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Practice and Procedure

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PRACTICE AND PROCEDURE

I. VENUE

A South Carolina court in which a civil action is pending is authorized by statute to grant a motion for a change of venue if a fair and impartial trial cannot be had in such forum, even though the venue of the action has been properly established.[1] Prejudice directed against the party seeking the change of venue, if established by supporting affidavits,[2] is generally held to be a sufficient basis for finding that a fair and impartial trial cannot be had.[3] The South Carolina Supreme Court was faced with the opposite issue in *Stevens v. Sun News Co.*[4] The issue raised by the defendant newspapers did not concern prejudice directed against themselves as the movants, but, rather, prejudice in favor of the adverse party, *i.e.*, plaintiff Stevens.

Factually, the defendant newspapers were being sued on an alleged libel action by Stevens. Stevens held the office of state senator and was alleged by the defendants to be a prominent and influential citizen of Horry County, where the action was initially instituted. Defendants further alleged that the plaintiff was involved with many locally prominent and politically influential citizens in a business venture, which was the subject of the allegedly libelous article published by the defendants. Defendants moved for a change of venue on the basis of these alleged facts, as well as the fact that one of plaintiff's attorneys was the duly elected solicitor for the judicial circuit which includes Horry County. Defendants argued that the political prestige and influence of the plaintiff, his attorney, and his business associates were so extensive as to deny defendants a fair and impartial trial.[5]

1. S.C. CODE ANN. § 15-7-100(2) (1976) provides: "The court may change the place of trial in the following cases: . . . (2) When there is reason to believe that a fair and impartial trial cannot be had therein . . . ."

The statutory provisions establishing the grounds for a change of venue are, in all probability, exclusive of all other grounds. Young v. Niblach, 229 Ind. 509, 99 N.E.2d 252 (1951). *See also* Hanley v. Charleston Light Co., 110 S.C. 340, 96 S.E. 519 (1918). However, the statutory provisions appear to be sufficiently broad so as to bring a multitude of arguments within their scope.

2. S.C. CODE ANN. § 15-7-110 (1976).

3. *See* Johnston v. Belk-McKnight Co. of Newberry, 194 S.C. 490, 10 S.E. 2d 1 (1940); Louisville Times Co. v. Lyttle, 257 Ky. 132, 77 S.W.2d 432 (1935).

4. 267 S.C. 63, 226 S.E.2d 236 (1976).

5. Proposed Case and Exceptions at 20-22.

This motion for change of venue was denied by the trial judge and was appealed by the defendants to the Supreme Court of South Carolina.

Authority supported both the premise that prejudice in favor of an adverse party and its causes are sufficient within the scope of section 15-7-100(2) of the South Carolina Code to support a change of venue and the contradictory premise that such are insufficient to support a change of venue. A close analysis of *Stevens v. Sun News Co.*[6] reveals that the South Carolina Supreme Court has indirectly harmonized the legal theory underlying several prior opinions which appear, on their face, to be inconsistent.[7]

The case of *Johnston v. Belk-McKnight Co. of Newberry*[8] first enunciated the principle that removal of a cause of action need not be based solely on prejudice directed against the movant for a change of venue, but that it is permissible also to base a change of venue on prejudice directed in favor of the adverse party. The *Johnston* court recognized that the purpose of the venue statute[9] is to insure a fair and impartial trial. This goal of fairness and impartiality can be impaired as easily by a prejudice within the community which would influence a jury's verdict in favor of a particular litigant as it would be by prejudice which would influence a verdict against the movant.[10]

The question as to what circumstances would constitute prejudice in favor of the adverse party sufficient to impair the fairness and impartiality of the trial was left unanswered. Other jurisdictions, which have allowed prejudice in favor of an adverse party as a basis for a change of venue, have held that such prejudice exists where the adverse party is in such a position of power as

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6. 267 S.C. 63, 226 S.E.2d 236 (1976).

7. Varnadoe v. Hicks, 264 S.C. 216, 213 S.E.2d 736 (1975); South Carolina Elec. & Gas Co. v. Aetna Ins. Co., 235 S.C. 147, 110 S.E.2d 165 (1959); Johnston v. Belk-McKnight Co. of Newberry, 194 S.C. 490, 10 S.E.2d 1 (1940).

8. 194 S.C. 490, 10 S.E.2d 1 (1940).

9. S.C. CODE ANN. § 15-7-100 (1976). *See* note 1 *supra.*

10. We are unable to subscribe to the doctrine that the prejudice existing in the county from which removal is sought must be directed solely against the applicant [movant] for the change of the place of trial to entitle such applicant to a change of venue. There may exist no particular prejudice against the applicant, and yet prejudice could exist in favor of the opposing litigant such as to prevent the applicant from receiving a fair and impartial trial; and a fair and impartial trial is and should be the goal sought in all trials.

Johnston v. Belk-McKnight Co. of Newberry, 194 S.C. 490, 493, 10 S.E.2d 1, 2 (1940).

to exert, either directly or indirectly, an undue influence over those eligible for jury service, thereby promulgating a sense of favoritism or sympathy in favor of the adverse party.[11] Indeed, the South Carolina Supreme Court, by way of dictum in two pre-*Johnston* cases, has indicated that undue influence on the part of an adverse party would be sufficient cause for a change of venue if the opportunity for a fair and impartial trial were impaired.[12] The implication that arises is that undue influence in favor of or exercised by an adverse party is sufficient to constitute such prejudice as would necessitate a change of venue under the *Johnston* rationale.

The issue of what constitutes prejudice in favor of an adverse party was squarely presented in *South Carolina Electric & Gas Co. v. Aetna Insurance Co.*[13] Rather than serving to clarify and further define the situation, however, the decision merely succeeded in confusing the issue further. The popularity, influence, or good reputation of an adverse party was held not to be a sufficient basis for a change of venue.[14] As *Johnston v. Belk-McKnight Co. of Newberry*[15] was not overruled, it can only be concluded that this particular party's popularity, influence, or good reputation was not sufficient to constitute prejudice in favor. Instead, the popularity and good reputation of the adverse party should be

11. Smith v. Hortler, 4 N.C. (Car. L. Rep.) 131 (1814). *Cf.* Reyher v. Mayne, 90 Colo. 586, 10 P.2d 1109 (1932) (adverse party in a position of power but the facts as found by the trial judge did not constitute an abuse of discretion or undue influence).

Many states have statutorily imposed the duty of a change of venue where prejudice in favor of an adverse party exists in the form of undue influence. *See, e.g.*, ILL. REV. STAT. ch. 146, § 4 (1973); KY. REV. STAT. § 452.010 (1970). Authority also exists to the effect that such undue influence must not be shown to be general in nature. Instead, the movant must allege specific instances of the exertion of undue influence: it must be direct and actual and not indirect and potential. Swiggum v. Valley Inv. Co., 73 N.D. 765, 19 N.W.2d 569 (1945). This requirement that specific acts of undue influence be shown would place an unbearable burden upon the movant, and North Dakota appears to be unique in this requirement.

12. Carroll v. Charleston & Seashore R.R., 61 S.C. 251, 39 S.E. 364 (1901); McGown v. Northeastern R.R., 55 S.C. 384, 33 S.E. 506 (1899). The approval of the change of venue is dicta because the determination of the need for a change of venue was factual and at that time could not be reviewed on appeal. The dicta in *Carroll* are extremely enlightening, since the defendant was the largest employer in the area and a very prominent businessman and because a number of influential people in the community were concerned and interested in the defendant company. This was felt to have been such a position of power that it would, by its nature, exert a powerful influence over the minds of eligible jurors to render a verdict favorable to the adverse party and against the movant.

13. 235 S.C. 147, 110 S.E.2d 165 (1959).

14. *Id.* at 153, 110 S.E.2d at 168.

15. 194 S.C. 490, 10 S.E.2d 1 (1940).

considered an asset to such a party, which should be protected. Rather than providing a definition of what does constitute such prejudice as approved in *Johnston,* the court in *South Carolina Electric & Gas Co. v. Aetna Insurance Co.*[16] only expanded upon what does not constitute such prejudice.[17] Thus, a broad reading of the decision in *South Carolina Electric & Gas Co.* would indicate that little remained of any theory that a community attitude favorable toward a litigant, pervasive enough to affect a jury verdict, could be used as a basis for a change of venue.

In *Stevens v. Sun News Co.*[18] the court has retreated from such an expansive reading of *South Carolina Electric & Gas Co.* Rather than adopt a rule that a party's popularity, influence, or good reputation can never be used to establish prejudice in favor of the adverse party and, thus, cannot justify a change of venue, the decision adopted a causal connection approach to a position of power and prejudice in favor of an adverse party. The court focused on the restrictive and limiting language of the prior opinions.[19] *South Carolina Electric & Gas Co.* was cited approvingly

16. 235 S.C. 147, 110 S.E.2d 165 (1959).

17. The fact alone that a party to an action is popular, influential, or enjoys a good reputation is ordinarily not sufficient to warrant a change of venue . . . . As stated in Bennett v. Jackson, *supra* "A good name ordinarily is and rightfully should be a benefit rather than a burden to its bearer by virtue of which he should be protected rather than penalized."

Id. at 153, 110 S.E.2d at 168 (quoting Bennett v. Jackson, 172 S.W.2d 395, 398 (Tex. Civ. App. 1943)).

Several elements should be noted concerning this decision in *South Carolina Elec. & Gas Co.* First, the holding regarding a party's popularity, influence, and good reputation is most probably dicta. The decision of the case turned on the issue of convenience of the witnesses and the promotion of the ends of justice under S.C. CODE ANN. § 15-7-100(3) (1976). Indeed, the issue of a fair and impartial trial under S.C. CODE ANN. § 15-7-100(2) (1976) was not even raised in the movant's motion for a change of venue, even though it was addressed in the movant's affidavit in support of such motion. 235 S.C. at 151-53, 110 S.E.2d at 166-67. If a ground serving as a basis for a motion is not stated, then it cannot properly be considered. *See* Ulmers v. Willingham, 238 S.C. 503, 120 S.E.2d 859 (1961).

Second, the South Carolina Supreme Court adopted the rationale of Bennett v. Jackson. This Texas case rested on the premise that popularity is insufficient to establish that prejudice exists and that a fair trial cannot be had. Texas is one of the states which has mandated that undue influence constitutes a sufficient basis for granting a change of venue. TEX. R. CIV. P. R. 257. Thus, South Carolina, by implication, appears to have adopted in *South Carolina Elec. & Gas Co.* a distinction between mere popularity on the one hand and undue influence and prejudice on the other. *See* note 23 and accompanying text *infra.*

18. 267 S.C. 63, 226 S.E.2d 236 (1976).

19. Varnadoe v. Hicks, 264 S.C. 216, 220, 213 S.E.2d 736, 738 (1975) ("The mere fact

by the *Stevens* court, but only for the proposition that there is nothing inherent in a party's position or status which automatically establishes the presence of prejudice within the community in favor of the adverse party such as to render a fair and impartial trial impossible and thus justify a change of venue.[20] This signifies an approach considerably different from that established in *South Carolina Electric & Gas Co. v. Aetna Insurance Co.*[21] and probably signals a near return to the theory underlying *Johnston v. Belk-McKnight Co. of Newberry.*[22] The movant no longer must meet the intolerable burden of *South Carolina Electric & Gas Co.* in establishing prejudice in favor of the adverse party on grounds other than popularity, influence, or good reputation, which an expansive reading of *South Carolina Electric & Gas Co.* would require.

Instead, the movant must distinguish mere popularity and influence due to the good reputation and status of the adverse party from prejudice in favor of such party. This prejudice will exist when the popularity and influence of the adverse party are found to be so extensive as to have a direct or indirect impact upon the prospective jurors so as to influence the jury's deliberations beyond the consideration of the facts as presented by the evidence. It is in the latter situation where the influence that is inherently exerted by the adverse party due to his good character, which is permissible in itself, crosses an imaginary boundary so as to become an undue influence on the jury. This undue influence constitutes prejudice in favor of the adverse party sufficient to justify a change of venue under the *Johnston* rationale.[23]

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that the defendant Hicks holds an official position . . . does not justify the conclusion that a fair and impartial trial cannot be had in that county."); South Carolina Elec. & Gas Co. v. Aetna Ins. Co., 235 S.C. 147, 153, 110 S.E.2d 165, 168 (1959) ("The fact alone that a party to an action is popular, influential or enjoys a good reputation is ordinarily not sufficient to warrant a change of venue.").

20. "Normally, a party's popularity, influence, or reputation is not an adequate basis, in and of itself, to justify a change of venue. South Carolina Electric & Gas Co. v. Aetna Ins. Co., 235 S.C. 147, 153, 110 S.E.2d 165, 168 (1959)." Stevens v. Sun News Co., 267 S.C. 63, 69, 226 S.E. 2d 236, 239 (1976).

21. 235 S.C. 147, 110 S.E.2d 165 (1959).

22. 194 S.C. 490, 10 S.E.2d 1 (1940).

23. This distinction between mere popularity and influence inherent in a party's status and such influence so as to subject the jury to foreign considerations outside the scope of the evidence is crucial to the success of future movants in seeking a change of venue in a civil action.

Perhaps an extreme and obvious illustration will clarify the point. Plaintiff *A* is a large bank in a sparsely populated community. It brings suit against defendant *B* in the county in which *A* is primarily located. Since *A* is a large bank, a high proportion of the

The key for the movant is not only to recognize this crucial distinction and thereby base his motion for a change of venue upon prejudice in favor of the adverse party due to such party's undue, not inherent, influence, but also to support this allegation in fact. The movant must establish a nexus between the position of power of the adverse party and an actual or potential effect upon the jury. One method, if not the crucial method, of establishing this causal connection between the undue influence of the adverse party and the resulting impact upon the jury is the use of the affidavits required by section 15-7-110 of the South Carolina Code. If the movant can illustrate the undue influence to the court by securing affidavits from eligible jurors stating that they could not render, or that they believe that no jury could render, a verdict solely on the evidence presented without consideration of the adverse party's position of power, then the movant probably will have established the impact, direct or indirect, upon the jury of the party's undue influence, sufficient to constitute prejudice and justify a change of venue. This showing by the movant would be strengthened by the additional showing of the effect which a verdict against the adverse party would have upon such party and, thereby, the community. Indeed, the defect which caused the motion for a change of venue to be denied in *Stevens v. Sun News Co.*[24] was the failure on the part of the movant to establish factually, or even to place before the court facts tending to establish, this causal connection between the adverse party's status and any actual or potential effect upon the jury, which would constitute undue influence and resulting prejudice.[25]

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people of the county are in debt to plaintiff *A* and many more are customers of the bank. Defendant *B* on the other hand has just moved into his new home Blackacre within the county from out of state. Defendant *B* seeks a change of venue. Under the *Stevens* rationale, if defendant *B* can show that prospective jurors will be influenced by the debt owed to plaintiff *A* or by the other business transacted with plaintiff *A*, in addition to the merits of the case, the inherent influence of the bank becomes undue and subjects the jury to foreign influences which constitute prejudice in favor of plaintiff *A* and, under *Johnston*, justifies a change of venue. *See* Smith v. Hortler, 4 N.C. (Car. L. Rep.) 131 (1814); Swiggum v. Valley Inv. Co., 73 N.D. 765, 19 N.W.2d 569 (1945); Carroll v. Charleston & Seashore R.R., 61 S.C. 251, 39 S.E. 364 (1901); Herd v. Wade, 63 S.W.2d 253 (Tex. Civ. App. 1933).

Thus, a direct or indirect fear of reprisal from the powerful litigant who is in a position to do so would clearly constitute sufficient grounds for a change of venue under the *Stevens* rationale.

24. 267 S.C. 63, 226 S.E.2d 236 (1976).

25. In the instant case, no affidavits were secured from local residents stating that they could not render a just verdict if sworn as jurors, or that, based on their experience as *residents* of Horry County, any jury selected would be

The court left open the issue of what burden of proof must be met by the movant in order to establish a causal connection between one's status and the impact on a jury that would result in undue influence sufficient to preclude a fair and impartial trial.[26] However, the court has established a procedure which signifies a return to *Johnston v. Belk-McKnight Co. of Newberry*:[27] that a change of venue may be founded upon an existing prejudice in favor of an adverse party. Such prejudice can now be established by the showing of a causal connection between one's status, *i.e.*, popularity, influence, and good reputation, and the impact of such upon a jury, and furthermore, that the jury is likely to delve into considerations beyond the scope of the evidence presented.[28]

II. ANTICIPATORY RELIEF

The United States Court of Appeals for the Fourth Circuit has expanded the principles of equity, comity, and federalism, espoused by the Supreme Court in *Younger v. Harris*[29] and *Huffman v. Pursue, Ltd.*,[30] to find the doctrine of nonintervention by a federal court applicable to state proceedings which have not reached the level of actually being litigated in a state court. In *American Civil Liberties Union v. Bozardt*,[31] the court, without directly stating its rationale, extended the policy against federal intervention to deny declaratory and/or injuctive relief sought

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> subjected to foreign influences. Thus, there is no linchpin between the official status of the respondent and associates and any *actual* or *potential* impact upon prospective jurors . . . . Appellants [movants] did not satisfy the statutory requirement that "there is reason to believe a fair and impartial trial can not be had."

Id. at 69, 226 S.E.2d at 239.

26. It may be that the affidavit method of illustrating the impact upon a prospective juror, *see* note 25 and accompanying text *supra*, is the only method which the court will accept. Other courts have held that the presentation of facts justifying a conclusion of undue influence or prejudice and a sufficient impact upon the jury to be sufficient to create a belief that a fair and impartial trial cannot be had will warrant a change of venue. In other words, a mere allegation or suspicion without more is not sufficient to warrant a change of venue but the presentation of such facts does not have to reach the level of certainty either. Tongate v. Erie R.R., 123 Misc. 580, 205 N.Y.S. 768 (1924); Smith v. Hortler, 4 N.C. (Car. L. Rep.) 131 (1814); Swiggum v. Valley Inv. Co., 73 N.D. 765, 19 N.W.2d 569 (1945).

27. 194 S.C. 490, 10 S.E.2d 1 (1940).

28. *See* note 23 and accompanying text *supra*.

29. 401 U.S. 37 (1971).

30. 420 U.S. 592 (1975).

31. 539 F.2d 340 (4th Cir.), *cert. denied*, 97 S. Ct. 639 (1976).

against administrative procedures in general and disciplinary or licensing procedures in particular.[32]

The question left open after *Huffman v. Pursue, Ltd.*[33] was to what extent the doctrine of nonintervention in state proceedings would extend once the federal plaintiff qualified under the Anti-Injunction Statute.[34] Prior to *Huffman,* the Supreme Court had authorized the intervention of federal anticipatory relief only in state criminal proceedings where the federal plaintiff could demonstrate that such state proceedings caused him irreparable injury both great and immediate, usually arising from bad faith and harassment on the part of the state.[35] Focusing primarily upon the principles of comity and federalism, the Court in *Huffman* held that the *Younger* restraints applied to pending state civil proceedings which are "more akin to a criminal prosecution than are most civil cases" because the particular civil proceedings are "in aid of and closely related to criminal statutes."[36]

The principles of comity and federalism were found by *Huffman* to require restraint because

> interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from

32. The purpose of this survey necessarily limits the scope of analysis. The analysis of American Civil Liberties Union v. Bozardt begins with the Supreme Court's rationale as expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), because this decision accumulates the rationale of prior decisions for the purposes of this discussion. However, one needs to be familiar with the prior decisions of the Supreme Court. For this purpose, the cases of Hicks v. Miranda, 422 U.S. 332 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Mitchum v. Foster, 407 U.S. 225 (1972); Samuels v. Mackell, 401 U.S. 66 (1971); and Younger v. Harris, 401 U.S. 37 (1971), are vital for an in-depth analysis of the doctrine of nonintervention and its exceptions. *See also* Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings,* 29 STAN. L. REV. 29, 31-43 (1976) (hereinafter cited as Bartels); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion,* 53 N.C. L. REV. 591, 649-75 (1975) (hereinafter cited as Whitten); Note, *The New Federal Comity: Pursuit of* Younger *Ideas in a Civil Context,* 61 IOWA L. REV. 784 (1976) (hereinafter cited as IOWA Note); Comment, *Post-*Younger *Excesses in the Doctrine of Equitable Restraint: A Critical Analysis,* 1976 DUKE L.J. 523, 526-48 (hereinafter cited as DUKE Comment).

33. 420 U.S. 592 (1975).

34. 28 U.S.C. § 2283 (1970). Once the federal plaintiff qualifies under the Anti-Injunction Statute, he still faces the hurdles of equity, comity, and federalism before anticipatory relief from state proceedings will be granted. Niles v. Lowe, 407 F. Supp. 132, 134 (D. Hawaii 1976). *See also* DUKE Comment, *supra* note 32, at 540.

35. Younger v. Harris, 401 U.S. at 43-49; Samuels v. Mackell, 401 U.S. at 73.

36. 420 U.S. at 604.

> continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court ability to enforce constitutional principles."
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> . . . Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.[37]

The extent to which the principles of equity require restraint and nonintervention in *Huffman* is not clear. The Court recognized that the principles of equity pertaining to the doctrine of equitable restraint and the principles of nonintervention applicable to criminal cases, where the litigant assuredly has an adequate remedy at law,[38] technically are not applicable to civil proceedings. However, the classification of the civil proceeding as one akin to and in aid of its criminal counterpart probably does not totally rule out equity as a consideration, but its importance after *Huffman* is not as controlling a factor as it was in *Younger*.[39]

How far this doctrine of equitable restraint and nonintervention in the field of anticipatory relief will extend in the area of civil proceedings is a question that has not been answered by the Supreme Court. There is language in *Huffman* which appears to be very broad. The Court referred to its decision in *Huffman* as the "civil counterpart"[40] of *Younger* and relied upon two lower court decisions which appear to abandon all distinctions between state civil and criminal proceedings as authority.[41] More important, the analysis of the Court in *Huffman*[42] is capable of being applied to any type of proceeding. The consideration of the interests involved, the promulgation of substantive policies, interfer-

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37. *Id.*

38. Younger v. Harris, 401 U.S. at 43-44. For an exhaustive and authoritative discussion of the historical roots of the principles of equity and equitable restraint, see Whitten, *supra* note 32.

39. *See* Bartels, *supra* note 32, at 65; DUKE Comment, *supra* note 32, at 1205-06. *See also* Cousins v. Wigoda, 409 U.S. 1201, 1205-06 (1972) (Rehnquist, J., opinion in chambers).

40. 420 U.S. at 611.

41. *Id.* at 607. "[The] application [of the principles of comity, equity, and federalism] should never be made to turn on such labels as 'civil' or 'criminal' but rather upon an analysis of the competing interests in each case." Lynch v. Snepp, 472 F.2d 769, 773 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). *See also* Cousins v. Wigoda, 463 F.2d 603 (7th Cir.), *application for stay denied*, 409 U.S. 1201 (1972).

42. *See* note 37 and accompanying text *supra.*

ence with state proceedings, duplication of procedures, and the negative inference, inherent in intervention, regarding the state courts' ability and good faith to protect individual rights, weigh equally in favor of restraint and nonintervention on the part of the federal court whether the proceeding be civil, criminal, quasi-criminal, or even nonjudicial.[43]

A more restrictive reading is also possible in *Huffman.* The proceeding under scrutiny in *Huffman* was found to be more closely allied and akin to a criminal proceeding than most civil proceedings. Indeed, it was found to be "in aid of and closely related to" the criminal law.[44] The fact that the state was a party to the action and that the proceeding was a judicial one also appear crucial to the Court's decision.[45] Thus, it is equally possible that the *Huffman* extension is applicable only to judicial proceedings, with the state as a party, which are akin to a criminal proceeding and are in aid of and closely related to the state's interests underlying its criminal law.[46]

Thus, the Fourth Circuit in *American Civil Liberties Union v. Bozardt*[47] was faced with a factual situation which, under either a broad or restrictive interpretation of *Huffman,* required a certain amount of policy extension in order to find that the doctrine of equitable restraint and nonintervention was applicable to anticipatory relief sought against state disciplinary procedures. The question which is left unanswered after *Bozardt* is whether the court merely extended the limitations which a restrictive interpretation requires by fitting the disciplinary procedures within these limitations or whether the court rejected the restrictive, and perhaps meaningless, classifications and adopted an analytical scheme consisting of the interests involved in the proceeding and the resulting degree of interference with the state proceedings which the grant of federal anticipatory relief would create.

In *Bozardt,* the appellants, Jane Koe (a fictitious name) and

43. Grendco Corp. v. Rochford, 536 F.2d 197, 206 (7th Cir. 1976); Anonymous v. Association of the Bar of N.Y., 515 F.2d 427, 432 (2d Cir.), *cert. denied,* 423 U.S. 863 (1975); Lynch v. Snepp, 472 F.2d 769, 773 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974). *See* Theis, *Res Judicata in Civil Rights Cases: An Introduction to the Problem,* 70 NW. U.L. REV. 859, 870 (1976); Whitten, *supra* note 32, at 682; IOWA Note, *supra* note 32, at 805-14; DUKE Comment, *supra* note 32, at 555-58.

44. 420 U.S. at 604.

45. *Id.*

46. Vail v. Quinlan, 406 F. Supp. 951, 958 (S.D.N.Y.) *prob. juris. noted sub nom.* Judice v. Vail, 426 U.S. 946 (1976). *See also* Bartels, *supra* note 32, at 45-46, 62-65.

47. 539 F.2d 340 (4th Cir.), *cert. denied,* 97 S. Ct. 639 (1976).

the American Civil Liberties Union (hereinafter ACLU), sought injunctive and declaratory anticipatory relief to block pending state disciplinary proceedings by the Board of Commissioners on Grievances and Discipline of the South Carolina Bar. These proceedings were initiated due to allegations of solicitation in the suit of *Doe v. Pierce.*[48] The district court dismissed the suit and failed to intervene. On January 9, 1976, a private reprimand was issued against the petitioner Koe. Appellants appealed to the Fourth Circuit, alleging bad faith harassment, great and immediate harm,[49] and the infringement of rights pursuant to the Civil Rights Act of 1871.[50] The court in *Bozardt* affirmed the district court's denial of federal anticipatory relief and thereby held the *Huffman* rationale of equitable restraint and nonintervention to be sufficiently expansive to act as a bar to the intervention in disciplinary actions before an administrative body of the state.

The rationale that the *Bozardt* court used to find the principles of restraint in *Huffman* applicable to disciplinary proceedings is not entirely clear, as the court treated the application of the principles of equitable restraint and nonintervention in a rather conclusory manner. However, there are only two potential rationales which the *Bozardt* court could have applied in finding that nonintervention was required: (1) That the disciplinary proceedings fit within the restrictive reading of *Huffman* and qualified as judicial proceedings closely akin to a criminal proceeding and in aid of the criminal law; or (2) that the civil-criminal distinction was not a crucial factor and the proceeding was of such a crucial interest to the state that intervention by the federal court's granting of anticipatory relief would cause such disruption of the state proceeding, frustration of the effectuation of the state substantive interest, and would impinge on the ability and the good faith of the state to such an extent that nonintervention was required on the part of the federal court.

A persuasive argument can be put forth that *Bozardt* is a limited extension of *Huffman* in that the disciplinary proceeding can be classified as a judicial proceeding akin to a criminal proceeding which is in aid of the state's criminal law.

The first issue to be addressed in such an argument is

48. Civil Action No. 74-475 (D.S.C. 1975).

49. Brief for Appellants at 13-18. ACLU v. Bozardt, 539 F.2d 340 (4th Cir.), *cert. denied*, 97 S.Ct. 639 (1976).

50. 42 U.S.C. § 1983 (1970).

whether a disciplinary proceeding qualifies as a proceeding "more akin to a criminal prosecution than are most civil cases."[51] In this regard, several courts have classified similiar disciplinary proceedings as "quasi-criminal" and thus closely akin to a criminal prosecution.[52] This classification as a "quasi-criminal" proceeding is appropriate because the interests existent in the proceeding are much greater than those which usually exist between private civil litigants. The effect upon the attorney or the subject of the disciplinary action is much the same as the effect of a criminal proceeding. The attorney faces not only possible disbarment and the loss of a livelihood, but also the serious impairment of his professional reputation. Such an impairment could seriously harm the attorney's relations with his clients to the extent that he may not be able to function as he had previously and indeed may lose not only potential future clients, but may conceivably lose established clients, even if the disciplinary proceeding exonerates the attorney from all allegations of wrongdoing.[53] Such an effect would, of course, apply with equal validity to disciplinary proceedings in other professions. Thus, the valid classification of a disciplinary proceeding as "quasi-criminal" forms the basis of an argument that such a proceeding, as the one in *Bozardt,* is more akin to a criminal, rather than a civil, proceeding.

Secondly, to interpret *Bozardt* as only a limited extension of *Huffman,* it is necessary to classify the disciplinary proceedings

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51. 420 U.S. at 604.

52. *In re* Ruffalo, 390 U.S. 544, 551 (1968); Anonymous v. Association of the Bar of N.Y., 515 F.2d 427, 432 (2d Cir.), *cert. denied,* 423 U.S. 863 (1975); Goodrich v. Supreme Court of S.D., 511 F.2d 316, 318 (8th Cir. 1975); Erdmann v. Stevens, 458 F.2d 1205, 1208 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972). *See* Greene v. Virginia State Bar Ass'n, 411 F. Supp. 512, 516 (E.D. Va. 1976).

53. [I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding. A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. [citations omitted] Furthermore, disciplinary procedures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly, these factors played a part in leading the Supreme Court to characterize disbarment proceedings as being "of a quasi-criminal nature," In Re Ruffalo . . . .

Erdmann v. Stevens, 458 F.2d 1205, 1209-10 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972). *See also In re* Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975).

not only as akin to a criminal prosecution, but also as a judicial proceeding.[54] This classification seems more attenuated than the classification of the proceeding as "quasi-criminal" but it is an argument of some merit. As the Board of Commissioners on Grievances and Discipline is a mere investigative arm of the court with only the power of recommendation, its acts are arguably for and of the court, as the court itself has the exclusive power to discipline a member of its bar.[55] As a judicial inquiry has been defined as "one in which the court investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist,"[56] an argument could be put forth that the disciplinary proceeding is performing the investigative function of the court and thus is a judicial proceeding.[57] Inherent within this classification is the satisfaction of another requirement of a restrictive *Huffman* rationale, that the state be a party to the action. This is accomplished as the court and its investigative arm, the disciplinary committee, initiates the proceeding.

It is also necessary to demonstrate that federal interference in such state court proceedings would imply a lack of ability and faithfulness on the part of the state court to protect a party's constitutional rights.[58] There is no doubt that if the federal anticipatory relief were granted in *Bozardt,* the court would have struck an unfair blow to the integrity of the state judiciary.[59] There is no reason to believe that the state courts are not competent to pass on the constitutionality of their own procedures and to protect adequately the rights of those who appear before it.[60] Any rights which would not be protected would also be reviewable

54. *See* notes 45 & 46 and accompanying text *supra.*

55. ACLU v. Bozardt, 539 F.2d 340, 344-45 (4th Cir.), *cert. denied,* 97 S. Ct. 639 (1976); Burns v. Clayton, 237 S.C. 316, 331, 117 S.E.2d 300, 307 (1960).

56. Erdmann v. Stevens, 458 F.2d 1205, 1208 n.13 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972).

57. *See id.* at 1208-09; Mildner v. Gulotta, 405 F. Supp. 182, 191 (E.D.N.Y. 1975), *aff'd sub nom.* Gerzol v. Gulotta, 425 U.S. 901 (1976); Greene v. Virginia State Bar Ass'n, 411 F. Supp. 512, 516 (E.D. Va. 1976).

58. 420 U.S. at 609-11.

59. Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972); Niles v. Lowe, 407 F. Supp. 132, 136 (D. Hawaii 1976). *See also* Wallace v. Kern, 481 F.2d 621, 622 (2d Cir. 1973), *cert. denied,* 414 U.S. 1135 (1975).

60. Huffman v. Pursue, Ltd., 420 U.S. 592, 609-11 (1975); Mildner v. Gulotta, 405 F. Supp. 182, 198 (E.D.N.Y. 1975), *aff'd sub nom.* Gerzol v. Gulotta, 425 U.S. 901 (1976); Gipson v. Supreme Court of N.J., 416 F. Supp. 1129, 1131 (D.N.J. 1976).

upon appeal by that party to the Supreme Court.[61]

Finally, *Bozardt* may fall within a restrictive reading of *Huffman* if it can be shown that the interest of the state is in aid of and closely related to the criminal law of the state.[62] This issue is closely tied to the question of the degree of interference which federal anticipatory relief in a state proceeding would cause. In fact the two issues may be inseparable as the question, in reality, becomes whether the state interest in the proceedings is comparable to that which exists in a criminal proceeding so that interference by a federal court is equally great in either.[63]

In a disciplinary proceeding, especially one of the bar, the interest of the state is vital in nature. It is necessary for the state, through its highest court and its officers, to be able to control the integrity and character of its bar. The courts are exclusively responsible for the quality and discipline of the bar, even though they may delegate some of their investigatory functions to an administrative committee of the state bar.[64] The state courts will not be deterred from this obligation by interference of the federal courts in this area unless the requisite great and immediate irreparable harm can be shown. Thus, the interest of the state in providing the public with adequate and competent legal advice is as great an interest to the state as the interest of curbing the exhibition of pornography was in *Huffman.* It should also be noted that the same conclusion may be reached with respect to other administrative procedures as the analysis is equally applicable to nonbar proceedings where the interest of the state may be equally great.[65]

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61. Huffman v. Pursue, Ltd., 420 U.S. 592, 605 (1975); Anonymous v. Association of the Bar of N.Y., 515 F.2d 427, 432 (2d Cir.), *cert. denied,* 423 U.S. 863 (1975).

62. 420 U.S. at 604.

63. Anonymous v. Association of the Bar of N.Y., 515 F.2d 427, 432 (2d Cir.), *cert. denied,* 423 U.S. 863 (1975) ("The further inquiry is whether the proposed interference in the civil case is comparable to the disruption in *Huffman* of the state's interest in maintaining the standards of the criminal laws."); Whitten, *supra* note 32, at 682; Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings,* 50 N.Y.U. L. REV. 870, 883 n.62 (1975) ("The question first becomes which 'proceedings' rise to the level of interest found in criminal cases."). *See* McCune v. Frank, 521 F.2d 1152, 1158 (2d Cir. 1975).

64. *See* note 55 and accompanying text *supra.*

65. The interest of the state court in adjudicating the continuing professional fitness and character of its own officers is at least as great as the interests of the State of Ohio in policing the exhibition of pornographic material. Today more than ever, the integrity of the bar is of public concern and the state which licenses those who practice in its courts, and which is the only body which can

The practitioner who wishes to invoke the doctrine of equitable restraint and nonintervention should be successful if he can demonstrate the existence of all of the above factors. However, the fact that an attorney is faced with a situation in which some of the above factors exist while others are absent does not necessarily mean that the federal court will intervene and grant the anticipatory relief sought. *American Civil Liberties Union v. Bozardt*[66] can equally be taken as authority not only for a limited expansion of *Huffman* as described above where all the factors must be present, but also for the proposition that a federal court should deny anticipatory relief based on an interest analysis as presented by each case coupled with an analysis of the degree of accompanying interference.

The classification of the proceeding as "quasi-criminal," made in order to satisfy the requirement that the proceeding be more akin to a criminal prosecution than most civil proceedings dictated by a restrictive reading of *Huffman,* is a requirement that is of little actual meaning in and of itself. The initial problem with such a requirement is that it equates the police power of the state with the state's criminal justice system. The label "quasi-criminal" is attached to a proceeding in order to satisfy a strict construction of *Huffman* but in reality it fails to advance any analysis, since a disciplinary proceeding of the bar is a function of the police power of the state and does not form a part of the criminal justice system of the state; in other words, the power on the part of the state to effectuate and promulgate its interest in order to protect its citizens is much more expansive than its power to punish activity as a part of its criminal law.[67] Thus, the

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> impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the interloping of a federal court. As Mr. Justice Frankfurter observed in Theard v. United States, 354 U.S. 278, 281 . . . (1957), the "two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers among whom, in the present context, lawyers are included."

Anonymous v. Association of the Bar of N.Y., 515 F.2d 427, 432 (2d Cir.), *cert. denied,* 423 U.S. 863 (1975). *See* Erdmann v. Stevens, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972); Doe v. State Bar of Cal., 415 F. Supp. 308, 311 (N.D. Cal. 1976); Niles v. Lowe, 407 F. Supp. 132, 136 (D. Hawaii 1976); Mildner v. Gulotta, 405 F. Supp. 182, 191-92 (E.D.N.Y. 1975), *aff'd sub nom.* Gerzol v. Gulotta, 425 U.S. 901 (1976); Geiger v. Jenkins, 316 F. Supp. 370, 372-73 (N.D. Ga. 1970), *aff'd,* 401 U.S. 985 (1970).

66. 539 F.2d 340 (4th Cir.), *cert. denied,* 97 S. Ct. 639 (1976).

67. Polk v. State Bar of Tex., 480 F.2d 998, 1001-02 (5th Cir. 1973); Niles v. Lowe, 407 F. Supp. 132, 135 (D. Hawaii 1976); Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings,* 50 N.Y.U. L. REV. 870, 891 (1975). *See* Ahrensfeld v. Stephens, 528 F.2d 193, 198-200 (7th Cir. 1975); *In re* Ming, 469 F.2d 1352, 1353 (7th Cir. 1972).

mere fact that a proceeding is labeled "quasi-criminal" does not satisfy a restrictive reading of *Huffman,* as the argument put forth above would seem to indicate,[68] for the proceeding, even if quasi-criminal in nature, does not protect the same interests as the criminal justice system of the state is designed to protect. Rather, the classification of the proceeding in *Huffman* as akin to a criminal prosecution was intended to show that the interest of the state in such a proceeding must be comparable to that interest which the state possesses in its criminal justice system to the extent that federal interference in either situation would be equally annoying to the state.[69] Thus, *Bozardt* may more accurately be taken as authority for the proposition that an analysis of the interest of the state and the interference which would result if the federal court were to intervene is the proper analysis to be used in determining whether the doctrine of equitable restraint and nonintervention should bar the grant of anticipatory relief. This proposition may be gleaned from *Bozardt* because the classification of a disciplinary proceeding as "quasi-criminal" fails to satisfy the requirements of a restrictive interpretation of *Huffman.* The premise that *Bozardt* requires an analysis of the interest of the state rather than the nomenclature of the proceeding as "quasi-criminal" is further supported by the fact that the South Carolina Supreme Court has declared that disciplinary proceedings are not criminal in nature and are not designed for the purpose of punishment.[70]

The same rationale applies to the issue of the state's being a party to the proceedings. It also is a tool only to insure that the requisite interest and interference exist before anticipatory relief is denied due to the principles of equitable restraint and nonintervention. There is no magic in the state's being a party to the proceeding. The interest of the state may be as high in a proceeding between two individuals, especially where the effectuation of a substantive state policy is at issue.[71] Certainly the implication

68. *See* notes 51-53 and accompanying text *supra.*

69. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) ("[A]n offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding."); *see* notes 63-65 and accompanying text *supra. See* Theis, *Res Judicata in Civil Rights Cases: An Introduction to the Problem,* 70 NW. U.L. REV. 859, 870 (1976); DUKE Comment, *supra* note 32, at 555-73.

70. *In re* Kennedy, 254 S.C. 463, 176 S.E.2d 125 (1970); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960).

71. Perhaps a hypothetical situation may be helpful. *A,* a resident of a state with a right-to-work law is employed by a private contractor on a military base with that state.

that the state tribunals are not capable or lack the good faith necessary to protect a party's right is the same whether the state is a party or not, though the interference and annoyance to the state may be less since it is less directly involved. Indeed, the Fourth Circuit held prior to both *Bozardt* and *Huffman* that equitable restraint and nonintervention require the denial of anticipatory relief because of the competing interests involved in the proceeding and not because the state is or is not a party, which in that case it was not.[72]

The classification of a disciplinary proceeding as a judicial proceeding, so as to fit within a restrictive interpretation of *Huffman*, was tenuous at best and such classification can probably be ruled out as a factor worthy of consideration in determining the applicability of the principle of nonintervention. Several lower courts have recognized the fact that nonjudicial proceedings, *e.g.*, administrative proceedings, may be of the same interest to the state as judicial proceedings and that the effect of intervention by the federal courts in either proceeding is interference of the same degree. Thus, the principle has been recognized that where the nonjudicial proceeding is of the requisite interest to the state and interference would result in the same degree of intervention,[73] then the distinction between judicial and nonjudicial is one of form over substance and the *Huffman* rationale is applicable to nonjudicial proceedings as well.[74]

His employer has a union-security agreement with the applicable union and *A* is forced by his employer to join the union or be dismissed. *A* refuses and sues the employer and union pursuant to the private right of action granted by the right-to-work law. The applicability of the state's right-to-work law is a difficult legal question and would be determined in the private action without an action by the state against the employer. Therefore, the state may well wish to present an argument. The issue is of vital concern to the state and its policy but, due to the private right of action being brought first and thereby disposing of the legal question of state regulation upon a federal enclave, the state is not a party. The interest of the state is not any less as *amicus curiae* than it would be if it had brought the action itself. Indeed, the interest of the state would not be any less even if it did not present *amicus* argument. The interest of the state may be litigated without the state's being a party to the action in any manner.

72. Lynch v. Snepp, 472 F.2d 769, 773 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). *See* Williams v. Williams, 532 F.2d 120 (8th Cir. 1976); Littleton v. Fisher, 530 F.2d 691 (6th Cir. 1976); Fisher v. Federal Nat'l Mortgage Ass'n, 360 F. Supp. 207 (D. Md. 1973). *See also* DUKE Comment, *supra* note 32, at 556-57.

73. *See* notes 58-65 and accompanying text *supra*.

74. McCune v. Frank, 521 F.2d 1152, 1158 (2d Cir. 1975) ("A proceeding in a state court is not a pre-requisite to the applicability of *Younger* . . . *Younger* has relevance to administrative proceedings. . . ."); Do-Right Auto Sales v. Howlett, 401 F. Supp. 1035, 1038 (N.D. Ill. 1975). *See* DUKE Comment, *supra* note 32, at 558 n.14.

The Supreme Court has intimated that this judicial/nonjudicial distinction is one that will soon be abandoned. In *Rizzo v. Goode,*[75] the Court, in apparent dictum, seems to have shattered this distinction by finding that equitable relief, which injected the court into the internal disciplinary rules of the executive branch, was barred by the doctrine of equitable restraint and nonintervention, with the Court again relying on an analysis of the interest of the state and of the degree of interference which would result from intervention.[76] Indeed, the Court found the *Huffman* principles not only applicable to judicial proceedings, but also applicable to the executive branch of the state government or agency.[77] Thus, the distinction between judicial and nonjudicial proceedings is one that has been rejected by several lower courts and may soon be rejected by the Supreme Court, if it has not actually done so in *Rizzo.* A persuasive argument can be put forth that *Bozardt* also rejected such a distinction, as the language in *Bozardt* which discusses the relationship between the disciplinary proceeding and the court is not put forth to demonstrate the judicialness of the proceeding, but rather is used for the purpose of demonstrating that the appellants did not exhaust their state remedies, which is a distinct and separate requirement of *Huffman.*[78]

One is left with an analysis of the interest on the part of the state in the proceeding, the degree of interference with the state proceeding, and the interest of the state that the granting of federal anticipatory relief would create. At a minimum, one must show the state's interest in the proceeding which is comparable to the state's interest in its criminal laws. In other words, the state proceeding must vindicate a state interest which is of sub-

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75. 423 U.S. 362 (1976).

76. *Id.* at 377-81.

77. [T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.

Id. at 380. For more restrictive views of *Rizzo, see* Bartels, *supra* note 32, at 52 n.138; DUKE Comment, *supra* note 32, at 566-72.

78. ACLU v. Bozardt, 539 F.2d 340, 343-45 (4th Cir.), *cert. denied,* 97 S. Ct. 639 (1976).

stantial importance and which can be adequately promulgated and effectuated only within the state procedure. If the state proceeding is necessary to effectuate a state interest as comparable in importance to the state as its criminal laws, the doctrine of equitable restraint and nonintervention should prevent the grant of federal anticipatory relief.[79]

As a corollary, it is also necessary to show that the degree of interference by the grant of federal anticipatory relief will be comparable to that interference which accompanies federal intervention in criminal proceedings. The negative implication upon the state tribunals' ability to protect the party's constitutional rights is a constant and remains the same whether the proceeding be criminal, quasi-criminal, civil, or administrative. The key is whether the interference with the effectuation of the state interest is of the same nature as the interference with the criminal justice system of the state. This question is intimately connected with the prior issue of the substantial interest to the state which is being promulgated. In other words, not only should the interference be such that it will negatively reflect upon the ability or good faith of the state to protect the party's constitutional rights, but more important since this reflection exists in any situation where anticipatory relief is sought, the interference must also be of such a degree that it would frustrate the state interest that is sought to be effectuated and protected and would thus be an intolerable burden to the implementation of such vital interests of the state.[80]

Thus, the vital factors which the Fourth Circuit in *American Civil Liberties Union v. Bozardt*[81] impliedly endorsed by applying the principles of equitable restraint and nonintervention to state disciplinary proceedings are those factors requiring an analysis of the state's interests and the resulting interference of the grant of federal anticipatory relief upon such interest of the state and upon the integrity of such state proceedings necessary to the effectuation of such vital state interests.[82]

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79. *See* notes 62-65 and 68-70 and accompanying text *supra*. *See also* Bartels, *supra* note 32, at 76-79; IOWA Note, *supra* note 32, at 812-15; DUKE Comment, *supra* note 32, at 555-73.

80. *See* notes 58-61 and accompanying text *supra*. *See also* Whitten, *supra* note 32, at 682; DUKE Comment, *supra* note 32, at 555-73.

81. 539 F.2d 340 (4th Cir.), *cert. denied*, 97 S. Ct. 639 (1976).

82. The decision in *Bozardt* is also important for two other principles: (1) *Younger* and *Huffman* require the outright dismissal of the federal action rather than abstention. For further discussion of this topic, see Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Note, *Federal*

III. SUMMARY JUDGMENT

In *Title Insurance Co. of Minnesota v. Christian,*[83] the South Carolina Supreme Court refused to impose a strict and literal interpretation upon Circuit Court Rule 44(d).[84] Appellant, Title Insurance Co., sought damages alleging that Christian, Christian and Mann, attorneys-at-law, were negligent and failed to exercise reasonable professional skill in executing an application for a title insurance policy. Appellant moved for summary judgment, supporting his motion with the affidavits of appellant's agent within the state and of an officer of the bank involved in the case.[85] This ostensibly brought the appellant within the literal scope of rule 44(d). Respondents did not come forward with a further evidentiary showing as required by the final two sentences of rule 44(d). The trial judge, however, denied appellant's motion for summary judgment. The appellant appealed on the basis that once the motion for summary judgment is supported by the affidavits, rule 44(d) places on the adverse party the duty to come forward with evidentiary material illustrating the existence of a genuine issue of a material fact. If the adverse party does not produce such material, appellant contended that the trial judge is under a duty

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Courts, Injunctions, Declaratory Judgments, and State Law: The Supreme Court Has Finally Fashioned a Workable "Abstention Doctrine," 25 CLEV. ST. L. REV. 75 (1976); (2) The federal plaintiff is required to exhaust state remedies before seeking federal relief, even when the action is brought pursuant to 42 U.S.C. § 1983 (1970). For further discussion on this topic, see Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975); Mitchum v. Foster, 407 U.S. 225, 239-43 (1972); DUKE Comment, *supra* note 32, at 538-41. *See generally* Bartels, *supra* note 32.

83. 267 S.C. 71, 226 S.E.2d 240 (1976).

84. S.C. CIR. CT. R. 44. Rule for summary judgment:

> (d) Supporting and opposing affidavits shall be made on personal knowledge, or, if on information and belief shall state the sources of such, shall set forth only such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 44 is modeled after FED. R. CIV. P. 56, with Circuit Court Rule 44(d) corresponding to FED. R. CIV. P. 56(e). 267 S.C. at 75, 226 S.E.2d at 242, 243. *See also* Thevenot v. Commercial Travelers Mut. Accident Ass'n, 259 S.C. 235, 191 S.E.2d 251 (1972). As FED. R. CIV. P. 56 is the model for Circuit Court Rule 44, authority in the federal courts as to rule 56 will be particularly persuasive.

85. Record at 12-17.

to grant the motion for summary judgment,[86] since the "adverse party may not rest upon the mere allegations or denials of his pleadings."[87]

The South Carolina Supreme Court, in affirming the denial of appellant's motion, refused to interpret rule 44(d) as requiring an automatic award of summary judgment when the movant has supported his motion with affidavits and the adverse party does not respond, by affidavit or otherwise. Whether the failure of the adverse party to put forth controverting facts beyond the pleadings, thereby illustrating a genuine issue for trial, will result in summary judgment is not determined by the mere fact that the movant has supported his motion by affidavits. Rather, it is determined by whether the movant, on the basis of the materials presented by his supporting affidavits, has established the absence of a genuine issue of a material fact.[88] A motion for summary judgment, therefore, may not be used by the movant as a procedural device to avoid the burden of demonstrating the absence of a genuine issue.[89]

The effect of the decision in *Christian* is to place on the movant for summary judgment the burden of establishing that "no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law."[90] This burden carried by the movant is a threshold issue which must be met by the movant in order to avoid a denial of his motion.[91] Since all

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86. Brief for Appellant at 3.

87. *See* note 84 *supra.*

88. The court stated:

> "[The] party opposing summary judgment need not come forward in any way if the moving party has not supported his motion to the point of showing that issue is a sham." Brunswick Corp. v. Vineberg, 370 F.2d 605 (5th Cir. 1967). It is also clear from the Advisory Committee's Notes on the 1963 Amendment to Federal Rule 56 that "where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented."

267 S.C. at 276, 226 S.E.2d at 242. *See also* Kaplan, *Amendments to the Federal Rules of Civil Procedure 1961-1963 (II),* 77 HARV. L. REV. 801, 827 (1964).

89. "A summary judgment is neither a method of avoiding the necessity for proving one's case nor a clever procedural gambit whereby a claimant can shift to his adversary his burden of proof on one or more issues." United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970).

90. Gardner v. Campbell, 257 S.C. 209, 211, 184 S.E.2d 700, 701 (1971) (quoting Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967)).

91. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) ("As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact. . . ."); Rose v. Bridgeport Brass Co., 487 F.2d 804, 808 (7th Cir. 1973); Phoenix Sav.

inferences of fact from the materials offered by the parties must be drawn against the movant and in favor of the adverse party,[92] this burden is not easily met. Unless the movant satisfies the trial judge that no conflicting inferences may be drawn from the evidence such that reasonable men would not differ, he has failed to meet his burden of proof, and a summary judgment will be denied, as in *Christian.* As stated in *Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*:[93]

> [S]ummary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions.[94]

If the movant satisfies this burden by producing evidence demonstrating the absence of genuine issues and supports his motion with affidavits meeting the requirements of rule 44(d), then the adverse party cannot rest on its pleadings and "must set forth specific facts showing that there is a genuine issue for

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& Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967); Doff v. Brunswick Corp., 372 F.2d 801, 805 (9th Cir.), *cert. denied,* 389 U.S. 820 (1967). *See generally* 6 MOORE'S FEDERAL PRACTICE § 56.15[3], 56-463 to 473 (1976); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2727 at 524-34 (1973) (hereinafter cited as WRIGHT & MILLER); Bauman, *A Rationale of Summary Judgment,* 33 IND. L.J. 467, 472 (1958); Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington,* 45 WASH. L. REV. 1, 2-6 (1970).

States which have rules of summary judgment similar to Circuit Court Rule 44(d) or FED. R. CIV. P. 56(e) have also held that the movant bears this initial burden of demonstrating the lack of a genuine issue for trial. Childs v. Lee, 224 Ga. 609, 163 S.E.2d 726 (1968); Barich v. Ottenstror, 550 P.2d 395 (Mont. 1976); Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Tritchler v. West Virginia Newspaper Publishing Co., Inc., 193 S.E.2d 146 (W. Va. 1972).

The law does not seem to be settled as to whether the movant has the burden of proof as to all genuine issues being shown to be nonexistent, United States v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975), or if the movant has the burden of showing the absence of genuine issue only as to those issues for which he would have the burden of proof at trial, Capitol Indem. Corp. v. St. Paul Fire & Marine Ins. Co., 357 F. Supp. 399, 410 (D.C. Wis. 1972). *See generally* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 YALE L.J. 745 (1974).

92. This proposition is well established in South Carolina. Eagle Constr. Co. v. Richland Constr. Co., 264 S.C. 71, 212 S.E.2d 580 (1975); Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974); Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972).

93. 381 F.2d 245 (4th Cir. 1967).

94. *Id.* at 249.

trial."[95] The reason that rule 44(d) will not allow a party to rest on its pleadings is that the movant, by satisfying his initial burden of proof, has produced so much evidence as to controvert the validity of the adverse party's pleadings to the extent that no reasonable man would find veracity in the adverse party's allegations as presented by his pleadings.[96] The meeting of this burden by the movant triggers the latter part of rule 44(d) so as to shift the burden of going forward to the adverse party. The adverse party then bears the burden of producing specific facts which tend to controvert the material initially produced by the movant. The adverse party must go beyond his controverted pleadings and demonstrate the existence of a genuine issue as to any material fact.[97]

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95. *See* note 84 *supra.*

96. *See* Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir. 1967); Durasteel v. Great Lakes Steel Corp., 205 F.2d 438, 441 (8th Cir. 1953); 10 WRIGHT & MILLER § 2727 at 537 (1973).

97. Adickes v. S.H. Kress & Co., 398 U.S. 144, 160-61 (1970); Sweet v. Childs, 507 F.2d 675, 679 (5th Cir. 1975); Kolstad v. United States, 276 F. Supp. 757, 761 (D. Mont. 1967); 6 MOORE'S FEDERAL PRACTICE § 56.22[2] at 56-1344 to 1345 (1976); 10 WRIGHT & MILLER § 2727 at 536-37 (1973); Bauman, *A Rationale of Summary Judgment,* 33 IND. L.J. 467, 477 (1958).

The analysis provided in Doff v. Brunswick Corp., 372 F.2d 801 (9th Cir. 1966), *cert. denied,* 389 U.S. 820 (1967), is extremely useful.

> [O]n a motion for summary judgment, it is the moving party who carries the burden of proof; he must show that no genuine issue of material fact exists. . . .
>
> . . . .
>
> Where on the basis of the materials presented by his affidavits, the moving party, if at trial, would be entitled to a directed verdict unless contradicted, it rests upon the opposing party at least to specify some evidence to show that such contradiction is possible. [citations omitted] The burden of coming forward with specific controverting facts shifts to the opponent. [citations omitted] It is his duty to expose the existence of a genuine issue which will prevent the trial from being a useless formality. [citation omitted] If he has a plausible ground of defense, he must assert it.

Id. at 805 (citations omitted).

A prior line of cases in South Carolina also supports this position. Conran v. Yager, 263 S.C. 417, 211 S.E.2d 228 (1975); Garrett v. Reese, 262 S.C. 327, 204 S.E.2d 432 (1974); Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 186 S.E.2d 822 (1972). The holding in these cases was that the adverse party could not rely on his pleadings. A close reading, however, illustrates that the movant in each case had met his burden of proof, and that the burden of going forward with evidence had, in effect, shifted to the adverse parties, though the issue was never directly addressed by the court in each situation. *See also* Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington,* 45 WASH. L. REV. 1, 15 (1970).

Other states which have similar rules to Circuit Court Rule 44(d) have also adopted the rationale which requires the movant to meet the initial burden of proof as to the absence of a genuine issue of a material fact which, if met, shifts the burden of producing evidence to the adverse party as described above. Childs v. Lee, 224 Ga. 609, 163 S.E. 2d

If the adverse party fails to meet this burden, he runs the risk of having the movant's motion for summary judgment granted. This risk becomes especially high if the adverse party does not come forward at all. Indeed, only in the very unusual case should the motion be denied where the movant has met his burden and the adverse party has failed to come forward.[98] The movant can never be completely assured of having a summary judgment granted since the trial judge does have the discretion to deny such a motion even though the movant has technically met his burden. The trial judge should always have the discretion to allow the case to proceed to trial whenever any doubt as to the motion for summary judgment exists.[99]

If the movant fails to controvert a genuine issue alleged by the adverse party in his pleadings or fails to produce sufficient evidence such that reasonable men would not differ, then the movant has failed to satisfy his initial burden. In such a case, the burden of production does not shift to the adverse party.[100] In other words, in this situation the adverse party's pleadings remain valid, and such party is entitled to stand on his pleadings. In accordance with its federal counterpart, rule 44(d) as interpreted by *Christian* does not require an adverse party to come forward when the movant has not shown an absence of a genuine issue as to a material fact.[101]

In *Title Insurance Co. of Minnesota v. Christian,*[102] the appel-

726 (1968); Barich v. Ottenstror, 550 P.2d 395 (Mont. 1976); Mitchell v. K.W.D.S., Inc., 26 N.C. App. 409, 216 S.E.2d 408, *cert. denied*, 288 N.C. 242, 217 S.E. 2d 665 (1975); Burns v. Cities Serv. Co., 217 S.E.2d 56 (W. Va. 1975); Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976).

98. Indeed, this is the situation which Circuit Court Rule 44(d) and FED. R. CIV. P. 56(e) were designed to meet. Advisory Committee Notes to the 1963 Amendments, 31 F.R.D. 647, 648-49.

99. 6 MOORE'S FEDERAL PRACTICE § 56.23 at 56-1390 to 1391 (1976); 10 WRIGHT & MILLER § 2728 at 555 (1973).

100. *See* notes 94 & 96 and accompanying text *supra.*

101. FED. R. CIV. P. 56(e) has been interpreted almost uniformly also to require the movant to meet his burden of demonstrating the absence of a genuine issue of a material fact before the adverse party must come forward. If the movant does not meet this burden, the adverse party can successfully rest on his pleadings. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1972); Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 714 (10th Cir. 1974); Brunswick Corp. v. Vineberg, 370 F.2d 605, 611-12 (5th Cir. 1967); 6 MOORE'S FEDERAL PRACTICE § 56.22[2] at 56-1344 (1976); 10 WRIGHT & MILLER § 2739 at 717-19 (1973); Advisory Committee Notes to the 1963 Amendments, 31 F.R.D. 647, 648-49. *See* Elmwood Cemetery Ass'n v. South Carolina Tax Comm'n, 255 S.C. 457, 179 S.E.2d 609 (1971). *See also* Kaplan, *Amendments of the Federal Rules of Civil Procedure 1961-1963 (II)*, 77 HARV. L. REV. 801, 827 (1964).

102. 267 S.C. 71, 226 S.E.2d 240 (1976).

lant/movant failed to meet this initial burden. The appellant ostensibly came within the scope of rule 44(d) by supporting his motion for summary judgment with affidavits, but such support as appellant presented in his affidavits failed to demonstrate the absence of a genuine issue. Appellant left uncontroverted the defense, raised by respondents' answer and appearing as part of the title insurance policy, of knowledge on the part of the insured. Such an uncontroverted defense presented a genuine issue of material fact, requiring the denial of summary judgment.[103] It would follow that any allegation in the pleadings of the adverse party, which if factually true would constitute either a defense or basis of liability at law (depending on whether the adverse party is the defendant or plaintiff in the action), inherently presents an issue of material fact for the jury, if the movant fails to controvert such allegation to the extent that reasonable men would not differ as to the invalidity of such allegation. In this situation, the respondent/adverse party is under no obligation to come forward.[104]

In *Christian,* if the appellant had come forward in the first instance with evidentiary material refuting the defense by respondents, the court intimates that this would have been sufficient to meet the initial burden placed upon the movant and, thus, to shift the burden of production to the respondent.[105]

W. Irl Reasoner

103. *Id.* at 76-77, 226 S.E.2d at 242-43.

104. *See* note 101 and accompanying text *supra.* As a practical matter, the adverse party may be wise to come forward with material demonstrating the existence of a genuine issue or at least seek a continuance under Circuit Court Rule 44(e), even if the adverse party believes the movant has failed to meet his burden of proof. *See* Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703 (1976); 6 MOORE'S FEDERAL PRACTICE § 56.23 at 56-1390 to 1392 (1976).

105. 267 S.C. at 77, 226 S.E.2d at 243.