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Bar Admissions: Validity of Legislation Requiring Disclosure of Organizational Membership

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BAR ADMISSIONS: VALIDITY OF LEGISLATION REQUIRING DISCLOSURE OF ORGANIZATIONAL MEMBERSHIP

Plaintiffs were individuals and New and Old Left organizations representing a class of law students and recent law graduates planning to seek admission to the New York Bar. They filed two actions for declaratory and injunctive relief in the Southern District of New York, challenging the "character and fitness" requirement of the New York Bar Examination. New York officials and judges charged with screening bar applicants who have passed the written examination were named as defendants.[1] The complaints attacked New York's procedures for determining the "character and general fitness" of Bar applicants as overly broad, vague, and violative of the applicants' right of privacy. A three-judge court convened and consolidated the two suits. The court granted partial relief, but upheld the bulk of New York's system, over a vigorous dissent by Judge Constance Baker Motley. On appeal to the United States Supreme Court, plaintiffs-appellants unsuccessfully renewed their objections to New York's inquiry into applicants' associations and loyalty. *Held:* affirmed; a state may, consistent with the first amendment,[2] require bar applicants to reveal knowing membership in organizations advocating violent overthrow of the government. *Law Student Civil Rights Research Council v. Wadmond*, 91 S. Ct. 720 (1971).[3]

The roots of the instant controversy extend back to *Speiser v. Randall*,[4] wherein the United States Supreme Court invalidated California's requirement that veterans execute a loyalty declaration as a condition for obtaining a special tax exemption. Denial of an exemption was found to be a penalty for engaging in certain types of speech and association. Such restraints, the Court noted, bear a presumption of invalidity, which must be dispelled by the state if the restraint is to stand.[5] Therefore, the state, not the applicants for its public benefits, must bear the burden of proof where loyalty is in question.

In the landmark case of *Shelton v. Tucker*,[6] the Court struck down

1. Law Students Civil Rights Research Council v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) (three-judge court); New York requires that an applicant for admission to its Bar who has passed the required written examination satisfy a judicially appointed committee of his character and general fitness to practice law. N.Y. JUDICIARY LAW § 90 (McKinney 1968); N.Y. CIV. PRAC. LAW & RULES, Rule 9404 (McKinney 1963). Each applicant must complete a questionnaire composed by the committee and obtain affidavits of good moral character from two "reputable" residents of his county. N.Y. CIV. PRAC. LAW & RULES, Rule 9404 (McKinney 1963); N.Y. JUDICIARY LAW § 528.1 (McKinney 1968).

2. Appellants argued that the first amendment prohibited New York from requiring each applicant to disclose innocent membership in "violent advocacy" organizations, to state that he "believes in the form of government of the United States" and is ready to swear a loyalty oath "without any mental reservation," and to bear the burden of proving his loyalty.

3. Hereinafter cited as LSCRRC.

4. 357 U.S. 513 (1958).

5. *Id.* at 529.

6. 364 U.S. 479 (1960).

as overbroad an Arkansas statute requiring teachers to file affidavits listing all their organizational affiliations within the preceding five years. Justice Stewart, writing for the 5-4 majority, found the state's inquiry relevant and its interest significant, but nevertheless held that even valid purposes may not be achieved "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[7]

The applicability of *Speiser* and *Shelton* to bar admissions was initially resolved by *Konigsberg v. State Bar*.[8] The California Bar Examiners refused to certify applicant Konigsberg, on the basis that his refusal to answer questions regarding possible Communist Party affiliation obstructed a full investigation of his qualifications. The Supreme Court, speaking through Justice Harlan, upheld the Bar Examiners in a 5-4 decision. To Konigsberg's first amendment challenge, the Court responded that California's interest in obtaining full information regarding an applicant's character outweighed any deterrent effect on freedom of speech and association. *Shelton* was distinguished on the bases that the questions asked by California were limited to Communist affiliation, and that the typical bar examination committee, due to financial limitations, had available to it no "less drastic means" of investigation.[9] Konigsberg also sought unsuccessfully to apply *Speiser* to bar questionnaires, but the necessity of reaching this issue was obviated by allowing California to deny certification for failure to answer. The subsequent issue of who would bear the burden of proof had Konigsberg answered the questions was thus avoided.

The companion case to *Konigsberg, In re Anastaplo*,[10] upheld Illinois' refusal to certify an applicant on grounds similar to those sustained in *Konigsberg*. Subsequent cases have, however, marked a retreat from the broad "loyalty" inquiry allowed in *Konigsberg* and *Anastaplo*. Five years after *Konigsberg*, the Court in *Bond v. Floyd*[11] unanimously denied Georgia's claim that it had the power to test the sincerity of a state legislator's loyalty oath, on the grounds that first amendment freedoms of speech and association were violated. The Court held that such a power could too easily be used to restrict the right of dissent. The following year produced yet another 5-4 "loyalty" decision in *Keyishian v. Board of Regents*.[12] New York required its university employees to reveal, as a condition of employment, whether they had ever been members of societies advocating the doctrine of forcible overthrow of the government. The Court struck down this requirement on the grounds of vagueness and overbreadth, thus extending *Shelton* into the

7. *Id.* at 488.
8. 366 U.S. 36 (1961).
9. *Id.* at 41.
10. 366 U.S. 82 (1961).
11. 385 U.S. 116 (1966).
12. 385 U.S. 589 (1967).

"loyalty" area. That same year, in *United States v. Robel*,[13] the Court held that a provision in the Subversive Activities Control Act which prohibited all members of designated communist-action organizations from holding any employment in defense facilities, was unconstitutionally broad. The Court agreed that vital security interests were involved, but applied the "less drastic means" test because first amendment freedoms of speech and association were inhibited by the Act. Finally, in *Brandenburg v. Ohio*,[14] the Court further restricted the scope of punishable advocacy. Ohio's Criminal Syndicalism Act was found to be overbroad because it failed to distinguish between mere advocacy, and incitement to imminent lawless action. Under *Brandenburg*, a state may criminally sanction only the latter type of conduct.

Two companion cases were decided with the instant case: *In re Stolar*[15] and *Baird v. Arizona*.[16] The facts in each involved a state bar examiner's refusal to certify applicants for declining to answer questions relating to their political beliefs and affiliations. Both decisions hold that the applicant's refusal to submit to forced disclosure is protected under the first amendment. Applicant Stolar refused to state whether he was or had ever been a member of any organization which advocated forcible overthrow of the government. He further refused to list the names of all clubs and organizations of which he had ever been a member. Miss Baird, in response to the Arizona questionnaire, refused to state whether she had ever been a member of the Communist Party or any organization that advocates overthrow of the government by force or violence.

Justice Black, writing for himself and Justices Douglas, Brennan and Marshall, together with Justice Stewart who concurred separately, comprised the *Stolar* and *Baird* majority. They agreed that the first amendment's protection of association and speech, as enunciated in *Robel*, prohibits Arizona and Ohio from punishing an applicant for mere membership or beliefs. Therefore, the questions asked of the two petitioners served "no legitimate state interest."[17] The opinions of both Justices apply the "less drastic means" test enunciated in *Shelton* to strike Ohio's demand that applicants list all of their associational memberships. Although neither Justice specifically disapproves *Konigsberg* or *Anastaplo*, as Justice Blackmun, writing for the four dissenters in *Baird* notes, both cases have lost much of their vitality.[18]

The broad thrust of appellant's attack in the instant case was sharply pared by Justice Stewart. To the argument that New York's detailed inquiry into an applicant's previously private life works a "chilling effect," Justice Stewart responded that New York had been scrupulous

13. 389 U.S. 258 (1967).
14. 395 U.S. 444 (1969).
15. 91 S. Ct. 713 (1971) [hereinafter cited as *Stolar*].
16. 91 S. Ct. 702 (1971) [hereinafter cited as *Baird*].
17. *Stolar* at 717.
18. *Baird* at 708 (dissenting opinion).

in the use of its powers, and therefore no chilling effect need result.[19] Justice Stewart emphasized "at the outset that no person involved in this case has been refused admission to the New York Bar."[20] The Court saw little merit in appellant's contention that the requirement that an applicant submit third-party "moral character" affidavits constituted an invasion of privacy. The Court found no such invasion because an applicant is free to choose the persons who will submit the affidavits.[21]

Appellants argued that the statutory directive prohibiting certification of an applicant "unless he shall furnish satisfactory proof to the effect" that he "believes in the form of the government of the United States and is loyal to such government" placed an impermissible burden of proof on an applicant and intruded into the absolutely-privileged domain of personal belief.[22] The Court agreed that the unvarnished statutory language presented serious constitutional problems. However, it was willing to accord appellee's narrowing interpretation at least "respectful consideration."[23] Thus construed, the rule places no burden of proof upon applicants, and the problems present in *Speiser* are circumvented.[24] In addition, the Court accepted appellee's limiting interpretation of the statutory language regarding belief in and loyalty to "the form of the government of the United States." Were this read as a statutory authorization of inquiry into an applicant's political beliefs, independent of his actions, *Robel* would offer a formidable challenge to its validity.[25] However, appellees construed the phrase "form of the government" to refer only to the Constitution, and "belief" and "loyalty" to mean merely a willingness and ability to take the oath in good faith.[26] The majority of the Court also accepted appellee's construction of Question 27 of the application, which asked applicants whether they were able to take the oath "conscientiously" and "without any mental reservation."[27] This question was interpreted by both the Bar and the Court to inquire only as to whether the applicant would swear to the oath *pro forma* while manifesting disagreement with or indifference to it. Justice Stewart noted that this limited inquiry had been specifically exempted from invalidation

19. LSCRRC at 729.

20. *Id.* at 724.

21. *Id.* at 725.

22. Brief for Appellants at 11-43, LSCRRC.

23. LSCRRC at 726.

24. *Id.* at 727.

25. United States v. Robel, 389 U.S. 258 (1967). The same or similar distinction was required in Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Elfbrandt v. Russell, 384 U.S. 11 (1966).

26. LSCRRC at 727.

27. New York Bar Application Question 27 reads as follows:

27(a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions 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?

in *Bond v. Floyd*, and was acceptable in the absence of a showing that it had been used to penalize political beliefs.[28]

Question 26(a), which asks an applicant whether he has ever knowingly been associated with a group that advocates unlawful overthrow of a government,[29] was sustained by the majority despite the decisions in *Stolar* and *Baird*. Justice Stewart was careful to note two factors on which these cases could be distinguished. First, he re-emphasized that, unlike the two companion cases, none of the appellants in the instant case had been refused admission to the New York Bar on the basis of his answer, or a failure to answer, this question.[30] Second, he refused to consider 26(a) apart from its "follow-up," 26(b), which requires an applicant who answers 26(a) affirmatively to state whether he *intended* to further the organization's aims "by force, violence, or any unlawful means."[31] Justice Stewart found that knowing membership with specific intent to further illegal goals is punishable, and is thus properly subject to inquiry. New York's inquiry into knowing membership irrespective of intent was sustained on the authority of *Konigsberg*, despite its apparent erosion in *Stolar* and *Baird*. The division of Question 26 into two parts was further approved on the basis that it narrows the class of applicants whom the committee need further investigate.[32] "For those who answer part (a) in the negative, that is the end of the matter."[33] Whether such a function could as well be served by a single question limited to prohibited membership is not considered by the majority, despite the *Robel* and *Shelton* mandate that "less drastic means" be explored. The majority of the Court considers inquiry into an individual's associational ties essential to a profession "dedicated to the peaceful and reasoned settlement of disputes."[34] The appellants, however, share a much different perspective. They speak of the important need for lawyers who are committed to the law as a tool for pursuing social justice . . ." and who will vigorously defend those who challenge current social presumptions.[35] The majority in the instant case takes a narrower view of the lawyer's role, and upholds

28. LSCRRC at 727.

29. New York Bar Application Question 26(a) reads as follows:

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 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.

30. LSCRRC at 727-28.

31. New York Bar Application Question 26(b) reads as follows:

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?

32. LSCRRC at 728.

33. *Id.* n.19.

34. *Id.* at 728.

35. Brief for Appellants at 15, LSCRRC.

New York's associational inquiry as a method of screening out potential lawyers whose background reveals an indisposition to seek change wholly within the current legal system.

Two dissents were written. Justice Marshall, joined by Justice Brennan, would adopt appellants' specific attacks on questions 26 and 27.[36] Appellees' narrow construction is rejected as contrary to the clear meaning of the statutory language and as unsupported in case law or past administrative practices. Justice Marshall considers New York's inquiry into a prospective oath-taker's "sincerity" to have been flatly repudiated by *Bond v. Floyd*. He views Question 26(a) as overbroad in that it inquires into a type of membership which may not under *Robel, Brandenburg*, and *Keyishian*, be used to deny a person a public benefit. The other dissent, written by Justice Black, joined by Justice Douglas, would hold that first amendment freedoms of speech and association prevent New York from excluding an applicant for knowing membership, even if the applicant shared the organization's aim of violent overthrow.[37] Aside from his own views on the first amendment, Justice Black finds the majority position irreconcilable with other decisions of the Court. Assuming that appellees' interpretation of New York's burden of proof were correct, an applicant must still answer Question 27 in the affirmative before he can be certified. Justice Black found this burden of "coming forward with evidence" improper under *Speiser*.[38] He shares Justice Marshall's views on Questions 26 and 27, and adds that:

> [T]he Court's holding permits the knowledge and specific intent elements of Question 26 to be split into two parts. This allows the State to force an applicant to supply information about his associations, which, even under the majority's rationale, are protected by the First Amendment.[39]

Moreover, Justice Black cannot reconcile the instant decision with *Baird* and *Stolar*, which invalidated questions prying into activities protected by the first amendment.

The instant case sharply defines the extent to which State Bar "character" committees may inquire into an applicant's associational ties. *Stolar*, consistent with *Shelton*, prohibits unrestricted inquiry into all organizations of which an applicant has even been a member. *Stolar* and *Baird* prevent the state from asking an applicant whether she has ever been a member of an organization that advocates violent overthrow of the government. However, the instant case permits inquiry into knowing membership where it is preliminary to a more limited question addressed to specific intent, and where an affirmative response does not constitute an independent basis for denial of admission. As Justice Black argued,

36. LSCRRC at 737 (dissenting opinion).
37. LSCRRC at 731 (dissenting opinion).
38. *Id.* at 733.
39. *Id.* at 736.

the soundness of this distinction is questionable. Mere membership, whether knowing or unknowing, is constitutionally protected under *Robel* and *Brandenburg*. Consequently, as *Baird* holds, the state has no legitimate interest in demanding disclosure of membership, unless that inquiry is confined to membership on the part of one sharing the specific intent to further the organization's unlawful aims. Therefore, the Court's validation of New York's Question 26(a) is inconsistent with the reasoning of *Baird* and *Stolar*. *Konigsberg* is undermined by these companion cases, but upheld by the instant case. Its continued vitality is, therefore, uncertain.

The significance of the decision noted herein extends beyond the narrow confines of the bar admission question. It stands as a further indication of the Burger Court's retreat from *Dombrowski*, begun in *Younger v. Harris*.[40] Appellants' heavy reliance on a "chilling effect" failed to win them the relief granted, on closely-related grounds, to rejected applicants Stolar and Baird.

The instant decision also reveals that a majority of the present Court holds a "traditional" view of the lawyer's role in society, one more akin to "officer of the court" than to "vigorous advocate of social change." These attitudes may be expected to collide with increasing frequency in the future.

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FEDERAL INJUNCTIONS AGAINST STATE PROSECUTIONS RECONSIDERED

Harris was indicted and charged with a violation of the California Criminal Syndicalism Act.[1] Thereafter, Harris filed suit in a federal district court to enjoin Younger, the District Attorney for Los Angeles County, from prosecuting him.[2] Jim Dan and Diane Hirsch, members of the Progressive Labor Party, and Farrell Broslawsky, a history professor, intervened as plaintiffs in the district court suit.[3] All alleged that immedi-

40. 91 S. Ct. 746 (1971). Noted in 25 U. MIAMI L. REV. 506 (1971).

1. CAL. PENAL CODE §§ 11400-11401 (West 1961).

2. Harris alleged "the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, rights guaranteed to him by the First and Fourteenth Amendments." Younger v. Harris, 91 S. Ct. 746, 748 (1971).

3. Dan and Hirsch alleged that

> the prosecution of Harris would inhibit them as members of the Progressive Labor Party from peacefully advocating the program of their party which was to replace capitalism with socialism and to abolish the profit system of production in this country. *Id.*

Broslawsky alleged "the prosecution of Harris made him uncertain as to whether he could teach about the doctrines of Karl Marx or read from the Communist Manifesto as part of his classwork." *Id.*