

## COMMENT

### GOOD MORAL CHARACTER: ALREADY AN UNCONSTITUTIONALLY VAGUE CONCEPT AND NOW PUTTING BAR APPLICANTS IN A POST-9/11 WORLD ON AN ELEVATED THREAT LEVEL

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A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.

—Justice Hugo Black<sup>1</sup>

## INTRODUCTION

In the fall of 2002, when I was considering engaging in civil disobedience to protest war against Iraq, I asked a constitutional law professor if an arrest would affect my bar application. He said it depended on the state; there was no clear answer. This bothered me, as I had foregone participating in the Republican National Convention protests in 2000 because an attorney warned me that it might jeopardize my chances of being admitted to the bar.<sup>2</sup>

By the time I appear before the character and fitness committee of the state bar, I will have invested three years of hard work and accumulated a debt of over \$100,000 to become an attorney. Therefore, I am uncomfortable with the notion that I must choose between my future law career and exercising my First Amendment right of free expression.<sup>3</sup> It is also troubling to know I may have already jeopardized my chances of admission to the bar on the basis of activities I

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<sup>1</sup> *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957) (Black, J.) (“*Konigsberg I*”).

<sup>2</sup> Before that time, I had engaged in civil disobedience, but had never been arrested.

<sup>3</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

engaged in before coming to law school. Even if the committee does admit me, the possibility of being denied admission has already had a negative impact simply because I have not engaged in certain activities. It seems odd that I could spend my career representing those who engage in civil disobedience, while I am unable to do so myself now or that I might lose some of my First Amendment rights because I am going to be a lawyer.<sup>4</sup>

Some argue that what a bar admissions committee can and cannot do when deciding to admit an applicant is clear. They argue that there is no controversy, as the Supreme Court decided the issue in three cases in 1971. The committee can deny admission on the basis of “bad character,” but not an applicant’s political views. Furthermore, if all else fails, the applicant can appeal to the state, and ultimately to the Supreme Court for redress. However, if these arguments are accurate, it seems strange that my professor could not answer my question.

I disagree that bar admission is a “comfortable” area of First Amendment law, especially in the post-9/11 world, nor do I believe the answer to this dilemma is conclusive. Part I of this Comment introduces the character and fitness committee and the elusive concept of “good moral character.” Part II examines cases before 1971 that, by and large, rejected the notion of an applicant’s right to refuse to answer questions regarding his possible “Communist” associations.<sup>5</sup> Part III introduces the 1971 cases—*Baird*,<sup>6</sup> *Stolar*,<sup>7</sup> and *Wadmond*<sup>8</sup>—and their failure to overturn the earlier “Communist” cases outright. Part IV explores how the 1971 cases provide no guidance for character and fitness committees or prospective applicants because they contradict one another. Additionally, Part IV illustrates how state courts have been inconsistent when attempting to follow these decisions. Part V discusses the fact that the 1971 cases decided little more than the facts presented and were sensitive to the popular ideas of

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<sup>4</sup> Some might argue that lawyers cannot commit murder, but can defend those accused of committing the crime. In my opinion, civil disobedience is different than murder because although one breaks the law, it is deliberately done to send a higher political message and it is nonviolent.

<sup>5</sup> I use the pronouns “he” and “his” because the pre-1971 cases all concerned men.

<sup>6</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971) (“[W]e hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law.”).

<sup>7</sup> *In re Stolar*, 401 U.S. 23 (1971) (deciding that it is a violation of a bar applicant’s First Amendment rights to deny him admission solely because of the applicant’s refusal to answer questions about his beliefs and associations).

<sup>8</sup> *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (holding that the New York Bar’s admission requirements do not have a “chilling effect” upon the exercise of free speech and association of law students and that legislatures, not courts, are responsible for broad admissions policy changes).

the time in which they were made. Ultimately, they protected only applicants who held theoretical political views, not ones who had engaged in activities supporting those views. Part VI explores how the climate today, post-9/11, could alter character and fitness committee's definitions of "good moral character." Part VII highlights how the Supreme Court's tendency to favor states over applicants' First Amendment rights poses a greater danger in a post-9/11 world. Finally, this Comment concludes that the repercussions of denying admission to state bars because of an applicant's exercise of First Amendment rights affects not only the applicant but all those who may need representation.

## I. THE BAR ADMISSIONS PROCESS AND GOOD MORAL CHARACTER

Rather than having a national standard, admission to the bar is a state process, with each state deciding whom it wishes to admit. This procedure is both a blessing and a curse to prospective applicants. While the state-by-state system permits one who is denied admission in one state to then apply to another, such procedures allow state bar admission committees to reflect local prejudices and viewpoints. Despite some support for replacing the current system with a national law license, in August of 2002, the American Bar Association's House of Delegates rejected the idea.<sup>9</sup>

From its inception, the bar admissions process has been fueled by the desire to maintain a certain image of the legal profession and lawyers. The admissions process began in the late nineteenth and early twentieth century as other professions began to take an interest in character certification.<sup>10</sup> According to Lawrence M. Friedman, the desire for a more formal process was motivated by the desires to "upgrade the profession, . . . control the supply of lawyers, and keep out price cutters and undesirables."<sup>11</sup> However, Deborah L. Rhode suggests a more sinister motive: "Much of the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern European immigrants, which threatened the profession's public standing. Nativist and ethnic prejudices during the 1920's, coupled with economic pressures during the Depression, fueled a renewed drive for entry barriers."<sup>12</sup>

For admission purposes, the applicant must prove to a state character and fitness committee that she possesses "good moral charac-

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<sup>9</sup> Patricia Manson, *ABA Rejects National Law License*, CHI. DAILY L. BULL., Aug. 13, 2002, Westlaw, 8/13/02 CHIDL B 1.

<sup>10</sup> Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 498-99 (1985).

<sup>11</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 654 (2d ed. 1985).

<sup>12</sup> Rhode, *supra* note 10, at 499-500.

ter.” Although most states define what constitutes “good moral character,” as Marcus Ratcliff explains, it can include everything from “honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, fiscal responsibility, physical ability to practice law, knowledge of the law, mental and emotional stability, and a commitment to the judicial process.”<sup>13</sup> This shadowy concept lies against the backdrop of a process that historically excluded women, minorities, and more recently, lesbians and gays.<sup>14</sup>

## II. THE “COMMUNIST” CASES: PRE-1971

Although the Supreme Court addressed the subject of bar admissions in a trilogy of cases in 1971, its four earlier decisions in 1957 and 1961 are still significant because they have not been expressly overruled.<sup>15</sup> Moreover, by detailing and thereby concentrating on the individual’s particular circumstances, the Court never articulated a broad principle to guide later committees, courts, or future applicants. Finally, these cases demonstrate the extent to which the political climate of the time can influence character and fitness committees. The decisions are particularly relevant today at a time when the United States fears attacks perpetrated from within the country itself, similar to the fear of Communists.

On two days, one in 1957, and another in 1961, the Supreme Court decided four cases, *Schwartz* and *Konigsberg* (1957) and *Konigsberg* and *Anastaplo* (1961).<sup>16</sup> All four cases concern how an applicant’s association or refusal to answer questions regarding his possible associations with the Communist Party reflected upon his good moral character.

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<sup>13</sup> Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 495 (2000) (“However, at least seventeen states avoid the problems involved in describing the relevant character traits that make up good character by not publishing guidelines.”).

<sup>14</sup> Joel Jay Finer, *Gay and Lesbian Applicants to the Bar: Even Lord Devlin Could Not Defend Exclusion*, Circa 2000, 10 COLUM. J. GENDER & L. 231 (2001) (analyzing how societal attitudes and laws toward lesbians and gays have shifted in a positive way since the 1960s, but that lesbian and gay applicants to the bar could still face potential risks in overcoming the “good moral character” standard); see also Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93 (2001) (analyzing the rejection of applicants for mental and physical disabilities including depression and substance abuse in light of the ADA).

<sup>15</sup> “Neither [*Anastaplo* or *Konigsberg*] is now expressly overruled.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 12 (1971) (Blackmun, J., dissenting).

<sup>16</sup> The Supreme Court heard one applicant’s case twice—*Konigsberg*.

## A. Schware

In 1957, in *Schware v. Board of Bar Examiners of New Mexico*, the Supreme Court unanimously reversed New Mexico's denial of Rudolph Schware's application to sit for the bar exam.<sup>17</sup> Schware had served in the Army,<sup>18</sup> used an alias during his efforts to unionize Italian workers because he feared anti-Semitism,<sup>19</sup> and encouraged others to join the Loyalist government in the Spanish Civil War.<sup>20</sup> However, the committee denied his application after it confidentially learned of his previous Communist Party ties, even though it had never asked Schware about them.<sup>21</sup> The New Mexico Supreme Court supported the denial, emphasizing that Schware's membership was for a period of six to seven years during his adulthood, which indicated he was "a person of questionable character."<sup>22</sup>

In evaluating Schware's procedural due process claim,<sup>23</sup> the Supreme Court concentrated on the facts surrounding his past Communist Party ties rather than the "secret evidence" aspect of his claim.<sup>24</sup> Ultimately, the Court "forgave" Schware because he renounced the party and, at the time of his involvement, the party was legal.<sup>25</sup> Notably, the Court stressed that while Schware *believed* in the principles of the Communist Party, he did not *act*,<sup>26</sup> and that "[a]pparently many thousands of other Americans joined him in this step."<sup>27</sup>

The Court noted that a "[s]tate cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."<sup>28</sup> However, read in the context of the entire decision, this statement suggests that because there was no other indication of lack of good moral character on Schware's part, the committee's action was discriminatory. Otherwise, the denial would have been upheld.

Although helpful to Schware, the Court's decision provides little guidance to future applicants because it is too specific to Schware's

<sup>17</sup> 353 U.S. 232 (1957).

<sup>18</sup> *Id.* at 237.

<sup>19</sup> *Id.* at 236.

<sup>20</sup> *Id.* at 237.

<sup>21</sup> *Id.* at 235.

<sup>22</sup> *Id.* at 244.

<sup>23</sup> *Id.* at 233.

<sup>24</sup> Although the committee also refused to provide Schware with the information confidentially gained, the Supreme Court did not address that issue. *Id.* at 235 n.2.

<sup>25</sup> *Id.* at 244.

<sup>26</sup> "There is nothing in the record that gives any indication that his association with that Party was anything more than a political faith in a political party." *Id.*

<sup>27</sup> *Id.* at 245.

<sup>28</sup> *Id.* at 239.

own circumstances and, more significantly, because the standard the Court articulates is vague. The Court held that past membership in an organization is not enough to disqualify an applicant from the bar. While the Court found that “any qualification must have a rational connection with the applicant’s fitness or capacity to practice law,” it also conceded that it was within the state’s power to require a “high standard” of qualification for admission.<sup>29</sup> This implies that bar admission is subject to rational basis review: as long as the committee can justify a reason for its denial, it is constitutional. However, an applicant’s exercise of his First Amendment rights should be accorded more protection.

### B. *Konigsberg I and II*

The same day it decided *Schwartz*, the Supreme Court remanded the California State Committee of Bar Examiners’ refusal to certify Raphael Konigsberg for admission to the bar<sup>30</sup> because he failed to “dispel substantial doubts . . . about his character and loyalty.”<sup>31</sup> The committee heard evidence that Konigsberg attended Communist Party meetings in 1941.<sup>32</sup> Although Konigsberg refused to elaborate on his political views or indicate whether or not he was or ever had been a member of the Communist Party,<sup>33</sup> he did answer questions about his other associations and stated that he was not a Communist in a “philosophical sense.”<sup>34</sup> He also provided the written testimony of forty-two individuals who knew him over the course of twenty years and attested to his “excellent character.”<sup>35</sup>

In a 6–3 decision authored by Justice Black, the Court remanded the case because there was “no evidence . . . which rationally justify[d] a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government.”<sup>36</sup> The Court noted that even if it were true that Konigsberg was a Communist, the party was legal in California in 1941.<sup>37</sup> “[T]he mere fact of membership would not support an inference that he did not have good moral character.”<sup>38</sup> Without evidence of unlawful actions on Konigsberg’s part, the committee could

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<sup>29</sup> *Id.*

<sup>30</sup> *Konigsberg I*, 353 U.S. 252, 253, 274 (1957).

<sup>31</sup> *Id.* at 261 n.15.

<sup>32</sup> *Id.* at 266.

<sup>33</sup> *Id.* at 258.

<sup>34</sup> *Id.* at 267.

<sup>35</sup> *Id.* at 264.

<sup>36</sup> *Id.* at 273.

<sup>37</sup> *Id.* at 268.

<sup>38</sup> *Id.* at 267.

not assume that he “presently advocates overthrowing the Government by force.”<sup>39</sup>

In front of the committee on remand, Konigsberg introduced further evidence as to his good moral character (none of which was rebutted), reiterated unequivocally that he did not believe in violent overthrow of the government, and stated that he had never knowingly been a member of an “organization which advocated such action[s].”<sup>40</sup> Significantly, however, he continued to refuse to answer questions regarding his possible Communist Party ties on First Amendment grounds.<sup>41</sup> The committee again denied his application.<sup>42</sup>

In 1961, the Supreme Court considered whether Konigsberg’s refusals to answer could be grounds for a denial because he failed to carry his burden of proof.<sup>43</sup> The committee claimed that by his refusals, Konigsberg denied the committee the opportunity to investigate further and determine if there even was a problem with his application.<sup>44</sup> In a 5–4 decision, the Court held that by not answering questions that a committee deems to have “substantial relevance to his qualifications,” Konigsberg obstructed an investigation, providing adequate grounds for denial.<sup>45</sup> As the Court noted, membership in the Communist Party is a danger and therefore, an area of substantial relevance.<sup>46</sup>

Both Rudolph Schware and Raphael Konigsberg were accused of previous membership in the Communist Party when it was legal. However, Schware’s willingness to distance himself from it legitimized his application to the state bar and he was granted admission, while Konigsberg’s refusal to explicitly confirm or deny it provided adequate grounds for his denial.

### C. Anastaplo

In a companion opinion to *Konigsberg II*, the Court considered the denial of George Anastaplo on the basis of his “abstract belief in the

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<sup>39</sup> *Id.* at 271.

<sup>40</sup> *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 39 (1961) (“*Konigsberg II*”).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 42–43.

<sup>44</sup> *Id.* at 43.

<sup>45</sup> *Id.* at 44.

<sup>46</sup> *Id.* at 52. “This Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes.” *Id.*

'right of revolution'" as well as his refusal to answer questions about his associations.<sup>47</sup>

Anastaplo's application first caught the Illinois Committee on Character and Fitness's eye because he wrote an essay "defending the right to revolution as articulated in the Declaration of Independence."<sup>48</sup> When questioned further about when such a right to revolution might exist, he detailed situations such as "Nazi Germany; Hungry during the 1956 revolt against Russia; [or] a hypothetical decree of [the Supreme] Court establishing 'some dead pagan religion as the official religion of the country.'"<sup>49</sup> Significantly, Anastaplo stated that he could not think of "such a single instance" in United States history, but he believed "it [was] important to insist that there might be such instances."<sup>50</sup> In addition, Anastaplo refused to disclose his possible associations not only with the Communist Party or any other "subversive" organization, including the Ku Klux Klan, but also with political groups, such as the Democratic and Republican parties.<sup>51</sup>

The Court rejected the claim that Anastaplo's denial was "arbitrary or discriminatory."<sup>52</sup> Instead, the Court found that Anastaplo's petition was rejected because of his "refusal to cooperate in the Committee's examination."<sup>53</sup> The Court opined that once Anastaplo answered the committee's questions, his application would no longer be denied.<sup>54</sup>

What is most troubling about Anastaplo's denial is that the committee rejected him solely on the theoretical basis of his beliefs, as there was no evidence that Anastaplo had acted on those beliefs.<sup>55</sup> Although he articulated a belief in the right of the people to revolt, it was theoretical. Most importantly, when discussing his obligations as a lawyer, Anastaplo explained that he would not advise a client to resist a decision by force, but only "'with respect to the legal system as it exists."<sup>56</sup>

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<sup>47</sup> *In re Anastaplo*, 366 U.S. 82, 83-85 (1961). After passing the Illinois Bar, the Illinois Character and Fitness Committee rejected Anastaplo for refusing to answer questions about possible Communist Party associations. He appealed, but the Supreme Court refused to review his case. After the Supreme Court's *Konigsberg* and *Schwartz* decisions, Anastaplo sought a rehearing. See *In re Anastaplo*, 163 N.E.2d 429, 429-31 (Ill. 1959) (holding that bar applicant's denial of admission on the basis that the applicant failed to establish good moral character denied applicant his due process rights).

<sup>48</sup> Rhode, *supra* note 10, at 569.

<sup>49</sup> *In re Anastaplo*, 366 U.S. at 96 n.18.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 85 n.5.

<sup>52</sup> *Id.* at 94.

<sup>53</sup> *Id.* at 96.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 98 (Black, J., dissenting). Nothing in Anastaplo's record indicated a problem that "could have, in any way, cast doubt upon his fitness for admission to the Bar." *Id.*

<sup>56</sup> *In re Anastaplo*, 163 N.E.2d 429, 432 (Ill. 1959) (quoting Anastaplo's testimony).



Overall, the pre-1971 cases indicate that a bar committee must have a rational basis for denying membership or refusing to certify. *Schware* states that past membership in a legal organization is not enough for a denial. However, *Konigsberg* implies that past membership in a legal organization is grounds for denial if a candidate does not disavow his prior acts or does not answer allegations of membership. Additionally, refusing to answer the committee's questions about membership in the Communist Party in particular or a blanket refusal in general, as in George Anastaplo's case, serves as a basis for denial.

### III. THE 1971 TRILOGY

On February 23, 1971, the Supreme Court inconsistently decided multiple bar admissions cases—*Baird*, *Stolar*, and *Wadmond*. In plurality decisions, the Court reversed the denials of individuals, Sara Baird and Martin Stolar, while in *Wadmond*, it upheld a class challenge to New York's questions regarding group associations. In doing so, the Court established that challenges to the bar admission process would be decided ad hoc, rather than according to bright-line rules.

#### A. Baird

The Arizona Bar Committee refused to process Sara Baird's application because she declined to answer whether she had been a member of the Communist Party or another organization that advocated violent overthrow of the government.<sup>57</sup> She did, however, provide an extensive list of all the organizations she had been a member of since the age of sixteen, including: the Girl Scouts, the Young Republicans, the Young Democrats, and the Law Students Civil Rights Research Council.<sup>58</sup> She then appealed to the Arizona Supreme Court, asking that the bar committee show cause for its denial, which the court denied.<sup>59</sup> In a plurality decision, the United States Supreme Court reversed the denial.<sup>60</sup>

At times the Court used sweeping language about the importance of protecting the applicant's First Amendment rights. However, the Court implied that Arizona was sweeping too broadly only because there was no other evidence of a "problem" with Sara Baird's application. As the Court stated:

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<sup>57</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 4-5 (1971).

<sup>58</sup> *Id.* at 7 n.7.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.* at 8.

But here petitioner has already supplied the Committee with extensive personal and professional information to assist its determination. . . . And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.<sup>61</sup>

In this way, *Baird* only protects the applicant who specifically refuses to answer questions about the Communist Party but reveals all other associations to a state character and fitness committee.

In reversing her denial, the Supreme Court adopted an approach similar to the one it took in *Schwartz*: it considered the committee's denial in the context of the rest of Baird's application and evaluated whether the committee had legitimate grounds. The Court noted that there was no indication Baird failed to disclose any organization to which she had belonged<sup>62</sup> or that there was anything that remotely suggested her views might be a problem for the committee. As the Court described: "This record is wholly barren of one word, sentence, or paragraph that tends to show this lady is not morally and professionally fit to serve honorably and well as a member of the legal profession."<sup>63</sup>

### B. Stolar

Similarly, Ohio refused to allow Martin Stolar to sit for the bar examination after he refused to answer detailed questions about his associations.<sup>64</sup> Although at oral interrogation before the committee Stolar answered that he was not, nor had he been, a member of the Communist Party.<sup>65</sup> During the written portion, he refused to answer the following:

12. State whether you have been, or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force . . . .

13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member.

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<sup>61</sup> *Id.* at 7.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.* at 8. Considering the fact that the Court made specific reference to Ms. Baird's gender through the use of "lady," it is unclear whether or not Ms. Baird's gender played any role in the decision. In the course of my research, *Baird* is the only Supreme Court case involving a woman whose application to the bar had been denied for her political views or refusal to answer questions regarding them. The Court also said, "In effect this young lady was asked by the State to make a guess as to whether any organization to which she ever belonged 'advocates overthrow of the United States Government by force or violence,'" a comment that has patronizing undertones. *Id.* at 5.

<sup>64</sup> *In re Stolar*, 401 U.S. 23, 26 (1971).

<sup>65</sup> *Id.*

7. List the names and addresses of all clubs, societies or organizations of which you are or have been a member since registering as a law student.<sup>66</sup>

Stolar cited infringement of his First and Fifth Amendment rights as the grounds for his refusal.<sup>67</sup> Additionally, Stolar, already a member of the New York Bar, provided the committee with his New York application.<sup>68</sup> The New York information listed his organizational associations such as the Boy Scouts, activities with his local temple, and VISTA.<sup>69</sup> It also indicated that when joining the Army, Stolar signed the standard U.S. Army pre-induction security oath.<sup>70</sup> Finally, Stolar answered "yes" to the question: "Can you conscientiously, and do you, affirm, without any mental reservation, that you have been and are loyal to the Government of the United States?"<sup>71</sup>

*Stolar* provides some First Amendment protections to future bar applicants because it limited the kinds of associational questions the state can ask and recognized the potential negative effect on Free Expression rights. The Court held that Ohio's questions that required Stolar to first list the organizations of which he had been a member since the age of sixteen and since joining law school were too broad.<sup>72</sup> Most significantly, the Court acknowledged that bar admission questions could chill the First Amendment rights of applicants: "Law students who know they must survive this screening process before practicing their profession are encouraged to protect their future by shunning unpopular or controversial organizations."<sup>73</sup>

Nevertheless, *Stolar* does not overrule *Anastaplo*; instead, it carves out an exception for Martin Stolar. Like George Anastaplo, Martin Stolar refused to answer questions about his associations in his application. The Ohio committee argued that the associational information was needed to assess an applicant's character.<sup>74</sup> Although acknowledging the state's need, the Court found the question irrelevant because Martin Stolar was a member in good standing of the New York Bar and because his New York application provided substantially the same information Ohio was seeking.<sup>75</sup> Furthermore, there were no problems or questionable activities in Stolar's application.<sup>76</sup> Therefore, like Baird and Schware, Stolar was protected from

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<sup>66</sup> *Id.* at 27.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 26.

<sup>69</sup> *Id.* at 25-26.

<sup>70</sup> *Id.* at 26.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 27-28.

<sup>73</sup> *Id.* at 28.

<sup>74</sup> *Id.* at 29.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 30. "There is not one word in this entire record that reflects adversely on Mr. Stolar's moral character or his professional competence." *Id.*

the committee's inquiries because his only "mistake" was not answering questions to which he had already provided answers. As in *Baird*, the Court elevated procedure over protection of an individual's right to free expression.

### C. Wadmond

Unlike *Baird* and *Stolar*, in *Law Students Civil Rights Research Council, Inc. v. Wadmond*, a class of individuals and organizations representing future applicants to the New York Bar challenged its admissions procedures, namely Question 26 as chilling their First Amendment rights.<sup>77</sup> In a plurality decision, the Court upheld the procedure.<sup>78</sup>

In Question 26, New York first asked the applicant about membership in various groups and, then, whether the individual shared the group's illegal intent, splitting the *Scales* requirement.<sup>79</sup> The Court upheld the question, claiming it promoted efficiency by limiting the number of applicants the committee must investigate further.<sup>80</sup> Reaffirming *Konigsberg*, the Court stated: "It is also well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer."<sup>81</sup>

Ultimately, the Court refused to issue blanket First Amendment protections to applicants because the application was only facially, and not effectually, invalid. As the Court explained: "[T]here has been no showing that any applicant for admission to the New York Bar has been denied admission either because of his answers to these

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<sup>77</sup> 401 U.S. 154, 158–59 (1971). The plaintiffs also objected to New York's requirement that an applicant assert her belief and loyalty to the form of the United States government, which the majority upheld. *Id.* at 161–64.

<sup>78</sup> *Id.* at 167.

<sup>79</sup> *Scales v. Ohio*, 367 U.S. 203 (1961) (requiring that an individual must not only be a member of an organization that advocates violent overthrow of the government, but also must be aware of these aims and share the group's intent).

Question 26 asks:

26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means? \_\_\_\_\_ If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

*Wadmond*, 401 U.S. at 164–65.

<sup>80</sup> *Wadmond*, 401 U.S. at 164–65.

<sup>81</sup> *Id.*

or any similar questions, or because of his refusal to answer them."<sup>82</sup> In this way, the Court reinforced the notion that every single applicant must litigate and that different standards can apply to each individual. If every decision depends on an actual denial, this assumes the only harm is the denial of admission, ignoring the chilling effects on speech. In responding to the plaintiff's argument that "constitutional deprivations will be inevitable,"<sup>83</sup> the Court stressed the state's entitlement to have some kind of screening process and its decision, not the Court's, to decide what it will be.<sup>84</sup>

#### IV. THE 1971 TRILOGY'S INCONSISTENCIES FOSTER CONFLICTING STATE INTERPRETATIONS

Read together, *Baird* and *Stolar*, as compared to *Wadmond*, raise serious inconsistencies, most notably, regarding what kinds of questions a committee can ask and how it can treat the refusal to answer questions. For example, in *Stolar*, the Court held that "Ohio may not require an applicant for admission to the Bar to state whether he has been or is a 'member of any organization which advocates the overthrow of the government of the United States by force.'"<sup>85</sup> Yet in *Wadmond*, the Court allowed New York to ask a nearly identical question.<sup>86</sup> This suggests the Ohio question was too broad because it "related only to . . . beliefs and associations,"<sup>87</sup> while *Wadmond's* question is permissible because the second part inquires if the applicant shares those intentions. In the same way, Justice Stewart notes in his concurrence in *Baird* that mere membership is not grounds for rejection, only "knowing membership" is.<sup>88</sup> However, under *Scales*, an individual not only must be a member of an organization that advocates violent overthrow of the government, but also must be aware of these aims and share the group's intent.<sup>89</sup> Therefore, allowing the preliminary question, as in *Wadmond*, ignores the *Scales* standard altogether and provides fewer First Amendment protections to bar applicants.

Furthermore, the denial on the basis of a refusal to answer questions is not applied in a content-neutral manner; rather, it depends upon what other kinds of information the applicant has provided. *Wadmond* holds that a committee can properly deny an applicant for her refusal to answer questions regarding possible Communist asso-

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<sup>82</sup> *Id.* at 165.

<sup>83</sup> *Id.* at 167.

<sup>84</sup> *Id.*

<sup>85</sup> *In re Stolar*, 401 U.S. 23, 30 (1971).

<sup>86</sup> See *supra* note 79; *Wadmond*, 401 U.S. at 164-65.

<sup>87</sup> *Stolar*, 401 U.S. at 30.

<sup>88</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) (Stewart, J., concurring in the judgment).

<sup>89</sup> *Scales v. Ohio*, 367 U.S. 203 (1961).

ciations. Under this rule, Sara Baird's denial should have been upheld. Instead, taking *Wadmond* and its two companion cases together, it seems more likely that the Court is saying that an applicant can be denied *only if* there is some other evidence of a problem. Most notably, applicants like Sara Baird or Martin Stolar are protected against broad sweeping inquiries because they provided extensive personal information and nothing else indicated a problem with their records. By contrast, Raphael Konigsberg refused to answer questions about his Communist Party ties even after a woman accused him of attending Communist Party meetings. George Anastaplo declined to give information about any of his associations which added to suspicions the committee already had after reading his writings regarding the right to revolution. In this way, only uncontroversial candidates are afforded protection.<sup>90</sup>

The contradictions in the 1971 cases has led to divergent state court interpretations. For example, West Virginia relied on *Baird* and *Stolar* to reverse a denial while New York used *Wadmond* to reject a challenge to application questions.

### A. Pushinsky

In 1980, the West Virginia Supreme Court of Appeals reversed the committee's refusal to process Jon Pushinsky's application for admission to the state bar, relying primarily on *Baird* and *Stolar*.<sup>91</sup> The committee refused to process his application because he marked "Decline to Answer," assuming this choice recognized his First Amendment right<sup>92</sup> in response to the following:

21. Do you advocate or knowingly belong to an organization or group which advocates the overthrow of the Government of the United States of America or of the State of West Virginia by force or violence?

Yes  No  Decline to Answer<sup>93</sup>

When Pushinsky's admission to the bar was subsequently delayed, he met with the board. At this meeting, he confirmed that he intended to mark "Decline to Answer" and would continue to respond to the question in that manner.<sup>94</sup> The committee then sent a letter asking Pushinsky if he advocated overthrow of the government of the United States or of West Virginia by force or violence and, secondly, if he

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<sup>90</sup> See *Baird*, 401 U.S. at 9 (Stewart, J., concurring in the judgment) ("[U]nder some circumstances simple inquiry into present or past Communist Party membership of an applicant for admission to the Bar is not as such unconstitutional.").

<sup>91</sup> *Pushinsky v. W. Va. Bd. of Law Exam'rs*, 266 S.E.2d 444 (W. Va. 1980).

<sup>92</sup> *Id.* at 446 & n.4.

<sup>93</sup> *Id.* at 445.

<sup>94</sup> *Id.*

“knowingly” belonged to “any organization or group” which advocated that idea.<sup>95</sup> Pushinsky initiated suit, alleging the inquiries and the committee’s refusal to process his application abridged his First Amendment rights.<sup>96</sup> He did, however, state his willingness to answer all other inquiries.<sup>97</sup>

In response, the committee said it denied Pushinsky processing because he refused to answer the question, not because of his beliefs, echoing the argument in *Konigsberg*.<sup>98</sup> The court sided with Pushinsky, pointing out that “Decline to Answer” was an available response.<sup>99</sup> Relying on *Wadmond*, the committee also argued that reading the two questions in conjunction with one another solved the constitutional problem because it transformed the second question into one of “personal advocacy” rather than association.<sup>100</sup> The court, however, held both questions unconstitutional. Citing *Baird* and *Stolar*, the court dismissed the first question as “fatally overbroad” because it embraced all forms of advocacy.<sup>101</sup> Further, it distinguished *Wadmond* on the ground that it asked about the applicant’s *specific intent* to further the illegal aims of the group, rather than whether or not the applicant was simply aware that the group held those aims, as the West Virginia question did.<sup>102</sup> As with Rudolph Schware, Sara Baird, and Martin Stolar, the West Virginia Supreme Court of Appeals noted that the committee made no allegation that Pushinsky had “ever engaged in activity or associations which involved advocating the violent overthrow of the government.”<sup>103</sup>

Most importantly, the court described the questions as “outdated” and not helpful in adding any perspective to an applicant’s ability to practice law, but merely provided a “reason for [the committee] to withhold a license to practice law.”<sup>104</sup>

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<sup>95</sup> *Id.* at 445–46.

<sup>96</sup> *Id.* at 446.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* Although the Court reversed the committee’s decision, it hinted that if the committee had proved that it needed Pushinsky’s answers in order to assess his moral character, the situation might have been different. *See id.* at 451 (noting that the committee would have to show that the question was necessary to protect a legitimate state interest under *Baird*, the court then stated that the committee had failed to show that they needed Pushinsky’s answers to assess his character, implying that such a showing would have overcome the *Baird* requirement).

<sup>100</sup> *Id.* at 448.

<sup>101</sup> *Id.* at 447–48.

<sup>102</sup> *See id.* at 449 (focusing on the conclusory role played by the West Virginia Bar).

<sup>103</sup> *Id.* at 446 n.3.

<sup>104</sup> *Id.* at 451.

### B. Fieman

New York's Character and Fitness Committee treated Colin A. Fieman similarly. After applying to the New York Bar in 1991, Colin A. Fieman's application was "delayed" for processing because he refused to answer Question 21, believing it violated his First Amendment rights. That question stated:

Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.<sup>105</sup>

Fieman refused to answer because the question makes no reference to specific intent; rather, it simply focuses on membership and knowing the aims of the group. As he explains: "It was impossible for me to reconcile the purpose of the Character Committees' investigation, and my own responsibilities as a prospective attorney . . . . [A]nswering . . . would mean that from the outset of my legal career I was willing to tolerate without protest unconstitutional state action."<sup>106</sup> In declining to answer, Fieman listed Supreme Court cases supporting his position on his application.<sup>107</sup>

The committee held Fieman's application in limbo. First, it sent his application without a recommendation to the appellate division for a ruling on the constitutional issues Fieman raised.<sup>108</sup> After six months the court sent the application back to the committee, without a decision.<sup>109</sup> After another six weeks, the committee made a favorable recommendation for admission and sent the application back to the court, which the appellate court denied with leave to renew.<sup>110</sup> In deciding, the court found Question 21, which was identical to the first question upheld in *Wadmond*, to be "proper." It described Fieman's refusal to answer as a "willful obstruction of the legitimate function of the Committees to inquire into an applicant's character and fitness to practice law,"<sup>111</sup> a response similar to the Supreme Court's treatment of Raphael Konigsberg and George Anastaplo.

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<sup>105</sup> Colin A. Fieman, *A Relic of McCarthyism: Question 21 of the Application for Admission to the New York Bar*, 42 BUFF. L. REV. 47, 47-48 (1994).

<sup>106</sup> *Id.* at 50.

<sup>107</sup> *Id.* In his article, however, Fieman does not say which Supreme Court cases he cited as authority for his refusal.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 50-51.

<sup>110</sup> *Id.* at 51.

<sup>111</sup> *Id.*



Fieman eventually withdrew his appeal, answered the question out of frustration, and was immediately admitted to the bar.<sup>112</sup> Technically, the New York committee neither accepted nor denied Fieman's application.

*Pushinsky* and *Fieman* illustrate how two state courts can rely either on *Baird* and *Stolar* or on *Wadmond*. The West Virginia Supreme Court considered Jon Pushinsky's "decline to answer" as a response and relied mainly on *Baird* and *Stolar*, rather than *Wadmond*, to reverse the denial.<sup>113</sup> In doing so, the court valued Pushinsky's First Amendment rights. On the other hand, New York denied Fieman after holding his application in limbo for over seven months. Future character and fitness committees could follow New York's lead and avoid constitutional issues simply through delay.

## V. THE SUPREME COURT'S BAR ADMISSIONS DECISIONS REFLECT SOCIETY'S ACCEPTANCE OF THE APPLICANT'S VIEWS

The Supreme Court's bar admissions decisions reflect society's acceptance of the applicant's views. In both *Baird* and *Stolar*, the Court recognized that the earlier 1957 and 1961 decisions were sensitive to the time period in which they were made. For example, in *Baird* the Court remarked: "This has been an increasingly divisive and bitter issue for some years, especially since Senator Joseph McCarthy from Wisconsin stirred up anti-Communist feelings and fears by his 'investigations' in the early 1950's."<sup>114</sup> In *Stolar* it noted: "These cases [*Baird* and *Stolar*], which concern inquisitions about loyalty and government overthrow, are relics of a turbulent period known as the 'McCarthy era,' which drew its name from Senator Joseph McCarthy from Wisconsin."<sup>115</sup> The influence of popular sentiment on bar admission is evident in the treatment of Terrence Hallinan and Matthew Hale regarding their views on civil rights and racial equality. What this means in a post-9/11 world remains to be seen.

### A. Hallinan

The California Character and Fitness Committee refused to certify Terence Hallinan, arguing that his arrests for engaging in civil

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<sup>112</sup> *Id.* at 75 (explaining his choice to give up "under the pressure of professional considerations").

<sup>113</sup> *Pushinsky v. W. Va. Bd. of Law Exam'rs*, 266 S.E.2d 444 (W. Va. 1980). The court does not explain why "decline to answer" was even an option or how Pushinsky's application would have been treated had it not been an option and he refused to answer.

<sup>114</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 3 (1970).

<sup>115</sup> *In re Stolar*, 401 U.S. 23, 24 (1971).

disobedience demonstrated bad character.<sup>116</sup> Hallinan was a member of groups such as the National Association for the Advancement of Colored People (“NAACP”) and Student Non-Violent Coordinating Committee (“SNCC”) and had been arrested while organizing voters in Mississippi.<sup>117</sup> In defending his actions, Hallinan stressed the need to end racial inequality and pointed to the Civil Rights Act of 1964 for support.<sup>118</sup>

The Supreme Court of California reversed the denial, sidestepping the civil disobedience issue, and instead emphasized:

[Hallinan’s] sentiments on the qualified right of civil disobedience, however controversial, are shared, not only by large numbers of idealistic youth who have similarly demonstrated peacefully throughout our nation in recent years to protest suppression of the rights of Negroes, but also by some legal scholars and other eminent people.<sup>119</sup>

The court reversed, not because Hallinan’s moral convictions prompted him to act, but because the principle upon which he was fighting became popular between the time of his actions and when his denial reached the California Supreme Court. As the court observed: “Whether these activities involve moral turpitude is dependent upon the issues involved and the motivation of the violator.”<sup>120</sup> Therefore, unlike one who demonstrates remorse for his actions or subsequently distances himself from them as Schwere did, Hallinan’s views, luckily for him, became popular.

### B. Hale

The more recent denial of Matthew Hale’s bar application demonstrates how “good moral character” continues to be problematic. Illinois rejected Matthew Hale, leader of the World Church of the Creator (“WCOTC”), which argues that Hitler’s idea for the superiority of the “white race” should be applied worldwide, not simply to the German race.<sup>121</sup> Hale’s predicament drew sharp criticism as well as

<sup>116</sup> See *Hallinan v. Comm. of Bar Exam’rs*, 421 P.2d 76, 79 n.2 (Cal. 1966) (describing the grounds whereby Hallinan was denied acceptance due to lack of “good moral character”).

<sup>117</sup> *Id.* at 83.

<sup>118</sup> See *id.* at 85 (“I think somebody in the southern part of the United States has an obligation . . . to disobey some of those laws that are really unconstitutional and that persecute people on the bases of their race and everything else.”).

<sup>119</sup> *Id.* at 86–87 (footnotes omitted).

<sup>120</sup> *Id.* at 87. The court continued,

Of course, we do not mean to condone disobedience of the law in any form; we mean only to express strong doubt that the leaders of current civil rights movements are today or will in the future be looked upon as persons so lacking in moral qualifications that they should for that reason alone be prevented from entering their chosen profession.

*Id.*

<sup>121</sup> *In re Hale*, Comm. of Character & Fitness (Ill. App. Ct. 1998), reprinted in GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 875, 876 (3d ed. 1999); see also Anderson v.

applause as an example of how bar admissions committees successfully prevent racists from becoming lawyers.<sup>122</sup> Even George Anastaplo incorrectly predicted that Matthew Hale “is likely to be admitted to the bar fairly soon, just as I would probably be admitted today if I should apply again”<sup>123</sup> because “we *have* learned, during the past generation or two, that it is dangerous and otherwise self-defeating to deny governmental privileges because of the unpopular, even offensive, opinions a citizen might hold.”<sup>124</sup>

After Hale passed the Illinois bar exam in 1998, a majority of the Inquiry Panel of the Character and Fitness Committee declined to certify him, a decision which the hearing panel upheld, as did the Illinois Supreme Court.<sup>125</sup> Hale petitioned for a writ of certiorari to the United States Supreme Court, which was also denied.<sup>126</sup> Hale then filed suit under 42 U.S.C. § 1983 against the Illinois Character and Fitness Committee and the Illinois Supreme Court, among others, alleging First Amendment, due process and equal protection violations.<sup>127</sup> The court dismissed those claims, without reaching the merits, because of the *Rooker-Feldman* and preclusion doctrines.<sup>128</sup>

Ultimately, the committee refused to admit Hale because it found his views of racial superiority offensive and, in particular, his opposition to the Fourteenth Amendment.<sup>129</sup> As the committee described:

Hale, No. 00-C-2021, 2001 U.S. Dist. LEXIS 3774 (N.D. Ill. Mar. 29, 2001) (mentioning, in a matter unrelated to his bar application, that Montana also declined to admit Hale in late March 2001).

<sup>122</sup> See Richard L. Sloane, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale To Reaffirm That Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397 (2002) (determining that by any reasonable definition of “good character,” Matthew Hale failed to meet the standard). *But see* Mathew Stevenson, Comment, *Hale vs. Hypocrisy: Matt Hale and the New Politics of Bar Admissions*, 63 MONT. L. REV. 419 (2002) (concluding that Hale was denied bar admission because of the board’s disapproval of his political views, not because of his moral standing).

<sup>123</sup> George Anastaplo, *Lawyers, First Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. U. L. REV. 353, 362 (1999).

<sup>124</sup> *Id.* at 540.

<sup>125</sup> *In re Hale*, Comm. of Character & Fitness (Ill. App. Ct. 1998), reprinted in GEOFFREY C. HAZARD ET AL., *supra* note 121, at 875.

<sup>126</sup> *Hale v. Comm. of Character & Fitness*, 530 U.S. 1261 (2000) (mem.).

<sup>127</sup> *Hale v. Comm. of Character & Fitness*, 2002 WL 398524, at \*1 (N.D. Ill. Mar. 13, 2002) (listing defendants and causes of action). See Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2003), providing in part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>128</sup> *Hale*, 2002 WL 398524, at \*3 (holding that lower federal courts lack subject matter jurisdiction to review state court civil decisions and that Hale’s claim was precluded by the Supreme Court’s denial of his petition for review).

<sup>129</sup> The Fourteenth Amendment provides:

“Mr. Hale’s life mission, the destruction of the Bill of Rights, is inherently incompatible with service as a lawyer or judge who is charged with safeguarding those rights.”<sup>150</sup> The inquiry panel also distinguished Hale’s situation from the *Baird* and *Stolar* decisions by noting that neither Sara Baird nor Martin Stolar “[was] actively involved in inciting racial hatred [or] . . . dedicated their lives to destroying equal rights under law that all American [sic] currently enjoy.”<sup>151</sup> However, the inquiry panel admitted that Hale and the WCOTC “disavow violence and an intention to seek the forcible overthrow of the United States Government.”<sup>152</sup> Additionally, Hale had “never been convicted of a crime in excess of a public ordinance violation.”<sup>153</sup> Most importantly, the committee conceded that Hale had “affirm[ed] that he had the ability and intended to comply with all of the rules and laws governing the conduct of an attorney, regardless of whether he agreed or disagreed with such rules and laws.”<sup>154</sup> This affirmation is similar to George Anastaplo’s pledge. Therefore, there was no real danger in his speech as a lawyer.<sup>155</sup>

*Hale* sets a dangerous precedent because under the theory of the Illinois Supreme Court, if an applicant’s wanting to oppose a constitutional amendment is enough to deny bar admission, it would not be far-fetched to deny bar admission to an applicant who disagrees with a government policy. As W. Bradley Wendel notes:

Certainly if the basis for exclusion is Hale’s advocacy of a principle that is at odds with then-prevailing law, it is hard to see why this principle cannot be extended to deny admission to lawyers who believe in the unconstitutionality of the death penalty, the immorality of sodomy statutes, or the wrongness of *Roe v. Wade*.<sup>156</sup>

Thinking of my own experience before law school, would the fact that I spent eight months doing paid work opposing the sanctions against Iraq prevent me from becoming a member of the Illinois Bar, or any other bar?

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>150</sup> *In re Hale*, Comm. of Character & Fitness (Ill. App. Ct. 1998), reprinted in GEOFFREY C. HAZARD ET AL., *supra* note 121 at 883.

<sup>151</sup> *Id.* at 880.

<sup>152</sup> *Id.* at 876.

<sup>153</sup> Stevenson, *supra* note 122, at 426.

<sup>154</sup> *Hale v. Comm. of Character and Fitness*, 2002 WL 398524, at \*1 (N.D. Ill. Mar. 13, 2002).

<sup>155</sup> Although the committee never said so explicitly, the undercurrent of the decision suggests that the committee regarded Hale’s speech as “hate speech,” and therefore outside First Amendment protection.

<sup>156</sup> W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 325 (2001).

During my time with the American Friends Service Committee (“AFSC”),<sup>137</sup> an international Quaker organization, I actively promoted the organization’s “Campaign of Conscience.” Begun in December 1999, the campaign’s purpose was to end the U.N. Security Council’s sanctions on Iraq by highlighting their humanitarian impact.<sup>138</sup> AFSC encouraged individuals to lend moral and financial support toward the purchase and shipment of water purification equipment with chlorine filters into Iraq. AFSC illegally shipped the items because it never received Treasury Department approval for a license.<sup>139</sup> By engaging in civil disobedience, AFSC hoped to educate the public about the lack of potable water in Iraq as well as provide U.S. citizens with a way to become personally involved in changing the situation.<sup>140</sup> Although these actions were punishable by jail time and/or fines, to date no one has been prosecuted.<sup>141</sup>

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<sup>137</sup> AFSC was founded in 1917 and seeks to “understand and address the root causes of poverty, injustice, and war” through nonviolent means. AFSC, AFSC Mission and Values (June 19, 1994), at <http://www.afsc.org/about/mission.htm>.

<sup>138</sup> See AFSC, Campaign of Conscience for the Iraqi People, at <http://www.afsc.org/conscience/default.html> (last visited Apr. 27, 2004).

<sup>139</sup> *Id.*

<sup>140</sup> The pledge supporters signed read as follows:

Enclosed is my contribution to the Campaign of Conscience for the Iraqi people. I understand that these funds will be used for this educational campaign and to purchase humanitarian aid and materials to repair the civilian infrastructure of Iraq.

I support the American Friends Service Committee, the Fellowship of Reconciliation, and Pax Christi, USA, in expressing their moral commitment to respond to the humanitarian crisis in Iraq. I understand that the Campaign will apply for licenses to ship these goods to the people of Iraq, but if denied will ship without licenses, violating the U.S. sanctions. My contribution might then be interpreted by the U.S. government as a violation of U.S. law, which provides for civil fines up to \$275,000 per violation and criminal penalties up to \$1 million and/or twelve years in prison.

By my contribution, I am publicly associating with the Campaign’s effort to end the economic sanctions against the people of Iraq. I feel morally obligated to help alleviate the human suffering in Iraq, which is perpetuated by the destruction of Iraq’s civilian infrastructure: water purification, sewage treatment, and power generation for schools, hospitals, and homes.

I understand that a copy of this signed statement will be presented by the Campaign of Conscience to the President, the U.S. Ambassador to the United Nations, U.S. senators and representatives, and that my name may be used in public statements of support for the Campaign of Conscience.

AFSC, CAMPAIGN OF CONSCIENCE FOR THE IRAQI PEOPLE BROCHURE, <http://www.afsc.org/conscience/brochure2.pdf> (last visited Apr. 27, 2004).

<sup>141</sup> In November 2002, the Department of Justice assessed Voices in the Wilderness (“VitW”) with a \$20,000 penalty for bringing medicine and school supplies into Iraq. Press Release, Voices in the Wilderness (Aug. 12, 2003). In September 2003, VitW challenged the fines in district court and requested a permanent injunction against the federal government from assessing any fines for the shipment of food, clothing, and medical supplies. Press Release, Voices in the Wilderness, Anti-Sanctions Activists Countersue U.S. Government (Sept. 29, 2003), [http://vitw.us/media\\_pr/archives/000123.html](http://vitw.us/media_pr/archives/000123.html).

Similar to the applicants in the Communist-era cases,<sup>142</sup> I am applying to the bar at a time when my views against the war in Iraq are unpopular.<sup>143</sup> Finally, unlike applicants such as George Anastaplo, who only held theoretical beliefs, I acted on my opposition to the sanctions policy by having it serve as my source of full-time employment. How this will be treated remains to be seen, as well as whether or not it would be more of an issue if I were a young man of Arab descent.<sup>144</sup>

## VI. THE POST-9/11 CLIMATE AGGRAVATES THE ALREADY VAGUE “GOOD MORAL CHARACTER” STANDARD

The concept of “good moral character” is vague because Supreme Court decisions, most notably the 1971 trilogy, are inconsistent. The overall post-9/11 climate further complicates this uncertainty. Before 9/11, character and fitness committees scrutinized applicants’ associations. Today, during a time in which the government sees internal opposition as threatening, bar applicants are at an even greater risk of rejection due to their activities.<sup>145</sup> For example, the PATRIOT Act ambiguously defines “domestic terrorism.”<sup>146</sup> Therefore, the vague-

<sup>142</sup> See *supra* Part II.

<sup>143</sup> According to polls by USA Today/CNN/ Gallup in April 2004, 48% of Americans approve of the way President Bush is handling the situation in Iraq. This is an almost 30% decline from April 2003, at the start of the war, when 76% of Americans approved of Bush’s handling of the situation in Iraq. *Campaign 2004 Polls*, <http://www.usatoday.com/news/politicselections/nation/polls/usatodaypolls.htm>.

<sup>144</sup> This may also be treated differently because it was three years ago rather than during my last year of law school. On the other hand, whether this will become more of an issue in light of other activities, such as my involvement as a plaintiff in the litigation against Donald Rumsfeld, is unclear. See *Burbank v. Rumsfeld*, No. 03-5497 JF (E.D. Pa. filed Oct. 1, 2003) (on file with author) (arguing that the Department of Defense’s threat to withhold millions of dollars in funding because the University of Pennsylvania Law School refuses to allow military recruiters on campus violates Penn Law faculty and students’ First Amendment rights and requesting declaratory and any other relief).

<sup>145</sup> The government is now more closely watching antiwar protestors. See Eric Lichtblau, *F.B.I. Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1 (reporting that in October 2003, the FBI sent a memo to local law enforcement agencies to monitor the activities of war protestors and to report suspicious activities to its counterterrorism bureau); Ryan J. Foley, *Iowa University Ordered To Turn over Records on Activists*, PHILA. INQUIRER, Feb. 8, 2004, at A20 (describing a federal subpoena to Drake University to hand over records of an anti-war gathering at the school as well as any observations campus security made of the meeting). For examples of how nongovernment entities have treated speech critical of the government, see Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL’Y REV. 185, 186 (2002), which discusses the professional consequences to newspaper writers, a professor, and a television personality after their “unpatriotic” remarks surrounding the events of September 11 or for their critiques of President Bush’s behavior in the midst of the attacks.

<sup>146</sup> USA PATRIOT Act § 802, 18 U.S.C. § 2331 (2001); see also *infra* text accompanying note 161.

ness of “good moral character” may not only lead to more rejections in the post-9/11 world, but may chill speech as well as activities.

### A. Good Moral Character: A Vague Concept

“Good moral character” is an unconstitutionally vague concept under the First Amendment because it allows for arbitrary decision making, and provides no notice to applicants for what qualifies as acceptable or unacceptable behavior. Therefore, it is even more vulnerable to viewpoint-based discrimination in the post-9/11 climate, which will, in turn, lead to a chilling of applicants’ First Amendment rights.

Good moral character varies depending on how each state’s character and fitness committee characterizes it, a body that in most states is composed of the applicant’s future competitors. As Justice Black noted: “It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.”<sup>147</sup> Such a dangerously subjective notion is reminiscent of Justice Stewart’s “I know it when I see it”<sup>148</sup> definition of pornography. Despite this subjectivity, the Supreme Court has rejected due process challenges to the good moral character requirement.<sup>149</sup>

“Good moral character” also fails to notify applicants what kind of behavior qualifies as “good” versus “unacceptable.” As Justice Marshall remarked in *Grayned v. Rockford*: “Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.”<sup>150</sup> Even if law students know that character and fitness committees scrutinize their lives, this still provides no indication or notice of exactly what is considered to be a problem. As a result, the Supreme Court aptly observed in *In re Stolar*: “Law students who know they must survive this screening process before practicing their profession are encouraged to protect their future by shunning unpopular or controversial organizations.”<sup>151</sup> Therefore, rather than simply adjusting or avoiding certain kinds of “unacceptable” behavior, cautious applicants shun a wider range of activities. As Deborah L. Rhode found: “[A] third of the respondents in one law student survey reportedly had refrained

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<sup>147</sup> *Konigsberg I*, 353 U.S. 252, 263 (1957).

<sup>148</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>149</sup> See *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (holding that the New York Bar’s “character and general fitness” requirement does not violate the U.S. Constitution).

<sup>150</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

<sup>151</sup> *In re Stolar*, 401 U.S. 23, 28 (1971).

from certain activities because of the impending character review. Among the activities cited were attending political rallies, signing petitions, and seeking an Army deferment on psychological grounds.<sup>152</sup> Rhode conducted her study in the early 1980s. In the post-9/11 climate, it seems likely that applicants will be even more apt to steer away from controversial activities and causes.

Alternatively, the political climate in the country might have no outward effect on the bar admissions process in terms of denials, but may simply discourage those with “unpopular” viewpoints from entering law school or the legal profession, or certain kinds of applicants may simply avoid practicing in certain states such as Illinois.<sup>153</sup> Thinking of myself, will it be a problem that the human rights center where I worked in Northern Ireland was housed in a building occupied by an Irish Republican Army (“IRA”) ex-prisoners group?<sup>154</sup>

The Court has dismissed possible chilling effects on prospective applicants by claiming that interrogation into associations is conducted in private and if such arbitrary decisions were to be made, the applicant is afforded the right to appeal.<sup>155</sup> However, a procedural right means little if there is no substantive guarantee. Furthermore, privacy protections are lost when an applicant must appeal publicly.<sup>156</sup>

When placed in the wrong hands, “good moral character” provides a weapon for character and fitness committees to arbitrarily exclude those felt to be “undesirable.” Such an amorphous concept becomes even more dangerous in a post-9/11 world. As an alternative, committees should measure and name the actual qualities that they seek—responsibility in financial dealings, honesty, etc.—rather than using the “unusually ambiguous,”<sup>157</sup> catchall phrase, “good moral character.”

### *B. How 9/11 and the PATRIOT Act Feed Into the Vagueness*

In the context of a process that is characterized by the vague “good moral character” standard, it is possible that the post-9/11 climate, especially with the PATRIOT Act, will lead to further restric-

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<sup>152</sup> Rhode, *supra* note 10, at 569.

<sup>153</sup> Illinois rejected Clyde Summers, George Anastaplo, and Matthew Hale. See *In re Summers*, 325 U.S. 561 (1945); *infra* Part VII.C; *In re Anastaplo*, 366 U.S. 82 (1961); *supra* Part II.C; *Anderson v. Hale*, 2001 U.S. Dist. LEXIS 3774 (N.D. Ill. Mar. 29, 2001); *supra* Part V.B.

<sup>154</sup> This fact may be treated somewhat differently now, as the IRA has been on cease-fire since 1994 and I worked in Ireland in 1999. Perhaps if I had applied for bar admission in the 1980s or if the IRA were currently on the government’s list of “terrorist” organizations, it would be a different matter.

<sup>155</sup> *Konigsberg II*, 366 U.S. 36, 52–53 (1961).

<sup>156</sup> See *id.* at 73 (Black, J., dissenting) (“[T]he Court fails to take into account the fact that judicial review widens the publicity of the [interrogations] . . .”).

<sup>157</sup> *Konigsberg I*, 353 U.S. 252, 263 (1956).



tions on applicants' associations. To date, the incursions into privacy and civil liberties since 9/11 have primarily focused on aliens and immigrants, rather than United States citizens. However, in criticizing INS detentions of immigrants and aliens, David Cole, Georgetown Law professor and volunteer attorney for the Center for Constitutional Rights, has warned that "what we do to aliens today provides a precedent for what can and will be done to citizens tomorrow."<sup>158</sup> As evidence he notes that "[t]he McCarthy era of the 1940s and '50s, in which thousands of Americans were tarred with guilt by association, was simply an extension to citizens of a similar campaign using similar techniques against alien radicals in the first Red Scare thirty years earlier."<sup>159</sup>

Furthermore, although a bar committee may not inquire into an applicant's associations, it is still free to ask whether an applicant is a member of the Communist Party,<sup>160</sup> arguably leaving the committee free to change the designated group to fit the times. Section 802 of the PATRIOT Act creates a federal crime of "domestic terrorism," defined as "acts dangerous to human life that are a violation of the criminal laws" if they "appear to be intended . . . to influence the policy of a government by intimidation or coercion," and if they "occur primarily within the territorial jurisdiction of the United States."<sup>161</sup> As Nancy Chang, attorney for the Center for Constitutional Rights explains,

Because this crime is couched in such vague and expansive terms, it may well be read by federal law enforcement agencies as licensing the investigation and surveillance of political activists and organizations based on their opposition to government policies. It also may be read by prosecutors as licensing the criminalization of legitimate political dissent.

Therefore, given that character and fitness committees previously scrutinized applicants' associations, it would not be surprising if there was a return to these tactics post-9/11.

On the other hand, even those like Floyd Abrams, who see the need for greater government intrusion post-9/11, view First Amend-

<sup>158</sup> David Cole, *Enemy Aliens and American Freedoms: Experience Teaches Us That Whatever the Threat, Certain Principles Are Sacrosanct*, NATION, Sept. 23, 2002, at 20, 22.

<sup>159</sup> *Id.*

<sup>160</sup> See *In re Anastaplo*, 366 U.S. 82, 83–85 (1961); *Konigsberg I*, 353 U.S. at 270 (concluding that membership in the Communist Party alone is an insufficient ground for denying bar membership); see also *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 217 (1971) (discussing *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971), and character investigations for bar admissions; noting that "five Justices found inquiry into Communist Party affiliation unobjectionable").

<sup>161</sup> USA PATRIOT Act § 802, 18 U.S.C. § 2331 (2001).

<sup>162</sup> Nancy Chang, *The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights?*, Nov. 2001, at 2–3, at [http://www.ccr-ny.org/v2/reports/docs/USA\\_PATRIOT\\_ACT.pdf](http://www.ccr-ny.org/v2/reports/docs/USA_PATRIOT_ACT.pdf).

ment freedoms as off limits. Abrams believes that in a post-9/11 world, “we must . . . be prepared to yield some of our privacy, to accept a higher level of surveillance of our conduct, even to risk some level of confrontation with the Fourth Amendment of the United States Constitution.”<sup>163</sup> Nevertheless, he makes an exception for the First Amendment stating,

One thing I am not prepared to even begin to compromise about is the First Amendment. In fact, as we give the government more power, it is all the more important that the press be utterly free to criticize the manner in which the government exercises that power and (more controversially) to be knowledgeable about what the government has done. . . .

That is why we must continue to resist every effort of the Administration to characterize dissent as treason.<sup>164</sup>

Whether character and fitness committees will tar applicants with the guilt by association standard used in the communist-era cases or whether they will instead protect applicants’ First Amendment rights, as Floyd Abrams argues, remains to be seen.

### *C. Zachary Sanders: A Post-9/11 Example*<sup>165</sup>

The case of Zachary Sanders demonstrates that the denial of admission to the bar due to political views is especially relevant today, with the heightened unpopularity of certain views in the current “war on terrorism” and the ideologies that espouse it. In September 2003, the New Jersey Supreme Court upheld the character and fitness committee’s denial of Zachary Sanders, a graduate of Yeshiva University’s Benjamin Cardozo School of Law.<sup>166</sup> The exact reason for Sanders’s denial is unclear because there is a mix of controversial politics and dishonesty. Sanders believes his three trips to Cuba and opposition to the United States foreign policy relating to Cuba cost him admission. While this can not be entirely discounted, it is difficult to gauge how much his deceit regarding his Cuba trips colored his

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<sup>163</sup> Floyd Abrams, *The First Amendment and the War Against Terrorism*, Irving R. Segal Lecture in Trial Advocacy at the University of Pennsylvania Law School (Sept. 23, 2002), in 5 U. PA. J. CONST. L. 1, 5–6 (2002). The Fourth Amendment protects “[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV.

<sup>164</sup> Abrams, *supra* note 163, at 8.

<sup>165</sup> This discussion is severely limited by the fact that *In the Matter of Zachary Sanders*, No. 55242, is a signed order rather than a published opinion.

<sup>166</sup> See generally Tim O’Brien, *Cuba Trips, Cigars Sink Bar Applicant*, N.J. L.J., Sept. 8, 2003, at 15. Sanders was admitted in New York in 2001. *Id.*

overall application. Lying and deliberate omissions during the bar admissions process is a near automatic grounds for denial.<sup>167</sup>

Sanders claims that his three trips to Cuba were acts of civil disobedience. As he explained in his appeal to the New Jersey Supreme Court after the committee recommended his denial: "A healthy respect for the rule of law, and one's duty to comply with it as an officer of the Court, does not prevent one from engaging in civil disobedience."<sup>168</sup> Sanders then specifically noted "injustices codified in law, such as 'slavery, Jim Crow segregation, the Japanese internment camps, and the displacement of Native Americans.'"<sup>169</sup>

However, Sanders not only failed to disclose his trips to customs officials, but only admitted the trips after a search of his bags revealed cigars.<sup>170</sup> In response, Committee Chair Robert Ritter noted: "Lawyers, in particular, cannot choose which laws they will violate because of political beliefs."<sup>171</sup>

Sanders's attitude toward the committee also cannot be discounted. Ritter found Sanders's behavior "unremorseful and combative,"<sup>172</sup> reminiscent of Raphael Konigsberg and George Anastaplo. In his rebuttal brief, John Janasie, First Assistant Ethics Counsel with the Office of Attorney Ethics, noted that Sanders's "intemperate exchange"<sup>173</sup> with the committee demonstrated that Sanders "lacks appreciation for the need for 'ordinary civility and common decency' as 'essential for the justice system to run evenly.'"<sup>174</sup>

Although Sanders alleges his trips were acts of civil disobedience, such an act should spring out of moral conviction, not convenience. The purpose of civil disobedience is to *publicly* highlight the immorality of a law.<sup>175</sup> If Sanders truly believed he was acting in an effort to highlight the immorality of the law, he had ample time and several opportunities to disclose any one of his three trips to Customs officials. Instead, upon reentry in the United States after each trip, Sanders did not disclose his trip to Cuba, he hid cigars, and after the

<sup>167</sup> See, e.g., *In re E.L.D.*, 494 S.E.2d 317 (Ga. 1998) (denying admission to an applicant who gave false and misleading information to the Board to Determine Fitness of Bar Applicants, Georgia's character and fitness committee).

<sup>168</sup> O'Brien, *supra* note 166, at 14.

<sup>169</sup> *Id.* (quoting Sanders brief).

<sup>170</sup> *Id.* at 15.

<sup>171</sup> *Id.* at 14.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Black's Law Dictionary defines civil disobedience as "[a] deliberate but nonviolent act of lawbreaking to call attention to a particular law or set of laws of questionable legitimacy or morality." BLACK'S LAW DICTIONARY 239 (7th ed. 1999).

U.S. Treasury inquired about Sanders's first trip, he did not answer, resulting in a \$10,000 fine.<sup>176</sup>

Ultimately, *Sanders* demonstrates why clear standards are needed because it is not apparent why he was rejected. Some may argue Sanders's case is another example of a bar applicant being denied because he espouses controversial political views, especially views critical of U.S. foreign policy after 9/11. If this is true, more denials are likely. On the other hand, Sanders's lack of candor cannot be dismissed. Additionally, his case illustrates how sensitive character and fitness committees still are regarding an applicant's flippant attitude toward them.

## VII. BALANCING AN APPLICANT'S FIRST AMENDMENT RIGHTS AGAINST THE STATE'S INTERESTS POST-9/11

When a character and fitness committee forces an applicant to forego exercising her First Amendment rights in order to be admitted to the bar, it imposes an unconstitutional condition on the applicant. Doing so also allows the court to balance the applicant's First Amendment rights against the interests of the state. Furthermore, if courts continue this approach, as suggested in *Hale*, applicants will be even more at risk in a post-9/11 world.

### A. Bar Admission as a Privilege Versus a Right

Assuming *arguendo* that admission to the bar is a privilege rather than a right, character and fitness committees cannot impose unconstitutional conditions upon a bar applicant.<sup>177</sup> As Kathleen M. Sulli-

<sup>176</sup> O'Brien, *supra* note 166, at 14.

<sup>177</sup> At times, the Supreme Court has classified admission to the bar as a "right" rather than a "privilege"; however, the Court has qualified the definition by noting it was only a right for certain individuals. For example, in *Baird*, the Court remarked: "[W]hatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971). Nevertheless, it then explained that "[t]he practice of law is not a matter of grace, but of right for one who is *qualified by his learning and his moral character.*" *Baird*, 401 U.S. at 8 (emphasis added). In *Anastaplo*, the Court echoed this view: "[A]s with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications . . ." *In re Anastaplo*, 366 U.S. 82, 90 (1961); *see also In re Anastaplo*, 163 N.E.2d 429, 438 (Ill. 1959) (noting that "the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal constitutions"); *In re Application of Cassidy*, 51 N.Y.S.2d 202, 204 (N.Y. App. Div. 1944) ("Membership in the Bar is not a right; it is a privilege burdened with the specified statutory conditions which, as to every proposed new member, must be met at the time of admission."). In this way, admission to the bar is only a right for people possessing what the character and fitness committee deems as good moral character. Therefore, applicants with no "controversial views," such as Sara Baird and Martin Stolar, are afforded a higher standard of protection while those like

van describes: "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."<sup>178</sup> In this way, the government cannot "'produce a result which [it] could not command directly.'"<sup>179</sup> As Justice Stewart explained,

[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.<sup>180</sup>

In the same way, the state has the power to decide whom it wishes to admit into its bar. However, forcing an applicant to reveal her past political associations or, worse still, suggesting that she never form them in the first place in order to be admitted to the bar amounts to an unconstitutional condition.

In defending its rejection of Matthew Hale, the Illinois Committee on Character and Fitness pointed to public employee speech cases such as *Pickering v. Board of Education*, which balance the individual's right to speak on issues of public concern as a citizen against the state's interest in providing efficient public services.<sup>181</sup> Although those cases discuss the imposition of unconstitutional conditions, even the committee acknowledged that they were not directly analogous to bar admission.<sup>182</sup> The committee argued that the state had an

Raphael Konigsberg and George Anastaplo are not. Conversely, it could be argued that admission to the bar leans more toward being a right than a privilege because an applicant has already invested three years of effort and money to pursue a law degree and, in the majority of cases, has also passed the bar exam. *But c.f.* *Hallinan v. Comm. of Bar Exam'rs*, 421 P.2d 76, 80 n.3 (Cal. 1966) (noting that disbaring an attorney impinges on a vested property *right* to maintain an established practice, while an applicant seeks merely the *privilege* of admission to the bar). As the Supreme Court observed in *Greene v. McElroy*: "[F]reedom to practice [a] chosen profession" and "the right to . . . follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." 360 U.S. 474, 492 (1959). Ultimately, describing admission as a privilege rather than a right gives character and fitness committees more room to arbitrarily deny someone on the basis of good moral character with no protection afforded to the applicant.

<sup>178</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

<sup>179</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (alteration in original)).

<sup>180</sup> *Id.*

<sup>181</sup> *In re Hale*, Comm. of Character & Fitness (Ill. App. Ct. 1998), reprinted in GEOFFREY C. HAZARD ET AL., *supra* note 121 at 880–81 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

<sup>182</sup> *Id.* at 880, n.7. "Public employment cases, unlike bar admission cases, usually arise where the party seeking relief already holds a governmental position and is not applying for one." *Id.* Moreover, although the committee did not acknowledge it, a lawyer is not a state employee in the same sense a police officer or a public school teacher is. Although the state regulates admission to the bar, unless a lawyer is government employed, the state does not pay the lawyer's

interest in protecting itself from someone like Hale whose life mission is to promote racial superiority. Alternatively, it reasoned that Hale's denial was supportable even if its decision was held to a strict scrutiny standard.<sup>183</sup> Nevertheless, the committee adopted these two approaches only after acknowledging that the Supreme Court had not decided a bar admissions case in over twenty-five years.<sup>184</sup> In this way, Hale illustrates how the Supreme Court's lack of clarity in the area of First Amendment rights for bar applicants confuses character and fitness committees.

### B. *The Balancing Approach and Repercussions Post-9/11*

If the Court follows the balancing approach it has adopted in previous cases, and as the committee suggested in Hale, applicants will be even more vulnerable in a post-9/11 world. In *Konigsberg*, *Anastaplo*, and *Wadmond*, the Court "balanced" the applicant's First Amendment rights against those of the state to uphold denials of admission to the state bar.<sup>185</sup> In doing so, the Court stressed the state's need to "protect" itself from dangerous lawyers. Not only does this contravene First Amendment law and impose an unconstitutional condition on the applicant, but it allows for an accordion-like approach to fundamental freedoms.<sup>186</sup>

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salary. Furthermore, even though a lawyer's role could be described as a "quasi-public obligation" because a lawyer's "acts . . . take on a public quality by virtue of [his or her] power . . . to invoke the official apparatus of the state," Wendel, *supra* note 136, at 375, this situation is still not sufficiently analogous to the public employee cases the committee mentions.

Political patronage cases also discuss the unconstitutional condition doctrine. However, those cases speak more to the need to support the party system through political appointments. In contrast, applicants to the bar do not, by and large, serve one of the two political parties. In the patronage cases, applicants are fired, hired, or transferred because of how it might chill beliefs. For examples of political patronage cases, see *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980).

<sup>183</sup> *In re Hale*, Comm. of Character & Fitness (Ill. App. Ct. 1998), *reprinted in* GEOFFREY C. HAZARD ET AL., *supra* note 121 at 880 (citing *Elrod v. Burns*, 427 U.S. 347, 362 (1976)).

<sup>184</sup> *Id.*

<sup>185</sup> Even though the 1971 cases were decided after *Brandenburg*, there is no discussion of the immediate sense of danger of the speech. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down an Ohio law on the grounds that a state may not outlaw speech merely because it advocates violent political overthrow unless such speech is made to incite or is likely to incite imminent lawless action).

<sup>186</sup> In some respects, the "good moral character" concept, with its ability to evade definition and its susceptibility to the prejudices and fears of the time, is similar to the historical inability to define seditious libel. For a discussion of seditious libel as an "accordion-like concept, expandable or contractible at the whim of judges" and generally "consist[ing] of criticizing the government: its form, constitution, officers, laws, symbols, conduct, or policies, and soon," see LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* 10 (Harper & Row 1963) (1960).

Although the state has a right to regulate who may practice before its courts, character and fitness committees should be regulating competency, not erecting a barrier to entry based on an applicant's relinquishment of her First Amendment rights. In *Pushinsky*, the West Virginia Board of Law Examiners argued that in balancing the applicants' First Amendment rights against those of the state, the state needed to be protected against "subversive attorneys."<sup>187</sup> Dismissing the argument out of hand, Justice McGraw noted that the need was to protect the public against "unqualified and undisciplined persons," not "subversive attorneys."<sup>188</sup> Instead, he proposed that membership in or advocacy of groups that encourage the overthrow of the government by force is a "political philosoph[y]," and not a "moral weakness."<sup>189</sup> If, once admitted, an attorney becomes a problem, disciplinary action or disbarment is always an option. Admitting a person with controversial or unpopular views will not mean that her practice of law will be solely concerned with promoting that idea, nor is it indicative of how she will behave as an attorney. From a practical standpoint, if an attorney presents frivolous claims, Rule 11 sanctions are available.<sup>190</sup> Furthermore, attorneys must present their ideas in the context of the adversarial process and must persuade judges and juries while maintaining a client base.<sup>191</sup>

As Justice Black observed in reference to George Anastaplo: "The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it."<sup>192</sup>

Moreover, this approach is even more dangerous in a post-9/11 world, when the state's need to protect itself is arguably higher. As society's perceived danger increases, the balance of substantial relevance and the need to protect the public increases, thereby decreasing the value placed on the applicant's free speech and association rights. As Justice Black noted: "[T]his so-called 'balancing test' . . . means that the freedoms of speech, press, assembly, religion and petition can be repressed whenever there is a sufficient governmental interest in doing so."<sup>193</sup> The First Amendment should be able to ex-

<sup>187</sup> *Pushinsky v. W. Va. Bd. of Law Exam'rs*, 266 S.E.2d 444, 450 (W. Va. 1980).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> FED. R. CIV. P. 11.

<sup>191</sup> See Anastaplo, *supra* note 123, at 366 ("Certainly anyone with *any* unconventional opinions has to learn to moderate what he says and does in public if he is to secure clients, persuade juries, and stay in the good graces of judges.")

<sup>192</sup> *In re Anastaplo*, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

<sup>193</sup> *Id.* at 111 (Black, J., dissenting); see also *Konigsberg II*, 366 U.S. 36, 75 (1961) (Black, J., dissenting) (criticizing the balancing approach as "necessarily tied to the emphasis particular

pand and contract over time to incorporate new forms or media of speech, such as e-mail and the Internet, but that expansion and contracting should not relate to how speech is treated, such as restricting certain kinds of political speech more in times of war or crisis.<sup>194</sup>

Although in *Baird* the Court limited the scope of inquiry and afforded some protection to bar applicants, when read in conjunction with *Konigsberg* and *Schwartz*, the door is still open for committees to ask about personal beliefs and associations as long as it is done in a targeted way. In *Baird* the Court remarked: “[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution.”<sup>195</sup> In *Konigsberg* and *Schwartz* in particular, the Supreme Court described the state’s needs as so high that when the balancing occurs, bar applicants are inherently disadvantaged. For example, in *Konigsberg*, the Court held that not answering questions a committee deems to have “substantial relevance to . . . qualifications,” to be tantamount to obstructing an investigation, which is adequate grounds for denial.<sup>196</sup> Additionally, as the Court noted, membership in the Communist Party qualifies as an area of “substantial relevance.”<sup>197</sup>

Furthermore, the Court has consistently regarded the state’s interests as outweighing those of the individual applicant’s First Amendment rights. As Justice Harlan remarked in *Konigsberg II* regarding the ability of the state to inquire into an applicant’s Communist membership:

[W]e regard the State’s interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.<sup>198</sup>

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judges give to competing societal values. . . . But it is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times.”).

<sup>194</sup> For a discussion of the courts’ treatment of free speech in times of war, see Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223 (1996) (highlighting cases brought under wartime speech restrictions, such as the Alien and Sedition Acts and the 1917 Espionage Acts).

<sup>195</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971).

<sup>196</sup> *Konigsberg II*, 366 U.S. at 44.

<sup>197</sup> *See id.* at 52 (“This Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes.”).

<sup>198</sup> *Id.* The words “circumstances here presented” could possibly provide a restraint on what committees can do.



In the end, balancing is an ad hoc approach that evaluates each applicant on a case-by-case basis rather than attempting to craft general rules for future applicants or future character and fitness committees, thereby perpetuating the vague standard of good moral character. Ultimately, the balancing approach hides what the Court is really doing: sanctioning character and fitness committees' imposition of an unconstitutional condition. In assessing an applicant's "good moral character," the state essentially says: "In order to join the legal profession in our state, prove you were not, and are not now, part of certain organizations or that you do not hold certain views. However, if you were formerly part of a controversial organization or engaged in activities we disapprove of and now disown them, you can join." For Clyde Summers, this meant renouncing his pacifist views in order to be an attorney in Illinois, while, in a later Maryland case, a getaway driver in a bank robbery was admitted for demonstrating "remorse" for his earlier actions.<sup>199</sup> This highlights the continuing, broad discrepancies among state admission standards.

### C. Summers

In 1945, the Supreme Court upheld the Illinois decision to deny admission to conscientious objector Clyde Summers.<sup>200</sup> Summers refused to swear to uphold the Illinois state constitution because it required men of his age be part of the state militia.<sup>201</sup> As the Illinois committee explained to Summers:

You eschew the use of force regardless of circumstances but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. . . .

. . . .

I do not argue against your religious beliefs or your philosophy of non-violence. My point is merely that your position seems inconsistent with the obligation of an attorney at law.<sup>202</sup>

Essentially, Summers was "allowed" to be a conscientious objector to war, but could not hold his beliefs as an attorney. First Amendment rights were extended to him in his personal life, but not in his professional one. Ironically, the Illinois Character and Fitness Committee denied Summers admittance because he rejected force, while other

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<sup>199</sup> See *In re Application of G.L.S.*, 439 A.2d 1107 (Md. 1982) (admitting a candidate to the Maryland Bar after he demonstrated remorse and law-abiding behavior for 14 years after driving the getaway car in a bank robbery).

<sup>200</sup> *In re Summers*, 325 U.S 561 (1945). Although decided in 1945 before the "Communist cases," *In re Summers* is still good law.

<sup>201</sup> *Id.* at 569-70.

<sup>202</sup> *Id.* at 563-64 & n.3.

states' committees rejected Anastaplo and Konigsberg because they feared the men's theoretical support for the use of force or the right to revolution.

Although the Supreme Court argued that one could not be denied admission to the bar based on religion,<sup>203</sup> as Justice Black alleged, there appears to be no other basis for the decision, other than the unpopularity of his views,<sup>204</sup> especially since Summers had "never been convicted for, or charged with, a violation of law."<sup>205</sup> Similarly, Hale was also denied admission for his views. Although these are two very different cases and very different men, in both, the applicant's world view, shaped by his religious beliefs, "interfered" with the "correct" view of the law.<sup>206</sup> The Illinois Character and Fitness Committee seemed to distinguish between one's religious and political beliefs. Summers was "allowed" to be a conscientious objector to war, but not a lawyer, and Hale, who was never jailed for his activities, was not allowed to be an attorney. It is unclear if the committee denied Hale because his religion was not "traditional" or well-established, or because he "crossed the line." How admissions committees will treat applicants with radical Islamic beliefs remains unclear.

## CONCLUSION

Although the number of applicants denied admission to the bar due to their political views is relatively small,<sup>207</sup> the First Amendment implications are troublesome and the stakes for the individual applicant are high. Appeal is available for one who is denied admission; however, this ignores the hardship placed on the applicant who has invested time and money over the preceding three years in law school, not to mention the sacrifices beforehand. It also raises pri-

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<sup>203</sup> The Court stated:

[U]nder our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line.

*Id.* at 571; *see also* *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957) ("Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church.").

<sup>204</sup> *In re Summers*, 325 U.S. at 573-74 (Black, J., dissenting) ("The fact that petitioner measures up to every other requirement for admission to the Bar set by the State demonstrates beyond doubt that the only reason for his rejection was his religious beliefs.").

<sup>205</sup> *Id.* at 574 (Black, J., dissenting).

<sup>206</sup> In disagreeing with the Illinois Character and Fitness Committee, I do not in any way mean to suggest that I agree or support Matthew Hale's view of the world.

<sup>207</sup> *See Rhode, supra* note 10, at 502 ("[T]he number of individuals formally denied admission remained minimal.").

vacy concerns because appealing is a public matter,<sup>208</sup> unless the applicant chooses to file anonymously.<sup>209</sup> Finally, pointing to the availability of appeal dismisses the chilling effect on the applicant's First Amendment rights.

The chilling effect of the "good moral character" standard ultimately affects more than just the bar applicant. Instead of simply discouraging certain kinds of activities, the "good moral character" standard could discourage certain people from entering law school in the first place. Consequently, this could lead to a law school population of predominantly younger students who have not had as much time to "practice" their views and, overall, a more homogenized group within the legal profession. This in turn could influence the kinds of clients who receive representation, especially criminal defendants. Although the Rules of Professional Conduct provide that "[a] lawyer shall not seek to avoid appointment . . . *except for good cause*,"<sup>210</sup> one of the good cause reasons includes a "client or [a] cause [that] is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."<sup>211</sup> Furthermore, a lawyer may permissively withdraw from representation if the representation violates the lawyer's sense of moral norms, i.e., she finds the client's cause "repugnant" or there is a "fundamental disagreement."<sup>212</sup> Therefore, the more homogenized the pool of lawyers becomes, the greater the risk to society that certain kinds of clients will not have adequate representation.

In a broader sense, the vague "good moral character" interrogation harms more than just the applicant. Society has an interest in protecting all people's First Amendment rights where "no one is intimidated with respect to his beliefs or associations."<sup>213</sup> Such thinking echoes the individual liberty theory of First Amendment: the value of speech is about individual liberty and equality, not simply measured in terms of its economic or political value to others.<sup>214</sup>

Attempting to ascertain how bar admissions committees will treat applicants in the post-9/11 world is unclear; from the beginning of

<sup>208</sup> As Justice Black noted in dissent: "[J]udicial review widens the publicity of the questions and answers and thus tends further to undercut its first ground." *Konigsberg II*, 366 U.S. 36, 73 (1961) (Black, J. dissenting).

<sup>209</sup> Given this fact, my research has been limited to reported cases.

<sup>210</sup> MODEL RULES OF PROF'L CONDUCT R.6.2 (2003) (emphasis added).

<sup>211</sup> MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (2003).

<sup>212</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(3) (2003).

<sup>213</sup> *Konigsberg II*, 366 U.S. at 73 (Black, J., dissenting). "It is the interest of all the people in having a society in which no one is intimidated with respect to his beliefs or associations." *Id.*

<sup>214</sup> As C. Edwin Baker argues: "[P]eople's speech and, more generally, their expressive conduct are crucial to their self-identification, to their capacity to change the world, and to their voluntary interactions, including communicative interactions, with others." C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 985 (1997).

the character requirement for bar admissions, the legal profession was concerned with its public image. In the end, the shaping of the bar admissions process will depend on how lawyers view their role within it, because lawyers themselves comprise the character and fitness committees in most states. In late 2001, Michael B. Keating, President of the Boston Bar, gave somewhat conflicting remarks regarding the issue. He encouraged support for the administration's policies while warning of the danger such policies may pose to civil liberties:

Despite the atrocities committed by our enemies, our responsibility as lawyers, individually and collectively, is to steadfastly preserve and protect the personal liberties of everyone—as enunciated in our constitutions and by our courts. Ours may be the watchful eye that will insure that during this national crisis, the civil liberties even of the perpetrators and supporters of these murderous attacks will be protected.<sup>215</sup>

However, he went on to say: “[N]ow is also the time for members of the legal community—in all the various leadership roles that we have in our communities—to visibly support our government in its efforts to rid the world of the threat of terrorism.”<sup>216</sup>

As W. Bradley Wendel has remarked:

The idea of lawyer exceptionalism—the notion that lawyer[s] have diminished expressive liberties because of their relationship with the rule of law—is even more frightening when you consider that the rule of law has not always been protective of the groups you want to protect.<sup>217</sup>

Therefore, in a post-9/11 world, it is more important than ever for bar admissions committees as well as courts to protect applicants' exercise of their first amendment rights rather than to succumb to fear by issuing denial.

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<sup>215</sup> Michael B. Keating, *A Letter from the President of the Boston Bar Association*, 9 METRO. CORP. COUNS. 12, Dec. 2001, at 52.

<sup>216</sup> *Id.*

<sup>217</sup> W. Bradley Wendel, “*Certain Fundamental Truths*”: *A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, 65 LAW & CONTEMP. PROBS. 33, 59 (2002).