic power of franchisors:

> Franchisees and their attorneys should meet with other franchisees to ascertain franchisor's activities involving: (a) unfair or deceptive acts or practices; (b) discriminatory practices; (c) price-maintenance policies; (d) territorial, customer or other illegal restrictions; and (e) other conduct that may be illegal under antitrust and other laws.[58]

A franchisor such as Ford Motor Company who disapproves of franchisees' collective activity often has the convincing power of a termination at will clause in the franchise agreement to persuade the franchisee not to participate in groups such as the Alliance.[59]

Until franchisees are accorded the same rights and protections as workers to associate collectively, franchisors can abuse their massive economic power[60] to diffuse any internal opposition.[61] Massachusetts has met the need with the Franchising Fair Dealing Statute, section ten

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57. "Through their dominant economic position, the manufacturers have employed the franchise, a 'one-sided document which is neither contract, license or agreement,' to gain maximum control over the management of the dealers' business without corresponding 'legal' responsibility." Kessler, *supra* note 2, at 1138.

58. Hammond, *Litigation Techniques in Representing Franchises*, in FRANCHISING: SECOND GENERATION PROBLEMS 80 (Practising Law Institute 1969).

59. The breadth of termination at will clauses is discussed in Comment, *Franchise Regulation: Ohio Considers Legislation to Protect the Franchisee*, 33 OHIO ST. L.J. 643, 664-72 (1972). Automobile dealers have some protection under the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25 (1970). But, partly because the Act requires the difficult proof of coercion, there have been few successful actions by terminated dealers. Macaulay, *supra* note 54, at 742-43 (Table 2). For the general lack of success under the Act, see *id.* at 741-89.

60. "The dealers are . . . economic dependents of the company whose cars they sell . . . .

. . . . [T]he economic power of Ford over its dealers is so great that dealers who desperately need Ford cars will be helpless to resist Ford's 'influence' and 'persuasion,' whether legalistically called 'coercion' or not." Ford Motor Co. v. United States, 335 U.S. 303, 323, 325 (1948) (Black, J., dissenting). The economic resources of the franchisor are also available to prolong litigation, "thereby requiring franchisees to suffer substantial legal fees" which few can afford. H. BROWN, FRANCHISING, TRAP FOR THE TRUSTING 95 (1969). "One of the biggest strengths the franchisor has over the franchisee is the . . . franchisee can't sue—it costs too much." Statement of David Slater, President of Mutual Franchise Corp., Boston Globe, Feb. 18, 1970, at 68, cols. 1-8.

61. An injunction against termination of franchises was allowed to stand because the terminations were intended to harass the leaders of class action litigation. *Franchising, supra* note 2, at 544 n.105, *discussing In re* International House of Pancakes Franchise Litigation, 331 F. Supp. 556 (Jud. Pan. Mult. Lit. 1971).

of which provides: "Every franchisee shall have the right of free association with other franchisees for any lawful purpose."[62] Washington,[63] Vermont,[64] New Jersey[65] and Pennsylvania[66] also have responded legislatively to the need to equalize the balance of power; however, these statutes usually do not provide effective sanctions.[67] The Washington Franchise Act, for example, "merely invalidates 'yellow-dog' provisions in franchise contracts, [therefore] it accomplishes very little."[68]

Ford Motor Company's hostility toward the Ford Dealer Alliance and toward Smith as a member of the Alliance is the unspoken issue in the case. The presence of malice does not rebut a privilege to procure breach of contract in North Carolina. Although plaintiff had properly alleged the elements of tortious inducement of breach of contract, the lower courts were restrained from imposing liability if Ford interfered under a legal right, regardless of information or intimation about Ford's motives.[69] Invocation of "insider" status in answer to the complaint had been sufficient to establish the legal right and to support a motion to dismiss. Although the different result in *Smith* heralds judicial

62. MASS. GEN. LAWS ANN. ch. 93B, § 10 (1975). Massachusetts did not enact other provisions that would have provided franchisees with a statutory right to bargain collectively and with procedural protections of the State Labor Relations Act. *See* text of the proposed Franchise Fair Dealing Act in THE FRANCHISING SOURCEBOOK 211 (J. McCord ed. 1970). For a complete discussion of the proposed Act by its author, see Brown, *supra* note 44.

63. WASH. REV. CODE ANN. § 19.100.180(2)(a) (Supp. 1974).

64. VT. STAT. ANN. tit. 9, § 4080 (Supp. 1975).

65. N.J. STAT. ANN. § 56:10-7(b) (Supp. 1975).

66. The Pennsylvania statute protects dealers of gasoline, petroleum products and motor vehicle accessories. Act No. 126 (Nov. 26, 1975), § 4(1), [1975] 3 Pa. Leg. Serv. 362.

67. "The [Washington] statute does not actually guarantee the right of franchisees to associate for any purpose. If franchisees were organized to bargain collectively with the franchisor or to set retail prices, hours and the like, they could well be in violation of federal antitrust laws." Chisum, *State Regulation of Franchising: The Washington Experience*, 48 WASH. L. REV. 291, 371 (1973) [hereinafter cited as Chisum]. If the National Labor Relations Act was applicable to all franchise relationships, sanctions would exist for franchisor abuse of franchisee rights. For a discussion of the possible applicability, see McGuire, *supra* note 1, at 227-49 and Fels, *Agency Problems*, in BUSINESS AND LEGAL PROBLEMS OF THE FRANCHISE 113-18 (J. McCord & I. Cohen eds. 1968).

68. Chisum, *supra* note 67, at 371.

69. There have been cases in other jurisdictions in which the courts have expressed concern over the means of inducement. *E.g.*, Connors v. Connolly, 86 Conn. 641, 86 A. 600 (1913). "[C]ertain bounds must be set to the use of means . . . if a decent regard for the rights of others is to be preserved and the public welfare conserved." *Id.* at 649, 86 A. at 603. *See generally* Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

recognition of a *qualified* "insider" status, it may be mandated by the judicial response to the injustice of allowing Ford's malicious inhibition of Smith's personal right of association. The tort remedy is inadequate in several ways. It does not adapt easily to the franchise in which the "inducer" has a contractual relationship with the parties. It does not protect a franchisee from "lawful" but malicious interference. Without an element of malice, punitive damages are out of reach. In all, the franchise agreement allows the knowledgeable franchisor an opportunity to contract for an absolute right, and the remedy is insufficient to deter franchisor abuses.

Protective legislation similar to the Massachusetts statute should be enacted in North Carolina.[70] A terminable at will clause in a franchise contract affords the parties an absolute right to terminate. Neither the hardship that the clause works nor its unconscionability is considered because franchise contracts do not seem to provoke the same judicial protectiveness as standardized contracts.[71] Furthermore, there is the possibility of no remedy under North Carolina tort law because the exercise of a legal right cannot result in liability regardless of motive. *Smith v. Ford Motor Co.* allows the franchisee and his employee easier access to a tort remedy but does not prevent Ford and other franchisors from simply increasing their power, their "insider" status, in future franchise agreements. The disparate power the franchise contract puts in the hands of the franchisors must be balanced. Legislative recognition of the rights of franchisees and their employees[72] would protect

70. Current North Carolina automobile franchise legislation is limited to licensing procedures and termination requirements. *See* N.C. GEN. STAT. § 20-285 to -308 (1975). Although at least one writer believes that "[e]nforcement of minimum standards of fairness is not such an innovative step that it can be taken only as an overriding matter of public policy or after legislative mandate," Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations,* 1967 DUKE L.J. 465, 468, the pervasiveness of the justification defense in North Carolina, with little attention to "minimum standards of fairness," underlines the need for a statutory remedy to franchisor abuses in this state. Corrective legislation should respond to this inadequacy as well as to other inequities prevalent in franchise relationships. *See generally Student Symposium: The Franchise Relationship—Abuses and Remedies,* 33 OHIO ST. L.J. 641-742 (1972).

71. Gellhorn, *supra* note 70, at 468. A factor which limits judicial intervention is the fact that the complex controls asserted in franchise agreements defy explication by general practioners and rigid evaluation by most judges. H. BROWN, FRANCHISING, TRAP FOR THE TRUSTING 95 (1969).

72. For single distributor franchise arrangements it may not be vital to provide franchisee employees with statutory protections, but in "the larger franchise enterprises, [a] definitional problem usually lies in determining whether the franchisor is unrelated to the franchisee's employees, or whether he is a joint employer of them." McGuire, *supra* note 1, at 230.

North Carolina businessmen who associate themselves with national franchisors and would provide the North Carolina courts with an ascertainable standard by which to scrutinize franchisor abuses.

ELIZABETH ANANIA

Family Law—Constitutional Right of Privacy: The Father in the Delivery Room

Eleven years ago in *Griswold v. Connecticut*[1] the United States Supreme Court gave full constitutional recognition to a broad and fundamental realm of protected human conduct. This conflux of rights was termed generally by the Court as the right of "privacy."[2] With the source of this newly developed right ambiguously stated and its scope extremely uncertain, lower courts have had little guidance in determining the bounds of its practical application. In the recent case of *Fitzgerald v. Porter Memorial Hospital*[3] Judge John Paul Stevens of the United States Court of Appeals for the Seventh Circuit (now Justice Stevens of the United States Supreme Court) was presented with the problems of determining the breadth of the right to privacy and the limits placed upon it by countervailing societal interests. At stake were the important, if not fundamental, rights of a father, mother and doctor[4] in having the father present in the delivery room at childbirth.[5] The court, unwilling to entangle itself in a medical dispute,[6] held that the parents' interest in having the father present was of insufficient magnitude to invalidate hospital regulations forbidding fathers from entering the delivery room.[7]

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1. 381 U.S. 479 (1965).
2. *Id.* at 484.
3. 523 F.2d 716 (7th Cir. 1975).
4. Plaintiffs argued that the hospital regulations improperly restricted their doctors' rights to practice medicine. Although the trial court found no standing in plaintiffs to assert their doctors' rights, the court of appeals found standing under *Griswold* in which a doctor was allowed to assert his patient's rights. The appellate court ruled that since plaintiffs had no protected rights in themselves they had no greater claim when standing in their doctors' stead. *Id.* at 721-22 & n.23.
5. *Id.* at 717.
6. *Id.* at 721.
7. *Id.*

Plaintiffs in *Fitzgerald* were married couples who had completed training[8] in the psychoprophylactic method, or as it is more commonly known, the Lamaze method of natural childbirth.[9] At the filing of the complaint in federal district court,[10] each couple, with one exception, was either expecting a child or had recently had a child at Porter Memorial Hospital,[11] the public hospital named as defendant.[12] Seeking injunctive and declaratory relief and damages[13] on the ground that their constitutional rights of privacy had been violated,[14] plaintiffs[15] challenged the official hospital policy that prohibited the "presence of

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8. Plaintiffs presented in their brief a summary of their required childbirth preparation:

> This method requires a serious commitment on the part of those participating. Husbands and wives must attend a series of classes that include lectures, films, question and answer periods, instruction in controlled breathing and relaxation techniques, and discussions on various pregnancy-related topics. This advance preparation and training serve to prepare the couples for the events that take place during pregnancy, labor and delivery, and enable them to function as a team during labor and delivery, with the husband supplying physical and emotional support to his wife. 523 F.2d at 717 n.2.

9. The Lamaze method is a recognized "method of analgesia (pain relief)" in childbirth that was "evolved" in the West by the French scientist Lamaze. It is traceable to its original developer, the famous Russian scientist Pavlov. Olds & Witt, *New Man in the Delivery Room—the Father*, TODAY'S HEALTH, Oct. 1970, at 52, 55.

The theoretical basis of the method has been described as giving "a woman's brain so much to think about consciously and so many new reflexes to deal with subconsciously, that whatever pain might occur cannot register on the brain." Part of the husband's role is "to keep his wife's brain busy coordinating the breathing rhythms and relaxing techniques she has learned." *Id.*

10. The district court's decision and opinion were given in an unreported memorandum decision on September 10, 1974. 523 F.2d at 718.

Jurisdiction was claimed under 28 U.S.C. § 1343(3) (1970). 523 F.2d at 718 n.4. An alternate basis of jurisdiction was set forth in the complaint under 28 U.S.C. section 1331 (1970) with the requisite statement of amount in controversy. 523 F.2d at 718 n.5.

11. 523 F.2d at 717.

12. Also named as defendants were members of the board of directors and the administrator of Porter Memorial Hospital. *Id.* at 718.

13. *Id.*

14. In particular it was alleged that the first, fourth, ninth and fourteenth amendments to the Constitution were violated. *Id.* 42 U.S.C. section 1983 (1970) was used as a remedial basis, 523 F.2d at 718 & n.4. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The court of appeals noted that there was no question that Porter Memorial Hospital was "a public hospital and that its actions are 'under color of state law' within the meaning of § 1983." 523 F.2d at 718 & n.4.

15. Plaintiffs sued on behalf of others similarly situated as well as on their own behalf, *id.* at 718; however, no ruling was rendered by the district court on the request that the suit be certified a class action. *Id.* at 718-19. The court of appeals did not touch upon this issue.

any person . . . in the Delivery Rooms . . . other than . . . Medical . . . and Nursing Staff."[16]

The district court dismissed the complaint, finding no constitutional violation since plaintiffs were not denied access to the hospital facilities. Nor were they totally prohibited from using a medically approved operation.[17] In addition it was held that plaintiffs had no standing to assert the rights of their physicians.[18] On appeal, Judge Stevens, writing for the Seventh Circuit, upheld the district court's dismissal of the complaints.[19]

Although the court of appeals acknowledged that the decision to have or not to have a child is constitutionally protected, the court held that the decision of "where, by whom, and by what method" a child is delivered is of a lesser magnitude.[20] Based upon this conclusion, the court found that the parents' interest in their children gave them no "greater right to determine the procedure to be followed at birth than that possessed by other individuals in need of extraordinary medical assistance."[21]

Having found in this manner that the parents' rights were not of fundamental importance, the court noted two policy considerations that it used to justify its dismissal of plaintiffs' case. First, the court expressed concern that a decision in plaintiffs' favor would require a holding grounded in the rights of the individual as opposed to rights that have their origin in marriage.[22] Since these rights could not be limited to the marriage relationship, the court feared that such a decision could be easily extended to create new rights of "companionship" in unwed parents and patients in stress about to undergo serious surgery,[23] and

16. *Id.* at 717.
17. *Id.* at 718-19.
18. *Id.* at 719.
19. *Id.* at 722. By the time the case was reviewed by the court of appeals all plaintiffs had given birth to their children; however, the court found that the case was not moot under Roe v. Wade, 410 U.S. 113, 125 (1973): "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition yet evading review.'" Fitzgerald v. Porter Memorial Hosp., 523 F.2d at 717-18 n.3, *quoting* Roe v. Wade, 410 U.S. at 125 (1973).
20. 523 F.2d at 721.
21. *Id.*
22. *Id.* at 720. The court recognized that the Supreme Court placed emphasis upon "the private aspects of the institution of marriage" in Griswold v. Connecticut, 381 U.S. 479 (1965); however, Judge Stevens noted that *Griwsold* was not limited narrowly to marital rights. 523 F.2d at 720. The court's concern is borne out by the fact that in Roe v. Wade, 410 U.S. 113 (1973), Jane Roe's right to abortion was based on a "privacy" right though she was not married when pregnant.
23. 523 F.2d at 720 n.16.

additionally, could be extended to a patient claiming a right to choose surgical procedures to be used.[24] Secondly, the court observed that there were "valid medical reasons for exclusion in individual cases."[25] Consequently, the court found it too unpalatable a result to impose an "inflexible rule upon all hospitals" by substituting its own judgment for the "professional judgment" of the hospital staff.[26]

The weight that should be given the parents' interest in choosing delivery procedures must be determined by reference to the Supreme Court "privacy" decisions preceding *Fitzgerald.* As long ago as 1891 the Supreme Court gave protected status to a form of personal privacy right, which it articulated in *Union Pacific Railway Company v. Botsford* as the "inviolability of the person."[27] Various later decisions found that rights of personal autonomy deserved constitutional recognition in equal protection or due process contexts in activities relating to marriage,[28] family relationships,[29] control over one's children's education,[30] and procreation.[31] These family related rights were deemed "fundamental"[32] or "implicit in the concept of ordered liberty,"[33] the threshold prerequisites to constitutional protection and close judicial scrutiny.[34]

Breaking with the tradition of piecemeal cataloguing of fundamental personal rights, *Griswold v. Connecticut*[35] recognized that there were "zones of privacy" formed by the "penumbras" of specific guarantees listed in the Bill of Rights,[36] in particular, the first, third, fourth, fifth and ninth amendments.[37] Justice Douglas, writing for the Court in *Griswold,* found that the marriage relationship was embraced by one of

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24. *Id.*
25. *Id.* at 721.
26. *Id.* at 721-22.
27. 141 U.S. 250, 252 (1891).
28. Loving v. Virginia, 388 U.S. 1 (1967) (statutes prohibiting marriages between races violative of equal protection and due process).
29. *See id.; cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to single people violative of equal protection).
30. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute preventing parents from sending children to religious schools violative of due process "liberty"); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute forbidding teaching of foreign language violative of due process "liberty").
31. Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization law violative of equal protection).
32. *See, e.g., id.* at 541.
33. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).
34. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
35. 381 U.S. 479 (1965).
36. *Id.* at 484.
37. *Id.*

these constitutionally preserved "zones of privacy" and that it thus required close judicial scrutiny, which in *Griswold* resulted in invalidation of the offending legislation.[38] The difficulty in determining the source, meaning and scope of the marital right to privacy, as well as in determining the balancing test to be utilized when the right is present, is compounded by the diversity of viewpoints on each aspect of the issue expressed by the individual concurring justices in *Griswold.*

Justices Goldberg, Warren and Brennan, in a concurring opinion in *Griswold,*[39] identified the ninth amendment as the source of the marital right to privacy, an additional, fundamental personal right reserved to the people.[40] Accordingly, this ninth amendment right was viewed as being within the sheltering concept of "liberty" in the fourteenth amendment's due process clause.[41] With such a right in question, Goldberg, Warren and Brennan required that the state show an interest that was "compelling" or the statute could not be sustained.[42] Justices Harlan and White, who wrote separate opinions concurring in the result,[43] found the due process clause to be sufficient in itself to establish the marital right to privacy.[44] While Harlan would seemingly require the state to show a compelling interest,[45] White demanded that there be a showing of "substantial justification" before a state can enter into this "realm of family life."[46] These divergent notions have left many unanswered questions concerning the right of privacy.[47] However, it is clear that regardless of its origins or its breadth, there *is* a constitutional right to privacy that attaches to at least some family relationships, particularly the marriage relationship.[48] Furthermore, when it is present and is threatened there must be, at a minimum, a

38. *Id.* at 485-86. Douglas expressly rejected a return to the substantive due process approach present in Lochner v. New York, 198 U.S. 45 (1905). In addition to citing the cases that overruled the *Lochner* approach, Douglas wrote: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

39. 381 U.S. at 486.

40. *Id.* at 488, 491-92.

41. *Id.* at 493.

42. *Id.* at 497.

43. *Id.* at 499, 502.

44. *Id.* at 500, 502.

45. *See id.* at 499-502.

46. *Id.* at 502.

47. Plaintiffs in *Fitzgerald* appeared unsure of the source of the right of privacy themselves since they based their claim on both the penumbral rights from the Bill of Rights and the word "liberty" in the due process clause. 523 F.2d at 719.

48. *See* text accompanying notes 62-69 *infra.*

showing of "substantial justification" for the encroaching statute or regulation.[49]

The nature and the limits of this marital or family-related zone of privacy are the critical factors in determining whether parents have the right to assure the father's presence at childbirth. The cases used by the *Griswold* Court to illustrate the application of the right to privacy show that this right encompasses two general, separate catagories of rights.[50] First, there is the "right to be let alone."[51] Secondly, there is an affirmative, "activist"[52] right possessed by people generally that is characterized best as the right to the "orderly pursuit of happiness."[53] It was this latter category of rights that plaintiffs pressed upon the appellate court in *Fitzgerald.* Judge Stevens described this right as "the individual's right to make certain unusually important decisions that will affect . . . [a person's] own, or his family's, destiny."[54]

The court of appeals' finding in *Fitzgerald,* that the interests put forward by plaintiffs did not represent " 'basic values' . . . dignified by history and tradition,"[55] was based upon two conclusions: that the father's presence was of less importance than the protected right to have a child,[56] and that privacy rights did not grow out of family relationships but out of the individuals' rights.[57] Asserting that the source of any privacy rights in marriage is the right of privacy in the individual, the court attempted to justify its refusal to give special consideration to the marital and family relationships.[58] Although it is unquestionably true that rights in marriage stem from individual

49. For an in-depth study of *Griswold,* the right to privacy and its historical roots see Emerson, *Nine Justices in Search of a Doctrine,* 64 MICH. L. REV. 219 (1965); Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410 (1974); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case,* 64 MICH. L. REV. 235 (1965).

50. *See* cases listed at 381 U.S. 482, 484 and note 51 *infra.*

51. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). A more recent case illustrating this principle is Stanley v. Georgia, 394 U.S. 557 (1969) (a state's power to regulate obscenity does not extend to mere possession by individual of obscene material in his own home).

52. The "activist"/"passive" rights dichotomy was considered in Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?,* 64 MICH. L. REV. 197 (1965).

53. Loving v. Virginia, 388 U.S. 1, 12 (1967). It was held in *Loving* that freedom to marry was one of these essential personal rights.

54. 523 F.2d at 719.

55. *Id.* (footnotes omitted).

56. *Id.* at 721.

57. *See id.* at 720-21.

58. *See id.*

rights,[59] the appellate court ignored a great many cases that have held that the "private realm of family life"[60] is an area of particular importance and sensitivity.[61]

The cases that have dealt with family relationships portray a "private *realm* of family life which the state cannot enter."[62] The right of privacy consists of more than a parent's right to have or not to have children.[63] It is more than a parent's right to send a child to religious schools[64] or to have his children study a particular subject.[65] The right to privacy is more than the right to marry freely[66] and more than the right to "establish a home and bring up children."[67] These are simply the landmarks of a "zone of privacy" that surrounds "family life,"[68] "something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[69] In light of this history of the fundamentality of family life, Judge Stevens has left the question of parental rights unresolved by writing that the right to determine the manner in which one's child is born is less important than the right to decide to have the child.[70]

If the hospital has entered into this realm of family affairs, the court was obliged to seek out some form of "substantial justification" if it were to uphold the restrictions.[71] The court need not have upheld plaintiffs' case, but it was obliged to examine plaintiffs' claims in

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59. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

60. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

61. *See* cases cited notes 62-69 *infra.*

62. Griswold v. Connecticut, 381 U.S. 479, 495 (1965), *quoting* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasis added).

63. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

64. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

65. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

66. *See* Loving v. Virginia, 388 U.S. 1 (1966).

67. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

68. Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting). It should be noted that reference was made in *Griswold* to this dissenting opinion as authority. 381 U.S. at 484.

69. Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

70. An appropriate analogy exists in Meyer v. Nebraska, 262 U.S. 390 (1923). In *Meyer* the Court said that liberty "denotes . . . the right . . . to marry, establish a home and bring up children." *Id.* at 399. The Court did not stop at that point but held that the parents had a right to have their children study German, contrary to the Nebraska statute. Bringing up one's children in a chosen *manner* (to learn German) in effect was included within the more important right, the right to have and bring up children generally. Although the right to choose the manner in which one's child will be born is a less important right, it appears to be part and parcel of the larger right, the right to have and to rear children.

71. *See* text accompanying notes 45-49 *supra.*

relation to the "medical" interests asserted by defendant hospital. In short, the court was duty-bound to scrutinize the conflicting interests and balance them in reaching its decision.[72] If after careful examination the court had dismissed plaintiffs' case it would have done so on firmer ground. However, direct judicial review of the hospital rules was refused.[73]

The court refused review of the regulations in deference to the medical profession.[74] The dissent in *Fitzgerald* argued strongly for at least a hearing of the evidence.[75] If the court had weighed the evidence carefully it might have been unable to support soundly its decision upholding the hospital regulations.

In a footnote Judge Stevens listed several medical articles illustrating the split in medical opinion and supporting his conclusion that there were valid "medical reasons" for sustaining the hospital rules.[76] The strongest argument made in these articles against a father's presence consisted of a list of "medical reasons" that may be summarized in part as follows (some of which apparently influenced and were incorporated into the court's opinion):[77] (1) anything can go wrong in the delivery room; (2) "using the tactics of this lobby [*i.e.*, persons seeking to enforce these rights of privacy through legislative or other legal means], and with similar reasoning" the principle may be extended to other operations; (3) intimacy has its limits—"a girl simply is not at her romantic best in a delivery room;" (4) the training of doctors and other medical personnel is more difficult and less effective with the father present; (5) the increased threat of malpractice suits growing out of a husband's account of the doctor's actions; (6) risk of infection—every person whose presence is not essential should be excluded.[78]

There are several difficulties with using such reasoning as exemplary of valid "medical reasons" as the court did in *Fitzgerald*. A couple's romantic concerns clearly are beyond the range of a doctor's expertise in delivery room procedure. The fact that parents' rights may be extended to future cases is primarily a legal matter, not a medical

72. Roe v. Wade, 410 U.S. 113 (1973), is an example of such a balancing approach.

73. 523 F.2d at 720.

74. *Id.* at 721.

75. *Id.* at 722.

76. *Id.* at 721 n.22.

77. *See id.* at 720 n.16 & 721 n.22.

78. Morton, *Fathers in the Delivery Room—An Opposition Standpoint*, HOSPITAL TOPICS, Jan. 1966, at 103-04.

issue. Assuming that there is a real threat of an increase in the number of malpractice suits, which is in itself questionable,[79] again it is a legal argument, not a medical justification. Additionally, questions arise as to the seriousness and the urgency of the claim that student doctors may have trouble learning about delivery procedure when the father is present. The only specific "medical reason" listed in the article cited by the court is the possibility of infection caused by the father's presence (this concern was also raised as a "medical reason" by the defendant hospital). However, that possibility is not based upon a greater likelihood of a properly prepared father causing infection, but a greater likelihood of infection generally with the increased number of persons present during childbirth.[80] Ironically, no such concern was expressed about increasing the chance of infection by the presence in the operating room of a number of student medical personnel. Although the court did not expressly accept all of the listed reasons in its rationale, it implicitly recognized them as valid medical justifications and as evidence of a medical dispute.[81]

It is probable that there are valid and important medical reasons beyond those noted by the court in its footnote of medical authority, but it is clear that Judge Stevens bowed too easily to those persons within the medical profession who voiced objections to the Lamaze or related procedures. In addition, there was an impressive array of "uncontradicted" evidence within the record that included surveys that reported more than 45,000 births without a single infection "traceable to the practice [of childbirth with the father present] and not one malpractice suit."[82] Also, the record of the district court contained affidavits by a Clinical Professor of Obstetrics and Gynecology of the Chicago School of Medicine who found "no evidence in current obstetrical literature indicating that the presence of husbands . . . (assuming proper safeguards are taken) would be hazardous . . . ."[83] The benefits of the method were summarized by the professor (who had delivered approximately one thousand babies in the past four years with fathers present) as follows: (1) "the father's presence . . . has an extremely stabilizing effect on the mother;" (2) the mother is able to "bear down more

79. The dissent noted surveys contained in the trial court record that showed that in over 45,000 births with the father present, no malpractice suit arose. 523 F.2d at 722.

80. Morton, *supra* note 78.

81. *See* 523 F.2d at 721 & n.22.

82. 523 F.2d at 722.

83. *Id.* at 723.

intensively," shortening labor; (3) the shortened labor increases the chance of a baby being healthy and decreases the possibility of hypoxia (insufficient oxygen); (4) "no greater number of hospital personnel are in attendance when the father is present . . . ."[84] Also, the doctor stated that he had had no serious incident occur due to the father's presence in approximately one thousand births. In light of this evidence the dissenting judge was surely justified in his view that an evidentiary hearing was required.

The *Fitzgerald* decision is important in three respects. First, it provides one court's answer to the broader issue presented—when there is a dispute within the medical profession the courts should not intervene. Secondly, it establishes an unfortunate but influential precedent in its denial of the parents' interest in having the father in the delivery room. Thirdly, *Fitzgerald* provides an interesting view of the approach of Justice Stevens toward the right of privacy, a right championed by his predecessor, Justice Douglas. If *Fitzgerald* is an indication of how Justice Stevens views the right of privacy, it is unlikely that this right will be extended beyond the facts contained in the cases that have espoused it.

If this right to privacy is a right that has been created and expanded to meet the needs of a changing society, which it apparently is,[85] *Fitzgerald* presents an ideal case for its application. Childbirth with husband participation is of growing significance[86] and comes easily within the realm of the marital and family relationships. It is not the final decision reached in *Fitzgerald* that is worrisome, for there may be truly weighty medical or other reasons for upholding the hospital rules. However, the court should have looked at the strength of the medical evidence and applied it to the particular case before it, keeping within its consideration less drastic alternatives.[87] If in the balance the same

84. *Id.* at 722-23.

85. This point is presented very convincingly in Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1427-31 (1974).

86. The American Society for Psychoprophylaxis in Obstetrics (ASPO) has estimated that approximately 247,500 couples were trained in the Lamaze technique in 1975. Letter from Melba A. Gandy, Executive Director of ASPO to NORTH CAROLINA LAW REVIEW, Jan. 22, 1976, on file in U.N.C. Law Library.

Ms. Gandy also expressed concern that new dangers would arise with hospital rules restricting a father's presence: a danger that is becoming more and more evident is that when hospitals do not permit the father to be present, couples are choosing to have their child at home, physically separated from hospital facilities that may be vital in the event of difficulties during delivery. *Id.* at 2.

87. Possible compromise measures were suggested in Goetsch, *Fathers in the Delivery Room—'Helpful and Supportive,'* HOSPITAL TOPICS, Jan. 1966, at 104,

decision were reached it would have been a better result than shying away from the right because the balance was difficult or controversial or because it called into question medical opinions. Constitutional rights can be dealt with and medical concerns may at the same time be given due weight and respect.

ERIC M. NEWMAN

Hospitals—A Current Analysis of the Right to Abortions and Sterilizations in the Fourth Circuit: State Action and the Church Amendment

The United States Supreme Court in *Roe v. Wade*[1] found that the right of privacy guarantees a woman the prerogative of having an abortion "free of interference by the State."[2] The right of privacy also includes the fundamental right to decide whether to bear or beget a child[3] and therefore implicitly encompasses the sterilization decision.[4] However, in *Roe*'s companion case, *Doe v. Bolton*,[5] the Court let stand a section of the challenged Georgia abortion statute that allows a hospital to refuse to admit a patient for an abortion. The Court noted that the purpose of this provision was "obviously . . . to afford appropriate protection . . . to the denominational hospital."[6] Thus an enigma remains: how valuable is the *Roe* guarantee to an abortion or sterilization free of state interference if under *Doe*[7] some hospitals may absolutely refuse to admit patients for such operations?[8]

As *Roe* guarantees abortions "free of interference by the State," an initial inquiry must concern the scope of the duty thus imposed. Clear-

1. 410 U.S. 113 (1973).
2. *Id.* at 163. The absoluteness of the right depends on the trimester of pregnancy concerned.
3. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
4. Compare the sterilization decision with the personal rights listed in Roe v. Wade, 410 U.S. at 152-53 that have been held to be part of the right of privacy.
5. 410 U.S. 179 (1973).
6. *Id.* at 198. However, the Court generally spoke in terms of "hospital" without any qualification.
7. The *Roe* and *Doe* opinions are to be read together. Roe v. Wade, 410 U.S. at 165.
8. *See* Note, *Hill-Burton Hospitals after Roe and Doe: Can Federally Funded Hospitals Refuse to Perform Abortions?*, 4 N.Y.U. REV. L. & SOC. CHANGE 83, 84 (1974).

ly a state cannot pass a statute forbidding abortions during the first two trimesters of pregnancy since the *Roe* decision directly invalidated such a statute.[9] But the Supreme Court has not yet determined whether the state *ever* has a duty to insure the availability of such procedures.[10] If the state must insure access to facilities that offer these operations, the nature of the state's relationship with a particular hospital becomes crucial for execution of this duty. Hospitals generally incorporate and, thus, traditionally have been classified as either public or private by corporation law.[11] The due process clause of the fourteenth amendment has been held to apply to public hospitals in the context of staff membership.[12] The Supreme Court in *Roe* found the right to an abortion to be based on the due process clause of the fourteenth amendment.[13] Thus, not surprisingly, several courts since *Roe* have held that a public hospital must allow nontherapeutic abortions and sterilizations when the hospital offers other procedures that involve the same amount of risk and care, and when the hospital's failure to allow abortions or sterilizations would result in denial of the patient's fundamental right to such operations.[14] If these courts are correct in construing *Roe* as imposing an affirmative duty[15] on the state to insure that a publicly owned hospital that offers medically indistinguishable procedures also offers abortions and sterilizations when the individual's fundamental right would otherwise be abridged, then, upon a finding of state action,

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9. 410 U.S. at 164.

10. The Supreme Court recently denied a writ of certiorari to two cases that would have potentially presented this issue to the Court: Taylor v. St. Vincent's Hosp., 44 U.S.L.W. 3492 (U.S. Mar. 2, 1976) (White, J. and Burger, C.J., dissenting), *denying cert. to* 523 F.2d 75 (9th Cir. 1975) (sterilization); Greco v. Orange Memorial Hosp. Corp., 96 S. Ct. 433, 436 (1975) (White, J. and Burger, C.J., dissenting), *denying cert. to* 513 F.2d 873 (5th Cir. 1975) (abortion).

11. Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy*, 1966 WASH. UNIV. L.Q. 485, 486. The author argues that since the purpose of a hospital is to serve the public rather than to make a profit, the public/private dichotomy has little meaning in the hospital context. Apart from corporation law, the distinction is invalid since public and private hospitals cannot be distinguished on the basis of purpose or function. *Id.* at 514-15.

12. *See* cases collected in *id.* at 487-91.

13. 410 U.S. at 153.

14. *See* Doe v. Poelker, 515 F.2d 541, 546 (8th Cir. 1975) (abortion); Doe v. Hale Hosp., 500 F.2d 144, 147 (1st Cir. 1974) (abortion); Nyberg v. City of Virginia, 495 F.2d 1342, 1347, 1378 (8th Cir. 1974) (abortion); Hathaway v. Worcester City Hosp., 475 F.2d 701, 705-06 (1st Cir. 1973) (sterilization). The actions were based on the equal protection clause of the fourteenth amendment.

15. Although the Constitution does not usually impose an affirmative duty on a state, the state's previous involvement in unconstitutional conduct may allow for such an imposition. A state's unconstitutional abortion statute should suffice for this involvement and render any later attempt at neutrality insufficient for adequate protection of the right to an abortion. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).

Roe would also compel the state to require a private hospital to offer such procedures under identical circumstances. Whether the requisite state action can be found in a private hospital's receipt of Hill-Burton funds is unclear.

The Hill-Burton Act[16] provides a highly regulated program designed to assist a state in furnishing adequate hospital care to all its citizens. Once a state decides to participate in the program, a state agency is responsible for administering the plan within the statutory guidelines.[17] The Fourth Circuit has consistently held that a hospital's receipt of Hill-Burton funds is a sufficient basis for a finding of state action.[18] Although it has never directly addressed the issue in the abortion-sterilization context, in the recent case of *Doe v. Charleston Area Medical Center, Inc.*,[19] the court implied that it would also apply this state action doctrine in such cases.[20] Whether the Fourth Circuit should apply this theory of state action in the abortion-sterilization context must be considered in light of recent judicial and congressional action to the contrary.

The landmark case finding state action on the basis of receipt of Hill-Burton funds is the 1963 Fourth Circuit Court of Appeals decision in *Simkins v. Moses H. Cone Memorial Hospital.*[21] The suit was brought by black patients and doctors who were denied treatment and staff privileges respectively by the defendant hospitals on the basis of race.[22] The court relied on two aspects of the Hill-Burton program to support a finding of state action in accord with previous Supreme Court holdings. First, participating Hill-Burton hospitals "operate as integral

16. 42 U.S.C. §§ 291-91o (1970). Public and nonprofit hospitals are eligible. 42 U.S.C. § 291a(b).

17. 42 U.S.C. § 291d(a)(1)-(2) (1970).

18. *E.g.*, Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974); Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). *See also* Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).

19. Civil No. 75-1161 (4th Cir. Nov. 6, 1975). Hill-Burton funding was not necessary because the hospital involved was complying with a state law by refusing to offer nontherapeutic abortions. *Id.* at 9. However, in an earlier unrelated case, this same hospital was found to be "sufficiently imbued with state action by receipt of Hill-Burton funds to invoke application of the fourteenth amendment." *Id.* at 7. That finding came in Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974).

20. *See* Civil No. 75-1161 at 7-9.

21. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

22. *Id.* at 962.

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."[23] Thus the hospitals and the state were joint beneficiaries within the rationale of *Burton v. Wilmington Parking Authority*.[24] The fact that the object of both the state and the hospitals was to furnish the public with adequate medical care strengthens this analysis.[25] Second, "[u]pon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care,"[26] and it is irrelevant for fourteenth amendment purposes that the instrument utilized would otherwise be private. The

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

24. 365 U.S. 715 (1961). *Burton* concerned a private restaurant, located in a public building, that refused to serve blacks. The Court's finding of state action rested in part on the benefits mutually conferred on the state and the restaurant because of the restaurant's location.

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle 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.

Id. at 725.

However, recent Supreme Court decisions define state action narrowly. In 1972, the Supreme Court decided Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which state regulation pursuant to the issuance of a liquor license to a private club that had discriminatory policies was held insufficient for a finding of state action. In 1974, the Court held in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), that a state regulated private utility company could terminate electric service to a consumer without complying with formal due process requirements, despite its monopolistic status and the essential nature of its product. By basing the holdings on the absence of state involvement in the challenged activity, the Court appears to be limiting the holding of *Burton*. However, the nature of the state's involvement with a Hill-Burton hospital is more analogous to *Burton* than to either *Moose Lodge* or *Jackson*. By participating in the Hill-Burton program, the state is essentially going into the hospital business. Offering surgical procedures is the crux of that business. Therefore, there is a symbiotic relationship between the state and the hospital that meets the requirements of *Burton*. In addition, *Moose Lodge* and *Jackson* are distinguishable on the basis of the relationship of the constitutional right to the entity involved. A finding of state action in *Moose Lodge* would have required members of a private club to forfeit their freedom of association as the price of a liquor license. In *Jackson*, the consumer was provided with some procedural safeguards, and a utility company is not in the business of conducting formal due process hearings. The infringement on the individual's right was slight as compared to the potential burden of the utility of complying with formal due process requirements. For an analysis of this balancing of interests, see Note, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817, 827-28 (1975).

25. Note, *Constitutional Law—State Actions—Denial of Abortion by Private Hospital Receiving Federal Financial Support under the Hill-Burton Program does not Constitute State Action.*, 2 FORDHAM URBAN L.J. 611, 618-19 (1974).

26. 323 F.2d at 968.

hospital's performance of a state adopted function brings it within the holding of *Marsh v. Alabama*.[27]

Although *Simkins* dealt with racial discrimination, later Fourth Circuit holdings demonstrate that the racial context was not the determinative factor. Relying on the *Simkins* analysis of the nature of the Hill-Burton program, state action has been found in other factual contexts.[28] Although no clear basis exists for treating abortion and sterilization cases differently, two occurrences in 1973 may prevent the extension of the Fourth Circuit's state action theory to the abortion-sterilization area. First, the Seventh Circuit Court of Appeals, despite precedent otherwise,[29] held in *Doe v. Bellin Memorial Hospital*[30] that the receipt of Hill-Burton funds is not a sufficient basis for a finding of state action because the receipt of governmental funding does not establish that the state was directly or indirectly involved in the hopsital's decision not to offer such procedures—a position that other courts have since adopted.[31] Second, Congress enacted the conscience clause of the Health Programs Extension Act of 1973[32] forbidding courts to require a Hill-

27. 326 U.S. 501 (1946) (corporate town). The *Simkins* court also cited: Terry v. Adams, 345 U.S. 461 (1953) (primary); Smith v. Allwright, 321 U.S. 649 (1944) (primary); Nixon v. Condon, 286 U.S. 73 (1932) (primary). 393 F.2d at 968 n.15. *See also* Munn v. Illinois, 94 U.S. 113, 126 (1876). *But see* Hudgens v. NLRB, 44 U.S.L.W. 4281 (U.S. Mar. 3, 1976), *overruling* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), which held that a private shopping center was sufficiently analogous to a business district to be imbued with state action to require that first amendment rights be recognized on its premises. Whatever the potential effect of *Hudgens* on *Marsh*, the state's participation in the Hill-Burton program still falls within the holdings of the three Texas primary cases *supra* and within the sentiments expressed in *Munn*, *supra*.

28. *E.g.*, Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974) (denial of staff privileges must comply with due process); Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969) (county residency requirement for staff privilege eligibility violates due process and equal protection).

29. Holmes v. Silver Cross Hosp., 340 F. Supp. 125, 133 (N.D. Ill. 1972). The Seventh Circuit may be applying a double standard depending on the presence or absence of racial discrimination. Note, 2 FORDHAM URBAN L.J., *supra* note 25, at 617. The author queries what the Seventh Circuit would do if a Hill-Burton hospital serving a predominantly black community refused to treat sickle cell anemia. *Id.* at 619.

30. 479 F.2d 756 (7th Cir. 1973).

31. Abortion-sterlization context: Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975) (abortion); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) (sterilization); Allen v. Sisters of Saint Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), *aff'd*, 490 F.2d 81 (5th Cir. 1974) (sterilization). In general: Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974); Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973); Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y.), *aff'd mem.*, 506 F.2d 1395 (2d Cir. 1974). *Cf.* Jackson v. Norton-Children's Hosps. Inc., 487 F.2d 502 (6th Cir. 1973).

32. 42 U.S.C.A. § 300a-7 (1974). The part of the Church Amendment relevant to

Burton hospital to allow abortions or sterilizations if the hospital's refusal is based on religious or moral grounds.

In *Bellin*, the Seventh Circuit Court of Appeals extended the "specific act theory" of state action to apply to the abortion area. The specific act theory was developed by the Second Circuit in *Powe v. Miles*[33] in relation to governmental funding of education. *Powe* held that receipt of public funding is not a sufficient basis for a finding of state action unless the state was involved directly or indirectly in the specific act challenged.[34] Relying on the Supreme Court's failure in *Doe* to invalidate the provision of the Georgia abortion statute that allows hospitals to refuse to admit abortion patients, the Seventh Circuit decided that as long as the state is neutral as to whether a Hill-Burton hospital need offer such procedures, the hospital's decision will be free of state action.[35]

The reluctance of the courts to find state action in the abortion-sterilization area possibly reflects a hostility to the *Roe* and *Doe* decisions[36] and a repugnance to requiring hospitals to offer any particular service.[37] Despite these considerations, finding state action on the basis of receipt of Hill-Burton funds has merit in the abortion-sterilization context, as well as in the traditional situations. One purpose of the Hill-Burton Act is "to assist the several States . . . to furnish adequate

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this discussion is section 300a-7(a)(2)(A). For the relevant language, see text accompanying note 47 *infra*.

33. 407 F.2d 73 (2d Cir. 1968).

34. *Id.* at 81.

35. 479 F.2d at 760. "We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves." *Id.* *See* note 15 *supra*. For analysis of *Bellin*'s reliance on *Doe*, see text accompanying notes 44-45 *infra*.

36. The most striking example of judicial reluctance to find state action in the abortion-sterilization context is the Fifth Circuit's decision in Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 96 S. Ct. 433 (1975). The hospital in *Greco*, which was exempt from all local, state and federal taxation, was built on land owned by the county, its construction was financed by interest-bearing county bonds and Hill-Burton funds, and the building was leased to a private nonprofit corporation for one dollar a year. The lease included a provision that the lessor county was relieved " 'of the responsibility and expense of operating a hospital.' " *Id.* at 876. The reason for judicial hostility may be the nature of the *Roe* decision itself. *See* Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223, 223-34 (1973).

37. This repugnance is explained in part by corporation law. The decisions made by a corporation's board of directors are within the board's sound discretion. 1966 WASH. UNIV. L.Q., *supra* note 11, at 493. However, hospitals should not be governed by corporation law. *See* note 11 *supra*. *Cf.* Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716 (7th Cir. 1975).

hospital, clinic, or similar services to all their people."[38] All hospitals in the state are taken into account in the allocation of Hill-Burton funds,[39] and the state has the power to preclude the construction of public hospitals in an entire area by funneling these funds to private hospitals.[40] Since the Hill-Burton Act gives the state extensive control over the types of hospitals available to the public, mere neutrality towards each hospital's decision is insufficient to insure the exercise of an individual's fundamental right "free of interference by the State." By participating in the Hill-Burton program, the state is essentially going into the business of providing medical care to all its inhabitants. As the constitutional right involved is peculiarly related to what is now a state function, this situation is distinguishable from recent United States Supreme Court cases that define state action narrowly.[41]

Although *Bellin* distinguished *Simkins* on the ground that the state's duty to require a hospital to comply with the constitutionally sound nondiscriminatory regulations of the Hill-Burton Act implicated the state in the hospital's discriminatory policies,[42] this analysis applies just as well to the abortion-sterilization decisions. The only difference is that the compulsion comes from the Supreme Court[43] rather than congressional mandate. However, the end result is the same: the hospital need only comply with the Constitution. In addition, the *Bellin* court's reliance on *Doe v. Bolton* was misplaced. Besides the fact that the Supreme Court did not expressly pass on the validity of that specific provision of the Georgia abortion statute,[44] the language in *Doe* shows at most an intention to protect the denominational hospital.[45] Even if the Seventh Circuit intended merely to protect the denominational hospital, the effect of the specific act theory is to insulate all private Hill-Burton hospitals from judicial attack. Protection of the denominational hospital may be better discussed in connection with the Health Programs Extension Act of 1973.

The second occurrence threatening the Fourth Circuit's position on Hill-Burton funding was Congress' enactment of the conscience clause,

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38. 42 U.S.C. § 291(a) (1970).
39. Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237, 256 (1974).
40. *See* Note, 4 N.Y.U. REV. L. & SOC. CHANGE, *supra* note 8, at 88-89.
41. *See* textual matter in notes 24 and 27 *supra*.
42. 479 F.2d at 761. *See* text accompanying note 17 *supra*.
43. *See* paragraph containing notes 9-15 *supra*.
44. The *Bellin* court recognized this fact. 479 F.2d at 760.
45. *See* text accompanying note 6 *supra*.

popularly known as the Church Amendment, of the Health Programs Extension Act of 1973. This clause in relevant part states:[46]

> (a) The receipt of . . . [Hill-Burton funds] . . . by any . . . entity does not authorize any court . . . to require
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> . . . .
>
> (2) such entity to—
>
> (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions . . . .[47]

The conscience clause was passed in reaction to a preliminary injunction issued in *Taylor v. St. Vincent's Hospital*[48] enjoining the defendant hospital from prohibiting the plaintiff's doctor from sterilizing her during the delivery of her baby. In granting the injunction, the court found receipt of Hill-Burton funds alone sufficient to support the state action element of jurisdiction under 42 U.S.C. section 1983 and 28 U.S.C. section 1343.[49]

As construed by the courts, the Church Amendment forbids a judicial finding of state action on the basis of receipt of Hill-Burton funds in the abortion-sterilization context if the hospital's refusal to perform such procedures is based on religious or moral convictions.[50] Concerning the scope of the statute, the United States District Court for the District of Idaho has noted that " . . . recent congressional action has effectively revoked the ability of a court to find state action on the part of a hospital which receives Hill-Burton funds."[51] Although the broadness of this language indicates that under no circumstances can a court clothe a Hill-Burton hospital with state action,[52] the Ninth Circuit

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46. All future references to the Church Amendment apply only to the portion of the clause quoted.

47. 42 U.S.C.A. § 300a-7(a)(2)(A) (1974).

48. Civil No. 1090 (D. Mont. Nov. 1, 1972). The citation for the later trial of the section 1983 action is: Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3492 (U.S. Mar. 2, 1976).

49. 1973 U.S. CODE CONG. & AD. NEWS 1473.

50. Cases construing the Church Amendment are: Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3492 (U.S. Mar. 2, 1976); Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

51. Watkins v. Mercy Medical Center, 364 F. Supp. 799, 801 (D. Idaho 1973), *aff'd*, 520 F.2d 894 (9th Cir. 1975).

52. Note, 4 N.Y.U. REV. L. & SOC. CHANGE, *supra* note 8, at 93 & n.75.

gives the statute a much narrower construction, as shown in *Chrisman v. Sisters of St. Joseph of Peace*.[53] To determine the state action issue in *Chrisman*, the court ignored Hill-Burton funding as a relevant factor and proceeded to analyze other state connections with the defendant hospital.[54] The *Chrisman* interpretation of the statute's mandate is probably correct.

The trial court in *Taylor* stated that the Church Amendment was a valid exercise of congressional power to limit the jurisdiction of the inferior courts under Article III of the Constitution.[55] In *Chrisman*, the Ninth Circuit held that the statute did not violate the establishment clause of the first amendment since Congress' object in passing the conscience clause was to retain neutrality.[56] However, the statute has yet to be challenged on the basis of legislative encroachment on the judicial role of interpreting the Constitution.[57] In light of the Supreme Court's interpretation of the judicial and legislative roles, a strong constitutional attack could be made on this basis.

In *Reynolds v. Sims*,[58] the United States Supreme Court rejected the argument that congressional approval of a plan that had a detrimental effect on the constitutional right to vote protected that plan from judicial scrutiny. The Court stated: "Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights."[59] Therefore, Congress lacks the power to define state action so as to deprive an individual of a fundamental constitutional right. The fact that the conscience clause may be construed as a valid exercise of the congressional power to limit the jurisdiction of the federal courts is insufficient to protect the clause from constitutional attack since a statute can be " . . . unconstitutional even though it was adopted by Congress as an exercise of federal power."[60] In *Shapiro v. Thompson*,[61] the Court noted that "Congress is

53. 506 F.2d 308 (9th Cir. 1974).

54. *Id.* at 312.

55. 369 F. Supp. at 951. *See* Note, 4 N.Y.U. REV. L. & SOC. CHANGE, *supra* note 8, at 95-96.

56. 506 F.2d at 311.

57. This challenge was attemeted in *Hodgson v. Anderson*, but the court found the plaintiffs did not have standing to make the challenge. 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed*, 420 U.S. 903 (1975).

58. 377 U.S. 533 (1964).

59. *Id.* at 582.

60. Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

61. 394 U.S. 618 (1969). *Shapiro* concerned statutory provisions denying welfare assistance to otherwise qualified recipients because they failed to meet a one year residency requirement. The Court held the provisions unconstitutional as a violation of

without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection clause."[62] Although Congress' purpose in enacting the Church Amendment was to afford protection to the denominational hospital, the vehicle chosen has the effect of allowing the state to reap the benefits of the Hill-Burton program while at the same time denying the fundamental rights of individuals by channeling funds to denominational hospitals.[63]

The conflict remains between the fundamental right recognized in *Roe* and the desire to protect denominational hospitals recognized in *Doe*. Although the Church Amendment was an attempt by Congress to give the dictum in *Doe* statutory significance, statutory restraints on judicial interpretation of the Constitution are not within Congress' power.[64] However, a crucial question remains: does the denominational hospital *need* protection? A finding of state action does not automatically compel the hospital to offer abortions or sterilizations. The hospital may only be compelled if the individual does not have access to a facility willing to allow the performance of these procedures. In the few cases when the state refuses to furnish a clinic for these purposes and the denominational hospital is the only facility available, the infringement on the entity's religious or moral convictions is slight since the staff and doctors involved in the performance of abortions and sterilizations must not have any religious or moral objections to the procedures.[65] As the hospital need only provide its physical facilities for the performance of such procedures, its interest should be subordinated to an individual's fundamental rights.[66] Until the Supreme Court sees fit to clarify the hospital's role in the abortion-sterilization area, the Fourth Circuit should follow its own sound precedent when faced with this problem.

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the right to travel even though it assumed arguendo that Congress had approved the statutes. *Id.* at 641.

62. *Id.* The Court relied on Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

63. *See* text accompanying notes 38-41 *supra.*

64. *See* text accompanying notes 58-63 *supra.*

65. *See* Ambrose, *The Milwaukee Story: A Public Hospital's Resistance to the Supreme Court Abortion Rulings*, 4 FAM. PLAN./POP. REP. 68, 69 (1975). *Cf.* 42 U.S.C.A. § 300a-7(c) (1974).

66. *Compare* Watkins v. Mercy Medical Center, 364 F. Supp. at 803 *with* Note, 74 COLUM. L. REV., *supra* note 39, at 257-58, 261 for analysis of whether a hospital has a first amendment right of freedom of religion.