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In the recent decision of *Law Students Civil Rights Research Council, Inc. v. Wadmond,*[1] a panel of three judges[2] of the United States District Court for the Southern District of New York struck down as unconstitutional several questions in questionnaires distributed by the Appellate Division and the Committee on Character and Fitness[3] to determine the fitness of applicants for membership in the state bar. Before a prospective lawyer can validly practice in New York state courts, he must prove not only his familiarity with state law and procedure, but also his "character and general fitness."[4] This second criterion has long been part of the admission process for membership in the bars of this country.[5] Although the total concept of proving fitness was put in question in the *Law Students* case, the action of the court was directed not so much at the requirement itself, but the way in which New York has administered inquiries under it. The court decided that present methods violate an applicant's rights of free speech and association protected by the first and fourteenth amendments.

Although none of the plaintiffs[6] have been denied admission to the bar, they sought injunctive and declaratory relief,[7] to enforce the Civil Rights Act of 1871.[8] Both were class actions in that they were maintained on behalf of all persons, "seeking or planning to seek such admission."[9]

Circuit Judge Friendly, writing for the majority, agreed that several of the questions objected to suffered from serious constitutional infirmities and would have to be changed or excluded. He ruled that the defendants had 90 days to correct the difficulties found by the court and report what actions have been taken, with leave for the

1. Civil No. 68-2917 (S.D.N.Y., Feb. 17, 1969).

2. 28 U.S.C. §§ 2281, 2284 (1964). Section 2281, which provides for injunctive relief to prevent enforcement of a state statute, requires a three-judge court when a statute is challenged as unconstiutional on its face or in application. *See* Evergreen Review, Inc. v. Cahn, 230 F. Supp. 498 (E.D.N.Y. 1964). Section 2284 sets out the composition and procedure of such a panel.

3. "The appellate division in each judicial department shall appoint a committee . . . for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state." N.Y. Civ. Prac. R. 9401 (McKinney 1963).

4. N.Y. Judiciary Law § 90(1)(a) (McKinney 1968).

5. For a detailed discussion of various state provisions, see 45 N.C.L. Rev. 1008 (1967).

6. Plaintiffs in the combined suits were the Law Students Civil Rights Research Council, Inc., "an organization of some 1500 law students with chapters at sixty law schools" and also three law students who had passed the New York bar examination and planned to apply for admission when eligible. Defendants are the various appellate divisions and their justices and the Committees on Character and Fitness for the First and Second Judicial Departments and their members. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 2 (S.D.N.Y., Feb. 17, 1969).

7. *Ibid.* The relief was sought pursuant to 28 U.S.C. § 1343(3) (1964).

8. 42 U.S.C. § 1983 (1964).

9. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 2 (S.D.N.Y., Feb. 17, 1969).

plaintiffs to seek further relief if not satisfied that the court's order had been followed. In a lengthy separate opinion Judge Motley called for more sweeping changes in the system itself and objected to the majority position that the statute requiring applicants to *prove* their fitness is constitutional.[10]

This discussion will be directed to limitations on state bars' implementing statutes requiring a determination of an applicant's fitness for admission.[11]

The New York Statutes

The court in *Law Students* first dealt with two New York statutes[12] which together set up and implement the requirement that every applicant possess the "character and general fitness requisite for an attorney and counsellor-at-law."[13] The court sustained the validity of the requirement statute relying on *Konigsberg v. State Bar.*[14] In that case the Supreme Court upheld a similar California statute, recognizing that there is a valid state interest in maintaining high standards for its judicial system. This recognition, however, was only a general affirmation of state concern and said nothing specifically about statutory schemes similar to the one in New York. Although *Konigsberg* clearly establishes the constitutionality of provisions like Section 90, the New York court was still faced with the complaint that the implementation statute [Rule 9406] was unconstitutional both on its face and as applied. The alternatives open to the court, assuming some relief was to be granted, were either to strike Rule 9406 as unconstitutional as written or seek through other methods to change the application of the Rule, bringing it within constitutional bounds.

Under Rule 9406 no person can be admitted to practice unless he furnishes the bar satisfactory proof of his loyalty to the United States government. The plaintiffs, relying on *Speiser v. Randall,*[15] claimed that such a burden was an unconstitutional abridgment of free speech and association. In *Speiser,* a veteran was denied a special tax exemption because he refused to sign a loyalty oath. The statute involved put the burden of proof upon the applicant to demonstrate his loyalty before the exemption would be granted. The Supreme Court held the requirement invalid because denial of the exemption solely on the grounds of not signing the oath would be an unconstitu-

10. *See* dissent, Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 3-4 (S.D.N.Y., Feb. 17, 1969).

11. Much has been written on admission to the bar, see, *e.g.,* Jackson, *Character Requirements for Admission to the Bar,* 20 FORDHAM L. REV. 305 (1951); Rosenberg, *Constitutional Limitations on the Process of Admission to the Bar,* 23 N.Y.U.I.L. REV. 135 (1968). The question of loyalty as a prerequisite to bar admission became a major consideration especially during the last decade in light of the preoccupation in this country with tests of loyalty as related to the general fear of Communism. *See* Brown & Fassett, *Loyalty Tests for Admission to the Bar,* 20 U. CHI. L. REV. 480 (1953).

12. N. Y. JUDICIARY LAW § 90(1)(a) (McKinney 1963); N.Y. CIV. PRAC. R. 9406 (McKinney 1963).

13. N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 1968).

14. 366 U.S. 36, 40-44 (1961).

15. 357 U.S. 513 (1958).

tional limitation on the freedom of expression guaranteed by the first amendment. The Court based its decision on the fact that the concept of loyalty was not settled even within the courts and the burden of proving such a fact would have a deterrent effect on prospective applicants. The *Speiser* opinion, however, allowed for an exception in those cases where only a limited class is involved and where there are present serious dangers to public safety.[16] The New York court disagreed with the plaintiffs that the Supreme Court holding was controlling and distinguished the case from the facts at bar. In order to justify the burden of proof requirement of the New York Rule, the court fit the *Law Students* problem within the exception left in *Speiser*. In so doing, the court in part used a rationale culled from language used in *Konigsberg* to the effect that it would be appropriate in bar admission cases to apply a balancing test which would weigh an applicant's right to free association against the state's interest in assuring itself that lawyers practicing before its courts are loyal beyond suspicion. The strength of the language, however, is questionable in light of the fact that Mr. Justice Harlan, who wrote the opinion, noted specifically that the applicant's burden of proving good moral character was not in issue as the case was presented.[17] In fact, the holding in *Konigsberg* was based on the fact that Konigsberg had been forewarned that if he did not cooperate with the California committee he would be denied admission for obstructing a valid inquiry. The New York court thus strains the *Konigsberg* decision to support its holding that Rule 9406 fits into the *Speiser* exception.

The court did not rely solely upon the exception in the *Speiser* decision, but found additional grounds for its holding in "the lack of 'unequivocal indication' that it [Rule 9406] imposes a true burden of proof as distinguished from a burden of coming forward with evidence."[18] Again the court cites Justice Harlan's dicta to support a precarious position. If an applicant were required only to make a statement that he is loyal to his government to satisfy this burden then this argument would be more acceptable. However, as Judge Motley pointed out, the applicant's answers to written questions may be investigated further by the committee, thus continuing the burden of proof upon him throughout the entire admission process.[19] Clearly then, there is more than a mere burden of coming forward with evidence.

The plaintiffs also argued that Rule 9406 was unconstitutionally vague in that nowhere in the statutes or decisions of New York is there a clearly ascertainable definition of "good moral character."[20] The court held that the Rule was constitutional

16. *Id.* at 527. *See also* Garner v. Board of Public Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

17. 366 U.S. 36, 40-41 (1961).

18. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 11 (S.D.N.Y., Feb. 17, 1969).

19. *Id.* at 1 (dissent).

20. *See, e.g., In re* Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (1944), *aff'd on rehearing,* 296 N.Y. 926, 72 N.E.2d 41, 63 N.Y.S.2d 840 (1947); *In re* Brennan, 230 App. Div. 218, 227, 243 N.Y.S. 705, 715 (1930); *In re* Peters, 221 App. Div. 607, 225 N.Y.S. 144 (1927), *aff'd,* 250 N.Y. 595, 166 N.E. 337 (1929). *See* text accompanying notes 42-50.

provided that it was implemented in accordance with its purpose as construed by the defendants. The defendants interpreted the statute so that "it requires a law officer-to-be to affirm that he believes in and is loyal to our constitutional form of government"[21] only.

The majority in the *Law Students* case refused to strike down the New York statute but rather chose to police its use. Beyond the reasons given by the court, there would seem to be more basic policy considerations why it chose the course that it did. If it had struck Rule 9406 the result would have been to leave the bar helpless to effectively administer Section 90 which the court had specifically upheld. If an applicant is not required to supply proof of his fitness to the bar, how is any proof to be acquired? Large scale investigations such as those the FBI and other federal agencies conduct to screen their applicants would be too time consuming and costly for state bars. The number of applicants seeking bar admission is increasing each year. The need for expeditious processing is likewise increasing because of pressure from the legal profession for more licensed practicioners to handle present levels of business.[22] Thus, retaining the statutes and controlling the methods used to implement them is, at least, supported by the practicalities of the situation.

Procedural Limits

The Supreme Court in *Willner v. Committee on Character and Fitness*[23] held that admission proceedings present issues which are justiciable[24] and that findings made by investigating committees are more than mere advisory opinions.[25] In *Willner* the petitioner had passed the New York bar examination some 30 years before but had been denied certification because of charges which were filed against him with the committee. These charges were never revealed to him. On appeal to the Court of Appeals he was refused, without opinion, a statement of the reasons why he had been denied certification.[26] On hearing in the Supreme Court, the committee contended that Willner was rejected solely on the basis of his own statements. The record revealed several complaints filed against him by members of the bar charging him with fraud in connection with accounting services performed for a client as a registered CPA. The

21. Brief for Defendant at 16, Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 (S.D.N.Y., Feb. 17, 1969).

22. TIME, April 18, 1969, at 77, col. 1.: "[G]rowing numbers of the nation's brightest law students are ignoring . . . generous offers [asmuch as $15,000 to start] and instead are choosing to teach, clerk for a judge, take a fellowship for further study, or work in a poverty program. . . .

To revive interest, some firms have been forced to provide more outlets for the idealism of the young. . . . Many [w]ell-established Manhattan firms, cooperate in programs whereby their junior staff members work one night a week at Legal Aid Society offices in ghetto neighborhoods."

23. 373 U.S. 96 (1963).

24. *Id.* at 102.

25. *Id.* at 104.

26. Willner v. Committee on Character and Fitness, 11 N.Y.2d 866, 182 N.E.2d 288 (1962).

Court held that since the record failed to show that these complaints were not considered in rejecting him, he was constitutionally entitled to notice of the charges and a full hearing on the issue.[27]

In a concurring opinion, Justice Goldberg, recognizing the concern of the committee to keep its investigations informal and private to facilitate its process, concluded that procedural safeguards are important in admission proceedings and should be protected by whatever procedures are required.[28] Thus the ordinary procedural safeguards guaranteed by the due process clause of the fourteenth amendment in trial type situations must be afforded bar applicants. It is generally accepted that the *Willner* case has given procedural rights in admission proceedings[29] including notice of the charges against the applicant and a full hearing on the issues raised, with the right to confront and cross-examine his accusers.

Although these procedural rights have been guaranteed by *Willner,* there remains a question whether an applicant can refuse to comply by claiming the fifth amendment right against self-incrimination. The Court in *Cohen v. Hurley*[30] held that a lawyer's refusal to answer questions asked of him by a special committee of the bar was sufficient grounds for disbarment, even though he had claimed a fifth amendment right against self-incrimination. The Court reasoned that the petitioner's refusal to answer relevant questions concerning professional conduct was a failure to discharge obligations, which, as a lawyer, he owed to the court.[31] By way of dicta, the Court indicated that the difference between admission and disbarment proceedings was "not of constitutional moment"[32] when considering fifth amendment rights, the inference being that the fifth amendment right against self-incrimination is inapplicable in admission proceedings.

The Court later overruled *Cohen* in *Spevack v. Klein.*[33] Its reasoning was based in part on its decision in *Malloy v. Hogan*[34] in which it was held that the fifth amendment applies in full force against the states through the fourteenth amendment. The *Spevack* case held that disbarment under circumstances similar to *Cohen* was an unconstitutional penalty for invoking one's fifth amendment right. The Court did not, however, address itself to the situation in which an applicant seeks admission to the bar. In a concurring opinion, Justice Fortas asserted that the right against self-incrimination may not be recognized in every case where a person's right to practice his profession is put in jeopardy.[35] The holding in *Spevack* did not itself secure the fifth amendment right to bar applicants. Language in the opinion gives the impression that there was an unwillingness on the part of the Court to extend its holding beyond the disbarment situation.

The court in *Law Students,* refusing to lift the burden of proving loyalty from the applicant—a procedural consideration, underscores judicial unwillingness to provide

27. Willner v. Committee on Character and Fitness, 373 U.S. 96, 106 (1963).
28. *Id.* at 107-08.
29. *See* Sprecher, *Due Process Generally in Bar Admissions,* 35 BAR EXAM. 34 (1966).
30. 366 U.S. 117 (1961).
31. *Id.* at 125.
32. *Id.* at 123.
33. 385 U.S. 511 (1967).
34. 378 U.S. 1 (1964).
35. 385 U.S. 511, 519 (1967).

every procedural right which is granted in criminal cases. It can only be concluded, therefore, that the self-incrimination issue is still an open question in bar admission proceedings.

Substantive Limits

The Constitution provides protection in many ways for those who wish to practice law in this country. Although the *Law Students* case is primarily concerned with the first amendment protections of free speech and association, there are other considerations which limit what states may do in controlling admission to the bar. After the Civil War, Congress passed a law which, in effect, made anyone who had supported the South ineligible to practice law in the federal courts.[36] The Supreme Court, in Ex parte *Garland*,[37] ruled that such a law was both a bill of attainder and an ex post facto law and therefore unconstitutional. An applicant may not be excluded on the basis of past acts alone,[38] nor can he be excluded for acts which when done were not illegal.[39] While *Garland* drew a line beyond which no state could go, it by no means made admission to practice an absolute right.[40]

There are, however, important social interests which can be protected only by requiring high standards for lawyers. In *Schware v. Board of Bar Examiners*[41] the Court made it clear that a state may exclude anyone from practicing law so long as there is a rational connection between the objectionable conduct and the legitimate state interest sought to be protected.[42] This raises the preliminary question of whether the practice of law is a right or a privilege.[43] Justice Cardozo, when sitting on the bench in New York, characterized membership in the bar as a "privilege burdened with conditions."[44] While the notion of necessary conditions may be valid, later courts have preferred to categorize membership in the bar as a right, emphasizing that it is not a matter of "grace and favor"[45] with the courts. Whatever can be gleaned from the cases in the form of definitions of the proper standard for judging fitness for admission is of little help in understanding what real limitations have been enforced against the bar in the way it controls admissions. A brief survey of those applicant situations which have been approved as well as those which have been disapproved will illustrate the confusion which exists.

Although there are scattered among the states various criteria for admission to the bar,[46] it is clear that the final determination as to who will be admitted is the proper function of the courts.[47] It has been held, under statutes requiring a recommendation

36. Act of July 2, 1862, 12 Stat. 502, *as amended,* Act of Jan. 24, 1865, 13 Stat. 424.
37. 71 U.S. (4 Wall.) 333 (1866).
38. *Id.* at 377.
39. Schware v. Board of Bar Examiners, 353 U.S. 232, 244 (1957).
40. *See In re* Summers, 325 U.S. 561 (1945).
41. 353 U.S. 232 (1957).
42. *Id.* at 239.
43. *See* Booker, *The "Right" to Practice Law,* 1 DUKE B.J. 249 (1951).
44. *In re* Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).
45. *In re* Kellar, 81 Nev. 240, 242, 401 P.2d 616, 617 (1965).
46. MD. ANN. CODE art. 10, §§ 1-8 (1968); ARIZ. SUP. CT. R. 28(a)(1956).
47. *See, e.g.,* Heibergher v. Clark, 148 Conn. 177, 169 A.2d 652 (1961).

from the character committee as a condition to admission, that an appellate court can review de novo all the evidence even though the committee has acted pursuant to legislation and had rational grounds for its decision.[48]

Analysis of what has been decided in admission cases reveals a standard of *conduct-belief* which courts have used to determine when to look beyond recommendations of character committees. By this standard, unfavorable beliefs cannot be used as a reason for denying admission unless some kind of conduct—or lack of conduct—can be found. Once some form of conduct is shown, the only limiting factor is the "rational connection" test of *Schware*. What things are rationally connected to preserving high standards in the bar seems to be as varied as committees and judges conceive them to be.

In one case, a man who had practiced law in another state applied for bar admission in Arizona. During investigations by the character committee, testimony was received that he had been guilty of soliciting clients in his previous practice. Such solicitation is a violation of Canon 27 of the Code of Professional Ethics and grounds for disbarment. Upon appeal from an adverse ruling by the committee, the Supreme Court of Arizona acknowledged the impossibility of resolving the conflicting testimony but admitted petitioner on other evidence of his good character.[49] Other courts have been less willing to look beyond the recommendations of character committees, especially when the applicant has been charged with crimes involving moral turpitude.[50] The court may ignore other evidence of good moral character and accept recommendations of the committee "unless there is a strong showing of abuse of discretion, arbitrary action, fraud, corruption or oppression upon the part of the examiners."[51] Clearly the courts may exercise a large amount of discretion in cases involving conduct deemed immoral.

The Supreme Court in *Schware,* citing the brief for respondent, posited that "[m]ere unorthodoxy [in the field of political and social ideas] does not . . . negative 'good moral character.' "[52] There is, therefore, more justification for independent judgments by the courts where mere beliefs are questioned by committees. In *Florida Bar v. Wilkes*[53] the Supreme Court of Florida was asked to uphold a state law which made disbarment in another state conclusive proof of the guilt of the acts of misconduct adjudicated there. It accepted the statute, but refused to disbar the petitioner merely on a general complaint of foreign disciplinary action.[54] Reviewing de novo the evidence gathered by the committee, it could find nothing more incriminating than belief in existentialist philosophy. This, it made clear, would not suffice for disbarment in Florida.

As suggested, not every case falls easily into a definitional scheme. In re *Brooks*[55] considered the case of a petitioner who, because of strong religious beliefs could not "morally" cooperate in the war effort. After forthrightly registering as a conscientious

48. *In re* Courtney, 83 Ariz. 231, 319 P.2d 991 (1957).
49. *Ibid.*
50. *In re* Monaghan, 122 Vt. 199, 167 A.2d 81 (1961).
51. *Id.* at 205, 167 A.2d at 86.
52. 353 U.S. 232, 244 (1957).
53. 179 So. 2d 193 (Fla. 1965), *cert. denied,* 390 U.S. 983 (1968).
54. *Id.* at 201.
55. 57 Wash. 2d 66, 355 P.2d 840(1960), *cert. denied,* 365 U.S. 813 (1961).

objector he refused to report to a wartime work camp because of his religious beliefs. After serving 22 months of a three year sentence, he applied for membership in the bar. His application was denied by the committee. On appeal, the court affirmed the refusal on the basis of his record. It is difficult to justify this holding in light of the *Schware* caveat that mere beliefs will not negate good moral character.

First Amendment Limits

The *Law Students* case is significant in that it establishes clear standards in the admission process in New York with respect to first amendment guarantees. There has been a long line of cases in the Supreme Court which has given the right of free speech and association a preferred position in our constitutional system.[56] *Law Students* is the first case to apply these protections to the bar admission process. After careful scrutiny of each question in the questionnaire distributed by the committee, the court struck down those not "in line with developing concepts of First Amendment rights."[57]

The court indicated that several questions which were dropped by the committee before commencement of the suit would not have survived a first amendment attack.[58] These questions required extensive listings of associational ties by the applicant, in a manner held unconstitutional in two recent Supreme Court decisions.[59] The court then discussed three questions which were presently in the questionnaire, and found fault with all three.

Question 27(b),[60] a pledge of loyalty to the Constitution, was sustained as identical to the pledge previously upheld in a prior New York case involving school teachers.[61] The court also pointed out that supporting the principles of the Constitution is basic to our form of government and is a valid concern of the courts.[62] The phrase "without mental reservation" does not significantly change the import of the New York question.

56. *See, e.g.*, Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

57. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 19 (S.D.N.Y., Feb. 17, 1969).

58. For example, question 29(a) required that an applicant "[g]ive the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges."

59. In the earlier of the two cases, the Court invalidated an Arkansas statute concerned with teachers which contained a question similar to 29(a), because its requirement to list, without limit, every conceivable kind of associational tie, whether social, professional, political, avocational, or religious is prohibited by the first amendment guarantees of freedom of speech, assembly and petition. The relationships revealed by such listings, they said, *"could have no possible bearing upon the teacher's occupational competence or fitness."* (Emphasis added.) Shelton v. Tucker, 364 U.S. 479, 488 (1960).

In the latest case on this point, the Court referred to the "associational freedom" protected in *Shelton* and added that these rights "create a preserve where the views of the individual are made inviolate." Schneider v. Smith, 390 U.S. 17, 25 (1968).

60. "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?"

61. Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd* (per curiam), 390 U.S. 36 (1968).

62. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 20 (S.D.N.Y., Feb. 17, 1969).

The court did, however, object to the vagueness of question 27(a).[63] A promise to support a constitutional system already given, the questioning of belief in the "principles underlying the form of government of the United States of America"[64] might reasonably be interpreted by an applicant as requiring belief in something more than the essentials—"democratic government and change by lawful methods."[65] An applicant, for example, might not feel he could answer the question affirmatively if he did not believe in the electoral college or a bicameral legislature.[66] For this reason, the court held that the question shared the defect of the oath in *Whitehill v. Elkins*[67] which was held to be so vague "as to make men of common intelligence speculate at their peril on its meaning."[68]

The court turned next to the problem of overbreadth in question 26.[69] Not finding the scope of the inquiry so broad as that objected to in *Shelton,* the court found the question defective in two other respects. First it was objected that the use of parenthetical past-tense verbs gives the impression that membership in an organization which at *any* time advocated the violent overthrow of the government is questionable. This kind of overbreadth, the court held, yields the "chilling effects" objected to in *Keyishian v. Board of Regents.*[70] An organization may change leadership, goals and means by which its goals are sought. It is obvious that only memberships coincidental with advocacy of illegal goals or methods can be questioned. Unfortunately, the question, as written, does not make this distinction clear. Question 26 was also challenged on the authority of *Sweezy v. New Hampshire*[71] which held, in effect, that only knowing membership in an illegal organization is objectionable absent a compelling state interest. If a person is a member of a group for legitimate reasons and is unmindful of its avowed purposes, such membership cannot, constitutionally, be held against him. A question void of this "scienter" notion, as is this one, is unacceptable.

63. "Do you believe in the principles underlying the form of government of the United States of America?"

64. *Ibid.*

65. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 21 (S.D.N.Y., Feb. 17, 1969).

66. *Ibid.*

67. 389 U.S. 54 (1967).

68. *Id.* at 59.

69. "Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) 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."

70. 385 U.S. 589 (1967). In this case the Court examined the Feinberg Law of New York as it applied to state teachers. The law required a test of loyalty as a condition to employment in the state school system. The Court noted the "stifling effect on the academic mind from curtailing freedom of association" in a manner which does not account for the specific intent of the subject, but merely finds a type of guilt by association. This stifling effect arises "since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Id.* at 607, 609.

71. 354 U.S. 234, 265 (1957) (concurring opinion of Frankfurter, J.). *See also* Wieman v. Updegraff, 344 U.S. 183 (1952).

Finally question 31[72] was struck because of its *in terrorem* effect on the right to free association, especially in light of the directions at the head of the application: "1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or . . . in the revocation of his license to practice law."[73] The court, referring to a test derived from Justice Frankfurter's concurring opinion in *Sweezy,* could find no compelling state interest sufficient to justify such extensive listing of associational ties as required by question 31. It emphasized the absolute necessity of specificity in questions which touch upon first amendment freedoms.

It is easy to see the possible effect that such a scheme of questions and oaths might have on a prospective lawyer. He knows the kind of inquiries he will be expected to answer, but is not sure which of the groups he may wish to join would be objectionable to the committee. Many law students today are involved in civil rights, politics and other student movements. Much valuable work being done by these students might be jeopardized if searching inquiries deterred students from joining these groups because of a fear of possible sanctions from the bar. *Law Students* is a recognition of this possibility and a judicial warning against it.

A final issue, neither totally ignored nor completely met, was raised about the oral interviews which usually accompany written screening. The plaintiffs contended that, "the scope of this questioning is sometimes so broad as to constitute an unwarranted invasion into the applicant's personal and political privacy."[74] The court answered that there was no reason to assume that, "as the scope of the committees' written inquiry is contracted, there will not be a similar adjustment in the focus of their spoken questions."[75] Hopefully, the court is not being too optimistic. If the scope of the oral interviews is not adjusted, there may be different grounds for attacking this practice based on the right of privacy. The issue put on these grounds would resolve itself almost totally to the question of relevance which should be handled by trial-type procedures.

Conclusion

Law Students is a partial victory in New York[76] for those who have objected to present

72. "Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is 'Yes' state the facts."

73. Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 25 (S.D.N.Y., Feb. 17, 1969).

74. *Id.* at 26.

75. *Ibid.*

76. The defendants argued that the constitutional court provided in the United States Code is only applicable to state-wide issues, as a judge made exception to Section 2281, *see* Moody v. Flowers, 387 U.S. 97 (1967); Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, 31-34, 55 (1964). They based their theory on the fact that questionnaires from only two of the four judicial departments were in direct issue in the complaint made by the plaintiffs. The court found no merit in this argument citing, *inter alia,* "the effect of admission or denial is state-wide; admission in one department is the key to lawful practice throughout the State." Law Students Civil Rights Research Council, Inc. v. Wadmond, Civil No. 68-2917 at 17 (S.D.N.Y., Feb. 17, 1969).

admission processes. The effect of this holding can only be hypothesized in light of the prestige of the District Court of the Southern District of New York and the soundness of the court's reasoning. Although the court refused to shift the burden of proof from the applicant to the bar on the question of worthiness, it did severely limit the means used to elicit such proof. This case heralds the application in New York, and predictably in other states with similar procedures, of the first amendment protections to those who wish to practice law.

Refusal to invalidate the statutes involved here is a judicial affirmance of the need for continued careful scrutiny of prospective attorneys. Rather than shifting the burden of proof from the applicant, the court here preferred to more closely supervise the methods used by the bar for determining whether this burden has been met. The general effect of this case will be to make bar procedures less susceptible to arbitrariness and discrimination. It will not, however, significantly alter the right of state bars to require high standards of character and to require proof of this by the applicant. The claimed "chilling effect" which the statutory requirement itself may produce in the law student should be warmed by this court's policing of admission techniques.

Alice in Wunderlich: The Attorney General's Dream of Limiting the GAO's Claim Settlement Authority

The present controversy over the authority of the General Accounting Office (GAO) to review contract appeals board decisions arose out of a contract between the Air Force and Southside Plumbing Company, Inc. The contract contained the standard "disputes clause" which provides that if a dispute arises under the contract, the contractor can request a decision by the contracting officer.[1] This decision is final unless appealed within 30 days to the department head or his duly authorized representative —in the instant case, the Armed Services Board of Contract Appeals (ASBCA).[2] The decision of the appeals board on questions of fact is "final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."[3]

Southside claimed additional compensation for work which it asserted was outside the scope of the contract and therefore not covered by the basic price. Both the contracting officer and the ASBCA denied the claim.[4] Rather than appealing to the

1. 32 C.F.R. § 7.103-12 (1968). The contracting officer is the person who executes the contract on behalf of the government. *Id.* § 7.103-1(b).
2. *Id.* § 30.1 (1968).
3. *Id.* § 7.103-12 (1968).
4. Southside Plumbing Co., 1963 Gov't Cont. Rep. ¶ 3982 (ASBCA); 1964 Gov't Cont. Rep. ¶ 4314 (ASBCA).