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Admission to the Bar -- "Good Moral Character" -- Constitutional Protections

Wallace C. Tyser Jr.

has said, that amendment is concerned, "not with a private right, but with a public power, a governmental responsibility."[65]

HUGH B. ROGERS, JR.

Admission to the Bar—"Good Moral Character"—Constitutional Protections

Traditionally, states have been free to set up bar admission standards as rigorous or as lenient as desired.[1] Thus, it is permissible to require that the applicant for admission have graduated from law school,[2] that he swear to uphold state and federal constitutions[3], and that he does not advocate violent overthrow of the government.[4] Perhaps the most important requirement established by every state is that the applicant have "good moral character."[5] This requirement allows the states a great deal of discretion in determining who will be admitted to the bar since the function of this requirement is to insure that only those who have sufficiently high moral character are allowed to practice law.[6] Any determination of character is clearly a discretionary determination.[7] Since the state impliedly warrants

[65] Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

[1] See Note, 106 U. PA. L. REV. 753, 755 (1958).

[2] *E.g., Ex parte* Florida State Bar Ass'n, 148 Fla. 725, 5 So. 2d 1 (1941).

[3] *In re* Summers, 325 U.S. 561 (1945).

[4] Konigsberg v. State Bar, 353 U.S. 252 (1957) (by implication). All fifty states require the applicant to show nonadvocacy of violent overthrow of the government. See RULES FOR ADMISSION TO THE BAR (West 38th ed. 1963).

[5] See RULES FOR ADMISSION TO THE BAR (West 38th ed. 1963); 64 A.L.R.2d 301 (1959); Jackson, *Character Requirements for Admission to the Bar*, 20 FORDHAM L. REV. 305 (1951). Besides use of the term "good moral character," courts draw analogy and support from the term "moral turpitude," *i.e.*, if there is "moral turpitude," there is a lack of "good moral character." See Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CALIF. L. REV. 9 (1935).

[6] See Comment, 15 STAN. L. REV. 500, 511 (1963) to the effect that the high moral character required is one that would enable the attorney to decide what is "right" for professional conduct as distinguished from private conduct.

[7] As to what considerations should be taken into account in deciding this question, see Starrs, *Considerations on Determination of Good Moral Character*, 2 CATHOLIC LAW. 161 (1956). As to whether a judge or other decision maker should follow his own convictions or that of the public in determining "good moral character," see Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838 (1951).

to its citizens that they can place their trust in the profession, this requirement allows the state to fulfill this function.[8] Further, it has been noted that while one can acquire legal learning through experience, a person admitted to the bar who has poor moral character will likely remain so.[9]

Notwithstanding the state's interest in the protection of the public, the interests of the individual applicant have been recognized. In two 1957 cases the United States Supreme Court for the first time reversed bar admission denials. In *Konigsberg v. State Bar*[10] the Court recognized the usefulness of the requirement of "good moral character" but noted that "[s]uch a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."[11] In the companion case of *Schware v. Board of Bar Examiners*[12] the Court held:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State 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.[13]

In *Schware*, evidence that Schware had been a member of the communist Party, had been arrested but never indicted for "suspicion of criminal syndicalism" because of his participation in the 1934 labor disputes at California shipyards, and had used aliases was not sufficient to justify a finding that Schware was unfit to practice law. And in *Konigsberg*, evidence of alleged past membership in the Communist Party, together with Konigsberg's refusal to answer questions about this, did not warrant the committee in concluding that Konigsberg was not of sufficient moral character and was disloyal to state and federal governments in light of the fact that Konigsberg repeatedly denied that he ever espoused violent over-

[8] See Comment, 15 STAN. L. REV. 500, 511 (1963).
[9] *In re* Farmer, 191 N.C. 235, 238-40, 131 S.E. 661, 663-64 (1926), citing *In re* Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906).
[10] 353 U.S. 252 (1957).
[11] *Id.* at 263.
[12] 353 U.S. 232 (1957).
[13] *Id.* at 239.

throw of the government and in good faith based his refusal to answer the questions of whether he had ever been in the Party on the fifth amendment.

A recent case applied the *Schware* holding. In *Hallinan v. Committee of Bar Examiners*[14] the California Supreme Court reversed a finding of the committee below that the applicant was not of sufficient moral character to practice law. The applicant had been denied admission because of his participation in civil rights demonstrations, with subsequent convictions for unlawful assembly, disturbing the peace, trespass to obstruct dawful business, and unlawful entry.[15] The committee of examiners thought the applicant had "shown a disrespect for the law and judicial officers, which exceeds the bounds of his acknowledged right to hold and espouse, to advocate, advertise, and to participate in mass demonstrations to achieve the acceptance of any social, political or philosophical views of beliefs in a peaceful and non-violent manner."[16]

The California Supreme Court reversed because it felt a "clear analogy" existed between the facts in *Schware* and *Hallinan*. In *Schware* the applicant was arrested for, but never convicted of a violation of the Neutrality Act of 1917 which made it unlawful for a person within the United States to join or to hire others to join the army of any foreign state. The Court in *Schware* reasoned that even if Schware had violated the Neutrality Act of 1917, this would not indicate a lack of good moral character since "[m]any persons in this country actively supported the Spanish Loyalist Government . . . many idealistic young men volunteered to help causes they believed right."[17] Likewise, the court in *Hallinan* reasoned that since many legal scholars and other eminent people, as well as ideal-

[14] 55 Cal. Rptr. 228, 421 P.2d 76 (1966).

[15] The committee listed other grounds, the gist of which was that the applicant had shown a tendency "to employ against the persons and property of others unreasonable physical force and the threat thereof." *Id.* at 231, 421 P.2d at 79 n.2. The California Supreme Court examined the applicant's prior history of fist fights and concluded this was insufficient to deny admission because such acts could be classified as "adolescent behavior" and had no direct relationship to the practice of law. *Id.* at 245, 421 P.2d at 93. The court also regarded petitioner's failure to mention his participation in a will contest and conviction in England for blocking a footpath as *de minimus* "[i]n view of the extensive list of arrests which petitioner did include in his bar application. . . ." *Id.* at 247, 421 P.2d at 95.

[16] *Id.* at 231, 421 P.2d at 79 n.2.

[17] *Id.* at 238, 421 P.2d at 86, citing Schware v. Board of Bar Examiners, 353 U.S. 232, 242 (1957).

istic youth, shared the applicant's belief, it could not be said that the applicant lacked "good moral character."[18] Criminal prosecution, not exclusion from the bar, was the manner of punishment appropriate here.[19] The court felt that the applicant would not "obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court."[20]

Although *Hallinan* did not involve the situation where the applicant refuses to answer committee inquiries, cases dealing with this problem have clearly shown that the applicant's protections are not based on any clearly defined right, but are the result of a balancing of interests. In the second *Konigsberg* case,[21] it was held that since Konigsberg was warned of possible exclusion if he did not answer the questions from the committee about his alleged past Communist Party membership, it did not violate the fourteenth amendment when he was excluded because of his silence since the question was material and there would be "no likelihood that deterrence of association may result. . . ."[22] The Court reached the same result in *In re Anastaplo*.[23] Analagously, the Court in a disbarment proceeding held that the due process clause was not violated when the attorney was disbarred on the basis of his refusal to answer inquiries.[24] These cases did not overrule *Schware* and the first *Konigsberg* case because neither committee drew unfavorable inferences from the silence, as had happened in the first *Konigsberg* case, but denied admission on the ground that the applicant was non-cooperative in refusing to answer questions put to him.[25]

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[18] *Id.* at 238-39, 431 P.2d at 86-87.

[19] *Id.* at 239, 421 P.2d at 87.

[20] *Id.* at 239, 421 P.2d at 87.

[21] Konigsberg v. State Bar, 366 U.S. 36 (1961).

[22] *Id.* at 52.

[23] 366 U.S. 82 (1961). Anastaplo also refused to answer questions about his alleged past membership in the Communist Party. Although there was "substantial character evidence altogether favorable to Anastaplo, there is nothing in the Federal Constitution which required the Committee to draw the curtain upon its investigation at that point." *Id.* at 95. The rationale of the court seemed to be that the applicant was best "circumstanced to supply" information about his past. *Id.* at 90. For a complete discussion of the problem of loyalty, see Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 (1953).

[24] Cohen v. Hurley, 366 U.S. 117 (1961). See note 32 *infra*.

[25] But Justice Black's dissent in *Konigsberg* points out the inconsistency between the first *Konigsberg* case and the second one:

> The majority avoids the otherwise unavoidable necessity of reversing the judgment below on that ground [the test of the 1957 cases] by simply refusing to look beyond the reason given by the Commit-

Some writers maintain that these cases mean only that the Court was unwilling to find an arbitrary or discriminatory exclusion.[26] Nevertheless, the state's power to exclude because of the applicant's refusal to answer questions actually gives the state a technique of exclusion for any undisclosed reason since in any given case application of the rule is still discretionary. Take the case of two silent applicants. If the committee wanted to exclude both, it could; but if only one were excluded, then it is apparent that considerations other than just the silence of the applicant come into play. And under the 1961 cases the real reason for exclusion could not be detrmined.[27]

Others have suggested that the Court feared the unique opportunity that the legal profession presents to the Communist Party,[28] but the more sensible view is that the Court was balancing the interests of state regulation verses individual freedom.[29] To accept the argument of the applicant that he should be allowed to remain silent would in effect shift the burden of proof from the applicant to the committee which is ill-equipped to investigate the applicant's past.[30]

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tee to justify Konigsberg's rejection. In this way, the majority reaches the question as to whether the Committee can constitutionally reject Konigsberg for refusing to answer questions growing out of his conjectured past membership in the Communist Party even though it could not constitutionally reject him if he did answer those questions and his answers happened to be affirmative.

Konigsberg v. State Bar, 366 U.S. 36, 60 (1961).

[26] See Comment, 47 IOWA L. REV. 507, 513 (1962).

[27] See Note, 64 W. VA. L. REV. 70, 74 (1961).

[28] See Comment, 47 IOWA L. REV. 507, 513 (1962).

[29] Justice Harlan, speaking for the Court, said: "Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved." Konigsberg v. State Bar, 366 U.S. 36, 51 (1961).

See Note, 15 VAND. L. REV. 634, 634-37 (1962) in which it was suggested that in such a context, that is, in the area of state investigations for a public job, or some license, or benefit, two groups of cases appear: (1) Where the question asked is justified to protect the state's interest but the answers are of so little probative value in regard to determining fitness that exclusion here is arbitrary and unreasonable, *e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 252 (1957). (2) Where the question itself is so unrelated to any state interest that it is arbitrary to ask the question, *e.g.*, Bates v. Little Rock, 361 U.S. 516 (1960) (compulsory disclosure of NAACP membership lists under city occupational license tax held unconstitutional); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (membership lists of NAACP not relevant to a determination of fitness to conduct intrastate business).

[30] However, it is at least questionable whether the ultimate burden of persuasion is shifted to the committee. The court in *Konigsberg* distin-

Furthermore, the Court appeared to fear that the Supreme Court would become a "super state supreme court of appeals."[31]

This balancing of interests in regard to the fifth amendment is now subject to question since the recent case of *Spevack v. Klein*[32] overruled *Cohen*. Although *Spevack* held only that the self-incrimination clause of the fifth amendment applied to state disbarment proceedings through the fourteenth amendment, disbarment is not so dissimilar from admission proceedings that *Spevack* could not be used analogously to overrule the second *Konigsberg* case and *In re Anastaplo*.[33] Furthermore, if one assumes that the state policy behind either proceeding is the same—to maintain high ethical standards in the profession for the protection of the public—it would likewise appear that the issue of whether the first and fifth amendments should apply to admission proceedings is basically the same.

guished Speiser v. Randall, 357 U.S. 513 (1958), which held that it was a violation of due process to require taxpayers to prove their nonadvocacy of violent overthrow of the government in order to receive tax exemptions, from the burden of proof required for bar admission. While in *Speiser* the taxpayer had the ultimate burden of persuasion, the applicant for bar admission had only the burden of coming forward with the evidence; thus, there was a greater threat to the individual in *Speiser* since the taxpayer would have to disclose more information than the applicant would have to give in the *Konigsberg* situation. But if this is so, only the burden of coming forward is shifted to the committee. Thus, it appears to be less of a handicap to the committee, assuming it already has the ultimate burden of persuasion.

It is also questionable whether the Court, speaking through Justice Harlan, was correct in implying that the committee has the ultimate burden of proof. Most states place the burden of proof on the applicant, See Note, 106 U. PA. L. REV. 753 n.4 (1958). Even if the applicant still has it, California Supreme Court Justice Traynor suggests that the exclusionary rule should be applied only where there is a prima facie espousal of communist theory, or for that matter any question of fact in issue. Konigsberg v. State Bar, 52 Cal. 2d 769, 774-78, 344 P.2d 777, 780-83 (1959) (dissenting opinion). This would mean that the applicant could be silent about certain matters if he has already put in evidence sufficient to rebut any prima facie case made by the committee.

But see Sprecher, *Bar Admission Agencies: Their Right to be Informed*, 51 A.B.A.J. 248 (1965).

[31] "[O]ur function here is solely one of constitutional adjudication, not to pass on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the State's action." *In re* Anastaplo, 366 U.S. 82, 97 (1961). See Comment, 56 MICH. L. REV. 415, 424-25 (1958).

[32] 87 S. Ct. 625 (1967).

[33] The court in *Spevack* said: "In this context [disbarment proceedings] 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" *Id.* at 628. The argument would be that exclusion is as "costly" as disbarment.

The Court has had less trouble in sustaining procedural protections for the applicant. In *Willner v. Committee on Character & Fitness*[34] the applicant was denied admission on the basis of an adverse and confidential trial report from a committee of lawyers. Willner was not allowed to examine this report nor was he told of the charges it contained. The New York State Court of Appeals denied Willner's petition for a hearing on the charges. On certiorari to the United States Supreme Court, it was held: "petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed against him before either the Committee or the Appellate Division."[35] Although it might appear somewhat unclear whether a right to a hearing includes the right of confrontation and cross-examination, a recent case had no trouble in finding that this was a part of the *Willner* case.[36] State courts have also insisted that the applicant have procedural protection.[37]

Thus, except for the procedural right to a hearing, the Court has established no standards for the committees to follow. Although *Schware* established the requirement of a "rational connection," cases relying on *Schware* do not make it clear whether the reversal of the exclusion is based on a finding that the committee used a qualification that has no rational connection with the applicant's fitness or whether the committee was reversed because it excluded when there was no basis for their finding that the applicant failed to meet the standards.[38] Having no guides as to what is a "rational connection" between the question asked and the determination of whether the applicant has good moral character, committees can ask questions that have little relevance to the ultimate determination to be made. This is harmful in two ways. In the first place, such questioning can subject the applicant to invasions of purely private mat-

[34] 373 U.S. 96 (1963). *Compare* Green v. McElroy, 360 U.S. 474 (1959) *with* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[35] 373 U.S. at 106.

[36] Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964).

[37] See *e.g.*, Application of Burke, 87 Ariz. 336, 351 P.2d 169 (1960); Application of Kellar, 81 Nev. 240, 401 P.2d 616 (1965); *In re* Crum, 103 Ore. 296, 204 P. 948 (1922).

[38] A possible exception is Florida Bar v. Wilkes, 179 So. 2d 193 (1965). The court, relying on *Schware* in a disbarment proceeding, ruled that the mere belief in existentialist philosophy did not show that the applicant was unfit to practice law.

ters.[39] Secondly, such irrational questioning can deter freedoms of expression and association.[40] In *Hallinan*, would it be unreasonable to assume that future applicants would at least be leary of participation in civil rights demonstrations? Part of Justice Harlan's rationale in refusing to allow the applicant to use the fifth amendment was that no deterrence of association would result. But is this realistic since the applicant has spent the last few years preparing for entry into the legal profession and it is always questionable whether an appellate court will reverse the exclusion in question? Thus, the ultimate responsibility for establishing proper standards to see if the applicant has "good moral character" lies with the bar examining committee.

WALLACE C. TYSER, JR.

Antitrust Law—Horizontal Mergers—Section 7 of the Clayton Act

In *United States v. Von's Grocery Co.*,[1] the Supreme Court struck down a horizontal merger[2] as a violation of Section 7 of the Clayton Act. In March of 1960, when Von's, the third largest retail grocery chain in the Los Angeles area, purchased the sixth largest, the United States brought action charging an antitrust violation. At trial, the District Court decided that from "the evidence, it cannot be concluded that the merger in question would probably lessen competition in the metropolitan area either at the time of the mergr

[39] See Griswold v. Connecticut, 381 U.S. 479 (1965).

[40] Justice Black said in the first *Konigsberg* case: "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." Konigsberg v. State Bar, 353 U.S. 252, 273 (1957). See Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 501 (1953). Another bad result is the attitude such questioning produces in the applicants. It perhaps tends to make them give only the "right" answers. *Ibid.* This is bad not only because the applicant feels he has to hide some belief, but also because it will hinder the committee from reaching conclusions based on truthful answers.

[1] 384 U.S. 270 (1966).

[2] A horizontal merger is a merger between two companies that compete directly in similar economic functions, while a vertical merger is one between companies that buy or sell the product of the other, and a conglomerate merger is between companies that have no direct relationship with each other.