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# Judicial Review--Professional Association--Inquiry into Exclusion from Membership

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### Judicial Review — Professional Association — Inquiry into Exclusion from Membership

Plaintiff, a dentist specializing in orthodontics,<sup>1</sup> applied for membership in certain orthodontics associations.<sup>2</sup> After his application was rejected without reason,<sup>3</sup> plaintiff sought an injunction to require defendants to admit him as a member. The lower court returned a judgment against plaintiff at the close of his evidence on the basis that, in the absence of showing "economic necessity" for membership, he was not entitled to judicial review of the denial of his application.<sup>4</sup> *Held*, reversed. Since membership in an orthodontics association is a practical necessity for a dentist, a rejected applicant has a judicially enforceable right to have his application considered in a manner comporting with fundamentals of due process, including a showing of cause for rejection. *Pinsker v. Pacific Coast Society of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).<sup>5</sup>

The fundamental legal question presented in *Pinsker* is whether an individual, by showing that he may be deprived of substantial economic advantages by exclusion from membership in a professional association, can establish a right to judicial intervention with respect to the denial of his application for membership. This question itself poses an interesting dilemma for the judiciary in its attempt to balance and reconcile conflicting group and indivi-

<sup>1</sup> Orthodontics is that branch of dentistry which deals with irregularities of the teeth. One who practices orthodontics deals predominantly with children. *Boswell v. Boswell*, 280 Ala. 53, 59, 189 So.2d 854, 859 (1966).

<sup>2</sup> The defendants were American Association of Orthodontists (A.A.O.), Pacific Coast Society of Orthodontists (P.C.S.O.), Pacific Coast Society of Orthodontists, Southern Component (P.C.S.O.S.), and various officers and committee members of these. *Pinsker v. Pacific Coast Society of Orthodontists*, 1 Cal. 3d 160, 163, 460 P.2d 495, 496, 81 Cal. Rptr. 623 n.1 (1969).

<sup>3</sup> Upon his first application, plaintiff was informed that he was in partnership with another dentist who was a non-member of the association. After separation of his patients from those of his partner, plaintiff was again rejected without reason. *Id.* at 164, 460 P.2d at 497, 81 Cal. Rptr. at 164.

<sup>4</sup> At the close of the plaintiff's evidence, judgment was granted defendants pursuant to § 631.8 of the California Code of Civil Procedure, which provides that one party may move for a judgment at the close of the opposing party's evidence without waiving his right to offer evidence in defense in the event the motion is not granted. *Id.* at 166-67, 460 P.2d at 499, 81 Cal. Rptr. at 627.

<sup>5</sup> The lower court's decision in *Pinsker* was appealed to the California Court of Appeals. The appellate court, however, did not allow defendants to put on evidence in rebuttal. The supreme court held that pursuant to section 631.8 of the California Code of Civil Procedure, the situation was as if the motion had not been granted, and the defendants had a right to offer their evidence in rebuttal. *Id.* at 167, 460 P.2d at 500, 81 Cal. Rptr. at 628. This was a secondary point in *Pinsker*, and is not considered in the body of this comment.

dual interests. The scope of this comment will be confined to the general approach which has been taken by the judiciary with emphasis on the way in which *Pinsker* is related to other recent decisions.

It has been established as a general rule in many jurisdictions that voluntary associations have unlimited discretion to grant or refuse membership, and that courts will not interfere even though such an admission is arbitrarily denied.<sup>6</sup> While this rule applies to *exclusion*, it must be noted that there is a distinction between the approach taken by courts with respect to exclusion from membership and *expulsion*. Courts have been more prone to grant limited judicial review in cases of expulsion of members, where such expulsion has been wrongfully or arbitrarily brought about.<sup>7</sup> Since the essential question being treated is an individual's right to membership, it would be helpful to look first at the approach that courts have taken with respect to expulsion from membership, as distinguished from exclusion.

In granting limited judicial review to expulsion from membership, courts mainly have compelled reinstatement on two theories: the property doctrine and the contract theory.<sup>8</sup> The property doctrine is based essentially upon the existence of some vested interest of the complainant in the assets of the association.<sup>9</sup> For jurisdictional purposes, courts look to see if there has been a deprivation of a property right as a result of the member's expulsion. Sufficient property rights have been held to exist in case of an individual's

<sup>6</sup> See e.g., *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957) (exclusion from medical association not violation of Sherman Anti-Trust Act); *Chapman v. American Legion*, 244 Ala. 553, 14 So.2d 225 (1943) (failure to issue local charter not violation of first or fourteenth amendment); *Trautwein v. Harbourt*, 40 N.J. Super. 247, 123 A.2d 30 (1956) (no liability for excluding plaintiff from fraternal organization); *Levy v. United States Grand Lodge, I.O.S.B.*, 9 Misc. 633, 30 N.Y.S. 885 (Sup. Ct. 1894) (refusal to interfere with internal questions of benevolent association in absence of bad faith); *McKane v. Democratic Gen. Comm.* 123 N.Y. 609, 25 N.E. 1057 (1890) (court refused to enforce right of a duly elected member of county political committee); *Kearns v. Howley*, 188 Pa. 116, 41 A. 273 (1898) (equity without jurisdiction to interfere with the act of political committee); *Harris v. Thomas*, 217 S.W. 1068 (Tex. Civ. App. 1920) (membership in voluntary association is privilege which may be withheld at pleasure); *State ex rel. Hartigan v. Monongalia County Medical Soc'y*, 97 W. Va. 273, 124 S.E. 826 (1924) (individual not entitled to compel restoration to medical society when initial election was erroneous; see note 31 *infra*).

<sup>7</sup> See generally Annot., 89 A.L.R.2d 964 971-80 (1963).

<sup>8</sup> Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 998-1002 (1963).

<sup>9</sup> *Id.* at 999.

right to use the association's physical property<sup>10</sup> or a member's right to a pro-rata share of the association's assets in event of dissolution.<sup>11</sup> On rare occasions even a personal or pecuniary interest has been held sufficient.<sup>12</sup>

The "contract" theory rests on the idea that the laws of an organization constitute a contract between the member and the organization.<sup>13</sup> Under this view the courts will look to see if an association has acted in accordance with its rules, and also to determine if those rules violate public policy.<sup>14</sup>

The application of either of these theories to cases of exclusion from membership is obviously inadequate. The "property" doctrine cannot be applied by a non-member since he has yet to gain a property interest, pecuniary or otherwise, in the association's assets. The "contract" theory is likewise inapplicable since no contractual right has arisen between the prospective member and the association. In any case, basing judicial intervention on the supposed existence of some contractual right is largely an illusory use of rhetoric. In cases where judicial intervention has been justified on this basis, it very easily could be justified on another more appropriate and sounder basis.<sup>15</sup> Yet if a court is committed to the "con-

<sup>10</sup> *Davis v. Scher*, 356 Mich. 291, 97 N.W.2d 137 (1959); *Hawkins v. Obremski*, 227 N.Y. S.2d 307 (Sup. Ct. 1962); *Heaton v. Hull*, 51 App. Div. 126, 64 N.Y.S. 279 (Sup. Ct. 1900).

<sup>11</sup> *Stein v. Marks*, 44 Misc. 140, 89 N.Y.S. 921 (Sup. Ct. 1904).

<sup>12</sup> See *Berrien v. Pollitzer*, 165 F.2d 21 (D.C. App. 1947); (personal right of membership, humiliation and injury to feelings due to expulsion); *Joseph v. Passaic Hosp. Ass'n*, 38 N.J. Super. 284, 118 A.2d 696 (1955) (right to earn a livelihood); *Barr v. Essex Trades Council*, 53 N.J.Eq. 101, 30 A. 881 (1894) (right to practice profession).

<sup>13</sup> Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1001 (1963).

<sup>14</sup> *Id.* See *Parsons v. North Cent. Ass'n*, 271 F. Supp. 65 (N.D. Ill. 1967); *Irwin v. Lorio*, 169 La. 1090, 126 So. 669 (1930); *Weyrens v. Scotts Bluff County Medical Soc'y*, 133 Neb. 814, 277 N.W. 378 (1938).

While judicial intervention has rested primarily upon the "contract" or "property" theories, other cases have held that there is a judicial remedy without specifically relying upon such theoretical application. See *Bernstein v. Alameda-Contra Costa Medical Ass'n*, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); *Smith v. Kern County Medical Ass'n*, 19 Cal. 2d 263, 120 P.2d 874 (1942); *Reid v. Medical Soc'y*, 156 N.Y.S. 780 (Sup. Ct. 1915); *Brown v. Harris County Medical Soc'y*, 194 S.W. 1179 (Tex. Civ. App. 1917). See also 41 MINN. L. REV. 212 (1957); 5 UTAH L. REV. 270 (1956).

<sup>15</sup> It would seem that the application of set rules in these cases for the purpose of acquiring jurisdiction, while lending itself to stability in the law, will not always produce a desirable result. Courts might reach a fairer result in a higher percentage of cases if they would sacrifice stability and look to the particular individuals, the particular organizations, and the particular facts unique to each case. This in essence is what the court did in *Pinsker*.

tract" theory, judicial concern may be precluded because the association's rules have been compiled with,<sup>16</sup> or lead to situations where a court would require strict compliance with an association's rules even though other factors would point to judicial abstention.<sup>17</sup>

It readily can be seen that, whether applied to expulsion or exclusion, rigid adherence to some judicial doctrine such as the "property" or "contract" doctrine in many instances does not reach the desired result. In recognizing this problem, several courts have indicated an increased sensitivity to the roles that professional associations play in our society and the effect of denial of membership upon an individual. While these associations are normally voluntary,<sup>18</sup> membership in a particular association is often essential for one to conduct his trade or profession effectively. The control exercised by such groups over the affairs of a particular profession may make membership in these groups the only practical means of influencing one's working environment.<sup>19</sup> Thus, in placing more emphasis on the aspect of control exercised by voluntary associations, a number of courts have departed from adherence to old rules and have looked more to the particular facts of each case. Through these cases there appears to be a realization of the significant role these organizations play, and looking at the facts of each case, courts have taken into consideration the nature of that role, the appropriateness of particular actions and policies to that role and the interests of affected individuals and the public at large.<sup>20</sup>

Due to this increased emphasis on the interests of the individual and on public policy, the differences between cases of expulsion and exclusion, while still important, have diminished in significance. The first indication of departure from judicial ab-

<sup>16</sup>See, e.g., *West Virginia Pulp & Paper Co. v. Lewis*, 17 Misc. 2d 94, 191 N.Y.S.2d 303 (Sup. Ct. 1958).

<sup>17</sup>The "contract" theory has been criticized by several legal writers. See Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930); Note, *Judicial Control of Actions of Private Associations* 76 HARV. L. REV. 983, 1002 (1963); Comment, *Exhaustion of Remedies in Private, Voluntary Associations*, 65 YALE L.J. 369 (1956); 5 UTAH L. REV. 270 (1956).

<sup>18</sup>The involuntary aspect of these organizations has been recognized in some cases and articles. See, e.g., *Group Health Cooperative v. King County Medical Soc'y*, 39 Wash. 2d 586, 237 P.2d 737 (1952). See also Chafee, *Supra* Note 17.

<sup>19</sup>For an interesting discussion of these factors see Tobriner and Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1254-55 (1967).

<sup>20</sup>*Id.* at 1262-63.

stention appeared in litigation involving labor unions,<sup>21</sup> but it was not until the decision in *Falcone v. Middlesex County Medical Society*,<sup>22</sup> that this increased sensitivity was reflected in cases involving professional associations. In *Falcone*, the plaintiff was denied membership in the county medical society because he did not spend four years at an A.M.A. approved school. He had received a D.O. degree from the Philadelphia College of Osteopathy,<sup>23</sup> and subsequently obtained an M.D. degree. The lower court held 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 a substantial injury to a plaintiff, the court will grant relief, providing that such exclusion was contrary to the organization's own laws . . . or the application of a particular law or laws of an organization was contrary to public policy. It follows that each case must stand upon its own facts.<sup>24</sup>

The court concluded that the medical society had virtual monopolistic control over the practice of medicine in that locality, and that because of denying plaintiff membership, he was unable to use hospital facilities. By virtue of this exclusion from membership, the plaintiff was held to have suffered substantial injury.

In *Blende v. Maricopa County Medical Society*,<sup>25</sup> the court relied heavily on the *Falcone* decision. In agreeing with that decision

<sup>21</sup> For a discussion of the trend away from judicial abstention involving labor unions see Summers, *Union Powers and Worker's Rights*, 49 MICH. L. REV. 805 (1951).

<sup>22</sup> 34 N.J. 582, 170 A.2d 791 (1961), *aff'g*, 62 N.J. Super. 184, 162 A.2d 324 (Sup. Ct. 1960) One early case often cited as evidence of judicial review in cases of exclusion is *Hillery v. Pedic Soc'y*, 189 App. Div. 766, 179 N.Y.S. 62 (Sup. Ct. 1919). In that case plaintiff, a Negro, was duly elected to membership. Subsequently, the society changed its by-laws in order to make its entrance requirements more stringent. The court held that the revision of the by-laws, as applied to the plaintiff, was a nullity and that he was duly elected and still a member.

<sup>23</sup> Osteopathy is the system of medical practice based on the theory that diseases are due chiefly to a loss of structural integrity in the tissues and that the body is capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy. *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 586, 170 A.2d 791, 794, n.2 (1961), *aff'g* 62 N.J. Super. 184, 162 A.2d 324 (1960). This theory is not generally accepted by many in the medical profession, and recognition of osteopaths as regular physicians has often been withheld. 34 N.J. 582, 585, 170 A.2d 791, 793, n.1 (1961), *aff'g* 62 N.J. Super. 184, 162 A.2d 324 (1960).

<sup>24</sup> 62 N.J. Super. 184, 197, 162 A.2d 324, 331 (1960), *aff'd*, 34 N.J. 582, 170 A.2d 791 (1961).

<sup>25</sup> 96 Ariz. 240, 393 P.2d 926 (1964).

and allowing a mandamus proceeding against defendants,<sup>26</sup> the court stated that while private groups should have the right to determine their own membership, this right does not extend to situations where a medical society exercises control over a doctor's access to hospital facilities as in *Falcone*. "[T]he society's exercise of a quasi-governmental power is the legitimate object of judicial concern."<sup>27</sup>

The *Pinsker* decision, read in conjunction with *Falcone* and *Blende*, manifests this rather recent evolution of judicial concern over the increasing power of professional associations. In *Pinsker* the court steered away from the requirement of showing an economic necessity for membership. Since the associations exercise extensive control over the specialty of orthodontics, membership in the defendant associations becomes a practical necessity. This is not to say that the plaintiff would not have been able to be reasonably successful in the practice of orthodontics without being a member in the associations. However, he suffered a loss of substantial economic advantages and damages to his reputation by being denied membership. Thus, although in the past courts have sometimes distinguished between economic advantages and economic necessity, the court in *Pinsker* did not do so. Probably the basic direction of the *Pinsker* decision, however, concerns its emphasis on public policy as a factor to be considered. In its opinion, the court stated that:<sup>28</sup>

Defendant associations hold themselves out to the public and the dental profession generally as the sole organizations recognized by the ADA, which is itself a virtual monopoly, to determine standards, both ethical and educational, for the practice and certification of orthodontics. Thus, a public interest is shown, and the associations must be viewed as having a fiduciary responsibility with respect to the acceptance or rejection of membership application.

In recent cases where membership has been compelled, particularly those cases remanded for further proceedings, public policy reasons largely have been responsible for the departure from the general rule of the past. Allegedly voluntary associations have taken on many aspects of involuntariness in view of the tremendous economic and political power which they possess. They are no

<sup>26</sup> The court in *Blende*, while not compelling admission to membership, did allow a mandamus proceeding requiring the lower court to hear the case in accordance with the opinion. *Id.* at —, 393 P.2d at 930.

<sup>27</sup> *Id.* at —, 393 P.2d at 929.

<sup>28</sup> *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 166, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969).

longer merely involved with areas which are solely private concerns. They effect the public at large, and they also have an impact on many individuals who are non-members but have sufficient relationships with these organizations to be substantially affected by their actions. The public responsibility which has devolved upon these organizations is obvious. This idea is perhaps best reflected by the lower court in *Falcone*, where it stated: "The monopolistic control . . . of the practice of medicine . . . necessarily carries with it certain public responsibilities. It may not escape these responsibilities by designating itself as a private, voluntary association."<sup>29</sup>

It should be cautioned that while emphasis has been placed upon recent decisions which have departed from the general rule, there are still a substantial number of jurisdictions, including West Virginia,<sup>30</sup> which either still adhere to judicial abstention or which have not had a recent opportunity to decide such a case. It should also be emphasized that judicial inquiry into exclusion from membership has been confined to those voluntary associations such as professional associations herein discussed, and has not been extended to social clubs, religious organizations and fraternal associa-

<sup>29</sup> *Falcone v. Middlesex County Medical Soc'y*, 62 N.J. Super. 184, 199, 162 A.2d 324, 332 (1960), *aff'd*, 34 N.J. 582, 170 A.2d 791 (1961).

<sup>30</sup> The case of *State ex rel. Hartigan v. Monongalia County Medical Soc'y*, 97 W. Va. 273, 124 S.E. 826 (1924), has been frequently cited in support of the general rule that voluntary associations have an unlimited right to determine their own membership. The only other West Virginia case in point is *Simpson v. Grand Int'd Bhd. of Locomotive Eng'r.* 83 W. Va. 355, 98 S.E. 580 (1919), *cert. denied*, 250 U.S. 644 (1919). While not directly concerned with exclusion or expulsion from a professional association, the more recent case of *State ex rel. Bronaugh v. Parkersburg*, 148 W. Va. 568, 136 S.E.2d 183 (1964), gives an indication that the West Virginia court might consider requiring reinstatement of a member of an organization if he was unjustly expelled. In *Bronaugh* a regularly licensed physician and surgeon was suspended from the staff of a public hospital with no reason given for his suspension. While it was emphasized that private hospitals have the right to exclude physicians, the court held this does not apply to public hospitals, so long as the physician conforms to all reasonable rules and regulations. *Id.* at 572, 136 S.E.2d at 786. In reflecting its awareness of the role such organizations play, the court stated:

A physician or surgeon who is not permitted to practice his profession in a hospital is, as a practical matter, denied the right to fully practice his profession. Much of what a physician or surgeon must do in this day of advanced medical technology can be done only in a hospital. . . . Although one's right to practice medicine is not absolute and unqualified, it is a valuable franchise afforded to one properly trained which should be reasonably protected.

*Id.* at 575, 136 S.E.2d at 787. (on the other hand), while it is clear the West Virginia court will not hesitate to interfere in areas directly concerned with the public interest, it is still not certain that it would judicially enforce one's right to membership in a professional organization.

tions which are primarily pervaded by intimate social relationships<sup>21</sup> The external impact of exclusion from these organizations is largely confined to exclusion of persons from sharing in these relationships, traditionally a matter of only private concern.

It would appear, however, that the judicial trend with regard to the problem of exclusion from membership is to view the facts of each case individually, concentrating on the type of organization and its purpose, the extent of control which it exercises and the effect on other individuals and the public.

Charles Blaine Myers, Jr.

<sup>21</sup> *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1965), cert. denied, 384 U.S. 905 (1966); *Kurk v. Medical Soc'y*, 260 N.Y.S.2d 520 (Sup. Ct. 1965). Note, *Judicially Compelled Admission to Medical Societies*, 75 HARV. L. REV. 1186 (1962).

### Statutes — Vagueness of Phrase “Contributing to Delinquency of a Minor”

The defendant, Ralph Hodges, was convicted of contributing to the delinquency of a minor in the state of Oregon. He appealed his conviction, contending that the statute under which he was indicted violated the due process clause of the fourteenth amendment. *Held*, reversed and remanded. The statute was unconstitutionally vague and thus did not give adequate notice of what conduct was proscribed and consequently the judge and jury were allowed so much leeway in its application that the law-making (legislative) function was effectively delegated to them. *State v. Hodges*, 457 P.2d 491 (Ore. 1969).

The challenged section of the Oregon statute stated that “any person who does any act which manifestly tends to cause any child to become a delinquent child shall be punished upon conviction. . . .” “Delinquent child” is defined in a separate section of the

<sup>1</sup> When a child is a delinquent child as defined by any statute of this state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such a child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child, shall be punished upon conviction by a fine of not more than \$1,000, or by imprisonment in the county jail for a period not exceeding one year or both, or by imprisonment in the penitentiary for a period not exceeding five years.

ORE. REV. STAT. § 167.210 (1967).