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## The Old Age Wall: The Problem of Gaining Access to Nursing Home Residents

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# THE OLD AGE WALL: THE PROBLEM OF GAINING ACCESS TO NURSING HOME RESIDENTS

Jaya R. Salzman\*

As public awareness of nursing home problems has increased, community organizations have formed to redress the problems and alleviate the loneliness of the isolated elderly and disabled. Nursing homes or "warehouses for the dying"<sup>1</sup> are populated by elderly and infirm patients, predominantly women,<sup>2</sup> who suffer from three to four chronic conditions, one of which is usually a mental or psychological problem.<sup>3</sup> Many patients are overdrugged,<sup>4</sup> malnourished,<sup>5</sup> or left lying in their bodily wastes for hours.<sup>6</sup> Because bedridden patients are not turned regularly, they may develop bedsores which can become infected or gangrenous.<sup>7</sup> Many nursing homes do not meet the minimal government standards for sanitation or patient care,<sup>8</sup> which can result in patient injuries and deaths.<sup>9</sup> Boredom abounds in these institutions because patients have few recreational or social activities,<sup>10</sup> and few receive visitors.<sup>11</sup>

## Nursing home administrators often respond to community

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1. Speech by then President Richard M. Nixon to American Association of Retired Persons/National Retired Teachers Association in Chicago, Illinois (June 25, 1971) *reprinted in* B. VLADECK, *UNLOVING CARE* 3 (1980) [hereinafter cited as *VLADECK*].

2. Pre-1970 studies show that women in nursing homes outnumber men two to one; studies during the early 1970's show that women outnumber men three to one. Subcommittee on Long-Term Care of the Senate Special Committee on Aging, *Nursing Home Care in the United States: Failure in Public Policy, Introductory Report*, S. Rep. No. 1420, 93d Cong., 2d Sess. 16 (1974) [hereinafter cited as *Introductory Report*]. Women comprise 71% of the nursing home population. NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, *National Nursing Home Survey: 1977 Summary for the United States*, Vital & Health Statistics, series 13, No. 43 (PHS) 79-1794, Table 19, at 29 (1979) [hereinafter cited as *1977 Survey*].

3. VLADECK, *supra* note 1, at 14.

4. *Id.* at 18.

5. R. BUTLER, *WHY SURVIVE? BEING OLD IN AMERICA* 265 (1975).

6. *Id.* at 263, 265.

7. *Id.* at 265.

8. *Introductory Report*, *supra* note 2, at 76-77.

9. *See, e.g., infra* notes 31 and 37.

10. BUTLER, *supra* note 5, at 265.

11. Only 10% of nursing home patients have a living spouse, almost 50% have no viable relationship with a close relative, and most receive no visitors. *Introductory Report*, *supra* note 2, at 16, 18.

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groups who wish to help residents by locking the doors in an attempt to maintain the wall of silence between the residents and the outside world, thus preventing the public from interfering with their management of these business enterprises. Advocates have been forced to battle to gain access for three purposes: to inform patients of their statutory and constitutional rights and help them to effectuate these rights, to mitigate residents' isolation, and to work to improve the overall conditions within the nursing homes.

Without the assistance of advocates, residents are often unaware either of their constitutional rights or the statutory federal patients' bill of rights<sup>12</sup> which delineates fourteen basic rights of residents in nursing homes. All facilities which receive federal funds for patient reimbursement are required to abide by these enumerated rights. The patients' rights include freedom from mental and physical abuse, including chemical and physical restraint,<sup>13</sup> the right to be treated with consideration and respect,<sup>14</sup> the right to voice grievances to staff or outside representatives of their choice,<sup>15</sup> the right to associate and communicate privately with persons of their choice, and the right to meet with community groups.<sup>16</sup>

Residents also need advocates' help in asserting their rights and voicing grievances. Nursing home patients are difficult to organize because more than seventy percent are women,<sup>17</sup> and as such have been acculturated not to be aggressive.<sup>18</sup> The medical profession often views women patients as "silly, self-indulgent and superstitious" and regards women's ailments as "psychosomatic."<sup>19</sup> Similarly, nursing home patients' complaints are writ-

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12. 42 C.F.R. § 405.1121(k) (1981). CAL. ADMIN. CODE, tit. 22 R. 72527(a) (1982) contains all of the federal rights and articulates a few additional patient rights.

13. 42 C.F.R. § 405.1121(k)(7) (1981).

14. 42 C.F.R. § 405.1121(k)(9) (1981).

15. 42 C.F.R. § 405.1121(k)(5) (1981).

16. 42 C.F.R. § 405.1121(k)(11), (12) (1981).

17. See *supra* note 2.

18. Interview with Katherine E. Meiss, Attorney, Western Center on Law and Poverty, Sacramento, Cal. (Aug. 27, 1982).

19. B. EHRENREICH & D. ENGLISH, COMPLAINTS AND DISORDERS: THE SEXUAL POLITICS OF SICKNESS 79 (1973).

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ten off as the ramblings of confused or senile persons. Both of these approaches not only discredit the individual to others, but make the individual doubt herself. Furthermore, both the nursing home patient fighting for her statutory rights and for better care, and the woman struggling for her autonomy and independence in society are opposing the very institutions they depend upon.<sup>20</sup> Armed both with knowledge of legal rights and with outsiders to lend credibility to complaints, residents are better assured of a response to their grievances and enforcement of their rights.

Access also provides isolated residents with friendship: "[a]ll people need love and attention to survive. For some people in nursing homes, volunteer programs provide the only avenue for concerned community members to demonstrate that nursing home residents are loved, and that others do care."<sup>21</sup> Communication is difficult for the disabled, elderly patient on medications. Visitor groups are more likely to have the necessary time and patience for this communication than busy staff within the facility.<sup>22</sup> The isolation of nursing home patients is aggravated by residents' lack of means of communicating with the outside world. Most residents do not have private televisions or telephones; weakened eyesight may prevent them from reading newspapers and mail,<sup>23</sup> or from writing letters.

Communication needs to be assured. Where the rights of vulnerable, dependent people are at issue, courts must be particularly alert to efforts—from whatever source and for whatever motivation—to deprive such persons of whatever control they can retain over their own lives. Greater protection of human rights, and not less,

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20. "Our sheer physical dependence on medical technology makes the medical system all the more powerful as a source of sexist ideology." *Id.* at 84.

21. American Health Care Association, Establishing and Maintaining a Volunteer Program 3 (1976), *quoted in* Plaintiff's Motion for Preliminary Injunction at 6, *Teitelbaum v. Sorenson*, No. 79-199 PHX WEC (D. Ariz. July 3, 1979) (order denying motion to dismiss and granting preliminary injunction), *judgment entered*, (D. Ariz. Aug. 6, 1979) (granting permanent injunction), *appeal docketed*, No. 793530 (9th Cir. Aug. 30, 1979) [hereinafter cited as *Teitelbaum* Motion for Preliminary Injunction] (organization wishing to explain a state income tax credit or refund to patients cannot be denied access).

22. Interview with David Schulke, Director of United Neighbors in Action, (now defunct), Oakland, California (March 2, 1983).

23. *Teitelbaum* Motion for Preliminary Injunction, *supra* note 21, at 5-6.

is demanded of courts when vulnerable, dependent persons' rights are at stake.<sup>24</sup>

Finally, access is needed to ensure decent care in the facilities. Residents are confronted with both a health care institution, the skilled nursing facility, which shows disregard for residents' health and safety, and a regulatory agency, such as California's Department of Health Services (DHS), that does little to remedy abuses within the homes. Although there are numerous federal and state codes which govern the quality of care to be administered in skilled nursing facilities,<sup>25</sup> care remains

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24. Brief of *Amicus Curiae*, National Citizens' Coalition for Nursing Home Reform, Washington, D.C., for plaintiff-respondent at 4, *State v. Hoyt*, 304 N.W. 2d 884 (Minn. 1981) (daily visitor of brain-damaged nursing home resident cannot be convicted of trespass since the guardians have implied consent by permitting access for 22 months).

25. In California, the Department of Health Services (DHS) "is responsible for ensuring that long-term care facilities provide adequate health care for California's chronically ill or convalescent patients. . . . According to department staff, as of March 1982, approximately 1,200 long-term care facilities provided care to approximately 106,000 patients. Through its Licensing and Certification Division . . . the department enforces the minimum health standards specified in the California Health and Safety Code, in Title 22 of the California Administrative Code (Title 22), and in Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act. Through the Health Care Financing Administration, the federal government contracts with the State to certify health facilities for participation in the Medicare and Medi-Cal Program." AUDITOR GENERAL OF CALIFORNIA, *THE DEPARTMENT OF HEALTH SERVICES CAN IMPROVE THE ENFORCEMENT OF HEALTH CARE STANDARDS IN LONG-TERM CARE FACILITIES* 1-2 (Aug. 1982) [hereinafter cited as AUDITOR GENERAL'S REPORT]. See also CAL. HEALTH AND SAFETY CODE §§ 208(a), 1275 (West 1979) (the department can adopt and enforce rules and regulations to enable it to perform its duties).

"The Department is required to conduct at least one annual inspection of each long-term care facility to assess its compliance with state licensing and federal certification requirements for participation in the Medicare and Medi-Cal programs. In addition, the survey teams investigate complaints received by the district offices." AUDITOR GENERAL'S REPORT 2-3. See also CAL. HEALTH & SAFETY CODE § 1422(b) (West Supp. 1984) (amending requirement: "conduct inspections annually, except with regard to facilities which have no Class A or Class B violations. . . . Every facility shall be inspected at least once every two years") and §§ 1419-21 (West 1979) (investigation of complaints).

The DHS issues citations to facilities that do not comply with state and federal rules and regulations. CAL. HEALTH & SAFETY CODE § 1423 (West Supp. 1984). There are three classifications of citations. Class "A" violations involve situations where there is either "imminent danger . . . or . . . substantial probability that death or serious physical harm to patients" will occur. Class "A" violations carry a civil penalty between \$1,000 and \$5,000 "for each and every violation." CAL. HEALTH & SAFETY CODE § 1424(a) (West Supp. 1984). Class "B" violations involve situations which have a "direct or immediate relationship to the health, safety, or security of long-term health care facility patients,

substandard.<sup>26</sup> In California, DHS has demonstrated an unwillingness to enforce the regulations by not uniformly applying the citation and fine system<sup>27</sup> and by not trebling fines<sup>28</sup> in the event

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other than Class "A" violations." The penalty for a "B" violation is between \$50 and \$250 "for each and every violation." CAL. HEALTH & SAFETY CODE § 1424(b) (West Supp. 1984). CAL. HEALTH & SAFETY CODE § 1427 (West 1979) and CAL. ADMIN. CODE tit. 22, R. 72701(a)(4) (1982) describe a "C" violation as one having "only a minimal relationship" to the safety or health of the patients. This type of violation carries no penalty.

CAL. HEALTH & SAFETY CODE § 1426 (West 1979) authorizes the director of DHS to adopt regulations outlining the criteria and specific acts constituting Class "A" and Class "B" violations.

26. AUDITOR GENERAL'S REPORT, *supra* note 25, at 7.

27. "[D]istrict offices issue different levels of citations and/or assess different fines for similar violations. . . . Consequently, a surveyor may assess an "A" violation for a case in which another department staff member may assess a "B" or "C" violation or no violation." *Id.* at 30.

This lack of uniformity in citing is demonstrated in the case of *Patient A*, an 85 year-old woman in a nursing home. A nurse attempted to administer medication to her, and A insisted that she was not taking any medication. The nurse refused to allow A to speak with her doctor and insisted that she take the pills. Finally, another nurse entered and discovered that the medication was intended for the roommate. Later that day, A wanted to speak with the administrator of the facility about the incident. She kept pressing her call bell. The nursing home responded by disconnecting the call bells between patient rooms and three nursing stations, thus affecting approximately 150 patients. Interview with Michael Zielinski, Organizer, United Neighbors in Action (July 15, 1982). (This example and others in this Comment were taken from the files of United Neighbors in Action, Oakland, California, a former Bay Area community organization that handled complaints and sought to redress the problems of nursing home residents. To protect the privacy of patients and the anonymity of facilities, all references are deliberately obscure. Copies of fact sheets used in this Comment on file with Jaya Salzman.)

By chance, the DHS arrived that day to conduct its inspection of the facility. They discovered the disconnected call bells and cited the facility with one "B" violation: "[f]ailure to maintain the audible signal between patient rooms and nursing stations has a direct and immediate relationship to the health and safety of all patients in the facility." United Neighbors in Action, Fact Sheet on Facility (compiled from facility records of violations, Department of Health Services, Berkeley, Cal.).

Most such incidents of a short duration go undetected. A penalty of at most \$250 for not being able to respond to 150 patients' pleas for immediate medical attention, bed pans, or help from sudden falls or other serious medical developments is more than lenient. (See depositions below.)

Moreover, an inadequate call bell system is an "A" violation. CAL. ADMIN. CODE tit. 22, R. 72703(a)(7) (1982). Unauthorized administration of medication, such as was attempted on *Patient A* is included in the list of both "A" and "B" violations. CAL. ADMIN. CODE tit. 22, R. 72703(a)(3) and R. 72705(a)(4) (1982).

This incident can be contrasted with the following two depositions:

Q: If an inspector . . . finds there is not an adequate emergency call system, would that by itself be sufficient for issuing an "A" citation?

A: . . . [I]f it were the usual skilled nursing patient, bed patient, and it wasn't working, it would automatically be an "A" citation.

of recurrent violations.<sup>29</sup> Because DHS is not enforcing the regulations, nursing homes feel free to repeat infractions without penalty.<sup>30</sup> Furthermore, two statutory measures in California reduce the punitive value of the fining system and allow nursing homes to continue violating the regulations. First, if nursing homes correct within a specified time the "B" violations—those violations that have a direct effect on patients' health or safety—they can avoid payment of the fines.<sup>31</sup> Second, since fa-

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Deposition of Marian Vought (District Administrator, Berkeley Office, Dep't of Health) at 33-34, *United Neighbors in Action v. Obledo*, No. 495950-2 (Alameda County Super. Ct., Cal. filed June 1, 1977) [hereinafter cited as *United Neighbors in Action*, Deposition of Marian Vought]. (The case was initiated against DHS for its lack of enforcement of the codes.)

Q: [P]rior to the issuance of an "A" citation . . . they would have to find if there were no call system operating, that that in fact endangered a patient's life?

A: Yes . . . I can't recall ever seeing it as a Class "A" citation. . . . If it is a person who is completely dependent . . . I think it automatically should be an "A" citation.

Deposition of Charlene Harrington (Dec. 9, 1977) (former Deputy Director of the Dep't of Health Licensing and Certification Division) at 117, 120-22, *United Neighbors in Action v. Obledo*, No. 495950-2 [hereinafter cited as *United Neighbors in Action*, Deposition of Charlene Harrington, Dec. 9, 1977].

28. CAL. HEALTH & SAFETY CODE § 1428(e) (West Supp. 1984) requires the trebling of fines for violations repeated within twelve months. DHS does not enforce the regulations in more than 75% of the cases involving repeat citations. AUDITOR GENERAL'S REPORT, *supra* note 25, at 37.

29. See *supra* note 25 for a description of the violation system.

30. A: [T]here are very few "A" violations given, and really no penalties have ever been collected for "A" citations; so I think the deterrent effect for "A's" is almost nil. . . . [T]he facilities know that before anything is going to be done, they have to be given a large number of citations, and they have to have seriously repeated violations over quite a long history.

Q: That . . . has led you to believe that . . . that may be the reason for continued noncompliance by some of the facilities.

A: Yes.

*United Neighbors in Action*, Deposition of Charlene Harrington, Dec. 9, 1977, *supra* note 27, at 148-49.

31. "Class 'B' violations . . . have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients. . . . If a Class 'B' violation is corrected within the time specified, no civil penalty shall be imposed unless it is a second or subsequent violation of the same regulation occurring . . . since the previous . . . inspection or 12 months, whichever is greater." CAL. HEALTH & SAFETY CODE § 1424(b) (West Supp. 1984).

An example of how this section is abused is illustrated by *Patient B*, who was taken to a convalescent hospital to recuperate from a fractured hip. Her son observed that she developed a severe cough four days after admittance but the nursing home did not notify

cilities can appeal any citations they receive,<sup>32</sup> inspectors issue citations only when they have an "open and shut case."<sup>33</sup>

Fighting to gain entrance to nursing homes can pressure the facilities to improve their overall conditions. Since facilities which deny access are often those that have something to hide,<sup>34</sup> gaining access may lead to discovery of substandard care. Because patients are dependent on the facility for assistance,<sup>35</sup> lack financial resources,<sup>36</sup> and are afraid of retaliation,<sup>37</sup> outside ad-

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the doctor, and that although she was given some fluids, she did not receive the assistance she needed in drinking them. One week after admittance her son found her condition greatly deteriorated. She was pale, had trouble breathing, and did not recognize him. The staff seemed unconcerned with her condition, but he forced a nurse to call an ambulance. The hospital immediately put her on intravenous liquids due to her dehydrated condition, but she died the following day. Complaint letter from United Neighbors to DHS Berkeley Office (Dec. 30, 1980).

DHS found that the facility had not identified problems nor developed an individual plan of care for the patient. They found that the staff did not assist the patient with fluids nor notice her dehydration and decreased food intake. The staff also did not initiate appropriate action on discovery of her serious condition. Department of Health, Licensing and Certification Division, Berkeley Office, Notice of Violations (Feb. 26, 1981).

"It is an outrage that the facility was issued [two] "B" citations [with fines of \$50 to \$250] for infractions that led to the death of a patient. . . . A Class "A" violation is [one] . . . which presents an imminent danger . . . or a substantial probability that death . . . would result therefrom." The fines were retracted when the violations were "corrected." "[H]ow can they be corrected when my mother died directly from these violations?" Letter from *Patient B's* son to Department of Health (Nov. 23, 1981).

32. CAL. HEALTH & SAFETY CODE § 1428(a) (West Supp. 1984).

33. Deposition of Charlene Harrington (Aug. 15, 1977) at 65, *United Neighbors in Action v. Obledo*, No. 495950-2.

34. "[L]ack of regular visits by outsiders has been found by researchers to be directly correlated to poor quality of care rendered to residents." National Senior Citizens Law Center, *Access to Facilities 1* (Jan. 1981) (paper written by staff, Washington, D.C.).

35. One study found that 55% needed assistance in bathing, 47% with dressing, 11% with eating, and 33% were incontinent. *Introductory Report*, *supra* note 2, at 17. A later study's figures were higher: 86% needed help with bathing, 69% with dressing, 66% with walking, 33% with eating, 53% with using the bathroom, 45% were incontinent. *1977 Survey*, *supra* note 2, at 45.

36. Seventy percent of nursing home residents have an income of less than \$3,000 a year as opposed to less than 50 percent of the entire elderly population. *VLADECK*, *supra* note 1, at 14.

37. Both patients and their relatives fear that their complaints to facilities or to California's DHS will result in retaliation against the patient. In a deposition regarding retaliation, an administrator of DHS stated that they look to see if "the person is discharged from the facility or is asked to leave the facility. That is very easy to substantiate. Those where there is [sic] complaints of . . . withholding of food or not giving them sufficient amounts of food . . . takes [sic] a great deal of investigation." *United Neighbors in Action*, Deposition of Marian Vought, *supra* note 27, at 117-18. In another deposition, the former Deputy Director of Licensing and Certification stated that she did not know of any substantiated cases of retaliation. She also stated that though the Depart-



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vocates can assist residents in filing complaints with the state regulatory agency, or can organize the residents into a cohesive group that can demand the care they deserve in the facility.

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ment was aware of a presumption of retaliation if a patient is moved within 120 days of filing a complaint; she did not think that any of the district offices applied that presumption. *United Neighbors in Action*, Deposition of Charlene Harrington, Aug. 15, 1977, *supra* note 33, at 96-97. These depositions were taken subsequent to the following occurrence.

*Patient C*, age 47, was paralyzed on one side from a stroke and was therefore unable to feed herself. She weighed 106 pounds when she entered the nursing home. *C*'s friends complained to the facility that she was not given sufficient food or water. When it appeared as though nothing had changed, the friends filed a complaint with DHS. At this inspection, three months after *C* entered the facility, the inspector stated that *C* was malnourished and estimated her weight at 75 pounds. The DHS report did not mention malnutrition, gave the facility a "C" violation, and no fine. The friends continued to make complaints. Soon after, when cysts were discovered on the patient, she was sent by ambulance to an acute care hospital for diagnosis. The hospital refused to admit her because she was not due to be evaluated for a week. Yet, on the same day, the nursing home claimed that she could not return because the bed had been filled.

The nurse at the emergency room told *C*'s daughter that *C* should have been transferred, not discharged. The cysts were later found to be minor and had been present a long time. *United Neighbors in Action* Fact Sheets; interview with Elizabeth Hirshfeld, former Director of *United Neighbors* and present at the inspection of the facility (Oct. 5, 1982).

A complaint of retaliation was filed with DHS against the facility. CAL. HEALTH & SAFETY CODE § 1432 (West 1979) states that:

- (a) No licensee shall discriminate or retaliate in any manner against a patient . . . on the basis . . . that such patient . . . or any other person has initiated or participated in any proceeding specified in this chapter. A licensee who violates this section is subject to a civil penalty of no more than five hundred dollars. . . .
- (b) Any attempt to expel a patient . . . [who has filed a complaint] or upon whose behalf a complaint has been submitted to the state department . . . within 120 days of the filing of the complaint or the institution of such action, shall raise a rebuttable presumption that such action was taken by the licensee in retaliation for the filing of the complaint.

The physician in charge of the patient at the hospital told the DHS inspectors that he believed that *C* was "dumped" because of the controversy surrounding her care and that the cysts were used as an excuse to remove her. (Written statement by Davida E. Coady, M.D., Adjunct Assistant Professor at UCLA School of Public Health, for *United Neighbors in Action*, from a conversation with the physician in charge (March 18, 1977) (on file with Jaya Salzman). Dr. Coady also noted a marked increase in the weight of the patient after being out of the facility for two weeks.) The DHS could not substantiate the allegation of retaliation and stated that the doctor in charge at the hospital said "she had received excellent nursing care" at the Convalescent Hospital. Department of Health Memorandum from Alice Willis, Inspector, to Joan Dowling, Unit Supervisor, Berkeley Office (March 29, 1977).

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Pressuring the facilities to improve the standard of care can prevent the conditions from becoming worse as the population, and especially the elderly population, increases.<sup>38</sup>

There are few reported cases<sup>39</sup> involving community groups who have attempted to gain entrance to nursing homes. Of the unreported cases, some have involved out of court settlements,<sup>40</sup> some remain unreported,<sup>41</sup> one involved a consent decree,<sup>42</sup> one resulted in a dismissal,<sup>43</sup> and one litigant decided to drop the suit when circumstances changed.<sup>44</sup> Some advocates have preferred orchestrating the passage of strong access legislation in

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38. By the year 2030, it is estimated that with a general population growth of 40%, the elderly population will double to comprise 22% of the population and the number of people over 85 years will triple. These projections are from the 1977 census. U.S. Dep't of Health & Human Services, Health Care Financing Administration, *Long Term Care: Background & Future Directions*, HCFA 81-20047, 10 (Jan. 1981). Nursing home utilization is predicted to grow 132% by that year. This is based solely on current age trends. It does not take other factors into consideration such as present discouragement of nursing home use or the prospect of fewer people to care for elderly relatives because of the increase of women in the work force. *Id.* at 12-13.

39. *State v. Hoyt*, 304 N.W. 2d 884 (Minn. 1981); *Fried v. Straussman*, 41 N.Y. 2d 376, 361 N.E. 2d 984, 393 N.Y.S. 2d 334 (1977) (nursing homes can deny doctor access without a hearing if the exclusion is made in good faith and is based on objectively reasonable grounds).

40. *Citizens for Better Care v. Alden Care Enterprises*, No. 72-214876 (Wayne County Cir. Ct., Mich. filed August 11, 1972) (advocate organization which reported incidents of substandard care denied access to nursing home); *Health Law Project v. Sarah Allen Nursing Home*, No. 71-1795 (E.D. Pa. filed July 20, 1971) (stipulation entered August 13, 1971) (advocate organization working to improve conditions in nursing homes denied access). Both cases were settled. *Nursing Home Law Letter*, Access to Nursing Homes 11 (March 1979) (available from Nat'l Senior Citizens Law Center, 1424 16th St. N.W., Suite 300, Washington, D.C. 20036).

41. *Teitelbaum v. Sorenson*, No. 79-199 PHX WEC (D. Ariz. July 3, 1979); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, No. 81-1379 (1st Cir. Dec. 30, 1981) (nursing home can deny access to organization wishing to inform patients of the legal services they can provide); *Strickland v. Kempiners*, No. 80-L-016025 (Cook County Cir. Ct., Ill. Feb. 20, 1981) (nursing home cannot deny access to organization that visits patients).

42. *Hudson v. McGee*, No. 71778 F (Cir. Ct. St. Louis, Mo. 1977) (attorney cannot be prevented from meeting privately with a client in a nursing home).

43. *Frost v. Littleton House Nursing Home*, No. 79-3082 (Super. Ct. Middlesex County, Mass. 1979) (former patient and friend of residents denied access to nursing home). The facility was successful in portraying the single individual desiring access as a troublemaker and thus preventing interference with their administration. Telephone interview with Jack Fisher, Cambridge and Somerville Legal Services (Feb. 7, 1983).

44. *Legal Services Corp. of Iowa v. Bladister, Inc.*, Civ. No. 80-263-C (S.D. Iowa filed July 29, 1980) (legal services organization denied access to nursing home); telephone interview with Wendy Geertz, Attorney for Plaintiff (Feb. 10, 1983).

their states rather than litigating on a case-by-case basis.<sup>45</sup> Courts differ whether the right of the private property owner or of the individual resident should prevail, or which bases of litigation can be successfully asserted in denial of access claims. This Comment explores the approaches to and legal issues involved in the litigation of a denial of access complaint: as a violation of the constitutional rights of freedom of speech and association in both federal and state courts; as a private right of action for violation of federal and state statutory rights of residents to receive visitors in private or meet in groups;<sup>46</sup> and as a breach of contract. All free people in this society have the right to meet with others of their choice. The elderly and the infirm should not be denied this right merely because they are confined, perhaps permanently, in health care facilities.

## I. BASES OF LITIGATION

### A. RIGHTS UNDER THE FIRST AMENDMENT

Nursing home residents and advocates have the right under the first amendment<sup>47</sup> to meet together and discuss the quality

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45. Telephone interview with Chuck Chomet, Citizens for Better Care, Detroit, Mich. (Oct. 5, 1982). For more details concerning benefits of legislative action see *infra* notes 151-63 and accompanying text.

46. 42 C.F.R. § 405.1121(k)(11), (12) (1981) provides:

'These patients' right policies and procedures ensure that, at least, each patient admitted to the facility:

(11) may associate and communicate privately with persons of his choice, and send and receive his personal mail unopened, unless medically contraindicated (as documented by his physician in his medical record);

(12) may meet with, and participate in activities of, social, religious, and community groups at his discretion, unless medically contraindicated (as documented by his physician in his medical record);

CAL. ADMIN. CODE tit. 22, R. 72527(a)(12), (13) (1982) contains nearly identical language.

47. The first amendment states in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

The due process clause of the fourteenth amendment extends these guarantees to state governments. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV

of patient care and how to improve conditions in the facilities. The first amendment to the United States Constitution guarantees citizens freedom of speech, peaceable assembly, and the authority to petition the government for redress of grievances. These first amendment rights, which the United States Supreme Court has called "our most precious freedoms,"<sup>48</sup> have also been held to include freedom of association.<sup>49</sup>

Advocates who wish to inform nursing home patients of their constitutional and statutory rights are protected by the first amendment. The Supreme Court has ruled that freedom of association includes the right of attorneys to meet with people "who seek legal redress for infringement of their constitutionally guaranteed and other rights."<sup>50</sup> Without the help of others, the resident will remain unaware of rights she should be able to assert.

The freedoms under the first amendment are well-established when the parties meet in public places.<sup>51</sup> But when first amendment rights are abridged on private property, the plaintiff must establish that there was state action<sup>52</sup> for her claim to prevail. The government cannot restrict the acts of private persons on private property unless the government is somehow a participant in the denial of constitutional rights. A party claiming denial of first amendment rights is permitted to bring a suit into federal courts for injunctive relief or damages under 42 U.S.C. section 1983 if there has been a denial of constitutional "rights,

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§ 1.

48. NAACP v. Button, 371 U.S. 415, 438 (1963) (first amendment protects organization which urged people to use their legal services to redress infringement of their constitutional rights).

49. NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (action to require disclosure of membership lists infringes on plaintiff's freedom of association); Bates v. Little Rock, 361 U.S. 516, 522-23 (1960) (action to require disclosure of membership lists is a denial of plaintiff's freedom of association); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (statute requiring teachers annually to file a list of all organizations they belong to or contributed to is a denial of freedom of association); NAACP v. Button, 371 U.S. at 452; Kusper v. Pontiker, 414 U.S. 51, 56-57 (1973) (statute prohibiting voting in political party's primary if person has voted in primary of any other party within last two years infringes on freedom of association).

50. NAACP v. Button, 371 U.S. at 428.

51. Hague v. CIO, 307 U.S. 496, 512-13 (1939) (invalidating ordinance prohibiting all public meetings without a permit).

52. See *infra* text accompanying notes 94-121 for a discussion of the state action requirement.

privileges, or immunities" under color of state law.<sup>53</sup>

Although patients reside in nursing homes, most nursing homes are private property, and private property owners can restrict who may enter the premises.<sup>54</sup> Frequently, residents do not know that advocates wish to talk with them and so cannot invite them to visit. Even if patients do request an advocate to visit them, administrators sometimes deny them access. Although individuals can be denied access to the private property of workplaces, apartment buildings, and shopping centers, those individuals can still leaflet or speak with people on the public sidewalks as they enter or leave the property. However, because nursing home residents generally do not leave the facility, this alternative is not useful, and advocates may have no way to approach the residents other than to enter the facility.

To assert the advocates' right of access on first amendment grounds, an analogy must be drawn between nursing homes and other situations where the courts have permitted people to enter private property to distribute information or communicate with people. A cause of action for infringement of the first amendment in denial of access cases is important because, unlike other bases of litigation, the plaintiff can be either the resident or the advocate. Although residents may not know that an advocate was barred from the facility, the outsider who was denied entrance may still litigate the issue. This section explores how in

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53. 42 U.S.C. § 1983 (1981) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

The under color of state law requirement is discussed *infra* text accompanying notes 94-121.

42 U.S.C. § 1988 (1981) permits the prevailing party in an action brought under § 1983 to recover reasonable attorney's fees.

54. "And it may well be that respondents' ownership of the property here in question gives them various rights . . . to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 319 (1968) (court permitted peaceful union picketing in a privately-owned shopping center).

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similar situations courts have balanced the private property owners' interests against those of the individuals seeking access. The need to find state action in order that first amendment remedies apply to the actions of private individuals is also discussed.

### 1. *The Balancing Test*

In cases which have involved access to private property, courts have used a balancing test to determine whether the owner's interests in privacy and freedom from intrusion are outweighed by the first amendment rights of communication. Absent alternative means of communication, peaceful speech and assembly have been permitted. Using this test, the Supreme Court has ruled in *Martin v. City of Struthers* that door-to-door solicitation is an exercise of first amendment rights and cannot be prohibited since homeowners have a less drastic alternative available to the denial of those rights.<sup>55</sup> Although privacy might be disturbed by door-to-door solicitors, homeowners or apartment building residents can easily end the communication by telling the solicitor that they are not interested, or by posting a no soliciting sign.

A nursing home can be analogized to an apartment building; a nursing home patient can inform community people who come to her door that she does not wish to speak with them.<sup>56</sup> There is no need for the nursing home to protect all patients from an advocate who exercises reasonable care not to disturb sleeping or ill patients. Nursing home administrators should not be able to exercise this control on behalf of patients, since advocates who have spoken to residents have found many to be interested in receiving their help.<sup>57</sup>

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55. 319 U.S. 141 (1943).

56. Recent access legislation permits community organizers and legal services personnel to enter for other than commercial purposes. ILL. ANN. STAT. Ch. 111-½, § 4152-110 (Smith-Hurd 1980). However, the question remains as to whether access can be constitutionally limited to particular kinds of people and particular kinds of speech.

57. The out-of-court settlement in *Citizens for Better Care v. Alden Care Enterprises*, No. 72-214876 (Wayne County Cir. Ct., Mich. filed August 11, 1972) involved visits to the eight facilities owned by defendant corporation by representatives of both parties. Fifty-four percent of the patients stated that they wanted a representative from Citizens for Better Care to visit them again. Telephone interview with Chuck Chomet, Citizens for Better Care, Detroit, Mich. (Oct. 5, 1982).

The Supreme Court decision in *Marsh v. Alabama*<sup>58</sup> extended the balancing test articulated in *Struthers* to permit access onto private property for the exercise of first amendment rights. The case involved the distribution of religious literature by a Jehovah's Witness on a sidewalk in a company-owned town. The Court found this town to be similar to all other towns in that "[t]he property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated," and that the public highway intersects the town, making it "accessible to and freely used by the public in general."<sup>59</sup> The Court balanced the right of the property owner to be free from intrusion against the first amendment rights of the residents of the town and found that "the latter occupy a preferred position."<sup>60</sup>

Although this principle was extended to include shopping centers,<sup>61</sup> it was cut back in *Lloyd Corp. v. Tanner*<sup>62</sup> and later

58. 326 U.S. 501 (1946).

59. *Id.* at 502-3.

60. *Id.* at 509.

The court further stated that:

In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.

*Id.*

61. *Logan Valley*, 391 U.S. 308.

We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks . . . are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town.

*Id.* at 319.

62. 407 U.S. 551 (1972) (distribution of handbills protesting the Vietnam War in privately owned shopping center is unprotected by the first amendment since it is unrelated to mall activities and reasonable alternative means of communication exist).

overruled.<sup>63</sup> Yet, the portion of the test in *Lloyd* which permits intrusion onto land if no “adequate alternative avenues of communication exist”<sup>64</sup> continues to be used.<sup>65</sup>

Some courts have extended the principle established in *Marsh* to migrant labor camps. Of all the situations in which the courts have examined abridgement of first amendment rights, the migrant labor camp is the environment most similar to that of the nursing home. Both situations involve isolated groups of people who spend most or all of their time on the private property of another; both involve isolated and impoverished minorities unaware of their rights yet in need of attention; and both involve unsolicited outside groups wishing entry to help the people. Therefore, a number of these decisions will be examined.

The Fifth Circuit has stated that a labor camp is analogous to a company town because the property owner maintained a “self-contained community.”<sup>66</sup> In using the *Lloyd* test, the court found that there were no alternative avenues of communication available to organizers. The workers’ biweekly trip to town was an inadequate alternative.<sup>67</sup> The court therefore concluded that the organizers had a right of access based on the first amendment which overrides the constitutional right of the property owner to keep people off his property. “[T]he mere fact that the owner has sequestered its employees from general intercourse with mankind can afford it no immunity from the prohibitions of the first amendment.”<sup>68</sup>

Other cases have reached the same result using the *Marsh* analogy. A New York county court found that the first amendment prevailed although the right of access did not involve legal advocates or organizers, but a newspaper reporter.<sup>69</sup> In another

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63. *Hudgens v. NLRB*, 424 U.S. 507 (1976) (peaceful union picketing in privately owned shopping center not protected by first amendment).

64. 407 U.S. at 567.

65. *Pell v. Procunier*, 417 U.S. 817 (1974) (first amendment rights of inmates are not violated in denying interviews with the press since alternative channels of communication are available); *Greer v. Spock*, 424 U.S. 828 (1976) (political candidates do not have a right to speak at Fort Dix since military personnel can attend political rallies off base).

66. *Petersen v. Talisman Sugar Co.*, 478 F.2d 73, 82 (5th Cir. 1973) (United Farm-worker organizers and a minister have a right of access to a migrant labor camp).

67. *Id.*

68. *Id.* at 83.

69. *People v. Rewald*, 65 Misc. 2d 453, 318 N.Y.S. 2d 40 (1971).



case, a New York district court held that although the camp contained only living quarters and a store, it bore "the hallmarks of a company town" and therefore the property owner had no constitutional right to restrict legal workers "unsolicited" access to workers when there was no reasonable alternative to communication.<sup>70</sup> Similarly, a district court in Michigan<sup>71</sup> stated that although the camps "are not exactly like the business district of the company owned town in *Marsh*," the principle to be applied "is identical."<sup>72</sup> "[T]he property rights of the camp owner do not include the right to deny access . . . to guests or persons working for any governmental or private agency whose primary objective is the health, welfare, or dignity of the migrant workers as human beings."<sup>73</sup>

In two migrant labor camp cases courts did not find a sufficient similarity to the *Marsh* company town to permit access. The Seventh Circuit in *Illinois Migrant Council v. Campbell Soup*<sup>74</sup> held that a labor camp was not analogous to a company town because people leave to get "goods and services typically obtainable in a small town."<sup>75</sup> In *Asociacion de Trabajadores Agricolas v. Green Giant Co.*,<sup>76</sup> the Third Circuit rejected the right of access because the plaintiff had documented neither the physical and psychological isolation of the people in the labor camps nor the unavailability of alternative means to communicate with the workers.<sup>77</sup>

Because the environment of nursing homes can be distinguished from that found in the camps in *Campbell Soup* and *Green Giant*, courts may be persuaded to permit access. Unlike

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70. *MidHudson Legal Services v. G. & U., Inc.*, 437 F. Supp. 60, 61-62 (S.D.N.Y. 1977) (emphases added). (Court granted legal services program access to camp to distribute booklet informing migrant workers of their rights and the right to assist in the assertion of those rights).

71. *Folgueras v. Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971) (organizers trying to assist migrant workers residing at a labor camp cannot be denied access).

72. *Id.* at 623.

73. *Id.* at 624 (emphasis added).

74. 574 F.2d 374 (7th Cir. 1978).

75. *Id.* at 378.

76. 518 F.2d 130 (3d Cir. 1975).

77. *Id.* at 138.

the migrant camp in *Campbell Soup*, a nursing home supplies most of the goods and services the resident receives. The facility provides residents with room and board, medical attention, laundry services, physical therapy, and occasional recreational activities. If the supplies or medications that a patient needs are not available on the premises, the facility typically arranges to bring them to the patient. Further, in contrast to the reasoning in *Green Giant*, nursing home patients are isolated and do not leave the facility; advocates have no alternative means of communicating with them.

In two unpublished nursing home access cases, the courts examined the analogy to migrant labor camps and reached opposite findings.<sup>78</sup> In the first case, *Teitelbaum v. Sorenson*,<sup>79</sup> the District Court in Arizona determined that a nursing home is the “functional equivalent” of a town because a nursing home includes “all the components of a town.” The court stated that “since the facility provides all necessary services to the residents and they are physically and psychologically confined and isolated from other community activities,”<sup>80</sup> access may not be denied to a local organization.

In contrast, the First Circuit Court in *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*<sup>81</sup> denied the plaintiffs access to the facility. The court found three ways the rest home differed from the *Marsh* company town. First, the court determined that a rest home lacked the “residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’” that the Supreme Court had found present in the *Marsh* company town.<sup>82</sup> Instead of examining ways in which a facility is a “self-contained community,”<sup>83</sup> the court concentrated on the physical attributes outlined in *Marsh*. Second, the

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78. Although the courts discussed the *Marsh* analogy to examine whether there was state action, that information is included within the discussion of first amendment balancing. The courts overlapped the issues of whether the nursing home is sufficiently like the *Marsh* company town to fulfill the state action requirement, with whether the private property is sufficiently a complete community and the patients are so isolated by their environment that the advocates have no alternative means to communicate with them.

79. No. 79-199 PHX WEC (D. Ariz. July 3, 1979).

80. *Id.* slip op. at 5.

81. No. 81-1379 (1st Cir. Dec. 30, 1981).

82. *Id.* slip op. at 3; see also *Marsh*, 326 U.S. at 502.

83. *Petersen v. Talisman Sugar Co.*, 478 F.2d at 82.

court found that a rest home is not freely accessible to the public as is a company town located next to a public highway.<sup>84</sup> The court failed to consider that during visiting hours a rest home is accessible to portions of the public. Third, the court found that the owner of the rest home was not "performing the full spectrum of municipal powers" such as "operat[ing] utilities or their own police or fire protection services" as did the company town in *Marsh*.<sup>85</sup> The court failed to consider that, like a migrant camp, the rest home pays the city and its agencies to provide full services for this total community within a city.

Relying on the two migrant labor camp decisions that denied access, *Campbell Soup*<sup>86</sup> and *Green Giant*,<sup>87</sup> the court denied access and concluded that advocates could utilize other means to communicate with residents in the facility: letters, telephone calls, or requests by residents for the plaintiffs to visit them at specific times during visiting hours.<sup>88</sup> This holding differs in principle from *Marsh* and the migrant labor camp decisions. In those cases, uninvited people could enter to communicate with residents. They neither had to know specific names of residents, nor rely on the inhabitants' previous knowledge of the group's existence. Yet, such information is necessary for advocates to utilize these alternative means of communication in nursing homes. By failing to recognize the complete isolation of residents and by suggesting impracticable alternative means of communication, the court in *Cape Cod* denied residents and advocates their constitutional rights of freedom of speech and association.

In the balancing analysis which weighs the nursing home's interests against those of residents and advocates, the court in *Cape Cod* was persuaded that visits by members of an advocacy organization would "threaten patient care and pose significant risks to the elderly residents."<sup>89</sup> Although residents in a rest

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84. *Cape Cod*, No. 81-1379, slip op. at 3 (1st Cir. Dec. 30, 1981).

85. *Id.* at 4.

86. 574 F.2d 374.

87. 518 F.2d 130.

88. *Cape Cod*, No. 81-1379, slip op. at 5 (1st Cir. Dec. 30, 1981).

89. *Id.* at 6-7.

home require a lower level of care than residents in a nursing home, the facility was successful in asserting its alleged interests in minimizing disturbance to patients and in protecting patients from unwanted visitors. Since the patients are legally entitled to voice grievances,<sup>90</sup> and are permitted visitors during visiting hours, another's assistance in exercising the right to complain or informing the patients of their rights should not be considered a disturbance. Furthermore, the patient, not the facility, should determine whether an advocate is unwanted.<sup>91</sup> "Although patients at the facility may at times become confused or may not be entirely functional, they may still benefit greatly from visitation . . . . These patients have the greatest need for outside advocates . . . ." <sup>92</sup> The court in *Cape Cod* did not permit the residents to determine for themselves whether they wanted to exercise their right to freely associate with the advocacy organization.

Since few cases exist in the area of nursing home access, one cannot predict whether courts will be swayed by arguments such as those offered by the rest home in *Cape Cod*. The plaintiff's success in *Teitelbaum* can be partially attributed to the emphasis on educating the trier of fact. Numerous expert witnesses and other witnesses were introduced to dispel myths about the elderly in nursing homes and to help the judge understand the importance of and difficulties in communication for the elderly. Using both this information and the analogy to migrant camps, the court weighed the interests in favor of residents' and advocates' freedom of speech and association to permit access.<sup>93</sup>

## 2. *Finding State Action*

Because the government generally does not restrict the actions of private parties on private property, before a plaintiff can

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90. 42 C.F.R. § 405.1121(k)(5) (1982) states in pertinent part that a patient "may voice grievances and recommend changes . . . to facility staff and/or to outside representatives of his choice . . . ." CAL. ADMIN. CODE tit. 22, R. 72527(a)(6) (1982) contains nearly identical wording.

91. See *supra* notes 55-57 and accompanying text.

92. *Teitelbaum v. Sorenson*, No. 79-199 PHX WEC, slip op. at 3 (D. Ariz. July 3, 1979).

93. *Id.*

bring a claim under 42 U.S.C. section 1983 alleging denial of freedom of speech and association, she or he must show that the defendant acted under color of state law. The United States Supreme Court has ruled that the under color of state law requirement is synonymous with state action.<sup>94</sup> If the deprivation of first amendment rights resulted from actions of a federal or state governmental agency, the state action requirements is automatically met. Since nursing homes are privately owned, the plaintiff must make the more difficult showing that defendant's actions are sufficiently connected to the state's so that they can be treated as the actions of the state itself. Three methods of finding state action to assert a claim of denial of access are examined below.<sup>95</sup>

#### a. *Public Function Test*

One method of finding state action is through application of the public function test—whether the private entity exercised “powers traditionally exclusively reserved to the State.”<sup>96</sup> The United States Supreme Court in *Blum v. Yaretsky*<sup>97</sup> held that nursing homes do not “perform a function that has been ‘traditionally the exclusive prerogative of the State.’”<sup>98</sup> Because the Court did not find state action, the nursing home in *Blum* was permitted to discharge or transfer Medicaid patients to lower

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94. *United States v. Price*, 383 U.S. 787, 794-95 n.7 (1966) (private persons who acted jointly with state officials in releasing prisoners from jail then intercepting and killing them are acting under color of law).

95. No simple test exists for finding state action. “Formulating an infallible test” of state action “is an impossible task.” *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (voters’ proposition permitting property owners to discriminate in who they sell or lease to is state action). “Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance.” *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (court found that because restaurant that racially discriminates was on public property, there was state action).

96. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (no state action for state-regulated private utility company to terminate service to customer in arrears).

97. 457 U.S. 991 (1982).

98. *Id.* at 1011; see also *Bladister*, Civ. No. 80-263-C (S.D. Iowa filed July 29, 1980), First Court Order at 7 (Nov. 18, 1980); *Fuzie v. Manor Care*, 461 F. Supp. 689, 695 (N.D. Ohio, 1977) (transfer or discharge of Medicaid patients by nursing home does not meet state action requirement).

levels of care without a hearing. The Court held that although the state must "provide funds for the care of the needy," the state is not required to provide any particular type of care, "much less long-term nursing care."<sup>99</sup> Also, although states must fund nursing homes to receive federal funds from Medicaid, the statute "does not require that the States provide the services themselves."<sup>100</sup>

The Court in *Blum* did not examine the approach to the public function test enunciated in *Marsh v. Alabama*,<sup>101</sup> where the Court found state action because the privately-owned town was the functional equivalent of a sovereignty. This analysis has been expanded<sup>102</sup> to include migrant labor camps and, in *Teitelbaum v. Sorenson*,<sup>103</sup> a nursing home. In his dissent in *Blum*, Justice Brennan stated that nursing homes meet the state action test because they are equivalent to a *Marsh* company town.<sup>104</sup> Thus, the *Marsh* analysis is useful for both first amendment and state action analyses. Because the *Blum* majority did not examine the *Marsh* approach to the public function test, it appears that the Court no longer utilizes this analysis. The Court now seems unwilling to extend the meaning of public function. Nevertheless, *Marsh*, the migrant labor camp cases, and nursing home access cases all involve denial of first amendment rights and thus differ from *Blum*. Because the Court generally safeguards this important freedom, it may be more willing to use the *Marsh* company town analysis to find state action in denial of access cases.

#### b. *Nexus Test*

A second state action test was enunciated in *Jackson v. Metropolitan Edison Co.*<sup>105</sup> where the Court stated that there must be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of

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99. *Blum*, 457 U.S. at 1011.

100. *Id.*

101. 326 U.S. 501.

102. See *supra* text accompanying notes 66-88.

103. No. 79-199 PHX WEC (D. Ariz. July 3, 1979).

104. 457 U.S. at 1028.

105. 419 U.S. 345 (1974).

the latter may be fairly treated as that of the State itself."<sup>106</sup> In *Burton v. Wilmington Parking Authority*,<sup>107</sup> the Court found state action in the interdependent relationship between the state and a restaurant on public property. The Court termed it a relationship of mutual benefits because the state received funds from the leased property and the restaurant received convenient parking and maintenance of the building from the state.<sup>108</sup> The Court ruled that the state was a "joint participant in the challenged activity."<sup>109</sup> Since *Burton*, however, the Court has required more of a showing to find state action. The Court in *Blum* determined that the combination of government regulation and government subsidy is insufficient to find state action.<sup>110</sup> Similarly, although the Court in *Burton* held that the state's inaction was sufficient to find state action,<sup>111</sup> *Blum* stated that the state must be "responsible for the specific conduct of which the plaintiff complains."<sup>112</sup> The *Blum* court held that it is still possible to find state action with this test if "the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit."<sup>113</sup> Only if the state enacts a statute which prohibits access will the advocate be assured of finding state action under this test in a denial of access case.

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106. *Id.* at 351.

107. 365 U.S. 715 (1961).

108. *Id.* at 723-24.

109. *Id.* at 725.

110. *Blum*, 457 U.S. at 1004 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350) stated that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." See also *Fuzie v. Manor Care*, 461 F. Supp. at 695; *Fried v. Straussman*, 41 N.Y.2d 376, 379, 361 N.E.2d 984, 986, 393 N.Y.S. 2d 334, 336 (1977) (doctor denied access to a nursing home).

111. 365 U.S. at 725.

112. *Blum*, 457 U.S. at 1004. The court in *Blum* did not find that the state was responsible for the decision to transfer patients and, therefore, found no state action. *Id.* at 1005-12.

113. *Id.* at 1004.

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c. *State Authorization or Encouragement Test*

The third state action test considers whether the state has, by its actions, encouraged or affirmatively approved of the actions of the private entity.<sup>114</sup> This can occur when the state has become so involved in the deprivation of rights that it has sanctioned them.<sup>115</sup> In *Blum*, the Supreme Court stated that “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>116</sup> The *Blum* court further stated that “[m]ere approval of or acquiescence in the initiatives of a private party” would not lead to a finding of state action.<sup>117</sup> The Court did not elaborate on what this phrase meant, but used it to find that no state action was involved in the transfer plan arranged by the doctors.

Under this theory, a finding of state action can be argued from the state’s encouragement in two California denial of access incidents.<sup>118</sup> Although the state enforcement agency knew of

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114. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66 (1978) (warehouseperson’s proposed sale of goods to satisfy lien is not state action since resolution of private disputes is not exclusively reserved to the state and the state merely acquiesced to the private action, it did not affirmatively authorize or encourage it).

115. *Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948) (state action if state court enforces racially restrictive covenant); *Reitman v. Mulkey*, 387 U.S. 369, 375-79 (1967) (state action for voters to overturn legislation and thereby constitutionally permit racial discrimination in the sale or leasing of real property).

116. 457 U.S. at 1004.

117. *Id.*

118. Two organizers visited patients at *Facility A* to inform them of their rights. Previous to this, the advocates had filed complaints against this facility because of poor patient care. The organizers were forced to leave with a police escort. (Letters of complaint from Sheila Mason, Organizer, United Neighbors in Action to DHS (September 25, 1981 and November 6, 1981)). DHS replied three months after a complaint was filed. The complaint had included a signed letter from a resident stating she wanted members of the organization to continue to visit her. DHS stated that they were unable “to resolve” the complaint since “[o]ther advocacy groups . . . do not have a problem with such confrontations,” and since the facility stated that “the patients are not mentally responsible.” They stated that they would only take action if “there is a definite deprivation of patients’ rights” and that the organization should seek “legal processes.” Letter from Donald Dunn, District Administrator of the Berkeley Office of Department of Health Services to United Neighbors in Action (December 21, 1981).

The Health Department believed the facility’s claim of residents who were mentally unfit and therefore unable to decide for themselves. CAL. ADMIN. CODE tit. 22, R. 72527(a)(12), (13) (1982) permits patients to meet with others or in groups unless “medically contraindicated.” There is no evidence here to show that was the case. Also, CAL.



the incidents from complaints, and verified the occurrences in its investigations, it failed to take any action on these violations of the patients' bill of rights.<sup>119</sup> It can be argued that the state agency was not merely acquiescing to the nursing home's rules since the agency had an affirmative duty to act on the complaints. By ignoring violations of which it was aware, the state encouraged the nursing homes to continue to deny access.

In conclusion, the Supreme Court has made the state action test almost impossible to meet under any of these theories. Without state action, a resident's first amendment right to associate with advocates cannot be asserted. Fortunately, on occasion, the Supreme Court has responded to a violation of important rights or the need to protect a select group of people and has expanded theories to protect these interests. The development of state action theories as a means to prohibit racial discrimination is a prime example.<sup>120</sup> Because of the Court's interest in safeguarding first amendment rights and because of the total isolation of nursing home residents when access is denied, the Court might be persuaded to find state action in a denial of access complaint. Perhaps the original *Marsh* public function test will be revived to show that the nursing home is a total community segregated from the world. Possibly a state's encour-

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ADMIN. CODE tit. 22, R. 72527(c) (1982) states that only (a)(1) through (4) of the Patients' Bill of Rights devolves to the next of kin and this is only when the patient has been judged legally incompetent.

At *Facility B* an attorney and an organizer attempted to visit patients to inform them of their legal rights. Previous complaints about violations in this facility had been filed. A staff person followed them around and snapped photographs of their conversations with residents. During their conversations, residents said that they would like to have them visit again. When the police arrived to answer a call of trespass, the two voluntarily left. (Declaration of Lucy Fitzpatrick, Attorney, Senior Adults Legal Assistance (SALA), Palo Alto, Cal., November 1981) (on file with Jaya Salzman). Eight months after receiving the initial complaint, DHS determined that because "the incident does not represent a 'practice' of the facility which would cause a patient to forego exercising his or her rights because of fear of retaliation," they could not construe it as a violation. Letter from Paul Gould, District Administrator, DHS to United Neighbors in Action (June 11, 1982).

119. Patients are permitted to meet with visitors of the patient's choice or in groups. 42 C.F.R. § 405.1121(k)(11), (12) (1981); CAL. ADMIN. CODE tit. 22, R. 72527(a)(12), (13) (1982).

120. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Shelley v. Kraemer*, 334 U.S. 1; *Reitman v. Mulkey* 387 U.S. 369.

agement in incidents such as those in California<sup>121</sup> could also invoke a finding of state action. Without such a showing, nursing home residents are prevented from exercising their first amendment rights to demand quality care. Thus, they may spend the remainder of their days isolated in a substandard, yet state and federally funded and regulated, facility.

## B. RIGHTS UNDER THE CALIFORNIA CONSTITUTION

A state can provide greater protection of individual rights under its constitution than the minimum standards set by the United States Constitution.<sup>122</sup> Because California has done this with freedom of speech, nursing home residents and advocates are likely to prevail in a denial of access complaint. In most states, to assert a freedom of speech violation under the state constitution, a plaintiff must demonstrate state action. The California Supreme Court in *Robins v. Pruneyard Shopping Center*,<sup>123</sup> held that a finding of state action was not necessary because article I, section 2 of the state constitution<sup>124</sup> is significantly broader in scope than the first amendment. Free speech rights are protected against the actions of private parties if the private property is open to the public. In balancing the private property owner's rights against the plaintiff's first amendment rights, the court stated that the protection of citizens' freedom of speech and right to petition is an important state interest and justifies "reasonable restrictions on private property rights."<sup>125</sup>

Although nursing homes are not open to the public to the same extent as shopping centers, they do have general visiting hours. Thus, a denial of access claim in the California courts

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121. See *supra* notes 118-19 and accompanying text.

122. *Cooper v. California*, 386 U.S. 58, 62 (1967) (search of impounded vehicle constitutional under the fourth amendment); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (state may enact statute to protect free speech at privately-owned shopping center).

123. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd* 447 U.S. 74 (1980). *Pruneyard* involved two high school students who circulated a petition at a shopping mall protesting the United Nations' resolution against Zionism. The shopping center, which had a no-soliciting rule, forced the plaintiffs to leave. The California Supreme Court held that the plaintiffs' free speech rights could not be prohibited at a shopping mall open to the public.

124. CAL. CONST. art. I, § 2(a) provides in pertinent part: "[e]very person may freely speak . . . his or her own sentiments on all subjects . . . ."

125. 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.

probably will have the same outcome as *Pruneyard*: the plaintiffs' rights to communicate with others will be upheld. Permitting access to nursing homes by advocates during visiting hours is the type of reasonable restriction on private property rights that the court in *Pruneyard* allows.

At this time, when the United States Supreme Court is cutting back on parties' ability to assert state action, *Pruneyard* is invaluable. Advocates and residents in nursing homes can find protection of their right to meet within the facility.

### C. PRIVATE RIGHT OF ACTION FOR VIOLATION OF THE MEDICAID ACT

When a nursing home resident cannot meet and communicate with members of a community organization, she can assert a claim for violation of the Medicaid Act.<sup>126</sup> The patients' bill of rights, a part of this federal statute, gives residents the right to meet with individuals and groups of their choice.<sup>127</sup> Although neither resident nor advocate can communicate when access is denied, only the resident can be a plaintiff to the action. The federal regulations were enacted to outline the care to be administered to patients, therefore when there is a violation of the statute, the patient is the injured party.

In order to seek relief for a violation of a federal statute, an individual must either be given express authority in the statute to sue for enforcement and damages, or a private right of action must be implied under the statute.<sup>128</sup> No express right for a private cause of action exists in the Medicaid statute.<sup>129</sup> The Supreme Court in *Cort v. Ash*<sup>130</sup> examined the following four fac-

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126. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396n (1976 & Supp. V 1981).

127. 42 C.F.R. § 405.1121(k)(11), (12) (1981).

128. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (stockholder's derivative suit cannot be implied under the criminal statute prohibiting corporate expenditures in presidential elections).

129. *Roberson v. Wood*, 464 F. Supp. 983, 988 (E.D. Ill. 1979) (patients in nursing home have implied cause of action under the Medicaid Act).

130. 422 U.S. 66.

tors to be used to determine if such a cause of action could be implied:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . ? Second, is there any indication of legislative intent, either explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>131</sup>

Three cases have examined whether the Medicaid statute implies a private right of action for nursing home residents. District courts in New Hampshire and Illinois found that the statute did; a district court in Ohio reached the opposite conclusion.

The unpublished New Hampshire decision<sup>132</sup> did not use the four-prong *Cort* test. Relying on another Supreme Court holding,<sup>133</sup> the court found that absent a mechanism for nursing home patients to obtain relief, federal courts must adjudicate their claims. The plaintiffs were entitled to a hearing before transfer from a facility.

The Illinois decision, *Roberson v. Wood*,<sup>134</sup> involved the transfer of patients without the adequate notice or hearing plaintiffs asserted were required by the Medicaid statute. Using the *Cort* test, the district court found first that the statute was created for the benefit of these patients since safeguards for patients' care and services must be provided.<sup>135</sup> Second, the court found that there was a legislative intent to create a private remedy because the only enforcement remedy provided by Medicaid is the withholding of funds if facilities are not in compliance

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131. *Id.* at 78.

132. *Berry v. First Healthcare Corp.*, MEDICARE & MEDICAID GUIDE (CCH) ¶ 28,693 (D.N.H. Oct. 26, 1977).

133. *Rosado v. Wyman*, 397 U.S. 397, 406 n.8 (1970).

134. 464 F. Supp. 983 (E.D. Ill. 1979).

135. *Id.* at 988. *See also* 42 U.S.C. § 1396a(a)(19) (1974).

with the law. This exclusive remedy does not protect the interests of patients. Third, the private remedy therefore is consistent with the purpose of the legislation: no one else can protect the patients' rights.<sup>136</sup> Finally, since Medicaid is purely a federal statute, litigation is appropriate in federal court.<sup>137</sup>

The contrary Ohio decision, *Fuzie v. Manor Care*,<sup>138</sup> also involved a patient who asserted that her transfer from the nursing home was illegal. The court examined the *Cort* four-prong test and determined that the Medicaid statute was not intended as a private remedy. The court stated that the first factor was not met because the plaintiff did not have an absolute right not to be transferred.<sup>139</sup> One commentator, Butler, has refuted this argument. "Whether there is an absolute right to any benefits under Medicaid is irrelevant to determining whether the statute was *created* for the benefit of recipient plaintiffs; such a question relates, if at all, to [the] ultimate remedy, not to whether a claim is stated."<sup>140</sup> Under the second prong of the *Cort* test, the court held that the legislature did not intend to create such a remedy. Medicaid, unlike Medicare, provided for administrative enforcement but no judicial review.<sup>141</sup> According to Butler, this is an incorrect examination of the statute. While Medicare is an exclusive federal program with specifically defined terms, Medicaid allows states to develop their own programs under the federal guidelines. Not only had courts permitted beneficiaries to sue states for violations of the program for more than ten years, but Congress had "implicitly acquiesced in these judicial decisions."<sup>142</sup> This demonstrates legislative intent for a private cause of action.<sup>143</sup> In examining the third prong, the Ohio court held

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136. "[W]here the agency has not provided a mechanism by which recipients can obtain relief, there is no basis for the refusal of federal courts to adjudicate the merits of these claims." *Roberson v. Wood*, 464 F. Supp. at 989. See also *Rosado v. Wyman*, 397 U.S. at 406 n.8.

137. *Roberson v. Wood*, 464 F. Supp. at 988-89.

138. 461 F. Supp. 689 (N.D. Ohio 1977).

139. *Id.* at 696.

140. Butler, *A Long-Term Health Care Strategy for Legal Services*, 14 CLEARINGHOUSE REV. 613, 651 (1980) [hereinafter cited as Butler, *Health Care Strategy*].

141. *Fuzie*, 461 F. Supp. at 696-97.

142. Butler, *Health Care Strategy*, *supra* note 140, at 652.

143. *Id.*

that a private cause of action by the patient was inconsistent with the purpose of the legislation. The court stated that a private remedy would "disrupt" the program's implementation.<sup>144</sup> Butler disagreed. She cited a congressional report which suggested enforcement by beneficiaries of the program because states fail to monitor nursing home compliance.<sup>145</sup> The court held that because plaintiff's cause of action should be adjudicated in state court and not federal court, the fourth prong of the test was not met. The court stated that the plaintiff was a third-party beneficiary of the provider agreement between the nursing home and the state, and that actions for breach of contract belong in the state court.<sup>146</sup> Butler countered the court's argument, stating that "[c]ontracts based exclusively on federal statutes should provide federal claims."<sup>147</sup>

Denial of access to nursing homes can also be analyzed under the four-prong *Cort* test. Although the courts differed on whether patients have an implied private right of action in transfer cases, results in denial of access cases are likely to be more successful. Under the first prong, the patients' bill of rights certainly was created for the especial benefit of residents. For the second and third prongs, whether a court will use the analysis in *Roberson* rather than that in *Fuzie* is only conjecture. Because state regulatory agencies have demonstrated their unwillingness to enforce the provisions of the federal statute that permit residents to meet with visitors of their choice or in groups,<sup>148</sup> the plaintiffs can argue that allowing a private right of action not only protects patients' rights, but also will result in compliance with this provision of the Medicaid Act—certainly the legislators' intent in enacting the Medicaid Act. Under the fourth prong, although states must enforce the Medicaid provisions, litigation of a federal statute is appropriate in federal court.

#### An alternative method of asserting a cause of action for vio-

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144. *Fuzie*, 461 F. Supp. at 697.

145. Butler, *Health Care Strategy*, *supra* note 140, at 652.

146. *Fuzie*, 461 F. Supp. at 697.

147. Butler, *Health Care Strategy*, *supra* note 140, at 652.

148. 42 C.F.R. § 405.1121(k)(11), (12) (1981); see *supra* notes 118-19 and accompanying text for examples of how the California DHS did not enforce these statutory provisions.

lation of this federal statute exists. The Supreme Court has held that a party can apply 42 U.S.C. section 1983 to assert a private claim for a violation of a federal statute, since section 1983 permits a cause of action for deprivation of rights under both the Constitution and laws of the United States.<sup>149</sup> Again, to be successful with this claim, state action must be shown.

In conclusion, although the federal patients' bill of rights authorizes access,<sup>150</sup> a nursing home patient may be unable to prevent deprivation of her rights. Before a court will rule on the issue, the patient must demonstrate her right to assert a violation of a statute. Results under either the *Cort* four-prong test, or with state action for a violation of section 1983 are uncertain. Further, as the nursing home patient may not know her rights and may be afraid or unable to assert them without an outsider's help, the limitation on potential plaintiffs may effectively prevent both access and the resultant communication between patient and advocate. Courts have placed a possible legal barrier in the way of a patient resolving a denial of her statutory rights. Hopefully, courts will be persuaded to find a private right of action under the Medicaid Act with a strong showing that access is not only an important patient's right, but also a means both to alleviate the despair of the isolated, incarcerated elderly and to implement quality patient care.

#### D. PRIVATE RIGHT OF ACTION FOR VIOLATION OF STATE STATUTES

Passage of state regulations that both carefully enunciate the types of community organizations that can demand access, and provide an express private right of action for violations of the statute, may prove to be the most effective means of assuring advocates a right to enter and meet with residents of nursing homes. The current federal regulations permit access but do not say who can be admitted. Nursing homes are quick to assert that the statutes should permit entrance to visiting friends and rela-

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149. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (section 1983 encompasses claims based on statutory violations of federal law; plaintiffs are entitled to attorney's fees for successfully asserting deprivation of Social Security welfare benefits).

150. 42 C.F.R. § 405.1121(k)(11), (12) (1981).

tives, but not to organizations that do not know individual residents. Providing an express right of access to advocates and a means of enforcing the regulation can prove less difficult and costly than asserting constitutional violations or violations of the federal Medicaid Act.

Until recently, residents in California nursing homes had a limited remedy for fighting nursing home violations in the state courts. The California Health and Safety Code permits a patient to assert a cause of action for injunction or damages if the facility has committed either an "A" type violation (imminent danger or substantial probability of death or serious harm) or "B" type violation (direct effect on patients' health or safety) unless the violation has been corrected.<sup>151</sup> This private remedy has a number of disadvantages. First, DHS must cite a facility for an "A" or "B" type violation, which DHS is reluctant to do.<sup>152</sup> Second, recovery is limited to the maximum amount of the penalty that can be assessed. The maximum penalty is \$5,000 for an "A" violation and \$250 for a "B" violation. Because few "A" violations are issued, and because "B" violations result in such small recoveries, few patients have been motivated to bring lawsuits.<sup>153</sup>

On September 27, 1982, former Governor Brown approved subsection (b) as an amendment to section 1430 of the California Health and Safety Code, which gives a patient a private right of action to bring a civil suit against a nursing home if the California patients' bill of rights<sup>154</sup> has been violated.<sup>155</sup> The

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151. CAL. HEALTH & SAFETY CODE § 1430(a) (West Supp. 1984) reads:

Any licensee who commits a class "A" or "B" violation may be enjoined from permitting the violation to continue or may be sued for civil damages . . . by any person acting for the interests of itself. The amount of civil damages which may be recovered . . . shall not exceed the maximum amount of civil penalties which could be assessed on account of the violation or violations.

152. See *supra* notes 25-33 and accompanying text.

153. Letter from Standing Committee on Legal Problems of Aging of the Legal Services Section of the State Bar of California to State Senator Petris (April 13, 1982) (discussing the advantages to an amendment to Cal. Health & Safety Code § 1430).

154. CAL. ADMIN. CODE tit. 22, R. 72527 (1982).

155. CAL. HEALTH & SAFETY CODE § 1430(b) (West Supp. 1984) states:

A resident or patient . . . may bring a civil action against any licensee . . . who violates any rights of the resident or patient as set forth in the Patients Bill of Rights in Section 72527 of Title 22 of the California Administrative Code . . . . The li-



plaintiff can receive up to \$500 in damages, costs and attorney fees,<sup>156</sup> and injunctive relief. If a nursing home stops a resident from meeting privately with individuals or community groups,<sup>157</sup> a patient can receive damages for violation of her rights and for injunctive relief. The drawback to this new law is that only a patient can assert that her right to meet with an advocate has been violated,<sup>158</sup> and the amount of damages is small.<sup>159</sup> Also, the definition of access has not been clarified to show that community groups that do not know specific residents have an express right of entry.

Other states have enacted regulations specifically to prevent denial of access. A Washington, D.C. regulation provides access to members of community organizations and legal services programs, enumerates what these community people can do in the nursing homes, and provides enforcement remedies for both residents and advocates.<sup>160</sup> Better results are assured when a denial

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censee shall be liable for up to five hundred dollars (\$500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue . . . .

156. Attorney fees do not need to be commensurate with the amount of the award of damages, nor must the party prevail on all claims. In *Rivera v. City of Riverside*, 679 F.2d 795 (1982), the judgment for the plaintiff was \$33,350 and the award of attorney fees was \$243,344. (Police broke up the party plaintiff was attending with tear gas and unnecessary physical force. The jury found for the plaintiff on negligence, false arrest, false imprisonment and 42 U.S.C. § 1983 charges.)

157. CAL. ADMIN CODE tit. 22, R. 72527(a)(12), (13) (1982) includes these as patient rights.

158. See *supra* note 155.

159. Senate Bill 1930, which became the Health and Safety Code §1430(b), was initially stronger. It provided for damages of up to \$2,500 and punitive damages. The California Association of Health Facilities (CAHF) is an organization made up of the for-profit nursing home corporations. CAHF is well-organized and maintains a lobbyist in Sacramento. The bill was weakened because of organized pressure from the industry. Nursing home reform organizations, after having seen many excellent pieces of legislation fail in the past because of pressure from CAHF, decided that a bill with a small damages award was better than no bill at all. Interview with Katherine E. Meiss, Attorney, Western Center on Law and Poverty, Sacramento, Cal. (Oct. 7, 1982).

160. District of Columbia Health Care Facilities Regulation No. 74-15, § 3 permits advocates to: speak with patients, advise them of their rights, assist them in asserting their rights, and inspect the facility. The regulation specifies the visiting hours during which the community groups may enter. The regulation also states that patients who utilize these services shall not be retaliated against. The regulation has strong enforcement provisions. Violators are guilty of a misdemeanor and subject to a per diem fine and imprisonment. The regulation permits a civil suit by patients or community groups

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of access complaint is litigated under a strong state regulation or statute. After Illinois enacted a statute that prohibits denial of access,<sup>161</sup> a plaintiff successfully litigated denial of access in the state court.<sup>162</sup> Subsequently, other plaintiffs were successful in gaining access through less expensive and time-consuming hearings with the Department of Public Health.<sup>163</sup> Once legislation such as the very specific Washington, D.C. regulation is enacted, advocates can at last use their time to ensure that residents in skilled nursing facilities receive proper care and are treated with dignity.

### E. ACTION FOR BREACH OF CONTRACT

In *Fuzie v. Manor Care* a district court of Ohio stated that a patient could assert a claim for violation of the regulations as a third party beneficiary to the provider agreement between the nursing home and the state.<sup>164</sup> States enter into provider agreements with nursing home facilities to ensure that patients will receive the minimum standard of care provided by federal and state regulations. The nursing home, in return for assuring quality care, is licensed and reimbursed by the state. A district court of Illinois in *Roberson v. Wood* also found that a patient is the third party beneficiary to the contract between the state and the facility.<sup>165</sup>

Both courts found pendent jurisdiction. Although a contract action ordinarily would be maintained in state court, the plain-

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that have been denied access to each other. Recovery includes damages, punitive damages, costs, and attorney's fees.

161. ILL. ANN. STAT. Ch. 111-½, § 4151-104 (Smith-Hurd Supp. 1983-84) (definition of access), §4152-108 ("[e]very resident shall be permitted unimpeded, private and uncensored communication of his choice by mail, public telephone, or visitation. . . ."), and § 4152-110 (listing who may have access, the social and legal services advocates may provide, and the requirements and limitations on the access privilege).

162. *Strickland v. Kempiners*, No. 80-L-016025 (Cook County Cir. Ct., Ill. Feb. 20, 1981).

163. *Illinois Citizens for Better Care v. Sherwin Manor Nursing Home*, No. R8-NH-81-08 (Dep't of Public Health, Ill. Mar. 26, 1981); *Greenfield v. Pembridge House*, No. 1-LTC-81 (Evanston North Shore Health Dep't, City of Evanston, Ill. May 8, 1981); *Nolon v. Forty Six Twenty One, Corp.*, No. R8-NH-81-12 (Dep't of Public Health, Ill. July 30, 1981); *Lopez v. Royal Elm Convalescent and Geriatric Center*, No. R8-NH-82-17 (Dep't of Public Health, Ill. Oct. 19, 1982).

164. 461 F. Supp. 689, 697-98 (N.D. Ohio 1977).

165. 464 F. Supp. 983, 987-88 (E.D. Ill. 1979).

tiff patients were able to bring their suit in federal court. The Ohio court permitted adjudication in federal court because the nursing home must adhere to both federal and state regulations.<sup>166</sup> The Illinois court stated that this action was pendent to other federal claims asserted.<sup>167</sup>

In a denial of access claim a patient also can bring a cause of action against a nursing home as a third party beneficiary to the provider agreement because the nursing home must comply with the federal and state patients' bill of rights. Following the reasoning in *Fuzie* and *Roberson*, the nursing home patient is the beneficiary of the agreement between the state and the facility and therefore can sue if the contract is violated. A patient may also be able to sue the nursing home directly for breach of the admission contract between the patient and the facility. At the time of entry, the resident must sign a statement that she is informed of her rights under the patients' bill of rights. The facility must adhere to these regulations.<sup>168</sup> In denying access and thus violating the patients' bill of rights, the facility is breaching its agreement with the patient.

Breach of contract is important to assert in a claim against a nursing home for denial of access. The difficulties in obtaining standing in other causes of action may result in patients and advocates never adjudicating the denial of constitutional rights or violation of statutory rights. Breach of contract may be the only cause of action that the court will examine; this may be the only theory that would permit advocates to enter facilities and communicate with the residents.

## CONCLUSION

Nursing home patients have the same constitutional rights as all other citizens and are given additional protection under

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166. 461 F. Supp. at 698.

167. 464 F. Supp. at 987-88. "[I]t arises out of a common nucleus of operative facts and plaintiff would ordinarily be expected to try them all in one judicial proceeding." *Id.*

168. 42 C.F.R. § 405.1121(k), (k)(1) (1981); CAL. ADMIN. CODE tit. 22, R. 72527(a), (a)(1) (1983).

federal and state regulations. Yet, these rights are often denied, and regulatory agencies remain lax in their enforcement of patient care standards. To secure their rights, residents need outside help. Yet, the community groups dedicated to helping them are often denied entrance to the facilities. Fighting either denial of access or a violation of any other patient right in court may prove impossible due to judicial safeguards. The difficulty in finding either state action for infringement of constitutional rights, or an implied private right of action for violation of statutory rights may prevent patients from enforcing their guaranteed rights. The answer to nursing home problems lies in stronger state and federal legislation to permit access by community organizations and legal services groups, stricter enforcement of existing health, safety, and patients' rights regulations, and effective organizing of patients and relatives to demand better quality of care.