

1-1977

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### Recommended Citation

Peter F. Sloss and Robert G. Becker, *The Organization Affected with a Public Interest and Its Members--Justice Tobriner's Contribution to Evolving Common Law Doctrine*, 29 HASTINGS L.J. 99 (1977).

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# The Organization Affected with a Public Interest and Its Members — Justice Tobriner's Contribution to Evolving Common Law Doctrine

By PETER F. SLOSS\*  
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In 1967 Justice Mathew O. Tobriner along with Joseph R. Grodin wrote a thoughtful and provocative article entitled *The Individual and the Public Service Enterprise in the New Industrial State*,<sup>1</sup> in which they fashioned a thesis for understanding how the American common law has responded to some of the challenges posed by the growing dominance of organizations over individuals in our highly technical and specialized society. Their thesis was that the courts had exhibited a subtle but significant trend of imposing extra-contractual duties and obligations on various organizations, based on a revival of the early common law concept of "status" or relationship associated with enterprises "affected with a public interest." This thesis was illustrated in the context of several different types of relationships between the individual and powerful organizations in our modern day society. One of these relationships was the one existing between certain organizations such as unions, professional societies, and trade associations and their individual members.<sup>2</sup>

The 1967 Tobriner and Grodin article was stimulated by previous judicial and legislative attention to this particular relationship. In 1961 the New Jersey Supreme Court decided the landmark case of

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1. Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967) [hereinafter cited as Tobriner & Grodin].

2. The other relationships considered by Tobriner and Grodin, principally those between the individual as a consumer and the corporate enterprise, are beyond the scope of this article.

*Falcone v. Middlesex County Medical Society*,<sup>3</sup> which recognized an obligation on the part of a professional organization to admit "qualified" applicants. The California Supreme Court also had decided a line of cases, commencing in 1944 with *James v. Marinship Corp.*,<sup>4</sup> in which labor unions were restrained from arbitrarily excluding or expelling members. In 1959 Congress passed the Landrum-Griffin Labor Reform Act, which contained a "bill of rights" for union members including safeguards against improper disciplinary action.<sup>5</sup>

This article will seek to explore the development since 1967 of the common law doctrines governing the relationship between the individual and organizations "affected with the public interest." It will explore in particular Justice Tobriner's contributions to that development as evidenced by his authorship of two significant opinions of the California Supreme Court in this area.<sup>6</sup>

Certain issues have evolved and, to some extent, have been resolved since Tobriner and Grodin published their thesis in 1967. The courts have refined the definition of the types of organizations and relationships which are deemed to be "affected with a public interest." They have continued to consider the organizations' substantive requirements for membership and have intervened where such requirements were found to be arbitrary or otherwise contrary to public policy. As the limitations on substantive obstacles to membership have become better recognized, the courts increasingly have had to answer procedural questions, and the elements of a "fair procedure," which the courts will require organizations to follow, are beginning to emerge. Additionally, the courts have confronted a number of questions concerning the procedures for judicial review of organizational actions.

Since enactment of the Landrum-Griffin Act in 1959, issues of labor union-member relations have generally been litigated in the federal courts. The issues before those courts have pertained to prob-

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3. 34 N.J. 582, 170 A.2d 791 (1961).

4. *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944). See *Directors Guild v. Superior Ct.*, 64 Cal. 2d 42, 409 P.2d 937, 48 Cal. Rptr. 710 (1966) (union may exclude unemployed persons, but not employees); *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958); *Williams v. International Bhd. of Boilermakers*, 27 Cal. 2d 586, 165 P.2d 903 (1946); *Bautista v. Jones*, 25 Cal. 2d 746, 155 P.2d 343 (1944); Tobriner & Grodin, *supra* note 1, at 1254-58, 1260-62.

5. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 522 (codified at 29 U.S.C. §§ 411-531 (1970)).

6. *Westlake Community Hosp. v. Superior Ct.*, 17 Cal. 3d 465, 551 P.2d 410, 131 Cal. Rptr. 90 (1976); *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

lems of statutory construction rather than common law doctrine. Because the statute describes the procedures that unions must follow in expulsion cases in fairly general terms, however, federal labor cases parallel state cases involving questions of fair procedure within organizations other than unions. This Article will refer to some of these parallels in discussing the common law developments, although a comprehensive discussion of the labor cases is not within the scope of this Article.

Although the Labor-Management Reporting and Disclosure Act of 1959 deals only with union disciplinary procedures and not with problems of union admission policies and practices, there has been a recent dearth of state cases involving union admission problems. Probably, this decline may be attributed to the increased reliance placed on other federal legislation that has provided remedies for those seeking entrance to unions, such as the union unfair labor practice sections of the Labor-Management Relations Act of 1947<sup>7</sup> and the Equal Employment Opportunity Act of 1972.<sup>8</sup>

### The Tobriner - Grodin Thesis: Resurrection of an Early Common Law Concept for Modern Application

Tobrer and Grodin noted that concepts of relationship and status were of paramount significance in the early common law. This status oriented legal system imposed obligations independent of contract or tort doctrine. In particular, status principles in the area of economic dealings were embodied in the concept of an enterprise "affected with the public interest."<sup>9</sup>

Later, with the advent of a mercantile economy and a liberal

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7. 29 U.S.C. § 158(b) (1970); *see, e.g.*, *Local 1104, Communications Workers v. NLRB*, 520 F.2d 411 (2d Cir.), *cert. denied*, 423 U.S. 1051 (1975) (unfair labor practice to enforce union shop clause against employees denied membership for reasons other than failure to pay dues); *NLRB v. Local 106, Glass Bottle Blowers Ass'n*, 520 F.2d 693 (6th Cir. 1975) (unfair labor practice to maintain two local unions, segregated solely on basis of sex); *NLRB v. International Longshoremens Ass'n, Local 1581*, 489 F.2d 635 (5th Cir.), *cert. denied*, 419 U.S. 1040 (1974) (collective bargaining agreement discriminating against aliens an unfair labor practice).

8. 42 U.S.C. § 2000e-2(c) (1970); *see, e.g.*, *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354 (9th Cir. 1975) (sex discrimination in union membership policies); *Sims v. Sheet Metal Workers Int'l Ass'n, Local 65*, 489 F.2d 1023 (6th Cir. 1973) (union admission testing practices found discriminatory in effect); *Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (racial discrimination in union admission policies); *EEOC v. Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975) (non-job-related union admission requirements discriminatory in effect).

9. Tobrer & Grodin, *supra* note 1, at 1249.

laissez-faire economic philosophy, the courts largely ignored status concepts. Contract, as a vehicle of individualism in a free economy, became the paramount concern of the common law. In their article, however, Tobriner and Grodin advanced the view that with the increased organization and specialization of twentieth century society, contract principles are no longer sufficient to regulate the unequal relationships between individuals and dominant organizations. Contract doctrine, they concluded, is inadequate to define a legal obligation between individuals and such large organizations as unions, professional societies, manufacturers, or insurance companies.

In response to this dilemma, courts and legislatures have imposed new, extra-contractual obligations to protect the individual and to limit the ability of the dominant organization to impose its own terms upon the relationship. The authors characterized this trend as a revival of "status" concepts. In particular, they noted that certain institutions are viewed by modern law as quasi-public in nature, recalling the earlier concept of enterprises "affected with the public interest."<sup>10</sup>

In applying common law status concepts to relationships between the individual and organizations such as unions, professional societies, and trade associations, Tobriner and Grodin emphasized the public nature of the relationship by pointing to various of its functions in which the public interest inheres: protecting individual interests, avoiding unreasonable restraints on trade or on the employment of professionals, and regulating various aspects of commercial and professional life.<sup>11</sup> Tobriner and Grodin recognized that there are two interests inherent in the relationship between the individual and the organization that the law seeks to advance or protect, the public interest and the individual interest. Also recognized, although not emphasized in the Tobriner and Grodin article, is the organization's interest in maintaining and preserving its autonomy. This Article will discuss the means by which the courts have reconciled and balanced these often competing interests.

### **The Tobriner - Grodin Thesis as Applied by the California Supreme Court**

A case regarding the relationship between the individual and a professional society, raising the very issues discussed by the Tobriner

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10. *Id.* at 1251-54.

11. *Id.* at 1255-56.

and Grodin article, soon reached Justice Tobriner's own court. *Pinsker v. Pacific Coast Society of Orthodontists* reached the California Supreme Court twice, in 1969<sup>12</sup> and again in 1974. The second opinion was written by Justice Tobriner himself.<sup>13</sup> These two decisions will be hereinafter referred to as *Pinsker I* and *Pinsker II* respectively.

### Pinsker I — Defining the Individual and Public Interests

Dr. Pinsker, a dentist, had been denied membership in societies of orthodontists based upon an unwritten rule excluding those who practiced in association with a dentist who was not qualified for membership. No hearing was conducted by the societies on Dr. Pinsker's application for membership. The lower court had denied him relief.<sup>14</sup> The principal question in *Pinsker I*, written by Justice McComb, was whether membership in the societies was of a character that the law should protect.

The record showed that Dr. Pinsker had been successfully practicing dentistry and specializing in the field of orthodontics without membership in the societies. He showed, however, that membership in the societies would be an advantage to him as it likely would lead to referral of more patients and give him access to educational and other opportunities which were important to his professional advancement.<sup>15</sup> Earlier cases had justified judicial intervention in the admission policies of organizations when membership was found to be an "economic necessity."<sup>16</sup> Only by stretching the word "necessity" to the limits could the facts before the court in *Pinsker I* warrant a finding that membership in the orthodontists' societies was an "economic necessity" for Dr. Pinsker. The court therefore concluded that a showing of "substantial economic advantages" or "practical necessity" was enough to warrant a judicial remedy for arbitrary exclusion from membership. The court considered not only the economic interests of Dr. Pinsker but also analyzed the "public service" characteristics of the orthodontic societies. In terms quite similar to those used by Tobriner and Grodin, the court concluded, "Thus, a public interest is shown, and the associations must be viewed as having a fiduciary re-

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12. 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).

13. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

14. 1 Cal. 3d at 162, 460 P.2d at 496, 81 Cal. Rptr. at 624.

15. 1 Cal. 3d at 163, 460 P.2d at 496-97, 81 Cal. Rptr. at 624-25.

16. *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944); *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961).

sponsibility with respect to the acceptance or rejection of membership applications."<sup>17</sup>

The opinion of the California Supreme Court in *Pinsker I* evidences consideration and weighing of the individual interest and the public interest and reaches a result favoring judicial control over the status relationship between the organization and a would-be member. The use of the phrases "substantial economic advantages" or "practical necessity" in the *Pinsker I* decision should not be construed as establishing a touchstone by which to assay all organizations that deny membership to "qualified" applicants, although these phrases are the ones seized upon by courts in subsequent cases.<sup>18</sup> Not only are these short phrases an oversimplification of the court's decision in *Pinsker I*, but the "test" is neither workable nor desirable. Many rejected aspirants to membership in organizations could make a stronger showing of "substantial economic advantages" that would flow from membership than did Dr. Pinsker. Whether courts would wish to intervene in all such cases, however, is highly doubtful.<sup>19</sup> For example, a life insurance salesman denied membership in the local country club might make a strong showing that membership, leading as it would to social contacts with possibly the best prospects in the community for large life insurance policies, would be a substantial economic advantage to him. The well demonstrated reluctance of the courts to intervene in the affairs of organizations that are largely social in character indicates that such a showing would be unlikely to evoke a judicial mandate opening the doors to the clubhouse. The reason for this reluctance is that consideration of the individual's interest alone, whether economic or otherwise, is not sufficient to warrant judicial interference in the affairs of a purely private organization, no matter how arbitrary its action may be. Unless the organization is affected with the public interest, the private rights of the members of the organization to associate with whomever they please, for whatever reason, overcome any advantage that an individual might obtain by membership. Indeed, the right of members in a purely social organization to choose

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17. 1 Cal. 3d at 166, 460 P.2d at 499, 81 Cal. Rptr. at 627, citing *Tobriner & Grodin*, *supra* note 1.

18. *Criminal Courts Bar Ass'n v. State Bar*, 22 Cal. App. 3d 681, 688 n.6, 99 Cal. Rptr. 661, 665 (2d Dist. 1972); *Greenberg v. Hollywood Turf Club*, 7 Cal. App. 3d 968, 976, 86 Cal. Rptr. 885, 890-91 (2d Dist. 1970).

19. See, e.g., *Blatt v. University of S. Cal.*, 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (2d Dist. 1970) (refusal to intervene on behalf of rejected applicant to Order of the Coif).

their associates has been described as one that is constitutional in character.<sup>20</sup>

There is further defect in the application of the terms "substantial economic advantages" or "practical necessity" as *the* test for judicial intervention in the admission process of an organization. The interests the law seeks to advance or protect by recognizing a status relationship between an individual and an organization affected with the public interest are not limited to individual economic interests. A good illustration is the New Jersey case of *Higgins v. American Society of Clinical Pathologists*.<sup>21</sup> In that case the plaintiff, who was not employed by a physician, challenged a requirement that an individual be employed by a physician in order to obtain certification to a registry of medical technologists. The New Jersey Supreme Court in declaring the requirement invalid did not cite any evidence that her future employment prospects were diminished in any way because of the lack of certification. Notwithstanding this absence of a finding that plaintiff was economically disadvantaged by the exclusion, the New Jersey court expressly held that the law should protect the personal relationship between the individual and the association and the status conferred by the relationship for reasons of public policy regardless of any *economic* advantage to the individual. The court found that the rule upon which certification was denied was contrary to public policy because it tended to deprive the public of the services of the highest qualified technologists in laboratories not run by physicians, even though such laboratories were lawful under state law.<sup>22</sup>

The individual interests that the courts consider, therefore, are not exclusively economic. Justice Tobriner noted in an earlier decision by the California Supreme Court that the economic interest of an individual in union membership is his interest in employment but carefully explained that it is no more important than his interest in participation in the full panoply of union affairs. As he wrote in the opinion:

The decisions of this court thus recognize that membership in the union . . . affords to the employee not only the opportunity to participate in the negotiation of the contract governing his employment but also the chance to engage in the institutional life of the union . . . .

Participation in the union's affairs by the workman compares

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20. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-83 (1972) (Douglas, J., dissenting).

21. 51 N.J. 191, 238 A.2d 665 (1968).

22. *Id.* at 199-202, 238 A.2d at 669-71.



to the participation of the citizen in the affairs of his community. The union, as a kind of public service institution, affords to its members the opportunity to record themselves upon all matters affecting their relationships with the employer; it serves likewise as a vehicle for the expression of the membership's position on political and community issues . . . .<sup>23</sup>

In the light of such language, some courts' narrow focus upon the individual's economic interest to the exclusion of public and noneconomic interests is surprising. For example, in one case in which a bar association was suing over its disenfranchisement from the State Bar's Conference of Delegates, the court in denying relief tersely dismissed the applicability of *Pinsker I* because of the absence of any compelling economic or "practical necessity."<sup>24</sup>

Although searching for a single three-word key to unlock the process of judicial decision in complex cases is tempting, "substantial economic advantage" must be rejected as *the* factor in deciding problems posed by rejected applicants for membership in organizations, although it is undoubtedly an important one. Rather, the courts must analyze all the factors mentioned in the Tobriner and Grodin article and reviewed above.

### Pinsker II — The Requirement of "Fair Procedure" and Recognition of the Organization's Interest

#### *Fair Procedure*

The court in *Pinsker I* concluded that Dr. Pinsker had "a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection."<sup>25</sup> The court did not elaborate upon what procedures, if any, the fundamentals of due process required but remanded the case to the trial court to determine whether the society had complied with the decision. After remand, the society articulated

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23. *Directors Guild v. Superior Ct.*, 64 Cal. 2d 42, 52-53, 409 P.2d 934, 941-42, 48 Cal. Rptr. 710, 717-18 (1966) (footnote omitted). The same language was quoted in Tobriner & Grodin, *supra* note 1, at 1258. For a further exposition of "right to participate" in union affairs and a lively criticism of the failure by most jurists (Justice Tobriner notwithstanding) and by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411-531 (1970), to recognize this right in the context of membership exclusion cases, see Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 820-31 (1951).

24. *Criminal Courts Bar Ass'n v. State Bar*, 22 Cal. App. 3d 681, 688 n.6, 99 Cal. Rptr. 661, 665 (2d Dist. 1972).

25. 1 Cal. 3d at 166, 460 P.2d at 499, 81 Cal. Rptr. at 627.

the reason for its decision to exclude Dr. Pinsker, basing it on one of its Principles of Ethics, which prohibited "delegating to a person less qualified any services or operation which requires the professional competence of an orthodontist."<sup>26</sup> The society did not hold a hearing or afford Dr. Pinsker the opportunity to respond in any other manner. Five years later in *Pinsker II*, the court had to take up the problems where it had left off.<sup>27</sup>

In *Pinsker II*, the supreme court was asked to explain what it had meant by "a manner comporting with the fundamentals of due process." Speaking for the court, Justice Tobriner initially addressed whether the court's earlier holding required only reasonable, nonarbitrary grounds for exclusion or whether a fair decision-making procedure was also required. The society contended that *Pinsker I* required only that there be cause for rejection. Justice Tobriner rejected this argument that the due process required by *Pinsker I* was only substantive. In doing so, however, he noted that what is involved is not "due process" because that is a constitutional concept but rather a common law obligation imposed upon certain organizations to follow "fair procedure."<sup>28</sup> This distinction is more than just a matter of fine semantics. Justice Tobriner appears to have been cautioning subsequent courts that rules of procedural due process, adopted in situations in which there was constitutional compulsion as a function of the government action involved, should not be applied thoughtlessly to voluntary organizations. Rather, under *Pinsker II* the courts should apply flexible procedural standards that are appropriate to the situation at hand. The court declined to spell out detailed standards but did specify two elements inherent in its concept of fair procedure: (1) adequate notice of the charges against the individual and (2) a reasonable opportunity

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26. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 544, 526 P.2d 253, 256, 116 Cal. Rptr. 245, 248 (1974).

27. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974). The cases certainly demonstrate that one disadvantage of judicial intervention is the time required to obtain relief. Dr. Pinsker originally commenced his suit in 1962. Seven years were consumed getting the case to the California Supreme Court the first time. After remand, another five years elapsed before the case again reached the court. The second decision, 12 years after the original suit was brought, did not grant Dr. Pinsker any relief, but merely instructed the trial court to issue an injunction requiring the society to reconsider his application. *Id.*

28. 12 Cal. 3d at 550 n.6, 526 P.2d at 259, 116 Cal. Rptr. at 251. However, in a recent decision, *Anton v. San Antonio Hosp.*, 19 Cal. 3d 802, 826, 567 P.2d 1162, 1182, 140 Cal. Rptr. 442, 456 (1977), the court, in an opinion by Justice Sullivan, describes the requirement as minimal due process.

for him to respond.<sup>29</sup> These elements of fair procedure were found to be lacking in Dr. Pinsker's case.<sup>30</sup>

### *Fair Procedure under the Landrum-Griffin Act*

*Pinsker II* leaves a question as to what other elements of fair procedure were left unmentioned, and the decision also leaves some uncertainty about what specific procedures will satisfy the two standards that were stated so briefly. Federal court decisions construing the procedural requirements established by the Landrum-Griffin Act of 1959 for union disciplinary cases have considered some specific problems of fair procedure in internal union affairs.<sup>31</sup> The Act provides that no union member may be disciplined unless he has been "(A) served with written specific charges; (B) given a reasonable time to prepare his defense; [and] (C) afforded a full and fair hearing."<sup>32</sup> These standards are similar to those included in Justice Tobriner's description of fair procedure.<sup>33</sup> Cases applying them to detailed procedural questions may be helpful in delineating the two broad standards in *Pinsker II*.<sup>34</sup>

In interpreting the Act's requirement of "written specific charges," the federal courts have been primarily concerned with questions of form arising solely from the statutory terminology.<sup>35</sup> In one holding, however, the United States Supreme Court declared that the charges need not be confined to offenses explicitly contained in the union's

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29. *Id.* at 555, 526 P.2d at 263-64, 116 Cal. Rptr. at 255-56.

30. The court also suggested that the hearsay rule is not an essential part of "fair procedure." *Id.* at 556 n.14, 526 P.2d at 264, 116 Cal. Rptr. at 256.

31. See Sloss, *Procedural Due Process in Voluntary Associations*, 48 CAL. ST. B.J. 138 (1973). The procedural standards evolved by state courts for union disciplinary proceedings prior to the Landrum-Griffin Act are also discussed in Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175 (1960). See also Annot., 21 A.L.R.2d 1397 (1952).

32. 29 U.S.C. § 411(a)(5) (1970).

33. Tobriner and Grodin suggest in their article that the statutorily declared standards were essentially "codifications of leading common law decisions" in this area. Tobriner & Grodin, *supra* note 1, at 1260.

34. For a detailed survey of how the procedural standards specified by the Act have been construed by the federal courts, see Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727 (1969). See also Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383 (1975).

35. E.g., *Eisman v. Baltimore Regional Joint Bd. of Amalgamated Clothing Workers*, 352 F. Supp. 429 (D. Md. 1972) (notice lacked requisite specificity because union member was in fact disciplined for additional, unspecified reasons); *Smith v. American Fed'n of Musicians*, 80 L.R.R.M. 3063 (S.D.N.Y. 1972) (notice must include circumstances, time and place of union member's misconduct).

articles and bylaws.<sup>36</sup> Although this holding, too, rested primarily on statutory construction, the Court also suggested another basis, that to hold otherwise would improperly permit judicial intrusion into the union's authority to interpret its own rules.<sup>37</sup>

In applying the Act's second requirement, that the accused be "given a reasonable time to prepare his defense,"<sup>38</sup> the federal courts have weighed various practical considerations, such as the availability to the accused of help from other union members or from professional counsel,<sup>39</sup> whether the accused received postponements of the trial,<sup>40</sup> and whether he was in fact prejudiced by the amount of preparation time allowed.<sup>41</sup> One commentator has suggested that other considerations might include "the gravity of the offense charged, the amount of free time the member had available to prepare a defense, the formality of the proceedings, and any special circumstances known to the union."<sup>42</sup>

In construing the third requirement of the Act, that the accused be accorded a "full and fair hearing," the courts have imposed a number of specific guidelines. For example, the accused must be able to speak on his own behalf and to call his own witness,<sup>43</sup> and he must be permitted to confront and cross-examine adverse witnesses.<sup>44</sup> Also

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36. *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971).

37. *Id.* at 242-43.

38. 29 U.S.C. § 411(a)(5)(B) (1970).

39. *Vars v. International Bhd. of Boilermakers*, 215 F. Supp. 943, 948 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963); *Rosen v. District Council 9, Bhd. of Painters*, 198 F. Supp. 46, 48 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964).

40. *Caraballo v. Union de Operadores y Canteros de la Industria del Cemento de Ponce*, 55 L.R.R.M. 2787, 2788 (D.P.R. 1964); *Rosen v. District Council 9, Bhd. of Painters*, 198 F. Supp. 46, 48 (S.D.N.Y. 1961), *appeal dismissed*, 326 F.2d 400 (2d Cir. 1964).

41. *Burke v. International Bhd. of Boilermakers*, 57 Lab. Cas. ¶ 12,496 (N.D. Cal. 1967) (whether evidence sought would have been admissible); *Vars v. International Bhd. of Boilermakers*, 215 F. Supp. 943, 948 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963).

42. Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 744 (1969).

43. *Yochim v. Caputo*, 51 L.R.R.M. 2516, 2517 (S.D.N.Y. 1962); *see Parks v. International Bhd. of Electrical Workers*, 314 F.2d 886, 912 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

44. *Parks v. International Bhd. of Electrical Workers*, 314 F.2d 886, 912 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963); *Anderson v. Brotherhood of Carpenters*, 53 L.R.R.M. 2793, 2795 (D. Minn. 1963). The right of confrontation and cross-examination was sometimes protected by state courts prior to passage of the Landrum-Griffin Act. *E.g.*, *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal. 2d 134, 144, 231 P.2d 6, 11 (1951).

the hearing must be before an "impartial tribunal."<sup>45</sup> Several decisions have held that the accused also has a right to compel the taking of a stenographic record.<sup>46</sup> On the other hand, the courts have not imposed any right to professional counsel. Rather, the unions have been required merely to put the accused on an equal footing with his accusers with regard to assistance in presenting his defense.<sup>47</sup> A hearing was not expressly mentioned in *Pinsker II* but arguably is implied by Justice Tobriner's requirement that the individual have "a reasonable opportunity to respond."<sup>48</sup> Certainly when a hearing is held, the holdings respecting union disciplinary cases suggest some specific elements of fair procedure that may be required.

### *Recognition of the Organization's Interest*

The court in *Pinsker II*, after establishing the fair procedure requirements, held that the trial court hearing, in which Dr. Pinsker did present evidence refuting charges, did not remedy the society's failure to conduct proper proceedings. This conclusion is consistent with earlier cases cited by the court<sup>49</sup> that hold that permitting the trial court to determine the merits of the controversy is an unwarranted interference with organizational autonomy and imposes too great a burden on the courts. The proper remedy, according to *Pinsker II* and

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45. *Falcone v. Dantine*, 420 F.2d 1157 (3d Cir. 1969) (evidence that member of trial body "prejudged" the case); *Needham v. Isbister*, 84 L.R.R.M. 2105, 2107 (D. Mass. 1973) (evidence of individual bias); *Kiepora v. Local 1091, United Steelworkers*, 358 F. Supp. 987, 990-91 (N.D. Ill. 1973) (members of tribunal also witnesses against accused); *Air Line Stewards Local 550 v. Transport Workers Union*, 55 L.R.R.M. 2711, 2718 (N.D. Ill. 1963), *rev'd on other grounds*, 334 F.2d 805 (7th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965) (person who brought charges on hearing tribunal).

46. *Hart v. Local 1292, United Bhd. of Carpenters*, 341 F. Supp. 1266, 1269 (E.D.N.Y. 1972); *Deacon v. Operating Engineers Local 12*, 59 L.R.R.M. 2706, 2709 (S.D. Cal. 1965).

47. *Cornelio v. United Bhd. of Carpenters*, 243 F. Supp. 126, 128-29 (E.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 728 (3d Cir. 1966); *Smith v. General Truck Drivers Local 467*, 181 F. Supp. 14 (S.D. Cal. 1960).

48. 12 Cal. 3d at 555, 526 P.2d at 263-64, 116 Cal. Rptr. at 255-56. In *Anton v. San Antonio Community Hosp.*, the court in fact specified that a hearing is one of the procedural elements required in a hospital admission or expulsion case. 19 Cal. 3d 802, 818, 567 P.2d 1162, 1170, 140 Cal. Rptr. 442, 450 (1977) (citing *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 528 P.2d 253, 116 Cal. Rptr. 245 (1976)).

49. *Ferguson v. Thomas*, 430 F.2d 852, 858 (5th Cir. 1970); *Ellis v. AFL*, 48 Cal. App. 440, 445, 120 P.2d 79, 81 (1st Dist. 1941); *see Sussman v. Overlook Hosp. Ass'n*, 95 N.J. Super. 418, 231 A.2d 389 (App. Div. 1967).

the cited cases, is to return the case to the organization and direct it to make its own determination in a proper manner.<sup>50</sup>

The court in *Pinsker II* further concluded that the society's rule prohibiting delegation of orthodontic services to a dentist not eligible for membership in the society was neither arbitrary nor contrary to public policy and could form a permissible basis for the rejection of membership. In its discussion of this issue, the court emphasized the considerable deference that should be granted to the policies of professional organizations of this sort, at least as to policies that appear on the surface to promote legitimate objectives. The expertise of the society in formulating such policies was cited and contrasted with the lack of expertise of the courts. As the supreme court observed:

"In making such an inquiry, the court must guard against unduly interfering with the Society's autonomy by substituting judicial judgment for that of the Society in an area where the competence of the court does not equal that of the Society. . . . If the Society has refused membership . . . through the application of a reasonable standard — one which comports with the legitimate goals of the Society and the rights of the individual and the public — then judicial inquiry should end." Only when a society rule is contrary to established public policy or is so "patently arbitrary and unreasonable" as to be "beyond the pale of the law" should a court prohibit its enforcement.<sup>51</sup>

In *Pinsker II* the California court appears to have accorded considerable weight to the professional organization's expertise.<sup>52</sup> The emphasis in *Pinsker II* on deference to the organization's policies was strengthened by the further opportunity given the Society in that case to assess Dr. Pinsker's qualifications for membership in accordance with fair procedure. In tandem these factors indicate that the California court seriously intends to weigh an organization's interest in autonomy against the individual and public interests.

### Westlake Hospital—Judicial Remedies for Exclusion and Special Problems of Hospitals

#### *The Westlake Community Hospital Case*

The second significant case in which Justice Tobriner wrote the opinion for the court was *Westlake Community Hospital v. Superior*

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50. 12 Cal. 3d at 557, 526 P.2d at 264-65, 116 Cal. Rptr. at 256-57.

51. *Id.* at 558, 526 P.2d at 266, 166 Cal. Rptr. at 258 (quoting *Blende v. Maricopa County Medical Soc'y*, 96 Ariz. 240, 245, 393 P.2d 926, 930 (1964)) (citations omitted).

52. Other states have paid less deference to the organizations' expertise. See, e.g., *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961);

*Court of Los Angeles County*.<sup>53</sup> The case involves staff privileges of doctors in private nonprofit hospitals, which have frequently been treated as similar to membership in associations affected with the public interest.<sup>54</sup> *Westlake* delineates some important new principles not covered in *Pinsker I* or *Pinsker II*, particularly with respect to the judicial remedies available to applicants for membership on hospital medical staffs who are rejected and to existing members who are expelled. Because the court in *Westlake* indicated that the fair procedure requirement of *Pinsker II* applied, many of the principles of *Westlake* presumably also apply to other organizations affected with the public interest.

*Westlake* involved two different hospitals. The plaintiff, Dr. Kaiman, had her staff privileges revoked at one hospital (*Westlake*) and was denied staff privileges at the other (*Los Robles*). She sued both hospitals and individual members of the hospitals' various boards and committees. She did not seek reinstatement or admission to the staff of either hospital.<sup>55</sup> Rather, she sought general and exemplary damages. The case raised a number of issues, with which the court dealt.

First, if the bylaws or other governing rules of the organization provide a quasi-judicial remedy for termination of or exclusion from membership, this remedy must be exhausted before judicial relief may be sought.<sup>56</sup> After exhaustion of the quasi-judicial remedy,<sup>57</sup> a rejected applicant or terminated member must set aside the organization's decision in a mandamus action before any tort action for damages will lie.<sup>58</sup>

Second, if the bylaws or other governing rules of the organization do not provide any quasi-judicial remedy or if the existence of such a

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see also, *Blende v. Maricopa County Medical Soc'y*, 96 Ariz. 240, 242-44, 393 P.2d 926, 928-29 (1964).

53. 17 Cal. 3d 465, 551 P.2d 410, 131 Cal. Rptr. 90 (1976).

54. *Ascherman v. Saint Francis Memorial Hosp.*, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1st Dist. 1975); *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1st Dist. 1974). But see *Silver v. Castle Memorial Hosp.*, 53 Haw. 475, 476-77 n.2, 497 P.2d 564, 566-67, cert. denied, 409 U.S. 1048 (1972). See generally Note, *Hospital Staff Privileges: The Need for Legislation*, 17 STAN. L. REV. 900 (1965). See notes 55, 63 & 67 *infra*.

55. 17 Cal. 3d at 470, 551 P.2d at 412, 131 Cal. Rptr. at 92.

56. *Id.* at 474-77, 551 P.2d at 414-16, 131 Cal. Rptr. at 94-96.

57. The opinion does not explicitly define "quasi-judicial remedy." It implies, however, that it is a proceeding which includes the two "fair procedure" requirements of *Pinsker II* — adequate notice of "charges" and a reasonable opportunity to respond. 17 Cal. 3d at 477-78, 551 P.2d at 417, 131 Cal. Rptr. at 97.

58. *Id.* at 482-85, 551 P.2d at 420-22, 131 Cal. Rptr. at 100-02.

remedy is ambiguous, then no exhaustion of remedies is required, and a tort action for damages may be brought without seeking mandamus relief.<sup>59</sup>

Third, bylaw provisions by which members or applicants waive any claim for damages arising out of disciplinary action taken by the organization are contrary to public policy and void.<sup>60</sup>

Fourth, California Civil Code section 43.7,<sup>61</sup> which might be construed to exempt committees of professional societies and hospital medical staffs from liability arising out of committee actions, provides in fact only a *qualified* privilege to the *members* of such committees or boards and does not exempt the organization itself.<sup>62</sup>

Finally, California Civil Code section 47(2),<sup>63</sup> although apparently affording an absolute privilege to hospital boards with respect to defamation liability, is not applicable in cases such as *Westlake*, involving disputed *actions* rather than statements or publications.<sup>64</sup>

The *Westlake* case brings the interest of the organization and its members, other than the member claiming improper exclusion, sharply into focus as an important element in the balancing process in which the courts must engage. The hospital's interest in maintaining high standards coincides with the public interest. The public has an equal interest, however, in affording qualified practitioners access to hospital facilities. Tort liability for exclusion or expulsion obviously is a powerful deterrent to improper action, but the fear of tort liability can also serve as a deterrent to any action at all. Justice Tobriner in *Westlake* addressed these problems. The decision, however, raises some new problems that will require resolution in future cases or by the legislature.

#### *Judicial Procedure and Exhaustion of Administrative Remedies*

The doctrine of exhaustion of administrative remedies and the cognate rule requiring that judicial review of an organization's administrative action occur through a mandamus proceeding are analogous to the rules governing judicial review of actions by state administrative agencies exercising quasi-judicial functions. This analogy was followed in Justice Tobriner's opinion, although he also noted that the

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59. *Id.* at 478, 551 P.2d at 417-18, 131 Cal. Rptr. at 97-98.

60. *Id.* at 479, 551 P.2d at 418, 131 Cal. Rptr. at 98.

61. CAL. CIV. CODE § 43.7 (West 1954 & Supp. 1977).

62. 17 Cal. 3d at 481-82, 551 P.2d at 419-20, 131 Cal. Rptr. at 99-100.

63. CAL. CIV. CODE § 47(2) (West 1954 & Supp. 1977).

64. 17 Cal. 3d at 481-82, 551 P.2d at 419-20, 131 Cal. Rptr. at 99-100.



decision of a private association "may not be entitled to exactly the same measure of respect as a similar decision of a duly constituted public agency . . . ." <sup>65</sup> The decision cited, in this regard, section 1094.5 of the California Code of Civil Procedure, which establishes the procedure in California for review by administrative mandamus of the orders or decisions of public agencies. The statute provides for a court, sitting without a jury, to review the record of proceedings before a public agency to determine whether the agency "has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." <sup>66</sup>

A complex set of rules has evolved in California regarding judicial review of quasi-judicial decisions of state administrative agencies under section 1094.5. Generally, the courts review only the administrative record without considering extrinsic evidence, except in cases in which it can be shown that relevant evidence could not have been produced through the exercise of reasonable diligence or that such evidence was improperly excluded at the administrative hearing. <sup>67</sup> The standard of review by the trial court varies, depending upon the nature of the administrative proceeding. If the administrative decision "substantially affects fundamental vested rights," the trial court exercises independent judgment, based upon the administrative record. If such fundamental vested rights are not affected, the trial court is limited to the determination of whether the administrative decision is supported by substantial evidence upon the whole record. <sup>68</sup> In cases involving professional or business licenses, which are probably the state agency proceedings most analogous to private organization proceedings, the applicable standard has been held to depend upon whether the proceeding concerns initial application for the license, which is not a fundamental vested right, or revocation of an existing license, which is a fundamental vested right. <sup>69</sup>

In *Anton v. San Antonio Community Hospital*, <sup>70</sup> the supreme court applied the same rules to judicial review of a hospital staff reappointment proceeding. The court held that the hospital's refusal to reap-

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65. *Id.* at 484, 551 P.2d at 421, 131 Cal. Rptr. at 101.

66. CAL. CIV. PROC. CODE § 1094.5(b) (West Supp. 1977).

67. *Id.* § 1094.5(d).

68. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974); *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971) (Tobriner, Acting C.J.) (construing CAL. CIV. PROC. CODE § 1094.5(c) (West 1955)).

69. *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

70. 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977).

point a doctor who had enjoyed staff privileges for a number of years involved a fundamental vested right and that the trial court in an administrative mandamus proceeding should "exercise its independent judgment in order to determine whether the findings of the administrative body were supported by the weight of the evidence."<sup>71</sup> The court's discussion implies that, if the administrative proceedings involve an initial application for admission to hospital staff membership, the affected right is not vested, and the scope of judicial review should be limited to a determination of whether the findings are supported by substantial evidence in light of the whole record.

Whether the standard of judicial review in a particular case is independent judgment or the substantial evidence test, the logic of the *Pinsker* cases and the *Westlake* case leads inevitably to the conclusion that judicial review normally should be limited to the record made in the proceedings of the private organization. Even if the organization excludes evidence that the court later determines should have been considered in order to meet the requirements of fair procedure, the appropriate judicial response, if the analogy of administrative mandamus is to be followed, would be to direct the organization to consider such evidence in further proceedings.<sup>72</sup> Indeed, this option was the one taken by the court in *Pinsker II* when it directed the society to reconsider its decision in accordance with fair procedure and declined to rule on Dr. Pinsker's admission on the basis of the judicial record.<sup>73</sup>

The implications for organizations such as professional societies and hospitals are significant and raise some difficult questions. As the relatively few decided cases indicate, proceedings with regard to applications for or expulsions from membership or staff privileges, if conducted at all, are conducted with great informality.<sup>74</sup> Probably, few organizations have been accustomed to compiling any detailed record of such proceedings.<sup>75</sup> In the light of *Pinsker I*, *Pinsker II*, and *Westlake*, any such proceedings may become the subject of a mandamus action if the individual applicant or member believes that the proceedings were arbitrary or unfair. Both the organization and the

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71. *Id.* at 830, 567 P.2d at 1179, 140 Cal. Rptr. at 459.

72. See *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952); *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal. 2d 134, 146-47, 231 P.2d 6, 12-13 (1951); *English v. City of Long Beach*, 35 Cal. 2d 155, 217 P.2d 22 (1950).

73. 12 Cal. 3d at 556-57, 526 P.2d at 264-65, 116 Cal. Rptr. at 256-57.

74. See, e.g., *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965); *Silver v. Castle Memorial Hosp.*, 53 Haw. 475, 497 P.2d 564, cert. denied, 409 U.S. 1048 (1972).

75. In *Westlake*, for example, a stenographic record was prepared. 17 Cal. 3d at 471, 551 P.2d at 413, 131 Cal. Rptr. at 93. This appears to be an exception.

individual therefore need to prepare a record that will be adequate for purposes of judicial review. If the labor cases are followed in other contexts, the right of the individual to such a record may well be imposed in the future.<sup>76</sup> Furthermore, the parties to such proceedings, and particularly the party who has the burden of proof, may require representation by a lawyer at the proceedings. A right to counsel probably will not be imposed by the courts in the foreseeable future;<sup>77</sup> nevertheless, without the participation of a lawyer the record is likely to be inadequate for purposes of judicial review. The result of inadequate records will be repeated remands for further hearings, as occurred in the *Pinsker* cases.<sup>78</sup>

A further problem is that private organizations, unlike state administrative agencies, lack subpoena power. As a consequence, their ability to procure the necessary evidence for a full record is hampered. Cases could arise in which the individual challenging organizational action seeks to present evidence to a court that he could not have presented in the administrative proceedings of the organization because he and the organization lacked any means of compelling testimony or the production of documentary or tangible evidence. For example, in proceedings of a medical society to exclude or expel a doctor because of treatment of patients that allegedly violates the society's rules of conduct, the testimony of the patients may be critical either to establish the violation or to aid the doctor's defense. The patients, however, cannot be compelled to appear at a hearing and may have no desire to do so voluntarily. The only form in which their evidence can be presented is hearsay. If the doctor later brings a mandate proceeding to challenge an adverse decision by the society's quasi-judicial tribunal, either party may wish to use the court's subpoena power to procure the testimony of the patients in court.<sup>79</sup>

In this situation, a court essentially has four alternatives, all of which present certain problems. First, the court may elect to refuse to consider the evidence because it was not presented to the organization's tribunal. This refusal would be contrary to the procedures

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76. See note 35 *supra*.

77. See note 36 *supra*. In *Anton v. San Antonio Community Hosp.*, the court held that permitting counsel only in the discretion of the hospital's judicial review committee was not offensive to the applicable standard of "minimal due process." 19 Cal. 3d 802, 826, 567 P.2d 1162, 1176, 140 Cal. Rptr. 442, 456 (1977).

78. In *Anton v. San Antonio Community Hosp.*, the court noted that the record might be inadequate for purposes of informed judicial review. 19 Cal. 3d 802, 825 n.24, 569 P.2d 1162, 1175, 140 Cal. Rptr. 442, 455 (1977).

79. See Sloss, *Procedural Due Process in Voluntary Associations*, 48 CAL. ST. B.J. 138, 143 (1973).

followed in review of state administrative action, in which presentation of evidence that could not have been presented to the administrative tribunal in the exercise of reasonable diligence is permitted. If a court in reviewing the proceedings of a private organization refuses to receive such evidence, it may be precluding relief in a situation in which the proffered evidence would show the organization's action to be arbitrary.

The second alternative is to receive and consider the evidence. This choice, however, forces the court to substitute its evaluation of the evidence for the expertise of the organization. In some cases, a serious interference with organizational autonomy could result. A third alternative, which would eliminate this potential interference, is to receive the evidence and then remand the proceedings to the organization for its consideration. The drawback to this sequence is the possibility of lengthy, cumbersome, and expensive proceedings.

A fourth alternative, which would probably require legislation, is to make subpoena power available to the parties to the administrative proceeding before the tribunal of the private organization. Such delegation is not unprecedented; essentially the same access to subpoena power has been granted by statute in California for arbitration proceedings.<sup>80</sup>

Except in rare cases, these problems should not prove too severe if the courts continue to recognize that the requirement of fair procedure is, as Justice Tobriner urged in *Pinsker II*, a flexible common law concept and not an extension of all the technical rules that have been applied in constitutional due process cases. In effectuating this distinction, the courts should be extremely hesitant to receive evidence that allegedly could not have been produced below. Certainly, one element of fair procedure that the courts should enforce is the obligation of the organization to make available any evidence within its command that is necessary to a fair determination of the issues. Hearsay evidence frequently can be an alternative to evidence that would be available only through the use of legal process. Of course, there may be situations in which the use of hearsay is manifestly unfair, but the test should be the fundamental fairness of the proceedings and not the technical rules of evidence. If these principles are applied, there should be very few cases in which judicial intervention to procure evidence through the use of the subpoena power would be deemed essential to fair procedure.

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80. CAL. CIV. PROC. CODE § 1282.6 (West 1973).

*Some Special Problems of Hospitals*

As one type of organization affected with the public interest, the hospital raises special problems that merit further consideration. The hospital-physician relationship probably has been more productive of litigation in recent years than any other type of organizational relationship. The decisions of most courts have established beyond doubt that hospitals are affected with the public interest.<sup>81</sup> Hospitals, however, are notably different from other organizations considered in this article, although these differences have not always been recognized by the courts.

The first difference is that hospitals, unlike professional societies and labor unions, do not generally occupy a monopoly position. Although in some rural areas or small communities there may be only one hospital, access to which is vital to the effective practice of medicine, in metropolitan areas there are usually a number of hospitals that often compete aggressively for the attention of doctors and, through them, for patients. Membership on the staff of a particular hospital, therefore, is not always a practical necessity for a physician, although membership on the staff of some hospitals certainly is.<sup>82</sup>

A second peculiar characteristic of hospitals is that their facilities are limited. A hospital has only a finite number of beds, operating rooms, and pieces of medical equipment. Its ability to expand its facilities may be restricted not only by economic constraints but also by federal and state regulations.<sup>83</sup> This inability to expand may dictate in some instances the need to restrict the size of the staff by arbitrary means in order to ration the use of limited facilities. The right of hospitals to reject applicants for membership on the basis of policies limiting staff size, without regard to qualifications, has been considered in some cases, with mixed results.<sup>84</sup>

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81. See note 54 *supra*. Some courts have treated hospitals' activities in admitting or excluding staff members as "state action," due to the hospitals' receipt of substantial public funds. See *Ascherman v. Saint Francis Memorial Hosp.*, 45 Cal. App. 3d 507, 512, 119 Cal. Rptr. 507, 510 (1st Dist. 1975).

82. Of course, denial of staff privileges at one hospital may trigger similar action by others. See, e.g., *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1st Dist. 1974).

83. See, e.g., National Health Planning & Resources Development Act of 1974, 42 U.S.C. §§ 300-300t (Supp. 1977); CAL. HEALTH & SAFETY CODE §§ 437-39.5, 1250-1315 (West 1970 & Supp. 1977).

84. See *Guerrero v. Burlington County Memorial Hosp.*, 70 N.J. 344, 360 A.2d 334 (1976); *Walsky v. Pascack Valley Hosp.*, 145 N.J. Super. 393, 367 A.2d 1204 (Ch. Div. 1976); *Davis v. Morristown Memorial Hosp.*, 106 N.J. Super. 33, 254 A.2d 125 (Ch. Div. 1969).

Third, most cases consider hospital staff membership to be a simple membership situation, similar to membership in other organizations. Hospital staff organization is, in fact, hierarchical and complex to a degree not evident in many other situations. Most large hospitals have categories of staff membership that carry with them various rights and responsibilities. Within these categories, many differing types of privileges may be granted or denied, such as permission to perform various surgical or medical procedures, with or without supervision by other members of the staff, and access to various specialized facilities.<sup>85</sup> Again, limitations in facilities, equipment, or auxiliary personnel and the need for proper administrative and professional supervision and monitoring, combined with growth restraints imposed by federal and state regulations, may compel the hospitals to restrict access to certain of these privileges.<sup>86</sup> A question arises as to the extent to which *Westlake's* requirement of a quasi-judicial remedy for exclusion from membership applies to access to these various privileges. If hospitals are required to provide such a remedy only for denial of staff membership, as opposed to privileges, the right to fair procedure may prove illusory. If, however, fair procedure requirements are applicable to every privilege that a hospital can grant or withhold, the functioning of the hospital may become so enmeshed in procedural complications that all efforts to control the quality of care in the institution will be frustrated.

Fourth, hospitals are subject to liability in tort for failure to select members of their medical staff with adequate care or for granting privileges to the unqualified.<sup>87</sup> The existence of a duty of care in selecting staff and in granting or terminating staff privileges, which is owed to the public using hospital facilities, is not necessarily inconsistent with a duty to the physician to follow fair procedure and refrain from arbitrary action. The hospital is faced on one side by potential claims by doctors for unfair or arbitrary exclusion or expulsion and on the other by claims of the patient for injury caused by the incompetence or negligence of practitioners who should have been excluded.

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85. Ludlam, *Physician-Patient Relations: The Role of Staff Privileges*, 35 LAW & CONTEMP. PROB. 879 (1970).

86. See notes 83-84 *supra*.

87. *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965); *Purcell v. Zimbelman*, 18 Ariz. App. 75, 500 P.2d 335 (1972); *Mitchell County Hosp. Authority v. Joiner*, 229 Ga. 140, 189 S.E.2d 412 (1972); Southwick, *The Hospital as an Institution — Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. W.L. REV. 429 (1973).

Fifth, the public is vitally affected by the hospital's ability to fulfill its function as a provider of effective and economical health care. Government has assigned to hospitals a key role in monitoring the quality of health care,<sup>88</sup> which hospitals cannot possibly perform if unduly restricted in their ability to select staff.

All of these factors distinguish hospitals from other organizations affected with the public interest. Professional societies, trade associations, and labor unions exist primarily to further the interests of their members. Hospitals exist primarily to treat the sick. The view embraced by some courts,<sup>89</sup> that a medical license in and of itself is, as a matter of course, sufficient to warrant the granting of hospital staff privileges, conflicts with this principal hospital objective. Despite this fundamental distinction in purpose, however, hospitals cannot be excused from the obligation of following fair procedure. It does not follow from this distinction, however, that arbitrary exclusions are required or should be tolerated.

Two current problems could be alleviated by relatively simple changes in statutes or hospital procedures. The first is the threat of dual tort liability, to the physician for wrongful exclusion from privileges or to the patient for failure to exclude unqualified practitioners. One aspect of this problem of liability could be corrected by legislation. In California, hospital medical staff boards and committees have a qualified exemption from liability for their quasi-judicial acts so long as they act in good faith and in accordance with written rules.<sup>90</sup> Under the holding in *Westlake*, however, this immunity does not extend to the institution itself. Because it is the hospital, not the members of its committees, which faces the prospect of dual liability, it should enjoy the same degree of immunity as individuals.

The large number of cases involving exclusion from medical staffs, many of which have resulted in decrees adverse to hospitals, suggests that hospitals have been slow to adapt to developing legal requirements. The second suggestion for alleviating hospitals' problems involves resolution of hospital-physician disputes by arbitration. Its advantages are (1) that in many instances it may be relatively quick and inexpensive, as compared to judicial proceedings, (2) that sensitive matters of professional reputation can be protected by the privacy

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88. See 20 C.F.R. §§ 405.1023, 405.1031 (1976).

89. See *Silver v. Castle Memorial Hosp.*, 53 Haw. 475, 487-91, 497 P.2d 564, 572-75 (concurring opinions), *cert. denied*, 409 U.S. 1048 (1972); *Porter Memorial Hosp. v. Harvey*, 151 Ind. App. 299, 279 N.E.2d 583 (1972); *McCray Memorial Hosp. v. Hall*, 141 Ind. App. 203, 226 N.E.2d 915 (1967).

90. CAL. CIV. CODE § 43.7 (West Supp. 1977).

of arbitration proceedings, and (3) there would be an opportunity to select a qualified corps of arbitrators who understand the technical problems of physician qualifications, the hospital's need to restrict certain privileges, and the requirements of fair procedure.

Arbitration provisions could be inserted in hospital medical staff bylaws, either as a substitute for some stages of the hospital's quasi-judicial procedure or as a final remedy after exhaustion of that procedure instead of resort to the court by means of a mandamus proceeding. Precedents sustaining binding arbitration provisions in other contexts<sup>91</sup> indicate that such bylaw provisions would be upheld.

#### Marin County Board of Realtors: Restraint of Trade v. Judicial Deference to Organizational Autonomy

Another significant decision by the California Supreme Court regarding the relationship between organizations affected with the public interest and their members is *Marin County Board of Realtors, Inc. v. Palsson*.<sup>92</sup> A number of cases, as well as the Tobriner and Grodin article have considered the organization's "monopoly" position as one important factor bearing upon its character as a "public interest" organization.<sup>93</sup> Most of the cases, however, are not, strictly speaking, restraint of trade cases. Monopoly is merely one element that the courts consider.<sup>94</sup>

*Marin County Board of Realtors* considered the problem of exclusion from membership in the strict context of an antitrust case, in this instance one arising under California's Cartwright Act.<sup>95</sup> In that case the rejected applicant for membership was excluded on the basis of a rule that denied membership to those who worked only part-time as real estate brokers or salespersons. Denial of membership precluded his employment by a member broker and denied him access to the board's multiple listing service, which controlled a substantial segment of the market in his community. The court, in an opinion written by Justice Mosk, held that the rule was invalid under the

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91. *E.g.*, *Madden v. Kaiser Foundation Hosps.*, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 822 (1976); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 484 P.2d 1397, 95 Cal. Rptr. 53 (1971).

92. 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976).

93. Tobriner & Grodin, *supra* note 1; *see, e.g.*, *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944); *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968); *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961).

94. *See* note 93 *supra*.

95. CAL. BUS. & PROF. CODE §§ 16720-27 (West 1964).



Cartwright Act, rejecting an argument that the Act did not apply to service businesses. The court further considered carefully whether the rule of reason or a *per se* rule<sup>96</sup> should apply to this situation. The strong overtones of boycott would seem to indicate that the restraint should be held to be illegal *per se* under the applicable Sherman Act precedents, which California courts follow in cases under the Cartwright Act. Nonetheless, the court concluded that the rule of reason should apply. The court argued that, if practices such as those in question were to be deemed boycotts which are illegal *per se*, then an association that provides any economic benefits to its members would be required to provide them to nonmembers, and professional trade associations would be required to admit anyone permitted by law to practice the particular trade or profession. Justice Mosk concluded that such an application of antitrust laws would not further the public interest.

The court cited *Pinsker I* to refute the argument that an association has an absolute right to choose its members. The court declined to follow the *Pinsker* cases, however, and it held that the orthodontic societies' rule that excluded a person practicing in association with an unqualified dentist was valid because it was reasonably related to a legitimate purpose of the society. The court in *Marin County Board of Realtors* held that if a rule poses "serious anti-competitive dangers to society," the application of the rule of reason requires not only a demonstration that the anticompetitive practice relates to a legitimate purpose, but also that it is reasonably necessary to accomplish that purpose and narrowly tailored to do so.<sup>97</sup>

Trade associations have long been the targets of antitrust suits.<sup>98</sup> Since the Supreme Court decision in *Goldfarb v. Virginia State Bar*,<sup>99</sup> which removed any doubts that professions were subject to the antitrust laws, professional associations presumably can look forward to

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96. The distinction, as explained by the court, is: "In general, only unreasonable restraints of trade are prohibited. However, 'there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' (Northern Pac. R. Co. v. United States) Among these *per se* violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." 16 Cal. 3d at 930-31, 549 P.2d at 839, 130 Cal. Rptr. at 7 (citations omitted).

97. *Id.* at 939, 549 P.2d at 844, 130 Cal. Rptr. at 12.

98. See McKay, *Trade Associations*, in ANTITRUST ADVISOR 393 (C. Hills ed. 1971).

99. 421 U.S. 773 (1975).

the same liabilities.<sup>100</sup> Undoubtedly, not every rejected applicant for membership in an organization affected with the public interest can make out an antitrust case. The *Marin County Board of Realtors* case presented peculiar factual elements. First, the organization occupied a strong monopoly position. Second, membership was, if not an absolute necessity, at least highly advantageous to a real estate salesperson. Finally, the organization had tied membership to other economic activities, specifically its multiple listing service, which tended to enhance its monopoly position.

In a sense, most organizations that offer any professional or occupational advantage to members restrain trade. Unless the organization admits all applicants, those who are rejected are inhibited to some degree in their ability to compete. For example, the court in *Pinsker I* found that membership in the orthodontic society was a practical necessity for an orthodontist. It follows that Dr. Pinsker's exclusion placed him at a competitive disadvantage.

The court in the *Marin County Board of Realtors* case refused to recognize any presumption in favor of the validity of an organization's rules. It distinguished *Pinsker II* on the ground that *Pinsker II* did not involve allegations of antitrust violations.<sup>101</sup> One interpretation of the case could be that Dr. Pinsker, or anyone in a similar situation, has only to utter the magic incantation "restraint of trade" to shift the burden to the organization, that then has the burden of proving its membership policy "relates to a legitimate purpose [and] . . . is reasonably necessary to accomplish that purpose and narrowly tailored to do so."<sup>102</sup> Possibly this reading of *Marin County Board of Realtors* is correct, but it is doubtful for at least three reasons.

First, in distinguishing *Pinsker*, the court refers to situations in which an exclusionary membership policy "poses serious anticompeti-

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100. The holding in *Marin County Bd. of Realtors* is not unique. The United States Justice Department has brought a number of antitrust proceedings against real estate boards and obtained consent decrees, which typically direct the organization to "admit to membership and to allow participation in its services to any person duly licensed by the appropriate governmental authority as a broker to sell real estate . . . provided such person or member meets and satisfies reasonable and non-discriminatory written requirements . . . ." *United States v. Metro MLS, Inc.*, [1974-2] TRADE CASES (CCH) ¶ 75,137, at 97,078 (E.D.Va. Aug. 5, 1974); *See United States v. Long Island Bd. of Realtors, Inc.*, [1972] TRADE CASES (CCH) ¶ 74,068, at 94,417-18 (E.D. N.Y. Aug. 1, 1972). Most of these cases, however, involve price-fixing, an element not mentioned in the *Marin County Board of Realtors* case.

101. 16 Cal. 3d at 938-39, 549 P.2d at 844, 130 Cal. Rptr. at 12.

102. 16 Cal. 3d at 939, 549 P.2d at 844, 130 Cal. Rptr. at 12.

tive dangers to society.”<sup>103</sup> Although every such policy may have some tendency to restrain trade, the court’s language suggests that the test involves more substantial anticompetitive effects. Second, the rule-of-reason antitrust decisions confirm this analysis. If the rule of reason, as opposed to a *per se* rule of illegality, is applicable there is authority for the proposition that substantial anticompetitive effects must be shown before the courts will find a violation.<sup>104</sup> Third, because the court in *Pinsker II*, decided in 1974, and in *Westlake*, decided in 1976, placed considerable emphasis on the presumptive validity of the organization’s rules, it would be inexplicable if, in 1976, the court meant to vitiate this presumption merely because a case was brought under a different legal theory.

The exact boundaries of the competing doctrines of the *Pinsker* cases and *Marin County Board of Realtors* will have to be clarified in subsequent decisions. Those applicants excluded from membership in organizations affected with a public interest presumably will allege restraint of trade in most cases, because their burden of proof is much less if the court applies the principles of *Marin County Board of Realtors*, rather than of *Pinsker*.

### Conclusion

Over 100 years ago, Oliver Wendell Holmes, Jr., observed: “It is the merit of the common law that it decides the case first and determines the principles afterwards. . . . Lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts, without being very clear on the *ratio decidendi*.”<sup>105</sup> Those individuals who make a lasting impact on our legal institutions, however, are the ones who are able to detect and verbalize the *ratio decidendi* on which the decisions of actual controversies are founded. Without this articulation of the principles underlying judicial action, the decisions of individual courts and judges are unlikely to have much impact beyond the parties and the particular state of facts involved in the single controversy that is at bench.

By this standard, Justice Tobriner’s contribution to the law governing the relationship between organizations affected with a public interest and their members must be viewed as significant. Probably most significant was the formulation in his 1967 article with Grodin

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103. *Id.*

104. 16 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS — ANTITRUST LAWS AND TRADE REGULATIONS § 6.02 (1969).

105. 5 AM. L. REV. 1 (1870).

of the criteria by which such organizations could be identified. His emphasis on the public character of the organizations in whose affairs the law should intervene has proved sound. Judicial decisions both before and after the publication of the *Tobriner* and *Grodin* article in 1967, although sometimes lacking in articulation of the principles applied, nevertheless sustain the concept of the organization affected with a public interest.

The second great insight that Justice *Tobriner* has brought to the law of member-organization relations is that, in analyzing the procedural aspects of these controversies, the courts must search not for due process but for fair procedure. By this insight, Justice *Tobriner* has freed organizations from the restrictions of legalistic forms and challenged them to be innovative in devising fair procedures that will be workable in their own particular environments. Finally, by his emphasis on judicial restraint in the review of organizational decisions, Justice *Tobriner* has given the organizations the assurance that, if they adopt fair procedures and follow them conscientiously, their efforts will not be vitiated by judicial activism.

Although these contributions may not have received great attention from the public or lawyers compared to other major judicial decisions of the past few decades, their importance should not be minimized. In spite of the ever expanding role of government, voluntary action and particularly joint action remains an important process by which social objectives are achieved. The types of organizations discussed here — labor unions, professional and trade associations, and private, nonprofit hospitals — illustrate some of the diverse and significant roles that voluntary organizations continue to perform.

The continued vitality of such organizations depends on at least two factors. On the one hand, the power that these organizations can exercise must be subject to reasonable social controls. This requirement is embodied in the characterization, "affected with a public interest." Too great an interference in their autonomy, however, will tend to destroy their character as voluntary organizations. Organizations function through the voluntary, often uncompensated efforts of their members and their leaders. In part these efforts are motivated by tangible advantages that the individuals involved receive from the organization, but intangible feelings of loyalty to the organization undoubtedly are a major factor. Too great an interference with organizational autonomy tends to destroy the sense of organizational identity which creates such loyalties.

The balance between adequate social control and preservation of organizational autonomy is a delicate one, but its maintenance is vital if voluntary organizations are to survive and continue to play an important role in our society. Justice Tobriner has demonstrated his sensitivity to the delicacy of this balance. If the principles that he has delineated continue to be followed, they will do much to preserve voluntary organizations as a vital and responsible force.