

University of Michigan Journal of Law Reform

Volume 11

1977

Hospital Medical Staff: When are Privilege Denials Judicially Reviewable?

David Hejna
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Courts Commons](#), and the [Health Law and Policy Commons](#)

Recommended Citation

David Hejna, *Hospital Medical Staff: When are Privilege Denials Judicially Reviewable?*, 11 U. MICH. J. L. REFORM 95 (1977).

Available at: <https://repository.law.umich.edu/mjlr/vol11/iss1/6>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

HOSPITAL MEDICAL STAFF: WHEN ARE PRIVILEGE DENIALS JUDICIALLY REVIEWABLE?

The relationship between a hospital and its medical staff is unique. Most physicians serving as hospital staff are not salaried employees.¹ Rather, they use hospital facilities to care for their patients pursuant to "staff privileges" granted by the hospital's board of governors.² Staff privileges at one area hospital are practically indispensable for the modern physician,³ and privileges at a conveniently located hospital are considered important.⁴ By extending staff privileges the hospital benefits from having a staff large enough to ensure maximum use of its facilities.⁵ The public benefits when an adequate number of qualified physicians have access to hospital facilities.⁶

Despite the importance to physicians, hospitals, and the public of reasonable grants of medical staff privileges, procedures for staff selection are often capricious and arbitrary.⁷ Although staff privileges are officially granted by the hospital's board, the actual decisions concerning staff selection are generally made by members of the hospital's current medical staff.⁸ These medical staffs often function like "exclusive social clubs or secret fraternal societies,"⁹ having power to exclude an applicant for "ideological, moral or even political reasons,"¹⁰ or for no reason at all.¹¹ Furthermore, the denial of privileges at one hospital may have adverse¹² or even disastrous¹³ consequences for the physician's career in general. Widespread abuse in the staff selection process has been alleged or documented in numerous cases and may involve conspiracy to exclude

¹ See M. ROEMER & J. FRIEDMAN, *DOCTORS IN HOSPITALS* 4, 25 (1971).

² HEALTH LAW CENTER, *PROBLEMS IN HOSPITAL LAW* 25 (2d ed. 1974).

³ Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968); Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959); Southwick, *Hospital Medical Staff Privileges*, 18 DE PAUL L. REV. 655, 658 (1969).

⁴ Ascherman v. Saint Francis Memorial Hosp., 45 Cal. App. 3d 507, 511, 119 Cal. Rptr. 507, 509 (1975).

⁵ Personal communications with G. Flick, Hospital Administrator, University of Michigan Hospital, and L. Burns, Hospital Administrator, University of Wisconsin Hospital. See ROEMER & FRIEDMAN, *supra* note 1, at 110-11.

⁶ Hawkins v. Kinsie, 540 P.2d 345, 348-49 (Colo. App. 1975); Greisman v. Newcomb Hosp., 40 N.J. 389, 402, 192 A.2d 817, 824 (1963); Fritz v. Huntington Hosp., 39 N.Y.2d 339, 348, 348 N.E.2d 547, 554, 384 N.Y.S.2d 92, 99 (1976).

⁷ Barrett v. United Hosp., 376 F. Supp. 791, 803 (S.D.N.Y. 1974).

⁸ *Joining The Hospital's Professional Social Club*, ACTION KIT FOR HOSPITAL LAW, November, 1973, at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Hawkins v. Kinsie, 540 P.2d 345, 348 (Colo. App. 1975).

¹² Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174, 178 (4th Cir. 1974).

¹³ Ascherman v. San Francisco Medical Soc'y, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1974).

new competition for patients,¹⁴ race discrimination,¹⁵ bias against osteopathic doctors,¹⁶ intolerance of a doctor's criticism of hospital policy,¹⁷ irrationally restrictive bylaws,¹⁸ mistaken summary appraisal of a doctor based on uncorroborated hearsay and rumor,¹⁹ and conspiracy to exclude a physician who testifies extensively in malpractice litigation.²⁰

In light of these abuses and the importance of properly granting staff privileges, there should be some means of correcting improper denials of staff privileges. If the hospital is a public institution, owned and operated by the government, a physician denied staff privileges may contest the denial in court and assert his right to the due process and equal protection safeguards of the United States Constitution and to certain federal statutory safeguards.²¹ Most hospitals, however, are private, non-profit organizations,²² and some small, private hospitals are even operated for profit.²³ The question whether the denial of staff privileges by a private hospital is judicially reviewable has been approached differently by the courts. All of the approaches provide the same kind of protection for the physician: procedural and substantive safeguards to ensure a fair hearing on his qualifications.²⁴ However, the approaches differ in the factors that

¹⁴ Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962); Burkhardt v. Community Medical Center, 432 S.W.2d 433 (Ky. 1968); Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965); Raymond v. Cregar, 38 N.J. 472, 185 A.2d 856 (1962); Hagan v. Osteopathic Gen. Hosp. of R.I., 102 R.I. 717, 232 A.2d 596 (1967); Nashville Memorial Hosp., Inc. v. Binkley, 534 S.W.2d 318 (Tenn. 1976).

¹⁵ Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968); Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

¹⁶ Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963); Schneir v. Englewood Hosp. Ass'n, 91 N.J. Super. 527, 221 A.2d 559 (1966). *Cf.* Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961) (regarding application of osteopathic physician for membership to a local medical society). Legislation has ameliorated the problem for osteopaths to some extent. HEALTH LAW CENTER, *supra* note 2, at 199. *Compare* Hayman v. City of Galveston, 273 U.S. 414 (1927) *with* Stribling v. Jolley, 253 S.W.2d 519 (Mo. App. 1953).

¹⁷ Ascherman v. San Francisco Medical Soc'y, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1974); Hagan v. Osteopathic Gen. Hosp. of R.I., 102 R.I. 717, 232 A.2d 596 (1967).

¹⁸ Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968); Ascherman v. Saint Francis Memorial Hosp., 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975); Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963).

¹⁹ Ascherman v. San Francisco Medical Soc'y, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1974).

²⁰ Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972).

²¹ Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975); Schooler v. Navarro County Memorial Hosp., 375 F. Supp. 841 (N.D. Tex. 1973); Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963). *See generally* Annot., 37 A.L.R.3d 645, 666-69 (1971). *See* note 30 *infra*, for a discussion of the safeguards imposed.

²² ROEMER & FRIEDMAN, *supra* note 1, at 3, 18. *See* BUREAU OF HEALTH MANPOWER, PUBLIC HEALTH SERVICE, DEP'T OF HEW AND THE AMERICAN HOSP. ASS'N, MANPOWER RESOURCES IN HOSPITALS—1966, at 1 (1966). Private non-profit hospitals are often called "voluntary" hospitals.

²³ ROEMER & FRIEDMAN, *supra* note 1, at 18.

²⁴ *Compare* Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975) (constitutional due process protection) *with* Anton v. San Antonio Community Hosp., 53 Cal. App. 3d 196, 127 Cal. Rptr. 394 (1976) (common law fiduciary duty protection).

must be present before the court has jurisdiction to apply those safeguards. This article discusses the various approaches and favors the one that imposes a common law fiduciary duty upon all voluntary hospitals to ensure that staff privileges are not unreasonably denied.

I. AVAILABILITY OF CONSTITUTIONAL AND STATUTORY PROTECTION

State statutes dealing with the denial of hospital staff privileges often apply only to public hospitals, and only to the most prevalent forms of discrimination.²⁵ A notable exception, however, is a recently amended New York statute which provides that the denial of staff privileges must be related to "standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant."²⁶ In *Fritz v. Huntington Hospital*,²⁷ the New York Court of Appeals held that the statute applied to both private and public hospitals.²⁸ Furthermore, the court ruled that physicians who had been denied privileges had standing to seek injunctive relief under the statute.²⁹

Judicial review does not deprive the hospital of its broad discretion in setting professional and ethical qualifications; but generally the substantive criteria which a board may rely upon in refusing to grant privileges must be reasonably related to the operation of the hospital. The following cases illustrate reasonable grounds for denying privileges. *Guerrero v. Burlington County Memorial Hosp.*, 70 N.J. 344, 360 A.2d 334 (1976), and *Davis v. Morristown Memorial Hosp.*, 106 N.J. Super. 33, 254 A.2d 125 (1969) (overcrowding); *Bricker v. Sceva Spare Memorial Hosp.*, 111 N.H. 276, 281 A.2d 589, *cert. denied*, 404 U.S. 995 (1971), *Huffaker v. Bailey*, 540 P.2d 1398, 1400-01 (Ore. 1975) and *Hagan v. Osteopathic Gen. Hosp.*, 102 R.I. 717, 726, 232 A.2d 596, 601-02 (1967) (disruptive influence, uncooperativeness, or personality clash adversely affecting hospital efficiency); *Schneir v. Englewood Hosp. Ass'n*, 91 N.J. Super. 527, 221 A.2d 559 (1966) (inexperience, mediocre academic record, and no pressing need for privileges); *Davidson v. Youngstown Hosp. Ass'n*, 19 Ohio App. 2d 246, 250 N.E.2d 892 (1969) (podiatrist reasonably excluded). A physician's staff privileges may be summarily suspended where continued care by the physician might endanger his patients, but a hearing must be held within a reasonable time. *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301, 310 (E.D. Pa. 1970).

The applicant is also generally entitled to procedural fairness, including notice of any adverse charges and an opportunity to be heard. *Sosa v. Board of Managers of Val Verde Memorial Hosp.*, 437 F.2d 173, 176-77 (5th Cir. 1971). The aid of counsel for the applicant may be appropriate where the charges are especially serious, or where the hospital's attorney is present. *Silver v. Castle Memorial Hosp.*, 53 Hawaii 475, 485, 497 P.2d 564, 572, *cert. denied*, 409 U.S. 1048 (1972). See generally Note, *Denial of Hospital Staff Privileges: Hearing and Judicial Review*, 56 IOWA L. REV. 1351 (1971); Comment, *Hospital Medical Staff Privileges: Recent Developments In Procedural Due Process Requirements*, 12 WIL-LAMETTE L.J. 137 (1975).

²⁵ *Porter Memorial Hosp. v. Harvey*, 279 N.E.2d 583 (Ind. App. 1972); *Moore v. Board of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 495 P.2d 605, *cert. denied*, 409 U.S. 879 (1972). See generally HEALTH LAW CENTER, *supra* note 2, at 188-95.

State restraint of trade statutes have generally been held inapplicable to a hospital's refusal to grant staff privileges. *Moles v. White*, 336 So. 2d 427 (Fla. App. 1976). See generally Southwick, *Hospital Medical Staff Privileges*, 18 DE PAUL L. REV. 655, 669 (1969).

²⁶ N.Y. PUB. HEALTH LAW § 2801-b(1) (McKinney Supp. 1975).

²⁷ 39 N.Y.2d 339, 348 N.E.2d 547, 384 N.Y.S.2d 92 (1976).

²⁸ *Id.* at 345, 348 N.E.2d at 552, 384 N.Y.S.2d at 96.

²⁹ *Id.* at 345-46, 348 N.E.2d at 552-53, 384 N.Y.S.2d at 96-97. The court remanded the

Despite the limited protection under most state statutes, federal constitutional and statutory protection is available when "state action" is found.³⁰ State action is clearly present if the hospital is public.³¹ However, determining whether there is state action in the private hospital setting is more complex. Most voluntary hospitals have varying degrees of involvement with federal, state, and local government. Proprietary hospitals are also extensively regulated and may indirectly receive substantial funding through medicare and medicaid programs.³² The courts have applied three principle tests for state action in the private hospital setting.

A. *The Nexus Test*

Under the nexus test for state action, there must be a direct connection between the state and the hospital's denial of staff privileges. A three-pronged formulation of the test is set forth in *Barrett v. United Hospital*.³³ First, state involvement with the hospital must be significant. Second, the state must be involved in the act which caused the injury, that is, the denial of privileges. Third, the state's involvement must aid, encourage, or connote approval of the injurious act.

In applying the nexus test, the *Barrett* court ruled that tax-exemption, the receipt of substantial federal aid, and extensive state regulation of hospitals did not satisfy the nexus requirement. There was no direct connection between those state activities and the hospital's policies regarding the

case for a hearing on the merits of the plaintiff's claim that the defendant hospital's exclusion of all osteopathic doctors failed to meet the requirements of the statute.

³⁰ The Fifth and Fourteenth Amendments to the Constitution provide that the state shall not deprive a person of "liberty, or property, without due process of law" nor deny to any person "equal protection of the laws." Hospital staff privileges are generally considered to be a property or liberty interest of the physician. *Foster v. Mobile County Hosp. Bd.*, 398 F.2d 227, 229 (5th Cir. 1968); *Wyatt v. Tahoe Forest Hosp. Dist.*, 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959); *North Valley Hosp., Inc. v. Kauffman*, 544 P.2d 1219, 1224 (Mont. 1976); *Adler v. Montefiore Hosp. Ass'n*, 453 Pa. 60, 71-72, 80-81, 311 A.2d 634, 640, 644-45, (1973), *cert. denied*, 414 U.S. 1131 (1974). *But see Shaw v. Hosp. Authority*, 507 F.2d 625, 628 n.4 (5th Cir. 1975); *Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1366 (7th Cir. 1974). *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972), which held that a non-tenured teacher without other contractual agreement had no constitutionally protected property or liberty interest in continued employment at a public school. Nonetheless, *Roth* was found not to apply to a physician's interest in having hospital staff privileges in *Schlein v. Milford Hosp.*, 383 F. Supp. 1263, 1264 (D. Conn. 1974).

Because staff privileges are generally viewed as a property or liberty interest, the principle issue where privileges are denied is whether state action is involved. This is also generally true for related federal statutory protection. 42 U.S.C. § 1983 (1970) ("under color of state law"). Dicta in some cases have suggested that 42 U.S.C. § 1985 (3) may apply to invidious class discrimination despite the absence of state action. *Pollock v. Methodist Hosp.*, 392 F. Supp. 393, 395 (E.D. La. 1975); *Barrio v. McDonough Dist. Hosp.*, 377 F. Supp. 317, 319-20 (S.D. Ill. 1974). Nonetheless, it is unlikely that invidious class discrimination will be present in many privilege denials. In *Bricker v. Crane*, 468 F.2d 1228, 1233 (1st Cir. 1972), for example, the court held that physicians who had testified extensively in malpractice litigation did not comprise a suspect class. *See generally Griffin v. Breckenridge*, 403 U.S. 88 (1971).

³¹ See note 22 *supra*.

³² *Monyek v. Parkway Gen. Hosp., Inc.*, 273 So. 2d 430 (Fla. App. 1973).

³³ 376 F. Supp. 791, 797 (S.D.N.Y. 1974), *aff'd*, 506 F.2d 1395 (2d Cir. 1974).

termination of staff privileges.³⁴ There were, for example, no state requirements that the hospital's bylaws governing the staff appointment process receive state approval, nor were any state nominees sitting on the board of trustees.³⁵

The only decision where state action has been found in a private hospital under the nexus test is *Aasum v. Good Samaritan Hospital*.³⁶ In *Aasum*, the plaintiff chiropractor claimed that the hospital's refusal to permit him access to clinical laboratory facilities to treat his patients was unreasonable and discriminatory. The defendant private, non-profit hospital's refusal was based on recommendations of the Oregon Board of Medical Examiners concerning use of hospital facilities by persons not licensed to practice medicine. In view of this connection between the state agency and the hospital's exclusion of the plaintiff, the court found state action under the *Barrett* formulation of the nexus test. The court, however, sustained the constitutionality of the hospital's action.

In both *Barrett*³⁷ and *Aasum*,³⁸ the courts noted that a less restrictive test would be applied where there are allegations of racial discrimination. Other courts are in accord with this double state action standard,³⁹ but the standard has not been endorsed by the Supreme Court.⁴⁰ In other respects, however, the nexus test is more consistent with recent Supreme Court rulings than the other two tests for state action commonly employed by the courts. In *Jackson v. Metropolitan Edison Co.*,⁴¹ a public utility that held a partial monopoly because of extensive state regulation terminated a consumer's electric service without advance notice or a prior hearing. The Court held that no state action was present because the termination policy had been initiated by the utility and had never been specifically approved by the state regulatory agency.⁴² The Court found that there was no direct connection between the state and the termination of electric service. The Court also held that the company was not fulfilling a "public function" to an extent that would constitute state action.⁴³

³⁴ *Id.* at 800-05.

³⁵ *Id.* at 803.

³⁶ 395 F. Supp. 363 (D. Ore. 1975), *aff'd*, 542 F.2d 792 (9th Cir. 1976).

³⁷ 376 F. Supp. 791, 797 (S.D.N.Y. 1974).

³⁸ 395 F. Supp. 363, 367 n.4, 368 (D. Ore. 1975).

³⁹ *Ascherman v. Presbyterian Hosp. of Pacific Medical Center*, 507 F.2d 1103, 1106 (9th Cir. 1974) (Duniway, J., concurring); *Ponca City Hosp. v. Murphree*, 545 P.2d 738, 742 (Okla. 1976).

⁴⁰ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting).

⁴¹ 419 U.S. 345 (1974).

⁴² *Id.* at 355-57.

⁴³ *Id.* at 352-54. These rulings in *Jackson* appear to retreat from the state action decisions in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). In *Burton*, the Court found state action where a restaurant leased space in a parking structure owned and operated by a state agency and built with public funds. The Court premised its finding of state action on whether "to some significant extent the State in any of its manifestations has . . . become involved," and noted that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 722. The Court reasoned that state action was present because the restaurant was operated as an integral part of the public parking structure and benefitted from the building's tax-exempt status, and because the state

Although the nexus test is generally in accord with the Supreme Court's state action decision in *Jackson*, the test does not provide adequate protection for physicians denied staff privileges by private hospitals.⁴⁴ Consequently, adequate protection under a theory of state action can be afforded physicians only if the Court's decision is held inapplicable in the hospital setting.

B. The Significant State Involvement Test

A few courts, relying on early Supreme Court rulings, apply a relatively broad test for state action in the hospital setting.⁴⁵ State action is present wherever state involvement with the hospital is significant, as viewed after sifting and weighing all relevant facts and circumstances.⁴⁶ Neither a direct nexus between the state and the denial of staff privileges nor state approval of the denial is required.

In cases decided under this test, findings of state action have rested primarily on the presence of substantial federal funding.⁴⁷ Hospital funding for capital expenditures is derived chiefly from the Hill-Burton Act.⁴⁸ A finding of state action is likely where Hill-Burton funds account for one-third to one-half of the costs for any large hospital construction

agency by its inaction had tacitly supported the restaurant's discrimination against the plaintiff. 365 U.S. at 724-25.

In *Moose Lodge*, however, the Court found no state action in a state agency's issuance of a liquor license, where it was issued to a private club, located in a private building, which did not hold itself out as a public accommodation. The Court again noted the importance of "sifting facts and weighing circumstances," 407 U.S. at 172 (quoting *Burton*, 365 U.S. at 722), and stated that the test was whether the state had "significantly involved itself" with the discrimination. 407 U.S. at 173 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). The Court found none of the factors that constituted significant state involvement in *Burton*.

⁴⁴ *Aasum v. Good Samaritan Hosp.*, *supra* note 36, at 7, is the only case in which state action has been found under this test.

⁴⁵ This approach was first formulated and has been consistently applied by the Fourth Circuit. See *Christhilf v. Annapolis Emergency Hosp. Ass'n*, 496 F.2d 174 (4th Cir. 1974). Arguably, the First, Third, and Eighth Circuits are in accord. *Klinge v. Lutheran Charities Ass'n of St. Louis*, 523 F.2d 56 (8th Cir. 1975); *Bricker v. Sceva Speare Memorial Hosp.*, 339 F. Supp. 234, 237 (D.N.H. 1972), *aff'd sub nom. on other grounds*, *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). Compare *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301 (E.D. Pa. 1970) with *Ozlu v. Lock Haven Hosp.*, 369 F. Supp. 285 (M.D. Pa. 1974). The Eastern District of Louisiana is in accord. *Pollock v. Methodist Hosp.*, 392 F. Supp. 393 (E.D. La. 1975). In addition, support for a broader test has been expressed by members of two state courts. *Adler v. Montefiore Hosp. Ass'n*, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974); *Silver v. Castle Memorial Hosp.*, 53 Hawaii 475, 487, 497 P.2d 564, 572-73 (1972) (Abe, J., concurring), *cert. denied*, 409 U.S. 1048 (1972). The Tenth Circuit appears to have rejected this approach. Compare *Don v. Okmulgee Memorial Hosp.*, 443 F.2d 234 (10th Cir. 1971) with *Ward v. St. Anthony Hosp.*, 476 F.2d 671 (10th Cir. 1973).

⁴⁶ *Eaton v. Grubbs*, 329 F.2d 710, 712-13 (4th Cir. 1964); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 966-67 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). The test is derived primarily from *Burton v. Wilmington Parking Auth.*, 365 U.S. 163 (1972). See note 43 *supra*.

⁴⁷ Because federal funding has been so pervasive in hospital construction, the test is sometimes expressed as if that were the only criterion. *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826, 828 (4th Cir. 1969); *Barrett v. United Hosp.*, 376 F. Supp. 791, 800 (S.D.N.Y. 1974), *aff'd*, 506 F.2d 1395 (2d Cir. 1974).

⁴⁸ 42 U.S.C. § 291 (1970 & Supp. V 1975).

project.⁴⁹

The Hill-Burton Act, however, is more than merely a source of hospital funding. The Act also establishes state-wide planning for the construction of all public and private non-profit hospitals.⁵⁰ This regulatory aspect increases the "significance" of any funds received by a hospital and may be significant even where no funds are received. In *Eaton v. Grubbs*,⁵¹ for example, although the defendant non-profit hospital had not received any Hill-Burton funds, the pervasiveness of the state's participation in the Hill-Burton program contributed to the finding of significant state involvement. The court also considered the hospital's history of local grants and tax-exemptions, the county's reversionary interest in the hospital's real property, and the benefits to the hospital from the state's exercise of its power of eminent domain.⁵²

Unlike the nexus test for state action,⁵³ the significant state involvement test is not relaxed in cases of alleged racial discrimination.⁵⁴ The pivotal case was *Sams v. Ohio Valley General Hospital Association*,⁵⁵ where the plaintiffs claimed that the defendant hospitals' refusal to grant staff privileges to physicians not having offices and practices within the county was irrational and discriminatory, and thus a denial of equal protection. The court held that the same state action test should be applied as in prior cases involving racial discrimination.⁵⁶ The court then found that state action was present under the significant state involvement test because both hospitals had received substantial Hill-Burton funds.⁵⁷

The same test was applied in subsequent cases where the physician claimed that he had been denied due process, rather than equal protection. In *Christhilf v. Annapolis Emergency Hospital Association*,⁵⁸ for example, the court affirmed the district court's finding of state action by a private, non-profit hospital based on county and Hill-Burton funding for capital expenditures. Having found state action, the court held that the plaintiff's hospital privileges could not be terminated without due process.⁵⁹

⁴⁹ *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826, 827 (4th Cir. 1969); *Citta v. Delaware Valley Hosp.*, 313 F. Supp. 301, 307 (E.D. Pa. 1970).

⁵⁰ 42 U.S.C. §§ 291c-291e (Supp. V 1975). See generally *Ward v. St. Anthony Hosp.*, 476 F.2d 671 n.5 (10th Cir. 1973); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 963-65 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

⁵¹ 329 F.2d 710, 713 (4th Cir. 1964).

⁵² *Id.* at 712-13.

⁵³ See notes 37-40 and accompanying text *supra*.

⁵⁴ See *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 257 F. Supp. 369, 371 (D. W. Va. 1966), *rev'd on other grounds*, 413 F.2d 826, 828 (4th Cir. 1969); *Pollock v. Methodist Hosp.*, 392 F. Supp. 393, 395 (E.D. La. 1975).

⁵⁵ 413 F.2d 826 (4th Cir. 1969).

⁵⁶ *Id.* at 828.

⁵⁷ One hospital had received \$3,352,755 to assist construction of a new addition costing a total of \$9,863,758. The other hospital had received \$625,976 for a new wing costing a total of \$1,264,696. In addition, both hospitals had received appreciable private contributions from the community. *Id.* at 827.

⁵⁸ 496 F.2d 174 (4th Cir. 1974).

⁵⁹ *Id.* at 178.

Although the significant state involvement test goes far toward expanding protection for the physician concerning staff privileges, certain problems inhere in the approach. The test is apparently not in accord with the recent Supreme Court decision in *Jackson* that requires application of the nexus test criteria, at least in cases outside the hospital context.⁶⁰ The significant state involvement test is also more vague than the nexus test because it focuses generally on the "significance" of state involvement with the institution rather than on a direct connection between the state and the injurious act.⁶¹ Because it is vague, the test does not provide adequate guidance for hospitals. Finally, increased findings of state action for the purpose of safeguarding medical staff privileges concomitantly subject the hospital to suits based on other constitutional claims, including claims by patients which may be appropriate only against truly public hospitals.⁶²

C. Public Function Test For State Action

The Sixth Circuit has applied a public function test,⁶³ which forms an intermediate approach to the state action question in the private hospital setting. Under this test, a hospital is subject to constitutional and statutory constraints on state action if it is fulfilling the role of a public agency. Although a direct nexus between the state and the denial of staff privileges is not required, something more than regulation and partial state funding must be shown.⁶⁴ For example, the appointment of a private

⁶⁰ See notes 41-43 and accompanying text *supra*.

⁶¹ See Part I.A. *supra*. See also *Jackson v. Statler Foundation*, 496 F.2d 623, 636-41 (2d Cir. 1974) (Friendly, J., dissenting), *cert. denied*, 420 U.S. 927 (1975); *Ascherman v. Presbyterian Hosp. of Pac. Medical Center*, 507 F.2d 1103, 1105-06 (9th Cir. 1974) (Duniway, J., concurring).

⁶² For example, in *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975), the plaintiff sought declaratory and injunctive relief against enforcement of the defendant hospital's policy of prohibiting abortions except for the purpose of saving the life of the mother. The court ruled that, absent en banc reconsideration, it was constrained to apply the same state action test as in prior cases involving the staff privilege issue. Because the hospital had received substantial Hill-Burton funds, state action was found and the hospital's anti-abortion policy was held in violation of the Constitution. Congress has suggested that such a result in the case of private hospitals may be improper. The Health Programs Extension Act of 1973, 42 U.S.C. § 300a-7(a)(2)(A)(Supp. V 1975), provides that the receipt of Hill-Burton funds does not authorize a court to order a private hospital to perform an abortion "if the performance of such a procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." *Id.* The Court in *Charleston Area Medical Center*, however, found this provision inapplicable. 529 F.2d at 624 n.7. See generally *Abortion Issue Portends New Attacks On Hospitals*, ACTION KIT FOR HOSPITAL LAW, September 1972.

The fiduciary duty approach, discussed in Part II, *infra*, achieves judicial review of staff privilege denials without the greater imposition of requiring private hospitals to perform abortions against hospital policy. Compare *Doe v. Bridgeton Hosp. Ass'n*, 130 N.J. Super. 416, 327 A.2d 448 (1974) (no fiduciary duty respecting patient abortions) with *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 192 A.2d 817 (1963) (fiduciary duty respecting staff privileges).

⁶³ *O'Neil v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971); *Meredith v. Allen County War Memorial Hosp.* Comm'n, 397 F.2d 33, 35 (6th Cir. 1968).

⁶⁴ *Jackson v. Norton-Children's Hosp.*, 487 F.2d 502 (6th Cir. 1973), *cert. denied*; 416 U.S. 1000 (1974).

hospital's board members by a public body, when combined with state regulation and funding, is sufficient to satisfy the public function test. In *Meredith v. Allen County War Memorial Hospital Commission*,⁶⁵ the entire commission operating the private, non-profit hospital was appointed by the governing body of the county. In addition, the hospital was the only one in the area and it had been financed in part with public funds. The court held that "[a]n institution such as this, serving an important public function and financed in part by public funds, is sufficiently linked with the state for its acts to be subject to the limitations of the Fourteenth Amendment."⁶⁶

The Sixth Circuit broadened its approach in *Chiaffitelli v. Dettmer Hospital, Inc.*,⁶⁷ where only five of the nine hospital board members were responsible to the public. Under the private hospital's charter, four members were appointed by the County Commissioner and a fifth was the Judge of the Common Pleas Court.⁶⁸ In view of this, the Sixth Circuit in a per curiam opinion reversed the district court's ruling that the hospital was not a "public agency." Although the hospital had received public funding, the court expressly disclaimed reliance on that factor in holding that the hospital was a public agency.⁶⁹ The court then ruled that, as a public agency, the hospital was subject to the plaintiff physician's claim that the failure to renew his privileges was arbitrary and discriminatory in violation of 42 U.S.C. § 1983.⁷⁰

Public appointment of hospital board members is only one of several additional factors that may sustain a finding of state action in a private, non-profit hospital under this test. In *O'Neil v. Grayson County War Memorial Hospital*,⁷¹ the court found state action although none of the hospital board members were publicly appointed. The court observed that the hospital was the only one in the county and was financed in part by Hill-Burton funds.⁷² The Hospital Foundation also leased premises from the County Fiscal Court on a long term basis in exchange for nominal consideration and the Foundation's agreement to fulfill all duties incident to maintenance and operation of the hospital.⁷³ The lease further provided the Fiscal Court with a reversionary interest in all donations received by the hospital and required that the hospital's board contain at least one member from each of the county's districts. The court held that all these facts were elements of "the public function served by the Hospital,"⁷⁴ and concluded, "the Hospital is not a purely private institution, immune from the mandates of the Fourteenth Amendment."⁷⁵

⁶⁵ 397 F.2d 33 (6th Cir. 1968).

⁶⁶ *Id.* at 35.

⁶⁷ 437 F.2d 429 (6th Cir. 1971).

⁶⁸ *Id.* at 430.

⁶⁹ *Id.* at 430 n.1 and accompanying text.

⁷⁰ *Id.* at 430.

⁷¹ 472 F.2d 1140 (6th Cir. 1973).

⁷² *Id.* at 1142.

⁷³ *Id.*

⁷⁴ *Id.* at 1143.

⁷⁵ *Id.*

The public function rationale also appears to have been the basis for a finding of state action in a private, non-profit hospital by the District Court of Connecticut. In *Schlein v. Milford Hospital*,⁷⁶ the court found that because the state licensed physicians and because state licensing of hospitals had created a geographic monopoly, the hospital played "a pivotal role in the implementation of the state's regulatory authority."⁷⁷ Therefore, the hospital was required to comply with the due process limitations of the Fourteenth Amendment.

The public function test for state action in the hospital setting is commendable because it reflects the increasing tendency of people to view the hospital as fulfilling a public function.⁷⁸ Some writers have taken the position that hospitals have essentially become "public utilities."⁷⁹ Even if hospitals are public utilities, however, it does not necessarily follow that state action is present. Supreme Court decisions dealing with the public function doctrine do not require such a result⁸⁰ because those decisions involved private entities carrying on traditional governmental functions, while hospitals have traditionally been non-governmental.⁸¹ In addition, the doctrine was originally developed with respect to First Amendment issues, not due process and equal protection claims.⁸²

Even if decisions applying the public function test to the hospital setting have formulated a permissible interpretation of the Supreme Court rulings, the test is nevertheless overly vague.⁸³ Hospitals subject to this test cannot adequately determine which factors the court will apply or what weight the court will accord particular factors. In addition, the test fails to result in findings of state action at many private hospitals.⁸⁴ Finally, as with the other tests, findings of state action concomitantly subject the

⁷⁶ 383 F. Supp. 1263 (D. Conn. 1974).

⁷⁷ *Id.* at 1265. Conn. Gen. Stat. Ann. § 19-33 (West 1969) (transferred to § 19-577 in 1976) requires a license for anyone wishing to "establish, conduct, operate or maintain" a hospital. Conn. Gen. Stat. Ann. § 19-36 (West 1969) (transferred to § 19-580 in 1976) requires that in issuing a license, consideration be given to the "demonstrable need for such institutions." It is worth noting that a similar North Carolina statute has been held unconstitutional. *In re Certificate of Need For Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

⁷⁸ Southwick, *Hospital Medical Staff Privileges*, 18 DE PAUL L. REV. 655, 657 (1969); *Silver v. Castle Memorial Hospital*, 53 Hawaii 475, 487-90, 497 P.2d 564, 572-74 (1972) (Abe, J., concurring), *cert. denied*, 409 U.S. 1048 (1972).

⁷⁹ M. ROEMER & J. FRIEDMAN, *supra* note 1, at 20.

⁸⁰ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974). See notes 41-43 and accompanying text *supra*. See discussion in *Barrett v. United Hosp.*, 376 F. Supp. 791, 799 (S.D.N.Y. 1974), *aff'd*, 506 F.2d 1395 (2d Cir. 1974); *Hawkins v. Kinsie*, 540 P.2d 345, 347-48 (Colo. App. 1975); *Moles v. White*, 336 So. 2d 427, 429-30 (Fla. App. 1976).

⁸¹ *Barrett v. United Hosp.*, 376 F. Supp. 791, 799 (S.D.N.Y. 1974). The principle Supreme Court decision is *Marsh v. Alabama*, 326 U.S. 501 (1946), where the Court held that a "company town" was subject to constitutional restrictions regarding freedom of press and religion. Subsequent Supreme Court opinions may have effectively limited the public function doctrine to the facts of *Marsh*. Note, *Judicial Review of Private Hospitals*, 75 MICH. L. REV. 445, 456-57 n.70 (1976).

⁸² See note 81 *supra*.

⁸³ The Sixth Circuit recognizes that its approach is vague. *O'Neil v. Grayson County Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973).

⁸⁴ See *Jackson v. Norton-Children's Hosp.*, 487 F.2d 502 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974).

hospital to a range of claims unrelated to the unique issue of staff privilege denials.⁸⁵

II. AVAILABILITY OF COMMON LAW PROTECTION: THE FIDUCIARY DUTY

Where the denial of staff privileges comprises a common law tort such as defamation⁸⁶ or interference with trade or business,⁸⁷ the physician may bring an appropriate action against the hospital board and members of the medical staff.⁸⁸ However, where the hospital has held a "quasi-judicial" hearing concerning the physician's qualifications, statements made in connection with the hearing are privileged even though they are false and result in an unreasonable denial of staff privileges.⁸⁹ In addition,

⁸⁵ See note 62 and accompanying text *supra*.

⁸⁶ *Goodley v. Sullivant*, 32 Cal. App. 3d 619, 108 Cal. Rptr. 451 (1973); *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 100 Cal. Rptr. 656 (1972); *DiMiceli v. Klieger*, 58 Wis. 2d 359, 206 N.W.2d 184 (1973). *Cf.* *Raymond v. Cregar*, 38 N.J. 472, 185 A.2d 856 (1962) (intentionally defamatory remarks tied to malicious interference with staff appointment).

⁸⁷ *Willis v. Santa Ana Community Hosp. Ass'n*, 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962); *Burkhart v. Community Medical Center*, 432 S.W.2d 433 (Ky. App. 1968); *Cowan v. Gibson*, 392 S.W.2d 307 (Mo. 1965); *Nashville Memorial Hosp., Inc. v. Brinkley*, 534 S.W.2d 318 (Tenn. 1976). *But see* *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958). *Letsch v. Northern San Diego County Hosp. Dist.*, 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (1966); *Blank v. Palo Alto-Stanford Hosp. Center*, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965). *But cf.* *Rush v. City of St. Petersburg*, 205 So. 2d 11 (Fla. 1967) (closed radiology department did not constitute an illegal corporate practice of medicine).

⁸⁸ Although this tort liability may discourage ungrounded privilege denials, it may also go too far and result in a grant of staff privileges to an unqualified physician. Those charged with evaluating staff often fear that true vigilance on their part will expose them to personal liability. JOINT COMM'N ON ACCREDITATION OF HOSPITALS (JCAH), GUIDELINES FOR THE FORMULATION OF MEDICAL STAFF BYLAWS, RULES AND REGULATIONS 1971, at 49-50 (1971). The problem of unqualified physicians obtaining staff privileges is important from the hospital's viewpoint because hospitals have been held liable for the negligence of its staff, on theories of either vicarious or direct corporate responsibility. *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966); *Corleto v. Shore Memorial Hosp.*, 138 N.J. Super. 302, 350 A.2d 534 (1975). *See generally* Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. WEST. L. REV. 429, 440-53 (1973). This development has led to the suggestion that hospitals should have greater discretion in denying staff privileges, and correspondingly be subject to less judicial review. *Huffaker v. Bailey*, 273 Ore. 273, 282, 540 P.2d 1398, 1402 (1975). However, it does not follow that judicial review to ensure that privileges are not unreasonably denied to a qualified physician will in any way affect the hospital's right to deny privileges to an unqualified applicant. Indeed, requiring hospitals to adopt sound procedures and criteria should help to ensure that only qualified physicians are granted staff privileges. *See generally* JOINT COMM'N ON ACCREDITATION OF HOSPITALS, *supra* at 10-14, 21-29.

⁸⁹ *Cf.* *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 100 Cal. Rptr. 656 (1972). The primary factors determining the nature of a quasi-judicial hearing applied by the court in *Ascherman* were "(1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly (3) whether its power affects the personal or property rights of private persons . . ." *Id.* at 866, 100 Cal. Rptr. at 659. A private hospital's hearing was held "quasi-judicial" in *Goodley v. Sullivant*, 32 Cal. App. 3d 619, 108 Cal. Rptr. 451 (1973). *But see* *DiMiceli v. Klieger*, 58 Wis. 2d 359, 206 N.W.2d 184 (1972).

it should be noted that any protection concerning staff privileges provided in a hospital's bylaws is judicially enforceable under common law principles.⁹⁰

A growing minority of courts, when confronted with a private hospital's unreasonable denial of staff privileges, have imposed a common law fiduciary duty upon the hospital.⁹¹ Under this duty, the hospital must ensure that privileges are not denied unreasonably, arbitrarily, or capriciously.⁹² As stated by the California courts, the hospital's action must be "substantively rational and procedurally fair."⁹³

The crucial issue, with respect to this duty, is determining the circumstances under which it will be imposed. In the leading case, *Greisman v. Newcomb Hospital*,⁹⁴ the New Jersey Supreme Court held that the defendant private, non-profit hospital had a fiduciary duty to evaluate the plaintiff physician's application for staff privileges on its merits, rather than arbitrarily excluding all osteopathic doctors under a provision of the hospital's bylaws. In finding a fiduciary duty, the court relied upon its determination that the hospital was not strictly private because it had received substantial funds from public sources and through public solicitations; had received tax benefits, possessed a virtual monopoly on area health care facilities, and was a non-profit organization dedicated by virtue of its certificate of incorporation to serving the sick and injured. The court further noted that enterprises even more private in nature than

⁹⁰ Note, *Denial of Hospital Staff Privileges: Hearing and Judicial Review*, 56 IOWA L. REV. 1351, 1356-57 (1971).

⁹¹ Peterson v. Tucson Gen. Hosp., Inc., 114 Ariz. 66, 559 P.2d 186 (Ariz. App. 1976); Anton v. San Antonio Community Hosp., 55 Cal. App. 3d 212, 127 Cal. Rptr. 394 (1976); Hawkins v. Kinsie, 540 P.2d 345 (Colo. App. 1975); Silver v. Castle Memorial Hosp., 53 Hawaii 475, 497 P.2d 564 (1972), cert. denied, 409 U.S. 1048 (1972); Bricker v. Sceva Speare Memorial Hosp., 111 N.H. 276, 281 A.2d 589 (1971), cert. denied, 404 U.S. 995 (1971); Davis v. Morristown Memorial Hosp., 106 N.J. Super. 33, 254 A.2d 125 (1969); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 250 N.E.2d 892 (1969); Woodward v. Porter Hosp., Inc., 125 Vt. 419, 217 A.2d 37 (1966); Rao v. Auburn Gen. Hosp., 10 Wash. App. 361, 517 P.2d 240 (1973).

For dicta expressing approval of the fiduciary duty approach, see Fahey v. Holy Family Hosp., 32 Ill. App. 3d 537, 336 N.E.2d 309 (1975), cert. denied, 426 U.S. 936 (1976); Burkhardt v. Community Medical Center, 432 S.W.2d 433 (Ky. 1968); Dillard v. Rowland, 520 S.W.2d 81, 91 (Mo. App. 1974); Alder v. Montefiore Hosp. Ass'n, 453 Pa. 60, 311 A.2d 634 (1973), cert. denied, 414 U.S. 1131 (1974). But see Moles v. White, 336 So. 2d 427 (Fla. App. 1976); Gotsis v. Lorain Community Hosp., 46 Ohio App. 2d 8, 345 N.E.2d 641 (1975); Ponca City Hosp., Inc. v. Murphree, 545 P.2d 738 (Okla. 1976).

⁹² Hawkins v. Kinsie, 540 P.2d 345, 348 (Colo. App. 1975).

⁹³ Ascherman v. Saint Francis Memorial Hosp., 45 Cal. App. 3d 507, 511-12, 119 Cal. Rptr. 507, 509 (1975), quoting Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 550, 526 P.2d 253, 260, 116 Cal. Rptr. 245, 260 (1974). The California courts have also incorporated principles of administrative law, such as the "substantial basis test" and the "exhaustion of administrative remedies" doctrines, into their analysis. Anton v. San Antonio Community Hosp., 55 Cal. App. 3d 212, 127 Cal. Rptr. 394, 398, 400 (1976). The substantial basis test limits the scope of review by the court by requiring that the hospital's action be sustained if there is a substantial basis for the decision in the evidence considered as a whole. The exhaustion doctrine provides that an appeal to the court is not available until the physician has exhausted all remedies within the hospital. See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.01-20.10, and §§ 29.01-29.11 (1958).

⁹⁴ 40 N.J. 389, 192 A.2d 817 (1963).

hospitals had been subjected to state regulation.⁹⁵ The court also observed that courts had imposed a common law duty on innkeepers, carriers, and farriers to serve all "comers." Finally, the court noted that it had the power to expand the common law to serve current public needs and cited its own recent decision⁹⁶ vesting a local medical society with a fiduciary duty respecting membership applications. Therefore, the court concluded that it was justified in imposing a similar duty on the defendant hospital.

Some courts continue to require either substantial funding or a virtual monopoly before they will review a hospital's denial of staff privileges under the fiduciary duty approach. In *Peterson v. Tucson General Hospital, Inc.*,⁹⁷ for example, the Arizona Appellate Court surveyed the various doctrines for judicial review of private hospitals, and concluded that review in the present case was proper because the defendant, a private, non-profit hospital, constituted a virtual monopoly. In *Silver v. Castle Memorial Hospital*,⁹⁸ the Supreme Court of Hawaii held that a private hospital was subject to judicial review where it received "more than nominal governmental involvement in the form of funding."⁹⁹ The court viewed such a hospital as a "quasi-public" institution.¹⁰⁰

In New Jersey cases decided since *Greisman v. Newcomb Hospital*, the factors of substantial funding and geographic monopoly have not been emphasized.¹⁰¹ Recent cases in California and Colorado have gone further and have imposed the fiduciary duty on virtually all non-profit hospitals. In *Hawkins v. Kinsie*,¹⁰² the Colorado Appellate Court held that judicial review of the hospital's failure to renew the plaintiff's staff privileges was available because the hospital, although private, was a non-profit corporation conducted for the benefit of the general public, and because physicians and patients generally would be penalized if no remedy were available. In *Ascherman v. Saint Francis Memorial Hospital*,¹⁰³ the plaintiff physician already had privileges at other hospitals and earned a gross annual income in excess of \$80,000. Nevertheless, the California Appellate Court held that he was entitled to a fair evaluation of his application because staff privileges at the defendant, non-profit hospital would greatly enhance the plaintiff's convenience in practicing his profession.

In a subsequent decision, *Anton v. San Antonio Community Hospi-*

⁹⁵ The regulated activities included charges for the storage of grain, fire insurance rates, and the milk industry. *Id.* at 396, 192 A.2d at 821.

⁹⁶ *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961). *Accord*, *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

⁹⁷ 114 Ariz. 66, 559 P.2d 186 (Ariz. App. 1976).

⁹⁸ 53 Hawaii 475, 497 P.2d 564, *cert. denied*, 409 U.S. 1048 (1972).

⁹⁹ *Id.* at 483, 497 P.2d at 570.

¹⁰⁰ *Id.* at 481, 497 P.2d at 569. *Cf.* *Sussman v. Overlook Hosp. Ass'n*, 95 N.J. Super. 418, 231 A.2d 389 (1967).

¹⁰¹ *Davis v. Morristown Memorial Hosp.*, 106 N.J. Super. 33, 254 A.2d 125 (1969); *Sussman v. Overlook Hosp. Ass'n*, 95 N.J. Super. 418, 231 A.2d 389 (1967).

¹⁰² 540 P.2d 345, 348-49 (Colo. App. 1975).

¹⁰³ 45 Cal. App. 3d 509, 119 Cal. Rptr. 507, 508 (1975).

tal,¹⁰⁴ the California Appellate Court held that *all* non-profit hospitals have a fiduciary duty respecting the denial of staff privileges. The court stated:

An entity operating a private, non-profit hospital assumes a public trust which carries with it an obligation to deal fairly with the public it serves and with the doctors to whom it accords hospital privileges The fiduciary obligation to the doctors requires observance of 'fair procedure' in making decisions pertaining to medical staff membership.¹⁰⁵

The fiduciary duty approach achieves essentially the same safeguards for the physician as those provided by the Constitution;¹⁰⁶ therefore, the same burden is imposed on the hospital under either approach. Ordinary costs associated with the hearing procedure should be incorporated into the hospital's non-profit operating budget.¹⁰⁷ On the other hand, it may be appropriate for the physician to pay for the cost of inspecting or copying documents in the hospital's possession bearing on charges against the physician.¹⁰⁸ Eventually, many hospitals may even benefit financially from the hearing procedures. Improved selection procedures may reduce the hospital's insurance payments,¹⁰⁹ and may reduce the number of cases in which the hospital is found vicariously or corporately liable for physician negligence.¹¹⁰ For some hospitals, an increase in the number of physicians who are granted staff privileges may produce an increase in the number of patients and, consequently, an increase in net revenue.¹¹¹

The fiduciary approach, however, differs from the constitutional approach in several important ways. First, the fiduciary duty approach encompasses a greater number of hospitals.¹¹² Furthermore, by clearly extending the duty to all non-profit hospitals, the fiduciary duty approach permits hospital administrators to plan accordingly in formulating procedures for evaluating applicants. In contrast, the constitutional approach based on state action is uncertain in scope, and is subject to superceding decisions of the Supreme Court.¹¹³ Also, the fiduciary duty can be limited to the issue of staff privileges, thus avoiding inappropriate constitutional claims by patients.¹¹⁴

¹⁰⁴ 55 Cal. App. 3d 212, 127 Cal. Rptr. 394 (1976).

¹⁰⁵ *Id.* at 398.

¹⁰⁶ See note 24 and accompanying text *supra*.

¹⁰⁷ *Klinge v. Lutheran Charities Ass'n*, 523 F.2d 56, 64 (8th Cir. 1975).

¹⁰⁸ *Christhilf v. Annapolis Emergency Hosp. Ass'n*, 496 F.2d 174 (4th Cir. 1974).

¹⁰⁹ Note, *supra* note 90, at 1351.

¹¹⁰ See note 88 *supra*.

¹¹¹ See note 5 *supra*.

¹¹² Compare *Barrett v. United Hospital*, 376 F. Supp. 791 (S.D.N.Y. 1974), *aff'd*, 506 F.2d 1395 (2d Cir. 1974) with *Anton v. San Antonio Community Hosp.*, 55 Cal. App. 3d 212, 127 Cal. Rptr. 394 (1976).

¹¹³ See note 60 and accompanying text *supra*.

¹¹⁴ See note 62 and accompanying text *supra*.

III. CONCLUSION

The modern physician needs staff privileges at a conveniently located hospital. The public needs more physicians with easy access to hospitals. The hospital needs a large enough medical staff to ensure maximum use of its health care facilities. Nevertheless, staff privileges continue to be denied unreasonably. Judicial review is necessary to curtail inadequate or secretive procedures and to discourage arbitrary, discriminatory, or self-serving recommendations by the hospital's current medical staff.

The imposition of a common law fiduciary duty avoids subjecting private hospitals to constitutional claims unrelated to the unique staff privilege issue, and also avoids strained interpretations of recent Supreme Court rulings on state action. Furthermore, imposing the duty on all private, non-profit hospitals provides an easily applied test. Finally, and most importantly, because all non-profit hospitals are subject to the fiduciary duty, this approach achieves optimal protection for physicians, hospitals, and the public.

—David Hejna