

Common Law Rights for Private University Students: Beyond the State Action Principle

During the last decade the Fourteenth Amendment's guarantee of due process has been judicially extended to encompass university disciplinary proceedings¹ which may result in a student's expulsion or suspension from a public school.² In general, a student at a public

1. Cases illustrating the reasons for which students have been summarily suspended or expelled include: *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957) (student expelled, under catalog regulation permitting such action for appropriate reason, for protesting the amount of his graduate fellowship); *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924) (student suspended under the in loco parentis doctrine for raucous behavior); *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958) (student dismissed from a student teaching position, required for his degree, because he was a "fanatical atheist"); *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186 (1866) (student suspended for joining secret society); *McClintock v. Lake Forest Univ.*, 222 Ill. App. 468 (1921) (student expelled for smoking); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928) (student expelled on a few vague rumors of misconduct and for not being a "typical Syracuse girl"); *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y.S. 739 (1902) (student expelled from law school for writing to a woman in class); *Samson v. Trustees of Columbia Univ.*, 101 Misc. 146, 167 N.Y.S. 202 (Sup. Ct.), *aff'd*, 181 App. Div. 936, 167 N.Y.S. 1125 (1917) (student expelled for speech encouraging draft resistance); *People ex rel. Cecil v. Bellevue Hosp. Med. College*, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct. 1890), *aff'd*, 128 N.Y. 621, 28 N.E. 253, 14 N.Y.S. 490 (1891) (student forbidden to take final examination for undisclosed reasons); *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966) (student suspended for violating driving regulations and for general misconduct). See also Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); articles cited in note 6 *infra*.

2. *Dixon v. Alabama St. Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (students entitled to a due process hearing with notice and statement of the charges before disciplinary action of expulsion may be taken; such hearing should include the right of cross-examination and access to testimony against the student); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967) (due process at the Merchant Marine Academy only requires a fair hearing, an appraisal of the charges pending, and an opportunity for defense; counsel is not required); *Lai v. Board of Trustees of E. Carolina Univ.*, 330 F. Supp. 904 (E.D.N.C. 1971) (university officials, after a "fundamentally fair proceeding," may use their discretion in disciplinary matters, absent a showing of bad faith or arbitrariness); *Gardenhire v. Chalmers*, 326 F. Supp. 1200 (D. Kan. 1971) (due process procedure is one fundamentally fair to the student and calculated to lead to a reliable determination of the issue involved; suspension reversed pending a hearing with adequate notice, knowledge of the charges, an opportunity to defend, and substantial evidence to support the decision); *Consejo General de Estudiantes v. University of Puerto Rico*, 325 F. Supp. 453 (D.P.R. 1971) (due process hearing under disciplinary rules may be held in private if it is fair and offers the accused an opportunity to appear and defend himself); *Bistrick v. University of S. Carolina*, 324 F. Supp. 942 (D.S.C. 1971) (due process requirements at state supported schools are met by a fair procedure which includes notice, knowledge of the evidence against the student, an opportunity to be heard in his own defense, and a decision based on substantial evidence); *Speake v. Grantham*, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971) (university may make reasonable regulations if they are sufficiently clear to give adequate notice of the punishable conduct; the court also listed due process hearing requirements and procedures for such a hearing); *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala. 1969) (state supported university may not issue regulations aimed at prior restraint of free speech, nor aimed at restricting the free flow of ideas to members of the university community); *Breen v. Kalil*, 296 F. Supp. 702 (W.D. Wis. 1969) (absent a showing which bears the heavy burden of proving the effects of such conduct on school performance, a school board

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university is now guaranteed notice in writing of the specific charges against him and of the nature of the evidence on which they are based; a hearing must be held at which the student may give explanations and present evidence in his behalf; and any disciplinary action taken must be supported by substantial evidence.³ Constitutional protection against arbitrary expulsion or suspension, however, extends only to those actions attributable to the state⁴ and is therefore unavailable to students at private universities.⁵

may not forbid male high school students from wearing long hair, and any such regulation violates due process); *Marzette v. McPhee*, 294 F. Supp. 562 (W.D. Wis. 1968) (students faced with suspension are entitled to notice of the charges, an opportunity to inspect statements against them, the right to the advice of counsel, to hear the evidence, to be given the names of witnesses, and to have a recorded hearing as the basis of any decision); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 702 (W.D. Mo. 1968) (disciplinary actions against students must be based on factual findings supported by substantial evidence); *Schiff v. Hannah*, 282 F. Supp. 381 (W.D. Mich. 1968) (accused student is entitled to notice and the opportunity to reply as part of a fair hearing); *Zanders v. Louisiana St. Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968) (students in disciplinary proceedings are entitled to notice, knowledge of adverse testimony, and an opportunity to defend themselves; under these conditions, the administration may exercise discretion, absent a showing of arbitrary action); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 397 U.S. 31 (1970) (university desiring to discipline students must give them adequate notice and a fair hearing on specific charges, and decisions must be based on substantial evidence; equal protection guarantees against unreasonable classifications also apply); *Esteban v. Central Mo. St. College*, 277 F. Supp. 649 (W.D. Mo. 1967) (implicit in due process requirements are notice and an impartial hearing, and accused students should have the right to see opposing testimony, have the aid of counsel, cross-examine witnesses, and present a defense), *dismissed on the merits*, 290 F. Supp. 622 (W.D. Mo. 1968) (university may make and enforce reasonable regulations, if students are afforded due process hearings, and the decisions are based on substantial evidence), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Wright v. Texas Southern Univ.*, 277 F. Supp. 110 (S.D. Tex. 1967) (university required to use due diligence to give students notice of charges, but actual notice not required if due diligence is used), *aff'd*, 392 F.2d 728 (5th Cir. 1968); *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967) (students' First Amendment rights protected, and suspension of a student, even following a hearing, for the peaceful exercise of such rights held unconstitutional); *Hammond v. South Carolina St. College*, 272 F. Supp. 947 (D.S.C. 1967) (university may not issue regulations which are blanket restrictions on First Amendment rights to freedom of speech and assembly); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (due process includes at least the right to notice of the charges and an opportunity to defend before suspension attaches).

3. *Farrell v. Joel*, 437 F.2d 160, 162 (2d Cir. 1971); *Dixon v. Alabama St. Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968) (en banc rules of court), *adopted in Farrell v. Joel, supra*.

4. The Fourteenth Amendment requires due process only for deprivations of property which are attributable to "state action." See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); Black, *Foreword: State Action, Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69 (1967). The federal courts have interpreted "property" to include the right to attend college, or to be free from arbitrary and illegal expulsions. See, e.g., *Dixon v. Alabama St. Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (state university); *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D. N.Y.), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (public high school). These cases establish that public secondary schools and state universities come under the state action doctrine.

5. Actions of universities not run by the state or funded by state monies, and which do not hold themselves out as state universities, have been held *not* to be actions of the state. *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974); *Grafton v.*

This lack of judicial protection for students' procedural rights at private universities has been sharply criticized by both students and legal commentators,⁶ but the courts have largely refrained from taking up the gauntlet and formulating the legal doctrine⁷ under which they could protect students from arbitrary expulsions. This judicial reluctance may be due in part to the fact that the commentary has not been adequate to the task. Much of the literature has merely tested the rationales commonly used by the courts;⁸ no fundamental analysis

Brooklyn Law School, 478 F.2d 117 (2d Cir. 1973); *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971); *Bright v. Isenbarger*, 445 F.2d 412 (7th Cir. 1971); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Braden v. University of Pittsburgh*, 343 F. Supp. 836 (W.D. Pa. 1972); *Brownley v. Gettysburg College*, 338 F. Supp. 725 (W.D. Pa. 1972); *Rowe v. Chandler*, 332 F. Supp. 336 (D. Kan. 1971); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970); *Counts v. Voorhees College*, 312 F. Supp. 598 (D.S.C. 1970); *Torres v. Puerto Rico Jr. College*, 298 F. Supp. 458 (D.P.R. 1969); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968); *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), *dismissed as moot*, 412 F.2d 1128 (D.C. Cir. 1969); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962). *But see* *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970) (New York statute affecting student discipline involved the state in expulsions sub judice); *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965) (state's participation in initial funding of school rendered school an instrumentality of the state at least for purposes of prohibiting racial discrimination); *Belk v. Chancellor of Washington Univ.*, 336 F. Supp. 45 (E.D. Mo. 1970) (private university's performance of public function of education may amount to state action when, by failing to keep order, it prevents students from participating in the educational process). *See also* H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1969). The anomaly of giving protection to public but not private school students is strikingly illustrated by *Powe v. Miles*, *supra*, where Alfred University students, being enrolled in a private university, discovered they had no procedural rights under the Constitution as the case was argued. Students at the New York State College of Ceramics, however, located on the same campus and administered by the same personnel, were guaranteed procedural rights under the Fourteenth Amendment because the action of their school constituted state action.

Nevertheless, the courts are probably wise in their reluctance to apply full constitutional protection to the private university setting, for application of the enormous array of duties demanded by the Constitution—only one of which involves due process—would accomplish too much. Full application might, for example, raise questions about establishment or free exercise of religion, and might serve to undermine the advantages of diverse educational experiences which a variety of private universities can offer.

6. The mass of literature on this subject is collected in Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 612-13 (1968). Particularly significant articles are: Carrington, *Civilizing University Discipline*, 69 MICH. L. REV. 393 (1971); Pennypacker, *Mandamus to Restore Academic Freedom*, 12 VA. L. REV. 645, 652 (1926); Seavey, *supra* note 1; Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969); Note, *Private Government on Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963). *See generally* LAW STUDENT DIV. OF THE AM. BAR ASS'N, *MODEL CODE FOR STUDENT RIGHTS, RESPONSIBILITIES & CONDUCT* (1969).

7. Those who have tried to formulate the doctrine have focused on attempts to color state action into the actions of a private university, a fiduciary theory, a critique of the contract theory, and a critique of the in loco parentis theory. Note, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795. *See, e.g.*, Note, *supra* note 6, at 1377-87.

8. A recent Note, for example, reexamines the contract theory, and concludes that a registration form could contain a term permitting the administration to expel a student summarily which would be enforceable under the law of contracts. Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 267 (1973).

of the nature of the student's interest and the protection sought has been forthcoming.⁹

To guarantee students procedural due process at private as well as public universities would be quite consistent with the goals of university life.¹⁰ The student accused of cheating on an exam, possessing drugs, participating in an unruly demonstration, or violating dormitory rules would be given a reasonable chance to establish his innocence, thus promoting the cause of ferreting out the truth.¹¹ Perhaps more importantly, due process guarantees would also benefit the university as a whole by serving to legitimize the exercise of authority by the administration,¹² thereby fostering a sense of community on campus which is conducive to an effective educational environment. In times of a major disturbance or an emotionally charged incident, the orderly procedures of mandatory due process can temper an administrator's impulse to impose rash penalties¹³ and also provide him with a shield to fend off cries from outside the university for hasty retaliation.

9. Chafee begins such an analysis, but his conclusion with regard to private schools is ultimately inadequate. Thus, his formulation of a law of private associations includes competing "policy reasons" for determining whether a member should in fact receive protection in a specific case. While it would seem that the student-university relationship would satisfy all the tests toward granting judicial protection for students in expulsion proceedings, Chafee himself is equivocal on the point. Compare Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1026 (1930), with *id.* at 1028. In fact, Chafee concludes his article by saying that whether a member of an association should receive protection against arbitrary expulsion depends upon instinctive reactions to the parties in the controversy. See *id.* at 1029. See Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95, 106-17 (1973) (tests the student-university relationship against Chafee's policy reasons, and concludes that all the tests toward granting students judicial protection are satisfied); Note, *supra* note 6 (tests several rationales used by courts and indicates that courts should have great freedom within these rationales to protect students' rights).

10. A 1970 survey indicated that most (70 percent) of the colleges that responded (25 percent of the total number) had formal procedures for disciplinary actions. Better than half (57 percent) of those who responded indicated that they allowed the accused to inspect the evidence to be used against him. Project, *Procedural Due Process and Campus Disorder: A Comparison of Law and Practice*, 1970 DUKE L.J. 763, 811-18. See also *Wahba v. New York Univ.*, 492 F.2d 96, 102 n.6 (2d Cir. 1974); LAW STUDENT DIV. OF THE AM. BAR ASS'N, *supra* note 6, §§ 2D-E, at 44-51.

11. See *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1065 (1968).

12. Ratner, *supra* note 11, at 1065: "But [fair trial values] also promote expeditious and authoritative decision in order to conserve public and private resources, reduce public and private anxiety, and heal sources of social disaffection."

13. Cf. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972); *United States v. Cassagnol*, 420 F.2d 868, 878 (4th Cir.), *cert. denied*, 397 U.S. 1044 (1970); *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965).

The student has a valuable interest in preserving his status¹⁴ as a university student, and expulsion, whether by public or private university officials, can have severe consequences which may handicap the student for the rest of his life.¹⁵ Nevertheless, not all interests which may be deemed valuable receive the protection of the law. The task is to demonstrate convincingly that the interest claimed merits protection, not merely in the abstract, but also within the concrete structure of the developing law.

This Note reexamines the common law precedent on student expulsions and suspensions and seeks to formulate a comprehensive doctrinal basis for common law judicial intervention which will realistically protect the procedural rights of public and private university students alike. Analysis of the rationales by which we select, among the values we prize, those which deserve judicial protection provides the doctrinal basis for determining whether the status of student merits such protection. Two rationales will emerge which characterize those interests which have historically been accorded judicial protection. It is urged that students at a private university have, under these two rationales, an interest in their status as students which is in the nature of a property right.¹⁶ On the basis of this analysis, the student's status may then be protected within a category of specific relations over which the common law has exercised judicial cognizance, the status of member in a private association.

14. Status is used here not in the mundane sense of social position within a community, but as a valuable interest derived from a relation with another person or institution, in this case a university. Professor Reich has pointed out that certain status interests today are often more valuable than tangible forms of wealth. Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964). "Student," in fact, is nothing but a status.

15. *Dixon v. Alabama St. Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Goldwyn v. Allen*, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 905 (Sup. Ct. 1967).

16. It is not necessary to adopt, or reject, the label of "property" for the valuable interest analyzed in this Note, the status of student at a private university. If property is viewed as a legal term encompassing a set of analytically similar interests which receive a certain form of judicial protection, then those interests of status which are protected may be considered property. Professor Reich's compelling argument demonstrates the logical and practical wisdom of viewing certain status interests as property with regard to constitutional rights. See Reich, *supra* note 14. Reich suggests himself that a similar analysis may be necessary to protect other new forms of wealth, such as status rights in private organizations. *Id.* at 786; cf. *Becker v. Reick*, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct. 1959) (plaintiff's loss of services of his minor child, though predicated on negligence, is in the nature of an infringement on a *property* right). Indeed, historically the category "property" has been extended from land to include intangible assets as forms of wealth have changed. See J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 11-46 (1924). Nevertheless, if property is viewed in a more limited way, excluding status and relational interests which receive judicial protection, the argument advanced here is equally persuasive, for it is based on an analysis of the rationales for protecting any dearly held value, regardless of the legal category into which it is placed. See Reich, *supra* note 14, at 739. The substantive basis for the argument, if not the legal category, is the same in both instances.

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I. The Rationale for Protecting an Interest as Property

One legal institution which protects individual or social values against arbitrary deprivation by the state or privately held power is "property."¹⁷ It performs this function, as Professor Reich suggests, by drawing a circle around the owner: Inside he is supreme, protected against arbitrary deprivation and unreasonable injury. To speak of an article of social or personal value as "property," however, is merely to make the legal conclusion that it is protected; it says nothing, that is, about *what* interests should be protected.¹⁸

Analysis of this more basic issue has received comparatively little attention from courts and commentators. With the notable exception of two landmark law journal articles,¹⁹ much legal reasoning has proceeded simply by rough analogy to precedent.²⁰ Elucidation of the purposes of property rights in general has been largely historical, with little development of an underlying rationale and little application of any suggested rationale to decisions concerning specific interests or rights clamoring for similar protection.

Examination of the rationale for protecting any particular dearly held value as property will provide the basis for a rational evolution of the law. It will give us a perspective from which we can judge whether legal protection encompasses the student-university relationship. As social life changes, valuable interests change, and there is pressure on the law to protect the new ones as well.²¹ Conceptually,

17. See generally M. COHEN, *Property and Sovereignty*, in *LAW & THE SOCIAL ORDER* 45, 46-49 (1933); R. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH* 96-108, 220-21 (1914); Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1, 17-20 (1943) [hereinafter cited as Pound, *Survey*]; Pound, *Interests of Personality*, 28 *HARV. L. REV.* 343, 344-49, 353-54 (1915) [hereinafter cited as Pound, *Personality*].

18. Reich, *supra* note 14, at 739, 771.

19. *Id.*; Pound, *Personality*, *supra* note 17.

20. See, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (property right in water level); *International News Serv. v. Associated Press*, 248 U.S. 215 (1918) (property right in news information); *Chicago Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905) (property right in commercial information); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (property right in land granted by a former sovereign); *Pearson v. Dodge*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969) (property right in information); *American Ag. Chem. Co. v. Moore*, 17 F.2d 196 (M.D. Ala. 1927) (property interest in commercial expectations); *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900) (property interest in trademarks); *Stephens & Co. v. Albers*, 81 Colo. 488, 256 P. 15 (1927) (property interest in a captive fox); *Evans v. Merriweather*, 4 Ill. (3 Scam.) 492, 38 Am. Dec. 106 (1842) (property interest in riparian rights); *Schley v. Couch*, 155 Tex. 195, 284 S.W.2d 333 (1955) (property interest in buried money); *Van Dyke v. Ogden Sav. Bank*, 48 Utah 606, 615-16, 161 P. 50, 54 (1916) (property right in cancelled checks).

21. Pound, *Personality*, *supra* note 17, at 343-44 n.2. In fact, "the history of law is a record of continually wider recognition and more efficacious securing of social interests." R. POUND, *THE SPIRIT OF THE COMMON LAW* 207 (1921); Pound, *Survey*, *supra* note 17. Nevertheless, the law does not create rights (*i.e.*, recognize new interests) willy-nilly. To prevent chaos and keep the development of the law rational, courts are constrained by precedent and operate by analogy.

the problem for any legal system is to decide which interests to recognize and secure. An understanding of the principles upon which this choice is based is necessary if the law is to be rational—that is, not to include interests which do not comport with the principles and not to exclude those which do.²² To place the student-university relationship among those interests which deserve judicial protection, therefore, will require a fundamental analysis of the nature and purpose of the legal concept of “property,” and analogy to related interests which already receive such protection.

A. *Enterprise-Worth and the Student-University Relationship*

The gradual freeing of land from the burdens of feudal obligations to make it available for commercial agriculture is the historical foundation of the modern law of property.²³ The necessity of *vesting* individuals with wealth (*i.e.*, protecting them against arbitrary deprivation) thus emerges as an integral part of the economic organization of society. Shorn of its feudal restraints and vested in individuals, land became available for use and exploitation for the sole benefit of the owner.²⁴ As the complexity of economic organization grew, forms of wealth other than land became similarly exploitable. When it became evident that incorporeal interests such as good will were often as valuable to the individual, and as essential to economic activity, as land, physical plant, and assets, the law began to protect such interests from unreasonable injury under the shield of “property.”²⁵ This evolution came to encompass even unrealized interests in the form of commercial expectations,²⁶ not because of any fundamental

22. See Pound, *Personality*, *supra* note 17.

23. See J. COMMONS, *supra* note 16, at 47-53; B. MOORE, *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 4-14 (1966).

24. J. COMMONS, *supra* note 16, at 61.

25. See generally Pound, *Personality*, *supra* note 17, at 349-55; Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

26. The common law has long protected a vast array of status rights involving economic expectations from unreasonable injury or deprivation under the law of tort. Examples include the following four torts: 1) inducing breach of contract and interfering with contractual relations, *Beekman v. Marsters*, 195 Mass. 205, 80 N.E. 817 (1907); *Raymond v. Yarrington*, 96 Tex. 443, 73 S.W. 800 (1903) (knowingly inducing a party to violate contract is as wrong as to injure or destroy his property); W. PROSSER, *TORTS* § 129, at 932 nn.88, 89 (4th ed. 1971); Green, *Relational Interests*, 30 ILL. L. REV. 1, 8-15 (1935); Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923); 2) injurious falsehood, *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951); *Al Raschid v. New Syndicate Co.*, 265 N.Y. 1, 191 N.E. 713 (1934); W. PROSSER, *supra*, § 128, at 919 nn.49-56; 3) interference with prospective advantage, *Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1926) (unwarranted interference with social opportunities); *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 53 A. 230 (Ch. 1902) (protecting probable expectancies); *Temperton v. Russell*, [1893] 1 Q.B. 715; W. PROSSER, *supra*, § 130, at 949-69; *Wright, Tort Responsibility for Destruction of Goodwill*, 14 CORNELL L.Q. 298 (1929); 4) interference with employment, *Hill Grocery*

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change in the nature of property or the rationale for protecting it, but because of a change in economic reality: What was of little value before, and of little importance to economic life, assumed enormous significance later.

The underlying rationale in this development was summarized by Professor Pound:

Legal recognition of . . . individual claims against the world at large, legal delimitation and securing of individual interests of substance is at the *foundation* of our *economic organization* of society. In civilized society men must be able to assume that they may control, for purposes beneficial to themselves, what they have discovered and appropriated to their own use, what they have created by their own labor and what they have acquired under the existing economic and social order. This is a jural postulate of civilized society as we know it. The law of property in the widest sense, including incorporeal property and the growing doctrines as to protection of economically advantageous relations, gives effect to the social want or demand formulated in this postulate.²⁷

At the root of legal protection, then, is the notion that an economic system like ours requires confidence²⁸ that the individual has mastery

Co. v. Carroll, 223 Ala. 376, 136 So. 789 (1931) (property right in job); Boxill v. Boxill, 201 Misc. 391, 111 N.Y.S.2d 33 (Sup. Ct. 1952) (status of partner requires duty to associate even if partnership is terminable at will of either partner); McDonald v. Feldman, 393 Pa. 274, 142 A.2d 1 (1958); Dorrington v. Manning, 135 Pa. Super. 194, 4 A.2d 886 (1939); Blumrosen, *Common Law Limitations on Employer Anti-Union Conduct: Protection of Employee Interest in Union Activity by Tort Law*, 54 NW. U.L. Rev. 1 (1959); Green, *Relational Interests*, 29 ILL. L. REV. 1041 (1935). See also Howard v. Weissmann, 31 F.2d 689 (7th Cir. 1929) (union's membership in superior union protected status); Eschman v. Huebner, 226 Ill. App. 537 (1922) (damages for malicious expulsion); Collins v. International Alliance, 119 N.J. Eq. 230, 182 A. 37 (Ch. 1935); Cameron v. International Alliance, 118 N.J. Eq. 11, 176 A. 692 (App. 1935) (voided classification in union constitution relegating certain members to junior status); Pittsburgh Ry. Co. v. Kinney, 95 Ohio St. 64, 115 N.E. 505 (1916) (enforcement of conventional status despite express agreements to the contrary); Note, *Application of a Status Concept to Membership Disputes in Labor Unions*, 45 YALE L.J. 1494 (1936). In addition, noncontractual economic expectations are given a more limited protection against malicious interference. Green, *Relational Interests*, 30 ILL. L. REV. 1, 15-20 (1935). The similarity between these protected rights and the student-university relationship, of course, is that both involve interests in future economic advantage.

While it is generally stated that one party to a contract cannot bring an action in tort against the other party for interference with the contractual relationship, if an agent of one party interferes maliciously then such interference is outside the scope of his agency and hence is treated as if it were the action of an unrelated party. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS*, §§ 6.5, 6.12, at 489-91, 516 (1956). Indeed, if a university administrator, as an agent of the university, acts maliciously in expelling a student, *i.e.*, acts in bad faith for a motive not based on the interests of the university, by analogy this cause of action in tort would directly apply to university expulsions; *cf.* cases cited in note 97 *infra*.

27. R. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 193 (1922). See Pound, *Survey*, *supra* note 17, at 25, 30-31, 33-36.

28. J. COMMONS, *supra* note 16, at 25.

over interests considered his own to use as he sees fit, that he can control the fruits of his labor, and that promises relating to his property will not encounter malicious interference. Thus, valuable interests, even unrealized interests in the form of commercial expectations, are protected as property when they, as a class, are perceived as important for rational economic life. If it is perceived that these interests have substantial enterprise-worth, *i.e.*, that they are valuable to the individual because of their economic consequences, the law of property will protect them against unreasonable injury.²⁹ Some courts have expressly recognized this premise in cases granting members of labor unions and professional associations protection against arbitrary expulsions without fair proceedings.³⁰

The rationale for protecting against arbitrary deprivation those interests which have enterprise-worth is clearly applicable to a student's relationship with a university. By applying to a university, being accepted, and continuing to meet certain academic standards, a student has a status which entails a reasonable expectation of receiving a degree. That this status has economic consequences today is beyond doubt. The federal courts have recognized as much in expulsion cases involving public universities, where there was no question of whether the students had been deprived of a property right but only of whether there was sufficient state action involved so that the cases fell within the Fourteenth Amendment.³¹

Social scientists have documented some of the quantifiable economic consequences of a college or graduate degree. Herman Miller indicates

29. It is to be carefully noted that the law itself does not affirmatively grant or create "enterprise-worth" interests but only grants legal coercive protection to those interests once obtained by private citizens. Pound, *Personality*, *supra* note 17, at 343-44.

30. *See, e.g.*, Local No. 57, Painters, Decorators & Paperhangers v. Boyd, 245 Ala. 227, 235, 16 So. 2d 705, 712 (1944) (wrongful and malicious interference with valuable property right, not only as a member of a national organization, but as an individual seeking to earn a livelihood); Swital v. Real Estate Comm'r, 116 Cal. App. 2d 677, 679-80, 254 P.2d 587, 588-89 (1953) (membership in an unincorporated professional society . . . is a valuable right, and . . . may not be terminated except by strict adherence to the fundamental requirements of the law . . . expulsion which flouts the requirements of substantial justice is void and cannot divest petitioner of *status* as a member of the Realty Board) (emphasis supplied); Ellis v. AFL, 48 Cal. App. 2d 440, 445; 120 P.2d 79, 81 (1941) (right to enjoy whatever advantages membership in this union would bring them in their calling could not be taken away by the unlawful action of the general executive board); Virgin v. American College of Surgeons, 42 Ill. App. 2d 352, 192 N.E.2d 414 (1963) (wrongful expulsion has such serious effects on ability to earn livelihood that it is judicially protectable); *cf.* Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969) (where membership in orthodontics association is a practical necessity, not only to make a good living, but to maximize potential and recognition in the field, admission proceedings must comport with due process).

31. *See* cases cited in note 4 *supra*. *See generally* Anderson v. Regents of the Univ. of Cal., 22 Cal. App. 3d 763, 99 Cal. Rptr. 531 (1972); Galton v. College of Pharm'l Science, 70 Misc. 2d 12, 332 N.Y.S.2d 909 (Sup. Ct. 1972).

that, on the average, people have received a higher income for every additional level of schooling in each decade since 1939, without exception.³² In addition, each degree higher than a B.A. increases income; most higher degrees require a bachelor's as a prerequisite. Completing any level of education and receiving a degree, furthermore, yields a greater return than simply completing any of the years leading up to graduation.³³ Although he doubts the extent to which education alone is responsible for these statistics, Christopher Jencks admits that higher education has predictable benefits both in expectations of higher salaries (an increase of seven percent per year of college) and higher occupational status.³⁴ Expulsion from a university, especially insofar as it makes admission to other universities impossible, denies a student access to large numbers of middle class occupations and professions; at the very least, it permanently mars his record, making competition for graduate school and jobs extremely difficult.³⁵ Granting the student's status at a university protection under the shield of property would prevent such expulsions without fair proceedings, and would be consistent with the rationale of protecting as property those valuable interests which have substantial importance to economic life.³⁶

B. *The Prevailing Social Ethic and the Status of Student*

The second rationale which determines those dearly held values which receive judicial protection is suggested by the protection given to the family unit³⁷ and, to some extent, to membership in social

32. H. MILLER, *RICH MAN, POOR MAN* 169 (1971).

33. *Id.* at 171.

34. C. JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 181, 222-23 (1972).

35. This was implicitly recognized in a case where the court held that a wrongful expulsion had to be expunged from the record although the student had been reinstated and the college had asked the case to be declared moot. *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969).

36. That the status of student has substantial economic importance which should be protected is presaged in *Greene v. Howard Univ.*, 412 F.2d 1128, 1130-31 (D.C. Cir. 1969), where the court ordered the records of dismissed students expunged before they would agree to moot the case as the university requested. The students had been reinstated by the university and some had already graduated, but the court felt that it should protect the students against the "collateral consequences" of their expulsion, which was accomplished by forcing the university to eliminate all mention of the expulsion from their records.

37. Under the law of tort, both husband and wife are deemed to have a property interest in the society or consortium of the other. *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950); *Florida Cent. & Peninsular R.R. Co. v. Foxworth*, 41 Fla. 1, 25 So. 338 (1899); *Mowry v. Chaney*, 43 Iowa 609 (1876); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 *COLO. L. REV.* 1341 (1961). A third party unreasonably invades that right by either physically injuring one spouse, *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *Wilde v. Leigh*, 75 N.D. 418, 28 N.W.2d

clubs,³⁸ *viz.*, that they deserve the coercive protection of the law because society presumes them inherently worthwhile based on widely shared fundamental values.³⁹ This element in the modern law has a two-fold origin: first, by way of the courts of chancery as bearers of the King's conscience;⁴⁰ secondly, by a reinfusion into the law of the feudal element of relation under which duties and obligations were determined on the basis of the relation between the parties in lieu of, or even in spite of, contractual arrangements.⁴¹ These values can be considered instrumental in the sense that they are deemed important toward promoting a better society, but largely they are considered important in and of themselves as part of the prevailing social ethic.⁴² Thus, in family law, parents have certain duties and obligations to their children reflecting the feudal concept of relation;⁴³ the nuclear family is deemed worthy of protection, and the courts do not consider

530 (1947), directly alienating the affections of one spouse, *Rank v. Kuhn*, 236 Iowa 854, 20 N.W.2d 72 (1945); *Dey v. Dey*, 94 N.J.L. 342, 110 A. 703 (1920), or having sexual intercourse with one spouse, *Knighen v. McClain*, 227 N.C. 682, 44 S.E.2d 79 (1947); *Karchner v. Mumie*, 398 Pa. 13, 156 A.2d 537 (1959).

It should be emphasized that the object of protection is the marital relation itself, not any particular aspect of it such as services or society, although these may be elements of the damage. *Dey v. Dey*, 94 N.J.L. at 344-45, 110 A. at 704. That the stability of the family unit itself is the object of protection may be inferred from the fact that contributory behavior on the part of either spouse is no bar to recovery. *See, e.g., Sikes v. Tippins*, 85 Ga. 231, 11 S.E. 662 (1892) (condoning wife's adultery no bar to husband's recovery); *Hardy v. Bach*, 173 Ill. App. 123 (1912) (wife's reputation for unchastity before and after marriage is no bar to action); *Pierce v. Crisp*, 260 Ky. 519, 86 S.W.2d 293 (1935) (proof that plaintiff's spouse was the seducer is no bar to recovery).

Similarly, both parents have a property interest in the physical society of their minor children. *Youngblood v. Taylor*, 89 So. 2d 503 (Fla. 1956); *Becker v. Reick*, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct. 1959) (plaintiff's loss, though predicated on negligence, is in the nature of an infringement on a property right). The child in some states has a property interest in the society of his parents. *Sea-Land Servs., Inc. v. Gaudet*, 94 S. Ct. 806 (1974); *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946). In addition, the wife and children have a property interest in the husband's obligation of support. *Schumm v. Berg*, 37 Cal. 2d 174, 231 P.2d 39 (1951); *Commonwealth v. Horner*, 168 Pa. Super. 411, 77 A.2d 641 (1951). To a limited extent, the wife also has a statutory obligation for the expenses of the family. *Cupit v. Brooks*, 223 Miss. 887, 79 So. 2d 58 (1955); *Hall v. Jordan*, 190 Tenn. 1, 227 S.W.2d 35 (1950); A. JACOBS & J. GOEBEL, *DOMESTIC RELATIONS* 702-03 (1961).

38. *See* note 66 *infra*.

39. *See* R. POUND, *supra* note 21, at 71, 141.

40. *Id.* at 72-73.

41. *See id.* at 1-31; Reich, *supra* note 14, at 768.

42. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243-51 (1973). The "prevailing social ethic" can be considered the modern analogue of the King's conscience.

43. *See* R. POUND, *supra* note 21, at 84-85, 195-96. This is what Professor Pound has called the feudal element in the law. It was based on analogy to the relation between lord and tenant, each of whom owed duties to the other based upon the relation. This was the background for the

juristic conception of rights, duties, and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrongdoing or culpable action, but simply and solely as the incidents of the relation.

Id. at 20. *See* Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894) (a relation is described as a nexus, which has a double aspect, *i.e.*, a right on one hand, and a duty on the other).

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evidence meant either to prove or to cast doubt upon its value to society. As new perceptions of the social ethic grow, new interests and rights are given protection.⁴⁴

The prevailing social ethic has long recognized the intrinsic value of education and its worth to the individual quite apart from the economic value of producing an educated citizenry.⁴⁵ The importance attached to providing greater educational opportunity is evident in the constant stream of aid-to-education laws of both federal and state governments.⁴⁶ In addition, the social status which education carries provides a significant indication of the high value placed on the student-university relationship.⁴⁷ Education also has a substantial impact, arguably beyond its actual skill-increasing effect, on income and occupational status.⁴⁸ In our increasingly technological society this impact is generally perceived as being more significant today than it was a half century ago. Education is, furthermore, considered the major institution other than the family which prepares young people for their adult life.⁴⁹ It is, in short, a relationship of crucial importance to the prevailing social ethic for reasons closely analogous to

44. Pound, *Survey*, *supra* note 17, at 21-24. Wellington, *supra* note 42, at 246-54, 265-67, 289-95, 302-11, suggests three sources for courts to consult in order to recognize developments in the prevailing social ethic, all of which rely on the legal-rational process of analogy: statutes dealing with analogous areas of the law; analogy to existing rights of action given by the common law; analogy with other protected interests.

45. It might be objected that the majority in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), felt that education is not a fundamental interest protected by the Constitution. This, however, does not speak to the thrust of the argument here. There is a great deal of difference between fundamental interests for constitutional purposes and other valuable interests which, while not rising to the level of a constitutional right, nevertheless receive the protection of the common law. Most of the valuable interests enumerated in notes 26 and 37 *supra* fall into the latter category.

46. See SUBCOMM. ON EDUC. OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, FEDERAL AND STATE STUDENT AID PROGRAMS, S. DOC. NO. 73, 91st Cong., 2d Sess. (1970); HOUSE COMM. ON EDUC. AND LABOR, A GUIDE TO STUDENT ASSISTANCE, H.R. DOC. NO. 221, 91st Cong., 2d Sess. (1971). See generally M. USDAN, D. MINAR & E. HURWITZ, EDUCATION AND STATE POLITICS 11-163 (1968).

47. See C. JENCKS, *supra* note 34, at 180-86, 191, 220-24; T. PARSONS & G. PLATT, THE AMERICAN UNIVERSITY 327-39 (1973); *cf.* p. 129 *supra*. See also A. GRISWOLD, LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL 3-4 (1959); C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION 85-90 (1968); A. REISS, OCCUPATIONS AND SOCIAL STATUS (1961).

48. See C. JENCKS, *supra* note 34, at 191, 220-21; *cf.* T. VEBLEN, THE HIGHER LEARNING IN AMERICA 135-47 (1918).

49. See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973), quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969). Two prominent sociologists have made an in-depth comparison of the socialization process in the family and in undergraduate college and have concluded that the two institutions have a similar role in the development of young people. T. PARSONS & G. PLATT, *supra* note 47, at 18-22, 163-224. See generally E. ERIKSON, CHILDHOOD AND SOCIETY (1950); D. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT (1968). As Justice Marshall noted in his dissent in *Rodriguez*, the fact that 48 of 50 states constitutionally require free public education and enforce those provisions with compulsory attendance laws strongly suggests the fundamental role of education in American society. 411 U.S. at 111-12 (Marshall & Douglas, JJ., dissenting).

those underlying the legal protection afforded to the family unit.⁵⁰

In summary, valuable interests are protected if they are perceived as being sufficiently important to economic potential, or if they are deemed inherently worthwhile by the prevailing social ethic. The student-university relationship meets both tests.

II. Protection of Members of Private Associations

That the student's interest is substantial has been demonstrated. Maintaining his status as student allows him to grow by making use of the opportunities for enrichment provided by the school's facilities and by the very existence of the university community—an intrinsic value widely recognized under the prevailing social ethic. The degree which represents the completion of his studies is, moreover, a necessity if he is to engage in certain valuable economic activities. The courts should, therefore, grant the student protection, but, in doing so, they need not act in a vacuum. They can work within the framework of the legal protection already given to other similar relationships, most notably that afforded to members of private associations in expulsion proceedings.

A. *The Common Law of Private Associations*

At English common law, a member of a private association was protected against expulsions which were contrary to "natural justice."⁵¹ Perhaps the leading case stating the nature of this protection is *Dawkins v. Antrobus*⁵² in which the litigious Colonel Dawkins sued

50. A student's residence at a university closely resembles family life in the sense that the student matures and is guided in his formative years by the strength of the university experience. Universities proclaim themselves to be places where young people not only may obtain instruction in fields of academic knowledge, but as places to develop maturity and insight.

51. See S. CHAKRAVERTIS, *NATURAL JUSTICE OR FUNDAMENTAL PRINCIPLES OF JUDICIAL PROCEDURE* (2d ed. 1967); S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 101-65 (1st ed. 1959); natural justice has been described as "what would be regarded as fair and just and seemly and sensible by the ordinary, reasonable, well-disposed, well-informed and impartial citizen." Morris, *The Court and Domestic Tribunals*, 69 *LAW Q.R.* 318, 323 (1953). See Note, *Toward Principles of Jury Equity*, 83 *YALE L.J.* 1023, 1025-37 (1974).

The British refer to bodies vested with the power to inflict a highly penal sanction as "quasi-judicial." See, e.g., *D'Arcy v. Adamson*, 29 *T.L.R.* 367, 368 (Ch. 1913) (power of expulsion from the club highly penal); *Glynn v. Keele Univ.*, [1971] 1 *W.L.R.* 487 (Ch.) (power of suspension of student from premises highly penal, therefore action was quasi-judicial). The proceedings of any such quasi-judicial body, or domestic tribunal, must conform to the principle of natural justice. Morris, *supra*, at 321. See *Pett v. Greyhound Racing Ass'n (I)*, [1969] 1 *Q.B.* 125 (C.A.); *General Med. Council v. Spackman*, [1943] *A.C.* 627; *Dawkins v. Antrobus*, 17 *Ch. D.* 615 (C.A. 1881); cf. *Russell v. Duke of Norfolk*, [1949] 1 *All E.R.* 109, 118 (C.A.); *Davis v. Carew-Pole*, [1956] 1 *W.L.R.* 833 (Q.B.); *Cookson v. Harewood*, [1932] 2 *K.B.* 478.

52. 17 *Ch. D.* 615 (C.A. 1881), discussed at length in Chafce, *supra* note 9, at 993-95, 1014-20. See also *Fisher v. Keane*, 11 *Ch. D.* 353 (C.A. 1878); *Innes v. Wylie*, [1844] 1 *Car. & K.* 257 (Q.B.).

for readmission to the Travellers' Club after he had been expelled for conduct allegedly injurious to the character of the club (for circulating a pamphlet lampooning Lieutenant General Stephenson, himself a club member). The colonel lost his lawsuit but won for future generations of unpopular club members court protection for their procedural rights. The court of appeals in *Dawkins* stated that expulsions from private associations will be overturned if motivated by actual malice, if the substantive basis for the expulsion and the proceedings thereto were ultra vires or if the procedures used were contrary to natural justice.⁵³ The requirements of natural justice, deemed to have been met in *Dawkins*, were that the accused have both notice of the charges against him and the opportunity to be heard in his own defense.⁵⁴ In addition, subsequent cases concerning expulsions from private associations established the right of members to meet and controvert the evidence presented in favor of expulsion,⁵⁵ but did not establish any absolute rights to cross-examination,⁵⁶ counsel,⁵⁷ or the trappings of a criminal trial.⁵⁸

Due process is the American analogue of natural justice, and the

53. Brett, L.J., stated:

The only real question which a court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions a court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of the club—in other words, whether the rules of the club are contrary to natural justice

Dawkins v. Antrobus, 17 Ch. D. 615, 630 (C.A. 1881).

54. *Id.* at 631. See *Fisher v. Keane*, 11 Ch. D. 353 (C.A. 1878) (notice and opportunity to be heard not given; trial committee not properly convened); *Labouchere v. Earl of Wharnccliffe*, 13 Ch. D. 346 (1879) (no due inquiry, no notice of definite charge, improper notice to summon meeting, resolution to expel carried by insufficient majority); *D'Arcy v. Adamson*, 29 T.L.R. 367, 368 (Ch. 1913) (no notice); *Burn v. National Amalg'd Labourers' Union*, [1920] 2 Ch. 364 (union proceeding contrary to natural justice); *cf. Leeson v. General Council of Med. Educ.*, 43 Ch. D. 366 (C.A. 1889); *General Med. Council v. Spackman*, [1943] A.C. 627. See generally R. POUND, *CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY* 95-98 (2d ed. 1930).

55. *Pett v. Greyhound Racing Ass'n (II)*, [1970] 1 Q.B. 46; *Ceylon Univ. v. Fernando*, [1960] 1 W.L.R. 223 (P.C.); *Board of Educ. v. Rice*, [1911] A.C. 179; *General Med. Council v. Spackman*, [1943] A.C. 627; *Rex v. St. Mary's Abbotts Kensington Assess. Comm.*, [1891] 1 Q.B. 378; *De Verteuil v. Knaggs*, [1918] A.C. 557; *Byrne v. Kinematograph Renters Soc'y*, [1958] 1 W.L.R. 762 (Ch.). This right to controvert contrary evidence was described as the right to "correct or controvert any relevant statement brought forward to his prejudice." *Knaggs, supra*, at 560-61. See also *Leeson v. General Council of Med. Educ.*, 43 Ch. D. 366, 379 (C.A. 1889).

56. *Ceylon Univ. v. Fernando*, [1960] 1 W.L.R. 223 (P.C.). The court apparently would have allowed Fernando a right of cross-examination if he had made a timely request at the time of his hearing. See de Smith, *University Discipline and Natural Justice*, 23 *Mod. L. Rev.* 428 (1960).

57. *Pett v. Greyhound Racing Ass'n (II)*, [1970] 1 Q.B. 46. In *Pett v. Greyhound Racing Ass'n (I)*, [1969] 1 Q.B. 125, 133 (C.A.), the court in dicta said that when an individual's "reputation or livelihood" was affected by an action of a private association, the individual had a right to counsel.

58. See, e.g., *Local Gov't Bd. v. Arlidge*, [1915] A.C. 120 (requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth).

state courts have intervened to guarantee members of private associations, incorporated and unincorporated, procedural rights against expulsion if the group's procedural rules were contrary to due process,⁵⁹

59. See, e.g., *Local No. 57, Painters, Decorators & Paperhangers v. Boyd*, 245 Ala. 227, 234, 16 So. 2d 705, 711 (1944) (expulsion conclusive on civil court if association gave notice and hearing, conducted in accordance with its rules, and acted in good faith); *Cason v. Glass Blower's Ass'n*, 37 Cal. 2d 134, 143, 231 P.2d 6, 10-11 (1951) (expulsion proceedings of private associations must not be malicious, contrary to the rules of the association, or contrary to natural justice; fair trial guaranteed); *Smith v. Kern County Med. Ass'n*, 19 Cal. 2d 263, 265, 120 P.2d 874, 875 (1942) (function of court in expulsion from private associations is to determine whether association acted within its powers in good faith, in accordance with its laws and the laws of the land); *Bernstein v. Alameda-Contra Costa Med. Ass'n*, 139 Cal. App. 2d 241, 253, 293 P.2d 862, 869 (1956) (expulsion from a private association unreviewable as long as it is accomplished according to the rules of the association, in good faith, and according to the law of the land); *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 679, 254 P.2d 587, 588-89 (1953) (due process guarantees of notice, hearing and a fair trial in expulsions imposed even if not in the rules of the association; *Davis v. International Alliance of Theatrical Stage Employees*, 60 Cal. App. 2d 713, 715, 141 P.2d 486, 488 (1943) (function of court in expulsion from private associations is to determine if association acted within its powers in good faith, in accordance with its laws and the laws of the land); *Ellis v. AFL*, 48 Cal. App. 2d 440, 443-44, 120 P.2d 79, 80-81 (1941) (no suspension of a member or a subordinate body from an association without charges, notice and hearing, even if the association's rules make no provision for it); *Virgin v. American College of Surgeons*, 42 Ill. App. 2d 352, 369, 192 N.E.2d 414, 423 (1963) (interest in being a member of a professional association protected against deprivation by association if it acts with malice, outside its powers and rules, or contrary to due process or natural justice); *Brooks v. Petroleum Club*, 207 Kan. 277, 484 P.2d 1026 (1971) (expulsion valid if inflicted with substantial compliance of bylaws and bylaws do not violate due process); *Niner v. Hanson*, 217 Md. 298, 308, 142 A.2d 798, 802 (1958) (equity will enter internal affairs of private associations where an expulsion is arbitrary or not in accordance with the rules of the organization); *Universal Lodge v. Valentine*, 134 Md. 505, 517, 107 A. 531, 535 (1919) (quoting the lower court's opinion, plaintiff did not have fair trial as constitution of the association, its rules and regulations, or as justice and fair dealing require); *Benson Coop. Creamery Ass'n v. First Dist. Ass'n*, 284 Minn. 335, 339, 170 N.W.2d 425, 427 (1969) (expulsion must be based on violation of rule of association which does not violate law of land or any public policy); *Peters v. Minnesota Dep't of Ladies G.A.R.*, 239 Minn. 133, 136, 58 N.W.2d 58, 60 (1953) (notice and hearing, the minimum standards of fairness, are required); *Junkins v. Local No. 6313, Communications Workers*, 241 Mo. App. 1029, 271 S.W.2d 71 (1954) (expulsion proceedings of association must be conducted within its rules, in good faith, with fair notice to the accused and must afford him an opportunity to be heard in his defense); *Madden v. Atkins*, 4 App. Div. 2d 1, 11-12, 162 N.Y.S.2d 576, 586-87 (1957) (although standards of due process less stringent than courts, substantial rights must be preserved); *Hawkins v. Obremski*, 33 Misc. 2d 1009, 1011, 227 N.Y.S.2d 307, 308 (Sup. Ct. 1962) (expulsion from an association requires notice and an opportunity to be heard); *Pegg v. United Mut. Life Ins. Co.*, 6 Misc. 2d 600, 601, 167 N.Y.S.2d 486, 487 (Sup. Ct. 1957) (court review of expulsion proceedings of private associations limited to ensuring that procedure was in accordance with association's bylaws, that the charges were substantial, and that the member had fair notice and the opportunity to be heard); *Van Valkenburgh v. Chemists' Club*, 38 N.Y.S.2d 228, 229 (Sup. Ct. 1942) (where there was no procedure in bylaws pertaining to suspension, courts impose standards requiring notice and a fair trial); *Harmon v. Matthews*, 27 N.Y.S.2d 656, 659 (Sup. Ct. 1941) (member of trade union or any voluntary association is entitled to have charges made known to him, be confronted by accusers and witnesses against him, to reasonable opportunity to question or cross-examine them, to examine the evidence, and to answer, explain, defend, and present evidence in his own behalf); *Yockel v. German American Bund*, 20 N.Y.S.2d 774, 776-78 (Sup. Ct. 1940) (summary expulsion is not justified as it is contrary to the law of the land and the Constitution; accused must have a fair trial and an opportunity to defend himself); *Local 38-123, Longshoremen v. Green*, 157 Ore. 394, 402, 72 P.2d 55, 58 (1937) (in expulsions an association must follow its own rules, but this is not sufficient if it fails to give sufficient protection against arbitrary action); *Bullard v. Austin*

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or if the action taken were *ultra vires*⁶⁰ or in bad faith⁶¹—the same tests set forth in *Dawkins*. In an early case, *Loubat v. Le Roy*, a New York court applied common law procedural requirements to an unincorporated association:

The legal principle is a general one affecting all proceedings which may result in loss of property, position or character, or any disaster to another; that he shall be first heard by the board or tribunal considering his case before that body will be legally permitted to pronounce his condemnation.⁶²

The American courts have followed their British brethren and denied review of the expulsion on the merits, but where serious economic injury was at stake, they have scrutinized the expulsion to determine whether it was based on substantial evidence or evidence sufficient to show the decision was in good faith.⁶³ These principles have been

Real Estate Bd., Inc., 376 S.W.2d 870, 874-75 (Tex. Civ. App. 1964) (judicial intervention into affairs of private association if expulsion procedure is contrary to natural justice); cases collected in R. POUND, *supra* note 54, at 95; Chafee, *supra* note 9, at 1014-20.

60. See, e.g., *Local No. 57, Painters, Decorators & Paperhangers v. Boyd*, 245 Ala. 227, 234, 16 So. 2d 705, 711 (1944); *Cason v. Glass Blower's Ass'n*, 37 Cal. 2d 134, 143, 231 P.2d 6, 10-11 (1951); *Smith v. Kern County Med. Ass'n*, 19 Cal. 2d 263, 265, 120 P.2d 874, 875 (1942); *Taboada v. Sociedad Espanola*, 191 Cal. 187, 215 P. 673 (1923); *Bernstein v. Alameda-Contra Costa Med. Ass'n*, 139 Cal. App. 2d 241, 253, 293 P.2d 862, 869 (1956); *Davis v. International Alliance of Theatrical Stage Employees*, 60 Cal. App. 2d 713, 715, 141 P.2d 486, 488 (1943); *Holmes v. Brown*, 146 Ga. 402 (1917); *Virgin v. American College of Surgeons*, 42 Ill. App. 2d 352, 192 N.E.2d 414 (1963); *Brooks v. Petroleum Club*, 207 Kan. 277, 484 P.2d 1026 (1971); *Wilson v. Pine Knot Council*, 175 Ky. 502, 194 S.W. 537 (1917); *Niner v. Hanson*, 217 Md. 298, 308, 142 A.2d 798, 802 (1958); *Baugh v. Thomas*, 56 N.J. 203, 265 A.2d 675 (1970); *Walsh v. Local 59, Theatrical Stage Employees*, 22 N.J. Misc. 161, 162, 37 A.2d 667, 668 (Ch.), *aff'd*, 136 N.J. Eq. 115, 40 A.2d 623 (1944); *Lo Bianco v. Cushing*, 117 N.J. Eq. 593, 177 A. 102 (Ch.), *aff'd per curiam*, 119 N.J. Eq. 377, 182 A. 874 (1936); *Pegg v. United Mut. Life Ins. Co.*, 6 Misc. 2d 600, 167 N.Y.S.2d 486 (Sup. Ct. 1957); *Local 38-123, Longshoremen v. Green*, 157 Ore. 394, 72 P.2d 55 (1937); *Berberian v. Lancaster Osteopathic Hosp. Ass'n*, 395 Pa. 257, 149 A.2d 456 (1959); *Allen v. Office Employees Int'l Union*, 53 Wash. 2d 1, 329 P.2d 205 (1958); cases collected in R. POUND, *supra* note 54, at 96; J. GRODIN, *UNION GOVERNMENT AND THE LAW—BRITISH AND AMERICAN EXPERIENCES* 97-98 (1961).

61. See, e.g., *Junkins v. Local No. 6313, Communications Workers*, 241 Mo. App. 1029, 271 S.W.2d 71 (1954) (expulsion proceedings not conducted fairly or honestly, bias was shown). While courts rarely find an expulsion to be in bad faith, almost all of them recite good faith, or lack of maliciousness, as one of the standards of expulsion proceedings. See cases cited in note 59 *supra*.

62. 40 Hun. (47 N.Y. Sup. Ct.) 546, 551-52, 17 Abb. N. Cas. 512 (1886).

63. See, e.g., *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 164-65, 460 P.2d 495, 498, 81 Cal. Rptr. 623, 626 (1969); *McCune v. Wilson*, 237 So. 2d 169, 172-73 (Fla. 1970); *Van Daele v. Vinci*, 51 Ill. 2d 389, 394-95, 282 N.E.2d 728, 731-32 (1972); *Virgin v. American College of Surgeons*, 42 Ill. App. 2d 352, 192 N.E.2d 414 (1963); *Kurk v. Medical Soc'y*, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct.), *rev'd on other grounds*, 24 App. Div. 2d 897, 264 N.Y.S.2d 859 (1965), *aff'd*, 18 N.Y.2d 928, 223 N.E.2d 499, 276 N.Y.S.2d 1007 (1966); *Berberian v. Lancaster Osteopathic Hosp. Ass'n*, 395 Pa. 257, 149 A.2d 456 (1959). See generally *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1036 (1963) [hereinafter cited as *Developments—Private Associations*].

applied to the expulsion proceedings of such diverse groups as mutual aid insurance associations,⁶⁴ unions,⁶⁵ social clubs,⁶⁶ and to both expulsions⁶⁷ and refusals of admittance⁶⁸ by medical associations.

64. *Taboada v. Sociedad Espanola*, 191 Cal. 187, 215 P. 673 (1923); *Curl v. Pacific Home*, 108 Cal. App. 2d 635, 239 P.2d 481 (1952); *Gervasi v. Societa Giusippi Garibaldi*, 96 Conn. 50, 112 A. 693 (1921); *D'Aloia v. Unione Fratellanza Italiana*, 84 N.J.L. 683, 87 A. 472 (E. & A. 1913); *Schwankert v. New Jersey State P.B.A.*, 77 N.J. Super. 224, 185 A.2d 877 (1962); *Wachtel v. Noah Widows & Orphans Benev. Soc'y*, 84 N.Y. 28, 38 Am. Rep. 478 (1881); *Kokolas v. Johnson City Lodge No. 311*, 66 Misc. 2d 39, 319 N.Y.S.2d 668 (Sup. Ct. 1971); *Pepe v. Missanellese Soc'y of Mut. Aid*, 141 Misc. 7, 252 N.Y.S. 70 (Sup. Ct. 1930); *Macavicza v. Workingman's Club*, 246 Pa. 136, 92 A. 41 (1914); *Ondo v. Greek-Catholic Union of Russian Bhd.s*, 155 Pa. Super. 492, 38 A.2d 370 (1944); *cf. Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969).

65. *Local No. 57, Painters, Decorators & Paperhangers v. Boyd*, 245 Ala. 227, 16 So. 2d 705 (1944); *Cason v. Glass Bottle Blower's Ass'n*, 37 Cal. 2d 134, 231 P.2d 6 (1951); *Otto v. Journeyman Tailors' Protective & Benev. Union*, 75 Cal. 308, 17 P. 217 (1888); *Davis v. International Alliance of Theatrical Stage Employees*, 60 Cal. App. 2d 713, 141 P.2d 486 (1943); *Junkins v. Local No. 6313, Communications Workers*, 241 Mo. App. 1029, 271 S.W.2d 71 (1954); *Alexion v. Hollingsworth*, 289 N.Y. 91, 43 N.E.2d 825 (1942); *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S.2d 114, *appeal dismissed*, 284 N.Y. 767, 31 N.E.2d 514 (1940); *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y.S. 336 (1931); *Joseph v. Passaic Hosp. Ass'n*, 26 N.J. 557, 141 A.2d 18 (1958); *Schwankert v. New Jersey State P.B.A.*, 77 N.J. Super. 224, 185 A.2d 877 (1962); *Harmon v. Matthews*, 27 N.Y.S.2d 656 (Sup. Ct. 1941). *See generally* *Grand Int'l Bhd. of Locomotive Engineers v. Green*, 210 Ala. 496, 98 So. 569 (1923); *Gardner v. Newbert*, 74 Ind. App. 183, 128 N.E. 704 (1920); *Howland v. Local 306, UAW*, 323 Mich. 305, 35 N.W.2d 166 (1948); *Cotton Jammers & Longshoremen's Ass'n v. Taylor*, 23 Tex. Civ. App. 367, 56 S.W. 553 (1900); *McGinley v. Milk & Ice Cream Salesmen*, 351 Pa. 47, 40 A.2d 16 (1944); *Summers, The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 200-06 (1960); *cf. Walsh v. Local 59, Theatrical Stage Employees*, 22 N.J. Misc. 161, 37 A.2d 667 (Ch. 1944); *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959). *But see* *Simpson v. Grand Int'l Bhd. of Locomotive Engineers*, 38 W. Va. 355, 98 S.E. 580, *cert. denied*, 250 U.S. 644 (1919); *State ex rel. Dame v. Le Fevre*, 251 Wis. 146, 28 N.W.2d 349 (1947). Union members are now guaranteed procedural rights by the *Landrum-Griffin Act*, 29 U.S.C. § 411(a)(5) (1970).

66. *See Brooks v. Petroleum Club*, 207 Kan. 277, 484 P.2d 1026 (1971); *Universal Lodge v. Valentine*, 134 Md. 505, 107 A. 531 (1919); *Peters v. Minnesota Dep't of Ladies GAR*, 239 Minn. 133, 58 N.W.2d 58 (1953); *Stahl v. Romanian Young Men's Ass'n*, 77 N.J.L. 380, 71 A. 1114 (Sup. Ct. 1909); *State ex rel. Sibley v. Board of Management of the Carteret Club of Elizabeth*, 40 N.J.L. 295 (Sup. Ct. 1878); *Spiegelman v. Engineers Country Club*, 38 App. Div. 2d 728, 329 N.Y.S.2d 166 (1972); *Cheney v. Ketcham*, 7 Ohio Dec. 183 (C.P. 1898); *Commonwealth v. Pennsylvania Beneficial Inst.*, 2 S. & R. 141 (Pa. 1815); *cf. Ostrom v. Greene*, 161 N.Y. 353, 55 N.E. 919 (1900). *But see* *Manning v. San Antonio Club*, 63 Tex. 166 (1884).

There is no protection for members of church societies involved in doctrinal disputes, probably because of the unwillingness of courts to intervene in areas concerning religious belief. *See, e.g., Moustakis v. Hellenic Orthodox Soc'y*, 261 Mass. 462, 159 N.E. 453 (1928). *See generally* *Comment, The Power of Courts over the Internal Affairs of Religious Groups*, 43 CALIF. L. REV. 322 (1955); *Comment, Judicial Intervention in Disputes Within Independent Church Bodies*, 54 MICH. L. REV. 102 (1955).

Courts are much less hesitant, however, to intervene in church affairs when no issues of doctrine are involved. *See Swafford v. Keaton*, 23 Ga. App. 238, 98 S.E. 122 (1919); *Baugh v. Thomas*, 56 N.J. 203, 265 A.2d 675 (1970); *Hendryx v. Peoples' United Church*, 42 Wash. 336, 84 P. 1123 (1906).

67. *Bernstein v. Alameda-Contra Costa Med. Ass'n*, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); *State ex rel. Waring v. Georgia Med. Soc'y*, 38 Ga. 608, 95 Am. Dec. 408 (1869); *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968); *Joseph v. Passaic Hosp. Ass'n*, 26 N.J. 557, 141 A.2d 18 (1958); *cf. Baugh v. Thomas*, 56 N.J. 203, 265 A.2d 675 (1970).

68. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 147 A.2d 817 (1963); *Falcone v. Middlesex County Med. Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961); *Note, Judicially Compelled Admission to Medical Societies: The Falcone Case*, 75 HARV. L. REV. 1186 (1961).

Unfortunately, neither British nor American courts were quite able to articulate just what interest they were protecting when they required natural justice or due process in the expulsion proceedings of private associations. The *Dawkins* court felt that there was an underlying property interest in the assets of the club which required its scrutiny and justified its intervention.⁶⁹ In an earlier case Lord Denman had held a member's expulsion without notice unlawful simply for being contrary to natural justice, but on rehearing hedged by implying that he was merely supplying a rule left out of a contract, although such a contract could conceivably include a judicially enforceable rule for summary expulsion.⁷⁰

With this insecure foundation, it is not surprising to find the cases foundering in a sea of doctrinal doubt. Some courts have considered the interest of the member in the assets of the association as the basis for guaranteeing procedural rights in expulsions. Members' rights to use the physical property of the association, to share in its tangible assets on dissolution, to have an opportunity to be elected to a salaried office, and to earn a livelihood (where that right is severely hampered unless the plaintiff is a member of the association) have been held to be property interests which serve as a basis for the courts' jurisdiction.⁷¹ Legal commentators, however, have pointed out the often disingenuous quality of a court's search for such a tangible property interest before protecting the procedural rights of members.⁷² Perhaps the ultimate tension created by blind adherence to a restricted property theory of this sort is illustrated by *Baird v. Wells*,⁷³ where the court recognized the member's reputation as the real interest at stake, but found that the lack of a tangible property interest prevented

69. *Dawkins v. Antrobus*, 17 Ch. D. 615, 620 (C.A. 1881).

70. *Innes v. Wylie*, [1844] 1 Car. & K. 257 (Q.B.).

71. See *Suckle v. Madison Gen'l Hosp.*, 499 F.2d 1364 (7th Cir. 1974) (property right of doctor in membership on hospital staff could have been developed); *Davis v. Scher*, 356 Mich. 291, 97 N.W.2d 137 (1959) (right to use association's physical property); *Barr v. Essex Trades Council*, 53 N.J. Eq. 101, 30 A. 881 (Ch. 1894) (right to engage in lawful business); *Heaton v. Hull*, 51 App. Div. 126, 64 N.Y.S. 279 (1900) (right to use association's property); *Stein v. Marks*, 44 Misc. 140, 89 N.Y.S. 921 (Sup. Ct. 1904) (right to use corporate property and to share assets on dissolution); *Williams v. District Executive Bd., UMW*, 1 Pa. D. & C. 31 (Lackawanna C.P. 1921) (possibility of being elected salaried officer as potential property interest). These cases are discussed in *Developments—Private Associations*, *supra* note 63, at 999.

72. See, e.g., *Chafee*, *supra* note 9, at 999-1001 (traditional property theory unsatisfactory because it diverts courts from real interests at stake, and makes decisions turn on an immaterial factor).

73. 44 Ch. D. 661 (1890). This interpretation may be inferred from the fact that the court felt it had no jurisdiction in the case, but went to some length to declare the expulsion wrongful. The plaintiff filed a statement that he was satisfied that his expulsion had been declared wrongful by the court, and would therefore let the matter rest. This case is discussed in *Chafee*, *supra* note 9, at 1000; *Developments—Private Associations*, *supra* note 63, at 1000; *Expulsion of a Member of a Club*, 70 Sol. J. 828 (1926).

equitable relief. It is hard to accept a rationale which results in enjoining expulsion where a scintilla of tangible property can be discovered to afford a technical basis for relief even though injury to that interest is not the significant damage at stake, but which denies relief for an equally severe injury where no such scintilla can be found.⁷⁴

In casting about for a satisfactory legal niche into which to fit the law of associations, many courts have chosen the law of contracts,⁷⁵ for, on first blush, it appears that the members of an association simply have a contractual agreement with each other. Hence, all rights and restrictions would flow from the contract, interpreted under the ordinary guidelines for the law of contracts. It would follow that if the association acted within its rules, and those rules had been made part of the contract but did not violate any public policy, the courts could only enforce the terms of the agreement.

In a leading critique, Professor Chafee has demonstrated the legal anomalies and the internal contradictions of the contract theory. Chafee argues, first of all, that the contract theory does not explain why the courts would defer to the association's interpretation of its own rules; for if the violation of an association rule is a breach of contract, then the court should be the final arbiter. Secondly, if the action for wrongful expulsion were in contract, then the several members of the association would be individually liable for whatever damage has occurred; yet American courts have almost uniformly denied the existence of such an action at law by the expelled member. Furthermore, in those actions at law which have been allowed, recovery has sounded in tort, so that the member can recover for injury to reputation or punitive damages. In addition, the injunctive or mandamus remedies normally granted to the successful suitor in an action for illegal expulsion are supposed to protect only rights of property and substance, whereas breaches of contract are not generally enjoined. Finally, the requirement that expulsion not be malicious or in bad faith, and the imposition of procedural guarantees where

74. Chafee, *supra* note 9, at 1000.

75. See, e.g., *Lawson v. Hewell*, 118 Cal. 613, 50 P. 763 (1897); *University of Miami v. Militana*, 184 So. 2d 701 (Fla. Dist. Ct. App.), *cert. denied*, 192 So. 2d 488 (Fla. 1966); *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *Krause v. Sander*, 66 Misc. 601, 122 N.Y.S. 54 (Sup. Ct. 1910). The contract theory is elaborated and discussed in Chafee, *supra* note 9, at 1001-07; *Developments—Private Associations*, *supra* note 63, at 1001-02. See *Summers*, *supra* note 65, at 179 (relief to wrongfully expelled member at common law based on contract theory).

there are none in the purported contract, are not doctrines ordinarily associated with the law of contracts.⁷⁶

The basic argument against the contract theory with regard to private associations is, however, that it confuses *consensual* relationships, which include contract as a subset, with strictly *contractual* relationships.⁷⁷ In the latter, the law imposes an obligation because of a promise supported by consideration signifying an agreement,⁷⁸ and the obligation is exactly limited to the agreement. With the former, the law imposes obligations outside of any agreement of the parties because of the nature of the relationship and its importance to society.⁷⁹

76. Chafee, *supra* note 9, at 1001-07. See also *Lahiff v. St. Joseph's Soc'y*, 76 Conn. 648, 57 A. 692 (1904) (mental suffering included); *Connell v. Stalker*, 21 Misc. 609, 48 N.Y.S. 77 (Sup. Ct. 1897) (union liable for suspended member's loss of wages); *Lytle v. New Castle Ag. Ass'n*, 91 Pa. Super. 152 (1927) (trespass against member of association for causing expulsion of another).

Some of Chafee's technical arguments can be countered. Courts can void provisions of contracts if the terms seem unduly harsh on party where there is gross inequality of bargaining position. It might be inferred that courts are doing this when they impose due process standards on associations. Against courts' deference to an association's interpretation of its own rules as being alien to a theory of contract is the argument that it is an implied term of the contract that the member will be bound by the decision of the association's tribunal. See *Developments—Private Associations*, *supra* note 63, at 1001-02.

77. Examples of consensual relations which extend beyond mere contractual relations are husband-wife-child, see note 37 *supra*; principal-agent, see RESTATEMENT OF AGENCY (SECOND) §§ 140, 153, 159-202, 212-67, 320-59 (1958); lawyer-client, see AMERICAN BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES (1967); bank-depositor (to a more limited extent), see *Milonich v. First Nat'l Bank*, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961); fiduciary-beneficiary, see RESTATEMENT OF TRUSTS (SECOND) §§ 169-226a, 261-79 (1959).

78. See Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-13 (1941).

79. To be sure, there is a thin line between "promises" held to be inherent in the agreement—*i.e.*, implied conditions—and obligations imposed outside of the agreement because of the policy of the law. Concerning implied conditions, see *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917); *Bell v. Lever Bros.*, [1932] A.C. 161, 224-27; *Holmes, The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Furthermore, much of contract law is concerned with determining the "agreement" of the parties on a particular issue to which the parties did not direct their attention at the time of the making of the contract. The law in this gap-filling function, a function which occupies the mass of UNIFORM COMMERCIAL CODE ART. II, must of necessity make reference to general principles existing beyond the parties' agreement; but in so doing the law still draws its legitimacy from the parties' own promises and seeks only to make those promises judicially manageable when the promises are somewhat inexact. Fuller, *supra* note 78, at 808. Furthermore, the law will not enforce promises which are outside social policies independent of the parties' agreement; indeed legal coercive enforcement is not inherent in the contractual relationship but depends upon social policy. See 2 R. ELY, *supra* note 17, at 615-18; Fuller, *supra* note 78, at 806-13. Once the law establishes a contractual relationship, however, it generally permits the parties to determine the rights and duties of that relationship. See generally E. PETERS, COMMERCIAL TRANSACTIONS 230-75 (1971). With consensual relations the law takes a more active role in determining the legal rights and duties of the parties and does not generally permit the parties to erect their own set of rights and duties. See note 77 *supra*; *Lanahan v. Nevius*, 317 A.2d 521 (D.C. App. 1974) (held that a father's legal obligation to support his minor children could not be limited by a separation agreement, and that the courts would impose minimum standards regardless of the terms of that agreement. The separation agreement, on the other hand, regarding the reciprocal obligations of husband and wife to each other, was deemed to be a contract with which the court felt it could not interfere in the absence of fraud, duress or concealment).

It is significant that the courts were willing to impose procedural rights in the private association cases, not only when the alleged contract between the member and the association was silent on the member's rights in expulsion proceedings, but even when this contract expressly denied such rights.⁸⁰ It is clear, therefore, that the courts found an interest of the member, apart from the contract, which they deemed worthy of protection. But since the courts seldom articulated the rationale behind their decisions, it was not clear what this interest, which they found merited protection, precisely was.

Chafee has offered the beginnings of a theory. He argues that the real object of judicial protection is the *status* a member acquires based on his *relation* to the association.⁸¹ Thus, wrongful expulsion is, in Chafee's view, a tort; suing in tort is the legal form for protecting valuable interests of this kind from unreasonable invasion.⁸² This formulation is undoubtedly correct; indeed, in some cases such an approach has already been adopted.⁸³ Nevertheless, it explains nothing about *why* such a status interest should be protected.

Such an explanation must depend on the underlying rationales for protecting any interest against unreasonable deprivation. These, as previously discussed, are rooted in the dual standards of enterprise-worth and importance to the prevailing social ethic. Analysis of these criteria provides a basis for a systematic evolution of the law to encompass associations whose members have similar interests but who have heretofore received only ambivalent protection. Such an association is the private university.

B. *The University as a Private Association*

Whatever doubts may have existed that the requirements of natural justice or due process applied to expulsions from universities under British law⁸⁴ were dispelled by *Ceylon University v. Fernando*.⁸⁵ There, a student expelled for allegedly cheating on an examination

80. See cases cited in notes 55-68 *supra*.

81. Chafee, *supra* note 9, at 1007. This view has little *explicit* support in the case law, although the recent New Jersey cases granting relief at common law to those expelled or excluded from private association expressly hold that status rights are the subject of judicial protection. See cases cited in notes 67-68 *supra*. Professor Ely believed all property rights basically involve questions of relation or status. See 1 R. ELY, *supra* note 17, at 96-108.

82. See notes 26 & 37 *supra*.

83. See, e.g., *Loubat v. LeRoy*, 40 Hun. (47 N.Y. Sup. Ct.) 546, 17 Abb. N. Cas. 512 (1886); *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. Co. Ct. 77 (1887).

84. See *Rex v. Dunsheath ex rel. Meredith*, [1951] 1 K.B. 127; *Ex parte Death*, [1852] 18 Q.B. 647.

85. [1960] 1 W.L.R. 223, 1 All E.R. 631 (P.C.). See de Smith, *supra* note 55.

was held to have a right under the principles of natural justice to a hearing and to an opportunity to controvert the evidence against him.

Indeed, the requirements of natural justice have in earlier times been applied to expulsions from universities by American courts as well, guaranteeing notice and an opportunity to defend and controvert evidence adduced by the university in favor of expulsion. A leading case is *Commonwealth ex rel. Hill v. McCauley*⁸⁶ in which the court expressly relied on private association precedent in overturning an expulsion.⁸⁷ Despite this promising beginning, however, the protection for procedural rights of students at common law was not founded on a well-articulated doctrinal basis. As a result the standards of *Hill* were easy prey for the notion that procedural rights for students were subversive of university discipline.⁸⁸ The erosion of *Hill's* precepts was stimulated by two interrelated legal developments: the rise of the in loco parentis doctrine and the tendency to conceive of the student-university relationship as being purely contractual in nature.

In the eyes of many students, the in loco parentis doctrine is nothing more than the justification offered by college administrators when other justifications fail. The invidiousness of this doctrine was

86. 3 Pa. Co. Ct. 77, 84-85 (1887). The court specifically relied on association and natural justice precedent in declaring a very expansive view of students' rights, rejected the in loco parentis argument, *id.* at 87-88, and recognized the status of the student as the protectable interest:

There are tens of thousands of youth continually in attendance at colleges . . . any of whom may suffer degradation and irreparable injury to reputation as well as pecuniary loss, by the unjust action of the faculty.

Id. at 86. In another early case, *Baltimore Univ. v. Colton*, 98 Md. 623, 57 A. 14 (1904), counsel for the plaintiff argued that a student "resembles most nearly, perhaps, a member of a beneficial association." *Id.* at 627, 57 A. at 16. In its opinion the court seemed to accept this analogy by referring to the student as a member, *id.* at 634, 57 A. at 16, and then using an association analogy, *id.* at 636, 57 A. at 17. See also *Gleason v. University of Minn.*, 104 Minn. 359, 116 N.W. 650 (1908). More recently in *Ryan v. Hofstra Univ.*, 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Sup. Ct. 1971), a lower New York court applied basic procedural standards to a private college as one alternative ground for overturning the expulsion of a student.

87. See *Morrison v. City of Lawrence*, 181 Mass. 127, 63 N.E. 400 (1902); *Tanton v. McKenney*, 226 Mich. 245, 197 N.W. 510 (1924); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433, *appeal dismissed*, 278 U.S. 661 (1928); *Koblitz v. Western Reserve Univ.*, 21 Ohio Co. Ct. 144, 11 Ohio Co. Dec. 515 (1901); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943). The vigor of the *Commonwealth ex rel. Hill v. McCauley* reasoning is not present in these cases. In all of them, the court found that a sufficient hearing had been given, while paying lip service to student procedural rights. The court in *Hyman* was able to say: "All the authorities agree that students may not be dismissed or suspended or deprived of any right without notice and a fair hearing." The court stated that a fair hearing involved notice, the names of adverse witnesses and an opportunity to make defense. 180 Tenn. at 111, 171 S.W.2d at 827. Yet the court upheld a dismissal based on a "hearing" which, from the report of the case, fell short of the court's own standard.

88. Rhetoric directed toward this point was employed in *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Woods v. Simpson*, 146 Md. 547, 126 A. 882 (1924); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433, *appeal dismissed*, 278 U.S. 661 (1928); *Vermillion v. State ex rel. Englehardt*, 78 Neb. 107, 110 N.W. 736 (1907).

illustrated in *Stetson University v. Hunt*,⁸⁹ where the court upheld the summary dismissal of a student on the basis of several vague rumors of misconduct and a general feeling that the student was not a particularly decorous young woman. The court used very broad language in asserting that the university, having the right of parents to discipline their children as they see fit, had no duty whatsoever to prefer or to prove charges.

The in loco parentis doctrine has now lost much of its force.⁹⁰ The federal courts have rejected it,⁹¹ commentators have rejected it,⁹² and the students themselves have consistently rejected it. Indeed, it had little rationality to begin with. Many college students were of majority age,⁹³ but were subjected to "parental" discipline from universities when their actual parents could not exercise it themselves. Even if the student were a minor, universities employed disciplinary tactics which were legally unavailable to the parents; parents have no right to boot their children out of the house, but colleges were given the right to expel under the guise of parental authority.⁹⁴

89. 88 Fla. 510, 102 So. 637 (1924). The court relied on two other cases reasoning from the in loco parentis premise: *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913); *Vermillion v. State ex rel. Englehardt*, 78 Neb. 107, 110 N.W. 736 (1907).

90. As the in loco parentis doctrine lost favor, some courts still upheld a school's exercise of parental discipline, refusing to require due process, on the grounds that an expulsion decision was merely "disciplinary" and not "adjudicative." This view was expressed most strongly in *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956), and *Vermillion v. State ex rel. Englehardt*, 78 Neb. 107, 110 N.W. 736 (1907). See generally *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 263 P. 433, *appeal dismissed*, 278 U.S. 661 (1928).

In support of this theory, the courts pointed out that college administrators do not have the power to subpoena witnesses or punish for perjury, thus adverting to the administrative law distinction between adjudicative and administrative proceedings. On the latter distinction, see W. GELLHORN & C. BYSE, *CASES AND COMMENTS ON ADMINISTRATIVE LAW* 486-538 (5th ed. 1970). This argument is irrelevant. Whether the expulsion process is adjudicative depends on the nature of the student's right. If the student's interest is worthy of protection, then the process of depriving him of that right is adjudicative, regardless of the power to subpoena witnesses or punish for perjury. See generally Comment, *Colleges and Universities: The Demise of In Loco Parentis*, 6 LAND & WATER L. REV. 715 (1971).

91. See, e.g., *Moore v. Student Affairs Comm.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968); *Buttney v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968); *Zanders v. Louisiana St. Bd. of Educ.*, 281 F. Supp. 747, 756 (W.D. La. 1968); *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968).

92. See, e.g., *Goldman, The University and the Liberty of its Students—A Fiduciary Theory*, 54 Ky. L.J. 643 (1966); Note, *supra* note 7, at 804; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1143-44 (1967).

93. Parental control rights end upon a person's "emancipation," *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E.2d 299 (1972), which is presumptively at the age of 21. *Limpert v. Limpert*, 119 N.J. Super. 438, 292 A.2d 38 (App. Div. 1972); *Commonwealth ex rel. Welsh v. Welsh*, 222 Pa. Super. 585, 296 A.2d 891 (1972). See generally *Schumm v. Schumm*, 122 N.J. Super. 146, 299 A.2d 423 (Ch. 1973) (presumption of emancipation at 21 not changed by statute lowering age of majority to 18).

94. See *Osborn v. Allen*, 26 N.J.L. 388, 391-92 (1857) ("The authority and rights of parents over their children result from their duties. The law of nature acknowledges no other foundation of a parent's right. . . . The great natural duties of parents to their children, maintenance, protection and education, are all recognized at common law"); sources cited in note 37 *supra*. See also *Pass v. Pass*, 238 Miss. 449, 118 So. 2d

Common Law Rights for Private University Students

More importantly, American courts have been strongly wedded to the general idea that the student's relationship to the university is wholly governed by and fully described in the contract he signs on matriculation, the university's rules and regulations generally being part of that contract. According to this view, the student contracts away his right to due process when he enrolls in a university whose regulations, which he might never have read, state that the dean of students has the power to expel a student summarily for a list of possible offenses. In *Anthony v. Syracuse University*⁹⁵ the court found that a statement in the college's registration form, which was separate from the rules, that students could be suspended whenever the administration so decided, created a contract terminable at the will of the college. A similar rationale was employed in *Barker v. Bryn Mawr College*,⁹⁶ again to uphold a summary dismissal. This rationale did not mean, however, that students automatically lost all rights upon matriculation at a private college, since, absent an express term in the contract to the contrary, the courts were willing to impose minimal standards of good faith upon administrators as implied terms of the agreement.⁹⁷

769 (1960) (father must provide for minor child's college education; collects conflicting authorities on that issue).

An in loco parentis relation arises and is continued only by the substitute parent's willingness to assume all the duties of natural parents, *see, e.g.*, *James v. McLinden*, 341 F. Supp. 1233 (D. Conn. 1969); *Fuller v. Fuller*, 247 A.2d 767 (D.C. App. 1968); *Commonwealth ex rel. Morgan v. Smith*, 429 Pa. 561, 241 A.2d 531 (1968), including the duty of support, *In re St. John*, 272 N.Y.S.2d 817 (Fam. Ct. 1966); *Little v. Little*, 9 N.C. App. 361, 176 S.E.2d 521 (1970). Thus, a college's unwillingness to continue support whenever the student has broken college rules indicates the lack of an intention to stand in an in loco parentis relationship with the student; *cf.* *Van Alstyne, Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368, 376 (1963). Under the in loco parentis doctrine, there would be no difference in the prerogatives of public and private universities toward the student. The in loco parentis doctrine would also grant universities a right without a duty based on the relation of university to the student. Of course, the in loco parentis doctrine outside the university, like the relation between natural parents and their children, involves both rights and duties.

95. 224 App. Div. 487, 231 N.Y.S. 435 (1928).

96. 278 Pa. 121, 122 A. 220 (1923), *aff'g* 1 Dist. & Co. Rep. 383 (Co. Ct. 1922). The court in *Barker* did not feel compelled to find an express term in the contract making the contract terminable at will, but contented itself with a finding that nothing in the contract between the private university and Barker required that university to give procedural rights to students it wished to expel. The reasoning of *Barker* controlled the result in *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957). There are intimations in *People ex rel. Bluett v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956), that the *Barker* reasoning may have been a factor underlying that decision as well. (Illinois has always had a restrictive rule in regard to students' procedural rights. *See, e.g.*, *Smith v. Board of Educ.*, 182 Ill. App. 342 (1913).) *But see Moore v. Student Affairs Comm.*, 284 F. Supp. 725 (M.D. Ala. 1968) (in a case concerning procedural rights guaranteed through the Fourteenth Amendment, the court stated that the student-university relationship is not purely contractual).

97. In *Booker v. Grand Rapids Med. College*, 156 Mich. 95, 120 N.W. 589 (1909), and *State ex rel. Burg v. Milwaukee Med. College*, 128 Wis. 7, 106 N.W. 116 (1906), the court would have allowed damages for breach of contract as a remedy for illegal expulsions. Furthermore, courts which have accepted the contract theory imply a duty

The contract doctrine is, as has been shown, conclusory.⁹⁸ The issue the courts should confront is whether the status of "student" is a protectable interest, and whether the student-university relationship engenders obligations for the parties irrespective of their contractual agreement. Mechanical application of the term "contract" forecloses necessary inquiry into the nature of the interests involved.

The proposition that the student's status should be protected has already been demonstrated by examination of the fundamental nature of the student's valuable interest. This interest has both enterprise-worth and the imprimatur of the prevailing social ethic, the two major rationales behind protecting any valuable interest as property. The law governing expulsions from private associations should therefore be extended, on this firmer doctrinal footing, to encompass the student-university relationship, thus affording the student the protection of common law due process which members of private associations already enjoy.

There remains to consider one rather technical objection to extending private association doctrine to students—that students are not "members" in that they have no role in the governance of their "association."⁹⁹ The objection is not fatal. First, it is not clear whether it is factually true in the contemporary university setting; many private universities involve students in the governing process directly and, although they may not elect the president or trustees, students are delegated significant authority in some areas.¹⁰⁰ Furthermore, this objection, to the extent it focuses on de jure governance, ignores the more important issue of whether student sentiments are reflected in decisions of the academic community of which the formal structure

on the part of the administrators not to act arbitrarily, capriciously or in bad faith. See *Mustell v. Rose*, 282 Ala. 358, 211 So. 2d 489, cert. denied, 393 U.S. 936 (1968); *Coffelt v. Nicholson*, 224 Ark. 176, 272 S.W.2d 309 (1954); *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Nelson v. Lincoln Med. College*, 81 Neb. 533, 118 N.W. 122 (1908); *Goldstein v. New York Univ.*, 76 App. Div. 80, 78 N.Y.S. 739 (1902); *Frank v. Marquette Univ.*, 209 Wis. 372, 245 N.W. 125 (1932); cf. *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, aff'd mem., 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962). One court has even gone so far as to hold that there is an implied term in the university-student contract that the university give a student every reasonable opportunity to defend himself in expulsion cases. *Koblitz v. Western Reserve Univ.*, 21 Ohio Co. Ct. 144, 11 Ohio Co. Dec. 515 (1901).

98. See pp. 138-40 *supra*.

99. In *Booker v. Grand Rapids Med. College*, 156 Mich. 95, 120 N.W. 589 (1909), and *Barker v. Bryn Mawr College*, 1 Pa. Dist. & Co. Rep. 383 (Co. Ct. 1922), aff'd, 278 Pa. 121, 122 A. 220 (1923), the courts stated in a conclusory fashion that the students involved were not "members" of the defendant "corporations" (*i.e.*, the colleges). Just as "contract" theory is conclusory, *i.e.*, avoids the issue of whether the complainant has a protectable interest, so really is the label "member" equivalent to the legal conclusion that the complainant has a protectable interest. The real inquiry, then, is not who is a member, but whether the interest of the party deserves protection.

100. See T. PARSONS & G. PLATT, *supra* note 47, at 185-87, 377-78.

is only one part. Virtually all private universities consult student representatives before taking major actions, and even curriculum over the long run tends to reflect student preferences.¹⁰¹ In short, students are considered a constituent part of the academic community and participate as such. Most importantly, if control over governance were the essential ingredient in defining who is a member, then one might expect some inquiry by the courts into the actual operation of the associations or, in this instance, the universities. The courts have not, however, concerned themselves with this issue in the private association cases. Indeed, protection of individual members from the governing authorities is the *raison d'être* of judicial intervention, even where the members as a body have nominal ultimate control. Finally, this objection is mechanistic. It would define "member" by reference to facts largely irrelevant to the social desirability of protecting the status interests that inure to students through attendance at universities. The formal characteristics of control over the governing authorities should not, therefore, serve to distinguish the relationship of a student to the university from that of members of other private associations.

III. Contours of the Property Right

Having demonstrated compelling reasons for protecting the student-university relationship as "property," it now becomes important to sketch the limits of that protection. It was once fashionable to speak of property rights as absolute,¹⁰² but such ideology surely is defunct today.¹⁰³ To consider for a moment the most obvious item of property, land, it is immediately apparent that there are a number of major constraints on its occupancy and use: zoning regulations,¹⁰⁴ conservation laws,¹⁰⁵ nuisance doctrine,¹⁰⁶ building code and health regula-

101. See *id.* at 186; cf. Platt & Parsons, *Decisionmaking in the Academic System: Influence and Power Exchange*, in *THE STATE OF THE UNIVERSITY: AUTHORITY AND CHANGE* 133 (C. Kruytbosch & S. Messinger eds. 1970).

102. See *Lochner v. New York*, 198 U.S. 45 (1905); M. COHEN, *supra* note 17, at 57-63.

103. See generally *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); Philbrick, *Changing Conceptions of Property in the Law*, 86 U. PA. L. REV. 691 (1938).

104. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Harbison v. City of Buffalo*, 4 N.Y.2d 533, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955).

105. See, e.g., *Consolidated Rock Prods. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); *State v. Goffstown*, 100 N.H. 131, 121 A.2d 317 (1956); *New Jersey Sports & Exposition Auth. v. McCrane*, 61 N.J. 1, 292 A.2d 545 (1972); cf. Note, *Land Subdivision Control*, 65 HARV. L. REV. 1226 (1952).

106. See, e.g., *Meat Producer, Inc. v. McFarland*, 476 S.W.2d 406 (Tex. Civ. App. 1972); *Wade v. Fuller*, 12 Utah 2d 299, 365 P.2d 802 (1961); *Bie v. Ingersoll*, 27 Wis. 2d 490, 135 N.W.2d 250 (1965); Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399 (1942).

tions.¹⁰⁷ Furthermore, in some circumstances one is forced to dispose of the land to meet personal debts.¹⁰⁸ In short, property rights in land are defeasible in whole or in part when confronted with certain conditions which represent the superiority of other societal interests.¹⁰⁹

The essence of the property protection is to protect an interest from deprivation by a more powerful party purely on the basis of the latter's superior power, without, however, making the owner absolutely supreme so that he can with impunity manipulate his protected interest to the detriment of others' property rights. Such protection is built into common law property doctrine by requiring that any deprivation be rationally justified, or by locating a presumption with the owner so that anyone who would deprive the owner must satisfy a burden of proof that his action is of overriding importance.¹¹⁰

A student's property interest in his status might thus conflict with certain arguable property rights of the university, based upon its rights to manage its affairs and to assure orderly pursuit of its own goals. The interests of the student and the university can be reconciled by allowing the university to manage its own affairs up to the point where it would defeat the student's legitimate valuable interest in a purely arbitrary way. This would be accomplished by guaranteeing the student due process in expulsion proceedings.

More specifically, it would follow from this discussion that students' property rights should be defeasible upon proof of conduct inconsistent with the purposes of the private university. A student who engages in a serious disruption of the university, for example, unreasonably infringes the university's rights and the rights of other

107. See, e.g., *Jones v. District of Columbia*, 323 F.2d 306 (D.C. Cir. 1963); *American Home Fire Assur. Co. v. Mid-West Enterprise Co.*, 189 F.2d 528 (10th Cir. 1951); *De Aryan v. Bultea*, 119 Cal. App. 2d 674, 260 P.2d 98, cert. denied, 347 U.S. 1012 (1954); *Lincoln Park v. Cullari*, 15 N.J. Super. 210, 83 A.2d 233 (1951); Christopher, *State Police Power in Health and Fraud Matters*, 8 UTAH L. REV. 289 (1963).

108. This would be involuntary bankruptcy. See J. MOORE & W. PHILLIPS, *DEBTORS' & CREDITORS' RIGHTS* 1-14, 1-16 (1966).

109. Thus, economic expectations are, for example, not protected absolutely by the law of tort but only against *unreasonable* injury or deprivation. They are, therefore, not protected against competitive injury, because competition (everyone's right to use property for his own benefit) is deemed more important to economic life than an absolute security in economic expectations. Justice Holmes explained the defeasible nature of property rights in this sense, responding to the contention that an individual's business was being injured by union activity: "[T]he policy of allowing free competition justifies the intentional inflicting of temporal damage . . . when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade." *Vegeahn v. Guntner*, 167 Mass. 92, 106, 44 N.E. 1077, 1087 (1896) (Holmes, J., dissenting). Expulsions from private associations are similarly protected, not absolutely, but only against unreasonable proceedings, not securing members against expulsion, but only against expulsions based on procedures which evidence no concern for the truth or respect for the member's interest in continued membership.

110. See Reich, *supra* note 14, at 771.

students, since a measure of stability and order in the academic community is necessary in order for it to exist at all. As a second example, if a student fails to achieve sufficient academic progress or achieves such progress fraudulently by cheating, the very reasons for protecting his relationship with the university are nullified. In general, the court should, for reasons similar to those governing judicial review of administrative decisions,¹¹¹ defer to the university's own definition of what conduct is so inimical to the purposes of the particular institution that expulsion is required. Substantive intervention into the governance of the university would, therefore, be limited to decisions or formulations of policy which are arbitrary or capricious. This has been the practice of courts in reviewing the expulsion decisions of private associations.¹¹²

Since the rationales for protecting the student's interest are based largely on guarding against the external effects of discipline arbitrarily imposed,¹¹³ or against actions which effectively deny the student the intrinsic educational benefits associated with the status of student, the court's *jurisdiction* would be limited to those instances where the sanction which the university imposes amounts to an effective expulsion, in the sense that his pursuit of an education and an eventual diploma, to which his status entitles him, are substantially frustrated. Minor matters of discipline which do not significantly impede

111. The reasons for giving an agency primary jurisdiction include: uniformity of decision, greater expertise in regard to investigation and determination of the relevant facts, the exercise of administrative discretion allowing flexibility in application of the law. See *Far East Conf. v. United States*, 342 U.S. 570, 574-75 (1952); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441-46 (1907); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 123-34 (1965).

112. See, e.g., *Local No. 57, Painters, Decorators & Paperhangers v. Boyd*, 245 Ala. 227, 234, 16 So. 2d 705, 711 (1944) (expulsion conclusive on civil court if association acted in good faith and provided fair procedures); *Niner v. Hanson*, 217 Md. 298, 308, 142 A.2d 798, 802 (1958) (equity is reluctant to enter internal affairs of private association but will do so where an expulsion is arbitrary or not in accordance with the association's rules); *Junkins v. Local No. 6313, Communications Workers*, 241 Mo. App. 1029, 271 S.W.2d 71 (1954) (only on clearest showing that remedies within the association are nonexistent or unreasonable will courts permit their jurisdiction to be invoked; association's decisions not subject to collateral attack for mere error; courts look to the record to determine whether proceedings were conducted within the bylaws, in good faith, whether the charges were substantial and whether the member had fair notice and an opportunity to be heard; court does not substitute its judgment for that of the association); *Pegg v. United Mut. Life Ins. Co.*, 6 Misc. 2d 600, 601, 167 N.Y.S.2d 486, 487 (Sup. Ct. 1957) (court will not substitute its judgment for that of association if charges were substantial and member had fair hearing); *Harmon v. Matthews*, 27 N.Y.S.2d 656, 664 (Sup. Ct. 1941) (court does not consider the weight of the evidence or substitute its judgment for that of the association if member had been accorded fair proceedings). For a university case employing this standard, avoiding judicial interference with academic judgments unless arbitrary or unreasonable, see *Balogun v. Cornell Univ.*, 70 Misc. 2d 474, 477, 333 N.Y.S.2d 838, 841-42 (Sup. Ct. 1971) (no abuse of discretion or gross error; no showing that denial was arbitrary, capricious, or malicious).

113. See note 36 *supra*.

the student's pursuit of his education and degree would not, therefore, fall within the court's jurisdiction regardless of how unfair or unreasonable the punishment may be.

This approach to determining the limits of the courts' jurisdiction was strikingly illustrated in *Glynn v. Keele University*,¹¹⁴ where the student had not been expelled, but only "suspended" from the premises for a few crucial weeks prior to examinations. The court probed beneath the university's categorization and decided that the action amounted to an effective expulsion since it made it impossible for the student to complete preparation for his examinations. After wrestling with the problem of the nature of the penalty imposed, Vice Chancellor Pennyquick concluded

that those powers [to suspend from the premises] are so fundamental to the position of the student in the university . . . that I do not think it would be right to treat those powers as matters of internal discipline.¹¹⁵

In another case, *Woody v. Burns*,¹¹⁶ an American court pierced a seemingly ministerial denial of late registration at a state school to find that it was refused solely on the grounds of misconduct. Thus, the denial was a veiled expulsion, and the court required due process. The courts' jurisdiction is, therefore, limited to those cases in which the student's right to pursue his education and degree has been violated—that is, where the school's action amounts to an effective expulsion. No precise formulation of this limitation can be constructed since the facts of each case will vary, but the conceptual framework by which the courts' jurisdiction should be judged—whether a de facto expulsion has occurred—provides a manageable standard which can be consistently applied. Broad areas of disciplinary actions which are not effective expulsions, as well as the entire realm of grading, remain properly outside the purview of the courts.¹¹⁷

With effective expulsion as the jurisdictional criterion, and with review limited to those expulsions which are clearly arbitrary or capricious, the court's major role is to guarantee students basic procedural rights. This will not entail preventing expulsions if warranted. If, for example, the school considers cheating or possession of heroin

114. [1971] 2 All E.R. 89.

115. *Id.* at 96.

116. 188 So. 2d 56 (Fla. Dist. Ct. App. 1966).

117. See, e.g., *Mustell v. Rose*, 282 Ala. 358, 211 So. 2d 489 (1968), *cert. denied*, 393 U.S. 936 (1970); *Militana v. University of Miami*, 236 So. 2d 162 (Fla. Dist. Ct. App.), *cert. denied*, 401 U.S. 962 (1970); cf. *Greenhill v. Bailey*, 378 F. Supp. 632 (S.D. Iowa 1974) (review of grades causing public school expulsion denied).

inimical to university life (and nearly all universities would), then, as long as basic procedural rights are followed, the only issues relevant to the accused student's valuable interest in remaining a student are whether he in fact committed the acts charged and whether expulsion is an arbitrary or capricious punishment for the nature of the act committed. If a hearing shows that he did commit the act, and the university considers expulsion the proper remedy, it is then proper to deprive the student of his status. If, on the other hand, he is expelled on the basis of a mere allegation without opportunity to challenge it, then no matter how serious the charge, his rights have been violated.

Once the student's general right to procedural fairness in university disciplinary proceedings has been established by the courts, the precise contours of that right will be developed organically on the basis of a growing body of case law. If the courts remain consistently aware of the nature of the right being protected, the elements of the required procedure can be tailored to the specific cases; the doctrine can remain flexible. Since there already is, however, a body of law which has developed a similar right for members of private associations, some basic requirements may be advanced with some confidence. The defendant should, at the very least, have notice of the charges against him and of the evidence upon which those charges are based, including the names of any witnesses. He should have an unbiased judging tribunal and the right to controvert the evidence used against him, including the right to challenge, through reasonable means, the veracity and credibility of witnesses.¹¹⁸ It is likely that such rights may be substantially achieved without insisting upon an absolute right to legal counsel or any particular format of cross-examination; the spirit of due process, not the letter, should control.¹¹⁹

118. See, e.g., *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 679, 254 P.2d 587, 588-89 (1953) (due process includes notice, a hearing, and a fair trial); *Harmon v. Matthews*, 27 N.Y.S.2d 656, 659 (Sup. Ct. 1941) (in expulsion proceedings a member is entitled to have the charges made known to him, to be confronted by his accusers and the witnesses against him, to a reasonable opportunity to question or cross-examine them, to examine the evidence, and to answer, explain, defend and present evidence in his own behalf). See also cases cited in notes 54-59 *supra*, and the state action due process cases in note 2 *supra*; cf. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

119. It may well be that the logic of the position advanced here should apply to professors and instructors as well as students. Development of the common law in regard to professors and instructors has suffered the same hiatus as the common law in regard to students. See *Cowan, Interference with Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958); *Finken, Toward a Law of Academic Status*, 22 BUFF. L. REV. 575 (1973). The Fourteenth Amendment has provided limited protection to professors and instructors. See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974).

Conclusion

The common law protects valuable interests of individuals and groups from arbitrary deprivation or unreasonable injury if those interests have enterprise-worth or are deemed inherently worthwhile under the prevailing social ethic. Students at private universities have an interest sufficiently valuable under these tests that the courts should protect it against arbitrary deprivation. The law of private associations already provides protection of members' rights in expulsion proceedings, but, with the exception of a few early cases, such protection has not been extended to students, due at least in part to an inadequate understanding of the fundamental nature of the interests at stake. Analysis of the basic rationales behind the law of property not only provides a firmer foundation for the law of associations; it also demonstrates why such protection applies with equal force to the student-university relationship.