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Denial of Admission to the Bar Which Is Based on the Applicant's Assertion of the Fifth Amendment Privilege against Self-Incrimination with Respect to Questions concerning the Applicant's Subversive Advocacy

Warren D. Bracy

SURVEY

DENIAL OF ADMISSION TO THE BAR WHICH IS BASED ON THE APPLICANT'S ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WITH RESPECT TO QUESTIONS CONCERNING THE APPLICANT'S SUBVERSIVE ADVOCACY

BY WARREN D. BRACY*

I INTRODUCTION

Can state bar authorities deny admission to an applicant who asserts her (his) Fifth Amendment Privilege against self-incrimination as the basis for refusing to provide information on whether (s)he advocated the violent overthrow of government or on whether (s)he was a member of an organization which (s)he knew while (s)he was a member advocated the violent overthrow of government? At least ten states[1] ask questions

* Associate Professor of Law, North Carolina Central University B..S. (Soc. Sci.), Loyola University, Chicago; M.A., Rutgers University; J.D., Cornell.

1. In the fall of 1988, the author wrote and requested copies of the bar application forms from the bar admission authorities in all fifty states, the District of Columbia, the Virgin Islands, and Puerto Rico. The authorities in forty-six of the fifty states responded to the author by sending the requested forms. So did the authorities in the District of Columbia, the Virgin Islands and Puerto Rico. Only ten of the respondents asked questions relevant to this article. All ten of those respondents represented state jurisdictions. The author wishes to thank all the bar admission authorities whose cooperation was very valuable in the formative stages of this article.

ALABAMA

(45) Loyalty to United States government:

(a) I can [ ] cannot [ ] take and subscribe to an oath or affirmation that;

(b) I have [ ] have not [ ] organized or helped to organize or been a member of any group of persons which I 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 other unlawful means;

(c) I believe in the form of government of the United States, and that I am, without any reservation, loyal to and prepared to support the constitutions of the United States, and of the State of Alabama. Yes ( ) No ( )

IDAHO

(38) ___ ___
Yes No Have you ever supported or advocated the overthrow of the U.S. government by force?

relating to the bar applicant's knowing membership in and specific intent to further the aims of groups which advocate the violent overthrow of government. At least two of those ten states make it a crime either to be a knowing member of such a group and fail to register with the authori-

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If, yes, attach a statement specifying all details.

INDIANA

(13) I _____ (fill in "do" or "do not") personally advocate the violent overthrow of the government of the United States.

(14) The only organizations to which I belong that do advocate the violent overthrow of the government of the United States are (if none, so state):

KANSAS

(14) ___ ___

Yes No 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, was advocating or teaching that the government of the United States or any state or any political sub-division thereof should be overthrown or overturned by force, violence, or any unlawful means? If you answer in the affirmative, attach a statement fully explaining your answer.

KENTUCKY

VERIFICATION

(1) I hereby certify as follows: I do not advocate the overthrow of government by force. 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 subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?

Yes ____ No ____

If yes, please attach a detailed explanation.

If your answer to the above is yes, 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?

Yes ____ No ____

NEW MEXICO

(26) Do you presently advocate the violent overthrow of the Government of the United States?

NORTH CAROLINA

(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 subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?

Yes ____ No ____

If your answer is in the affirmative, state the facts below.

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ties[2] or to advocate the violent overthrow of domestic government.[3]

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(26)(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?

Yes ____ No ____

OHIO

(6)(g) State whether, since registering as a candidate for admission to the practice of law, you have been or presently are: a member of or have helped to organize 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 political subdivision thereof, should be overthrown or overturned by force, violence or any unlawful means.

SOUTH CAROLINA

(21)(a) Have you ever knowingly 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 yes, please state facts.

Yes ____ No ____

_____

_____

_____

(21)(b)

___ ___

Yes No If your answer to (a) is "yes", 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 other unlawful means?

SOUTH DAKOTA

(3)(e) Are you now or have you ever been a member of or affiliated with any party or organization which advocates or advocated the overthrow of the constitutional form of government in the United States by force and violence? _____. If your answer is yes, please explain fully on attached sheet and state whether such membership or affiliation continues to date.

2. N.M. STAT. ANN. §§ 12-4-1 to -3 (1978).

12-4-1 [Policy]. That it is the public policy of the state of New Mexico that no communist organization, affiliate of the communist party or supporter or advocate of communistic doctrine or any person or organization which believes in, teaches or advocates the overthrow of the government of the United States or of the state of New Mexico by force or by any illegal or unconstitutional method or means, shall remain within the state and be unknown or unrecognized.

12-4-2 [Registration] That to effectuate the public policy as set out in Section 1 [12-4-1 NMSA 1978] hereinabove every communist organization, affiliate of the communist party or supporter or advocate of communistic doctrine, or any person or organization which believes in, teaches or advocates the overthrow of the government of the United States or of the state of New Mexico by force or by any illegal or unconstitutional methods or means, shall register with the secretary of state of New Mexico. Such registration shall be accomplished in such manner and on such forms as may be prescribed by the secretary of state. All organized groups or associations falling into the category required to register under this act [12-4-1 to 12-4-3 NMSA 1978], shall file a list of all of the members of such organization with the secretary of state, such list to show the names of all members, their addresses and designation of all officials of such organization. All individuals required by this act to register shall file their name [names], address [addresses] and the names of the organizations or associations to which they belong as members.

While the United States Supreme Court's decision in *Law Students Civil Right Research Council, Inc. v. Wadmond*[4] clearly permits the bar authorities to ask applicants questions relating to an applicants knowing membership in and specific intent to further the aims of groups which advocate the violent overthrow of the United States government, it is the thesis of this article that failure to admit an applicant merely because (s)he refuses on self-incrimination grounds to answer such questions transgresses both First and Fifth Amendment freedoms.

II DENIAL OF ADMISSION BECAUSE OF FAILURE TO ANSWER VIOLATES FIRST AMENDMENT FREEDOMS OF SPEECH, PETITION AND ASSEMBLY

The *Wadmond* court upheld the validity of asking questions[5] which were very similar to the ones presently asked in at least ten states. In its opinion the court indicated twice that no one involved had been refused certification because of failure to respond to the questions:

Registration under this act shall be completed within six calendar months after the passage of this act, and registrants shall reregister annually thereafter, such reregistration period to begin on April 1st and ending on May 1st of each year.

12-4-3. [Violation; Penalties] That the officers of any organization, association, party or group which shall fail to register under the provisions of this act [12-4-1 to 12-4-3 NMSA 1978], or any person who shall knowingly fail to comply with the provisions of this act, shall be guilty of a felony and on conviction thereof shall be punished by a fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5,000), or by imprisonment for not less than three (3) years or more than ten (10) years, or by both such fine and imprisonment.

3. N. C. GEN. STAT. § 14-11 (1988), provides in pertinent part:

It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the State, owned by the State of North Carolina, any political subdivision thereof, or by any department or agency of the State or any institution supported in whole or in part by State funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means.

4. 401 U.S. 154 (1971).

5. *Id.* at 164-65 [Questions] 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?

(27)(a) Is there any reason why you cannot take or subscribe to an oath of affirmation that you will support the Constitution of the United States and of the State of New York? If there is, please explain.

(b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?

> [N]o person involved in this case has been refused admission to the New York Bar . . . . [t]he basic thrust of appellant's attack is rather, that New York's system by its very existence works a "chilling effect" upon the free exercise of rights of speech and association of students who must anticipate having to meet its requirements.[6]
>
> In dealing with these questions we emphasize again that there 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 or any similar questions, or because of his refusal to answer them. Necessarily, therefore, we must consider the validity of the questions only on their face. . . .[7]

The constitutional challenge to the validity of the questions focused solely on the state bar association asking the questions. The Court's holding did no more than sustain the validity of asking the questions. The Court did not approve, even by way of dictum, a refusal to certify based on a mere failure to respond to the questions in controversy.

Furthermore, the circumstances in which the questions are asked in the ten states may differ in one very important respect from the circumstances surrounding the asking of the questions by the New York Bar. One reason advanced by the *Wadmond* Court for sustaining the validity of asking the questions was that New York did not place the burden of proving good character upon the applicant:

> The appellees have made it abundantly clear that their construction of the Rule is both extremely narrow and fully cognizant of protected constitutional freedoms. There are three key elements of this construction. First, the Rule places upon applicants no burden of proof.[8]

Ohio, one of the ten states which asks the subversive advocacy questions, places the burden of proving good character on the applicant.[9] When the burden of proving fitness and good character is placed upon an applicant who is asked subversive advocacy questions, there is an additional chilling effect which was not present in *Wadmond*.[10] That additional chilling effect may forbid even asking the questions, but at the very least it prohibits denial of admission based solely on the failure to respond.

Denial of a benefit based on the applicant's refusal to respond to subversive advocacy questions was the crucial issue in *First Unitarian Church of Los Angeles v. County of Los Angeles*[11] and *Speiser v. Randall*.[12] In order to obtain a tax exemption for religious property or vet-

6. *Id.* at 158-59.
7. *Id.* at 165.
8. *Id.* at 163.
9. Ohio Gov Bar I, § 10(b)(1).
10. *See supra,* note 4.
11. 357 U.S. 545 (1958).
12. 357 U.S. 513 (1958).

eran status, an applicant had to take an oath in which (s)he swore that (s)he did not advocate the violent overthrow of government. The Unitarian Church and the applicant with veteran status deleted the oath and filed for the benefit on a form which contained the one omission. The property tax assessor refused to grant the exemptions. The refusals were based solely on the applicants' failure to swear that they did not advocate the violent overthrow of government. The California property tax exemption provisions provided that if the assessor denied the application the applicant could initiate judicial review. In the judicial proceedings, the applicant had the burden of proving that (s)he was entitled to the exemption. The United States Supreme Court reasoned that when the qualification for a governmental benefit called into question freedoms protected by the First Amendment, it was unconstitutional to place the burden of proving the qualification upon the applicant. Likewise, due process is violated by placing the burden of proving non-subversive advocacy character and fitness on a bar applicant and then denying her (him) admission purely on grounds that (s)he did not meet the burden because (s)he did not answer the questions.

Other cases also support the argument that a refusal to certify based only on a failure to respond to subversive advocacy inquiries violates first amendment freedoms. The petitioner in *Baird v. State Bar of Arizona*[13] was denied admission because she refused to answer whether she had been a member of the communist party or any organization which advocated the overthrow of the United States government by force or violence. The *Baird* majority held in part:

> The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.[14]
>
> Of course Arizona has a legitimate interest in determining whether the petitioner has the qualities of character and professional requisite competence . . . to practice law. But here [the] petitioner has already supplied the Committee with extensive personal and professional information to assist its determination. By her answers to the questions other than No. 25, and her listing of former employers, law school professors and other references, she has made available to the Committee the information relevant to her fitness to practice law.[15]

The crux of *In Re Stolar*[16] is focused on the failure of bar officials to admit a candidate solely because of refusal to respond to questions regarding membership and participation in organizations that advocate vi-

13. 401 U.S. 1 (1971).
14. *Id.* at 6.
15. *Id.* at 7.
16. 401 U.S. 23 (1971).

olent overthrow. The *Stolar* majority held that the Constitution forbade Ohio from requiring that the potential lawyer state whether (s)he had been or was presently a member of such an organization:

> We conclude . . . 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."[17]
>
> There is not one word in this entire record that reflects adversely on Mr. Stolar's moral character or his professional competence. Although there were three questions that he did not answer with a simple "yes" or "no", he did answer all of the Committee's questions relevant to his fitness and competence to practice law. It is difficult if not impossible to see how the State of Ohio could have been obstructed or frustrated to any extent in determining Mr. Stolar's fitness to practice law by his failure to answer the questions more fully. . . . The State points to not one overt act on Stolar's part that even suggests a possible reason for denying his application.[18]

The rationale and holding of earlier litigation contradicts the transgression of First Amendment rights thesis. The *Konigsberg v. State Bar of California*[19] and *In Re Anastaplo*[20] decisions upheld the validity of bar denial to candidates who asserted first amendment freedoms as the basis for their refusal to respond to inquiries regarding communist party membership. However, the present persuasiveness of *Konigsberg* and *In Re Anastaplo* has been substantially eroded, if not completely diminished, by *Baird, Stolar* and *Wadmond*. The trilogy was decided at the commencement of the seventies — an era of significantly greater judicial protection for the right of political dissent. *Konigsberg* and *Anastaplo* were decided at the closing of the fifties — an era of virulent cold war rhetoric and McCarthyism. *Konigsberg* and *Anastaplo* have been presumptively overruled while the *Baird, Stolar, Wadmond* analysis is the law. Therefore, in my view, an applicant's first amendment rights are violated when state bar officials refuse admission because (s)he refuses to answer personal subversive advocacy questions.

III DENIAL OF ADMISSION BECAUSE THE APPLICANT REFUSES TO ANSWER VIOLATES HER (HIS) FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Smith Act[21] makes advocacy of the violent overthrow of the fed-

17. *Id.* at 30.
18. *Id.* at 30-31.
19. 366 U.S. 36 (1961).
20. *Id.* at 82.
21. 18 U.S.C. § 2385 (1988).

> Whoever knowingly or willfully advocates . . . the . . . necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence . . . or

eral government a crime. If convicted, one can be sentenced to prison for a term that does not exceed twenty-years, or one can be fined an amount that does not exceed twenty-thousand dollars or both.

New Mexico, one of the at least ten states which asks the subversive advocacy questions, has its own version of the Smith Act. The New Mexico Statute declares the existence of subversive advocacy groups to be against the public policy of the State. The statute then goes on to require those groups to register with the appropriate state officials. If the registration requirements are not met, those persons responsible for complying can be fined and/or imprisoned.[22]

North Carolina, another of the at least ten states which asks subversive advocacy questions, also has its own version of the Smith Act. North Carolina makes subversive advocacy unlawful. The first offense is a misdemeanor. The second offense is a felony. Conspiring to commit the offense is also a felony.[23] North Carolina also has a separate statute which forbids the use of state university facilities by a person who has pled the Fifth Amendment to questions regarding subversive advocacy.[24]

A North Carolina applicant who responded affirmatively to such questions would subject herself (himself) to potential prosecution for violation of the Smith Act and the North Carolina subversive advocacy statute. A New Mexico applicant who responds affirmatively to the subversive advocacy questions can be prosecuted for violating the Smith Act. That same New Mexico applicant can be prosecuted for violating state law if (s)he is one of those persons who has a duty to register. Given the existence and applicability of the Smith Act and similar state statutes, an affirmative response is an incriminating response.

Moreover, the privilege against self-incrimination is assertable in bar disciplinary proceedings. Bar associations cannot condition membership

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Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence . . . [s]hall be fined not more than $20,000 or imprisoned not more than twenty years, or both . . . .

Id.

22. *See supra* note 2.

23. *See supra* note 3.

24. N.C. GEN. STAT. § 116-99 (1987). Use of facilities for speaking purposes.

The board of trustees of each college or university which receives any State funds in support thereof, shall adopt and publish regulations governing the use of facilities of such college or university for speaking purposes by any person who:

(1) Is a known member of the Communist Party;

(2) Is known to advocate the overthrow of the Constitution of the United States or the State of North Carolina;

(3) Has pleaded the Fifth Amendment of the Constitution of the United States in refusing to answer any question, with respect to Communist or subversive connections, or activities, before any duly constituted legislative committee, any judicial tribunal, or any executive or administrative board of the United States or any state.

on waiver of Constitutional rights. *Spevack v. Klein*[25] is a pillar of the bar association self-incrimination argument. An attorney was disbarred because he refused to supply records and testify before a state bar misconduct proceeding. The disbarment was overturned on the ground that basing it on the mere refusal to supply self-incriminating materials violated the Fifth Amendment privilege:

> We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of livelihood as a price for asserting it.[26]

Neither *Konigsberg*,[27] *Cohen*[28] nor *In Re Anastaplo*[29] provide modern day support to the proposition that you must supply all pertinent information requested by the state bar officials. The heart of the rationale in those cases was effectively discarded in *Spevack*.[30] When the *Spevack* court effectively overruled the *Cohen* decision, the privilege against self-incrimination which heretofore had not been applicable in bar proceedings became available. No burden could attach to assertion of the right.

Spevack's importance does not end here. In addition to making the privilege against self-incrimination applicable to state bar procedures, it also distinguished between the governmental employee's right to remain silent and the right of a non-governmental employee to do likewise. In certain very narrowly tailored circumstances directly related to the responsibilities and duties of the job, the governmental employee may be disciplined or discharged for failure to provide information. Non-governmental employees have no such comparable duty. Mr. Justice Fortas advances that precise argument in his concurrence in *Spevack:*

> I agree that *Cohen v. Hurley* . . . should be overruled. But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly and narrowly relating to performance of his official duties.[31]

Mr. Justice Fortas' distinction is vital. Justices Stewart and Harlan dissented in *Spevack*. They opined that the decision went further than necessary because it prohibited disciplining governmental employees. However, when Justice Fortas authored the majority opinions in two later cases, *Gardner v. Broderick*[32] and *Uniformed Sanitation Men Ass'n.,*

25. 385 U.S. 511 (1967).
26. *Id.* at 514.
27. 366 U.S. 36 (1961).
28. 366 U.S. 117 (1961).
29. 366 U.S. 82 (1961).
30. 385 U.S. 511 (1967).
31. *Id.* at 519.
32. 392 U.S. 273 (1968).

Inc. v. Commission of Sanitation,[33] both Justice Stewart and Justice Harlan concurred. Their concurrence was based solely on the distinction between a governmental and a non-governmental employee's assertion of the privilege against self-incrimination. Though *Gardner* was reversed on other grounds, both cases upheld the acceptability of discipline including dismissal of public employees who refused to provide information in certain very narrowly tailored circumstances directly related to actual job performance and responsibility. The bar applicant's circumstance is clearly distinguishable and not controlled by the limited public employee rationale. In fact, the reasoning which underlies the public employee duty advances a persuasive argument as to why bar applicants cannot be penalized for exercising the privilege.

The prohibition against attaching a burden to the assertion of the privilege is further supported in *Dickson v. Sitterson*.[34] The North Carolina Statute[35] which forbade any person who had invoked the privilege for speaking on state college premises was challenged here. Speaking for the unanimous three judge panel, which included Circuit Judge Haynsworth and District Judge Butler, District Judge Stanley said,"The third section of the statute covers speakers who have 'pleaded the Fifth Amendment of the Constitution of the United States. Presumably, this means the "self-incrimination" class . . . Moreover, the imposition of any sanction by reason of the invocation of the Fifth Amendment is constitutionally impermissible."[36]

Since it is not constitutionally permissible to attach the non-access to state university premises penalty upon those who have invoked the privilege in the subversive advocacy arena, it is also unconstitutional when the state through its bar admission proceedings attaches the sanction of non-admission to those lawyer candidates who have invoked the privilege against self-incrimination regarding questions of personal subversive advocacy.

CONCLUSION

When an applicant validly invokes the First Amendment freedoms of speech, petition, assembly and association as the basis for refusing to respond to questions concerning the applicant's own personal subversive advocacy, the bar admissions authorities cannot utilize such failure to respond as grounds for declining to issue the license to practice law. The Fifth Amendment's privilege against self-incrimination is violated when

33. 392 U.S. 280 (1968).
34. 280 F. Supp. 486 (M.D.N.C. 1968).
35. N.C. GEN. STAT. § 116-99 (1987).
36. Dickson v. Sitterson, 280 F. Supp. 486, 498 (1968) (citing Spevack v. Klein, 385 U.S. 511 (1967)).

the bar admission authorities refuse to issue a license because an applicant has asserted the privilege in connection with declining to answer question's pertaining to personal subversive advocacy. The Constitution does not permit the attachment of a burden upon the proper exercise of fundamental rights.