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# Judicial Protection of Membership in Private Associations

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# NOTES

## *Judicial Protection of Membership in Private Associations*

### INTRODUCTION

Membership in a private association[1] can be extremely advantageous. A member is afforded many social and economic advantages not readily available to outsiders. Because an association offers these advantages, it must be able to control its members by disciplining the deviant ones. For the most part, private associations are left to govern their internal affairs without outside interference. Though such a policy be desirable, an association must be held to some minimum standard in expelling a member.

The first part of this article will examine the standards to which private associations must conform in expelling members. Further, the situations in which the courts will order reinstatement of an expelled member will be analyzed. Such relief is not an exclusive remedy but it is probably the most effective for the wrongfully expelled member. A judgment for money damages can be awarded but this offers only temporary balm, for the social and economic advantages available to a member, and lost through expulsion, are not easily compensated for in money.[2] Though damages can be awarded, they are, at most, only nominal and compensate for such things as injury to reputation and loss of the amenities of the club.[3] The inadequacy of this relief is evident from the fact that wounded feelings, humiliation, and anxiety resulting from an unwarranted expulsion are not easily susceptible to any pecuniary standard of measure.[4] This practical difficulty generally deprives the plaintiff of any real monetary redress.[5]

The second half of this article will deal with a comparatively recent judicial phenomenon. An examination will be made of the instances when a court will compel a reasonably qualified applicant to be admitted to membership in a private association.

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1. Included under the term "private associations" are labor unions, professional associations, churches, social, and fraternal organizations.

2. Conversely, reinstatement by judicial decree may be like the sword of Damocles over one's head. The group will try almost any means, legal and non-legal, to eliminate the undesirable member.

3. See Wright v. Bath Club Co., 70 SOL. J. 828 (1926). *But see* Local 4, Nat'l Organization Masters v. Brown, 258 Ala. 18, 61 So. 2d 93 (1952).

4. In Bowen v. Morris, 219 Ala. 689, 691, 123 So. 222, 223 (1929), the court said that the matter of "awaiting the uncertainties as to quantum of damages, the delay in recovery . . . are matters going to the adequacy of legal remedies."

5. Lavalle v. Socíeté St. Jean Baptiste, 17 R.I. 680, 687, 24 Atl. 467, 469 (1892).

## POLICY CONSIDERATIONS IN REVIEWING EXPULSIONS

Whenever a court seeks to resolve a membership dispute, there are several interests that must be balanced. First, courts are reluctant to interfere with the internal affairs of private associations.[6] This is so because of the public interest in promoting well managed, autonomous societies. However, the court's function is to see that these associations, while performing their societal functions, also provide an internal system of substantial justice for the member who must be disciplined.[7] Secondly, courts abhor involving themselves in a morass of ritual oftentimes found in these cases.[8] Despite this, the courts will interpret such provisions to ascertain if the expulsion was properly ordered by those who had the power to do so.[9] The third and most salient interest to be considered is the safeguarding of the member's rights when membership is an economic necessity.[10]

Another consideration implicit in many of the expulsion cases revolves about the type of association involved. Though this factor is not always verbalized, it may be the pivotal one in determining the propriety of intervention. Cases involving expulsion from church membership present the most notable example. While some courts have desisted on the ground that they do not want to become arbiters of mooted points of religious doctrine,[11] the real underlying consideration appears to be the constitutional dignity of the separation of church and state.[12] Despite the near prerogatives of sovereignty accorded religious congregations, the recent trend of cases has been toward broadening judicial review of such expulsions.[13]

An ever-present problem is the difficulty of determining whether an association's action in expelling a member has been so unreasonable that he should be reinstated. This is particularly acute when free speech

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6. See Local 57, Bhd. of Painters v. Boyd, 245 Ala. 227, 234, 16 So. 2d 705, 711 (1944) ("courts are indisposed to interfere with the internal management of an unincorporated, voluntary association . . . ."); Hussey v. Gallagher, 61 Ga. 86, 94 (1878) ("It is . . . wiser . . . that the courts should [stay] aloof in the internal struggles . . . .").

7. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1020-27 (1930).

8. *Ibid.* See Hopson v. Swansy, 1 S.W.2d 419 (Tex. Civ. App. 1927).

9. See Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 140 (1872).

10. Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961). Professor Chafee suggests a fourth interest — avoidance of judicial determination of non-legal issues. Chafee, *supra* note 7, at 1020-27.

11. Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Chase v. Cheney, 58 Ill. 509, 537 (1871).

12. "The judicial eye of the civil authority of this land of religious liberty cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excinded members." Shannon v. Frost, 42 Ky. (3 B. Mun.) 253, 259 (1842).

13. See, *e.g.*, Slaughter v. New St. John Missionary Baptist Church, 8 La. App. 430 (1928); Randolph v. First Baptist Church, 120 N.E.2d 485 (Ohio C.P. 1954).

is involved, especially in the area of union participation in political activities. In *DeMille v. American Fed. of Radio Artists*[14] the plaintiff was expelled for refusing to contribute to the union's political fund, the purpose with which he did not agree. The case resolved itself into the dichotomy of allowing a member complete political freedom and collective bargaining or of allowing only members whose political views are compatible with the majority to remain in the union. The court held that the latter factor should prevail.[15]

Expulsions from professional associations likewise present issues not always verbalized. For example, courts realize that medical societies have greatly benefited the public by raising professional standards. Much of this can be attributed to an almost unfettered control over the selection of members and the expulsion of unqualified ones.[16] Obviously, courts are less qualified to judge such a member's qualifications than are the societies themselves.

These considerations, while not always discussed, are implicit in any decision. Depending upon the weight given any one of these factors, it may sway the decision as to whether to intervene.

## EXHAUSTION OF INTERNAL REMEDIES

As a general rule, one who is seeking relief in court must first exhaust any remedies within the association.[17] The constitution and by-laws of the association usually provide the internal procedure by which a dispute between an association and its members is resolved.[18] Provisions requiring an aggrieved member first to resort to the machinery provided by the organization before appealing to the courts have been almost universally upheld even though valuable property rights are involved.[19] Thus, the failure to exhaust all internal remedies would normally be an

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14. 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied,* 333 U.S. 876 (1948).

15. "Mere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods." *Id.* at 150, 187 P.2d at 776. *But see* Gallaher v. American Legion, 154 Misc. 281, 277 N.Y. Supp. 81 (Sup. Ct.), *aff'd mem.,* 242 App. Div. 604, 271 N.Y. Supp. 1109 (1934).

16. This is the most common result in the medical profession. See Note, 63 YALE L.J. 937, 949, 959-61, 976 (1954). See also Perr, *Hospital Privileges Revisited,* 9 CLEV. MAR. L. REV. 137, 146-47 (1960).

17. Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); Reid v. Medical Soc'y, 156 N.Y. Supp. 780 (Sup. Ct. 1915), *aff'd mem.,* 177 App. Div. 939, 163 N.Y. Supp. 1129 (1917).

18. For a view of the appeal system within the American Medical Association see Comment, 63 YALE L.J. 937, 949-50 (1954). See generally Vorenberg, *Exhaustion of Intraunion Remedies as a Condition Precedent to Appeal to the Courts,* 2 LAB. L.J. 487 (1951).

19. *E.g.,* Peters v. Minnesota Dep't of Ladies of Grand Army of Republic, 239 Minn. 133, 58 N.W.2d 58 (1953), *reaff'd,* 245 Minn. 563, 73 N.W.2d 621 (1955); Dewar v. Lodge No. 44, B.P.O.E., 155 Minn. 98, 192 N.W. 358 (1923).

effective defense to any subsequent suit.[20] Several courts have even required non-members first to seek redress within an organization when suing for benefits,[21] admission to membership,[22] or reinstatement.[23]

The reasoning behind such a rule with respect to members is that the individual, by voluntarily joining an organization, has contractually bound himself to abide by its constitution and by-laws so far as they may relate to grievance procedure. Thus, if the by-laws require a member to bring his grievance to the intra-associational tribunal before resorting to the courts, this would be a sine qua non to any action that could be brought on the contract of membership.[24] Such a rule is entirely proper, for as the association provides a source of personal contact and benefit to its members, it must be able to wield some power of discipline, even to the point of expulsion, without fear of outside interference.[25] Since the association is also a party to the contract, it likewise must observe any procedure set out in its constitution and by-laws.

However desirable this rule may be, it is so riddled with exceptions that it is often rendered impotent. The rigidity with which this rule is adhered to varies proportionately with the economic importance of the organization. This point is illustrated by two Alabama cases decided two years apart. In *Costa v. La Luna Servante*[26] the plaintiff was expelled from a mystic society. On appeal the court rigidly applied the exhaustion of internal remedies rule.[27] But when the plaintiffs in *Local 4, Nat'l Organization Masters v. Brown*[28] were expelled from a labor union, the court enunciated a broad exception and did require the exhaustion of internal remedies.[29]

Examples of exceptions to this rule are multifold. The opportunity to comply with the exhaustion of internal remedies requirement must be reasonable. The expelled member will not be required to wait two

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20. See, *e.g.*, Levy v. Magnolia Lodge No. 29, I.O.O.F., 110 Cal. 297, 42 Pac. 887 (1895).

21. King v. Wynema Council, No. 10, Daughters of Pocahantas, 25 Del. (2 Boyce) 255, 78 Atl. 845 (1911). See Grubbs v. Comanche Tribe, 16 Ga. App. 11, 84 S.E. 494 (1915).

22. Davis v. Brotherhood of Ry. Carmen, 272 S.W.2d 147 (Tex. Civ. App. 1954).

23. Grand Lodge v. Taylor, 79 Fla. 441, 84 So. 609 (1920); Porth v. Local 201, United Bhd. of Carpenters, 171 Kan. 177, 231 P.2d 252 (1951).

24. Hickman v. Kline, 71 Nev. 55, 279 P.2d 662 (1955); White v. Brownell, 2 Daly 329 (N.Y. C.P. 1868).

25. See generally Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483 (1950).

26. 255 Ala. 6, 49 So. 2d 672 (1950).

27. "[I]t must appear that the member first exhausted all remedies within the association before applying to the court." *Id.* at 7, 49 So. 2d at 673.

28. *Id.* at 23, 61 So. 2d 93 (1952).

29. "It is obvious that they would suffer considerable damage, be put to great expense, inconvenience and loss of time in trying to secure their rights on appeal." 258 Ala. at 23, 61 So. 2d at 97.

years for a national convention to comply with this requirement.[30] Likewise, the geographical or financial inaccessability of perfecting an intra-associational appeal will spell an exception where this means loss of one's job in the interim.[31]

In most instances, the act of expulsion must have occurred first.[32] But where a member is precluded from having a fair and effective trial, he may go directly to the courts.[33] The same result obtains where an appeal of loss of membership within an association would be "a futile, useless and idle act. . . ."[34] Moreover, where the provisions for internal appeal are interpreted as precatory rather than mandatory, an exception will lie.[35] A waiver of the exhaustion requirement is implied in a situation where an association has failed to follow its own procedure in disciplining a member, thus estopping it from raising this defense in court.[36] In a situation where the "appeal board" sat in on the expulsion proceedings and several members of that board voted for expulsion of the member, it was held that the exhaustion requirement need not be followed.[37]

From this desultory review of the exhaustion of remedies requirement, one can see that the rule is more honored in its exceptions, and hence, it offers no homogeneous answer to this aspect of the law of private associations. The greater the economic implications of membership, the more likely that the courts will find an exception to this rule.

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30. In Naylor v. Harkins, 11 N.J. 435, 445, 94 A.2d 825, 830 (1953), the court held: "The notion that members . . . must await [intra-union] review of the legality of their ouster at a convention to be held almost two years thereafter . . . simply shocks our sense of justice and we have no hesitancy in rejecting it." *Accord,* Gleeson v. Conrad, 81 N.Y.S.2d 368 (Sup. Ct. 1948), *modified,* 276 App. Div. 861, 93 N.Y.S.2d 667 (1949). *Contra,* Snay v. Lovely, 276 Mass. 159, 176 N.E. 791 (1931), where the court held that a member must await the convention more than a year hence and in a city outside his state before he can appeal to the court.

31. See Local 4, Nat'l Organization Masters v. Brown, 258 Ala. 18, 61 So. 2d 93 (1952). See also Beedie v. International Bhd. of Elec. Workers, 25 N.J. Super. 269, 96 A.2d 89 (App. Div. 1953); Local 104, Int'l Bhd. of Boilermakers v. International Bhd. of Boilermakers, 33 Wash. 2d 1, 203 P.2d 1019 (1949).

32. Irwin v. Lorio, 169 La. 1090, 126 So. 669 (1930).

33. Schou v. Sotoyome Tribe, 140 Cal. 254, 73 Pac. 996 (1903); Myers v. Jenkins, 63 Ohio St. 101, 119-22, 57 N.E. 1089, 1093-94 (1900) (dictum); Wilson v. Miller, 194 Tenn. 390, 250 S.W.2d 575 (1952).

34. Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629, 635, 320 P.2d 494, 498 (1958); *accord,* Born v. Cease, 101 F. Supp. 473 (D. Alaska 1951); Wilson v. Miller, 194 Tenn. 390, 250 S.W.2d 575 (1952).

35. Voluntary Relief Dep't v. Spencer, 17 Ind. App. 123, 46 N.E. 477 (1897); Supreme Lodge of Order of Select Friends v. Dey, 58 Kan. 283, 49 Pac. 74 (1897).

36. Seligman v. Toledo Moving Picture Operators Union, 88 Ohio App. 137, 98 N.E.2d 54 (1947); Brown v. Harris County Medical Soc'y, 194 S.W. 1179 (Tex. Civ. App. 1917).

37. *Compare* Corregan v. Hay, 94 App. Div. 71, 87 N.Y. Supp. 956 (1904), *and* Reilly v. Hogan, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd mem.,* 264 App. Div. 855, 36 N.Y.S.2d 423 (1942), *with* Fish v. Huddell, 51 F.2d 319 (D.C. Cir. 1931), *and* Hall v. Morrin, 293 S.W. 435 (Mo. Ct. App. 1927).

TYPES OF INJURY AS THE BASIS OF JUDICIAL INTERVENTION

Judicial protection of membership in private associations from unjustified expulsion quite frequently occurs. For reinstatement to be decreed the plaintiff must allege an injury of one of three types. Relief may be afforded on the basis that membership in the association creates a contract between the member and the association, gives the member an interest in the group property, or creates a valuable personal relationship. On the basis of protecting any one of these interests an expelled member may be given redress. In reviewing an expulsion a court will avoid a de novo review, treating the association tribunal as an administrative tribunal. The inquiry will be limited to ascertaining whether the action was taken in bad faith or was contrary to the law of the land.[38]

*Implied Contract Theory*

The most elementary means of protecting a member from an unjustifiable expulsion is through the contract theory. It is thought that membership creates a contract between the member and the association, the terms of which are the constitution and by-laws of the association.[39] Thus, when a person joins a group, both he and the group are mutually bound by the rules of the organization. An improper expulsion is treated as a breach of contract and a ground for reinstatement.[40]

The inadequacies of this theory are manifold. A reviewing court is limited to the sole determination of "whether the association has acted within its powers in good faith, [and] in accord with its laws . . . ."[41] Thus, this theory is less than adequate for curbing the association's powers, for it merely lays out the groundwork for determining whether the disciplinary action was permissible according to the organization's rules. Moreover, its inadequacy is attested to by the many exceptions to the exhaustion of internal remedies rule where a court will purposely disregard the contract terms to render justice in a particular instance.[42] Legal scholars have berated this theory for its many conceptual and logical inconsistencies.[43]

38. Stevenson v. Holstein-Friesian Ass'n of America, 30 F.2d 625, 627 (2d Cir. 1929); Chafee, *supra* note 7, at 1005-06.

39. Slaughter v. New St. John Missionary Baptist Church, 8 La. App. 430 (1928); Brown v. Harris County Medical Soc'y, 194 S.W. 1179 (Tex. Civ. App. 1917).

40. Yockel v. German Am. Bund, Inc., 20 N.Y.S.2d 774 (Sup. Ct. 1940). See Farrall v. District of Columbia AAU, 153 F.2d 647 (D.C. Cir. 1946).

41. Smith v. Kern County Medical Ass'n, 19 Cal. 2d 263, 265, 120 P.2d 874, 875 (1942).

42. See notes 19-28 *supra.*

43. "And the contractual theory of voluntary associations can result in fictions compared to which the supposed fiction of corporate personality has less than the ingenuity of childish invention." Laski, *The Personality of Associations,* 29 HARV. L. REV. 404, 420 (1916); Chafee, *supra* note 7 at 1022.

*Property Interest Theory*

A second basis for adjudicating an expulsion is through the property theory. Under this theory a member is deemed to have a property interest in the assets of the organization, thus enabling a court to intervene under the pretext of protecting the member's rights in this property. Many courts deem this interest indispensable whenever reinstatement is sought because of the rule that equity will only protect property rights.[44] Such a rule was carried into the law of private associations in the case of *Rigby v. Connol.*[45] In that case the lack of any property interest in the society was fatal to the plaintiff's case.

The nonexistence of any property interest in the congregation has been the prevailing reason for the courts refusing to review church membership expulsions.[46] Currently, however, there is emerging a line of authority which holds that property interests exist in church membership that are to be accorded equitable protection.[47] Such a result is desirable, though probing for a property interest appears to be unnecessary. Membership itself should be enough to award reinstatement.

In most instances, mere naked membership is not regarded as a property interest. Hence, the mere allegation of membership will not usually be enough for equitable protection. However, where the association wields considerable economic power and membership affords one the opportunity of earning a living, the courts are liberal in finding membership itself to be a property right.[48]

The rigidity with which some courts adhere to the property interest requirement has led other courts to require, in addition, that the plaintiff have a severable property interest in an association before any relief can be granted.[49] To circumvent this dubious requirement many courts will seize upon any nominal property interest. This results in nothing more than paying lip service to this requirement. Thus, it has been held

44. See Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 642-50 (1916).

45. L.R. [1880] 14 Ch.D. 482; *accord*, Howard v. Betts, 190 Ga. 530, 9 S.E.2d 742 (1940); Irwin v. Lorio, 169 La. 1090, 126 So. 669 (1930); Hopson v. Swansy, 1 S.W.2d 419 (Tex. Civ. App. 1927).

46. Hundley v. Collins, 131 Ala. 234, 32 So. 575 (1902); State *ex rel.* Hatfield v. Cummins, 171 Ind. 112, 85 N.E. 359 (1908); Cooper v. Bell, 269 Ky. 63, 106 S.W.2d 124 (1937); Jenkins v. New Shiloh Baptist Church, 189 Md. 512, 56 A.2d 788 (1948); Dees v. Moss Point Baptist Church, 64 Miss. 1, 17 So. 1 (1892); Nance v Busby, 91 Tenn. 303, 18 S.W. 874 (1895); Minton v. Leavell, 297 S.W. 615 (Tex. Civ. App. 1927).

47. *E.g.*, Randolph v. First Baptist Church, 120 N.E.2d 485 (Ohio C.P. 1954) (property interest in church's assets in case of dissolution). See Comment, 43 CALIF. L. REV. 322, 326-30 (1955); Note, 13 CORNELL L.Q. 464 (1928).

48. Hickman v. Kline, 71 Nev. 55, 279 P.2d 662 (1955); Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 141 A.2d 18 (1958). See Metropolitan Base Ball Club v. Simmons, 17 Phila. 419, 1 Pa. County Ct. 134 (C.P. 1885).

49. *E.g.*, State *ex rel.* Baunhoff v. Taxpayers' League, 87 S.W.2d 207 (Mo. Ct. App. 1935).

that a fund to pay funeral expenses of members,[50] the association's museums and libraries,[51] and the franchise of the organization[52] are property interests in which a member has a right.

The property interest theory, though replete with many disadvantages, is far superior to the contract theory in offering protection to a member from an unjustified expulsion. Under the property rationale, once the requisite interest is found, the court can adjudicate the expulsion from a procedural and substantive viewpoint;[53] whereas under the contract theory, the court merely determines whether an association has followed its *own* rules, not whether the expulsion violates any civil rights of the member or is contrary to public policy. Despite such superiority, the property interest concept does not fully protect the aggrieved member. Courts, in many instances, are prevented from hearing meritorious cases due to the lack of the requisite property interest. The necessity of finding a property interest should be wholly irrelevant to the inquiry. The object of the suit is the protection of the status of the member. The presence or absence of a property interest should not determine the propriety of intervention in a particular instance.[54] Furthermore, by basing a decision on this factor the real interest of the member, that of a valuable personal relationship, is overlooked.

### *Valuable Personal Relationship Theory*

The third means of protecting a member from an unwarranted expulsion is by deeming membership itself to create such a valuable personal relationship that a court of equity will protect it.[55] Only a substantial injury to this interest will warrant such specific relief. Under this theory the true interest of the member is recognized, and this personal relationship is deemed paramount.[56]

The substantiality of this interest in an association is evidenced from the consequences of expulsion or suspension.

50. State *ex rel.* Hyde v. Jackson County Medical Soc'y, 295 Mo. 144, 243 S.W. 341 (1922).

51. Gregg v. Massachusetts Medical Soc'y, 111 Mass. 185 (1872). See Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 113 Atl. 70 (1921); see also Holcombe v. Leavitt, 124 N.Y. Supp. 980 (Sup. Ct. 1910).

52. State *ex rel.* Waring v. Georgia Medical Soc'y, 38 Ga. 608 (1869).

53. Franklin v. Sovereign Camp, Woodmen of the World, 145 Okla. 159, 291 Pac. 513 (1930). See also Davis v. International Alliance of Theatrical Stage Employees, 60 Cal. App. 2d 713, 141 P.2d 486 (1943); Yockel v. German Am. Bund, Inc., 20 N.Y.S.2d 774 (Sup. Ct. 1940).

54. See generally WALSH, EQUITY § 52 (1930).

55. Berrien v. Pollitzer, 165 F.2d 21 (D.C. Cir. 1947); Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956). *Cf.* Brown v. Harris County Medical Soc'y, 194 S.W. 1179 (Tex. Civ. App. 1917).

56. *Compare* Sims v. University Interscholastic League, 111 S.W.2d 814 (Tex. Civ. App. 1937), *dismissed as moot*, 133 Tex. 605, 131 S.W.2d 94 (1939), *with* Sult v. Gilbert, 148 Fla. 31, 3 So. 2d 729 (1941).

> The expulsion of one from a club, social organization or the like implies that he cannot get along with his fellows, or even worse that he is unfit to be associated with. Once the news of his expulsion is bruited about the consequences in his personal and in his business life can be very harmful.[57]

The possible graveness of being expelled from a private society is exemplified in an expulsion from a medical association. The expelled member may find it difficult, if not impossible, to obtain medical malpractice insurance.[58] He is likely to lose his hospital privileges and staff rights,[59] with the consequential effect of not being able to be certified as a specialist. Furthermore, he may be unable to consult with other doctors because they might fear censure by the medical society.[60] In a similar vein, "excommunication from a church means loss of the opportunity to worship God in familiar surroundings with a cherished ritual, and inflicts upon the devout believer loneliness of spirit and perhaps the dread of eternal damnation."[61]

From these examples it is evident that expulsion often may result in serious harm to the individual. If the expulsion is wrongful, this factor alone should warrant reinstatement. The greater the economic control of the group, the more serious are the consequences of expulsion, thus, making it easier for a court to find the substantial personal relationship interest necessary for protection.

Protection of a valuable personal relationship appears to be the best basis for relief. The other two theories are deficient in significant respects. The property interest theory is most often respected in form but blatantly disregarded in practice. Though courts purport to protect a property or contract right, they are, in reality, only soothing hurt feelings in many instances. The personal relationship theory goes to the heart of the matter. It affords the aggrieved person redress if the economic or emotional deprivations resulting from expulsion are substantial. The totality of the injury is considered. No attempt is made to pigeon-hole the injury. The substantiality of the injury is the criterion, thus, affording flexibility and producing more equitable results.

## SUBSTANTIVE BASES FOR REINSTATEMENT

A body of somewhat settled law has developed from the great number of cases involving expulsion from private associations. A division

57. de Funiak, *Equitable Protection of Personal or Individual Rights,* 36 KY. L.J. 7, 26 (1947). See Chafee, *supra* note 7, at 998: "The expelled club member finds his social reputation blasted, and is likely to be blackballed by other desirable clubs."

58. Note, 63 YALE L.J. 938, 951 (1954).

59. See Group Health Coop. v. King County Medical Soc'y, 39 Wash. 2d 586, 617-25, 237 P.2d 737, 755-58 (1951).

60. *Id.* at 632, 663-64, 237 P.2d at 767, 778.

61. Chafee, *supra* note 7, at 998.

into two rather distinct areas has developed from the case law. First, an expulsion will be nullified if it has violated the concept of "natural law." The "natural law" concept can be equated with due process. Secondly, a reinstatement will be ordered if it is shown that an association has neglected to follow its own procedure, as found in its constitution and by-laws, in expelling a member. A corollary of this proposition is that the courts will not countenance an expulsion which is authorized by a constitutional provision, by-law, or regulation that is contrary to law or public policy.

### *Natural Law Requirements*

The requirement that an expulsion be in accord with natural law means that the courts have developed a due process standard for private associations. A universal requisite is that the member who is about to be expelled receive a fair hearing or trial.[62] Notice of the hearing must also be given to the member,[63] and it must be sent early enough to give the member an opportunity to prepare a defense.[64] The notice must set forth the charges against the member and that the hearing is being held for the purpose of considering the expulsion of the member.[65] A court will carefully examine a summary expulsion without these procedural safeguards. Another factor of prime importance is that the tribunal must be impartial. The same person sitting as judge, jury, and executioner will not be tolerated. In one case, an expelled member was reinstated because a brother of the one who pressed the charges sat on the trial committee. Such a situation deprived the plaintiff of a fair trial.[66]

At the trial the member must have the right to cross-examine adverse witnesses.[67] It does not appear, however, that there is a right to be represented by legal counsel. The most that will be required is that the prosecution and defense be placed on the same footing. Thus, if the prosecutor is a layman, the member on trial is only entitled to another

62. Reid v. Medical Soc'y, 156 N.Y. Supp. 780 (Sup. Ct. 1915), *aff'd mem.*, 177 App. Div. 939, 163 N.Y. Supp. 1129 (1917); Blenko v. Schmeltz, 362 Pa. 365, 67 A.2d 99 (1949).

63. Slater v. Supreme Lodge, 76 Mo. App. 387 (1898); Langnecker v. Trustees of Grand Lodge, 111 Wis. 279, 87 N.W. 293 (1901).

64. Gallaher v. American Legion, 154 Misc. 281, 277 N.Y. Supp. 81 (Sup. Ct.), *aff'd mem.*, 242 App. Div. 604, 271 N.Y. Supp. 1109 (1934).

65. People *ex rel.* Meads v. Alpha Lodge No. 1 of Knights of Sobriety, Fidelity & Integrity, 13 Misc. 677, 35 N.Y. Supp. 214 (Sup. Ct. 1895), *aff'd mem.*, 40 N.Y. Supp. 1147 (App. Div. 1896).

66. *Ibid.* See State *ex rel.* Mayfield v. St. Louis Medical Soc'y, 91 Mo. App. 76 (1901); Way v. Patton, 195 Ore. 36, 241 P.2d 895 (1952); Blenko v. Schmeltz, 362 Pa. 365, 67 A.2d 99 (1949).

67. Brooks v. Emgar, 259 App. Div. 333, 19 N.Y.S.2d 114, *appeal dismissed mem.*, 284 N.Y. 767, 31 N.E.2d 514 (1940); Fales v. Missions' Protective Union, 40 R.I. 34, 99 Atl. 823 (1917).

layman as defense counsel unless, of course, the association otherwise agrees.[68]

On the other hand, application of the due process requirement will not prevent a member from being expelled at a second trial even though he was acquitted at an earlier trial on the same charges.[69] Provision for such an eventuality must appear in the constitution or by-laws. Similarly, a prior acquittal of a criminal charge in a court of law will not prevent an expulsion by the association based on the same charges.[70]

It is evident from this brief summary that there is a parallel to the requirements of constitutional due process. Fairness is the overriding factor. The deviant member must be advised of the charges against him. Only then can a reasonably impartial tribunal find him guilty and impose a penalty.

### *Public Policy Requirements*

Generally, an association has no right to expel or discipline a member for exercising a right or performing a duty as a citizen. Any provision authorizing censure for such activities will not be permitted to stand because it is repugnant to public policy. Thus, an expulsion from a medical society was nullified where a member was expelled for being a surety on a Negro's bond,[71] or for being a witness against another doctor in a judicial proceeding,[72] or for favoring free suffrage in contravention to the policy of the group.[73]

### *Contract of Membership Requirements*

As noted above, many courts have attributed a contractual characteristic to membership in private associations. Pursuant to this, courts have held that an association is bound to follow its own rules in expelling a member so long as these rules are not invalid for some other reason. Failure to follow the procedure set out in the association's constitution and by-laws will render the expulsion void.[74] Finally, good faith is required of a group in the expulsion of an undesirable member.[75]

68. See Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 616 (1959).

69. Rueb v. Rehder, 24 N.M. 534, 174 Pac. 992 (1918); Thompson v. Grand Int'l Bhd. of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S.W. 834 (1905).

70. Miller v. Hennepin County Medical Soc'y, 124 Minn. 314, 144 N.W. 1091 (1914).

71. State *ex rel.* Waring v. Georgia Medical Soc'y, 38 Ga. 608 (1869).

72. Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (Dist. Ct. App. 1956). See People *ex rel.* Gray v. Medical Soc'y, 24 Barb. 570 (N.Y. Sup. Ct. 1857).

73. Stein v. Marks, 44 Misc. 140, 89 N.Y. Supp. 921 (Sup. Ct. 1904). See Manning v. Klein, 1 Pa. Super. 210 (1895).

74. Harris v. National Union of Marine Cooks, 98 Cal. App. 2d 733, 221 P.2d 136 (1950); Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 141 A.2d 18 (1958).

75. *E.g.*, Fleming v. Moving Picture Mach. Operators, 16 N.J. Misc. 502, 1 A.2d 849 (Ch. 1938), *aff'd per curiam*, 124 N.J. Eq. 269, 1 A.2d 386 (Ct. Err. & App. 1938).

Judicial control over unjustified expulsions has developed in two ways. First, the aggrieved member must be afforded basic procedural due process before he can be expelled. Secondly, even though the expulsion is authorized by the laws of the organization, an expulsion will not be permitted to stand if these laws are contrary to public policy.

### JUDICIALLY COMPELLED ADMISSION

A difficult area of the law is opened when a person applies for membership in a private association and is summarily refused. Barring a change of position by the association, the frustrated person then must seek a court order compelling his admission. In such a situation neither the property theory nor the contract theory is applicable. The contract fiction cannot be stretched to one not a party to the compact. Neither is the property theory of any help, for the non-member cannot possibly be deemed to have an interest in an association's property.[76]

Traditionally, there has been a unanimity of opinion that a non-member is without a right to be admitted to membership in an association which has not selected him according to its rules,[77] there being no "abstract right to be admitted" to membership in a voluntary association.[78] The arbitrariness or unreasonableness of the exclusion will not spell a different result nor will it give rise to a cause of action for damages.[79] Though one may claim to be a member because he has received some indicia of membership, a court will usually accept the association's determination that the person is not a member.[80]

Judicially compelled admission is not an entirely new phenomenon. In the area of labor law courts have regularly compelled unions to admit persons who were reasonably qualified where the union has attained a closed shop.[81] Such was not always the case because, at the common

76. *Cf.* Carroll v. Local 269, Int'l Bhd. of Elec. Workers, 133 N.J. Eq. 144, 31 A.2d 223 (Ch. 1943).

77. *E.g.*, Sebastian v. Quarter Century Club of United Shoe Mach. Corp., 327 Mass. 178, 97 N.E.2d 413 (1951); Barazani v. Brighton & Manhattan Beach Chamber of Commerce, 20 Misc. 2d 844, 194 N.Y.S.2d 426 (Sup. Ct. 1959); Gold Knob Outdoor Advertising Co. v. Outdoor Advertising Ass'n, 225 S.W.2d 645 (Tex. Civ. App. 1949); Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957).

78. Mayer v. Journeymen Stonecutters' Ass'n, 47 N.J. Eq. 519, 524, 20 Atl. 492, 494 (Ch. 1890).

79. Arnstein v. American Soc'y of Composers, Authors & Publishers, 29 F. Supp. 388 (S.D. N.Y. 1939); Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A.2d 30 (App. Div.), *certification denied*, 22 N.J. 220, 125 A.2d 233 (1956).

80. Barazani v. Brighton & Manhattan Beach Chamber of Commerce, 20 Misc. 2d 844, 194 N.Y.S. 2d 426 (Sup. Ct. 1959); State *ex rel.* Hartigan v. Monongalia County Medical Soc'y, 97 W.Va. 273, 124 S.E. 826 (1924). See Pirics v. First Russian Slavonic Greek Benevolent Soc'y, 83 N.J. Eq. 29, 89 Atl. 1036 (Ch. 1914).

A court will enjoin persons from assuming the privileges of membership if they were not regularly elected. See Medical Soc'y v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944).

81. See, *e.g.*, James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J. Eq. 347, 197 Atl. 720 (Ch. 1938).

law, admission to a labor union was not protected. Unions were regarded as private clubs, membership being a privilege but not a right. Hence, "it would be quite impractical for the courts to undertake to compel men to receive into their social relationships one who was personally disagreeable whether for a good reason or for a bad reason."[82] Today, with the tremendous power which unions have over the supply of labor, the courts have imposed more and greater restrictions on the freedom of choice of members. The social amenities have all but been absorbed by the economic ramifications of union membership.

The most extensive judicial control of membership exists where the union has attained the closed shop status, thus exerting a virtual monopoly over the supply of labor. It seems repugnant to one's sense of justice to allow a union to negotiate a contract where all work is to be done by its members and at the same time to allow the union to restrict its membership. The union so situated "must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade . . . ."[83] This must be the rule because a union which has attained a closed shop "occupies a quasi public position similar to that of a public service"[84] which has to serve all comers. A union in this position loses its freedom from judicial restraint, a freedom enjoyed by social and fraternal organizations, to choose its members in an uncontrolled manner. Because of the basic importance of earning a living the union is given a choice — admit the person to membership or, in the alternative, refrain from enforcing the agreement against him.[85] A California court has gone as far as compelling that the plaintiff be admitted to union membership without any alternative.[86] No reason was given by the court for this holding.

Most of the friction results from the discriminatory practices of unions. For example, one court granted relief against a union which discriminated in admission solely because of race, creed, or color,[87] while

82. Frank v. National Alliance of Bill Posters, 89 N.J.L. 380, 381, 99 Atl. 134, 135 (Sup. Ct. 1916).

83. Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J. Eq. 347, 351, 197 Atl. 720, 722 (Ch. 1938). See Clark v. Curtis, 273 App. Div. 797, 76 N.Y.S.2d 3 (1947), *aff'd*, 297 N.Y. 1014, 80 N.E.2d 536 (1948).

84. James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944).

85. Williams v. International Bhd. of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); Riviello v. Journeymen Barbers Union, 88 Cal. App. 2d 499, 199 P.2d 400 (1948); Seligman v. Toledo Moving Picture Operators Union, 88 Ohio App. 137, 98 N.E.2d 54 (1947). See Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 44-51 (1947).

86. Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629, 320 P.2d 494 (1958).

87. Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). *Contra*, Oliphant v. Brotherhood of Locomotive Firemen, 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 355 U.S. 893 (1957); Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957). See generally Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874 (1957).

another court refused to enforce a contract provision which discriminated against women bartenders.[88] In the area of union discrimination, legislation in several states has sought to correct similar inequities.[89]

Aside from the labor union cases, courts have been zealous in protecting the rights of persons who are refused admission to professional associations which, in terms of economic reality, are not really "voluntary," but in fact are involuntary because they are necessary for economic survival.[90] A recent New Jersey decision graphically illustrates this point. In *Falcone v. Middlesex County Medical Soc'y*[91] the plaintiff sought full membership to the county medical society. His application was denied because three of his four years of medical training were spent in a non-approved osteopathic college. As a result of this refusal to admit, the plaintiff was denied access to local hospitals because they would lose their accreditation if they extended their facilities to one ineligible for membership in the county medical society. The Supreme Court of New Jersey affirmed a lower court ruling compelling admission and full membership. The rationale of the court's action was

> that where an organization is in fact involuntary and/or is of such a nature that the court should intervene to protect the public, and where an exclusion results in substantial injury to a plaintiff, the court will grant relief . . . .[92]

The involuntary characteristic is the crucial one. It is the *control* which an association exerts over the practice or trade that determines whether it is voluntary. In the practice of medicine, deprivation of hospital facilities seriously handicaps the physician's ability to successfully practice medicine.[93] There is a close analogy in this instance between the medical society and the public service company, and because of this, it is incumbent that the uncontrolled power of admission be limited.

If one is reasonably qualified for membership in such a group there appears to be no valid reason to exclude him.[94] A substantial injury results from the loss of opportunity to earn a living by limiting the eco-

88. Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

89. See, *e.g.*, COLO. REV. STAT. ANN. § 80-5-1(4) (1953); N.Y. EXECUTIVE LAW § 296(1)(b).

90. See Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951). See also Rex v. Askew, 4 Burr. 2186, 98 Eng. Rep. 139 (K.B. 1788). *Cf.* Hubbard v. Medical Serv. Corp., 367 P.2d 1003 (Wash. 1962).

91. 62 N.J. Super. 184, 162 A.2d 324 (L. 1960), *aff'd*, 34 N.J. 582, 170 A.2d 791 (1961). See Greisman v. Newcomb Hospital, 76 N.J. Super. 149, 183 A.2d 878 (L. 1962).

92. 62 N.J. Super. 184, 197, 162 A.2d 324, 331.

93. Use of hospital facilities is probably more of a privilege than a right. See Haymon v. City of Galveston, 273 U.S. 414 (1927). *But see* Note, 31 NOTRE DAME LAW. 286 (1956); Note, 63 YALE L.J. 937, 952-53 (1954).

94. In most states an osteopath is given a license equal to that of an M.D. See Note, 31 NOTRE DAME LAW. 286, 294-95 (1956). *Cf.* Harris v. Thomas, 217 S.W. 1068, 1077 (Tex. Civ. App. 1920).

nomic avenues available to the non-member. In view of this, compelled admission to such associations is justified.

## CONCLUSION

Though there has been a great multitude of cases involving private associations, the law is far from settled. In most instances, judicial aloofness is desirable because of the public interest in fostering self-governing associations. Yet, with recognition of the many economic advantages in belonging to such organizations, there has evolved a body of law which protects against an unjustifiable or arbitrary exclusion. The desirability of developing a hard and fast rule, though affording simplicity of application, does not appear more beneficial than allowing various groups the freedom of selecting who they want to be members. Such selectivity has commendably raised the standards of many professions such as law and medicine.

In compelling the admission of an individual to an association courts should be more careful and set higher standards. Where an "organization has a business monopoly"[95] or is one in which membership is an "economic necessity"[96] it is justifiable to compel admission. Ordinarily, however, social and fraternal societies have no such leverage, so their absolute discretion in admission should remain unimpaired. If the organization is, in fact, involuntary, it should not be allowed arbitrarily to exclude persons who are reasonably qualified.

Courts should be cognizant of alternative remedies. In *Hubbard v. Medical Serv. Corp.*[97] the court enjoined a private medical bureau from refusing to refer its patients to doctors who were not members of the medical group. This was declared to be an illegal boycott.[98] Such relief may be more desirable than forcing oneself upon a group when, through such means, a non-member can still reap the benefits of belonging to the association. In any case, the relief granted must be tailored to meet the threat to economic opportunity.

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95. Sebastian v. Quarter Century Club of United Shoe Mach. Corp., 327 Mass. 178, 181, 97 N.E.2d 412, 413 (1951).

96. Trautwein v. Harbourt, 40 N.J. Super. 247, 264, 123 A.2d 30, 39 (App. Div.), *certification denied,* 22 N.J. 220, 125 A.2d 233 (1956).

97. 367 P.2d 1003 (Wash. 1962). *Cf.* Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

98. The real basis of the decision appears to be that allowing such a practice would be inimical to the best interests of the patient, for it is the doctor's duty to secure the best possible treatment for his patient.