TORTS—JOINT LIABILITY—RISK SPREADING—INDUSTRY-WIDE STANDARD—*Hall v. E.I. DuPont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

For reasons primarily economic and practical, it was the custom of the explosives industry during the 1950's—continuing until 1965—not to place any warning labels upon individual blasting caps. Alleging that this practice constituted negligence and created an unreasonable risk, plaintiffs in 18 separate actions scattered across the country sought damages for accidents in which children were injured by blasting caps. In most instances the manufacturer of the injury-causing cap was unknown. These actions were finally consolidated into two cases decided simultaneously by the United States District Court for the Eastern District of New York.[1] The question posed was whether a group of manufacturers and their trade association, comprising virtually the entire blasting cap industry of the United States, could be held jointly liable for injuries caused by their products. The court indicated that under certain circumstances, illustrated by this litigation, an entire industry can be held liable for harm caused by its operations.

In the *Hall* case itself, three groups of injured victims were joined as plaintiffs, and each asserted separate claims against two different manufacturers of blasting caps. In each instance the producer of the injury-causing cap was identified, and another manufacturer was joined on a theory of industry-wide responsibility for the negligent design of the caps. In this action the court refused to impose joint liability because of the arbitrary basis on which the plaintiffs selected the non-producer defendants, and because of an "absence of any demonstrable need for joint liability in administrative or remedial terms . . . ."[2]

However, in the companion *Chance* case, the court did allow the joinder of substantially the entire national blasting cap industry and its trade association since the particular manufacturers responsible for each plaintiff's injury could not be identified. *Chance*[3] involved 13 children, allegedly injured by blasting caps in 12 unrelated accidents scattered throughout the country between 1955 and 1959. Plaintiff's claimed damages against the six major manufacturers of blasting caps in the United States, and their trade association, on the grounds of negligence, common law conspiracy, assault and strict liability in tort.

While the plaintiffs' injuries occurred at widely different times and places, the complaint alleged certain features common to all of them. In each case a child was injured when he came into the possession of, and accidentally detonated, a dynamite blasting cap which lacked any warning message by which a child could have been apprised of the dangerous nature of such caps. Among plaintiffs' central contentions were the following: (1) the defendants had actual knowledge that children were frequently injured by blasting caps, and through their trade association kept statistics and other information which clearly indicated the dangerousness of their product to children; (2) the defendants, by their failure to place warning labels on the blasting caps, had taken inadequate measures to minimize the risk created by the manufacture of such products; and (3) the defendants' common failure to place warning labels on the caps was the cause of the plaintiff's injuries.

The defendants responded to the plaintiffs' allegations with a motion to dis-

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[1] Hall v. E. I. DuPont De Nemours & Co., 345 F. Supp. 353 (1972). The decision includes both the *Hall* case and a companion case, *Chance v. E. I. DuPont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

[2] 345 F. Supp. at 386.

[3] Hereafter no distinction will be drawn between *Hall* and *Chance*; both cases will be cited generally as *Hall*.

miss, arguing basically that they could not be held responsible on a theory of joint liability. But the court, in a carefully drafted opinion, concluded that current policy considerations justify the extension of established doctrines of joint liability to the area of industry-wide cooperation in product manufacture and design. Although the court carefully couched its language in terms of traditional theories of joint liability, this decision clearly represents a unique application of those theories and, consequently, is bound to have a considerable impact upon their future development.

The court began its analysis of the question of joint liability by citing four distinguishable situations in which such liability has historically been imposed:

> (1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors fail to perform a common duty owed to the plaintiff; (3) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs); (4) although there is no concerted action nevertheless the independent acts of several actors concur to produce indivisible harmful consequences.[4]

The early common law courts imposed joint liability only in the first of these situations, when the tortfeasors acted in concert to further a common purpose. Thus in a case involving a group assault, each assailant would be held liable for the damage done by all.[5] It is to this kind of situation that the term "joint tort" is applied in its strictest sense,[6] and all other forms of joint liability have evolved from it.[7]

In this process of development, emphasis has gradually shifted away from the common law requirement of a joint commission of a single wrongful act. Due in large part to the assistance of statutory enactments, joinder has come to be viewed as a procedural tool "to expedite justice and avoid a multiplicity of actions . . . ."[8] The court in *Hall* analyzed three policy considerations which have been largely responsible for this development:

> The first is the problem of joint or group control of risk: the need to deter hazardous behavior by groups of multiple defendants as well as by individuals. The second is the problem of enterprise liability: the policy of assigning the forseeable costs of an activity to those in the most strategic position to reduce them. The third is the problem of fairness with respect to the burden of proof: the desire to avoid denying recovery to an innocent injured plaintiff because proof of causation may be within defendants' control or entirely unavailable.[9]

The first of these considerations, that of joint control of risk, has been of primary importance in those situations in which several defendants breach a common duty of care owed the plaintiff. Thus courts have had little trouble finding joint liability in cases in which, for example, plaintiff's property is damaged by the collapse of a party wall[10] or by the explosion of a powder house improperly maintained by several defendants.[11]

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[4] 345 F. Supp. at 371, *quoting from* 1 HARPER & JAMES, TORTS § 10.1 at 697-98 (1956).

[5] Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613).

[6] 18 TEXAS L. REV. 524 (1940).

[7] *See* Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937); Jackson, *Joint Torts and Several Liability*, 17 TEXAS L. REV. 399 (1939).

[8] 4 VAND. L. REV. 192, 194 (1950).

[9] 345 F. Supp. at 371.

[10] Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891); Klauder v. McGrath, 35 Pa. 128 (1860); Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

[11] Prussak v. Hutton, 30 App. Div. 66, 51 N.Y.S. 761 (1898).

Joint control of risk has also given rise to joint liability in situations involving various kinds of business relationships, such as the "joint enterprise" or "joint venture."[12] While the court conceded that the defendants in *Hall* were probably not engaged in a "joint venture" as that word is ordinarily used, the court was also careful to point out that for purposes of determining joint liability, the most important consideration is not the existence of a "joint venture" among the defendants, but their effective joint control of the risk involved.[13]

With respect to the second problem, that of "enterprise liability," the court observed that joint or vicarious liability has been imposed most often in situations in which the defendants have been the participants best able to bear the cost in a risk-creating process. This may frequently be the case even when the plaintiff's injury has been caused "directly" by some other subordinate participant.[14] Thus the manufacturer of a completed product will be held vicariously liable for any defects in his product, even though he may trace the defect to a component part supplied by another.[15] Similarly, it would not be unreasonable, as the court concluded in *Hall*, to impose joint liability upon an entire industry, when it is in a more strategic position to bear the risk of production than its individual members.

The third problem which confronts courts in imposing joint liability is to achieve fairness with respect to the allocation of the burden of proof This problem arises most often in cases involving "concurrent torts," which constitute the fourth type of situation cited by the court in *Hall*. This is the situation in which the independent acts of several defendants combine to produce a single, indivisible result, as when two motorists collide injuring a third.[16]

Courts imposing joint liability in this last type of situation have experienced some difficulty with the requirement that the harm produced must be "indivisible." The strict rule, as it was developed at common law, refused to permit joinder whenever the damage was even *theoretically* divisible, for example, when the plaintiff's sheep had been killed by dogs belonging to different owners,[17] when a stream had been polluted by the acts of several persons,[18] or when property had been damaged by fumes emitted from different chimneys.[19]

The practical effect of this rule was to deprive the plaintiff of any legal remedy by assigning him an oppressive burden of proof. In such instances a plaintiff who could readily establish fault was faced with the insurmountable problem of apportioning it. Unless he could show the quantum of damage for which each defendant was responsible, he had no claim against either. The logical solution to this

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[12] *See* Mechem, *The Law of Joint Adventures*, 15 MINN. L. REV. 644 (1931); cases dealing with various types of "joint venture" situations are collected in Annot., 48 A.L.R. 1055, 1077 (1927), *and* Annot., 63 A.L.R. 909 (1929).

[13] 345 F. Supp. at 373.

[14] *Id.* at 376.

[15] Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 512 (1963). Note that while these decisions are based on modern theories of strict liability, even before strict liability was recognized the manufacturer of a completed product was subject to vicarious liability for the negligence of his suppliers, Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Dow v. Holly Manufacturing Co., 49 Cal. 2d 720, 321 P.2d 736 (1958).

[16] *E.g.*, Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955); Meyer v. Cincinnati St. R. R., 157 Ohio St. 38, 104 N.E.2d 173 (1952).

[17] Nohre v. Wright, 98 Minn. 477, 108 N.W. 865 (1906).

[18] Mansfield v. Brister, 76 Ohio St. 270, 81 N.E. 631 (1907).

[19] Key v. Armour Fertilizer Works, 18 Ga. App. 472, 89 S.E. 593 (1916).

dilemma, in keeping with a developing policy of permissive joinder for procedural convenience, was to shift the burden of apportionment to the defendants, and to permit joinder when the injury was at least *practically* indivisible insofar as the plaintiff was concerned. This solution gained gradual acceptance by the courts.

This approach was adopted in *Landers v. East Texas Salt Water Disposal Co.*,[20] in which a Texas court allowed a plaintiff to proceed against, and to recover from, two companies for the damage done when they independently discharged salt water into his lake. The court also noted that either of the defendants could reduce his own liability by demonstrating the amount of damage for which he alone was responsible. Thus the burden of apportionment was effectively shifted to the defendants.

This device of shifting the burden of proof was eventually utilized to create still another extension of the doctrine of joint liability, *i.e.*, the situation, similar to the one in *Hall*, in which it is known that only one of several defendants is responsible for plaintiff's injury, but it is not known *which* one. The landmark case dealing with this situation is *Summers v. Tice*,[21] in which two hunters were held jointly and severally liable even though the shot which injured the plaintiff could have been fired by only one of them. The California court imposed liability on each of the defendants, not because each was a tortfeasor, but because each had engaged in tortious conduct:

> They are both wrongdoers—both negligent toward the plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can.[22]

The approach of *Landers* and *Summers* has been adopted by the Restatement (Second) of Torts § 433B, which provides in relevant part:

> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor. (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.[23]

Initially, it is difficult to understand why the court in *Hall* felt constrained to look beyond the *Summers* rule, as embodied in § 433B(3) of the Restatement, to support its decision. The *Hall* situation is not substantially different from that in *Summers* except that the defendants were six explosives manufacturers instead of two hunters. Each of the defendants was alleged to have engaged in the same tortious conduct—the failure to place warning labels on its blasting caps—but it was not known which of the manufacturers had caused which injuries. The plaintiffs each knew they had been injured by only one of the defendants, but they could not point to which one. This seems to be the ideal case for a shift in the burden of proof to the defendants under the rules developed in *Landers* and *Summers*.

Oddly, however, the court stated in *Hall* that the rule shifting the burden of apportionment to the defendants "is applicable only as a corollary principle of proof

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[20] 151 Tex. 251, 248 S.W.2d 731 (1952).

[21] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[22] *Id.* at 86, 199 P.2d at 4.

[23] RESTATEMENT (SECOND) OF TORTS § 433B (1965).

to plaintiffs' main theories that defendants engaged in concerted action, or operated as a joint enterprise, with respect to the labeling and design of the caps."[24] It would seem here that the court was requiring the plaintiffs to establish both "joint enterprise" among the defendants *and* concurrent tortious conduct sufficient to shift the burden of proof under § 433B of the Restatement. But why should this be required, when ordinarily each is considered to be, in itself, a separate and distinct ground for joinder? A possible answer is that the court was more interested in establishing a precedent for *industry-wide* liability than for joint liability among a certain unknown number of manufacturers. "The point is not only that the damage is caused by multiple actors, but that the sole feasible way of anticipating costs or damages and devising practical remedies is to consider the activities of a group."[25]

Obviously, then, the court, in imposing joint liability, was concerned with more than merely relieving the plaintiff of an unfair burden of proof. It seems that the court was also attempting to effect, through joint liability, a strategic allocation of the costs of risk-creating activity, a goal which has come to be associated more commonly in recent times with strict liability in tort.[26] Indeed, one of the most significant aspects of *Hall* is that it manages to integrate principles from two important areas of rapidly developing law: the areas of joint liability and strict liability in tort.

Strict liability, of course, starts from the premise that accidents and injuries are an inevitable and statistically foreseeable "cost" of production, and then attempts to allocate that cost where it can be most easily absorbed. As one court has stated, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[27] The court in *Hall* has merely carried this logic one step further: just as a manufacturer can bear the cost of risk-creating activity better than an individual, so, in certain circumstances, can an industry bear the cost better than individual manufacturers.

The device which the court employed to impose this "enterprise liability" upon an entire industry was the members' "joint control" over the risk-creating activity. Such control is relatively easy to establish when, as in this case, the industry collectively supports a trade association which assists in setting industry-wide safety standards. But the court clearly indicated that the kind of organized control suggested by a trade association is not necessary to support the imposition of joint liability. A plaintiff, in fact, need only show that each of the individual manufacturers adheres to the industry-wide standard or custom which resulted in the plaintiff's injury, and their joint control will apparently be presumed.[28]

In the final analysis, however, it is the doctrine of alternative causation that makes joinder possible in the *Hall* case. Clearly, an "industry-wide standard" of negligence will not, of itself, create joint liability for an entire industry when causation can be attributed to a single member of that industry. Therefore, it does not seem that *Hall* is destined to have any great impact in the area of products liability. While there may be a number of situations in which plaintiffs may be able to estab-

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[24] 345 F. Supp. at 379.

[25] *Id.* at 378.

[26] *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

[27] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); *see also* Ognall, *Some Facets of Strict Tortious Liability in the United States and their Implications*, 33 NOTRE DAME LAW. 239 (1958).

[28] 345 F. Supp. at 374.

lish negligence on an industry-wide scale, in almost all such situations the manufacturer of the injury-causing product will be identifiable and, consequently, *individually* liable. Only rarely, as with blasting caps, will the infliction of the injury result in the destruction of the only reliable evidence concerning the product's manufacturer.

Interestingly, though, as the court itself seems to recognize, this case could have a signficant impact upon the law governing multiple emitters of water and air pollutants. In these situations it is often difficult, if not impossible, to single out an individual emitter as the source of damage caused by pollution. A victim of lung cancer may, for instance, be able to establish that his disease was caused by the heavy pollution of his urban environment, yet be unable to single out any one emitter whom he might hold individually liable. In such a situation, the rule established in *Hall* might be invoked to permit the joinder of an entire industry (or industries) whose pollutants can be established as the source of the injury.[29]

Certainly the goal of risk allocation would be most effectively served by spreading the cost of developing anti-pollution techniques and devices over an entire industry. In those industries, such as steel or chemicals, in which pollution amounts to an "industry-wide standard," there should be little problem in finding the requisite "joint control." With a little imagination, the courts could even extend such a theory to a nuisance cause of action, and impose joint liability on those industries whose pollutants continue to befoul the nation's air and water.[30] Such a rule could be a powerful interim weapon in the hands of environmentalists awaiting preemptive legislation in that area.

While the possibilities are alluring, it should nonetheless be noted that the size of the industry may have been a significant factor in the court's decision in *Hall*. It is difficult to determine whether the result would have been the same in *Hall* had the explosives industry been a much larger one. "What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers."[31]

In adding this final caveat, the court has made its way back to the same unarticulated problem which confronts any court in the application of the *Summers* rule. As long as the number of defendants sought to be joined remains reasonably small, and their tortious conduct reasonably equivalent, it seems only fair to shift the burden of proof from the innocent victim to the defendants. As the number of defendants increases, however, the application of the rule grows increasingly uncertain, until it is difficult to justify, as a matter of "procedural convenience," a joinder of, for instance, some 50 hunters (or explosives manufacturers), one of whose conduct caused the plaintiff's injury. Unfortunately, the *Hall* analysis of joint risk control and enterprise liability is of little assistance in solving this problem.

John F. Zimmerman, Jr.

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[29] *Cf.* Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOKLYN L. REV. 17, 31-32 (1966).

[30] *See* Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 606-27 (1969).

[31] 345 F. Supp at 373.

CONSTITUTIONAL LAW—LIABILITY OF A PRIVATELY OWNED UTILITY UNDER 42 U.S.C. § 1983—*Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot* —— U.S. ——, 93 S. Ct. 66, 34 L. Ed. 2d 72 (1972).

In two recent decisions, *Palmer v. Columbia Gas Co.*[1] and *Ihrke v. Northern States Power Co.*,[2] federal courts found sufficient state involvement in a privately owned utility's termination of service to a defaulting customer, in accordance with company regulations, to hold such conduct subject to the 1871 Civil Rights Act (§ 1983).[3] In *Palmer*, the court continued in force a restraining order precluding the gas company from terminating service to customers without due process of law. This restraining order had been issued as part of plaintiff's combined suit—a class action for injunctive relief and an individual action seeking damages for wrongful termination. The trial court had allowed an immediate appeal from this order, with a continuance on the damage issue. In *Ihrke*, the appellate court reversed the dismissal of plaintiff's complaint, which had charged that termination of utility services without adequate notice and an impartial hearing was unconstitutional, and held the action of the company to be "under color of law" within the meaning of § 1983. The primary significance of these decisions rests in their potential as precedent for a future holding that mere status as a public utility is sufficient to require application of fourteenth amendment standards.

Historically, action by a private individual, presumably including a corporate citizen, has been exempt from constraints prescribed by the federal constitution. If any such conduct was wrongful, it was at most a private wrong[4] and not subject to action under § 1983. Under appropriate circumstances, however, individual action loses its essentially private character and, having acquired the attributes of action by the state, becomes subject to the fourteenth amendment. Basically these circumstances can be categorized by one of two alternative theories: (1) public function, and (2) state action, including the concepts of state involvement and conduct under color of law. Both theories have possible application to public utilities and, as will be developed, did receive consideration in one or both of the principal cases.

The public function theory, first articulated in *Marsh v. Alabama*,[5] has as its main tenet the concept of a private activity established and operated primarily for the benefit of the public or, as a variant of this, a private activity substituting for a public one. In *Marsh*, the Court found that a public function was performed by the operation of a privately owned company town and suggested in dicta that privately held bridges, ferries, turnpikes, and railroads may also be included within

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[1] 342 F. Supp. 241 (N.D. Ohio 1972).

[2] 459 F.2d 566 (8th Cir.), *vacated as moot*, —— U.S. ——, 93 S. Ct. 66, 34 L.Ed. 2d 72 (1972). Although the vacating of the lower court judgment will deny a stare decisis effect to this decision, there is no indication that the Court of Appeals for the Eighth Circuit would reach a contrary result should this same factual pattern be presented again. Furthermore, the immediate value of this case, that is, its use as a vehicle for studying and evaluating the factors considered in arriving at the conclusion of state involvement, justifies the inclusion of the *Ihrke* opinion within this casenote.

[3] 42 U.S.C. § 1983 (1970) provides:

Civil action for deprivation of rights. 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.

[4] Civil Rights Cases, 109 U.S. 3 (1883).

[5] 326 U.S. 501 (1946).

this concept.[6] The theory has received broader application in more recent decisions. In *Food Employees Local 590 v. Logan Valley Plaza,*[7] the Court brought a private shopping center within the proscriptions of the fourteenth amendment by equating its "public function" activities to those of a city business district. Similarly, in *Evans v. Newton,*[8] the public function theory was used by the Court as an alternative decisional basis for bringing a private park, open to the public on a racially restricted basis, within the fourteenth amendment.

As thus developed, it would not be unreasonable to apply the public function theory to a private commercial concern which has chosen as its *raison d'être* the provision of a vital public commodity. Indeed, the pervasiveness of this concept is indicated by Justice Harlan's dissenting opinion in *Evans.* Justice Harlan specifically mentioned applicability of the public function doctrine to private schools and suggested that this application would merely be the beginning.[9] In a recent Seventh Circuit decision, *Lucas v. Wisconsin Electric Power Co.,*[10] the dissenters adopted Justice Harlan's suggestion and took the position that a public utility represented a complete and fully interchangeable government substitute, due to the identity of function between a municipality and the utility.

Outside the situations of company towns and shopping centers, the public function theory has generally been disregarded by the courts as a means for bringing private conduct within federal constitutional proscriptions (*Evans v. Newton*[11] is an exception; however, as noted above, public function served only as an alternative ground). Contrary to the fears of overzealous application raised by Justice Harlan in the *Evans* case, courts have declined to broaden public function even to encompass the suggested private universities. Instead they have indicated that performing the task of education is not in itself enough to subject the school to liability under § 1983.[12] The utilization of the theory has been so limited that no decision has been found by this writer in which the court has placed sole reliance upon public function for holding a privately owned utility to federal due process and equal protection standards.

Rather than public function, the theory more commonly employed for scrutinizing the conduct of the private individual has been state action.[13] Under this theory the individual becomes equated with the state and is thereby subjected to the fourteenth amendment whenever the governmental unit becomes involved with that individual's private actions. With increasing governmental regulation and control over business and the individual, the number of situations in which state action might logically be found is nearly unlimited. The primary constraint placed upon this theory, as stated by the Court in *Burton v. Wilmington Parking Authority,*[14]

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[6] *Id.* at 506.

[7] 391 U.S. 308 (1968).

[8] 382 U.S. 296 (1966).

[9] *Id.* at 321 (Harlan, J., dissenting).

[10] 466 F.2d 638 (7th Cir. 1972).

[11] 382 U.S. 296 (1966).

[12] Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

[13] For the purposes of this case note, state action will be deemed an accepted and viable doctrine. A comprehensive development and discussion of the concept is available in the many notable law review articles in this area. *See generally* Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960), *and* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208 (1957). *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959), *with* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959).

[14] 365 U.S. 715, 722 (1961).

is the requirement that the state be involved to some "significant extent." The Court acknowledged the absence of a precise, universal formula to follow and instead required the significance of the particular involvement to be determined by an evaluation of the facts and circumstances in each situation. One element of certainty was indicated—not every instance of state involvement with the individual will necessarily convert private activity into state action.

The extent of involvement by the state in public utility operations may best be seen in an examination of the scheme of pertinent legislative controls affecting these companies. The legislation generally has two features, a statutory framework within which the utility must conduct its operations and a public utilities commission (PUC) whose function it is to ensure compliance or, as the California Supreme Court has stated, to "protect the people of the state from . . . monopoly in the public service industries."[15] While specific legislation may vary among the states, the general scope of state regulation is adequately reflected in those provisions of the current Ohio Revised Code relating to customer service.

The state of Ohio requires public utilities to file company rules and regulations with the PUC which is authorized to grant its approval or, alternatively, to direct changes to be made.[16] The PUC is also empowered to schedule hearings in which customer complaints may be aired,[17] and it may also, on its own initiative, conduct hearings into the reasonableness of public service and prescribe changes if required.[18] In addition, Ohio may be unique in providing by statute both that the utility may terminate gas service to a defaulting customer[19] and that a utility in certain circumstances may require a cash deposit before service will be provided.[20]

Despite statutory requirements of active participation and involvement by the PUC in supervising the activities of the utility, the courts have traditionally taken the position that this supervision did not constitute state action. In *Taglianetti v. New England Telephone & Telegraph Co.*,[21] a challenge was made to the utility's termination of service, pursuant to company regulations, when the customer was suspected of unauthorized and illegal use of the telephone. *Taglianetti* reflects the general attitude that mere filing of regulations with the PUC and their subsequent approval by the PUC did not constitute state action. In other actions against utilities § 1983 has been held inapplicable when no showing was made that the state had encouraged the particular action or benefited therefrom.[22] The utility's status as a protected and regulated monopoly has not in itself been enough to find state action; rather some intrusion by the state into the utility's internal management has been required.[23] Absent this intrusion, utilities have been able to adopt and enforce what were considered (under the common law) reasonable rules for conducting their businesses, including the termination of service to customers in default of payment.[24] No fourteenth amendment constraints were imposed.

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[15] Sale v. Railroad Comm'n, 15 Cal. 2d 612, 617, 104 P.2d 38, 41 (1940).

[16] OHIO REV. CODE ANN. § 4905.30 (Page 1954).

[17] *Id.* § 4905.26.

[18] *Id.* § 4905.37.

[19] *Id.* § 4933.12. The code section does not require termination of gas service for default but merely authorizes such action; however, authorization in itself may be state action.

[20] *Id.* § 4933.17. Although this section is not applicable to *Palmer* or *Ihrke*, conduct pursuant to it may lead to liability under § 1983 for violation of equal protection.

[21] 81 R.I. 351, 103 A.2d 67 (1954).

[22] Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 626 (7th Cir. 1969).

[23] Martin v. Pacific Northwest Bell Tel. Co., 441 F.2d 1116, 1118 (9th Cir. 1971).

[24] Siegel v. Minneapolis Gas Co., 271 Minn. 127, 129, 135 N.W.2d 60, 62 (1965).

In contrast to the majority position outlined above, in *Public Utilities Commission v. Pollak*[25] the Court "assumed" that the municipal transit company's operation of the challenged radio service, in concert with the action of the District of Columbia PUC in permitting such operation, was sufficient federal government action to render the fifth amendment applicable.[26] While the Court noted the congressionally created monopoly situation, it specifically refused to find governmental action on this ground. Instead the Court based its decision on the presence of regulatory supervision and particularly upon the fact that the PUC had conducted a hearing and given its approval to the radio service in issue.[27]

In the discussion to follow, an assessment will be made of the impact of the two principal decisions upon the concepts of public function and state action. Particular consideration will be given to the question of whether these concepts have been broadened so that mere status as a public utility will be sufficient to hold a private company to fourteenth amendment standards of conduct. For the status theory to be so recognized, the courts must have either equated provision of utility services to the public function doctrine, or broadened state action to the point that governmental regulation in general would constitute sufficient state involvement, thereby finding state action in the utility's inherent regulation.

As to the public function theory, only the *Ihrke* court makes any reference to it, and its consideration is rather cursory.[28] Moreover, the court's analysis becomes entangled with the idea of public regulation, thereby losing the pure concept of "public function" as conceived in *Marsh v. Alabama*[29] and merging it into the more prevalent theory, state action. (It is granted that some may consider public function and state action to be one and the same, yet it is difficult to reconcile such a proposition with the apparent absence of state involvement with the company town in *Marsh*, excluding the arrest and trespass conviction.) Public function as a viable concept seems relegated to the unique factual situation in which it arose.

Due to the limited development of the public function theory, if a rule is to be found in these decisions making mere status sufficient to bring a utility within federal constitutional proscriptions, it must be based on state action, or, more properly, *significant* state action. Without clear guidelines for a test, the question of significance may become very elusive in application to a specific situation. Indeed, the *Palmer* court admitted that it was confronted with a borderline situation in making its assessment. Ultimately deciding that regulatory supervision was the key to the state action question, citing *Pollak* as precedent, the court referred to two specific provisions of the Ohio Revised Code—§ 4905.26, authorizing the PUC to schedule hearings for customer complaints, and § 4933.12, authorizing gas shut-off for non-payment. If the former code section were the only basis for the decision, then *Palmer* would have made a very significant step toward making status the only criterion by which to judge whether conduct falls within the fourteenth amendment. Such a provision for customer hearings, although minor in the scheme of statutes, does represent a truly regulatory power that states would reserve to themselves as a check on utility activities—the type of regulation inherent in being a public utility.

Closer examination of the opinion suggests, however, that § 4905.26 may only

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[25] 343 U.S. 451 (1952). While the governmental unit involved here is the District of Columbia, the rationale used by the Court would have applicability whether the constitutional proscription is the fifth or the fourteenth amendment.

[26] *Id.* at 462-63.

[27] *Id.*

[28] 459 F.2d at 569.

[29] 326 U.S. 501 (1946).

have had secondary importance in the decision, with the critical element being the state's grant of shut-off power. The court specifically noted that this latter provision "clearly does not leave 'untouched the general managerial direction,' "[30] a situation quite unlike "mere regulation." Of particular significance is the court's attempt to distinguish *Palmer* from *Kadlec v. Illinois Bell Telephone Co.*,[31] in which it was held that the filing of the regulations, and subsequent activity pursuant thereto, did not constitute state action. A distinction between the cases based on the Ohio hearing statute would have been far more theoretical than practical, since a provision for the review of utility conduct under its regulations may actually be not that much different from an initial requirement of filing operating regulations for PUC review. When the *Palmer-Kadlec* comparison is made based on the shut-off provision, however, a difference becomes quite apparent. The *Palmer* court's reference to *Pollak*, in which the Court gave particular emphasis to the fact that a PUC hearing had been conducted and the challenged service upheld, may also suggest that *Palmer* placed greater emphasis on the shut-off authority, since PUC approval as in *Pollak* might be likened to specific state authorization to conduct business in a particular manner.[32]

As an assessment of the *Palmer* court's contribution to the state action notion, the supposition that utilities may be subject to § 1983 as a result of state regulation is not corroborated. Rather than such a broadly based concept of significant state action, the decision is grounded on the narrower idea that state action is present when the state has specifically granted a power to the utility, albeit a common law power which the company already possessed.[33] This narrower position is consistent with a recent decision in the Court of Appeals for the Seventh Circuit, *Lucas v. Wisconsin Electric Power Co.*[34] Although Wisconsin does provide for PUC hearings at which customer complaints may be aired,[35] the court found no state action in a utility shut-off pursuant to company regulations. Additionally, the *Lucas* decision suggests that a different issue would have been presented had the controversy arisen because the utility had been acting under specific state authority, such as the power to enter private property.[36]

In *Ihrke*, like *Palmer*, the decision initially suggests a very broad approach to state action. The opinion found several elements present which it labeled as "color of law," among them, the grant of an exclusive franchise, the authorization to use public property, and the obligation to file regulations. Thereafter, the court considers the public function doctrine,[37] the significance of which was previously discussed. The identified "color of law" elements are so inherent in the concept of a public utility as to suggest that the status has become the criterion of state involvement. In the final analysis, however, *Ihrke* rests on two particular examples of state involvement, the first being the right of the St. Paul City Council to review and reject company regulations and, second, the franchise agreement's require-

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[30] 342 F. Supp. at 245.

[31] 407 F.2d 624 (7th Cir. 1969).

[32] It should be noted that such a reading of *Pollak* would result in any utility activity becoming state action if it is challenged before the PUC and upheld.

[33] A quite analogous situation is presently developing under the Uniform Commercial Code in regard to repossession of collateral by a secured party after default by the debtor. *See* Adams v. Egley, 338 F. Supp. 614 (S.D. Calif. 1972).

[34] 466 F.2d 638, 654-55 (7th Cir. 1972).

[35] WIS. STAT. § 196.26 (1957).

[36] 466 F.2d at 656.

[37] 459 F.2d at 569.

ment that the utility pay five percent of its gross earnings to the city.[38] This latter element receives the predominant consideration of the court and suggests the presence of a situation quite similar to that in *Burton v. Wilmington Parking Authority*.[39] In *Burton*, the state had leased restaurant space in a public parking garage as a means of supplementing parking revenues to meet financial obligations. The state thereby benefited from the racially discriminatory practices of the restaurant, just as in *Ihrke* in which the city benefitted directly from the collection policies of the utility. Not only are benefits derived, the benefits are derived from a special source of funds—far different from mere taxes. In *Ihrke*, as in *Burton*, the governmental unit was in a position to directly affect the amount of these funds. While in *Burton* the state could have prevented racial discrimination through its initial lease arrangement (although an integrated restaurant may have suffered from fewer customers), the city of St. Paul had the power to disapprove offensive utility collection practices. In *Ihrke*, then, the mere supervisory powers became so entwined with the revenue provision that it is difficult to assert that regulation per se would have been a sufficient basis for the decision.

Taking *Palmer* and *Ihrke* together, it appears that, while a very expanded notion of state action is suggested, both decisions can be explained along traditional lines of analysis—significant state involvement is present when a private individual acts pursuant to specific state authorization or when private conduct directly benefits the state. Under such circumstances, a utility, or any other private activity, should be subject to liability under § 1983. Hence, these cases were properly decided.

Inasmuch as the courts have recognized utility service as an important right,[40] a significant question remains of what can be done to safeguard this right for all utility customers. If due process is thought to be the best protection, then the courts must adopt a more expansive theory than that relied upon in *Palmer* and *Ihrke* for bringing utilities within the fourteenth amendment. The presence of specific statutes and the profit sharing provision makes these two cases unique and drastically limits them as precedent. Broader exposure of utilities to § 1983 might arise if consideration were given to reviving and broadening the public function concept or to further developing the idea employed in *Pollak*, *i.e.*, that sufficient governmental involvement can be found if a utility activity has been challenged before the PUC and the activity has been upheld. An even more expansive concept of state action could be constructed as follows: The state's initial decision to furnish gas, electricity, and telephone services by a monopoly, which is the most economically efficient method, and the state's designation of specific companies as sup-

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[38] It is assumed that the five percent of gross earnings is in addition to any taxes occurring in the normal course of business that the utility would have to pay to the state or a subdivision thereof.

[39] 365 U.S. 715 (1961).

[40] That there is a right to utility service appears to be well settled in the case law. The older notion that such service was a private contract with the rights and obligations of the parties being based thereon, as suggested by Pollock v. New England Tel. & Tel. Co., 289 Mass. 255, 260, 194 N.E. 133, 135 (1935), has been displaced by a property right theory requiring due process of law before any governmental deprivation, Telephone News Sys., Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621, 625-26 (N.D. Ill. 1963), *aff'd per curiam*, 376 U.S. 782 (1964). The foundation of this property right theory lies primarily in the common law applicable to utilities which required them to serve where feasible all members of the public. *See* Pike v. Southern Bell Tel. & Tel. Co., 263 Ala. 59, 60, 81 So. 2d 264 (1955). Lest there be any doubt, in a very recent decision the Court accepted the position of Congress that both personal and property rights are within the purview of § 1983. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

pliers makes the sale of these services state action. Before such arguments are presented to the courts, however, consideration should be given to what customer benefits would be derived from a finding of significant state involvement and the resultant requirement of due process.

Due process has been held to require notice and an opportunity to be heard.[41] Taking the latter requirement first, neither *Palmer* nor *Ihrke* specifically stated that a pre-termination hearing was mandatory, although in *Ihrke* the complaint filed in the trial court sought such a determination. Indeed, provision for a judicial or administrative hearing may be precluded as a matter of practicability. As the court notes in *Palmer*, in the Toledo, Ohio, area during a typical calendar year, Columbia Gas sends out to its 140,000 customers from 120,000 to 140,000 shut-off notices, each indicating a utility bill which is at least two months in arrears. Out of this same group, 6,000 terminations are actually made. Even if a hearing were only required prior to an actual shut-off, the administrative and judicial burden would be overwhelming, if done on a state-wide basis with present staffing.

An additional aspect of the hearing question is to determine what actually would be gained by such a procedure. In those situations in which an irreconcilable dispute exists as to the amount actually owed, the real value of an impartial hearing comes to light. What proportion of the notices may have issued as a result of such disputes is uncertain; however, it would seem that the greater percentage arises from the customer's inability to pay. In this latter case, very little would be accomplished by an appearance before a neutral party, except to verify the customer's inability and to allow a credit agreement or comparable understanding to be worked out between the parties, under the supervision of the hearing officer.

Although ancillary to its decision,[42] the court in *Lucas* suggested that the availability to the customer of certain informal and formal remedies would satisfy due process without the need for a pre-termination hearing. The informal means included both working with utility company personnel to resolve the problem and utilizing the offices of the state PUC. As the *Palmer* court noted, however, reconciling differences through the utility has inherent disadvantages which may be aggrevated by a lack of cooperative effort, although it can hardly be denied that this should be the first step in any dispute.

Seeking resolution through the PUC on an informal basis would present its own special problems. Particularly significant would be the problems of time delay in written correspondence, the spatial separation between the customer and the agency, and perhaps the customer's lack of knowledge that such a means is available to him.

The suggested formal alternatives—injunction, payment under dispute with a suit to recover, and tort action for wrongful termination—would all require legal action to be initiated by the customer. Viewed with regard to the monetary amounts typically involved and the expenses of litigation, such alternatives, while presumably providing due process, seem unreasonable both for the indigent customer and for the one who can afford to pay but disputes his bill.

The greater benefit of due process would be a requirement that the customer be warned that his service is in actual jeopardy, thus allowing a proper course of action to be taken in an effort to preclude termination. It is significant, however, that proper notice could be required even without a finding of state action. At common law, the utility is permitted to make reasonable rules and regulations for

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41 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

42 466 F.2d at 648-50.

conducting its business.[43] It could be reasonably argued that a summary termination of utility service with insufficient warning to allow the customer to protect his rights would be unreasonable. Such an argument would attain the desired objective of notice without establishing the precedent that a utility is in itself state action.

The use of due process as a theory for protecting the rights of utility customers actually will offer little benefit to the individual. The requirement of notice can be achieved by an alternate theory, and the opportunity to be heard before termination, as presently available, may be more theoretical than practical. In addition, a broad finding that a public utility's activity is state action may present an undesirable side effect of unduly restricting the utility's managerial discretion in carrying out its operations. Such a situation might hypothetically arise under the present natural gas shortage and moratorium on new service, such that a potential new customer would claim denial of service to him violates equal protection, despite the fact that by extending service to such persons the gas supply for present customers would be reduced.

It would seem more appropriate for protection of the customer to come not from the judiciary but rather from the legislature, acting on its own or through the PUC. Appropriate measures should be taken to ensure that termination notices are sent out sufficiently in advance to allow effective response by the recipient;[44] that notices are not used for harassment, but to actually warn the customer of the impending action; that the customer is aware of the availability of the PUC or the courts to aid in resolution of disputes, information ideally provided in the shut-off notice; and that service will not be terminated while a determination is pending before an administrative or judicial body, without requiring the customer to seek an injunction through the courts.[45] This should not, however, be considered an exhaustive listing. The legislature might also evaluate the benefits of designating local hearing officers to augment those presently serving the PUC in its central office, and, of even greater significance, it should consider legislation to preclude or limit termination of utility service to persons within the categories such as the elderly, the physically and mentally ill or disabled,[46] and recipients of welfare benefits. Governmental units have previously made the judgment that persons within such categories are deserving of special consideration and benefits. It would be entirely consistent to ensure the provision of necessary public services.

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[43] *See* Seaton Mountain Elec. Light, Heat & Power Co. v. Idaho Springs Inv. Co., 49 Colo. 122, 111 P. 834 (1910) *and* Cardone v. Consol. Edison Co., 197 Misc. 188, 94 N.Y.S.2d 94 (Sup. Ct. 1949), *aff'd without opinion*, 276 App. Div. 1068, 96 N.Y.S.2d 491 (1950), *appeal denied*, 277 App. Div. 769, 97 N.Y.S.2d 541 (1950).

[44] In this respect, the Ohio statutory shut-off provision, § 4933.12, with its provision for 24 hours' notice, may be deficient.

[45] For over half a century in Ohio protection has been provided to the customer under the common law against termination while a bill is in dispute, Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 216, 92 N.E. 233 (1910), although the customer has been required to seek a court injunction to accomplish this. This requirement seems unnecessarily grudging, and, as suggested in the text of this article, the expense may coerce a customer into paying an unfair bill.

[46] Massachusetts presently has a statute prohibiting termination of water to a seriously ill person, if written notice is provided to the utility by municipal health authorities or a registered physician. MASS. GEN. LAWS ANN., ch. 165 § 11B (1970).