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Constitutional Law - Due Process - Denial of Admission to the Bar Based on Unwarranted Inferences of Bad Moral Character

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COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS—DENIAL OF ADMISSION TO THE BAR BASED ON UNWARRANTED INFERENCES OF BAD MORAL CHARACTER—Power over admission to the bar has long been vest-

ed in the judiciary of each state. While the legislature may prescribe certain standards, the state court alone is responsible for the determination of those qualified for the practice of law within its jurisdiction. The application of these standards often demands the exercise of meticulous judgment by the court in reaching its conclusion as to an applicant's fitness. Where, on the evidence or lack of evidence presented, the court finds that it cannot in good conscience grant its approval, the candidate is denied admission. To the extent that such a denial appears unjustified, serious constitutional questions may be raised. Is the state's determination to be final, based on a freedom to select its own bar? Or should the United States Supreme Court review this determination in order to ascertain whether the applicant's exclusion was arbitrary in violation of the Fourteenth Amendment to the Constitution? Two recent cases decided by the Supreme Court, *Schware v. Board of Bar Examiners of New Mexico*,[1] and *Konigsberg v. State Bar of California*,[2] have shown

[1] 353 U.S. 232 (1957). Schware petitioned the State Board of Bar Examiners for permission to take the 1954 state bar examination. His application revealed that he had used certain aliases while a dock worker between 1933 and 1937, and that he had twice been arrested on "suspicion of criminal syndicalism" and also for violation of the Neutrality Act of 1940. Charges were dropped in every instance. Confidential information obtained by the board indicated that petitioner had been a member of the Communist Party from 1932 to 1940. Schware freely admitted his membership in the party when questioned. The board reviewed the evidence, and, after a formal hearing, denied the application on grounds that petitioner did not have the requisite "good moral character" required by statute of those applying to take the state bar examination. See N.M. Stat. Ann. (1953) §18-1-8 and the appended Rules Governing Admission to the Bar. The New Mexico Supreme Court affirmed petitioner's denial. Schware v. Board of Bar Examiners, 60 N.M. 304, 291 P. (2d) 607 (1955). Schware petitioned the United States Supreme Court for certiorari, claiming that the state court's action had deprived him of due process of law, under the Fourteenth Amendment. The Supreme Court, speaking through Justice Black, concluded that there was no evidence which rationally justified a finding that petitioner was morally unqualified to take the examination. Thus, Schware had been denied due process. Justice Frankfurter, with Justices Clark and Harlan, concurred on the ground that the state court was unwarranted in concluding that petitioner's past communist affiliation made him "a person of questionable character."

[2] 353 U.S. 252 (1957). The California Committee of Bar Examiners refused to certify Konigsberg for admission to the state bar, on grounds that he had failed to prove (1) that he was of good moral character and (2) that he did not advocate overthrow of the Government of the United States or of California by unconstitutional means. See California Business and Professions Code (1937) §6060(c) and (1957 Supp.) §6064.1. At his hearing, there was evidence that petitioner had attended Communist Party meetings in 1941. Also introduced were editorials which petitioner had written criticizing certain public officials and their policies. Konigsberg refused to answer any of the committee's questions relating to his political views and communist associations, other than the direct question, "Do you advocate overthrow of the government of the United States or of this State by force or violence or other unconstitutional means?" His answer to this question was emphatically in the negative. The Supreme Court of California declined to review

that a denial predicated on unwarranted inferences and conclusions, especially with regard to past affiliation with the Communist Party, will be treated as offensive to due process of law under the Fourteenth Amendment. The sweeping language of these opinions appears to indicate that this constitutional protection to be afforded an individual will by no means be limited to candidates for admission to the bar.

I

Previous to *Schware* and *Konigsberg*, there was a general disinclination on the part of the Supreme Court to consider claims arising under the Fourteenth Amendment in state bar admission proceedings.[3] It was never disputed that the Fourteenth Amendment protects persons from any arbitrary deprivation of their rights by a state, whether relating to their life, liberty, or property.[4] A considerable amount of concern, however, has been evidenced as to whether admission to the practice of law properly falls within the scope of the Amendment, i.e., is it "life, liberty or property"?[5] That it is not "life" is elementary. In support of the proposition that admission is in the nature of a property "right," it was once felt that every citizen of the United States had a "right" to pursue any lawful calling or

Konigsberg's petition, without opinion. On certiorari, the United States Supreme Court speaking through Justice Black, after reviewing the evidence, which included testimonials from 42 persons as to Konigsberg's good character and an unblemished record as a teacher, health office supervisor, social worker and army officer, ruled that Konigsberg had been denied due process of law. There was nothing in the record which rationally justified a finding that petitioner had failed to establish his good moral character or to show that he did not advocate overthrow of government by unconstitutional means. Justice Frankfurter, dissenting, recommended remanding the case to obtain the California Supreme Court's certification as to whether it had based its decision on constitutional or procedural grounds. Justice Harlan, joined by Justice Clark, dissented both on the jurisdictional issue and on the merits. It was his opinion that, since the majority did not rule that the committee's questions were irrelevant or that petitioner was constitutionally privileged in refusing to answer them, the state was justified in refusing admission. It did not violate the Fourteenth Amendment for a bar committee to refuse certification to an applicant who deliberately, and without constitutional justification, obstructed a proper investigation into his qualifications by refusing to answer questions relevant to his fitness.

[3] See Bradwell v. Illinois, 16 Wall. (83 U.S.) 130 (1872). In re Summers, 325 U.S. 561 (1945), involved review of the question whether petitioner's freedom of religion had been violated by the Illinois Supreme Court's denial of admission to the bar.

[4] See Dent v. West Virginia, 129 U.S. 114 (1889).

[5] O'Brien's Petition, 79 Conn. 46, 63 A. 777 (1906). See Starrs, "Considerations on Determination of Good Moral Character," 18 UNIV. DETROIT L. J. 295 (1955).

profession of his choice.[6] It later became apparent that a state's grant of membership in the bar was more properly characterized as a "privilege burdened with conditions."[7] This characterization would seem to preclude Fourteenth Amendment protection to a candidate for admission to the bar, unless he can be said to have a guaranteed "liberty" to practice law which cannot be arbitrarily infringed. This viewpoint has been adopted on occasion.[8]

An additional obstacle to the Court's review of cases involving state bar admissions is the desire to allow as much autonomy as possible to the states in determining who is entitled to practice before their courts.[9] Just prior to its decision in the principal cases, the Court declined to consider two other cases presenting substantially the same set of circumstances as appears in *Konigsberg*.[10] In some instances, the Supreme Court has acted to protect individuals from arbitrary or discriminatory state action that has prevented them from carrying on a particular occupation.[11] These cases, however, dealt either with legislative enactments or the ministerial issuance of licenses, where no question of judicial discretion was involved.

Justice Black, speaking for the Court in both the *Schware* and *Konigsberg* cases, skillfully avoided the complexities that develop in attempting a proper classification of admission to the bar. In a rather succinct manner it was made clear that the due process and equal protection clauses of the Fourteenth Amendment are to encompass every case involving a state's denial of

6 Dent v. West Virginia, 129 U.S. 114 (1889).

7 Cardozo, J., in Matter of Rouss, 221 N.Y. 81 at 84, 116 N.E. 782 (1917). But cf. Henington v. State Board of Bar Examiners, 60 N.M. 393 at 398, 291 P. (2d) 1108 (1956), that the "right to take an examination to practice law is a qualified right. . . ."

8 See 26 NOTRE DAME LAWYER 498 (1951) and Meyer v. Nebraska, 262 U.S. 390 (1923).

9 See In re Summers, 325 U.S. 561 (1945) (denial of admission to bar of conscientious objector for failure to take oath pledging willingness to serve in state militia upheld). See also Barsky v. Board of Regents, 347 U.S. 442 (1954) (statutory suspension of physician's medical license following conviction for failing to produce papers subpoenaed by congressional committee upheld).

10 In re Anastaplo, 3 Ill. (2d) 471, 121 N.E. (2d) 826 (1954), cert. den. 348 U.S. 946 (1955), reh. den. 349 U.S. 908 (1955), noted in 1955 WASH. UNIV. L. Q. 83. Cross v. State Bar of California, 340 U.S. 925 (1951), motion for leave to file petition for writ of mandamus denied 345 U.S. 990 (1953), reh. den. 346 U.S. 843 (1953). There is no official report of the case below, but see Farley, "Character Investigation of Applicants for Admission," 24 BAR EXAMINER 147 at 151 (1955).

11 Wieman v. Updegraff, 344 U.S. 183 (1952); Meyer v. Nebraska, 262 U.S. 390 (1923); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Ex parte Garland, 4 Wall. (71 U.S.) 333 (1866); Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1866).

permission to pursue any lawful occupation.[12] Justice Black thus apparently established that the Supreme Court will no longer be reluctant to intervene in such cases for the purpose of reviewing an applicant's claim that the state's denial violated due process of law.

II

Once the jurisdictional problems were resolved, conflicting forces were in operation to shape the Court's decision. The states contended for self-determination in the selection of their bars, but Fourteenth Amendment guarantees were within reach if the refusals were found unwarranted. There was also undeniable pressure for a declaration in favor of the existence of an independent bar, free from the necessarily restrictive effects of forced political conformity.

In *Schware v. Board of Bar Examiners of New Mexico,*[13] notwithstanding other alleged indications of bad moral character,[14] it can safely be said that petitioner's exclusion was predicated almost entirely on his admitted membership in the Communist Party from 1932 to 1940. No evidence, however, was presented tending to show the nature or extent of petitioner's past conduct while a member. The New Mexico court had focused attention on the party as it is viewed today,[15] and apparently failed to give any consideration to the party's operation during the period of petitioner's membership. The issue was unmistakable. The Court had only to determine whether Schware's past membership as revealed to the New Mexico Supreme Court was sufficient to warrant an inference of present bad moral character. In holding that it was not,[16] the Court stripped New

12 Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 at 238-239 (1957). "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Cf. Ex parte Secombe, 19 How. (60 U.S.) 9 (1856).

13 353 U.S. 232 (1957).

14 The Court ruled that Schware's use of aliases while a dock worker and his previous arrests were insufficient to support a finding that he had present bad moral character. See 65 YALE L. J. 873 (1956) for a review of this case as it was decided by the New Mexico Supreme Court.

15 Schware v. Board of Bar Examiners, 60 N.M. 304 at 319, 291 P. (2d) 607 (1955).

16 ". . . [P]ast membership in the Communist Party does not justify an inference that he presently has bad moral character." Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 at 246 (1957).

Mexico's ruling of its substance and exposed its denial of admission to Schware as a denial of due process.

In support of this, a study of the development of the Communist Party in this country[17] shows it to have been little more than a "mere pressure group and propaganda organization"[18] working on behalf of Russia during most of the period of petitioner's membership. The party was legally recognized, and its candidates were listed on most state ballots. The inference of bad moral character which the state had drawn from Schware's past membership finds nothing to substantiate it, especially in light of petitioner's avowed repudiation of the party while under examination.[19] Thus the conclusion that Schware had been denied due process of law seems clearly justifiable. A state should be concerned with the candidate's present character, in order to determine satisfactorily whether, at the time of application, he is morally and ethically qualified to serve the profession of his choice. To deny him such an opportunity solely because of his past political affiliation, without further evidence as to its extent, and after fifteen years of clear disassociation, seems patently discriminatory.

A more complex situation was before the Court in the *Konigsberg* case. Petitioner's success in thwarting the line of inquiry which the examining committee chose to follow[20] left the committee no choice but to conclude that Konigsberg had not affirmatively proved his good character and fitness.[21] The committee was forced to deny certification and framed its denial in accordance with the relevant statutory provisions.[22] A majority of the Supreme Court prevailed in making the situation before it turn upon the same issue as did *Schware,* i.e., did the evidence justify reasonable doubts as to petitioner's character and loyalty. In view of the limited amount of evidence available on which peti-

17 See Moore, "The Communist Party of the U.S.A.; An Analysis of a Social Movement," 39 AM. POL. SCI. REV. 31 (1945).

18 Id. at 32.

19 Schware v. Board of Bar Examiners, 60 N.M. 304 at 332, 291 P. (2d) 607 (1955). This is to be contrasted with Konigsberg's behavior. See note 2 supra.

20 See note 2 supra.

21 See excerpts from the hearing and the State's brief, Konigsberg v. State Bar of California, 353 U.S. 252 at 282-283, 295, 306 (1957). See also McGilvray, "California Committee of Bar Examiners: Organization, Membership and Functions," 27 CALIF. STATE B. J. 26 (1952).

22 See note 2 supra.

tioner could be judged,[23] it was not surprising to find the Court holding that Konigsberg's denial for the reasons given[24] was an arbitrary deprivation of due process of law under the Fourteenth Amendment. The significance of this case lies not so much in what was said, but rather in what was left unsaid.

Close scrutiny of the *Konigsberg* decision discloses that, where an applicant "in good faith" refuses to answer questions considered by the examining board to be relevant to a determination of moral fitness, the state can no longer deny its approval if whatever evidence it does have before it would not, by itself, justify the denial. This result was achieved through the majority's adroit evasion of two crucial constitutional issues: whether the questions asked by the examining committee were improper under the circumstances, and whether petitioner was constitutionally entitled not to answer them—this refusal being based on his freedom of expression as guaranteed by the First Amendment operating through the Fourteenth.[25] Nothing was said regarding the relevancy of the board's inquiry into petitioner's past or present political beliefs.[26] It would seem that if the questions were relevant to the committee's determination of petitioner's moral character, a denial of admission based on lack of response to these questions would not appear to be arbitrary. Konigsberg's claim that his refusal to answer was constitutionally privileged was considered merely "not frivolous,"[27] but no inferences of bad moral character were allowed to be drawn from the refusal. It seems altogether too plain that the effect of this case may well be to impede future state investigations dealing with character and fitness. It places in the hands of the applicant both a shield and a sword. He can *prevent* inquiries that probe into the area

[23] There was no evidence as to the extent of petitioner's membership in the Communist Party, or even that he knew of the party's aims. This situation falls squarely within the principle of the Schware case. The Court also felt that it was not fair to infer bad moral character from his political writings. The real basis for the committee's denial seemed to be the unfavorable inferences of bad moral character which it drew from petitioner's refusal to answer questions probing into his political beliefs and testing the reliability of his assertion that he did not believe in overthrow of the government by unconstitutional means.

[24] See note 2 supra.

[25] Cf. Watkins v. United States, 354 U.S. 178 (1957), comment, 56 MICH. L. REV. 272 (1957); and Sweezy v. New Hampshire, 354 U.S. 234 (1957), note, 56 MICH. L. REV. 291 (1957), regarding freedom of expression before legislative investigating committees.

[26] See 2 U.C.L.A. L. REV. 224 (1955) for a discussion of the relevancy of inquiries pertaining to communist affiliation in character investigations.

[27] Konigsberg v. State Bar of California, 353 U.S. 252 at 270 (1957).

of political beliefs, the only requirement apparently being that he act "in good faith,"[28] without fear of any unfavorable inferences being drawn against him. And he can *compel* the board to make a determination of his fitness solely on the basis of whatever other evidence it is able to adduce. No longer can the board conclude that it has been so effectively obstructed that it cannot render a decision on the individual's character. Yet this result was reached without response to either of the critical constitutional questions that must be answered to give this case any meaning.

It does not seem likely that the majority, in reaching its decision, intended to impair local character investigation techniques to the extent that might appear foreseeable. The majority would probably deny that the Court is venturing so far into the realm that is traditionally within a state's jurisdiction as to become in effect "a super state court of appeals."[29] But in reality the Court appears to be doing just that, so long as it remains disinclined to speak on the fundamental constitutional issues involved. Perhaps *Konigsberg's* justification lies in peculiar facts of which the Court undoubtedly took cognizance, such as inadequate evidence of petitioner's possible membership in the Communist Party, an initial negative answer without aid of counsel to a question whether petitioner was a philosophical communist, and an emphatic denial of personally advocating violent overthrow of the government. But until the Supreme Court speaks out on the questions it so adeptly avoided, and thereby places the case on solid constitutional ground, the full implications of *Konigsberg* will remain open to doubt.

III

In protecting the petitioners from arbitrary action by a state, the Court in both cases placed considerable emphasis on the absence of any evidence which would indicate the extent of

[28] ". . . [W]e find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making." Konigsberg v. State Bar of California, 353 U.S. 252 at 270 (1957).

[29] Dissenting opinion of Harlan, J., Konigsberg v. State Bar of California, 353 U.S. 252 at 277 (1957).

their association with the Communist Party. Since there were no suggestions presented as to the nature of petitioners' past membership, the Court was not compelled to determine the kind of participation that is to be required before any inferences of bad moral character may be drawn.[30] Some light on this question, however, is shed by the Court's disposition of *In re Patterson*.[31] Patterson was the leader of a Communist Party cell, and a member of party regional boards between 1946 and 1949. He was a supporter of Marxist philosophy but claimed on examination that neither he nor the party advocated the overthrow of the United States Government by force or violence. The Oregon Supreme Court concluded that these statements were false, basing its opinion on popular conceptions regarding the aims of the Communist Party.[32] It accordingly ruled that his failure to

[30] It is interesting to consider the effect of the Court's holding in the principal cases on the *scienter* requirement suggested in Wieman v. Updegraff, 344 U.S. 183 (1952). That case held that an Oklahoma statutory loyalty oath required of state employees and interpreted to cover unknowing past membership in subversive organizations violated due process. Compare Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951). Nevertheless, Wieman, when added to Garner and Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952), is generally considered as standing for the affirmative proposition that knowing membership in a subversive organization may disqualify a person from state employment even though he did not personally believe in, act on, or advocate the organization's doctrine. It has been argued by McTernan, "Schware, Konigsberg and Independence of the Bar: The Return to Reason," 17 LAWYERS GUILD REV. 48 (1957), that language in the Schware case at 245 and 246 indicates that the Court might now be disposed to require a stronger showing: "There is nothing in the record, however, which indicates that he ever engaged in any actions to overthrow the Government of the United States or of any State by force or violence, or that he even advocated such actions. Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct. As this Court declared in *Wieman* . . . : 'Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.'" Although such language is undoubtedly significant, there are a number of difficulties present in any attempt to relate the two cases—some of them obvious. The state has a much closer relationship to its employees than it does to members of its bar. The standard for constitutional review of specific state loyalty requirements may be somewhat different from that for review of what is essentially administrative action under a very general statutory standard. The factor of long disassociation from the organization may have to be given considerable weight. Moreover, the two factors measured are different: Wieman dealing with *loyalty*, and Schware with *good moral character*. While the suggestion of disloyalty perhaps inferrable from knowing membership might be sufficient to tip the constitutional scales when loyalty was the ultimate issue, it would not seem to be sufficient when loyalty is considered merely as an evidentiary fact—only one of the many aspects of good moral character. When the uncertainties added by passage of time and change of Court personnel are considered, any comparison of the two cases must be made with extreme caution.

[31] 353 U.S. 952 (1957).

[32] Application of Patterson, 210 Ore. 495, 302 P. (2d) 227 (1956).

tell the truth in these instances was alone sufficient to justify a finding that Patterson did not possess the requisite "good moral character." He was denied admission to the Oregon Bar.[33] The Supreme Court, in a per curiam opinion, vacated the Oregon judgment and remanded the case for reconsideration in light of its decisions in *Schware* and *Konigsberg*.[34] *Patterson,* then, provides a slight intimation as to the extent an individual may participate in a subversive organization and yet maintain a character which is both "good" and "moral." But *Patterson* also gives another twist to the vise which the Supreme Court has seemingly placed on the state's freedom in the selection of its bar. Even an individual with a record of recent Communist Party leadership may have to be considered by the state as morally and ethically qualified for the practice of law.

IV

In the principal cases, the Court has displayed no hesitancy in overruling determinations made in the exercise of judicial discretion by a state court, which were believed arbitrary in nature.[35] This result was reached both when the state court's judgment was predicated on the nature of the evidence before it, as in *Schware,* and when it was apparently compelled by a want of evidence necessary for proper consideration of the issue, as in *Konigsberg.* It is this propensity to overrule, in either set of circumstances, that has caused Justice Harlan to warn that the Court may be overstepping its limits, and acting "instead as if it were a super state court of appeals."[36] Perhaps it was a concern over this encroachment upon state jurisdiction that previously motivated the Court in declining to review cases quite comparable to *Konigsberg.*[37]

In any review of state judicial or administrative determinations, problems necessarily arise regarding the Court's readiness to

[33] Pursuant to Ore. Rev. Stat. (1953) §9.220.

[34] In re Patterson, 353 U.S. 952 (1957). But compare Martin v. Law Society of British Columbia, [1950] 3 D. L. R. 173, where an admitted Communist was considered not a fit person to be allowed to practice law.

[35] The Supreme Court has not hesitated to overrule lower court decisions where admission to the federal bar is involved. See In re Levy, 348 U.S. 978 (1954), reversing Matter of Application of Levy, (5th Cir. 1954) 214 F. (2d) 331. See also Sacher v. Association of the Bar of the City of New York, 347 U.S. 388 (1954).

[36] Dissenting opinion of Harlan, J., Konigsberg v. State Bar of California, 353 U.S. 252 at 277 (1957).

[37] See note 10 supra.

engage in a reassessment of the facts and a reevaluation of the evidence. Where such cases have involved an alleged violation of due process of law, the Court has at times indicated that it will not substitute its judgment for that of the state body which made the determination in question.[38] In other instances the Court has proceeded to reappraise the record thoroughly in its consideration of the constitutional issues before it.[39] Review will generally be confined, however, to an examination of the record in order to ascertain whether the state action was so arbitrary or capricious as to offend due process. If either substantial or conflicting evidence is presented in support of the state's determination, this would traditionally be sufficient for affirmance. But from *Schware* and *Konigsberg* it appears that this general restraint may be somewhat relaxed. In both cases the Court reassessed the facts to determine whether the New Mexico court and the California Committee of Bar Examiners had acted reasonably in finding that the petitioners had not shown good moral character. Thus an apparent willingness to reevaluate evidence of this type has been indicated, at least in cases involving moral character determinations.[40] It now seems possible that any determination by a state judicial or administrative body which is either contrary to probative evidence or based upon a lack of substantial evidence will be subject to attack as a violation of due process, and that upon review the Supreme Court will thoroughly reexamine the record presented. That this is likely to be true in situations involving state licenses for professions and trades seems implicit in the principal cases. Whether it will extend to other areas of state regulation is yet to be seen. Nevertheless, while it may often be difficult to distinguish between a non-reviewable exercise of judicial or administrative judgment and a reviewable finding alleged to be arbitrary as lacking substantial evidence or as against the evidence presented, it does not seem likely that the Supreme Court will completely destroy this distinction.

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38 E.g., People ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).

39 E.g., Gallegos v. Nebraska, 342 U.S. 55 (1951).

40 Justice Frankfurter's concurring opinion in the Schware case apparently attempted to limit this potential extension of the Court's review powers. He stated that the New Mexico court's denial was overruled because that court, as a matter of law, had rested its decision on unwarranted conclusions. See McCloskey, "Useful Toil or the Paths of Glory? Civil Liberties in the 1956 Term of the Supreme Court," 43 VA. L. REV. 803 at 814 (1957).