TYING STAFF PRIVILEGES TO PHYSICIAN EMPLOYMENT CONTRACTS: AN EROSION OF DUE PROCESS RIGHTS OR A NECESSARY EVIL?*

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Recently, many hospitals have entered into exclusive employment contracts with independent physician groups to provide health care services in an effort to reduce their costs.[1] At the same time, a growing number of hospitals have included clauses in their employment agreements with these physician groups which provide that upon the termination of the contract, the contracting physicians will lose their staff privileges. Physicians have agreed to the inclusion of such clauses because of their desire to enter into these potentially lucrative contracts.[2] While these contractual relationships allow hospitals to provide more cost-efficient services, thereby lowering the overall expense of health

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[1] These contractual arrangements allow a hospital to reduce its malpractice liability by designating the contracting physicians as independent contractors. When sued, the contract will be used as evidence showing that the hospital did not exercise control over the physician, and that the physician was an independent contractor, thereby exculpating the hospital from liability. For an in-depth discussion of the use of the independent contractor exception in the health care context, *see generally* Classen, *Hospital Liability for Independent Contractors: Where Do We Go From Here?*, 40 ARK. L. REV. 469 (1987); Lisko, *Hospital Liability Under Theories of Respondeat Superior and Corporate Negligence*, 47 UMKC L. REV. 171 (1978); Southwick, *The Hospital's New Responsibility*, 17 CLEV.-MAR. L. REV. 146 (1968).

In the 1960's, hospitals began to realize that they could provide better service to patients and attending physicians by having a permanent group of in-house physicians provide ancillary services. These hospitals were primarily concerned with continuity, organization and expanded service. In return for limiting the scope of their practice, the physicians providing these ancillary services sought employment contracts and the ability to bill patients separately from the hospital. Later, some hospitals became worried that these physician groups might become difficult to dislodge if disagreements arose and sought to limit physician staff privileges. In the ensuing negotiations, many physician groups agreed to limit their rights in exchange for exclusivity. Letter from Joseph R. Matire, M.D. to H. Ward Classen (Dec. 4, 1987).

[2] *See infra* text accompanying notes 126-27.

care,[3] the inclusion of such clauses has been criticized by some physician groups.[4]

Physicians, threatened with the loss of their staff privileges, have traditionally been accorded the right to due process of law.[5] Furthermore, a hospital's bylaws usually proscribe additional procedures for reviewing the revocation of staff privileges. Such procedural safeguards are not extended to exclusive employment contracts. The physician's staff privileges are simultaneously and automatically terminated with his contract.[6] Because his staff privileges are contractual, the physician is prevented from exercising his due process rights.[7] Physicians have attacked this lack

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[3] Health care costs of the hospital or health care provider are reduced in several ways. First, administrative costs may be significantly reduced by having the physician group responsible for billing the patients, hiring its own staff, maintaining any necessary equipment and managing all other aspects of providing services. Additionally, physicians will provide their own malpractice insurance.

Second, under many agreements the physician group assumes the risk that a particular service will be under-utilized. The physician group will benefit, however, if a particular facility is over-utilized. For example, if few patients use the hospital's emergency room, the physician group will lose money if the emergency room is overstaffed. If the emergency room is extremely busy, however, the emergency room will show a profit thereby benefiting the physician group.

[4] The American College of Radiology (ACR) was one such group. *See generally* ACR Bulletin, Dec. 1986.

[5] *See generally infra* note 22 and accompanying text. Staff privileges allow physicians to admit their personal patients to a hospital and perform procedures for which the physicians are qualified. The denial of staff privileges has been heavily litigated. As to public hospitals, see Sosa v. Bd. of Managers of Val Verde Memorial Hosp., 437 F.2d 173 (5th Cir. 1971); Rosner v. Eden Township Hosp. Dist., 58 Cal.2d 592, 25 Cal. Rptr. 551, 375 P.2d 431 (1962); Martino v. Concord Community Hosp. Dist., 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (1965); Group Health Coop. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951). As to private hospitals, see Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Mulvihill v. Julia Butterfield Memorial Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971); Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963); Woodard v. Porter Hosp., Inc., 125 Vt. 419, 217 A.2d 37 (1966). *See also* Hein, *Hospital Staff Privileges and the Courts: Practice and Prognosis*, 34 FED'N INS. COUNS. Q. 157 (1984); McCall, *A Hospital's Liability for Denying, Suspending and Granting Staff Privileges*, 32 BAYLOR L. REV. 175 (1980).

[6] *See infra* note 103 for an example of such contractual provisions.

[7] *See, e.g.*, Alonso v. Hosp. Auth. of Henry County, 175 Ga. App. 198, 332 S.E.2d 884 (1985).

Courts have recognized that a hospital's bylaws constitute a contract between the hospital and a physician. *See* Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 141 A.2d 18 (1958); Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 395 Pa. 257, 149 A.2d 456 (1959); St. John's Hosp. Medical Staff v. St. John Regional Medical Center, Inc., 90 S.D. 674, 245 N.W. 2d 472 (1976). In *Berberian* the court stated that "[t]he relationship between a hospital association and a member of the hospital's staff is based on contract . . . ." *Berberian*, 395 Pa. at 262, 149 A.2d at 458. The court further observed that:

of due process as unconstitutional, alleging that hospitals possess superior bargaining power when entering into such contracts. Hospitals, however, maintain that they are exercising a legitimate contractual right which is necessary to insure the continued delivery of high-quality, cost-efficient health care.

This article examines the traditional physician-hospital relationship and the due process rights afforded to physicians in the revocation of their staff privileges. Additionally, relevant case law will highlight the relationship of staff privileges to employment agreements in hospital-physician contracts. Finally, this article will attempt to resolve the physician's need for due process rights and the hospital's attempt to maintain cost-efficiency.

I. THE PHYSICIAN-HOSPITAL RELATIONSHIP

The relationship between the physician and the health care provider is often confusing to the lay person. Most hospitals classify physicians according to a definitional nature of their prac-

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> While [the doctor's] relationship to the hospital was not that of membership in a voluntary organization, nevertheless he and the hospital had, in legal contemplation, entered into a contract whereof the provisions of the staff by-laws, as approved by the hospital's board of directors, constitute the legally binding terms. In the circumstances present, the defendant corporation is bound by the staff by-laws . . . . In both instances, the respective organizations have enacted and approved the by-laws which are an integral part of the contractual relationship between such organizations and their members or ones holding under them.

Id. at 265, 149 A.2d at 459.

Under contract law, an individual may waive any provision inserted in a contract for his own benefit. *See* Koedding v. Slaughter, 634 F.2d 1095, 1097 (8th Cir. 1980) (a party may waive favorable contract terms); National Util. Serv. Inc. v. Whirlpool Corp., 325 F.2d 779, 781 (2d Cir. 1963) (party may waive conditional performance inserted for his benefit in contract); Berks Title Ins. Co. v. Haendiges, 591 F. Supp. 879, 886 (N.D. Ohio 1984), *aff'd in part, rev'd in part*, 772 F.2d 278 (6th Cir. 1985) (contract term may be waived by conduct of parties and subsequent acts); Terry v. Int'l Dairy Queen, Inc., 554 F. Supp. 1088, 1095 (N.D. Ind. 1983) (a party may impliedly waive contractual provision inserted for party's benefit by knowing and willing acquiescence); TVA v. Westinghouse Elec. Corp., 429 F. Supp. 940, 943 (E.D. Va. 1977) (parties may waive rights secured under contract); Chung v. Park, 377 F. Supp. 524, 529 (M.D. Pa. 1974), *aff'd*, 514 F.2d 382 (3d Cir. 1975) (contractual provisions can be expressly or impliedly waived); Oleg Cassini, Inc. v. Couture Coordinates, Inc., 297 F. Supp. 821, 830 (S.D.N.Y. 1969) (party may eliminate a condition or waive a provision inserted in a contract for his benefit without consideration); In re Gordon Car and Truck Rental, Inc., 59 Bankr. 956, 962 (N.D.N.Y. 1985) (party's implied or express intention may waive contract terms included for his benefit). Thus, a physician may waive the due process rights contained within the hospital's bylaws which serve as his contract.

tice.[8] The most common form of practice is through "staff privileges," usually granted to private physicians.[9] Staff privileges allow physicians the right to admit and discharge their private patients to and from the hospital as well as the right to use the hospital's facilities.[10] Another group includes those physicians who are still in training. This includes externs, who are third and fourth year medical students; interns, who are typically one year out of medical school; and residents, who have completed their internship. All of these individuals practice under the supervision of an experienced physician.

Hospitals also employ full-time salaried physicians often referred to as "hospital based" physicians.[11] Included in this category are the faculties of the teaching hospitals that educate externs, interns and residents; and those physicians who have contracted with the hospital, for a set salary to provide medical services on behalf of the hospital. These individuals usually do not admit patients to a hospital, but they are responsible for treating patients who have already been admitted by other physicians.[12] Hospital-based physicians include radiologists, anesthesiologists and pathologists.

Staff privileges are extremely important to the practicing physician. The high cost of modern technology and the high degree of technological sufficiency necessary to support many medical procedures require that a physician have access to a full service hospital.[13] Access to a hospital through staff privileges

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8 *See infra* notes 9-11 and accompanying text.

9 Once a physician has been granted "staff privileges" he will be accorded "clinical privileges" which allow him to perform certain procedures. "Clinical privileges" have been defined as "permission to provide medical or other patient care services in the granting institution, within well-defined limits, based on the individual's professional license and his experience, competence, ability, and judgment." JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, *Accreditation Manual for Hospitals* 109 (1987) [hereinafter JCAH].

10 *See id.*

11 The term "hospital based physician" refers to the fact that traditionally their practice was based at the hospital. Today, however, many hospital based physicians such as radiologists have offices outside the hospital. *See* Anne Arundel Gen. Hosp., Inc. v. O'Brien, 49 Md. App. 362, 365, 432 A.2d 483, 485 (1981).

12 *Id.* Hospital based physicians also perform diagnostic tests and procedures as directed by admitting physicians. *Id.*

13 Many specialists such as radiologists require expensive equipment such as Cerebral Axial Tomographers (CAT Scans) or Nuclear Magnetic Resonance machines (NMR's) which may cost over one million dollars each. Economies of scale permit hospitals and other large organizations to own and operate this equipment because the costs involved can be divided among a large patient population. The high cost involved was the primary reason that the National Health Planning and

often determines the extent of a physician's practice.[14] Without the benefit of a full service hospital and its support services, many physicians would be precluded from freely practicing their medical specialty. Staff privileges also reflect peer approval and a physician's status in the medical community.[15] Consequently, a physician who is unable to obtain staff privileges may be severely stigmatized.

Hospitals and other health care providers are becoming more selective as to whom they will grant staff privileges. The reason for such increased scrutiny is two-fold. First, while the number of physicians in the general population continues to grow,[16] the number of available hospital beds has declined. Second, many plaintiffs are attempting to hold hospitals liable for the negligent actions of the physicians who practice at the hospital.[17] Consequently, as a means of reducing their potential liability, hospitals are employing a discerning approach to awarding staff privileges.

When a physician applies for staff privileges he undertakes a long and arduous process. Initially, a credentials committee will review the physician's application to determine if he is professionally qualified to practice medicine.[18] Following an interview

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Development Resources Act of 1974 was enacted. *See* 42 U.S.C. § 300(k) (1976), *repealed by* Pub. L. No. 99-660 § 701(a), 100 Stat. 3799 (1986). Because state regulation of the health care industry has increased, this act was repealed. *See id.*

14 *See, e.g.*, Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 267 (8th Cir. 1983) (physician's reputation is often measured by whether or not he possesses hospital staff privileges); Burkette v. Lutheran Gen. Hosp., 595 F.2d 255, 256 (5th Cir. 1979) (physician's private practice may be seriously hampered by denial of staff privileges); Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968) (denial of privileges would restrict access to advanced medical equipment, curtail economic remuneration for treatment of patients in the hospital and damage overall physician-patient relationships); Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959) ("much of what a physician or surgeon must do can only be performed in a hospital").

15 *See Engelstad*, 718 F.2d at 267 ("Staff privileges are basically viewed as a reflection of the measure of proficiency a doctor attains in his medical specialty.").

16 The number of medical degrees that have been granted continues to increase. In 1960, 7,032 medical degrees were conferred; 8,314 in 1970; 12,447 in 1975; 14,902 in 1980; and 15,813 in 1984. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 148 (107th ed. 1987). In certain geographical areas of the United States there is already an over-abundance of physicians.

17 *See generally* Classen, *supra* note 1.

18 *See* Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records*, 16 WASHBURN L.J. 54, 59-60 (1976); Note, *Medical Staff Membership Decisions: Judicial Intervention*, 1985 U. ILL. L. REV. 473, 477.

and a thorough check of the physician's educational background and professional references, the committee will make a recommendation as to his suitability for practicing medicine at the hospital.[19] The medical staff executive committee will also review the physician's qualifications. Finally, a recommendation is made to the hospital's governing board which will render a final decision.[20]

Upon joining a medical staff, a contract is created between the facility and the physician who agrees to abide by the bylaws, rules, regulations and policies of the hospital as well as of the medical staff.[21] The contract generally incorporates procedural safeguards which are triggered upon the termination of the physician's practice privileges at the hospital.[22] Furthermore, it has been recognized that a physician has a property interest in his staff privileges and is thus entitled to due process of law.[23]

Staff privileges are customarily granted for a limited time period, such as two years. When this period expires, the physician seeking reappointment is usually entitled to some measure of due process.[24] If, however, a hospital rejects a physician's initial application for staff privileges with a stated meritorious reason, the physician cannot avail himself of the protections of the hospital's bylaws and governing provisions.[25]

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19 *See* Holbrook & Dunn, *supra* note 18, at 59-60; Note, *supra* note 18, at 477.

20 *See* Note, *supra* note 18, at 477.

21 *See* Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 569, 141 A.2d 18, 24-25 (1958); Berberian v. Lancaster Osteopathic Hosp. Ass'n, 395 Pa. 257, 262, 149 A.2d 456, 458 (1959); Miller v. Indiana Hosp., 277 Pa. Super. 370, 374, 419 A.2d 1191, 1193 (1980); St. John's Hosp. Medical Staff v. St. John Regional Medical Center, Inc., 90 S.D. 674, 245 N.W.2d 472 (1976); O'Leary v. Bd. of Directors, 89 Wis.2d 156, 278 N.W.2d 217 (Ct. App. 1979).

22 *See* Northeast Georgia Radiological Ass'n v. Tidwell, 670 F.2d 507, 511 (5th Cir. 1982); Shaw v. Hospital Auth. of Cobb County, 507 F.2d 625, 629 (5th Cir. 1975); Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971) (all recognizing physician's right to reappointment until hearing is held in which hospital authorities evaluate whether the physician has met reasonable professional standards).

23 *See* Poe v. Charlotte Memorial Hosp., Inc., 374 F. Supp. 1302, 1312 (W.D.N.C. 1974).

24 *Woodbury*, 447 F.2d at 842. "Once having become a member of the hospital surgical staff Dr. Woodbury had a right to reappointment until the governing authorities determined after a hearing conforming to the minimum requirements of procedural due process that he did not meet the reasonable standards of the hospital." *Id.* The fact that the case was decided before Board of Regents v. Roth, 408 U.S. 564 (1972), may leave doubt as to whether it would be decided the same way today. *See infra* notes 74-77 and accompanying text (discussing *Roth*).

25 *See* Hayman v. City of Galveston, 273 U.S. 414, 416-17 (1927); Woodbury v. McKinnon, 447 F.2d 839, 842-43 (5th Cir. 1971); Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173, 177 (5th Cir. 1971).

Physicians traditionally have had their staff privileges terminated only for endangering patients' lives, failure to follow staff policies, or for rendering poor quality health care. Economic pressures, however, recently have encouraged health care providers to terminate staff privileges for economic reasons. Consequently, many hospitals have attempted to rewrite their bylaws to deny physicians any of their due process rights.[26] At the same time, many hospitals have attempted to induce physicians to waive their due process rights when entering into employment agreements with the hospital.[27] Although such action has been encouraged by members of the legal profession,[28] the legitimacy of waiving one's right to due process and the underlying constitutional concerns remains unresolved.

II. TRADITIONAL DUE PROCESS RIGHTS

The fifth and fourteenth amendments to the United States Constitution recognize an individual's right to due process of law.[29] The concept of procedural due process encompasses both an individual's liberty and property interests.[30] Specifically, the United States Supreme Court has required that defendants be notified of any legal action brought against them and that they be given an opportunity to set forth a defense to these charges.[31]

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26 A typical provision which may be inserted in the bylaws is as follows:

> Notwithstanding any other provisions of these bylaws, or of the rules and regulations, the Hospital may provide by Agreement that a physician's membership on the medical staff and clinical privileges are contingent on and shall expire simultaneously with such Agreement or understanding. In the event that an Agreement has such a provision or there is such an understanding, the provisions of these bylaws, rules and regulations, and policies of the medical staff and of the Hospital with respect to hearings, appellate review, etc., shall not apply.

27 A typical clause included in a physician-provider contract is as follows:

> Notwithstanding any provisions of the bylaws, rules and regulations, and policies of the Hospital and of the medical staff, the medical staff membership and clinical privileges of the physician shall terminate simultaneously with the termination of this Agreement. Provisions of said bylaws, rules and regulations, and policies of the Hospital and of the medical staff with respect to hearings, appellate review, etc., shall not apply.

28 *See* BAKER & HOSTETLER, HOSPITAL CONTRACTS MANUAL § 2:15 (1987).

29 U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

30 *Id.*

31 *See* Paul v. Davis, 424 U.S. 693, 710-11 (1976); Bell v. Burson, 402 U.S. 535, 539 (1971); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Milliken v.

These rights include the right to counsel for the indigent, the right to confrontation, and the right to a transcript of any judicial proceedings. Further, these enumerated rights are specifically mandated by the sixth amendment and are applicable to state action through the fourteenth amendment.[32]

In its broadest definition, substantive due process guarantees that no individual shall be arbitrarily deprived of life, liberty or property.[33] Embodied in this concept is a requirement that before an individual is deprived of life, liberty, property or any statutory right granted to him, he is entitled to a trial conducted by established rules governing the judicial hearing.[34] Furthermore, due process requires that a law not be unreasonable, arbitrary or capricious and that the law have a reasonable and substantial relationship to its objective.[35] In essence, substantive due process ensures a "fundamental fairness."[36]

A. State Action

To invoke the fourteenth amendment right of due process, the claimant must demonstrate the existence of state action and a property or liberty interest. The fourteenth amendment provides that a "state [shall not] deprive any person of life, liberty, or property without due process of law."[37] The fourteenth amendment guarantees the right of due process against state action but not against private action.[38] State action has been broadly defined and has been applied to those actions which on their face appear to be private in nature.[39]

Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385, 393 (1914); Roller v. Holley, 176 U.S. 398, 409 (1900). *See also* Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

[32] *See* Gideon v. Wainright, 372 U.S. 335 (1963) (right to counsel for indigents); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation); Griffin v. Illinois, 351 U.S. 12 (1956) (right to transcript on appeal as of right).

[33] *See* Galvan v. Press, 347 U.S. 522, 530 (1954); Poe v. Ullman, 367 U.S. 497, 515-18 (1961) (Douglas, J., dissenting).

[34] Pettit v. Penn, 180 So.2d 66, 69 (La. Ct. App. 1965), *cert. denied*, 248 La. 696, 181 So.2d 397 (1966).

[35] Nebbia v. New York, 291 U.S. 502, 525 (1934).

[36] *See* Bute v. Illinois, 333 U.S. 640, 649 (1948) (quoting Heubert v. Louisiana, 272 U.S. 312, 316 (1976)). *See also* Nowak, *Forward-Due Process Methodology in the Postincorporation World*, 70 J. CRIM L. & CRIMINOLOGY, 397, 402-03 (1979) (comparing Addington v. Texas, 441 U.S. 418 (1979) and Parham v. J.R., 442 U.S. 584 (1979), with the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976)).

[37] U.S. CONST. amend. XIV, § 1.

[38] Shelley v. Kraemer, 334 U.S. 1, 13 (1948); United States v. Harris, 106 U.S. 629, 638 (1882); United States v. Cruikshank, 92 U.S. 542, 554 (1875).

[39] *See infra* notes 40-71 and accompanying text.

To invoke the protections of the fourteenth amendment, one must provide evidence of state action or show that a private action is so closely intertwined with state action that they cannot be separated. Private action which has been found to constitute state action is illustrated by reference to *Burton v. Wilmington Parking Authority*.[40] In *Burton*, a state parking authority, which owned and operated a parking garage, leased space to a restaurant on the ground floor. A black customer brought suit when the restaurant refused to serve him, alleging a violation of the equal protection clause of the fourteenth amendment.[41]

The United States Supreme Court concluded that state action existed because the state leased the restaurant to its owners. The Court commented that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[42] The *Burton* Court justified its decision by citing the state's public ownership of the land and the building, the use of public funds for the construction of the building, and the mutual benefits derived by the state and the restaurant in operating the parking garage.[43]

The *Burton* Court's reasoning was more recently applied in *Moose Lodge No. 107 v. Irvis*[44] and *Jackson v. Metropolitan Edison Co.*[45] In *Moose Lodge*, a civic fraternity which owned a Pennsylvania liquor license refused to serve a black guest. The guest brought suit claiming state involvement in the club's activities. The plaintiff argued that the lodge's discriminatory practices were forbidden by the equal protection clause of the fourteenth amendment.[46] In contrast to *Burton*, the Supreme Court found that no relationship existed between the state and the club sufficient to constitute state involvement.[47] The Court concluded that state action does not exist merely because a private entity was subject to any degree of state regulation or because it received any type of benefit or service from the state.[48]

In *Jackson*, the Supreme Court held that a customer whose electrical service had been terminated without due process or an

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40 365 U.S. 715 (1961).
41 *Id.* at 716.
42 *Id.* at 722.
43 *Id.* at 723-24.
44 407 U.S. 163 (1972).
45 419 U.S. 345 (1974).
46 *Moose Lodge*, 407 U.S. at 165.
47 *Id.* at 175.
48 *Id.* at 173.

opportunity to find out the amount she owed was not entitled to due process protection.[49] The Court ruled that state action exists where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[50] The *Jackson* Court determined that the actions of the privately owned and operated utility did not constitute state action solely because the utility was extensively regulated by the state.[51] It emphasized that Metropolitan Edison's status as a regulated industry that operated for the public interest did not justify extending fourteenth amendment due process protection to its customers.[52]

In applying this reasoning to health care providers, the judiciary has placed great emphasis on whether a hospital enjoys public or private status. In *Shulman v. Washington Hospital Center*,[53] the United States District Court for the District of Columbia distinguished a public hospital from a private hospital. The court stated that a public hospital is "[o]ne owned, maintained and operated by a governmental unit . . . supported by governmental funds . . . ."[54] The court defined a private hospital as "one that is owned, maintained and operated by a corporation or an individual without any participation on the part of any governmental agency in its control."[55]

In *Briscoe v. Bock*,[56] the United States Court of Appeals for the Eighth Circuit adopted the *Jackson* court's requirement of a "sufficiently close nexus" for state action to exist.[57] In *Briscoe*, the record indicated that the hospital received federal and other public funds, enjoyed tax exempt status and was subject to state regulation.[58] The court concluded, however, that no state action was present.[59] Rather, it stated that "there was no such nexus between the state's relationship to the [h]ospital's operation and

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49 *Jackson*, 419 U.S. at 358-59.

50 *Id.* at 351 (citing *Moose Lodge*, 407 U.S. at 176).

51 *Id.* at 350.

52 *Id.* at 353-54.

53 222 F. Supp. 59 (D.D.C. 1963), *aff'd*, 348 F.2d 70 (D.C. Cir. 1965).

54 *Id.* at 61.

55 *Id.* The *Shulman* court found no state action with respect to revocation of staff privileges when the hospital in question received government funds but was privately owned and managed. *Id.* at 62.

56 540 F.2d 392 (8th Cir. 1976).

57 *See id.* at 395-96.

58 *Id.* at 394.

59 *Id.* at 396.

the dismissal of the plaintiff as to justify attribution of the challenged action of the [h]ospital to the state."[60] In *Schlein v. Milford Hospital*,[61] however, the District of Connecticut rejected the reasoning expressed in *Jackson* and adopted the *Burton* rationale. The *Schlein* court determined that state action was present where the hospital had been granted a license by the state which empowered it to determine the scope of the license required by a physician.[62]

Other courts have concluded that neither the receipt of state funding through the Medicare and Medicaid programs nor the existence of state regulation when taken alone constitute state action.[63] One court, however, has found that because a hospital performs a public function, its actions are attributable to the state, especially where the hospital is the only one in a particular geographic area.[64] This holding conflicts with the general rule

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60 *Id.*

61 423 F. Supp. 541 (D. Conn. 1976).

62 *Id.* at 543.

63 *See, e.g.*, Ward v. St. Anthony Hosp., 476 F.2d 671, 675-76 (10th Cir. 1973); Doyle v. Unicare Health Serv., Inc., Aurora Center, 399 F. Supp. 69, 74 (N.D. Ill. 1975); Slavcoff v. Harrisburg Polyclinic Hosp., 375 F. Supp. 999, 1003 (M.D. Pa. 1974); Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 61 (D.D.C. 1963).

In addition to government funding through Medicare and Medicaid, many health care providers receive direct government assistance through the Hill-Burton Act, 42 U.S.C. §§ 291 to 291o-1 (1982). The Hill-Burton Act provides public funds for the construction of hospitals and nursing homes in rural areas by not-for-profit and government sponsored organizations. Additionally the act requires that in return for government funding, the health care providers are required to provide free or reduced cost health care for 20 years after completion of construction. Furthermore, the act forbids a facility from denying access to the indigent or discriminating on the basis of race, creed, color or sex, etc. To be eligible, the institution must participate in Medicare or Medicaid. *See id.*

The courts are divided as to whether the receipt of Hill-Burton funding causes a hospital to become "public" in nature. A number of courts have found a hospital to be "private" despite the receipt of Hill-Burton construction funds. *See, e.g.*, Barrio v. McDonough Dist. Hosp., 377 F. Supp. 317 (S.D. Ill. 1974); Mulvihill v. Julia L. Butterfield Mem. Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971); Mauer v. Highland Park Hosp. Found., 90 Ill. App.2d 409, 232 N.E.2d 776 (1967); Halberstadt v. Kissane, 31 A.D.2d 568, 294 N.Y.S.2d 841 (1968); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); Woodard v. Porter Hosp., Inc., 125 Vt. 419, 217 A.2d 37 (1966); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W.Va. 229, 140 S.E.2d 457 (1965).

Other courts, however, have held that the receipt of Hill-Burton funding characterizes a health care facility as "public" in nature. *See* Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974), *vacated and remanded on other grounds*, 552 F.2d 1070 (4th Cir. 1977); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

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

that performing a public function in and of itself does not constitute state action.[65] Furthermore, institutions have been held to be private even though operating for the public welfare,[66] and characterized as a public charity,[67] tax exempt,[68] a non-profit institution,[69] and subject to the doctrine of charitable immunity.[70] Additionally, facilities built by the government or with government funds though operating as private hospitals still have been deemed private.[71]

B. The Existence of a Liberty or Property Interest

Invoking the fourteenth amendment's due process protection also requires the existence of a liberty or property interest.[72] Prominent among these liberty and property interests are the rights to obtain and to maintain employment without unreasonable government interference.[73]

1. Liberty Interest

The requirement that a liberty interest exist in an employment relationship was first expressed in *Board of Regents v. Roth*.[74] In *Roth*, the employment contract of a professor at a state univer-

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65 *See supra* notes 49-52 and accompanying text; *see also supra* note 63.

66 *See, e.g.*, Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963), *rev'd on other grounds*, 348 F.2d 70 (D.C. Cir. 1965); Moore v. Andalusia Hosp., Inc., 284 Ala. 259, 224 So.2d 617 (1969); Natale v. Sisters of Mercy, 243 Iowa 582, 52 N.W.2d 701 (1952); Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942); Van Campen v. Olean Gen. Hosp., 210 A.D. 204, 205 N.Y.S. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n., 149 W.Va. 229, 140 S.E.2d 457 (1965).

67 *See, e.g.*, Strauss v. Marlboro County Gen. Hosp., 185 S.C. 425, 194 S.E. 65 (1937).

68 *See, e.g.*, Mauer v. Highland Park Hosp. Found., 90 Ill. App. 2d 409, 232 N.E.2d 776 (1967); Levin v. Sinai Hosp. of Baltimore City, 186 Md. 174, 46 A.2d 298 (1946); Halberstadt v. Kissane, 31 A.D.2d 568, 294 N.Y.S.2d 841 (1968); State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n., 149 W.Va. 229, 140 S.E.2d 457 (1965).

69 *See, e.g.*, Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963), *rev'd on other grounds*, 348 F.2d 70 (D.C. Cir. 1969); Moore v. Andalusia Hosp., Inc., 284 Ala. 259, 224 So.2d 617 (1969); Mauer v. Highland Park Hosp. Found., 90 Ill. App. 2d 409, 232 N.E.2d 776 (1967).

70 State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 149 W.Va. 229, 140 S.E.2d 457 (1965).

71 Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963), *rev'd on other grounds*, 348 F.2d 70 (D.C. Cir. 1965); Akopiantz v. Bd. of County Comm'rs, 65 N.M. 125, 333 P.2d 611 (1958).

72 *See infra* notes 74-97 and accompanying text.

73 *See infra* notes 74-77, 81-91 and accompanying text.

74 408 U.S. 564 (1972).

sity who was openly critical of the school was not renewed. The professor brought suit alleging that the university's failure to renew his contract without notice or formal hearing violated his right to procedural due process.[75] In holding for the university, the Supreme Court ruled that to substantiate a claim of violation of a liberty interest, an individual must show damage to his standing in the community or the imposition of a stigma or other ostracism which would restrict future employment opportunities.[76] The Court noted that the university had made no such allegations and that the failure to be rehired carried no stigma or other future consequences.[77]

Shortly after *Roth*, the Supreme Court decided *Paul v. Davis*.[78] In *Davis* an individual accused of shoplifting brought suit against the Louisville, Kentucky police department alleging that the inclusion of his name and picture on a list of suspected shoplifters constituted an infringement upon his liberty interest.[79] The Court concluded that reputation alone is not a constitutionally protected interest. In reaching its decision, the Court emphasized that the state had not restricted an existing liberty interest and that a more substantial loss was required before due process protections could be invoked.[80]

Numerous courts have examined the existence of a liberty interest in a health care context. For example, in *Hoberman v. Lock Haven Hospital*,[81] a physician had been accused of professional misconduct by a medical executive committee subsequent to a hospital investigation and hearing.[82] Having no sanctions for such misconduct, the committee circulated a memorandum which stated, without reference to the physician, the committee's recommendation for instituting sanctions for future breaches of ethical conduct.[83] The physician sought a rehearing to review the charges against him and the hospital informed him of the procedure to be followed. Deeming the hospital rehearing pro-

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75 *Id.* at 568-69. The professor alleged that the university had acted in retaliation for his criticism of the school. *Id.*

76 *See id.* at 573. The Court stated that an individual's liberty interests are implicated only when the state has made a "charge against him that might seriously damage his standing and associations in his community." *Id.*

77 *Id.* at 573.

78 424 U.S. 693 (1976).

79 *Id.* at 697.

80 *See id.* at 711.

81 377 F. Supp. 1178 (M.D. Pa. 1974).

82 *Id.* at 1181.

83 *Id.* at 1181-82.

cedure unacceptable, the physician submitted a counterproposal, which the hospital rejected.[84]

The physician filed suit against the hospital, alleging that its rehearing procedures denied him his right to due process. The physician claimed that a hospital's activities constituted state action by virtue of its participation in federal and state program funding, and thus he was entitled to due process protection under the fourteenth amendment.[85] The United States District Court for the Middle District of Pennsylvania, while conceding that the physician may have had a liberty interest, rejected the physician's claim that state action was involved,[86] and held further that the hospital's rehearing procedure comported with due process requirements.[87]

In evaluating the existence of a liberty interest, some courts have required that a physician demonstrate that the hospital had published the allegations leveled against him.[88] Other courts have required that the physician challenge accusations lodged against him in order to substantiate controversies which may arise in a hearing.[89] Some jurisdictions have liberally interpreted these requirements. For example, courts have asserted that a physician's personal records and files which were available for inspection by prospective employers constituted "publication."[90] Furthermore, a court may find a protectable liberty interest where there is a scarcity of hospitals in a particular area.[91]

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84 *Id.* at 1182-83.

85 *Id.* at 1184-85.

86 *Id.* at 1186.

87 *Id.*

88 *See, e.g.*, Scarnati v. Washington, 599 F. Supp. 1554 (M.D. Pa. 1985), *aff'd*, 772 F.2d 896 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 795 (1986) (stigma not severe enough and any "publication" of charges was made by physician, not hospital); Hewitt v. Grabicki, 596 F. Supp. 297 (E.D. Wash. 1984) (remarks made in proficiency report insufficient to satisfy publication); Giordano v. Roudebush, 448 F. Supp. 899 (S.D. Iowa 1977) (disclosure of charges against doctor constituted publication sufficient to hamper future employment opportunities); Ritter v. Bd. of Comm'rs, 96 Wash. 2d 503, 637 P.2d 940 (1981) (press release issued by hospital and public statements made by hospital officials enough to satisfy publication requirements).

89 *See, e.g.*, Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983).

90 *See* Yashon v. Gregory, 737 F.2d 547, 556 (6th Cir. 1984); Giordano v. Roudebush, 448 F. Supp. 899, 905-06 (S.D. Iowa 1977); Clair v. Centre Community Hosp., 317 Pa. Super. 25, 35, 463 A.2d 1065, 1070 (1983). *See also* Comment, *The "Horowitz" and "Smith" Decisions: The Continuing Devitalization of the Liberty Concept*, 43 ALB. L. REV. 863, 881 (1979).

91 *See* Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968) (court noted that defendant hospital was the only public hospital in the area and that, without access to its facilities, plaintiff's practice would be limited); Clair v.

2. Property Interest

The right to procedural due process under the fourteenth amendment also protects an individual's property interest. The Supreme Court in *Roth* stated that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[92] The Court observed that the terms of the notice of employment stipulated the conditions of Roth's employment without any provision for renewal.[93] The Court held that the terms of the contract failed to provide Roth with a property interest sufficient to invoke the fourteenth amendment.[94]

In *Arnett v. Kennedy*,[95] the Supreme Court evaluated the existence of a property interest in an employment relationship. The Court found that a property interest in an employment relationship was entitled to fourteenth amendment due process protection only when the employee could be discharged for cause.[96] This decision gives rise to the supposition that an employee has a continued right of employment except when due cause exists to discharge him; he will therefore be entitled to due process in all other situations. In situations where employment is determined to be "at will," the Supreme Court has concluded that no property interest exists because the employer had the right to arbitrarily terminate employment and the employee had no expectation of continued employment.[97]

In the health care context, courts have held that because hospital bylaws provide specific lengths of time for which staff privileges are valid, the physician has a legitimate expectation of employment and thus a property interest.[98] Any attempt to discharge him during this period will invoke his constitutional right of due process. To do so without providing for due process would infringe upon his property interest. A physician lacks a property interest, however, when initially seeking staff privileges

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Centre Community Hosp., 317 Pa. Super. 25, 35, 463 A.2d 1065, 1070 (1983) (nearest hospital 30 miles away and plaintiff had no alternative hospital at which he could treat his patients).

92 408 U.S. at 577.

93 *See id.* at 566 n.1.

94 *Id.* at 579.

95 416 U.S. 134 (1974).

96 *See id.* at 151-52.

97 *See* Bishop v. Wood, 426 U.S. 341, 345-46 (1976).

98 *See supra* notes 23-25 and accompanying text.

because a physician does not have a constitutional right to staff privileges in a hospital. No cause of action would arise unless the hospital's refusal to grant such privileges was arbitrary and capricious. Consequently, a physician will only have a property interest when a hospital threatens the revocation of preexisting staff privileges.

III. Hospital Claims in Light of Increased Competitiveness in the Health Care Industry

The issue concerning automatic revocation of a physician's staff privileges upon termination of his employment contract is relatively undeveloped. Case law in this area predominantly deals with exclusive contracting and the denial of practice privileges in general.[99] Recently, however, several courts have considered the validity of tying staff privileges with employment agreements.

In *Northeast Georgia Radiological Associates v. Tidwell*,[100] the United States Court of Appeals for the Fifth Circuit held that medical staff privileges constitute a valuable property interest. Consequently, physicians must be given notice and a hearing prior to the termination or withdrawal of their staff privileges.[101] In *Tidwell*, a physician had applied for and received medical staff privileges at Walton County Hospital. At a later date, the physician and his wholly owned professional corporation, Northeast Georgia Radiological Associates, P.C., entered into an exclusive contract to provide radiological services for the hospital.[102]

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99 *See generally* Classen, *Jefferson Parish and its Progeny: More Efficient Health Care at What Price?*, 75 Ky. L.J. 441 (1987).

One of the first cases to specifically discuss this issue was Centeno v. Roseville Community Hosp., 107 Cal. App. 3d 62, 167 Cal. Rptr. 183 (1979). In *Centeno*, Roseville Community Hospital entered into an exclusive radiology medical services contract with the Roseville X-Ray Medical Group, a medical partnership. *Id.* at 66, 167 Cal. Rptr. at 184. The plaintiff, Dr. Centeno, subsequently left the partnership, and the hospital refused to allow him to continue to practice at the hospital, citing its exclusive contract with his former medical partnership. *Id.*

Dr. Centeno brought suit alleging, inter alia, that the hospital had denied him his due process rights and that exclusive contracts were illegal as against public policy. *Id.* at 66, 167 Cal. Rptr. at 184-85. The court, however, found that Dr. Centeno had not been denied due process and that the hospital had the authority to enter into an exclusive contract. *See id.* at 70-77, 167 Cal. Rptr. at 187-91. Furthermore, it held that exclusive contracts do not discriminate within the requirements of the equal protection clause. *Id.* at 73-74, 167 Cal. Rptr. at 188-89.

100 670 F.2d 507 (5th Cir. 1982).

101 *See id.* at 511.

102 *Id.* at 508-09.

The contract specifically provided that termination would only be for cause, and that all corporate employees must be members of the hospital staff.[103] It further required that the corporation's employees' staff privileges would automatically be terminated if the radiological services agreement were discontinued.[104] It was stipulated that matters not provided for under the contract were to be governed by the bylaws and policies of the hospital.[105]

The hospital terminated its contract with the physician and his corporation and withdrew his privileges without offering a pretermination hearing. The physician was later invited to attend the hospital's executive committee meeting to discuss his termination, but he declined the invitation.[106] The physician and his corporation brought suit against the hospital alleging breach of contract and a denial of their constitutional rights under section 1983 of the Civil Rights Acts.[107]

The United States Court of Appeals for the Fifth Circuit held that the physician was entitled to a hearing prior to the suspen-

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103 *Id.* at 509. The contract provided that:

> [T]his agreement shall be for a period of one year and shall be automatically renewed each successive year . . . unless either party, within ninety days from the anniversary date notifies the opposite party . . . . This agreement may be terminated for cause by the Hospital as to any and all those Hospital regulations which govern and control the other staff members of the Hospital . . . .

Id. at 509 n.3. The contract further provided that "[t]he P.C.'s employees shall comply with the policies, rules, and regulations of the Hospital. *Id.* at 509 n.4. The contract also stated that P.C.'s employees were required to have medical staff privileges. *Id.*

104 *Id.* at 509. The contract provided that "it is further agreed that the P.C.'s employees membership on the staff and all radiology privileges shall terminate if this Agreement is terminated." *Id.* at 509 n.5.

105 *Id.* at 509. The contract specifically provided: "In other matters not agreed upon herein they are subject only to the limitations of established medical staff and Hospital policies and by-laws, and rules and regulations established for the control and guidance of all staff positions." *Id.* at 509 n.6.

106 *Id.* at 509.

107 *Id.* at 510 (citing 42 U.S.C. § 1983 (1982)). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

sion or termination of his staff privileges.[108] The hospital's bylaws included three different procedural due process provisions for the protection of a physician's rights.[109] The court noted that the physician contract with the hospital incorporated the hospital's medical staff bylaws and established the existence of rules or mutually explicit understandings.[110]

Central to the court's holding was its recognition of prior decisions which found a property interest in a physician's medical staff privileges which were therefore protected by the fourteenth amendment.[111] The court reasoned that because medical staff privileges are a valuable property interest, notice and a hearing must be held prior to their termination or withdrawal, except in extraordinary situations where a valid governmental or medical interest is at stake.[112] Additionally significant was the fact that the physician had been granted staff privileges prior to entering into the contract.

The most recent case in this area is *Hospital Corporation of Lake Worth v. Romaguera*.[113] In *Romaguera*, a pathologist brought suit after his staff privileges were revoked following the termination of his employment agreement with the hospital.[114] His contract provided that he would have the exclusive right to render pathology services for the hospital but that the contract could be terminated without cause upon 120 days notice by either party. The contract further specified that his staff privileges would be automatically withdrawn upon termination of the contract.[115]

After executing the contract, the hospital amended its bylaws to provide that physicians in "medico/administrative" positions

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108 *Tidwell*, 670 F.2d at 511.

109 *See id.*

110 *Id.*

111 *Id.* (citing Shaw v. Hosp. Auth. of Cobb County, 507 F.2d 625 (5th Cir. 1975); Woodbury v. Mckinnon, 447 F.2d 839 (5th Cir. 1971); Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429 (6th Cir. 1971); Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968)).

112 *Id.* (citing Board of Regents v. Roth, 408 U.S. 564, 569-70 & nn.7-8 (1972); Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980); Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978); Burnley v. Thompson, 524 F.2d 1233 (5th Cir. 1975); Duffield v. Charleston Area Medical Center, 503 F.2d 512 (4th Cir. 1974); Jackson v. Norton-Children's Hosps., Inc., 487 F.2d 502 (6th Cir. 1973); Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971)).

113 511 So.2d 599 (Fla. Dist. Ct. App. 1986).

114 *See id.* at 559-60. The hospital terminated the agreement in order to award the exclusive contract to another physician group. *See id.* at 560.

115 *Id.*

such as those who interpret electrocardiograms (EKG's)[116] and electroencephalograms (EEG's)[117] would retain their staff privileges even after their contract with the hospital expired.[118] Dr. Romaguera claimed that he held an administrative position and was therefore protected by the bylaw revisions.[119] The hospital argued, however, that the bylaws did not amend Dr. Romaguera's contract because the contract required that both parties mutually agree in writing to any changes.[120]

The trial court found that Dr. Romaguera was a "medico/administrative" physician and therefore was entitled to the protections provided for under the bylaw amendments.[121] On appeal, the Florida District Court of Appeals concluded that a contract between a hospital and a physician would be affected by future bylaw amendments.[122] The court stated that the hospital had enacted the bylaw amendments for its own self-serving purposes, specifically to meet the requirements of the Joint Commission on the Accreditation of Hospitals (JCAH).[123] The court held that the contractual requirement that any amendment be in writing was satisfied by the written bylaw amendment.[124] The court reasoned that the hospital would have assented to its own bylaws as would have Dr. Romaguera since the amendments were of benefit to him.[125]

An important factor in the *Romaguera* case was the court's recognition of the potentially lucrative nature of exclusive contracts.[126] The court stated that these contracts are "extraordina-

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116 Electrocardiogram is defined as "[t]he graphic record of the heart's action currents obtained with the electrocardiograph." *Id.* at 448. The electrocardiograph is "[a]n instrument for recording the potential of the electrical currents that traverse the heart and initiate its contraction." *Id.*

117 Electroencephalogram is defined as "[t]he record obtained by means of the electroencephalograph." STEDMAN'S MEDICAL DICTIONARY 449-50 (5th ed. 1982). The electroencephalograph is "[a]n apparatus consisting of amplifiers and a write-out system for recording the electric potentials of the brain derived from electrodes attached to the scalp. It is useful in localizing intracranial lesions and brain tumors, and distinguishing between diffuse and focal brain lesions in epilepsy." *Id.* at 450.

118 *Romaguera*, 511 So.2d at 560.

119 *See id.*

120 *Id.*

121 *See id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *See id.* at 559-60. The court noted that "[t]he pathologist in this case had such a contract from which in 1981 . . . his P.A. grossed over $717,000 out of which he only paid two associates $110,000." *Id.*

rily lucrative and few applicants would hold out for post-contract staff privileges if by doing so the renewal of the exclusive contract would be forfeit[ed]."[127] The court's willingness to recognize the potentially lucrative nature of these contracts provides an additional factor for consideration in future cases.

In *Alonso v. Hospital Authority of Henry County*,[128] the Georgia Court of Appeals concluded that a physician's constitutionally protected property interest and right of due process is defined by the terms of his individual employment contract.[129] The court found that the physician's contract failed to incorporate procedural safeguards.[130] It distinguished *Tidwell*, in which the contract specifically incorporated the bylaws into the employment agreement, thus providing for procedural due process prior to the termination of a physician's staff privileges.[131]

The *Tidwell* and *Romaguera* decisions present an interesting caveat to the contractual waiver of due process rights. If a physician's employment agreement specifically incorporates by reference a hospital's bylaws, he will be afforded their due process protections. Furthermore, under the liberal interpretation of *Romaguera*, a physician will also be protected by any bylaw amendment, thus providing further due process protection.[132] Neither case, however, is incompatible with the holding of *Alonso* that a physician's due process rights can be contractually waived or limited.

Health care providers can structure their employment agreements, however, so that a physician's staff privileges will terminate simultaneously with his contract. In *Anne Arundel General Hospital v. O'Brien*,[133] a hospital entered into an exclusive contract with a group of radiologists to provide radiology services.[134] The hospital granted them staff privileges which expired the same day

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127 *Id.* at 561.

128 175 Ga. App. 198, 332 S.E.2d 884 (1985).

129 *Id.* at 202, 332 S.E.2d at 888 (citing Jago v. Van Curen, 454 U.S. 14, 18 (1981) ("Principles of contract law naturally serve as useful guides in determining whether or not a constitutionally protected property interest exists.")).

130 *See id.* at 202-03, 332 S.E.2d at 888. Specifically, the court noted that the contract failed to incorporate the hospital's bylaws. *Id.* at 203. Because the contract was drafted by the doctor, the court concluded that any ambiguity should be construed against him. *See id.* at 202.

131 *Id.* at 202-03, 332 S.E.2d at 888 (citing *Tidwell*, 670 F.2d at 510). *See supra* notes 100-12 and accompanying text (discussing *Tidwell*).

132 *See supra* notes 113-27 and accompanying text (discussing *Romaguera*).

133 49 Md. App. 362, 432 A.2d 483 (1981).

134 *See id.* at 373, 432 A.2d at 488.

as their employment contract.[135] When the hospital revoked their staff privileges on the day their contract terminated, the radiologists brought suit. The physicians argued that their due process rights had been infringed upon because their staff privileges existed separate and apart from the exclusive contract.[136]

Affirming the trial court's decision in part, the appellate court reasoned that because the contract dictated the terms of their employment,[137] the physician's privileges were never intended to extend past the contract term. It held that the physicians were not entitled to due process and that they had not been deprived of any property right. In further support of its decision, the court noted the radiologists' admission that the hospital had never promised to employ them after the termination of their contract and that they knew the continuation of their medical staff privileges was contingent on negotiating another contract.[138] Consequently, the court determined that the hospital had legally terminated the radiologists' staff privileges.[139]

IV. Protecting the Constitutional Rights of Physicians

A. Reaching an Equitable Balance

In resolving the inherent conflict between a hospital's alleged need for profitability and the physician's constitutionally protected right of due process, one must first evaluate the underlying economic considerations. A hospital is dependent upon its physicians to attract a large patient census which will patronize the hospital and its ancillary services. Without such patronage, a hospital will be unable to operate profitably. Consequently, it is of great importance for a hospital to have a productive professional staff which will be able to maintain a high census.

The physician desires to enter into a relationship with a hospital that will provide him with support services and access to the equipment necessary to perform his specialty. Other considerations important to the physician include a hospital's location and accessability to patients. A well known hospital can attract and direct patients to the staff physicians. As a result, physicians are especially desirous of obtaining staff privileges at prestigious hospitals.

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135 *Id.* at 366, 432 A.2d at 486.
136 *Id.* at 370, 432 A.2d at 488.
137 *See id.* at 374-76, 432 A.2d at 490-91.
138 *Id.*
139 *Id.* at 378, 432 A.2d at 492.

A hospital has superior bargaining power in negotiating a contract because of the increasing number of physicians,[140] its strong reputation in the community and often a level of specialization in certain procedures which are unavailable at other health care facilities. Furthermore, most hospitals are in the enviable position of having many more physicians apply for staff privileges than the hospital can accommodate.

Every individual has a constitutionally protected right of due process.[141] Although many health care providers are "private" and thus do not meet the state action requirement for invoking due process protections; any action to restrict a physician's due process rights should be closely scrutinized. Accordingly, the judiciary must not allow hospitals to coerce physicians into waiving their due process rights. Hospitals, in essence, are applying a form of economic duress.[142] In return for contractually waiving due process rights, a physician will receive the exclusive right to practice his specialty at a hospital. If the physician does not waive his rights, the hospital will not enter into a contract. Because of the growing number of physicians,[143] many physicians are willing to enter into an exclusive contract at any cost. If, however, they fail to obtain such a contract or lose the right to provide services, they face economic uncertainty.

It is only reasonable that a physician would have an expectancy of due process rights. By contracting with a physician, a hospital attempts to capitalize on the physician's stature in the community and profit from his talents. A hospital should not be allowed to act in a parasitic manner and totally abandon the physician for another more profitable relationship.

By granting physicians due process rights, physicians will be protected from decisions that are arbitrary and capricious or perhaps even politically motivated. There presently exists a great conflict between the interests of health care providers and physicians. As hospitals attempt to exert their authority over physi-

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140 *See supra* note 16.

141 *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983); Attoh v. INS, 606 F.2d 1273 (D.C. Cir. 1979); Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Nee Hao Wong v. INS, 550 F.2d 521 (9th Cir. 1977). *See also supra* note 29 and accompanying text.

142 Duress may render a contract voidable. *See* Chouinard v. Chouinard, 568 F.2d 430 (5th Cir. 1978); Ryder Truck Lines, Inc. v. Goren Equipment Co., Inc., 576 F. Supp. 1348 (N.D. Ga. 1983); Citibank, N.A. v. Real Coffee Trading Co., N.V., 566 F. Supp. 1158 (S.D.N.Y. 1983); La Beach v. Beatrice Foods Co., 461 F. Supp. 152 (S.D.N.Y. 1978).

143 *See supra* note 16.

cians, who traditionally have been independently minded, future problems and frictions will arise. As tensions increase between these two interests, a hospital's administration might be inclined to terminate those physicians who are viewed as troublesome or disruptive. Presently, many hospitals review physician records to determine how many patients each physician admits. Thus, a hospital may treat more favorably those physicians who generate a level of income which it deems "acceptable."

Those providers which have been unable to contractually resolve the issue of due process rights through the simultaneous termination of a contract and staff privileges, have attempted to amend their bylaws to eliminate the right to due process. In such situations, due process and other constitutional safeguards are lost. Consequently, physicians should carefully review a hospital's bylaws and any subsequent amendments to determine the effect on their due process rights. Employment contracts should contain a clause providing that the contract will be governed by the bylaws in existence at the time of the contract to avoid any problems associated with future revisions.

Physicians are not without fault, however. The judiciary should not protect those physicians who desire to maximize their earnings yet seek due process protections when their contracts are not renewed. Physicians who reap the benefits of exclusive contracts should also bear the responsibilities that accompany them. If a physician knowingly enters into a contract for a stipulated time period he should not be entitled to due process at the end of the contract unless he had a reasonable expectation that the contract or his staff privileges would be renewed.

Health care providers have a legitimate interest in providing services only to those physicians who are economically productive and deliver high-quality health care. Health care providers are justified in refusing to renew the contracts and staff privileges of those physicians who are not economically cost-effective. Hospitals are under great pressure to operate profitably. Furthermore, those physicians who are of questionable professional ability and who do not provide health care in conformance with the hospital's expectations should also be denied staff privileges.

Since hospitals can only accommodate a limited number of physicians, they must ensure that physicians with expired contracts vacate the hospital in a timely manner to allow the newly appointed physicians the opportunity to meet their contractual obligations. If the due process rights of physicians with expired

contracts delay the starting date for new appointees for a substantial period of time, the new physician group will be unable to assimilate quickly into the hospital. This delay might possibly affect the quality of health care delivered. Furthermore, the hospital may be unable to attract physician groups in the future because of the possibility of their being drawn into a protracted legal battle.

B. Several Viable Alternatives

Requiring a health care provider to grant physicians due process will have little effect on the hospital. The due process requirement could be implemented with minimal effort on the hospital's behalf within a short period of time through binding arbitration. The hospital would be required to notify the physician that the status of his staff privileges was scheduled to be changed and that the physician had the right to a hearing and appeal if he so requested. A two week period should be allowed for the physician to document his case and gather any supporting evidence. A hearing would then be held allowing each party to present its arguments before an impartial arbitrator. An artificial time constraint could be set requiring the arbitrator to render his decision within one week, with a one week period in which to appeal. In submitting disputes to arbitration, each party should agree to refrain from seeking a judicial remedy. Thus, the dispute would be completely resolved within a thirty day time span.

This is a viable alternative which should be incorporated into all contractual relationships between health care providers and physicians. Not only will the physicians' constitutional right to due process be safeguarded, but any concern over efficiency and expediency by the hospital would be addressed. This solution would also alleviate the potential problem of costly as well as lengthy litigation. Arbitration is not a burdensome alternative.

Binding arbitration is not the only means to resolve this issue. Health care providers and physicians could structure their agreements according to the guidelines established in *Anne Arundel General Hospital*.[144] The contract should be drafted so that it is effective for a stated number of years and that the physician's staff privileges terminate on the same day as the employment agreement. The physician would have no expectation of his staff privileges continuing, thereby avoiding any economic hardship.

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[144] *See supra* notes 133-39 and accompanying text.

If the physician's privileges were granted for a two year period he would know that they may not be renewed at the end of that time. Simultaneously, the physician will have gained the exclusive right to provide medical services and the entitlement to due process during the life of the contract.

Another alternative would be to provide in the contract that the physician would retain his staff privileges but would be unable to utilize the hospital's facilities upon the termination of his contract. This would allow a physician to continue practicing his specialty at the hospital, but would facilitate the introduction of new staff appointees. A radiologist, for example, would be unable to use the hospital's radiology equipment but would be able to provide consultation services when other staff physicians requested his opinion. This arrangement would guarantee that the hospital would be able to contract with a new physician group while allowing a physician with an expired contract to retain his staff privileges without interfering with the hospital's operation.

It is important that a physician retain those privileges he possessed prior to entering into an employment contract. It would be inequitable to require him to forfeit his prior privileges. This concern was addressed in *Tidwell*,[145] where the physician had staff privileges prior to entering into his exclusive contract. When the hospital terminated the contract, it terminated his preexisting staff privileges without providing due process. A physician should only be required to renounce those privileges he received through his exclusive contract. Thus, if he is granted special privileges upon entering the contract, fairness dictates that he lose only those privileges when the contract terminates. By maintaining and respecting this status quo, physicians and health care providers will be able to avoid the due process concerns associated with the retention of staff privileges.

V. CONCLUSION

In recent years, there has been a continuing trend to limit the due process rights of those physicians who enter into contractual relationships with health care providers. While this action is defended by many hospitals as necessitated by increased competition within the health care industry, these concerns do not justify the limitation of an individual's constitutional rights. By accepting the hospitals' argument the danger exists that eco-

145 *See supra* notes 100-12 and accompanying text.

nomic concerns will be used to further limit individual due process rights. At the same time, however, one must recognize that physicians often waive such rights in order to obtain the exclusive right to provide a medical service and to reap the financial benefits that accompany these contracts.

Due process protection for those physicians who contract with health care providers must be safeguarded in order to avoid inequitable results. Affording physicians due process rights will not impede the operation of a hospital or affect its profitability and efficiency. If the termination of a physician's staff privileges is justified, such action should only be taken after granting the physician due process. Courts should limit the ability of health care providers to infringe upon the constitutional rights of physicians. The judiciary should not allow them to act in an unconscionable manner when such a valuable property interest is at stake.