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Singleton v. Wulff: Extension of the Right of Privacy through Standing

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Singleton v. Wulff: EXTENSION OF THE RIGHT OF PRIVACY THROUGH STANDING

INTRODUCTION

Missouri participates in the Medicaid program, under which the Federal government partially underwrites qualifying state plans for medical assistance to the needy.[1] Missouri's plan[2] includes a list of twelve categories of medical services that are eligible for Medicaid funding. The last category provides medical assistance payments for pregnancies carried to term or for therapeutic abortions, but denies such payments for nontherapeutic abortions.[3]

In 1974 two Missouri-licensed doctors brought suit challenging the constitutionality of the state Medicaid Statute.[4] The district court dismissed for lack of standing to bring the action. On appeal, the Eighth Circuit Court of Appeals, in *Wulff v. Singleton,*[5] held that the physicians did have standing to bring the action. In reaching a similar decision on the subsequent appeal to the Supreme Court, Mr. Justice Blackmun held that the plaintiffs-physicians had standing to assert their own rights since they suffered concrete injury of an economic and professional nature from the operation of the challenged statute.[7] The Court also held[8] that physicians should be allowed to assert the rights of their women patients to be free of the unconstitutional governmental interference with the decision to terminate pregnancy.[9] This comment will examine the Court's rationale for granting the physicians standing on each basis.

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[1] 42 U.S.C. §§ 1396(a)-1396(g) (1970 & Supp. IV 1974).

[2] MO. REV. STAT. §§ 208.151-208.158 (Supp. 1975).

[3] MO. REV. STAT. § 208.151(12) (Supp. 1975) ("Family planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortion unless such abortions are medically indicated." *Id.*).

[4] Wulff v. State Bd. of Registration for Healing Arts, 380 F. Supp. 1137 (E.D. Mo. 1974).

[5] 508 F.2d 1211 (8th Cir.), *cert. granted,* 420 U.S. 1041 (1975).

[6] 428 U.S. 106 (1976).

[7] *Id.* at 112-13.

[8] *Id.* at 118.

[9] Justice Stevens, concurring, agreed with the Court's conclusion but, since he was not sure that the plurality's analysis would sustain the physicians' standing to represent their patients, he did not join in that part of the opinion. *Id.* at 121-22. Justice Powell, joined by the Chief Justice, Justice Rehnquist, and Justice Stewart, dissented as to the issue of representation. *Id.* at 122.

I. STANDING OF PHYSICIANS TO ASSERT THEIR OWN RIGHTS

A. *Analysis of* Wulff

The concept that a physician must show direct personal injury to be granted standing was first considered in the context of abortion cases in *Roe v. Wade*[10] and *Doe v. Bolton*.[11] The principal question in these cases was whether a state could constitutionally prohibit an abortion except when it was necessary to protect the life of the mother.[12] In each case, the Court granted the physician standing to challenge a criminal abortion statute. The Court reasoned that a sufficiently direct threat of personal detriment existed because the physicians were the ones against whom such statutes were aimed.[13]

In *Griswold v. Connecticut*,[14] as in *Roe* and *Doe*, a physician, who was criminally charged as an accessory to the crime of using birth control devices and thus had a direct personal stake in the result of the litigation, had standing to challenge the statute on his own behalf.

These cases, relied upon by the Court, are best interpreted as supporting only the limited proposition that the existence of a criminal statute which directly affects the interests of a physician will suffice to grant the physicians standing to challenge that statute. *Wulff* can be distinguished from each of these cases. The Missouri Medicaid statute imposes no criminal penalties upon the physicians and in this respect does not serve to directly and adversely affect their interests. The physicians are free to perform abortions without fear of any possible prosecution.

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[10] 410 U.S. 113 (1973).

[11] 410 U.S. 179 (1973).

[12] The Court's reason for recognizing the constitutional right to have an abortion was that this decision lay within the right of privacy previously identified by the Court. *See* Doe v. Bolton, 410 U.S. 179, 209-15 (1973); Roe v. Wade, 410 U.S. 113, 152-54 (1973). The leading modern case establishing a constitutional right of privacy is Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Supreme Court held invalid a state law prohibiting the use of contraceptive devices as applied to people who operated a birth control clinic. The Court rested its decision on the conclusion that a number of specific guarantees of the Bill of Rights protected "peripheral" rights or "penumbral" zones, some of which came together to form a constitutionally protected zone of privacy. The marriage relationship lay within this zone of privacy and it would be a violation of this interstitial right to permit governmental intrusion to enforce the anti-contraceptive law. *Id.* at 483-86.

[13] 410 U.S. at 124; 410 U.S. at 188.

[14] 381 U.S. 479 (1965).

Another case the Court regarded as lending support to its grant of standing to the physicians concerns a municipal hospital resolution which prohibited use of hospital facilities for nontherapeutic abortions. In *Nyberg v. City of Virginia,*[15] the District Court granted the physicians standing on two grounds: First, they have a right to practice medicine according to the highest medical standards without unreasonable restraints; second, they cannot be arbitrarily deprived of an opportunity to perform abortions which may account for a portion of their livelihood.[16]

Although, as in *Wulff,* the *Nyberg* Court found that potential economic injury was sufficient to grant standing, the physician's ability to perform abortions in *Nyberg* was severely limited due to the resolution adopted. The Medicaid statute under attack in *Wulff* neither prohibits nor limits the physicians in the performing of abortions. Therefore, *Wulff* is again distinguishable.

This analysis indicates that a grant of standing to the physicians in *Wulff* based on their own direct injury is questionable.[17] Since only the welfare recipients are directly affected under the Medicaid statute, they are the only proper parties to seek relief.

B. *Analysis of the Leading Cases*

Although the Court can be criticized for its analysis in *Wulff,* the court's inconsistency in this case brings into focus a more significant problem with the Court's general methodology. *Wulff* is an example of the Court's unwillingness to set out the various considerations that arise when plaintiffs seek standing to complain of injuries caused by remote governmental action. The Court tends to focus its decision around a narrow range of factors that are more easily susceptible to classification and rulemaking than are the policy concerns and values implicit in standing decisions. An attempt is made to root out the actual considerations of the Court in the recent cases utilized by the *Wulff* Court. *Wulff* is compared with these leading cases and reappraised in terms of the factors the Court weighed in reaching its determination to grant standing. This analysis will provide a reasonable basis for predicting future standing cases.

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[15] 495 F.2d 1342 (8th Cir.), *cert. denied,* 419 U.S. 891 (1974).

[16] *Id.* at 1344.

[17] *See* Note, *Denial of Equal Protection to Patient as also Constituting Denial of Equal Protection to Physician,* 7 U. TOL. L. REV. 213 (1975).

In *Linda R.S. v. Richard D.*,[18] an unwed mother sought to enjoin the discriminatory application of a Texas criminal child support statute to parents of legitimate children only, claiming that the district attorney unconstitutionally discriminated against her illegitimate children by refusing to prosecute their father for failure to provide child support.[19] The Court determined that it was speculative whether the injury would be remedied even if the relief was granted because the only result of success on the merits would be to send the father to jail.[20]

Mr. Justice White criticized the majority's reasoning, arguing that criminal sanctions are useful in coercing fathers to meet their support obligations.[21] What is important to notice is that the dissent's position, though resulting in an opposite conclusion from the majority, is just as valid. Presumably, other factors persuaded the Court to deny standing.

The controlling reason for denying standing was implied when the Court pointed out that a person lacks standing to contest the policies of the prosecuting authority when that person is neither prosecuted nor threatened with prosecution.[22] The underlying policy decision is that an interested and indirectly injured party should not be permitted to interfere in prosecutorial decisions. By explicitly basing its decision to refuse standing on the plaintiff's actual prospects for relief, the Court needlessly introduced a new concept into the law of standing.[23]

In *United States v. SCRAP*,[24] five law students challenged a ruling of the Interstate Commerce Commission (ICC) which allowed a surcharge on railroad rates, pending the adoption of rate increases, until an environmental impact study was made under the National Environmental Policy Act (NEPA).[25] Plaintiffs

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[18] 410 U.S. 614 (1973).

[19] *Id.* at 614-15.

[20] *Id.*

[21] *Id.* at 621.

[22] *Id.* at 619.

[23] The Court, in Warth v. Seldin, 422 U.S. 490 (1975), cited Linda R.S. v. Richard D., 410 U.S. 614 (1973), as support for its new causation test. The ultimate question in *Warth* was not whether the defendant harmed plaintiffs in a specific way, but whether the Court felt that it should provide effective relief. 422 U.S. at 504. The Court's reliance on *Linda R.S.* illustrated this concern.

[24] 412 U.S. 669 (1973).

[25] National Environmental Policy Act, 42 U.S.C. § 4342(2)(c) (1970).

sought standing under section 10 of the Administrative Procedure Act[26] claiming that the surcharge would result in discrimination against the hauling of recyclable goods and thereby damage the environment.[27] The Court granted standing by applying the liberal test that a complaint should be considered unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. The result in *SCRAP* seems sensible only because the speculative injury was of the type contemplated by the statute alleged to be violated. NEPA required an environmental impact statement thereby indicating that the purpose of the legislation was to protect against possible harm to the environment. Therefore, if the Court had denied standing on the grounds that the plaintiffs' only harm was concern over the possible detrimental environmental effects, it necessarily would have defeated the purpose of NEPA. A further policy behind the Court's refusal to dismiss the claim is the Court's evident willingness to give environmental litigants the opportunity to more easily and securely raise environmental claims.[28]

The Court, however, chose not to base its holding on the specific concerns of the case and instead, the case was made to turn on a procedural point. The Court stated that although plaintiffs might have been required to make a stronger showing of causality on a motion for summary judgment, they should not be forced to show more on a motion to dismiss.[29] This holding represents a failure of the Court to take responsibility for articulating the significant environmental considerations which undoubtedly led the Court to search for some procedure safeguard on which to ostensibly base their decision.[30]

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[26] Administrative Procedure Act, § 10, 5 U.S.C. § 720 (1970), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[27] Plaintiffs allege that the rate structure would selectively discourage the transportation and use of recyclable materials, consequently increase the consumption of natural resources, and thereby result in the proliferation of refuse and litter. The railroad replied that the surcharge represents a general rate increase and would not discourage the movement of scrap materials. 412 U.S. at 676.

[28] For a discussion advocating a liberal viewpoint regarding standing, see generally *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911, 929 (1972).

[29] 412 U.S. at 689.

[30] For a discussion of relevant considerations underlying situations like *SCRAP*, see

In *Schlesinger v. Reservists Committee to Stop the War*,[31] the citizens-plaintiffs sought a declaration that members of Congress were ineligible to hold a commission in the Armed Forces Reserve because of the incompatibility clause of the Constitution.[32] The plaintiffs alleged that a violation of the incompatibility clause would deprive citizens of the faithful discharge of legislative duties by reservist members of Congress.[33] The Court would not grant standing because of the abstract and speculative nature of the allegation.[34]

The weakness of the Court's decision is that a rule requiring concrete injury is illogical and inappropriate when applied to a constitutional provision which is designed to protect against injuries that are not necessarily concrete. The incompatibility clause is aimed at eliminating the possible ill effects on the legislature and the public from conflicts of interest in Congresspersons. Thus, if the plaintiffs in *Reservists* are concerned that Congresspersons may fail to discharge their duties faithfully because of conflict of interest, then the plaintiffs are suffering the very injury the provision was designed to prevent.[35]

One explanation for the *Reservists* decision was the Court's concern for the implications of allowing citizens to involve legislators in suits grounded on abstract and speculative allegations, which if sanctioned in courts, would impair a legislator's ability to perform his duties on grounds which may amount to no more than suspicion. In addition, the embarrassment associated with

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generally Comment, *Standing to Challenge Governmental Actions Which Have an Insubstantial or Attenuated Effect on the Environment*, 1974 DUKE L.J. 491.

[31] 418 U.S. 208 (1974).

[32] "[N]o Person holding any office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

[33] 418 U.S. at 212.

[34] *Id.* at 220.

[35] The problem of determining what injuries will be deemed concrete is particularly apparent when Schlesigner v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), is compared with United States v. SCRAP, 412 U.S. 669 (1973), where possible harm to aesthetic and environmental interests was considered a sufficient injury in fact. In Justice Marshall's dissent in *Reservists*, he expressed concern about the different results reached in these two cases, stating that it was reprehensible that the Court's priorities would allow hearing a claim involving interference with aesthetic appreciation of natural resources, but would not countenance one involving violation of a specific constitutional provision. 418 U.S. at 239-40. Implicit in this contrast is the fact that the Court recognizes a varying hierarchy of values, the more important of which will provide a controlling consideration in the decision regarding standing.

such litigation could be politically detrimental thus encouraging nuisance suits. But by not giving express weight to these policy considerations, the Court raised for subsequent courts formidable questions about the degree of concreteness needed for standing and created confusion as to the contextual appropriateness of the concrete injury test.

In *Warth v. Seldin*,[36] one group of plaintiffs consisted of low and moderate income individuals who resided outside of the town of Penfield. They claimed that Penfield's zoning ordinance had prevented persons of low and moderate income from acquiring residential property in the town.[37] In denying those plaintiffs standing, the Court enunciated a new causation test. The plaintiffs must allege facts from which it could reasonably be inferred that, absent Penfield's restrictive zoning practices, there would be a substantial probability that they would have been able to purchase or lease in Penfield.[38] The plaintiffs were denied access to federal court because they had not demonstrated that they personally would benefit in a tangible way from federal court intervention.[39] The Court, while recognizing that plaintiffs suffered a loss of housing opportunity, decided that this injury was not caused by Penfield's asserted illegal acts but rather was a consequence of the economy of the area housing market.[40]

The *Warth* Court used standing as a device to limit its policymaking role in the exclusionary zoning area rather than as a device to measure the sufficiency of plaintiffs' injuries. Although clothed as a constitutional decision that an insufficient causal relationship existed between plaintiffs' exclusion and Penfield's zoning ordinance to warrant effective relief,[41] *Warth* is based on a prudential determination to impose higher injury in fact standards where constitutional rights are being adjudicated.[42] By bas-

[36] 422 U.S. 490 (1975).

[37] The community's land use ordinance allocated 98% of the town's vacant land to single-family dwellings. Only .3% of the land available for residential construction was zoned for multifamily dwellings. *Id.* at 495.

[38] 422 U.S. at 504.

[39] *Id.* at 503-07.

[40] *Id.* at 506.

[41] The Court's reliance on Linda R.S. v. Richard D., 410 U.S. 614 (1973), illustrated this concern. 422 U.S. at 504 & n.79.

[42] *See* C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 18 (Supp. 1975).

ing its rationale on the issue of causality, the Court distorts the complex standing problem presented in *Warth* and sheds no light on the considerations it thought important.

C. *Conclusion*

The Court's treatment of injury in fact without any particularization in light of either the policies properly implicated or the context of the relevant precedent threatens that it will become a catchall for an unarticulated discretion on the part of the Court. Too often various considerations have been merged into one confused inquiry concerning standing. The Court, in *Wulff*, disguised its reasoning by focusing on the economic nature of the injury asserted and the professional relationship involved. By basing its decision on these aspects, the Court neglected the important difference between the precedent and *Wulff* in that the physicians alleged no direct personal injury under a criminal statute. By ignoring this disparity, the Court effectuated its policy consideration of expanding the constitutional right of privacy concerning governmental intrusions into matters relating to marriage, procreation, and family relationships by granting standing to physicians to contest statutes which prevent or severely restrict them in the performing of abortions.[43] In *Wulff*, the Court has actually sought to emphasize that decisions arising out of the physician-patient relationship are constitutionally protected under the right of privacy, but in doing so, has failed to take responsibility for articulating this as the paramount concern.

Underlying this tension is the Court's inability to fashion a general rule substantially applicable within similar contexts. It is necessary for the Court to place cases within meaningful groupings, to recognize within these groupings the considerations properly evoked in determining standing, and to articulate clearly and consistently through a more descriptive analysis the controlling factors in future cases.

II. STANDING TO ASSERT CONSTITUTIONAL JUS TERTII

The second basis upon which the Court granted standing to the physicians in *Wulff* was as representatives of their patients.

[43] A generalized right of privacy is nowhere mentioned in the Constitution. It is entirely the creation of the judiciary. *See* discussion note 12 *supra*.

Although the Court has proclaimed a general presumption against the representative assertion of a person's right (jus tertii),[44] the Court looks primarily to two factual elements to determine whether this presumption should apply in a particular case. The first is the ability of the third party to assert his own right.[45] The second[46] is the presence of a substantial relationship between the litigant and the person whose rights he seeks to assert.[47]

Applying these principles led the Court to grant jus tertii.[48] The Court found several obstacles to the women's assertion of their own rights. They could be chilled from asserting their rights by a desire to protect the privacy of their decision. Also, the Court stressed the imminent mootness of any individual woman's claim.[49] The closeness of the relationship was satisfied by the confidential nature of the physician-patient relationship. Each of these factors is considered below.

A. *Analysis of the Leading Cases: Obstacles*

The Court reneges on its committment to the first factual element justifying an exception when, after admitting that the mentioned obstacles are surmountable through the use of a pseudonym or assembled class action,[50] the Court concludes that if the assertion of a woman's right is to be representative to that extent

[44] 428 U.S. at 114 (citing Barrows v. Jackson, 346 U.S. 249, 255 (1953)). This rule was first enunciated in Tileston v. Ullman, 318 U.S. 44 (1943), where a physician was denied standing to attack a state anti-contraceptive statute in a declaratory judgment action on the grounds that it endangered the lives of three of his patients and consequently constituted a deprivation of life without due process of law. The Court held that his patients were not parties to the proceeding and that there was no basis on which to secure an adjudication of his patients' constitutional rights. *Id.* at 46. The primary consideration was the fact that there was no bar to the patients asserting their own rights on their own behalf.

[45] 428 U.S. at 116.

[46] *Id.* at 115.

[47] *Id.* (citing Doe v. Bolton, 410 U.S. 179, 188-89 (1973); Roe v. Wade, 410 U.S. 113, 116 (1973); Eisenstadt v. Baird, 405 U.S. 438, 445-46 (1972); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Barrows v. Jackson, 346 U.S. 249, 259 (1953)).

[48] 428 U.S. at 118.

[49] *Id.* at 117.

[50] Suit may be brought under a pseudonym. Furthermore, the case should not be treated as moot since the question is likely to recur and a holding of mootness would make it difficult or impossible for an important constitutional question to ever be presented for decision by the Court. *See* Roe v. Wade, 410 U.S. 113, 124-25 (1973). The Court, in Singleton v. Wulff, 428 U.S. 106 (1976), suggests that a class could be assembled, whose fluid membership always included some women with live claims. *Id.* at 117.

anyway, then there seems little loss in terms of effective advocacy from allowing its assertion by a physician.[51] This argument indicates that the Court is willing to allow jus tertii whenever personal litigation becomes practicably impossible.[52]

An analysis of the precedent relied upon by the plurality confirms the necessity of practicable impossibility. *Wulff* can be distinguished from these cases because the factor of impossibility is not present so as to justify the Court in granting an exception.

In *Barrows v. Jackson*,[53] a covenantor who sold land to a black purchaser in violation of a racially restrictive covenant was granted jus tertii, when he was sued for damages by another party to the covenant, to assert that enforcement of the convenant by an award of damages would violate the equal protection rights of prospective black purchasers of similarly restricted property. The Court argued that it would be "difficult if not impossible" for the prospective vendees to assert their grievance before any court.[54]

Other factors confirm the virtual impossibility of prospective black vendees asserting their own constitutional rights. First, the victim of the possible discrimination would not be known.[55] Second, it is difficult to see how, in the absence of a contract to sell, a black purchaser could have an actionable interest. And finally, there would be no chance, even under broad intervention rules, that a black would become a party to any proceeding to protest that the awarding of damages to a covenantor would impair his right to purchase property in the future.[56]

In *NAACP v. Alabama*,[57] the NAACP, in resisting efforts to enjoin it from doing business in the State of Alabama, had standing to assert that compulsory production of membership

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[51] 428 U.S. at 117-18.

[52] *Id.* at 126.

[53] 346 U.S. 249 (1953).

[54] *Id.* at 257.

[55] The Court refers to them as "unidentified but identifiable," meaning persons who might want to purchase a house but could not do so because of the racially restrictive covenant. *Id.* at 254.

[56] The federal courts recognize two types of intervention: 1) Intervention by right where conferred by federal statute and 2) intervention discretionary with the court where the intervenor's claim or defense involves a question of law or fact common to the action. FED. R. CIV. P. 24.

[57] 357 U.S. 449 (1958).

lists violated the constitutional rights of its members to freedom of association.[58] The action of the state was claimed unconstitutional because it would have deprived the members of their right to remain anonymous and to keep their membership in the organization secret. The members would have had to forgo those rights in order to assert them. The only possible way that their rights could have been effectively protected was to permit the association to assert them.[59]

In *Eisenstadt v. Baird,*[60] an advocate of birth control who was prosecuted for violating a statute forbidding the distribution of contraceptives to unmarried persons had standing to assert the constitutional claims of persons to whom he had distributed contraceptives.[61] The Court reasoned that since the statute prohibits, not use, but distribution, persons denied access to contraceptives are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.[62]

Singleton v. Wulff[63] can be distinguished from the *Barrows* line of cases on the issue of jus tertii in that the third party patients can easily seek relief on their own behalf.[64] The Missouri

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[58] *Id.* at 466.

[59] An effective way of counteracting pressures designed to nullify the constitutional rights of others may be to permit a third person who is not subject to the same pressures to assert them jus tertii.

[60] 405 U.S. 438 (1972).

[61] MASS. GEN. LAWS. ANN. Ch. 272, §§ 21, 21A (West 1970).

Section 21 provides in part: "Except as provided in section twenty-one A, whoever . . . gives away . . . any drug, medicine, instrument or article whatsoever for the prevention of conception . . . shall be punished by imprisonment . . . or by a fine . . . ."

Section 21A provides in part: "A registered physician may administer to and prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist . . . may furnish such drugs or articles to any married person presenting a prescription from a registered physician."

[62] The Court found a comparatively stronger basis for granting jus tertii than in Griswold v. Connecticut, 381 U.S. 479 (1965), where a physician who was criminally charged as accessory to the crime of using birth control devices had standing to assert that the Connecticut anti-birth control measure violated the constitutional rights of his patients to privacy in marital relations. The Court argued that unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, consequently, under the statute are denied a forum in which to assert their own rights. The Massachusetts statute, unlike the Connecticut statute considered in *Griswold*, prohibits the distribution, not the use, of contraceptives. 405 U.S. at 446.

[63] 428 U.S. 106 (1976).

[64] *See* Note, *Denial of Equal Protection to Patients as also Constituting Denial of Equal Protection to Physicians*, 7 U. TOL. L. REV. 213, 221-22 (1975).

Medicaid statute expressly provides the welfare recipients with a statutory right to an administrative hearing if their claims for medical assistance are denied.[65] Furthermore, the welfare recipients are afforded the right to appeal decisions regarding requests for medical assistance payments through the administrative process as required by federal legislation and established under the Missouri Revised Code.[66] By this direct statutory endowment, absent in *Barrows, NAACP,* and *Eisenstadt,* the patients in *Wulff* are granted the means to assert their rights on their own behalf.

One of the difficulties in applying the obstacle test is a lack of Court guidance in determining what relative degree of impracticability is conclusive to warrant the assertion of a third party's rights. As it stands, the test does not serve its intended purpose of providing a reasonably useful criterion for factually determining standing, but rather lends itself to whatever measure of adaptation serves the Court's discretion in granting or in refusing jus tertii on prudential grounds. This test, like the causation test, is another example of how the Court obscures what is at issue in a given case by creating an analytic device that can be stretched to accommodate the unarticulated discretion of the Court. The Court can fashion this test, as it did in *Wulff,* to grant or to refuse standing without either an enunciation of the policies properly implicated or a close regard for the context of relevant precedent.

B. *Analysis of the Leading Cases: Physician - Patient Relationship*

Focusing on the professional relationships in *Barrows, Griswold, Eisenstadt,* and *Doe,* the Court indicated that allowing physicians in *Wulff* standing to assert their patients' rights flows naturally from these decisions.[67] To the extent that there is a preexisting and substantial relationship[68] rather than a fortuitous

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[65] MO. REV. STAT. § 208.156 (Supp. 1975) ("The department of public health and welfare shall provide for granting an opportunity for a fair hearing to any applicant or recipient whose claim for medical assistance is denied or is not acted upon with reasonable promptness." *Id.*).

[66] 38 Fed. Reg. 22007, § 205.10(a)(5) (1973) ("An opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied . . . and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance." *Id.*).

[67] 428 U.S. at 115.

[68] *Id.* at 117.

one, the Court seems willing to grant jus tertii.[69] An analysis of these cases demonstrates that the *Wulff* Court has not clearly recognized that a relationship has no abstract importance but rather assumes significance by establishing a link between the claimant's injury and the constitutional right of the third party.

In *Barrows v. Jackson,*[70] the issue was whether the right of prospective black purchasers of real estate to be free from racial covenants implied or necessitated derivative protection for white sellers to be free from damages for breach of the covenant by selling to blacks. The vendor-vendee relationship was protected because the policy against discrimination implied collateral protection for white sellers.[71]

In the birth control controversies of *Griswold v. Connecticut*[72] and *Eisenstadt v. Baird,*[73] suppliers of contraceptive materials

[69] We should expect that the Court's sensitivity to the importance of a particular kind of relationship would vary from time to time as a general reflection of the existing social values. Today, for example, the Court is more apt to recognize the significance of a professional or fiduciary relationship as opposed to a commercial relationship and find that for certain social policy reasons one is more deserving of the Court's protection than the other. This change in emphasis illustrates how judicial doctrine develops in response to the particular problems and attitudes of a given social period and confirms the Court's social function as an arbiter and maker of policy. This course of development is both reasonable and desirable when you consider that the security of commercial transactions is embodied in established contract law doctrine while various protections of personal liberties have only recently come to be explained as resting on a constitutional right of privacy. It is not surprising, then, that the Court has taken a more active role to safeguard matters relating to marriage, procreation, and family relationships since the protection of these recently conceived liberties is not yet embodied in any established legal doctrine. *See also* discussion in note 82 *infra.*

As one example of increased judicial sensitivity, notice that the effect of holding a statute to be overbroad is to relax the usual standing rule that a litigant challenging a statute must show that his or her own conduct was constitutionally protected. In the preferred first amendment area, a litigant may attack a statute's constitutionality on overbreadth grounds even though the litigant may have engaged in conduct that the state could constitutionally have regulated by a statute that was more narrowly drawn. The primary reason for this extended base of standing is that the Court has been concerned about potential self-censorship by other persons who might be afraid to engage in protected speech because of the statute's broad coverage. If such persons did not speak, then the statute would have an inhibiting effect on constitutionally protected speech. *See e.g.,* Gooding v. Wilson, 405 U.S. 518, 521-22 (1972).

[70] 346 U.S. 249 (1953).

[71] The Court implicitly recognized this reasoning when it granted the vendor jus tertii to challenge restrictive covenants because the owner "is the one in whose charge and keeping reposed the power to continue to use the property to discriminate or to discontinue such use." *Id.* at 259.

[72] 381 U.S. 479 (1965).

[73] 405 U.S. 438 (1972).

were prosecuted under statutes forbidding use in Connecticut and distribution in Massachusetts, respectively. By granting jus tertii to the physicians in each case, the Court implicitly recognized the dependent nature of the relationship between enjoyment of a constitutional protection and the guarantee of access. The Court reasoned that the rights of recipients were likely to be diluted or adversely affected if they could not be asserted by the physicians.[74]

In *Roe v. Wade*[75] and *Doe v. Bolton*,[76] a patient's right to privacy was held to confer upon her physician a resultant right to perform abortions during her protected period. Physicians have a protected interest in performing abortions by virtue of the policy toward women. The Court argued in *Roe*[77] that a woman's exercise of her right to an abortion is necessarily at stake since she cannot safely secure an abortion without the aid of a physician.

In *Singleton v. Wulff*,[78] the Court emphasized that the presence of the confidential physician-patient relationship merged the physician and his patient for constitutional standing purposes.[79] By stressing the importance of a particular type of relationship that would justify an exception to the general rule, the Court offered a principle which is subordinate in importance to the nature of the governmental impact upon that relationship.[80] This analysis indicates that what is important is not whether a parciular category of relationship exists but rather whether the Missouri statute substantially impairs the expectancies or characteristics naturally arising out of the physician-patient relationship.

By placing primary emphasis on the nature of the relationship, the plurality seems to be generating a category of relationships, anyone of which, in itself, would justify a grant of jus tertii. The problem with this reasoning is that it promises to provide a

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[74] 381 U.S. at 481; 405 U.S. at 445-46.

[75] 410 U.S. 113 (1973).

[76] 410 U.S. 179 (1973).

[77] Roe v. Wade, 410 U.S. 113, 153-56 (1973).

[78] 428 U.S. 106 (1976).

[79] *Id.* at 117.

[80] The dissent would keep the emphasis on the impact of the litigation on the third party interests and treat the closeness of any relationship as only one factor in determining whether the third party interests will be represented adequately. *Id.* at 128 n.5.

reasonably useful criterion for factually determining jus tertii, but in actuality only surfaces one factor that a court should consider in deciding standing. Besides the presence of a substantial relationship, equally important factors are the nature of the governmental impact upon that relationship and the degree to which the third party is dependent on the claimant for the protection of his right. Although the Court recognized these contextual factors,[81] by analyzing *Wulff* in terms of a general rule with principled exceptions, the Court obscured the importance of these factors and failed to articulate the rationale behind the significance given to a professional relationship.

C. *Conclusion*

Although the Court has exercised its discretion to proclaim a general presumption against standing to assert the constitutional claims of third parties, the Court has recognized many departures from this rule. The frequency with which the Court has allowed exceptions suggests the lack of any coherent justification for the Court's general rule. This uncertainty can be attributed to the Court's failure to articulate the policy considerations properly implicated by its decisions and to recognize that these concerns cannot be itemized according to any principled criteria but rather are more accurately based on a variety of factors implicit in the various contexts in which jus tertii arises. By attempting to structure its reasoning with reference to two conclusive factors, the Court obscures the process by which the scope of jus tertii is determined.

Although it is generally wise to limit the assertion of jus tertii, there are instances where, in order to perpetuate other significant values, there must be a relaxation of the standing requirement. In such instances, it is imperative that the Court develop and apply well defined considerations so that neither set of values is diminished.[82] At the present time, the Court is more

[81] The Court reasons that the woman's exercise of her right to an abortion is necessarily at stake in Singleton v. Wulff, 410 U.S. 106 (1976), because "an impecunious woman cannot easily secure an abortion without the physician's being paid by the State." *Id.* at 117. In addition, "[T]he constitutionally protected abortion decision is one in which the physician is intimately involved." *Id.*

[82] For example, to the extent that the Court is willing to give special protection to a particular right or value, it may be willing to take a broadened view of standing when that right is asserted, although it is the right of one other than the claimant. The Court may

concerned with advancing and protecting personal liberties such as freedom from racial discrimination,[83] freedom of association,[84] and the right of privacy with respect to governmental intrusions into matters relating to marriage, procreation, contraception, and abortion.[85] This emphasis results because certain constitutional guarantees, within a given social period, inspire a greater sensitivity on the part of the Court than do others.[86] *Wulff* is an example of the Court's grappling with the task of clarifying and defining recently conceived personal liberties in matters of privacy through a broadened bases of standing to assert jus tertii.

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be eager to clarify the law in a particular area in order to prevent the inibition of the values embodied in that right because of the uncertainties as to its exact scope. Singleton v. Wulff, 428 U.S. 106 (1976) is one example of this broadened base of standing being extended to a litigant in order to insure the protection of a third party's interest, which is implicated by their relationship.

[83] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953).

[84] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958).

[85] *See, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976); Nyberg v. City of Va., 495 F.2d 1342 (8th Cir.), *cert. denied*, 419 U.S. 891 (1974); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[86] *See* discussion in note 69 *supra*.