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HISTORICAL BACKGROUND

Over the years, the Supreme Court ("Court") has been ambivalent in its decisions on the claim for third party standing.[1] Two cases of particular relevance on this issue, *Singleton v. Wulff* and *Powers v. Ohio*, establish the framework for third party standing analysis.[2] The *Singleton* Court considered several requirements to determine if the plaintiff had a valid third party standing. One was whether the plaintiff had suffered concrete "injury in fact" as to "make [the suit] a case or controversy," and another, whether the plaintiff had standing to base his claim or defense on the third parties' rights.[3] Criticizing the majority's misinterpretation of previous cases, Justice Powell in the dissenting opinion argued that the assertion of third party rights is proper only when it is "in all practicable terms impossible" for the third parties to do so themselves and not merely based on some "obstacle."[4]

Again in 1991, the Court readdressed the same issue in *Powers,* only this time to craft specific steps for the present day's third party standing analysis. Drawing from the language of *Singleton,* the three-pronged test for obtaining third party standing requires that the litigant must have suffered an "injury in fact" that

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1 Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 462 (1981).

2 Singleton v. Wulff, 428 U.S. 106 (1976); Powers v. Ohio, 499 U.S. 400 (1991).

3 *Singleton*, 428 U.S. at 111-13.

4 *Id.* at 126-27.

adversely affects the outcome of the case, that the litigant must have a "close relation[ship]" with the third party, and that there must be a hindrance that prevents the third party from asserting his own rights.[5] Unlike the personal relationship between individuals, a close relationship is one that links the litigant's advocacy to the third party's rights.[6] The hindrance prong, meanwhile, verifies the third party's inability to assert his own rights and not just his unwillingness to do so.[7] In all, Justice Scalia accurately summed up the Court's continuing ambivalence on third party standing in *Miller* by asserting that "[the Court's] law on [the] subject is in need of . . . clarification . . ."[8]

The decision to grant third party standing by federal courts or even the Court itself is a matter of judicial prudence and has yet to reach the level of constitutional significance.[9] Prudence rather than the Constitution allows courts to ease the strict requirements for third party standing when a "law will stifle protected speech."[10] Writing for the majority in *Warth v. Selden*, Justice Powell expressed his concerns about the possible lack of judicial restraint exercised by federal courts in determining third party standing, as he had stated:

> Without such limitations . . . essentially [related] to matters of judicial self-governance, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. [11]

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5 *Powers*, 499 U.S. at 410-11.
6 Eisenstadt v. Baird, 405 U.S. 438, 445 (1972).
7 *Singleton*, 428 U.S. at 116.
8 Miller v. Albright, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring).
9 Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249, 255 (1953).
10 Shimer v. Washington, 100 F.3d 506, 509 (7th Cir. 1996).
11 Warth v. Selden, 422 U.S. 490, 500 (1975).

Thus, three principles of judicial restraints or "prudential" considerations were established to prevent federal courts from getting involved in the resolution of abstract questions.[12] Of the three prudential considerations, the third is most relevant to third party standing analysis because it requires courts to determine whether the litigant is actually asserting his own rights and interests rather than those of the third parties.[13]

THE CLAIM FOR THIRD PARTY STANDING: *Perry v. McGinnis*

While third party due process was never expressly sought by the appellant, Everett Perry ("Perry"), in his suit against his employer, the Michigan Department of Corrections ("MDOC"), for wrongful termination, the factual findings in *Perry v. McGinnis* provide an ideal opportunity to examine the rule of third party standing.[14] Perry, a black man, worked as a disciplinary hearing officer for the MDOC for a few years before he was fired on November 5, 1993.[15] His duties were to preside over and dispose of cases at disciplinary hearings in Michigan state prisons.[16] Perry argued that he was increasingly cited by prison officials for substandard job performance when they noticed that his dismissal rate was higher than the norm.[17] He claimed that the MDOC denied prison inmates their due process rights protected by the Fourteenth Amendment by implementing the unwritten guilty verdict quotas and terminating him to eliminate fairness and impartiality in the disciplinary proceedings.[18] Judge Damon Keith who presided over the case commented that such a disciplinary system "reeks [prison inmates] of arbitrary justice [and that there]

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12 *Id.* at 500.
13 Saladin v. Milledgeville, 812 F.2d 687, 690 (11th Cir. 1987).
14 Perry v. McGinnis, 209 F.3d 597 (6th Cir. 2000).
15 *Id.* at 600.
16 *Id.*
17 *Id.* at 605.
18 *Id.*

can only be injustice."[19] It is only appropriate, hereafter, to discuss whether Perry would have satisfied each prong of the *Powers* analysis to succeed on the claim for third party standing.

The first prong establishes that the litigant must have suffered an "injury in fact" resulting from the infringement of his right.[20] In the present case, Perry asserted that prison officials terminated his employment in retaliation for his failure to abide by the unwritten quota policy.[21] Instead of blindly following some unofficial guidelines at the disciplinary hearings, he chose to decide cases on the basis of fairness and impartiality.[22] As a constitutional matter, his decisions on disciplinary actions taken against prison inmates constitute his own expression protected by the First Amendment.[23] Prison officials, therefore, violated his freedom of expression and as a result caused him to suffer an injury by wrongful termination.

Another argument to prove Perry's satisfaction of the first prong is the racial discrimination against him. Evidence from the case indicates that while many of Perry's white colleagues committed the same errors under similar circumstances, he was the only one being disciplined.[24] Perry's race best explains this disparate treatment by prison officials. Yet, the Court of Appeals in this case was uncertain if the "disparate treatment . . . had [anything] to do with race" or the result of other factors.[25] Whether or not race is the deciding factor, Perry must have been psychologically traumatized for being treated so differently than his colleagues. He suffers a mental injury. Thus, the first prong is satisfied from the facts of the case.

The condition of the second prong requires stricter scrutiny of the relationship between the litigant and third party. The "close relationship" between the two parties is not the kind one would

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19 *Id.* at 606.
20 *Powers*, 499 U.S. at 410-11.
21 *Perry*, 209 F.3d at 603-05.
22 *Id.* at 605.
23 *Id.* at 603.
24 *Id.* at 601-02.
25 *Id.* at 602.

think of as personal affection; rather, the litigant's advocacy of his own interest is linked to the third party's rights.[26] The Court in *Powers* went further to clarify that the litigant can raise the third party's rights only when there is a "congruence of interests [to] make it necessary and appropriate." [27] Two preceding cases, *Griswold* and *Eisenstadt*, elaborate on this concept of relationship. First in *Griswold*, the Court recognized the "professional relationship" that the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician had with the married couples to which they prescribed contraceptives.[28] At the time, the Connecticut statute prohibited anyone from preventing conception. [29] Citing other related cases where the litigants' interests and the third parties' rights aligned, the Court agreed that the appellants had standing to raise their counselees' constitutional rights since the "confidential relation[ship]" between them would allow appellants in their suit to protect "the rights of husband and wife . . . [that otherwise would] be diluted or adversely affected." [30]

Even when a professional or confidential relationship does not exist, this should not prevent a person from asserting another party's rights. [31] In *Eisenstadt,* the defendant Baird exhibited contraceptive articles and distributed a package of vaginal foam to a young woman at the end of his lecture at Boston University.[32] Because Baird was neither a physician nor a pharmacist at the time of the distribution, he was convicted for violating the Michigan statute.[33] The Court did not see how Baird's professional status should prevent him from challenging the statute "in its alleged discriminatory application to potential distributees."[34] Relying on

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26 *Eisenstadt*, 405 U.S. at 445.
27 *Powers,* 499 U.S. at 414.
28 *Griswold,* 381 U.S. at 480-81.
29 *Id.* at 480.
30 *Id.* at 481.
31 *Eisenstadt*, 405 U.S. at 445.
32 *Id.* at 440.
33 *Id.* at 442.
34 *Id.* at 444.

Griswold, the Court likewise expressed its concerns about the "impact of the litigation on the third party interests" rather than the nature of the relationship between the litigant and the third party. Baird's right to assert third party standing is important because his legal challenge of the statute provided unmarried people who were denied contraceptives in Michigan a "forum" to assert their own rights.[35] Like in *Griswold*, the Court emphasized the intertwining relationship between the litigant's advocacy and the third party's rights.

A closer scrutiny of the case at bar, however, reveals that Perry would not have satisfied the second prong. The nature of the relationship in *Griswold* is one of physician-patient, where there are certain elements of professionalism and confidentiality. Unlike the characteristics of physician-patient and attorney-client relationships, prison officials are often not so interested in inmates' rights as much as enforcing their incarceration.[36] In *Harris*, the inmate challenged the Georgia Department of Corrections ("DOC") policy that prohibited prison officials from writing recommendations on prisoners' behalf to the parole board. He claimed that the policy violated the prison officials' First Amendment right.[37] The Court of Appeals reversed and held that the inmate lacked standing to assert the free speech rights of prison guards. The court argued against granting third party standing because of the "adversarial nature of the relationship between prisoners and prison [officials]."[38] Similarly, Perry's relationship with the inmates can be characterized as adversarial. As a disciplinary hearing officer, Perry could not have formed any type of relationship with the inmates if he were also to decide on disciplinary actions taken against them. There has to be an adversarial mentality of prison officials against inmates in order to maintain fairness and impartiality in the course of disciplinary hearings.

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35 *Id.* at 445-46.

36 Harris v. Evans, 20 F.3d 1118, 1123 (11th Cir. 1994).

37 *Id.* at 1120.

38 *Id.* at 1123-24.

Other than the nature of relationship between the litigant and third party, the main factor to stress is the alignment of interests between the two parties, such that the litigant "will adequately and vigorously assert those interests."[39] This is lacking in the instant case because disciplinary hearings, in a sense, allow prisoners at the minimum to defend their own rights without relying on the litigants. The third parties' and litigants' interests intertwined in *Griswold* and *Eisenstadt* because the third parties were denied a "forum" to assert their constitutional rights.[40] On the other hand, the disciplinary hearings in *Perry* probably provide inmates a "forum" to defend the misconduct charges against them. According to the rules of the Federal Bureau of Prisons, another kind of "forum" available is the administrative proceeding that prisoners can request to remedy the rights they feel have been violated. [41] Given the prison inmates' appearance before the disciplinary board, they seemingly do not lack a standing to assert their own rights. A disciplinary hearing therefore represents the kind of "forum" that was previously denied to third parties in *Griswold* and *Eisenstadt*.

Another consideration is that the litigant should be a zealous advocate of the third party's rights.[42] There cannot be effective advocacy when a person is also the judge of another party's misconduct. Advocacy requires that person to share the third party's interest and to defend it zealously. On the contrary, a judge has to remain fair and impartial to all parties. That being so, Perry cannot assume both roles and also argues that the redress of his wrongful termination on the claim for third party standing will result in the inmates' greater enjoyment of their due process rights. Here, the interests of a judge and an advocate diverge. Perry's role as a disciplinary hearing officer is to judge the inmates' misconduct, while the advocacy of their due process rights may merely exist as an afterthought of his claim for remedy. In sum, as

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39 *Id.* at 1124-25.

40 *Griswold,* 381 U.S. at 481; *Eisenstadt*, 405 U.S. at 445-46.

41 Massey v. Wheeler, 221 F.3d 1030, 1033 (7th Cir. 2000).

42 *Eisenstadt*, 405 U.S. at 445.

long as there is "an adversarial nature of relationship between prisoners and prison [officials], and the differing interests of the two groups," the second prong cannot be satisfied.[43]

Lastly, it is difficult to determine with certainty if Perry would also have satisfied the hindrance prong. The rule states that the third party must be unable to assert his own rights and is not just reluctant to do so.[44] Based on the language in *Singleton* and *Powers*, hindrance need not be absolute, but the slightest evidence of it is justifiable. The best argument for evidence of hindrance in *Perry* is that the institutional secrecy among prison officials about the unwritten guilty verdict quotas denied prison inmates and Perry alike access to information that may be relevant to their performance or defense in the disciplinary hearings.

Even so, federal courts provide inmates procedural means to rectify any hindrance that they might have confronted. In *Massey*, prison officials denied the plaintiff federal prisoner access to surgical care for a hernia upon the prison physician's recommendation. The plaintiff claimed that they violated his Eighth Amendment rights.[45] The court, however, held that his claim was insufficient because he failed to first exhaust his administrative remedies as required by the Prison Litigation Reform Act.[46] Courts are not particularly concerned about the "effectiveness" or the prisoners' satisfaction with the administrative grievance procedure as much as its "availability" to them.[47] The prison system's administrative procedure affords prisoners their due process or, in other words, an opportunity to assert their rights. A remedy from that process redresses any wrong that the hindrance might have caused initially.

It is unclear from the present case if the disciplinary hearings resemble the kind of administrative grievance procedure where prisoners at the very least can assert their own rights. If there is no similarity between the two proceedings, the next

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43 *Harris*, 20 F.3d at 1123.
44 *Singleton*, 428 U.S. at 116.
45 Massey v. Helman, 196 F.3d 727, 731 (7th Cir. 1999).
46 *Id.* at 731-34.
47 *Id.* at 733-34.

question is whether prisoners are even granted the right to petition for appeal after their disciplinary hearings. Because these questions are left unanswered, this raises serious doubts about Perry's ability to satisfy the third prong.

THE PUBLIC INTEREST ON THIRD PARTY STANDING

There should be a public interest in third party standing because it involves one of America's largest public institutions—the prison system. Moreover, the vast majority of cases involving third party standing deal with constitutional rights.[48] One in particular is prisoners' due process rights protected by the Fourteenth Amendment. Another is a public employee's obligation to maintain "constitutionally mandated fairness" in disciplinary hearings, though it may deviate from his public employer's policy.[49] Those rights erode when prison officials like in *Perry* have the arbitrary power to implement an unofficial policy without oversight by at least one branch of the government.

The Court has always been deeply concerned about the abuse of arbitrary power by government officials. The original intent of the law of due process prior to its roots in American jurisprudence was to protect the common people against the English king's arbitrary power.[50] As due process applies to legislative power and perhaps to those of other public institutions as well, its purpose is to "secure the citizen against any arbitrary deprivation of his rights . . . [and] to exclude everything that is arbitrary and capricious."[51] Writing for the majority in *Yick Wo*, Justice Matthews best stated:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to

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48 *See* Rohr, *supra* note 1, at 461.
49 *Perry*, 209 F.3d at 605.
50 Dent v. West Virginia, 129 U.S. 114, 123-24 (1889).
51 *Id.*

> conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.[52]

The public also benefits when the law is applied properly to the claim for third party standing. A greater consistency and clarity in the application of the law to third party standing will simplify the legal proceedings and be more cost-effective for all parties involved.[53] A claim for third party standing is achievable only when the litigant satisfies all three prongs of the analysis set forth in *Powers.* While Perry proved that he suffered an "injury in fact" as required in the first prong, he failed to satisfy the conditions of the remaining two. Thus, it is unlikely that he would succeed on this claim in his suit.

Additionally, there has to be a "reasonable" standard in the claim for third party standing. A good reason for one is to exclude those litigants, who being opportunists, may manipulate third parties' rights for their own personal benefits, or that they simply do not have better alternative claims in bringing suits against other parties. The claim for third party standing should be granted by federal courts only if "[the] litigant . . . reasonably . . . gives adequate representation to the interests of the third parties whose rights [he] wishes to assert."[54] In every situation that involves a claim for third party standing, strict scrutiny is justified to ensure that not every litigant can base his claim frivolously on the assertion of third party rights.

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52 Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

53 *See* Rohr, *supra* note 48, at 463.

54 *Id.* at 461.