Towards Freedom of Choice in Organizational Membership

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Alfred Avins*

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I. CURRENT INFRINGEMENT ON FREEDOM OF ASSOCIATION

Attacks on individual freedom of choice and association in the name of "equality" and "brotherhood" have proceeded apace in the last half dozen years. Never has such a concerted effort been made to force together those whom individual inclination have put asunder. The dismal record is worth some re-examination.

High on the list must come the assaults on fraternities and sororities. As early as 1954 it was held constitutional for New York State's university to ban social organizations which discriminated based on race, creed, or color.1 In 1957 the University of Massachusetts ruled that no new fraternities or sororities would be permitted which did not accept students because of race, color, or creed, and that local chapters of established or national groups which had restrictive membership would be eliminated unless the restrictions were lifted within three years.2 California University regents followed suit in 1959.3

Other fraternities and sororities which faced reprisal because of restrictive membership have been located at the University of Iowa,4 Wesleyan University,5 Dartmouth College,6 University of Wisconsin,7 Wil-


2. Statement of Trustees and Administration of University of Massachusetts, 2 RACE REL. L. REP. 510 (1957).
3. Regents of the University of California, Statement on Student Organizations and Housing, 4 RACE REL. L. R. 803 (1959); 5 CALIF. ADM. CODE, EDUCATION, § 954.6 (1959), reprinted in 5 RACE REL. L. R. 537 (1960); Statement of the University of California, 8 RACE REL. L. R. 1245 (1963). See also N. Y. Times, July 19, 1959, at 9, col. 7.

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Williams College, Wayne State University, Stanford University, Lake Forest College, Yale University, Rutgers University, Cornell University, Bowdoin College, and The University of Illinois. Northwestern University, while conceding the right of fraternities and sororities to choose their own members, took action against local chapters of national organizations which restricted membership based on race, religion, or ethnic origin, so that these chapters would not be bound by national restrictions. In spite of the clear evidence that many students support such restrictions, as well as fraternity officials generally, college administrators in many schools seem determined to enforce restrictions on discrimination.

College students have not been alone in being the subject of anti-discrimination drives. In 1959, a private tennis club in New York City was the subject of a lengthy investigation by city officials for allegedly excluding Ralph J. Bunche, Under Secretary of the United Nations, on racial grounds. A long dispute about the "40 and 8", an American Legion "fun and frolic" subsidiary, because it would only accept white members, finally resulted in a court action in which a California judge refused to permit the national group to revoke the charter of a local chapter for accepting a Chinese-American as a member, or to charter an all-white chapter, telling the members to read the United States Constitution.

In California, Connecticut, New Jersey, and New York, pri-

18. See N.Y. Times, Nov. 21, 1962, at 11, col. 8, reporting a poll at the University of Michigan, in which 57 per cent of fraternity members favored religious restrictions.
21. N.Y. Times, July 9, 1959, at 1, col. 4; id., July 12, 1959, at 62, col. 3; id., July 15, 1959, at 1, col. 3; id., July 16, 1959, at 29, col. 8; id., July 18, 1959, at 1, col. 4; id., July 22, 1959, at 17, col. 2.
Private golf clubs have been banned from using municipal golf courses because they would not accept Negro members. A yacht club in Chicago was barred from public facilities for the same reason. A Protestant Episcopal minister went so far as to bar from communion any of his parishioners who had sanctioned the exclusion of a convert from Judaism from a country club Christmas dance.

Another tactic used to pressure private clubs has been well publicized resignations and attacks on them by high public officials. Attorney-General Robert F. Kennedy, Assistant Secretary of Labor George C. Lodge, Secretary of Labor Arthur J. Goldberg, Ambassador to India John K. Galbraith, and Mayor Robert F. Wagner of New York City have been among such officials. These resignations have not been mere private protests, but have been used as public sounding boards. Even the very "liberal" New York Times conceded the right of these clubs to discriminate as they saw fit, and suggested that political profit rather than intellectual piety produced the sudden flurry of self-righteous withdrawals. Public officials have also been told not to appear at functions where Negroes were barred.

Attacks on private clubs have not spared those of tender age. A New Jersey municipal human relations commission investigated a local Girl Scout and Brownie group to uncover discrimination. A spelling bee was also the subject of charges of excluding Negroes. Nor does a gratuitous and public-spirited service to the community by a private organization carry any guarantee of exemption from molestation on account of admission policies. Thus in the New York City suburbs, volunteer fire com-

31. See N.Y. Times, May 1, 1961, at 28, col. 1 (editorial):
    Mr. Goldberg was critical of a Washington club which, he believes, excludes some foreign diplomats because of their color. The club loses some good company on this account, as does any similar organization which shuts people out for bad and foolish reasons. But we cannot pass laws requiring private clubs to take in all who apply. See N.Y. Times, Feb. 14, 1962, at 32, col. 2 (editorial):
    We are not impressed by the parade of ostentatious resignations of political figures from private clubs on the sudden discovery that these clubs practice racial or religious discrimination in choosing members... when everyone else has known that the same clubs have practiced the same discrimination for years. It is just possible that some grand-standing for political purposes may be involved. We have nothing but contempt for the policy of a club that automatically refuses acceptance to a man because of his race or religion. But we suppose that even the contemptible, who consciously and deliberately advocate bigotry, have their right under the Constitution of a free country to form clubs in which they associate only with their chosen peers.
32. See N.Y. Times, April 28, 1961, at 19, col. 3; id., Nov. 10, 1961, at 26, col. 3.
34. N.Y. Times, Jan. 25, 1962, at 20, col. 5.
panies, which save the taxpayers thousands of dollars by substituting for a paid fire department, have recently been under attack for excluding Negroes as members.36 Ironically, the public service which these organizations render to the community, by being on call to fight fires, day and night, without pay, has been turned against them, and lawsuits have been brought to compel them to admit Negro members on the theory that they are governmental agencies.37

Attacks on the right of private organizations to choose their membership as they themselves decide show no signs of abating. In an aggravated incident, a Wisconsin judge was picketed at his home by massive groups of Negro demonstrators and white sympathizers to force him to withdraw from a fraternal order open only to white persons.38 N.A.A.C.P. youth officials promised to extend similar demonstrations throughout the Midwest.39 The New York City Human Rights Commission recently took jurisdiction of a complaint by a white physician that he was denied membership in a Negro medical society, and issued subpoenas requiring the society's officers to appear and testify.40

The Virgin Islands has probably gone further than any other jurisdiction in infringing on freedom of choice in organizations. It bans racial or religious discrimination by any private club which makes a charge for food, drink, or anything else, or has a swimming pool or other facility.41 Apparently, if a bridge foursome should meet regularly, and the members should "chip in" for a bottle of soda water, it would be illegal for the group to discriminate based on race or religion. Lest it be thought that government would never reach down so far, it might be noted that complaints of discrimination have recently been aired against bridge clubs, even though it appears that Negroes and white persons prefer to stay in segregated clubs even where desegregation has occurred, because "they find greater 'camaraderie' in their own groups."42


No employer or labor union . . . shall make any differentiation among employees or members on the basis of race, religion, color, national origin, or ancestry with respect to attendance at, or participation in, social events which are directly or indirectly sponsored by the employer or labor union for the benefit of employees or members.

41. 10 Virgin Islands Code, §§ 2, 3 (1957). See also N.Y. Times, May 7, 1961, at 130, col. 3; id., May 29, 1961, at 3, col. 4.

Are discriminatory clubs violating the rights of rejected applicants? This article will explore what the courts have thought about this subject to see whether current attacks on organizational freedom of choice can be deemed justified from a legal point of view.

II. SOCIAL ORGANIZATIONS

The earliest cases to deal with admission to organizations of a social nature involved membership in religious organizations. Authority is now uniform that courts will not interfere with admission to religious groups of any kind. A New Hampshire case ruled:

The action of the society, in refusing to admit some of the plaintiffs to membership, cannot be controlled or restrained by an injunction of the court. The right of admission to membership is voluntary and mutual between the society and individuals desiring to become members. No one can be compelled to join the society or remain a member in it against his wish, nor can the society be compelled to admit any one against its will, fairly expressed at a regular meeting by a majority vote. This principle is inherent in every voluntary association.

Fraternal organizations may likewise exclude whomever they choose, even on the most arbitrary grounds. The chief attraction of such a group may be "snob appeal," and arbitrary exclusions may be in reality the sum and substance of the group. Exclusion of Negroes was justified on this ground alone in one case. Courts may not interfere with mem-


44. Richardson v. Union Congregation, 58 N.H. 187, 189 (1877). In First Parish in Sudbury v. Stearns, 38 Mass. (21 Pick.) 148, 153 (1838), the court held:

No person can be made or become a member of any such corporation, without his consent . . . . So on the other hand no person can thrust himself into any such body against its will. The authority to prescribe the mode of admitting members, necessarily implies the power of determining whether they shall be admitted or not. This power may be exercised by a direct vote of the parish, or by proper by-laws be delegated to a committee or certain officers of the society. The relation of a member to a parish is founded on contract; and can be created in no way but by the agreement of the parties.


[T]here is no 'abstract right' to be admitted to membership in a voluntary association . . . . and a court will not compel the admission of a person to membership in such an organization who has not been elected according to its rules and by-laws . . . .

bership restrictions by social clubs, although these, too, may be wholly capricious. One club was allowed to restrict its membership to men, although it appears that exclusion of women was wholly arbitrary.

The fact that a group has a common tie, interest, or activity, which might serve as the basis for a reasonable set of qualifications for admission, does not disable the organization from selecting its members without regard to these standards, even when the group owns valuable property. Thus, literary clubs or historical societies may admit whom they like, and need not confine their examination of the candidate for membership to his intellectual attainments. It has been held that a club of university women need not admit Negroes to membership. An athletic association may bar competent athletes from its events, even when they are world-renown. The courts cannot review the refusal of a Y.M.C.A. or Y.W.C.A. to admit a person to membership. Even the

We refer to the right of the complainants to maintain their order with that degree of exclusiveness as will limit its membership, not only to Masons of high standing, but to white persons only. It cannot be denied that one of the chief values, and one of the strongly attractive features, of complainants' order consists in the fact that none but white males are entitled to its benefits. In thus restricting the rights of membership, the order has violated no legal right of any person excluded. It is not a question of ethics or moral or religious rights, or even of race discrimination. Nor yet is there any question of equal protection of law involved. The principle is precisely the same as though a society was organized limiting its membership by high tests of learning, skill, or the like. Clearly, the right to maintain such high standards of membership, followed by the consequent honors incident thereto, would be a valuable right capable of protection through the courts . . . . The rule would be the same if the facts were reversed and the negroes were complaining.

286 S.W. at 181.

47. Stewart v. Monongahela Valley Country Club, 177 Pa. Super. 632, 112 A.2d 444 (1955). In Sebastian v. Quarter Century Club, 327 Mass. 178, 179, 97 N.E.2d 412, 413 (1951), the court said: "The rule is that an organization, whether incorporated or not . . . is not required to admit to membership every qualified person who makes application . . . ."

In 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), the Superior Court of New Jersey pointed out:

Many authorities cited by the defendant society deal with fraternal and social organizations, emphasizing with great particularity that in organizations of such character the right of election and selection of membership has been reserved to them as a matter of law. It is well settled that in this latter class of organizations membership may be increased or decreased at will, without regard to standards, arbitrariness or otherwise, and without judicial interference.


54. In Leeds v. Harrison, 7 N.J. Super. 558, 569, 72 A.2d 371, 377 (1950), the court declared:

Counsel for the defendants argue that a voluntary association may require such qualifications for membership and such formalities of election as it may choose and that it may limit or restrict its membership to the original organizers or any other limited number, and cites numerous cases as authority.

It must be admitted that the proposition advanced by defendants is a correct
American Legion, if it arbitrarily refuses to admit a person to membership, is immune from judicial examination. If it arbitrarily refuses to admit a person to membership, is immune from judicial examination.55 It has been held that even groups of a civic or political nature can choose their members as they like.56 In McKane v. Adams,57 the New York Supreme Court declared:

The defendants have the right to associate themselves, for political purposes, with whom they will; and any number of them may, at any time, decline to act longer with persons objectionable to them. The court cannot compel the defendants to attend a meeting with the plaintiff, nor restrain the defendants from meeting by themselves, or with others, for political objects.58

On appeal, the Court of Appeals agreed, saying:

And if they would and will not associate with him, upon what reasoning or principle should they be compelled to, and the aid of a court of justice invoked? . . . It is by reason of the action, and of the assent of the members of the voluntary association, that one becomes associated with them in the common undertaking, and not by any outside agency, or by the individual's action. Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently, and then enforced. So when . . . the committee refused to admit him as a member, or to confirm his election, he was remediless against that refusal.59

exposition of the law. It must also be conceded that the court has no jurisdiction to compel the admission of a person to membership in a voluntary organization who has not been elected according to its rules and by-laws. The court does not exercise visitatorial powers over a voluntary association . . . .

55. In Chapman v. American Legion, 244 Ala. 553, 556, 14 So.2d 225, 228 (1943), the court quoted 7 C.J.S. Associations § 23 (1937) and

The grant or refusal of membership in a voluntary association is a matter within the complete control of the organization, which has the power to enact laws governing the admission of members, and to place restrictions on the right of admission.

In other words, membership is a privilege which the society may accord or withhold at its pleasure, and a court of equity will not interfere to compel the admission of a person not regularly elected, even though the arbitrary rejection of the candidate may prejudice his material interests . . . .


57. 51 Hun. 629, 4 N.Y. Supp. 401 (1889).

58. Id. at 402.

59. McKane v. Democratic Gen. Comm., 123 N.Y. 609, 25 N.E. 1057 (1890). The court also said:

We have in such an association what we must assume to be the voluntary organization of citizens, moved only by patriotic considerations in an endeavor to strengthen their party, and to promote its interests by organized and systematic work . . . . How can it be said that in such work anything like a contract relation subsists, or that there can be any obligation confining the free exercise of the personal rights of citizens? Shall they not be free to reject as an associate, or as an officer of their association, one whose character, aims, or record may, in their judgment, fall below the standard of loyalty or of integrity demanded by the work in which they are engaged, or who, for any cause satisfactory to their minds, is
The fact that the private organization uses government facilities should not make any difference. Accordingly, it has been held that a private club does not violate the Fifth Amendment by being racially exclusive even if it receives some government aid.\(^6\) The Constitution protects individuals against action by the government, federal, state, and local. It does not give individuals the right to associate with other individuals without the consent of the latter, and that consent may be withheld for reasons which the government could not give. The New York Supreme Court has pointed out:

The argument on constitutional, as distinguished from statutory, grounds is that the exclusion of a member from the American Legion because of his political opinions would constitute an invasion of the rights of free speech guaranteed by federal and state constitutional provisions.\ldots{} Such constitutional provisions protect the individual against action by governmental authorities; they do not give the individual a right to insist on membership in a private association, to whose members his views, whether or not denominated political, may be obnoxious.\(^6\)

The authorities are therefore uniform that exclusion from a social organization, even on arbitrary grounds, does not violate the rights of anyone. There is no legal wrong to be redressed by such exclusion.

### III. Professional Groups Generally

It is a well settled rule that professional associations have an unfettered right to restrict their membership as they like. For example, it has been held that a bar association may refuse to admit whomever it cares to exclude,\(^6\) and the power of a bar association to exclude Negro lawyers has been ruled upon, against the applicant.\(^6\) Likewise, an educational association cannot be compelled to admit members against its will.\(^6\) In a case involving music composers a federal court said:

unfit for the position of leadership he demands to occupy? Surely such propositions would seem to contain their own refutation.

\textit{Id.} at 1058.


62. State \textit{ex rel.} Cotonio \textit{v.} Louisiana Bar Ass'n, 111 La. 967, 968, 36 So. 50, 51 (1904) held: "Courts have no jurisdiction to compel the admission of a person, not elected according to its rules and by-laws, to membership in a voluntary association \ldots{}"


64. North Dakota \textit{v.} North Central Ass'n, 23 F. Supp. 694 (E.D. Ill. 1938), \textit{aff'd}, 99 F.2d 697 (7th Cir. 1938), where the district court said:

In churches, lodges, and all other like voluntary associations each person, on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization \ldots{} Consequently, such an organization is the judge of its own members, and membership therein is a
I find that ASCAP is a private association; that its rules and by-laws define the manner and means upon which it admits composers to membership; that no one has an absolute right to be a member; that it has the sole power to say who shall belong and who shall not. That refusal to admit plaintiff to membership is not an invasion of his rights and gives him no right of action against ASCAP thereby.65

Trade associations likewise have complete freedom to reject applicants for membership on any grounds whatever.66 For example, a chamber of commerce cannot be required to accept anyone who applies, even if he meets reasonable standards for membership.67 An exchange is equally free to accept or reject applicants without restriction on its discretion.68 In one case involving an advertising agency, the Texas Court of Civil Appeals quoted an American Jurisprudence Annotation and pointed out:

Membership in a voluntary association is a privilege which may be accorded or withheld and not a right which can be gained independently and then enforced. The courts cannot compel the admission of an individual into such an association, and if his application is refused he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion.69

A cooperative association may also limit its membership arbitrarily,70 unless because of its franchise it has a statutory duty to admit new subscribers.71 Speaking of a telephone association, a New York court accordingly explained:

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67. Barazani v. Brighton & Manhattan Beach Chamber of Commerce, 20 Misc. 2d 844, 846, 194 N.Y.S.2d 426, 428 (1959), where the court pointed out: "There is no rule of law anywhere which gives power to a court to compel admission of an individual into such an association, and if his application is refused he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion."70
68. W. G. Press & Co. v. Fahy, 313 Ill. 262, 145 N.E. 103 (1924); American Live-Stock Comm'n Co. v. Chicago Live-Stock Exch., 143 Ill. 210, 233, 32 N.E. 274, 279 (1892) ("a court of chancery will not undertake to force upon a corporation of this character a member, against the will of those whose duty it is to pass upon applications for membership."); Cline v. Insurance Exch., 140 Tex. 175, 180, 166 S.W.2d 677, 680 (1942) ("A voluntary association has the power to enact rules governing the admission of members and prescribing certain qualifications for membership . . . .")
71. See Myers v. Lux, 76 S.D. 182, 75 N.W.2d 533 (1956) (A public service cooperative engaged in furnishing electricity may be required to admit new members).
Such membership is a privilege which the association may accord or withhold at its pleasure, and a court of equity has no jurisdiction to compel the admission of a person not regularly elected, even though, as in the case of a political organization or labor union, the arbitrary rejection of the candidate may prejudice his material interests.\textsuperscript{72}

\textbf{IV. MEDICAL SOCIETIES}

The general rule in the United States has traditionally been that a voluntary medical society is free to admit or refuse to admit an applicant for membership on whatever grounds it deems justified,\textsuperscript{73} and "exclusion from any selective group of high-standard professionals leaves the rejected ones without desired kudos and prestige—but no court has ever taken it on itself to review such selections."\textsuperscript{74} A California court has observed that "membership in such an association is not a right that can be demanded but is a privilege that may be granted or withheld on the terms and conditions imposed by the association..."\textsuperscript{75} In the same vein, a federal court held:

\begin{quote}
The mere fact that the medical society is not merely a social or fraternal organization, but an active and effective instrumentality benefiting its members, does not necessarily require that organization to admit to membership any qualified person who seeks its undeniable benefits. The analogy of the medical society to a labor union drawn by plaintiff is no doubt apt, but the banding together of persons of common interest in a free society is so commonly done for almost every conceivable interest that such united action, in whatever sphere of human activity, can be classed as characteristic of, rather than repugnant to, a free
\end{quote}


\begin{quote}
Membership in a voluntary association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The courts cannot compel the admission of an individual into such an association, and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion.
\end{quote}

\textsuperscript{74} Salter v. New York State Psychological Ass'n, 14 N.Y.2d 100, 198 N.E.2d 250, 253 (1964). In Harris v. Thomas, 217 S.W. 1068, 1076-77 (Tex. Civ. App. 1920), the court said:

\begin{quote}
A voluntary association has the power to enact laws governing the admission of members and to prescribe the necessary qualifications for membership... Membership therein is a privilege which the society may accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interest.
\end{quote}

society and free trade. . . . The alleged economic activity of the medical associations, though it may have a profound effect upon other men of the profession as well as upon laymen, is no more contrary to any law or decision cited or founded by the court than the same sort of activity of other groups. Nor does the court find any law or decision requiring such groups to admit to membership any person who may be as well qualified as the present membership.  

But an exception has been carved in the foregoing rule where the medical society has the power to license physicians to practice medicine  

Thus, it has been held that although a dental society could normally choose whom it wanted as a member when it has no governmental functions, where by statute it had a voice in the selection of dental examiners, it became a quasi-governmental agency and had to admit all dentists on reasonable terms. Accordingly, a federal court held:

> Except for the Acts of the Georgia Legislature above quoted, the Georgia Dental Association and the Northern District Dental Society would have the undoubted right to admit only such persons as they desired, and could, without violating any law, exclude Negroes from membership.  

More recently, several courts have taken the position that where a medical society does in fact, although not in law, have control over the practice of medicine in a particular area, it should be treated as a public utility and not a mere voluntary society and should be required to admit all applicants who meet reasonable qualifications and standards. The theory behind these cases is that the society has an economic stranglehold on the profession, which makes it essentially different from a voluntary 

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> An individual is free to choose his associates and voluntary private association of individuals is free to choose its members. A court will not and cannot compel admission of an individual into a voluntary association, membership being a privilege and not a right. This is true no matter what may be the reason or the motive for the denial of membership.


80. Kronen v. Pacific Coast Soc'y of Orthodontists, 46 Cal. Repr. 808, 816 (Dist. Ct. App. 1965), where the court also said:

> As a general rule membership in a voluntary association is a privilege which may be granted or withheld by the association at its pleasure, not an enforceable right, and the courts will not interfere to compel admission to membership, no matter how arbitrary or unjust may be the rejection of the candidate.

81. See Group Health Co-op, v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951). Note also Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1022-23 (1930); Note, Expulsion and Exclusion from Hospital Practice and Organized Medical Societies, 15 Rutgers L. Rev. 327 (1961).
club or organization. The Supreme Court of New Jersey explained that "in the light of its virtual monopolistic control of the practice of medicine in the area, the County Society must be dealt with as involuntary in nature and subject to judicial scrutiny. . . ."

In none of these cases was it suggested that discrimination based on race, color, or creed alone could be forbidden, and, indeed, all of these cases dealt with other kinds of discrimination. Because of the monopolistic control over medical practice, a universal rule was applied that the society could not arbitrarily discriminate in refusing to admit applicants. But this rule is exceptional. It does not apply unless there is an economic domination of the profession.

V. LABOR UNIONS

The earliest case to deal with the right to be admitted to membership in a union treated a labor organization as if it were a private club. Thus, the New Jersey Chancery Court explained:

[N]o case can, I think be found where the power of any court has been exercised, as sought in this case, to require the admission of any person to original membership in any such voluntary association. Courts exist to protect rights, and where the right has once attached, they will interfere to prevent its violation; but no person has any abstract right to be admitted to such membership. That depends solely upon the action of the society. . . .

Another New Jersey court declared:

It would be quite impractical for the courts to undertake to compel men to receive into their social relationships one who was personally disagreeable, whether for good or bad reason. . . .

84. Mayer v. Journeymen Stone-Cutters Ass'n, 47 N.J. Eq. 519, 20 A. 492, 494 (1890). See also Cameron v. International Alliance of Theatrical State Employees, 118 N.J. Eq. 11, 21, 176 A. 692, 697 (1935):

Trade union membership, like other contractual relationships, is purely voluntary on both sides. Such organizations come into being for purposes mutually agreed upon. The cohesive force is the common interest. Their right to prescribe qualifications for membership and to make rules and regulations for the transaction of their lawful business is not open to question. They may impose such requirements for admission and such formalities of election as may be deemed fit and proper; they may restrict membership to the original promoters, or limit the number to be thereafter admitted; the power of such a body to make its membership exclusive is incident to its character. The underlying theory of such combinations is association mutually acceptable, or in accordance with regulations agreed upon. Enforced admission to membership is manifestly contrary to the scheme of such a society. No person has an abstract or absolute right to such membership.
[Courts] cannot, by a mandatory writ, intrude one man's companionship on another. The attempt to do so would be unavailing, as it would lead only to the disintegration of the association.\(^85\)

For many years, the rule was uniform that labor unions, like other voluntary associations could arbitrarily reject candidates for membership, and this is still the rule today in a number of jurisdictions.\(^86\) In Massachusetts, it was even held that a union which maintained a closed shop need not admit all qualified applicants.\(^87\) Federal law did not alter this rule.\(^88\) Since unions were able to arbitrarily bar white applicants, the courts held that they could discriminate on racial grounds and bar Negroes.\(^89\) The United States Court of Appeals for the Sixth Circuit explained: "The Brotherhood is a private association whose membership policies are its own affair. . . .\(^90\) The Supreme Court of Wisconsin quoted an American Jurisprudence Annotation in pointing out:

Like other associations, trade unions may prescribe qualifications for membership. They may impose such requirements for admission and such formalities of election as may be deemed fit and proper. Moreover, they may restrict membership to the original promoters, or limit the number to be thereafter admitted. No person has an abstract or absolute right to membership. . . .

Membership in a voluntary association is a privilege, which may be accorded or withheld, and not a right which can be

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85. Frank v. National Alliance of Bill Posters, 89 N.J.L. 380, 381, 99 A. 134, 135 (1916). In Wilson v. Newspaper Union, 123 N.J.Eq. 347, 197 A. 720, 722 (1938), the court remarked that "A union may restrict its members at pleasure . . . ." Accord, Carroll v. Local 269, 133 N.J.Eq. 144, 145, 31 A.2d 223, 224 (1943): "Our courts do not exercise visitatorial powers over voluntary associations or their proceedings, and that this court has no jurisdiction to compel the admission of a person, not elected according to the rules and by-laws, to membership in a voluntary association."

86. United Nuclear Corp. v. N.L.R.B., 340 F.2d 133 (1st Cir. 1965); Moynahan v. Pari-Mutuel Employees Guild, 317 F.2d 209 (9th Cir. 1963); State ex rel. Givins v. Superior Court, 233 Ind. 235, 238, 117 N.E.2d 553, 555 (1954) ("Membership in an unincorporated association . . . is a privilege and is neither a civil nor property right"); Radio Station KFH Co. v. Musicians Ass'n, 169 Kans. 596, 220 F.2d 199 (1950); Thorn v. Foy, 328 Mass. 337, 103 N.E.2d 416 (1952); Lowery v. International Bhd. of Boilermakers, 241 Miss. 458, 467, 130 So.2d 831, 836 (1961) ("It is well-settled law that clubs and societies, including labor unions, have the right to establish their own rules, and qualifications for membership"); Yeager v. International Bhd. of Teamsters, 39 Wash. 2d 807, 239 P.2d 318 (1951).


90. Oliphant v. Brotherhood of Locomotive Firemen, 262 F.2d 359, 363 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959), where the court held that racial discrimination in membership by a federally certified union does not violate the Fifth Amendment.
gained independently and then enforced. The courts cannot compel the admission of an individual into such an association, and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be this exclusion.

It may be disadvantageous to an individual not to be chosen for membership in a voluntary association but the courts hitherto have been powerless to compel the association to receive him. His exclusion has not been a wrong of which the courts have cognizance. . . .

The court added:

[we] find nothing in Wisconsin law denying to a labor union a legal right to determine the eligibility of its membership, nor can we find this court charged with a duty, or a right, to compel such a union to take in applicants who are unacceptable for any reasons, color among them, and thereby turn voluntary associations into involuntary ones.

However, a number of commentators observed that unions, because of their economic power, were different from social clubs and fraternal organizations where questions of sociability were decisive, and should be required to admit all applicants on reasonable terms. California was the first state to draw this distinction. The rule in that state had originally been the same as the rule elsewhere; a union could arbitrarily discriminate in selecting its members. But in the leading case of James v. Marinship Corp., decided in 1944, the Supreme Court of California said:

In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.

92. Id. at 532, 82 N.W.2d at 320.
96. Id. at 731, 155 P.2d at 335.
While the foregoing case dealt with racial discrimination, the California Supreme Court soon made clear that any employee's "right to protection against arbitrary and discriminatory exclusion from union membership should be recognized wherever membership is a necessary prerequisite to work." The rule that a union could not maintain both a closed shop and a closed union was applied when white workers were denied admission arbitrarily for reasons other than those of race, color, or creed such as personal friendship, dislike, or favoritism. Thus, the California courts went from a rule giving no protection to a worker who was arbitrarily refused the right to join a union, to a rule giving all workers the right to join unions, subject only to reasonable qualifications for membership, and granting a remedy in all such cases. Thus, applicants who were arbitrarily refused admission all received equal protection.

Other jurisdictions also altered their law to provide that a union with a closed shop or union security agreement could not arbitrarily refuse to accept applicants for membership. If a union could not limit its membership to white workers, neither could it give preference to sons of members. An Ohio court explained:

A union may restrict its membership at pleasure; it may, under certain conditions, lawfully contract with employers that all work shall be given to its members. But it cannot do both.

The experience in New York has been somewhat peculiar. Until the beginning of World War II, unions in New York were treated like social clubs, and could decline to admit any applicant for any reason or no reason. One case noted:

100. Carroll v. Local 269, 133 N.J.Eq. 144, 31 A.2d 223 (1943); Wilson v. Newspaper Union, 123 N.J.Eq. 347, 197 A. 720 (1938); See also N.L.R.B. v. Hotel Union, 320 F.2d 254 (3d Cir. 1963).
There is no rule of law anywhere which gives power to a court to compel a membership corporation or a voluntary association to accept an applicant as a member of such bodies, and there is no doubt that defendant was within its legal rights in rejecting plaintiff's application for membership.
The court added:
Whether to grant or refuse membership in a voluntary association is a matter under
It is well settled law in this state that a labor organization, being an unincorporated body, has a right to refuse admission of members to its ranks and may do so even if such a refusal is arbitrary. . . . Membership is a privilege and not a right. The defendant could have refused membership, limited or unlimited, to the plaintiff and such refusal could not have been reviewed by the courts. . . .

New York law permitted a union to maintain both an arbitrarily closed membership and a closed shop. The rule that unions could discriminate for any reason whatever was applied irrespective of the reason for rejection.

In 1940 New York passed a statute making it illegal for a union to refuse membership because of race, color, creed, or national origin. In Railway Mail Association v. Corsi the New York Court of Appeals noted that if the association were not a labor organization, it "would be free to admit to or exclude from membership such persons as it chose, for good reason, for bad reason or for no reason." But the court found that the association engaged not only in fraternal activities, but also lobbied on behalf of postal workers, its members, for better pay and working conditions. It therefore held that the group was a labor organization covered by the act, even though it manifestly could have neither a closed nor a union shop, since government employment is open to everyone. The court accordingly applied the statute to a completely voluntary organization of federal postal workers having no economic power to shut off jobs. The United States Supreme Court affirmed the New York court in holding the statute constitutional.

The result was a striking anomaly. If a person was discriminated against by a union because of race, color, religion, or ethnic origin, typically a Negro, he could obtain relief from the state even where the union was entirely voluntary and had no economic power over his job. But if he was a white person discriminated against for other arbitrary reasons, such as politics or personality, he was utterly helpless, even if, by a complete control of the organization itself, and the ruling is not subject to review by the courts.

Id. at 92, 205 N.Y.S. at 445.


106. In Murphy v. Higgins, 12 N.Y.S.2d 913, 915 (1939), aff'd, 260 App. Div. 854, 23 N.Y.S.2d 552 (1940), the Supreme Court declared: "[T]he court will not decree that the union shall permit non-union men to be employed where there is an existing 'closed shop' contract with the employers. Nor will the court compel a union to accept anyone for membership irrespective of the cause for refusal." Accord, Acierno v. North Shore Bus Co., 173 Misc. 79, 17 N.Y.S.2d 170, 171 (1939): "Under the present state of the Law, the court cannot compel a union to accept anyone for membership, irrespective of the cause for refusal and even though such refusal may be arbitrary."

107. N.Y. CIVIL RIGHTS LAW, art. 4, § 43 (1940).


109. Id. at 321, 56 N.E.2d at 724.

closed shop, rejection of his application for membership prevented him from working.

This situation has been only partially alleviated in New York. In 1947, in one case where a union admitted only sons of members, the Supreme Court declared:

It is undoubtedly the law of this State that the courts have no control of the membership of labor unions and that persons may be excluded therefrom without reason other than race, color, creed, or national origin.\textsuperscript{111}

In a cryptic opinion, which is virtually unintelligible, the Appellate Division reversed this holding, and the Court of Appeals affirmed the reversal without opinion.\textsuperscript{112} Lower courts have interpreted this decision to mean that a closed union cannot also maintain a closed shop. Accordingly, it was held that a union which admitted only sons of members could not maintain a union shop. The union would have to choose between a union shop and reasonable admission standards or a closed union and an open shop.\textsuperscript{113} Thus, a union could not discriminate based on sex, if that were arbitrary, and it had a closed shop.\textsuperscript{114}

But if the union does not maintain a closed shop, then aside from grounds of race, color, creed or national origin, the law in New York still is that "membership in a labor union, despite its economic importance . . . is still regarded as a privilege which may be granted or withheld by a union."\textsuperscript{115} Thus: "It has been the law in this state for many years that a union cannot be compelled to admit strangers to membership."\textsuperscript{116}

VI. SUMMARY AND CONCLUSIONS

What is freedom of choice in organizations, and what constitutes a violation thereof? In this author's opinion, it is a violation of freedom

\begin{itemize}
  \item Clark v. Curtis, 71 N.Y.S.2d 55, 56 (1947).
  \item Clark v. Curtis, 273 App. Div. 797, 76 N.Y.S.2d 3 (1947), aff'd, 297 N.Y. 1014, 80 N.E.2d 536 (1948).\textsuperscript{117}
  \item Colson v. Gelber, 192 Misc. 520, 80 N.Y.S.2d 448, 449 (1948). In Feinne v. Monahan, 196 Misc. 407, 92 N.Y.S.2d 112 (1949), it was held:
    The plaintiff . . . complains of his arbitrary exclusion from membership in the defendant union and his resultant inability to obtain employment at his trade in the city or vicinity, due to the union's control of employment and the unavailability of positions to those not members in good standing of the defendant union. He repeatedly requested the defendant to let him work if it would not admit him to membership, but the union arbitrarily denied each such application . . . . Membership in a labor union is a privilege which the law in this state permits a union to deny, however worthy the applicant and unfortunate his economic plight because of his exclusion . . . . In the final analysis the sole grievance is the refusal to admit the plaintiff to membership. The law does not regard such refusal as actionable.
  \item Ryan v. Simons, supra note 113, at 252.
\end{itemize}
of choice and association for any private organization, club or society to elect to membership, or otherwise to extend any privileges or facilities to any person, in violation of its constitution or by-laws, over the objection of any member who insists upon the restriction in the constitution or by-laws. The member may have joined in reliance on the provision not being violated, and is entitled to insist on the restriction unless it is changed in the manner set out for its amendment.

It is likewise a violation of freedom of choice for a group to elect to membership or otherwise grant to any person facilities or privileges, either over the objection of a parent group or one with which the club is affiliated, in violation of its constitution or by-laws, or that of the parent or affiliated group. The reason for this is that the parent group may have chartered the chapter, or the affiliated group may have made the affiliation, in reliance on the membership restriction which has been violated, and they should be entitled to insist on the benefits or conditions of their recognition of the local group. It is equally a denial of freedom of choice for a group to elect to membership any person, in violation of its established practices, over the objection of a majority of its members, although this is only likely to occur through outside pressure.

Finally, it is a denial of freedom of choice to require any person to join any private organization which contains as members any person he chooses not to associate with. And it is even a greater denial of freedom of choice for any governmental agency or private institution, such as a business corporation or university, to require any organization to commit an infringement on freedom of choice.

If there were no Negroes in the United States it is doubtful that anyone would quarrel with the foregoing principles. They are certainly in accordance with the common-law as it has developed regarding clubs and societies in the United States. It is true that very recently medical societies and labor unions which have obtained economic monopolies have been treated as public utilities and required to admit all applicants on reasonable terms. But these are essentially different from voluntary organizations, as has been pointed out. One case explained:

Certain conduct, which might not justify expulsion from some other type of association, where membership is a condition to earning a livelihood, or essential to the enjoyment of a contract or property right, may justify expulsion from a private social club, which usually has the primary purpose of affording pleas-

ant, friendly, and congenial social relationship and association between the members.\textsuperscript{118}

In respect to organizations which do not have economic monopolies, it has never been suggested that the right to admit or refuse members arbitrarily be curtailed, except in respect to race, color, creed, or ethnic origin. But the Constitution of the United States was not created especially for people discriminated against on these grounds. It was created equally for all people, and when a state bans some types of arbitrary discrimination and permits all others assuming such discrimination is arbitrary), it is clearly not an enforcement of equal protection of the laws; rather, it is a denial of equal protection.\textsuperscript{110} It is simply an example of special privileges for the favored groups who are given a legal remedy while all other persons discriminated against have no remedy.

But discrimination in selection for private clubs and societies is not arbitrary. Rather, it is the very essence of the group. No better illustration of this fact can be found than the recent recognition by City College of New York of its first Negro fraternity\textsuperscript{120} and its first Negro sorority.\textsuperscript{121} If Negroes object to exclusive, social relations and crave integrated clubs, they are perfectly free to combine with like-minded white persons to form inter-racial clubs. For example, a suburb of New York City recently granted a permit for an inter-racial golf and country club headed by Jackie Robinson, the former Brooklyn Dodger.\textsuperscript{122} Judge Wilkin, for the United States District Court for the District of Columbia, has put the matter very well, saying:

\begin{quote}
People of any race, religion, or political faith may assemble and
\end{quote}

\textsuperscript{118} Waugaman v. Skyline Country Club, 277 Ala. 495, 172 So.2d 381, 382 (1965).
\textsuperscript{119} Avins, Fourteenth Amendment Limitations on Banning Racial and Religious Discriminations: The Original Understanding, in Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, on S. 3296 (Civil Rights), 89th Cong., 2d Sess. 805 (1966).
\textsuperscript{120} N.Y. Times, Dec. 18, 1965, at 19, col. 4.
\textsuperscript{121} N.Y. Times, Nov. 5, 1966, at 22, col. 7.
\textsuperscript{122} N.Y. Times, Oct. 23, 1966, at 20, col. 3. For a similar club in Philadelphia, see N.Y. Times, March 5, 1967, at 21, col. 1.
associate for the advancement of their interests. No sound public policy would destroy the interesting diversity of life. If the aim and end of democracy should be to reduce all men to the same shape and shade and common opinion, then it could not and should not survive. It would counter one of the fundamental principles of evolution.

It is apparent to any person of fair mind that, if the defendant Association wishes to represent and to speak for all the lawyers of the District, then in all fairness it ought to make all lawyers eligible for membership. If it does not do so, then members of the bar who champion the proposed amendment ought to unite with other members of like mind and organize an all-inclusive bar association for the District which would be authorized to speak and act for all persons admitted to practice before the United States District Court.

The defendant Association, for a long time, has restricted its membership, and some of its members emphasize that object and purpose of the Association which is "to increase the mutual improvement and social intercourse of its members." If they feel that the social purposes of a limited membership are of more importance than being the agency of the entire bar of the District, their wishes and desires should not be overridden or denied except by action of the Association taken in accordance with the By-Laws.123