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# Procedural Due Process Rights of Physicians Applying for Hospital Staff Privileges

Carolyn Quinn

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## I. INTRODUCTION

Membership on a hospital staff plays a vital role in the career of the modern physician.[1] The granting or denial of hospital staff privileges, or the ability to use the facilities of a given hospital, often determines the scope of a doctor's practice.[2] Access to a hospital, for instance, allows the doctor to fully diagnose and treat his patients, utilizing sophisticated equipment and technology not available in his private office.[3] For specialists, such as surgeons, the hospital represents an integral facet of their practices, without which their careers would be severely limited.[4] Finally, receiving staff privileges reflects the more intangible achievements of peer approval and recognition that the physician-applicant meets the requisite standards of proficiency in his chosen field.[5]

1. *See* Englestad v. Virginia Mun. Hosp., 718 F.2d 262, 267 (8th Cir. 1983) (denial of position as director of pathology would limit plaintiff's practice); Burkette v. Lutheran Gen. Hosp., 595 F.2d 255, 256 (5th Cir. 1979) (denial of privileges limits physician's ability to engage in private practice); Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968) (denial of privileges precludes doctor from admitting and treating patients in hospital); Wyatt v. Lake Tahoe Forest Hosp. Dist., 174 Cal. App. 709, 715, 345 P.2d 93, 97 (1959) ("In this day of advanced medical knowledge and advanced diagnostic techniques much of what a physician or surgeon must do can only be performed in a hospital. In many instances only a hospital has the facilities necessary for proper diagnosis or treatment."); *see also* R. MILLER, PROBLEMS IN HOSPITAL LAW 115 (4th ed. 1983).

2. *See, e.g.*, Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968) (denial of privileges would restrict access to advanced medical equipment, force the physician to forego economic renumeration from treatment of his patients in the hospital and damage overall physician-patient relationships); *see also* Wyatt v. Lake Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959) (much of what physician does can be performed only in a hospital).

3. *See* Englestad v. Virginia Mun. Hosp., 718 F.2d 262, 267 (8th Cir. 1983); Burkette v. Lutheran Gen. Hosp., 595 F.2d 255, 256 (5th Cir. 1979); *see also* Cray, *Due Process Considerations in Hospital Staff Privileges Cases*, 7 HASTINGS CONST. L.Q. 217, 217 (1979).

4. *See* Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 229 (5th Cir. 1968); Wyatt v. Lake Tahoe Forest Hosp. Dist., 174 Cal. App. 2d 709, 715, 345 P.2d 93, 97 (1959); *supra* note 1 and accompanying text.

5. *See* Englestad v. Virginia Mun. Hosp., 718 F.2d 262, 267 (8th Cir. 1983) ("Staff privileges are basically viewed as a measure of proficiency a doctor attains in his medical profession."). Hospitals enforce exacting standards in reviewing applications for admittance to a hospital staff. *See infra* notes 7, 103, 146-47 and accompanying text.

Staff privileges, however, are not incidental to a medical degree.[6] Rigorous scrutiny of a doctor's education and qualifications precedes the approval of any staff membership position.[7] Additionally, the recent "glut" of medical school graduates confronts the practicing physician with increased competition for a limited number of positions.[8] Moreover, the emergence of liability for negligent supervision of staff members[9] has prompted hospital administrators and hiring committees to scrutinize eligible physicians with greater care.[10]

The denial or revocation of staff privileges causes many physi-

6. *See infra* note 7 and accompanying text.

7. The medical profession demands, and courts generally grant to hospitals, great latitude in choosing members of their staff. *See* Woodbury v. McKinnon, 447 F.2d 839, 842-43 (5th Cir. 1971). Credentials committees and other hospital bodies associated with the hiring process consider more than a physician's "paper" qualifications. Sosa v. Board of Managers, 437 F.2d 173, 176-77 (5th Cir. 1971). For instance, they also may take into account a doctor's character and standing in the community. *See also* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS—1985, at 74 (1984). The suggestions made by the commission (the "JCAH") indicate a preference that hospitals, in their bylaws, establish hiring procedures which place emphasis on patient care and which are hospital specific. *Id.* These guidelines are widely copied since JCAH accreditation affords a hospital financial benefits and professional prestige. Comment, *Medical Staff Membership Decisions: Judicial Intervention*, 1985 U. ILL. L.F. 473, 476. For instance, the bylaws of one hospital require that a physician admitted to staff "[b]e competent in [his] field," possess "[h]igh moral and ethical standards," and possess "[e]xperience and training" that would assure the board of directors "[t]hat any patient treated by [him] will be given high quality medical care." St. Francis Hospital, Evanston, Ill., By-Laws and Rules and Regulations for the Medical and Dental Staff (1985).

8. Between 1970 and 1980, the nation witnessed a 40% increase in the number of physicians while the national population grew only 10%. Lefton, *Competition for Hospital Privileges Seen Rising*, Am. Med. News, May 6, 1983, at 3.

9. *See* Purcell v. Zimbelman, 18 Ariz. App. 75, 87, 500 P.2d 335, 343 (1972) (hospital held liable for complications arising from abdominal surgery performed by staff physician); Mitchell County Hosp. Auth. v. Joiner, 229 Ga. 140, 143, 189 S.E.2d 412, 414 (1972) (where hospital is aware of incompetence of staff physician, hospital will be independently liable); Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 337, 211 N.E.2d 253, 260 (1965) (hospital liable for negligence of physician who improperly set broken leg), *cert. denied*, 383 U.S. 946 (1966). The doctrine of charitable immunity and the traditional interpretation of *respondeat superior* once combined to insulate hospitals from such suits. Recent trends in tort law, however, have fashioned an independent duty of hospitals to police the patient care practiced by their physicians and have broadened the scope of master-servant relationships to include hospitals and their doctors. *See generally* Note, *Independent Duty of a Hospital to Prevent Physician's Malpractice*, 15 ARIZ. L. REV. 953 (1973); Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians*, 50 WASH. L. REV. 385 (1975).

10. Manber, *Barred Doctors Go Before the Bar*, Med. World News, Jan. 18, 1982, at 72 ("Court rulings, along with hefty malpractice awards, have made it painfully clear to hospitals that they are responsible for the quality of medical care provided within their walls."). One commentator has noted that hospitals pay increasingly close attention to a doctor's work record at other institutions, hoping to ensure the professional competence

cians to resort to the courts.[11] Legal remedies may be pursued under several theories.[12] A favored cause of action for those doctors whose existing privileges at a public hospital are terminated or suspended is to allege a right to procedural due process under the fifth and fourteenth amendments.[13] The plaintiff doctors contend that the loss of privileges constitutes an unlawful infringement by the state on protected property or liberty interests, and that they therefore are entitled to receive notice and a hearing prior to removal from staff.[14]

Recently, the Illinois Attorney General issued an opinion interpreting an Illinois Department of Public Health rule which requires all licensed hospitals to grant physicians applying for staff privileges "due process and a fair hearing."[15] The Attorney General opined that the rejected applicant is entitled to the same panoply of procedures afforded present staff members when their positions are threatened by termination or suspension.[16]

Both the regulation and the Attorney General's opinion are problematic. The regulation raises the question of whether applicants are indeed entitled to due process safeguards. The opinion, in turn, poses the additional question of whether applicants, once guaranteed due process, should receive the same amount of procedural protection enjoyed by doctors who attain staff privileges and subsequently lose them.

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of physicians admitted to their staffs. Crane, *Tough New Rules For the Privileges Game*, MED. ECON., Mar. 1984, at 77.

11. Manber, *supra* note 10, at 72. *See infra* note 12.

12. These include actions in contract, tort and antitrust. *See, e.g.*, Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1982) (exclusion from staff constitutes unreasonable restraint of trade); Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100 (Colo. App. 1981) (defamatory statements published by defendant hospital cited by plaintiff as reason for rejection of application for staff membership); Ishak v. Fallston Gen. Hosp. & Nursing Center, 50 Md. App. 473, 438 A.2d 1369 (1982) (physician alleged that bylaws of hospital created contractual right to staff privileges); Nashville Memorial Hosp., Inc. v. Binkley, 534 S.W.2d 318 (Tenn. 1976) (doctor based tort claim on intentional interference with contractual relationship).

13. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1. ("No state shall . . . deprive any person of life, liberty, or property without due process of law.") *See infra* notes 69-91 and accompanying text.

14. *See infra* notes 69-91 and accompanying text.

15. Due Process Rights of Podiatrists Who Apply for Medical Staff Privileges, 1984 Op. Att'y Gen. No. 84-004 [hereinafter cited as Op. Att'y Gen. No. 84-004], interpreting 77 ILL. ADMIN. CODE ch. I, subch. b, § 250.310(a)(3) (1985). *See infra* notes 107-35 and accompanying text. While the title of the opinion refers only to podiatrists, the text of the opinion makes it clear that the Attorney General intended it to apply to all physicians applying for staff privileges. Op. Att'y. Gen. No. 84-004, *supra*, at 1, 2, 5.

16. Op. Att'y Gen. No. 84-004, *supra* note 15, at 5.

In examining these issues, this article will outline the constitutional principles underlying procedural due process and survey how courts have applied these principles in staff privileges cases. Next, this article will discuss the Department of Public Health regulation and the Attorney General's interpretation of the regulation's due process requirements. This article then will suggest that those requirements unnecessarily burden hospital administrators and that they should therefore be replaced by an informal process of peer review.

## II. BACKGROUND

The fifth and fourteenth amendments to the United States Constitution guarantee procedural due process to an individual deprived by government action of life, liberty or property.[17] When governmental conduct threatens a loss of these interests, the Constitution requires that certain minimal procedural processes be observed.[18] These processes generally include notice and an opportunity to be heard.[19] Such procedural rights attach only when the deprivation results from a government action[20] and there exists a liberty or property interest sufficient to merit constitutional protection.[21] Once it is determined that a right to due process ex-

17. *See supra* note 13 and accompanying text, *infra* notes 18-62 and accompanying text.

18. *See infra* notes 19, 55-62 and accompanying text.

19. *See infra* notes 55-62 and accompanying text.

20. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974). In staff privileges cases, physicians alleging deprivation of due process via federal action pursue this cause of action under the fifth amendment, *see, e.g.*, Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361 (9th Cir. 1976) (doctor dismissed from residency program at Veterans Administration hospital brought suit under the fifth amendment), while the fourteenth amendment is invoked when the physician contends a similar wrong was committed by a state. *See, e.g.*, Schlein v. Milford Hosp., 423 F. Supp. 541 (D. Conn. 1976), *aff'd*, 561 F.2d 427 (2d Cir. 1977) (doctor denied staff privileges contended that state licensure of the defendant hospital brought the hospital's acts within the ambit of "state action").

A detailed discussion of governmental action, federal or state, is beyond the scope of this article. It should be noted, however, that this first threshold requirement presents a formidable obstacle to any physician suing a private hospital under the fourteenth amendment. While public hospitals clearly fall within the sphere of the "requirements and prohibitions of the Fourteenth Amendment," Briscoe v. Bock, 540 F.2d 392, 394-95 (8th Cir. 1976), proving state involvement in the actions of a private facility is a much more onerous task. Following the lead of *Jackson*, some courts have required evidence of direct state involvement in the hiring process in order to find a state action. *See, e.g.*, Modaber v. Culpeper Memorial Hosp., Inc., 674 F.2d 1023, 1025 (4th Cir. 1982); *Briscoe*, 540 F.2d at 395; Barret v. United Hosp., 376 F. Supp. 791, 797 (S.D.N.Y. 1974).

21. *See* Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) (terminated college professor may not allege denial of due process absent a showing of a liberty or property

ists, it is still necessary to decide precisely what procedural protections the due process clause requires.[22]

### *A. Property Interests in the Employment Context*

The modern interpretation of property and liberty interests in the employment context evolved through a series of Supreme Court cases decided in the 1970's.[23] In defining these interests, the Court established tests to be applied to the claim of any individual alleging denial of procedural due process rights.

To have a property interest in continued employment, a person must have a legitimate claim of entitlement to such a benefit.[24] The entitlement claim, in turn, must depend upon a rule or understanding, known to both parties, that raises the expectation of continued employment.[25] An abstract desire for or unilateral expectation of the benefit will not be enough.[26] Instead, courts generally will look to state law as the source of the rule or understanding that gives rise to the claim of entitlement.[27]

Thus, in the landmark case of *Board of Regents v. Roth*,[28] the Supreme Court ruled that a nontenured professor at a public university did not possess a property interest in continued employment sufficient to entitle him to procedural due process.[29] The Court held that Roth's employment contract, which clearly enunciated the cessation of his position at the close of the academic year, failed to establish a "mutual expectation of continued employment" between the parties.[30] Moreover, the Court found no state statute or decision to support Roth's property interest claim.[31] In the absence of an independent source creating an expectation of further employment, the alleged property interest sim-

interest); Perry v. Sindermann, 408 U.S. 593, 603 (1972) (junior-college professor released from teaching position established a property interest, but not a liberty interest, in continued employment).

22. *See infra* notes 55-62 and accompanying text.

23. *See* Codd v. Velger, 429 U.S. 624 (1977); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

24. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").

25. *Id.*

26. *Id.*

27. *Id.*; *see infra* notes 70-73 and accompanying text.

28. 408 U.S. 564 (1972).

29. *Id.* at 578.

30. *Id.*

31. *Id.*

ply did not exist.[32]

### *B. Liberty Interests in Continued Employment*

The Supreme Court's criteria for establishing a legitimate liberty interest in continued employment proceed significantly beyond the traditional notion that liberty includes the right to pursue a chosen profession.[33] The present interpretation of liberty embellishes this right with a four-step analysis, commonly known as the "stigma-plus" test.[34] The first step requires a showing that the state's justifications for dismissal so severely stigmatize an individual as to effectively preclude him from obtaining future employment.[35] Merely preventing entry into a single position of employment is insufficient.[36] Instead, the reasons underlying the dismissal must seriously challenge the discharged individual's morality or standing in the community and thereby pose a grave threat to all avenues of future employment.[37] The second step in the "stigma-plus" analysis requires that the state disseminate these same reasons, thus taking the content of the allegations outside the confidence of the employer-employee relationship.[38] Third, the discharged individual must challenge the validity of the justifications for removal and allege that they are false.[39] Finally, any asserted deprivation of a liberty interest must be accompanied by a concurrent loss of a state-created status or right.[40]

The application of these principles defeated several liberty interest claims which came before the Supreme Court in the 1970's.[41] In *Roth*,[42] the Court found the terminated professor's alleged liberty interest unworthy of constitutional safeguards.[43] The Court held that although the denial of tenure might make the professor somewhat less desirable at another academic institution, a simple

32. *Id.* at 577-78.

33. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *infra* notes 34-40 and accompanying text.

34. *See* Weinstein v. University of Ill., No. 85-7771, slip op. at 5 (N.D. Ill. Feb. 20, 1986) (available April 12, 1986, on LEXIS, Genfed library, Dist. file).

35. *Roth*, 408 U.S. at 573.

36. *Id.* at 574 n.13 ("Mere proof, for example, that his record of nonretention in one job, taken alone, might make him less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty.").

37. *Id.* at 573.

38. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976).

39. *See* Codd v. Velger, 429 U.S. 624, 628 (1977).

40. *See* Paul v. Davis, 424 U.S. 693, 708-09 (1976).

41. *See infra* notes 42-54 and accompanying text.

42. *See supra* notes 28-32 and accompanying text.

43. *Roth*, 408 U.S. at 575.

failure to renew his contract neither implied some moral failing on his part nor completely foreclosed a rewarding career in academia.[44]

In *Bishop v. Wood*,[45] the Court held that a police officer dismissed for various infractions of duty could not legitimately claim an infringement of his liberty interest when the reasons for his discharge were known only to the officer and his employer.[46] Without a "publication" of these reasons, the Court ruled, the officer could not assert that a stigma attached to his reputation in the community.[47]

The plight of a discharged police officer came before the Court again in *Codd v. Velger*,[48] where damaging information contained in the personnel files of the New York City Police Department threatened the officer's ability to obtain future employment in a security-related field.[49] There the Court noted that the essence of due process is the right to be heard and to challenge the state's justifications for removal.[50] But if, as in *Codd*, the individual never contends that these reasons lack validity, the grant of due process is meaningless.[51]

Finally, in *Paul v. Davis*,[52] a private citizen argued that a flyer sent to local merchants identifying him as an active shoplifter severely impinged upon his constitutionally protected liberty interest.[53] The Court disagreed, holding that the alleged imposition of a stigma was not accompanied by deprivation of a state-created status or right and hence no due process rights attached.[54]

### *C. What Process is Due?*

The findings of government action and of a constitutionally protectible liberty or property interest constitute only the first phase of

44. *Id.* at 573 ("The State, for example, did not invoke any regulation to bar [the professor] from all other public employment in state universities. Had it done so, this . . . would be a different case.").
45. 426 U.S. 341 (1976).
46. *Id.* at 348.
47. *Id.*
48. 429 U.S. 624 (1977).
49. *Id.* at 625.
50. *Id.* at 627.
51. *Id.* at 627-28.
52. 424 U.S. 693 (1976).
53. *Id.* at 697.
54. *Id.* at 708-09. Although the Court did not phrase its opinion in these exact terms, the requirement that the alleged stigma be accompanied by the loss of a state-created right could be construed to mean that in order to establish a liberty interest, one must show the loss of a property interest.

the procedural due process analysis. Once the right to due process is established, it becomes necessary to determine what process is due.[55]

The concept of procedural due process is inherently flexible. It is a concept which may be molded to fit the exigencies of the particular fact pattern at hand.[56] Consequently, the range of possible procedures varies considerably, from simple notice[57] to a comprehensive trial-type hearing replete with presentation of evidence, direct and cross-examination of witnesses, a finder of fact and the presence of counsel.[58] To determine what procedures are required, courts employ a balancing test which weighs the interests of the opposing parties and considers the adequacy of the procedures already in place.[59] In *Mathews v. Eldridge*,[60] the Supreme Court defined the balancing formula as one that measures the importance of the individual interest at stake, the risk of error inherent in the existing procedural structure and the probable value of additional procedures, and the government's interest in avoiding the increased administrative and fiscal burdens that greater process would entail.[61] The compound character of the *Eldridge* test and

55. *See* Goss v. Lopez, 419 U.S. 565, 577 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

56. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands."); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (Court held that due process is not a "technical conception" and that its application must take into consideration "time, place and circumstances").

57. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78, 84-85 (1978) (when student was dismissed on academic grounds, faculty's warnings to student of dissatisfaction with academic performance were sufficient to satisfy fourteenth amendment due process requirements); *see also infra* notes 187-95 and accompanying text.

58. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970) (welfare recipient threatened with termination of benefits was entitled to pre-termination evidentiary hearing, including timely notice, opportunity to confront adverse witnesses and present oral evidence, counsel, impartial decisionmaker and written record of proceedings); *see also* J. NOWAK, CONSTITUTIONAL LAW 555-56 (1983).

59. *See* Goldberg v. Kelly, 397 U.S. 254, 255-56 (1970) (Court first announced balancing test in this case, weighing extent to which welfare recipient would be condemned to suffer a grievous loss against the government's interest in summary adjudication of the dispute); Goss v. Lopez, 419 U.S. 565, 579-80 (1975) (balancing students' interest in continuing public education against school's interest in summary suspension for disciplinary infractions); Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974) (prisoner's interest in parole balanced against state's interest in controlling content and structure of parole hearings).

60. 424 U.S. 319 (1976).

61. *Id.* at 335. The Court held:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such an inter-

the broad phrasing of its elements preserve the flexibility of procedural due process, and the test is sufficiently malleable to be applied to almost any conceivable legal dispute.[62]

### *D. Liberty and Property Interests and Doctors*

In cases involving hospital staff privileges, lower courts generally have recognized the principles enunciated in *Roth* and its progeny but have applied them inconsistently.[63] While the Supreme Court's holdings have exhibited an unmistakable trend toward a narrowing of the liberty and property interest concepts,[64] opinions addressing the staff privileges issue reflect a selective reading of the Court's decisions.[65] Some courts have incorporated the full range of Supreme Court decisions,[66] others have applied these holdings in an irregular manner,[67] and still others have created their own justifications for finding or denying the existence of constitutionally protected interests.[68]

#### 1. Staff Privileges as Property

The concept of staff privileges as a property interest has evolved along different paths of judicial interpretation.[69] Some courts have followed the Supreme Court's holdings strictly and have looked only to state law as the source of any property interest in staff privileges.[70] For example, one court denied a due process claim where

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> est through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.*

While the *Eldridge* test adds to the original balancing test the element of considering the risk of erroneous deprivation under the procedure given, the underlying concept of weighing competing interests is preserved. *See* Lawrence, *Fairly Due Process: Minimum Protection Recognized But Not Applied in* Mathews v. Eldridge, 1977 UTAH L. REV. 627, 632.

62. *See, e.g.*, Little v. Streater, 452 U.S. 1 (1981) (whether state must pay for blood test of indigent parent in paternity suit); Parrat v. Taylor, 451 U.S. 527 (1981) (prisoner's loss of property due to alleged negligence of prison officials); Addington v. Texas, 441 U.S. 418 (1979) (adult committed to psychiatric care facility); Barry v. Barchi, 443 U.S. 55 (1979) (suspension of racehorse trainer's license); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (termination of utility services to delinquent customers).

63. *See infra* notes 70-79 and accompanying text.

64. *See supra* notes 23-54 and accompanying text.

65. *See infra* notes 69-91 and accompanying text.

66. *See infra* notes 70-73 and accompanying text.

67. *See infra* notes 74-76 and accompanying text.

68. *See infra* notes 77-79 and accompanying text.

69. *See infra* notes 70-79 and accompanying text.

70. *See* Lew v. Kona Hosp., 754 F.2d 1420, 1424 (9th Cir. 1985) (Hawaii law recog-

a doctor's privileges arose from an oral contract and state common law indicated that such contracts were terminable at will.[71] Another court held that perfunctory renewal of annual staff membership met *Roth's* entitlement requirement[72] since local law would interpret such a circumstance as an implied contract.[73]

Other courts have interpreted the *Roth* entitlement concept more broadly, accepting any casual indicia of mutual expectations of continued employment as sufficient to fulfill the requirement that an entitlement claim be based on an independent source such as state law.[74] According to one such court, a property interest sufficient to create entitlement to hospital privileges existed when a hospital represented that[75] a residency program would last a certain number of years. Another court held that a doctor whose privileges were suspended and then indefinitely extended pending a decision from a superior could claim a property interest sufficient

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nizes a property right in position as probationary staff member); Yashon v. Gregory, 737 F.2d 547, 554 (6th Cir. 1984) (Ohio law indicates that employment contracts can be supplemented by "mutual rules or understandings"); Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 266 (8th Cir. 1983) (Minnesota case law holds that employment contracts are terminable at will; no property interest); Daly v. Sprague, 675 F.2d 716, 727 (5th Cir. 1982) (physician failed to cite any state law that would transform privileges into a property interest); Suckle v. Madison Gen. Hosp., 499 F.2d 1364, 1366 (7th Cir. 1974) (no Wisconsin law exists on which to base a claim of entitlement to privileges).

71. *See* Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 266 (8th Cir. 1983) (pathologist served on staff for twelve years with no formal written agreement between himself and the hospital).

72. *See supra* notes 24-32 and accompanying text.

73. *See* Yashon v. Gregory, 737 F.2d 547, 553 (6th Cir. 1984) (court found that pro forma reappointments to staff established a "common law of the work place"; Ohio law accepted this as an implied contract). *But see* Ritter v. Board of Comm'rs, 96 Wash. 2d 503, 509-10, 637 P.2d 940, 944 (1981) (annual staff appointments insufficient under state law to create property interest).

74. *See* Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983) (indefinite extension of privileges might be enough to create mutual understandings and thus a property interest); Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 367 (9th Cir. 1976) (resident released from medical program prior to end of agreed term had property interest). *But see* Schlein v. Milford Hosp., 423 F. Supp. 541, 543 (D. Conn. 1976) (physician-applicant had only a unilateral expectancy of being accepted to hospital staff), *aff'd*, 561 F.2d 427 (2d Cir. 1977); Scarnati v. Washington, 599 F. Supp. 1554, 1556 (M.D. Pa. 1985) (probationary physician could not claim property interest in continued privileges); Giordano v. Roudebush, 448 F. Supp. 899, 904 (S.D. Iowa 1977) (probationary physician could not claim property interest in continued position); Ritter v. Board of Comm'rs, 96 Wash. 2d 503, 509, 637 P.2d 940, 944 (1981) (annual reappointment to staff not equivalent to entitlement to that position).

75. Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 367 (9th Cir. 1976) (physician admitted to four-year residency program whose privileges were revoked after two years had a property interest in his position; program's history of full completion by all residents could be taken into consideration in establishing a property interest). *See also* Ong v. Tovey, 552 F.2d 305, 307 (9th Cir. 1977) (doctor terminated from residency program at Veteran's Administration hospital for being absent without leave).

to demand procedural due process.[76]

Finally, a few courts have created their own justifications for establishing entitlement to privileges.[77] Their rulings have ranged from pronouncements, without citation to authority, that possession of staff privileges constitutes a property interest,[78] to findings that privileges may be incidental to a property interest in occupational licensure.[79]

### 2. Staff Privileges and Liberty

In contrast to the property interest cases, courts generally have adhered closely to Supreme Court precedent in cases in which physicians have claimed injury to a liberty interest after revocation of staff privileges. Most courts have employed multi-pronged tests, requiring not only evidence of stigma and lost job opportunities but also a showing of some or all of the criteria developed in the Court's post-*Roth* cases.[80] For example, some courts have required the physician bringing suit to prove that the hospital published the allegations leveled against him.[81] Courts also have imposed upon the doctor an obligation to contest the veracity of the charges against him and thereby establish an actual controversy to be addressed in the hospital hearing.[82]

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76. Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983) (doctor's privileges suspended, then twice extended for indefinite period while parties waited for a ruling from the Veterans Administration in Washington, D.C. regarding the charges against him).

77. *See infra* notes 78-79 and accompanying text.

78. Klinge v. Lutheran Charities Ass'n, 523 F.2d 56, 60 (8th Cir. 1975) (surgeon dismissed from staff for poor surgical practice). *But see* Holston v. Sloan, 620 S.W.2d 255, 256 (Tex. Civ. App. 1981) (doctor's privileges suspended after he was admitted to the defendant hospital with a drug overdose; possession of privileges did not constitute a property interest).

79. Shaw v. Hospital Auth., 614 F.2d 946, 953 (5th Cir. 1980) (see *infra* notes 128-35 and accompanying text for a discussion of this case); Dorsten v. Lapeer County Gen. Hosp., 521 F. Supp. 944, 947 (E.D. Mich. 1981) (osteopath suspended from position as probationary staff member; property interest "might" be incidental to licensure).

80. *See supra* notes 34-40 and accompanying text, *infra* notes 81-82, 88-91 and accompanying text.

81. *See* Scarnati v. Washington, 599 F. Supp. 1554, 1557 (M.D. Pa.) (foreclosure of future employment and publication; stigma not severe enough and any "publication" of charges was made by physician, not hospital), *aff'd*, 772 F.2d 896 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 795 (1986); Hewitt v. Grabicki, 596 F. Supp. 297, 304 (E.D. Wash. 1984) (foreclosure of future employment and publication; remarks made in proficiency report insufficient to satisfy either prong of test); Giordano v. Roudebush, 448 F. Supp. 899, 905-06 (S.D. Iowa 1977) (foreclosure of future employment and publication; court found that doctor faced de facto dissemination of charges when applying for another job); Ritter v. Board of Comm'rs, 96 Wash. 2d 503, 510, 637 P.2d 940, 945 (1981) (foreclosure of future employment and publication; press release issued by hospital and public statements made by hospital officials enough to satisfy publication requirement).

82. *See* Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983) (foreclosure of future

Several courts have agreed that a mere diminution of reputation or inference of incompetency is insufficient to establish a liberty interest in staff privileges.[83] The charges leveled at the physician must be more serious.[84] Despite acceptance of this fundamental rationale, no court has defined precisely what would constitute a sufficiently grave accusation.[85] Some guidance, however, may be found in the cases. For example, a physician released from staff for performing major surgery without the required medical team and without administering a proper anesthetic to the patient could legitimately claim that release of these allegations would foreclose future employment opportunities.[86] Similarly, where harassment and coercion of fellow doctors and blatant breach of hospital policy were alleged, a court found that the stigma reached the requisite level of severity.[87]

The publication requirement also has eluded specific definition. One court found publication in a hospital press release and other public statements made by hospital officials.[88] Issuance of an intrastaff memorandum regarding alleged breaches of professional conduct, even when the physician was not directly named, was held to

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employment, publication and challenge to validity of charges; doctor disputed allegations that he worked at private hospital while supposedly on duty at Veteran's Administration hospital); Clair v. Centre Community Hosp., 317 Pa. Super. 25, 34, 463 A.2d 1065, 1071 (1983) (foreclosure of future employment, publication and challenge to validity of charges; court found no "stigma" imposed by dismissal for refusal to comply with public health statute but held that a "disability" was imposed which impinged upon the physician's liberty interest).

83. *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 (9th Cir. 1976). In *Stretten*, the court drew a distinction between charges so damaging that they injure a physician's reputation outside his professional community, thereby requiring procedural due process, and those which are not so damaging: "Liberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may force the individual down one or more notches in the professional hierarchy." *Id.*; *see also* Ong v. Tovey, 552 F.2d 305, 307 (9th Cir. 1977); Schlein v. Milford Hosp., 423 F. Supp. 541, 543 (D. Conn. 1976), *aff'd*, 561 F.2d 427 (2nd Cir. 1977); Suckle v. Madison Gen. Hosp., 499 F.2d 1364, 1366 (7th Cir. 1974).

84. *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 (9th Cir. 1976).

85. *Id.* The court chose the phrase "moral turpitude" to illustrate the severity of the stigma required to raise a liberty interest. *Id.*

86. Ritter v. Board of Comm'rs, 96 Wash. 2d 503, 510, 637 P.2d 940, 945 (1981). The court found that the press release issued by the hospital "[i]mplicitly questioned [the doctor's] diligence, and arguably his competence as a physician."

87. *See* Hoberman v. Lock Haven Hosp., 377 F. Supp. 1178, 1185 (M.D. Pa. 1974) (hospital issued intrastaff memorandum stating that a doctor had "[e]ngaged in conduct incompatible with good medical care and acceptable professional behavior"; although plaintiff was not named, the court found that " [b]ecause of the small size of the medical staff it was well known that the memorandum was directed towards him").

88. *See* Ritter v. Board of Comm'rs, 96 Wash. 2d 503, 510, 637 P.2d 940, 945 (1981).

be sufficient to impinge upon a liberty interest.[89] Some courts have found the simple maintenance of personnel files which could be examined by prospective employers sufficient to meet the publication requirement.[90] Courts occasionally have considered additional factors when determining whether a doctor with staff privileges has a liberty interest. If, for instance, the hospital is one of only a few institutions in the area, a court may be more apt to find a liberty interest which warrants constitutional protection, since access to hospital facilities is already limited.[91]

### *E. Doctors and the Process That is Due*

Once the protectible interest is found, courts proceed to a determination of the type of procedures sufficient to protect that interest.[92] It is important to note, however, that the determination of procedural rights occurs most frequently in cases in which doctors are protesting the loss or suspension of staff privileges already obtained, rather than denial of the initial application for access to hospital facilities.[93]

Like the Supreme Court, lower courts confronted with staff priv-

89. *See* Hoberman v. Lock Haven Hosp., 377 F. Supp. 1178, 1185 (M.D. Pa. 1974).

90. *See* Yashon v. Gregory, 737 F.2d 547, 556 (6th Cir. 1984); Giordano v. Roudebush, 446 F. Supp. 899, 905-06 (S.D. Iowa 1977); Clair v. Centre Community Hosp., 317 Pa. Super. 25, 32, 463 A.2d 1065, 1070 (1983). Each of these cases stands for the proposition that a doctor relieved of his staff appointment will be forced to reveal the circumstances surrounding his dismissal when applying for staff privileges elsewhere, whether he is asked directly or his personnel files become available for inspection. *Yashon*, 737 F.2d at 556; *Giordano*, 446 F. Supp. at 905-06; *Clair*, 317 Pa. Super at 32, 463 A.2d at 1070. Some commentators agree that such de facto dissemination could have a devastating effect on a physician's future employment prospects. *See, e.g.*, Mass, *Due Process Rights of Students: Limitations on* Goss v. Lopez*—A Retreat out of the "Thicket,"* 9 J. LAW & EDUC. 449, 457 (1979); Comment, *The* Horowitz *and* Smith Decisions: *The Continuing Devitalization of the Liberty Concept*, 43 ALBANY L. REV. 863, 881 (1979). These decisions nonetheless appear to extend the definition of dissemination or "publication" beyond the Supreme Court's original intent, as stated in Bishop v. Wood, 426 U.S. 341, 348 (1976) (requiring "public disclosure"). *See infra* text accompanying note 167.

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. Centre Community Hosp., 317 Pa. Super. 25, 32, 463 A.2d 1065, 1070 (1983) (nearest hospital 30 miles away; plaintiff had no alternative hospital at which he could treat his patients).

92. *See infra* notes 94-99 and accompanying text.

93. While decisions requiring that certain processes be afforded the disappointed physician-applicant do exist, they often pre-date the *Roth* decision and thus lack the liberty and property interest analyses now essential to establishing a procedural due process claim. *See, e.g.*, Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968); Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968). Other cases post-date *Roth* and its progeny yet fail to apply these tests at all. *See, e.g.*, Sosa v.

ileges conflicts have recognized the intrinsic flexibility of procedural due process and have tailored procedural requirements to the unique needs and interests of the parties.[94] While full trial-type hearings rarely are mandated,[95] courts nonetheless may require a hospital to grant a physician a generous range of procedural protections prior to his expulsion from the medical staff.[96] The core requirements—notice and an opportunity to be heard—are routinely granted.[97] Additional procedures, such as the right to be accompanied by counsel during the hearing process[98] and the ability to present and cross-examine witnesses,[99] also occasionally are required.

Underlying judicial surveillance of processes afforded doctors in staff privilege decisions is a consistent respect for the peer review system.[100] Hospitals typically maintain a network of physician-

Board of Managers, 437 F.2d 173 (5th Cir. 1971); Silva v. Queen's Hosp., 629 P.2d 1116 (Hawaii 1981).

California and New Jersey courts have afforded applicants procedural protections but their decisions have relied on common-law principles of "fundamental fairness" and not the constitutional principles grounded in the fifth and fourteenth amendments. *See, e.g.*, Ascherman v. San Francisco Medical Soc'y, 39 Cal. App. 3d 623, 647-48, 114 Cal. Rptr. 681, 696-97 (1974); Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 564, 401 A.2d 533, 541 (1979).

94. *See infra* notes 95-106 and accompanying text.

95. One court has held that the hospital setting is particularly ill-suited to adjudicatory proceedings. *See* Klinge v. Lutheran Charities Ass'n, 523 F.2d 56, 60 (8th Cir. 1975). *But see* Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 552, 401 A.2d 533, 541 (1979) (under common-law due process, physician-applicant entitled to notice, hearing, presentation of witnesses and right to counsel).

96. *See infra* notes 97-99 and accompanying text.

97. *See* Klinge v. Lutheran Charities Ass'n, 523 F.2d 56, 60 (8th Cir. 1975); Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc., 496 F.2d 174, 179 (4th Cir. 1974); Woodbury v. McKinnon, 447 F.2d 839, 844 (5th Cir. 1971); Branch v. Hempstead County Memorial Hosp., 539 F. Supp. 908, 916 (W.D. Ark. 1982); Poe v. Charlotte Memorial Hosp., Inc., 374 F. Supp. 1302, 1310 (W.D.N.C. 1974).

98. *See* Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 552, 401 A.2d 533, 542 (1979) (under common-law due process, physician has right to have counsel present at hearing). *But see* Silver v. Castle Memorial Hosp., 53 Hawaii 475, 484-85, 497 P.2d 564, 571 (1972) (whether physician denied reappointment to staff may be accompanied by attorney at hearing is within hospital's discretion).

99. *See* Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc., 496 F.2d 174, 178-79 (4th Cir. 1974) (surgeon dismissed from staff entitled to cross-examine witnesses at hearing); Branch v. Hempstead County Memorial Hosp., 539 F. Supp. 908, 916 (W.D. Ark. 1982) (minimum due process for physician whose privileges were terminated included right to confront and cross-examine witnesses). *But see* Woodbury v. McKinnon, 447 F.2d 839, 844 (5th Cir. 1971) (doctor denied reappointment to staff had no right to cross-examine members of the hearing committee).

100. *See* W. ISELE, THE HOSPITAL MEDICAL STAFF: ITS LEGAL RIGHTS AND RESPONSIBILITIES 126 (1984). Peer review is "the evaluation of the quality, efficiency and effectiveness of services ordered and performed by other physicians. The term includes all medical review efforts, including utilization review, medical audit, ambulatory care

staffed committees designed to monitor various aspects of hospital operations.[101] All medical procedures performed by a physician within the facility are subject to the scrutiny of the medical staff,[102] as is his initial application for staff privileges.[103] The peer review process is structured to ensure the highest possible quality of professional practice in the hospital and thereby to guarantee the safety and well-being of the patients.[104] Courts traditionally have recognized the value and efficacy of this system, noting that the judiciary lacks the expertise necessary to measure the competency of a doctor.[105] Consequently, courts have imposed their wills upon hospital medical staffs only with the greatest reluctance.[106]

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review, the credential awarding function, periodic reappointment evaluations and quality review activities." *Id.*

101. *See* W. ROACH, MEDICAL RECORDS AND THE LAW 126 (1985). The most common of these committees are the executive committee, the credentials committee, the medical audit committee, the tissue committee and the utilization review committee. *Id.*

102. The tissue committee, for example, supervises the quality of surgery conducted by staff members and will notify the executive committee if it finds a staff member authorizing unnecessary surgical procedures or performing operations in a negligent manner. *Id.*

103. The credentials committee, charged with the responsibility of granting or denying staff privileges sought by applicants, conducts an extensive review of the physician's medical education and training. *See* Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospital Quality Assurance Committee Records*, 16 WASHBURN L.J. 54, 60 (1976). Included in the committee's evaluation will be the applicant's medical school transcripts, letters of reference from previous employers or hospitals at which he has practiced commenting on the applicant's professional competency, and information regarding previous disciplinary action or reduction in staff privileges. *Id.*; *see also* Note, *Medical Staff Membership Decisions: Judicial Intervention*, 1985 U. ILL. L.F. 473, 477.

104. *See* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS—1985, at 74 (1984).

105. *See* Richards v. Emanuel County Hosp. Auth., 603 F. Supp. 81, 85 (S.D. Ga. 1984) ("Peer review of doctors is an established procedure for determining qualifications for staff privileges. The doctors of a hospital's medical staff and the hospital's governing authority are best able to establish the criteria and methodology for review of a doctor's competence to serve on the staff."); *see also* Truly v. Madison Gen. Hosp., 673 F.2d 763, 765 (5th Cir. 1982); Laje v. R. E. Thomason Gen. Hosp., 564 F.2d 1162, 1162 (5th Cir. 1977), *cert. denied*, 437 U.S. 905 (1978); Robbins v. Ong, 452 F. Supp. 110, 115 (S.D. Ga. 1978); Kaplan v. Carney, 404 F. Supp. 161, 165 (E.D. Mo. 1976).

106. *See* Sosa v. Board of Managers, 437 F.2d 173, 177 (5th Cir. 1971) ("The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance."); *see also* Truly v. Madison Gen. Hosp. 673 F.2d 763, 765 (5th Cir. 1982); Woodbury v. McKinnon, 447 F.2d 839, 842-43 (5th Cir. 1971); Robbins v. Ong, 452 F. Supp. 110, 115 (S.D. Ga. 1978); Jackson v. Fulton-DeKalb Hosp. Auth., 423 F. Supp. 1000, 1003 (N.D. Ga. 1976); Kaplan v. Carney, 404 F. Supp. 161, 165 (E.D. Mo. 1976).

## III. THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH RULE AND THE ATTORNEY GENERAL'S OPINION

Pursuant to the Illinois Hospital Licensing Act,[107] the Illinois Department of Public Health issued a rule concerning due process in the hospital setting.[108] The rule states, in part, that the "by laws, rules and regulations" of licensed Illinois hospitals must "specifically provide . . . for a policy that specifies a procedure for processing applicants for staff privileges and guarantees due process and a fair hearing for each such applicant."[109]

In 1983, the Illinois Hospital Licensing Board requested that the Illinois Attorney General clarify the phrase "due process and a fair hearing" and explain what procedures hospitals would have to afford applicants for staff privileges.[110] The Attorney General's subsequent opinion interpreted the rule as requiring hospitals to grant to each rejected applicant "reasonable notice"; the opportunity to appear and be heard, in person and by counsel, at each level of the application process; the opportunity to present evidence and examine evidence presented; and the opportunity to present, confront and cross-examine witnesses.[111]

To reach this conclusion, the Attorney General's opinion begins with the suggestion that "due process," as used in the rule, connotes a commonly accepted legal principle ingrained in the fifth and fourteenth amendments.[112] The essence of due process, according to the opinion, is "fundamental fairness,"[113] a concept which requires at least a "meaningful notice and the opportunity to be heard in the protection and enforcement of rights in an orderly proceeding adapted to the nature of the situation."[114] The opinion then cites three cases, each of which involved staff disputes in pub-

107. ILL. REV. STAT. ch. 111½, ¶¶ 142-157 (1985).

108. 77 ILL. ADMIN. CODE ch. 1, subch. b, § 250.310(a)(3) (1985).

109. *Id.*

110. Minutes of Meeting of Illinois Hospital Licensing Board, Springfield, Ill. (Nov. 2, 1983). There is some indication that the Hospital Licensing Board was dissatisfied with the Attorney General's subsequent response. *See* Minutes of Meeting of Illinois Hospital Licensing Board, Springfield, Ill. (Aug. 22, 1984). The Board first considered asking the Attorney General to write another opinion, clarifying his position as to the process due the physician-applicant, but this idea was later abandoned in favor of the appointment of a subcommittee to study the due process issue further. *Id.* The subcommittee has since voted to recommend to the Board that the language of the rule be altered, specifically removing the "fair hearing" requirement. *See* Minutes of the Meeting of the Subcommittee on Due Process, Chicago, Ill. (Sept. 19, 1985).

111. Op. Att'y Gen. No. 84-004, *supra* note 15, at 5.

112. *Id.* at 3.

113. *Id.*

114. *Id.*

lic hospitals, which illustrate the types of procedures that should be afforded the physician-applicant.[115]

The first case concerned a doctor denied reappointment to the defendant hospital staff because of various incidents of alleged misconduct.[116] Following several hearings before the hospital's credentials committee, joint conference committee, and board of directors, all of which confirmed the decision to release the doctor from staff, the doctor brought suit, claiming a denial by the hospital of his rights to procedural due process.[117]

In its decision, the Illinois Appellate Court proceeded directly to a discussion of the adequacy of the hospital's actions, foregoing any examination of the doctor's liberty or property interest.[118] The court rejected the doctor's claims that he had received insufficient notice of the complaints against him and that participation of the hospital's counsel in the hearings had denied him due process.[119] Noting that the plaintiff received notice, hearings at which he presented and cross-examined witnesses, and an opportunity to inspect evidence, the court held that the procedures afforded the plaintiff were more than adequate to satisfy any due process requirements.[120]

In the second case, a surgeon contested the denial of reappointment to a hospital staff based on supposed irregularities in his treatment of patients admitted for obstetrical and gynecological disorders.[121] The hospital gave the plaintiff no notice of the deliberations regarding his performance[122] and presented the decision to terminate his appointment as a *fait accompli*.[123] Alleging that these actions amounted to a deprivation of his procedural due pro-

115. *Id.* at 3-5 (citing Shaw v. Hospital Auth., 614 F.2d 946 (5th Cir.), *reh'g denied*, 620 F.2d 300 (5th Cir.), *cert. denied*, 449 U.S. 955 (1980); Poe v. Charlotte Memorial Hosp., 374 F. Supp. 1302 (W.D.N.C. 1974); Ladenheim v. Union County Hosp. Dist., 76 Ill. App. 3d 90, 394 N.E.2d 770 (5th Dist. 1979)).

116. Ladenheim v. Union County Hosp. Dist., 76 Ill. App. 3d 90, 93-94, 394 N.E.2d 770, 773 (5th Dist. 1979). Dr. Ladenheim allegedly verbally abused nurses, refused to treat welfare recipients and failed to administer proper care to patients undergoing major surgery. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 95, 394 N.E.2d at 774.

120. *Id.*

121. Poe v. Charlotte Memorial Hosp., 374 F. Supp. 1302 (W.D.N.C. 1974). There is some indication that the plaintiff may have been dismissed because of his pro-abortion stance. *Id.* at 1302. The court noted that he opened the first certified non-hospital abortion clinic in the state and was considered a very controversial figure. *Id.* at 1305-06.

122. *Id.* at 1306.

123. *Id.* The hospital sent a letter to the plaintiff informing him that his privileges were terminated "effective immediately." *Id.*

cess rights, the surgeon sought a judicial order to restrain the hospital from implementing its decision.[124] A federal district court held that the plaintiff had indeed been denied his constitutional rights.[125] The court reasoned, without citation to authority, that the suspension of staff privileges constituted a loss of valuable property, which triggered the fourteenth amendment guarantees of notice and a hearing.[126] A temporary restraining order instructed the hospital to reinstate the plaintiff to the staff as a probationary member, and to grant him a hearing in accordance with due process of law.[127]

The third case involved a podiatrist seeking privileges at the defendant hospital who attempted to persuade the hospital authorities to amend their bylaws, which limited staff membership to licensed dentists and physicians.[128] At a meeting between the parties, the hospital heard the plaintiff's arguments but rejected his application and refused to make any changes in the bylaws.[129]

The Fifth Circuit held that the thirty-minute meeting between the podiatrist and the hospital's medical-dental staff did not meet minimum standards of procedural due process.[130] The court relied on a 1923 United States Supreme Court case to invoke the constitutional requirements, characterizing the plaintiff's "right to practice any of the common occupations of life" as a protectible liberty interest.[131]

Following a remand to the lower court, the hospital provided the podiatrist with notice, an opportunity to present and cross-examine witnesses and a three-hour hearing in which to present his arguments.[132] The Fifth Circuit affirmed the trial court's finding that these acts provided the podiatrist with due process of law.[133] The appellate court noted that the plaintiff's liberty interest, this time defined as "emanating from his state-created right to practice podiatry"[134] did not guarantee the plaintiff an absolute right to obtain

124. *Id.* at 1304. The plaintiff's complaint also included an equal protection claim. *Id.*

125. *Id.* at 1312.

126. *Id.* "It is obvious from the record that Dr. Hoke's loss of staff privileges at Memorial Hospital in Charlotte is a loss of valuable property.").

127. *Id.* at 1312-13.

128. Shaw v. Hospital Auth., 507 F.2d 625, 627 (5th Cir. 1975).

129. *Id.*

130. *Id.* at 628.

131. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

132. Shaw v. Hospital Auth., 614 F.2d 946, 951 (5th Cir.), *reh'g denied*, 620 F.2d 300, *cert. denied*, 449 U.S. 955 (1980).

133. *Id.*

134. *Id.* at 947.

staff privileges but only an occasion to challenge the denial of staff membership.[135]

## IV. ANALYSIS

Both the rule mandating due process for physician-applicants and the Attorney General's interpretation of what process is due lack a constitutional foundation. The rule and opinion are similarly flawed in their assumption that an applicant is entitled to the same constitutional safeguards as a doctor already in possession of hospital staff privileges. By failing to distinguish between mere applicants and doctors with existing privileges, the rule ignores the critical fact that applicants lack a liberty or property interest which merits due process protection.[136] Furthermore, even if applicants are entitled to some procedural protection, the Attorney General's opinion mandates procedures which go well beyond the requirements of due process.[137]

### *A. The Physician-Applicant and the Property Interest*

In *Board of Regents v. Roth*,[138] the Supreme Court held that a desire for or unilateral expectation of employment will not create an entitlement claim sufficient to constitute a protectible property interest.[139] The understandings or rules crucial to the entitlement concept are necessarily mutual in nature. Thus, in the staff privileges context, there must exist an expectation of continued employment which the doctor and the hospital share.[140] Nothing in the normal procedure for processing applicants,[141] however, indicates that the expectations involved could be characterized as anything but unilateral.

Unlike physicians already admitted to the medical staff, the applicant has no present employment on which to base an entitlement claim. Whereas a physician appointed to staff for a specific term or

135. *Id.* The court noted that the plaintiff was not deprived of his livelihood when he was denied staff privileges at the hospital since he was a staff member at several other hospitals in the area. *Id.*

136. *See infra* notes 138-72 and accompanying text.

137. *See infra* notes 173-201 and accompanying text.

138. 408 U.S. 564 (1972).

139. *Id.* at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it."); *see supra* notes 24-27 and accompanying text.

140. *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361 (9th Cir. 1976) (both hospital and physician expected a completion of the four-year residency program at issue); *supra* notes 25, 30 and accompanying text.

141. *See supra* notes 103-05 and accompanying text.

program can argue that he and the hospital expect a fulfillment of the agreement between them,[142] the applicant, not yet admitted, lacks such an expectation.[143] Even in those cases in which a physician of supposedly limited tenure is held to possess a property interest, the doctor's "entitlement" rests on institutional practices in which he, as a member of the hospital community, participates and which he legitimately can expect to apply to him.[144] The applicant, however, is still an outsider and cannot reasonably expect to partake of the hospital's employment practices without first having been admitted to the hospital staff.[145]

The procedures employed by hospitals to screen applicants also defeat any claim of a mutual expectation of employment. Hospitals conduct meticulous investigations of the professional qualifications of all applicants.[146] From consideration of education to review of pending liability suits and malpractice insurance coverage, the screening procedure used by the medical profession attempts to achieve a single purpose, adequate patient care.[147] Courts and governmental bodies refrain from dictating professional standards utilized in the hiring process.[148] Both concede that only medical professionals possess the requisite knowledge to judge the competency of a peer.[149]

The hospital, then, brings no expectation of employment to a review of a particular application. Both the hospital and the physician can predict only that the application will be closely scrutinized and that only those deemed worthy of staff membership will be accepted. Without the requisite mutual expectations of employ-

142. *See* Yashon v. Gregory, 737 F.2d 547, 553 (6th Cir. 1984) (hospital had history of routinely reappointing staff members, including plaintiff; court held that this "common law" of the workplace was sufficient to establish a property interest). *Cf.* Engelstad v. Virginia Mun. Hosp., 718 F.2d 262, 266 (8th Cir. 1983) ("mutuality" is lacking where the doctor is employed under an oral, terminable-at-will contract).

143. Schlein v. Milford Hosp., 423 F. Supp. 541, 543 (1976) ("Whatever expectancy Dr. Schlein may have had concerning his application for staff privileges, it was less than Roth's expectancy in his reappointment to a position he already had."), *aff'd*, 561 F.2d 427 (1977).

144. *See supra* notes 75-76, 78 and accompanying text.

145. *See supra* note 143 and accompanying text.

146. *See* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL—1985, at 74 (1984). The JCAH requires that hospital bylaws contain hiring criteria "[d]esigned to assure . . . that patients will receive quality care." *Id.*

147. *Id.*

148. 1984 Op. Att'y Gen. No. 84-004, *supra* note 15, at 5-6 (citing Sosa v. Board of Managers, 437 F.2d 173 (5th Cir. 1971); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 250 N.E.2d 892 (1969)).

149. *See* Sosa v. Board of Managers, 437 F.2d 173, 176-77 (5th Cir. 1971); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 250, 250 N.E.2d 892, 896 (1969).

ment, a physician-applicant may not claim a property interest in staff privileges.

### *B. The Physician-Applicant and the Liberty Interest*

Any attempt by an applicant to prove a liberty interest in staff privileges is sure to fail as well. To sustain a liberty interest claim, the applicant must pass the stringent four-step "stigma-plus" test.[150] The individual asserting a deprivation of liberty must prove not only a stigma foreclosing future employment opportunities[151] but also a publication of the reasons underlying the denial of his application,[152] a coincidental loss of a state-created status or right,[153] and a challenge to the validity of the reasons for denial.[154]

The primary element of the liberty interest test is that a stigma attach which has the effect of foreclosing future employment opportunities.[155] Admittedly, a refusal to allow a doctor to associate with a given institution raises an issue of professional adequacy, but this falls short of the level of severity required. The Supreme Court and several lower courts have held that a blemish on a professional reputation is not enough.[156] The stigma imposed must have a far-reaching effect, raising questions of morality or basic medical competency.[157] The damage wrought by the rejection must result in an inability to find employment at any hospital, not just subsequent rejections from one or two facilities.[158]

The mere rejection of an application cannot be equated with stigmatizing allegations. A decision to deny staff membership rests on an examination of existing information about the physician.[159] The hospital posits no new judgments regarding a doctor's qualifications but instead merely scrutinizes the biographical information already established, such as educational history and performance evaluations gleaned from the recommendations of former colleagues.[160] Here, the distinction between applicants and physicians

150. *See supra* notes 33-54 and accompanying text.
151. *See supra* notes 35-37, 42-44 and accompanying text.
152. *See supra* notes 38, 45-47 and accompanying text.
153. *See supra* notes 40, 52-54 and accompanying text.
154. *See supra* notes 39, 48-51 and accompanying text.
155. *See supra* notes 35-37, 42-44 and accompanying text.
156. *See supra* notes 36, 44, 83-84 and accompanying text.
157. *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 (9th Cir. 1976) (charges must equate the doctor's behavior with "moral turpitude"); *supra* notes 84-86 and accompanying text.
158. *See supra* note 44 and accompanying text.
159. *See supra* notes 103, 146-47 and accompanying text.
160. *See* St. Francis Hospital, Evanston, Ill., Application for Appointment to the

with present staff privileges is key, because revocation of staff membership requires the formation of original charges while the simple denial of privileges demands no such effort from the hospital.[161] In the latter instance, then, the rejected applicant can point only to the denial of the application itself as a ground for asserting a stigma on his reputation.

The second step, publication of the reasons underlying rejection of the application, presents an additional barrier to a physician's liberty interest claim. While the Supreme Court appears to require that the publication be "official" in nature,[162] several lower courts apply a more flexible standard.[163] These courts hold that the maintenance of personnel records, which may be disclosed to the credentials committees of other hospitals, satisfies the publication requirement.[164] Following this rationale, one could argue that a doctor faces de facto publication merely by applying to another facility, since applications often request that doctors reveal whether they have been denied admittance elsewhere and state the reasons therefor.[165] A release of information form often accompanies the application,[166] ensuring that any material not supplied by the individual physician will eventually fall into the hospital's hands.

However, courts that have found "publication" in the mere retention of records are guilty of an overly expansive reading of applicable Supreme Court precedent. The Court has held that the allegedly damaging information must be "made public."[167] Too broad a reading of this requirement would render it meaningless.

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Medical and Dental Staff (1985); Evanston Hospital, Evanston, Ill., Application for Appointment to the Medical Staff (1985).

161. *See* St. Francis Hospital, Evanston, Ill., Application for Appointment to the Medical and Dental Staff (1985); Evanston Hospital, Evanston, Ill., Application for Appointment to the Medical Staff (1985).

162. *See supra* notes 45-47 and accompanying text.

163. *See supra* note 90 and accompanying text.

164. *Id.*

165. *See* Clair v. Centre Community Hosp., 317 Pa. Super. 25, 32, 463 A.2d 1065, 1070 (1983) ("An inevitable question in any application [the physician] may make to join the staff of another hospital is whether he has ever had his privileges revoked. Also inevitable is that such hospitals will check with the hospitals at which [the physician] has practiced."); *see also* St. Francis Hospital, Evanson, Ill., Application For Appointment to the Medical and Dental Staff, at 3 (1985) (question no. 18 asks, "Have you ever been refused membership on a hospital medical staff?"; if the applicant answers affirmatively, he must explain why.)

166. *See* St. Francis Hospital, Evanston, Ill., Application for Appointment to the Medical and Dental Staff (1985).

167. Bishop v. Wood, 426 U.S. 341, 348 (1976); *see supra* notes 45-47 and accompanying text.

If the maintenance of a memorandum describing a rejection decision is sufficient to constitute publication, it is difficult to imagine any recorded information which is not "made public." It is much more likely that the Court envisioned a situation in which the reasons for the decision would be made known to members of the general populace, not merely to prospective employers whose inquiries have been authorized by the applicant. Aside from this limited dissemination, it is extremely improbable that a hospital would "make public" the rejection of an application or the reasons therefor.

The third step in the "stigma-plus" test requires that the imposition of a stigma be accompanied by a loss of a state-created status or right.[168] This requirement further weakens the applicant's claim. A physician's medical degree does not carry with it the right to staff privileges.[169] Denial of an application in no way limits a licensed physician's right to practice medicine per se; it only forecloses the opportunity to utilize the facilities of a particular hospital. Again, the hospital's decision whether to grant staff privileges is to a large extent discretionary and is considered beyond the reach of governmental or judicial interference.[170]

Finally, physician-applicants do meet one step of the liberty interest test. The requirement that the physician voice a challenge to the truthfulness of the reasons asserted by the hospital[171] obviously demands little effort on the applicant's part. A mere assertion that the application has been denied on false grounds will suffice.[172] Fulfilling this leg of the liberty test, however, advances the applicant's claim no closer to judicial recognition. Having failed to meet the stigma, publication and state-created-right requirements, the applicant has no liberty interest which is damaged by denial of staff privileges.

### *C. The Physician-Applicant and the Process Due*

However misguided the Department of Public Health rule may be in endowing physician-applicants with the right to procedural

168. *See supra* notes 40, 52-54 and accompanying text.

169. *See* Sosa v. Board of Managers, 347 F.2d 173, 175 (5th Cir. 1971) ("It has been clearly established for years that a doctor has no constitutional right to staff privileges at a hospital merely because he is licensed to practice medicine."); *see also* Capili v. Shot, 487 F. Supp. 710, 713 (S.D.W. Va. 1978) (no constitutional right to privileges at hospital merely by reason of licensure).

170. *See supra* notes 100-06 and accompanying text.

171. *See supra* notes 39, 48-51 and accompanying text.

172. *Id.*

due process, the regulation nonetheless exists and accordingly leads to the issue of "what process is due."[173] The Attorney General's opinion indicates that applicants are entitled to a full panoply of procedures,[174] the practical implication of which is a cumbersome, trial-type hearing every time a hospital declines to accept a doctor's request for privileges.[175] Yet the requirement of "due process and a fair hearing" need not entail such an unwieldly process. A simple application of the *Mathews v. Eldridge*[176] test[177] would require nothing more than notice and an informal hearing.[178] The less formal process would lighten the administrative burden on the medical staff while providing adequate protection for the doctor's interest and perpetuating the court's traditional reluctance to interfere with medical staff appointments.

The *Eldridge* test suggests that the Attorney General should have balanced the physician-applicant's interest, the risk of error in less formal proceedings, the probable value of more formality, and the hospital's interest in avoiding more cumbersome procedures.[179] The physician's interest in obtaining staff privileges at a particular facility is not insignificant. Staff privileges are of critical importance to a medical career and for some specialists, privileges are vital to their very existence as professionals.[180] Nonetheless, denial of privileges at one hospital does not foreclose the opportunity to practice medicine entirely; it merely forces the doctor to submit his application elsewhere.[181]

The risk of an erroneous deprivation of a physician's interest through the peer review system used to screen applications for staff privileges is slight, and the value of additional procedures would be minimal. Courts hesitate to interfere with the admission process, preferring instead to let peer review operate unfettered by judicial tampering.[182] While courts will award certain procedural rights to physicians embroiled in staff privileges disputes,[183] a distinction must be made between the procedural protections due mere appli-

173. *See supra* notes 55-62 and accompanying text.
174. *See supra* note 111 and accompanying text.
175. *See infra* note 201 and accompanying text.
176. 424 U.S. 319 (1976).
177. *See supra* note 61 and accompanying text.
178. *See infra* notes 179-205 and accompanying text.
179. *See supra* note 61 and accompanying text.
180. *See supra* notes 1-4 and accompanying text.
181. *See supra* note 44 and accompanying text.
182. *See supra* notes 100-06 and accompanying text.
183. *See supra* notes 92-99 and accompanying text.

cants and those due physicians who hold privileges and subsequently lose them.

The trial-type hearing is useful for those cases in which issues of fact arise.[184] A revocation of staff privileges, when hospital committees must determine the truthfulness of allegations leveled against the physician, is such a situation[185] The application process, however, requires only a consideration of objective criteria, such as letters of recommendation and *curricula vitae*.[186]

The processes utilized by screening committees are like those employed by academic institutions when they are considering whether to dismiss students on the basis of poor academic performance.[187] Courts have noted the highly subjective nature of such decisions[188] and typically have held that students are not entitled to any form of hearing prior to dismissal.[189] Academic dismissals call for an evaluation of accumulated information by individuals whose training and professional experience make them uniquely qualified to decipher the impact of failing grades or other indicia of poor academic performance.[190] In these cases, as in peer review situa-

184. *See* 2 K. DAVIS, ADMINISTRATIVE LAW 448 (2d ed. 1979).

185. *See, e.g.*, Klinge v. Lutheran Charities Ass'n, 523 F.2d 56, 59 (1975) (intra-hospital hearing convened to determine whether surgeon "had failed to exercise the degree of care and skill that a reasonably careful and skilled surgeon would have exercised" in operations performed in the hospital); Meredith v. Allen County War Memorial Hosp., 397 F.2d 33, 34 (6th Cir. 1968) (doctor threatened with revocation of staff privileges appeared before hospital committee to answer charges of general uncooperativeness and refusal to handle emergency cases); Scarnati v. Washington, 599 F. Supp. 1554, 1555 (M.D. Pa.) (hospital committee convened to determine whether psychiatrist on medical staff prescribed improper medications for patients), *aff'd*, 772 F.2d 896 (3d Cir. 1985).

186. *See supra* note 103 and accompanying text.

187. *See infra* notes 188-95 and accompanying text.

188. *See* Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978) (reviewing dismissal of medical student for failing clinical program, the Court noted that the academic review process was by its nature "subjective and evaluative"); *see also* Mauriello v. University of Dentistry & Medicine, Nos. 84-5666 & 84-5720 (3d Cir. Jan. 14, 1986) (available Feb. 1, 1986, on LEXIS, Genfed library, Courts file); Henson v. Honor Comm., 719 F.2d 69, 72 (4th Cir. 1983); Miller v. Hamline Univ. School of Law, 601 F.2d 970, 972 (8th Cir. 1979); Nuttleman v. Case Western Reserve Univ., 560 F. Supp. 1, 2-3 (N.D. Ohio 1981).

189. *See* Board of Curators v. Horowitz, 435 U.S. 78, 84-85 (1978) (Court characterized the school's warnings to plaintiff of academic deficiencies as "as much due process as the fourteenth amendment requires"); *see also* Martin v. Helstad, 699 F.2d 387, 390-91 (7th Cir. 1983); Miller v. Hamline Univ. School of Law, 601 F.2d 970, 972 (8th Cir. 1979); Mahavongsanan v. Hall, 529 F.2d 448, 451 (5th Cir. 1976); Wilkenfield v. Powell, 557 F. Supp. 579, 583 (W.D. Tex. 1983); Sanders v. Ajir, 555 F. Supp. 240, 247 (W.D. Tex. 1983); Bleicher v. Ohio State Univ., 485 F. Supp. 1381, 1386-87 (S.D. Ohio 1980); Aubuchon v. Olsen, 467 F. Supp. 568, 572 (E.D. Mo. 1979); Watson v. University of S. Ala. College of Medicine, 463 F. Supp. 720, 727 (S.D. Ala. 1979).

190. *See* Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978); *see also* Hines v. Rinker, 667 F.2d 699, 704 (8th Cir. 1981); Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975); Nuttleman v. Case Western Reserve Univ., 560 F. Supp. 1, 2-3 (N.D. Ohio

tions, courts have admitted their inability to pass judgment on the merits of the professionals' decisions and readily have abdicated this responsibility to the professors, counselors and school administrative bodies involved in the decision to dismiss a student.[191] Moreover, the Supreme Court has held that these decisions are not adaptable to the "procedural tools of judicial or administrative decisionmaking."[192] Indeed, one court has stated that where the academic decision at issue is limited to the rejection of an application for admission, the court should exercise even greater restraint as the applicant possesses a lesser interest in education than the student already admitted to the school.[193]

In both academic decisions and peer review, the evaluation is conducted by individuals who are well-versed in the standards of their profession and whose own education makes them particularly qualified to reach a decision which reflects those standards.[194] Furthermore, these individuals need not indulge in adjudicatory findings of fact, but rather need only interpret objective records of performance and training.[195] The inherent risk of error in these procedures, therefore, is quite insignificant and the probable value of additional procedural protection is small.

The hospital's interest in the applicant screening process is twofold. Of primary importance is patient well-being.[196] Hospitals have a legal and professional obligation to provide an environment conducive to the highest possible standard of care.[197] This requires, at the very least, a competent, responsible medical staff. Hospitals also have a pecuniary interest in minimizing their own liability for the possibly negligent acts of medical staff members.[198] In view of the ever-increasing damages awarded in medical malpractice cases[199] and the wide sphere of culpability,[200] hospitals are

1981); Connelly v. University of Vt. & State Agricultural College, 244 F. Supp. 156, 161 (D. Vt. 1965).

191. *See* Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978); *see also* Hines v. Rinker, 667 F.2d 699, 704 (8th Cir, 1981); Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975); Nuttleman v. Case Western Reserve Univ., 560 F. Supp. 1, 2-3 (N.D. Ohio 1981); Connelly v. University of Vt. & State Agricultural College, 244 F. Supp. 156, 161 (D. Vt. 1965).

192. Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978).

193. *See* Adman v. Harvard Medical School, 494 F. Supp. 603, 619 (S.D.N.Y. 1980).

194. *See supra* notes 100-06, 187-93 and accompanying text.

195. *See supra* notes 103, 185-86 and accompanying text.

196. *See supra* note 147 and accompanying text.

197. *See* 77 ILL. ADMIN. CODE ch. I, subch. b (1985); *supra* note 147 and accompanying text.

198. *See supra* notes 9-10 and accompanying text.

199. *See* P. DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE

well advised to screen applicants for staff privileges with the utmost care.

To hold hospitals to the procedures recommended by the Attorney General surely would create an unnecessary and burdensome responsibility for hospital administrators and committees. Opinions addressing due process in the staff privileges context are replete with the exhaustive procedures that hospitals must grant to physicians challenging dismissal from staff.[201] To require the same measures for every rejected applicant is both wasteful and impractical. Because of the Attorney General's opinion, administrators now are faced with the dilemma of scheduling a trial-type hearing for every rejected applicant or ignoring the due process rule and inviting court action. If hospitals comply with the rule, doctors involved in the hiring process inevitably will spend an inordinate amount of time preparing for and participating in hearings and will have less time to devote to patient care and to their own practices. In sum, implementation of the full procedural rights delineated in the Attorney General's opinion will jeopardize the efficient operation of the hospital. The tension inherent in providing each and every applicant with these procedures surely will introduce a discordant note into the hospital community and threaten the attention that must be given to the hospital's primary concern, the health and safety of its patients.

## V. RECOMMENDATIONS

The Department of Public Health rule is devoid of any constitutional merit[202] and therefore should be abolished. In the alternative, the procedures recommended by the Attorney General[203] should be ignored because they destroy the equilibrium of interests sought by the *Eldridge* test[204] and hang a millstone of administra-

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CLAIMS (1982); 10 MED. LIAB. (Cap.) 1 (Jan. 1985) (patients are filing three times as many claims as they did ten years ago).

200. *See supra* notes 9-10 and accompanying text.

201. *See* Shaw v. Hospital Auth., 614 F.2d 946, 951 (5th Cir.) (procedures afforded plaintiff included notice, a personal appearance at a hearing with counsel and an opportunity to present and cross-examine witnesses), *reh'g denied*, 620 F.2d 300 (5th Cir.), *cert. denied*, 449 U.S. 955 (1980); Siquerira v. Northwestern Memorial Hosp., 132 Ill. App. 3d 293, 295, 477 N.E.2d 16, 17-18 (1985) (physician's privileges restricted; bylaws require hearing before ad hoc committee, opportunity to present and cross-examine witnesses, and an opportunity to introduce documentary evidence; hearings conducted over a period of six months). *See generally* Groseclose, *Hospital Privileges Cases: Braving the Dismal Swamp*, 26 SAN DIEGO L. REV. 1, 4-9 (1981).

202. *See supra* notes 138-72 and accompanying text.

203. *See supra* note 111 and accompanying text.

204. *See supra* note 61 and accompanying text.

tive responsibility around the hospital's neck.[205] The balancing of interests required by *Eldridge* leads more logically to the conclusion that the "due process and a fair hearing"[206] required by the Department of Health rule would be met fully by a thorough peer review process. Simple notice of the grounds for denial of staff privileges and the opportunity for an informal hearing between the doctor and the screening committee would preserve the integrity of both the rule and the peer review system traditionally favored in professional settings. The hearing would be no more than a casual "give and take" between the parties, free from the needless procedural embellishments of presence of counsel, presentation of evidence and examination of witnesses. Through this process, two interests would be served: the physician could confront the decisionmakers, explain his position and perhaps persuade the committee to view his application in a more favorable light, while the hospital's interest in preserving peer review and avoiding time consuming proceedings similarly would be respected.

## VI. CONCLUSION

The essence of due process is fairness and balance. The rule mandating due process for medical staff applicants and the Attorney General's opinion recommending the process due not only lack a constitutional foundation but also destroy the sense of proportion and justice inherent in due process. The better approach to the staff privileges dilemma is one which grants the applicant notice and an informal hearing with his fellow professionals. This formula would give equal weight to the physician's interest in a fair evaluation and the hospital's interest in a thorough, efficient screening process.

CAROLYN QUINN

205. *See supra* note 201 and accompanying text.
206. *See supra* note 108 and accompanying text.