



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 50 | Number 2

Article 6

2-1-1972

Constitutional Law -- Bar Admissions -- New Standards for Inquiry into Applicants' Associations and Beliefs

David M. Rapp

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

David M. Rapp, *Constitutional Law -- Bar Admissions -- New Standards for Inquiry into Applicants' Associations and Beliefs*, 50 N.C. L. REV. 360 (1972).

Available at: <http://scholarship.law.unc.edu/nclr/vol50/iss2/6>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

financially irresponsible motorists may escape liability for their negligence, the Supreme Court may have unwittingly added new momentum to the drive for wholesale reform of our automobile accident compensation system.

THOMAS A. LEMLY

Constitutional Law—Bar Admissions—New Standards for Inquiry into Applicants' Associations and Beliefs†

Bar associations have long conducted inquiries into the associations and beliefs of applicants and excluded those "subversives" likely to be a threat to the judicial system.¹ Since the first amendment applies to the states² and protects the rights of belief and association, constitutional problems arise when the state attempts to probe into this area. In February 1971 the United States Supreme Court decided three cases dealing with the power of state bar associations to compel answers to questions about the political associations of bar applicants. In *Baird v. State Bar*³ and *In re Stolar*⁴ questions posed by the Arizona⁵ and Ohio⁶ bars were held to be overly broad because they touched upon innocent as well as

†The potential effects of the primary cases used here were analyzed while appeals to the Supreme Court were pending in Note, *Attorneys—Admission to the Bar—Consideration of the Constitutionality of Bar Examiners' Inquiries into Political Associations and Beliefs*, 48 N.C.L. REV. 932 (1970). Having come before the highest court, they now deserve further consideration.

¹Remarks of Hon. Samuel J. Kanner, Chairman of the Florida Board of Bar Examiners, in 54 THE BRIEF 153, 154-55 (1959).

²*E.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958).

³401 U.S. 1 (1971).

⁴401 U.S. 23 (1971).

⁵Question 25 of the Arizona examination asks: "List all organizations, associations and club [*sic*] (other than bar associations) of which you are or have been a member since attaining the age of sixteen years." Question 27 asks: "Are you now or have you ever been a member of the Communist Party or any organization that advocates the overthrow of the United States by force or violence?" ARIZ. REV. STAT. ANN., S. CT. RULE 28(c), Exhibit A (Supp. 1970-71). Mrs. Baird answered Question 25 satisfactorily but refused to answer Question 27. 401 U.S. at 4-5.

⁶Stolar declined to answer the following questions:

12. State whether you have been or presently are . . . (g) a member of any organization which advocates the overthrow of the government of the United States by force

13. List the names and addresses of all clubs, societies or organizations of which you are or have been a member. 7. List the names and address of all clubs, societies or organizations of which you are or have become a member since registering as a law student.

401 U.S. at 27.

illegal membership in organizations. However, in a companion case, *Law Students Civil Rights Research Council, Inc. v. Wadmond*,⁷ the Court upheld questions 26.(a) and 26.(b) from the New York examination⁸ because they focused on organizational membership which was tantamount to criminal activity and therefore was a legitimate interest of the state. Although the Court recognized the danger of such probes it refused to forbid all questions dealing with political views and associations. The purpose of this note is to analyze the three cases, compare them with the previous law, and evaluate the significance of the holdings.

A comparison of the powers of public employers and bar associations to inquire into the organizational membership of employees and

⁷401 U.S. 154 (1971). A three-judge United States District Court granted partial relief by eliminating or revising certain questions objected to in *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969).

⁸The questions from the New York examination which are discussed in this note are:

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.

401 U.S. at 164 (emphasis added).

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?

Id. at 165 (emphasis added).

LSCRRC also involved other issues which are outside the scope of this note. Petitioners challenged New York's requirement that applicants possess "the character and general fitness requisite for an attorney and counselor at law." The requirement was affirmed because New York construed it "as encompassing no more than 'dishonorable conduct relevant to the legal profession.'" 401 U.S. at 159, quoting *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. at 144 n.20 (S.D.N.Y. 1969).

Petitioners also urged that the requirement of third party affidavits attesting to good moral character violated the right to privacy. The Court rejected this as bordering on the frivolous. 401 U.S. at 160.

In addition petitioners attacked the oath of "belief in the form of and loyalty to the Government of the United States." 401 U.S. at 161. Although the Court recognized that on its face this oath might be construed to violate the permissible scope of inquiry, it upheld the oath since as construed by New York it merely required the applicant to swear that he will support the constitutions of the United States and the state of New York. *Id.* See also *Connell v. Higginbotham*, 403 U.S. 207 (1971).

Finally, petitioners challenged two questions which asked whether the applicant could take the oath of support for the Constitution without mental reservation. The Court ruled that there could be little doubt of their validity since they were simply supportive of the applicant's good faith while taking the oath; in other words the oath is not *pro forma*. 401 U.S. at 165-66.

applicants reveals close parallels. Public employers have for two decades been prohibited from excluding from employment those employees who had no knowledge of the illegal goals of organizations to which they belonged.⁹ A requirement that teachers list all organizations to which they had belonged in the previous five years has been overturned as having a chilling effect on the exercise of freedom of association by discouraging group membership.¹⁰ The present standards of constitutional inquiry by public employers are set forth in *Keyishian v. Board of Regents*¹¹ and *Elfbrandt v. Russell*:¹² any imposition of civil disabilities on employees for membership in the Communist Party, even membership with a knowledge of the Party's goals, are now invalid without a showing that the employee had the specific intent to further the illegal goals of the party.¹³

Most of these standards had previously been extended to the bar applicant in a process of gradual evolution. In 1945 the Supreme Court upheld the refusal of a state bar to admit a conscientious objector because he could not truthfully take the oath of support for the state constitution which required male citizens to serve in the militia in the event of peril to the state.¹⁴ Twelve years later the Court, in *Konigsberg v. State Bar (Konigsberg I)*¹⁵, held that without a showing that the applicant had engaged in or supported unlawful activities he could not be excluded from the bar, even though he may have been a member of the Communist Party. A companion case further held that arrests without convictions are not sufficient evidence of bad character to justify denial of admission to the bar.¹⁶ However, in 1961 a second *Konigsberg v. State Bar (Konigsberg II)*¹⁷ allowed the bar to exclude the applicant for refusing to answer a question, although the answer to the question could not be in itself a ground for exclusion. The Court felt that the state's interest in ensuring that its lawyers are dedicated to the law and

⁹*Wieman v. Updegraff*, 344 U.S. 183 (1952). In question 26. (a) of the New York examination this requirement of scienter is met.

¹⁰*Shelton v. Tucker*, 364 U.S. 479 (1960).

¹¹385 U.S. 589 (1967).

¹²384 U.S. 11 (1966).

¹³385 U.S. at 609-10; 384 U.S. at 19.

¹⁴*In re Summers*, 325 U.S. 561 (1945).

¹⁵353 U.S. 252 (1957).

¹⁶*Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 243-46 (1957).

¹⁷366 U.S. 36 (1961). The examiners gave *Konigsberg* a hearing and advised him that refusal to answer would lead to exclusion.

orderly change outweighed the constitutional infringement occasioned by disclosure of past organizational membership, even though the question did not focus on knowing membership with specific intent. Thus, Konigsberg was said to be merely obstructing the examination process rather than exercising his first amendment rights. On another front, a California court had held that a criminal conviction is not a ground for summary exclusion; the conviction which leads to exclusion must be relevant to the practice of law.¹⁸

The recent cases afforded the Court an opportunity to equalize the standards for public employees and bar applicants. The petitioner in *Baird* answered a question which required her to list all organizations to which she had belonged but refused to answer a second question which required her to state whether she had been a member of the Communist Party or any other organization the goals of which were the violent overthrow of the government.¹⁹ Justice Black's plurality opinion²⁰ emphasized that since there was no requirement of scienter the second question forced her to guess at the goals of the organizations to which she had belonged.²¹ When an individual's first amendment rights are threatened, the state must carry a heavy burden of proof in establishing the necessity of its actions.²²

The assertion that the state has an interest in the character and competence of its lawyers was inadequate since Mrs. Baird had given sufficient response to other questions to satisfy the state's need.²³ Furthermore, the question she refused to answer was an inquiry into mere beliefs, which are constitutionally immune to inquisitions designed to exclude one from the bar.²⁴

Stolar dealt with the rejection of a member of the New York Bar

¹⁸Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d,76, 55 Cal. Rptr. 228 (1966). The court also said that a belief that a lawyer has a duty to disobey some unconstitutional laws is not an inference of bad character.

¹⁹See note 5 *supra*.

²⁰*Baird* and *Stolar* were both 5-4 decisions with the fifth vote in each case provided by Justice Stewart's separate concurrence. Therefore there was not a majority Court's opinion in either case.

²¹401 U.S. at 5.

²²*Id.* at 6-7.

²³*Id.* at 7. Mrs. Baird listed former employers and law professors and also the following organizations to which she had belonged: church choir, Girl Scouts, Girls Athletic Association, Young Republicans, Young Democrats, Stanford Law Association, and Law School Civil Rights Research Council. *Id.* at 7 n.7.

²⁴*Id.* at 8. See also *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

who had applied to the Ohio Bar. Stolar made available to the examiners extensive background information²⁵ and orally stated that he had never been a member of the Communist Party or the Students for a Democratic Society. He then refused to list all the organizations to which he had belonged and to state whether he had been a member of an organization which had plotted the overthrow of the government. The Court held that the applicant cannot be excluded for beliefs alone, even if he personally entertains beliefs the effectuation of which would be criminally punishable conduct.²⁶ The required listing of organizations may lead to an intimidating further investigation and have a chilling effect on the potential applicant's activities, thus infringing on the freedom of association.²⁷ As in *Baird*, Justice Black felt that Stolar had given ample information for the bar to determine his fitness and therefore was not required to answer a question which delved into a protected area.²⁸

Justice Stewart's concurring opinions in *Baird* and *Stolar* are particularly significant since his was the deciding vote in each case.²⁹ Although Justice Black's opinions stressed the concept that when the applicant has furnished sufficient background information the bar has no need or right to inquire into his political beliefs, Justice Stewart's votes were cast because the questions might have led to exclusion for membership without knowledge of the group's illegal goals and without the specific intent to further them.³⁰

In *LSCRRC* Justice Stewart wrote for a majority composed of himself and the four dissenters in *Baird and Stolar*.³¹ *LSCRRC* involved a group of law students who had not applied for bar admission but sought declaratory and injunctive relief against two questions on the

²⁵401 U.S. at 29. Stolar made available to the Ohio Bar the following information which had been furnished to the New York Bar: his law school; every address at which he ever lived; names, addresses, and occupations of his parents; his elementary and high schools; names of nine former employers; his criminal record (two speeding tickets); nine character references; and extensive background about his previous activities such as Boy Scouts, Moot Court, and religious activities.

²⁶*Id.* at 28-29.

²⁷*Id.* at 28.

²⁸*Id.* at 29.

²⁹Justice Stewart's opinions are, in effect, the law. The "lowest common denominator" concept calculates the law as the common ground shared by the plurality opinion and any concurring opinions that are necessary to give a majority.

³⁰401 U.S. at 9-10; 401 U.S. at 31.

³¹Justice Stewart's views in *Baird* and *Stolar* are expanded in *LSCRRC*. Justices Harlan, White, and Blackmun and Chief Justice Burger dissented in *Baird* and *Stolar* relying primarily on *Konigsberg II*, 366 U.S. 36 (1961) and the idea that the bar should be protected from those who would use the bar to upset the judicial system and society. 401 U.S. at 11; 401 U.S. at 31.

New York examination which inquired into the organizational membership of applicants.³² The first question required the applicant to affirm or deny his participation in any group which *he knew* advocated the overthrow of the government by force, violence, or any other means. The second question, only to be answered if the first question drew an affirmative response, inquired into the individual's specific intent to pursue the admitted goals. Stewart's views were essentially unchanged from *Baird* and *Stolar*, but here he detected an adherence to constitutionally acceptable guidelines not present in those two cases.³³ Since the state has the right to protect itself from the very real danger of subversive attorneys, it may ask questions of applicants which specifically identify those who pose the danger. Questions which are preliminary to further investigation are permissible as long as exclusion would result only when the investigation revealed that the applicant had actively engaged in subversive activity.³⁴ There is no requirement that each question reflect these standards, but rather the examination process as a whole must operate within these limits. Since the inquiry stops for those who answer the first question in the negative, there will be no unwarranted further interrogation; therefore there will be no needless intimidation leading to a chilling effect on the activities of law students.³⁵ In a nutshell, the state may exclude for knowledgeable membership and specific intent to further illegal goals because this protects a legitimate state interest without unnecessarily infringing on the applicant's first amendment rights.

Although the plurality's view in *Baird* and *Stolar* that if the applicant has furnished sufficient information no further inquiry is allowable is not treated in *LSCRRC*, one must conclude that it is not the controlling guideline when the three cases are viewed together. Justice Stewart does not raise this issue in either of his concurring opinions, dwelling instead on knowing membership and specific intent. Since his position is the obvious polestar for lower courts, the sufficient-information standard will probably not play a prominent role in future decision-making. The petitioner in *Konigsberg II*³⁶ had also furnished other background information while steadfastly refusing to answer the questions posed by the committee. The *Konigsberg II* holding on this point has been af-

³²See note 8 *supra*.

³³401 U.S. at 165-66.

³⁴*Id.*

³⁵*Id.* at 154-59, 166 n.19.

³⁶366 U.S. 36 (1961). See note 17 & accompanying text *supra*.

firmed; the examining committee, not the applicant, will determine the direction of the inquiry, subject to constitutional guidelines.

Baird, *Stolar*, and *LSCRRC* have, however, limited the *Konigsberg II* standards of constitutionally permissible inquiry by bar examiners. The *Elfbrandt* and *Keyishian* standards of scienter coupled with specific intent have been applied to inquiries by the bar, extending the same rights to bar applicants that have been enjoyed by public employees.³⁷ Not only must these requirements be met before the applicant may be excluded, but also, in contrast to *Konigsberg II*, the applicant may refuse to answer without being barred for obstructing the examining process if the standards are not met.³⁸ Furthermore, since membership in an organization with knowledge of its illegal goals and with the specific intent to further those goals is criminally punishable,³⁹ the new standards will exclude applicants only when their associations are tantamount to criminal conduct.

The various objections to political inquiry need to be carefully analyzed. One objection raised against all inquiry into organizational membership was that a chilling effect inevitably results from such inquiry.⁴⁰ That is, since law students realize that they may be held accountable for their associations, they will be inclined to avoid any potentially damaging associations. This objection is not easily thrust aside. When an applicant gives a positive answer to New York's question 26.(a) and a negative answer to question 26.(b) he has exposed himself to further investigation when, in fact, there may be no constitutional grounds for exclusion. This particular instance may discourage group membership by law students without serving the state's interest since the state has no legitimate interest in the protected activities of applicants. This slight danger is outweighed by the recognized interest of the state in determining the qualifications of its lawyers.⁴¹ Furthermore, the new standards make it clear to law students that they cannot be excluded for associations which are not criminal in nature, and they can plan their activities accordingly. Finally, membership which is reflected by a positive answer to both 26.(a) and 26.(b) is criminal conduct under *Scales v. United States*⁴² and deserves no protection from any chilling effect.

³⁷See text accompanying notes 11-13 *supra*.

³⁸See 401 U.S. at 7; 401 U.S. at 30-31.

³⁹*Scales v. United States*, 367 U.S. 203, 226-27 (1961).

⁴⁰401 U.S. at 167.

⁴¹*Id.* at 165-66.

⁴²367 U.S. 203 (1961); see text accompanying note 39 *supra*.

It has also been argued that inquiry into group membership aids in the perpetuation of a homogeneous bar by excluding "subversives" at a time when there is a great need for lawyers who are sympathetic to minority views.⁴³ The most obvious reply to this objection is simply to ask if the modern bar appears to be homogeneous. The answer has to be "no." With the narrower ground for exclusion indicated by *Baird*, *Stolar*, and *LSCRRC*, an even less homogeneous bar may be anticipated in the future. Mere political beliefs are protected—it is the participation in an illegal activity which *may* result in denial of admission.⁴⁴

Another argument relied on in *LSCRRC* is that when suitable alternative methods are available there is no legitimate state interest served by inquiry into organizational membership and therefore the first amendment rights of applicants must tip the scales of justice.⁴⁵ Alternatives such as the criminal process, contempt powers, and disbarment are sufficient to deal with the conduct of lawyers. Justice Stewart admitted in *LSCRRC* that while this may be "wise" New York had made its decision to conduct another program which is also within permissible limits.⁴⁶ It is quite possible that the declaratory nature of the case aroused little sympathy with the Court since petitioners could not show that anyone had ever been unconstitutionally excluded under the program.⁴⁷ Furthermore, would the alternative methods urged in *LSCRRC* be sufficient to protect the bar? Certainly recent history shows that the alternatives are less than foolproof.⁴⁸ It may be very unwise to force bar associations to rely as best they can on post-admission sanctions. Justice Black argued in dissent in *LSCRRC* that excluding a man from his career is as much of a punishment as depriving him of his property and therefore should require the same level of culpability.⁴⁹ He felt that since

⁴³Comment, *Bar Admissions—The Character Investigation as an Unconstitutional Scheme to Promote Conformity: Comment on LSCRRC v. Wadmond*, 23 VAND. L. REV. 131 (1969). Justice Black raises this issue in dissent in *LSCRRC*. 401 U.S. at 181.

⁴⁴Positive answers to the New York questions will not inevitably lead to exclusion but rather to further investigation where the applicant has a chance to explain the circumstances of his membership. 401 U.S. at 165-66.

⁴⁵401 U.S. at 167.

⁴⁶*Id.*

⁴⁷*Id.* at 165.

⁴⁸For an evaluation of the present practices and recommendations for the future, see *American College of Trial Lawyers Report and Recommendations on Disruption of the Judicial Process*, 16 CATHOLIC LAW. 242, 249-53 (1970).

⁴⁹401 U.S. at 174.

under *Brandenburg v. Ohio*⁵⁰ an individual can be punished only when his speech raises an imminent danger of incitement to lawless conduct, the same standard ought to be met before an individual is excluded from the practice of law.⁵¹ *Brandenburg* is distinguishable, however, because it involved a more pure form of speech while the sanctions under *LSCRRC* are directed at specifically illegal activity. The bar associations only attempt to regulate the profession, not to impose punishment. Denial of admission to the bar for subversive activities is no more a penal sanction than denial of admission to a convicted felon would be double jeopardy.

Other writers have pointed out that not all jurisdictions inquire into the activities of bar applicants.⁵² In England an applicant must have certificates of good moral character from two United Kingdom residents who have known him for one year.⁵³ He is ineligible for admission if he is an undischarged bankrupt or has been convicted of an offense that the examiners deem relevant to the profession. Canada's Ontario Province abolished character investigations after finding no relationship between prior conduct and conduct subsequent to admission.⁵⁴ Apparently not even all United States jurisdictions inquire into the loyalty of bar applicants beyond the oath of support for the Constitution.⁵⁵ Perhaps these are enlightened jurisdictions, but as Justice Stewart noted, while other programs may possess desirable features, the state has the right to conduct its own program within established guidelines.⁵⁶

Baird, *Stolar*, and *LSCRRC* represent a step forward by the Court because they assure applicants that only activity which could result in criminal punishment is a ground for denial of admission to the bar.

⁵⁰395 U.S. 444 (1969).

⁵¹401 U.S. at 183-84.

⁵²Comment, 23 VAND. L. REV., *supra* note 43, at 145-46.

⁵³*Id.* at 146 n.97.

⁵⁴Remarks by Richard J. Roberts at the Joint Session of the Section of Legal Education and Admissions to the Bar and National Conference of Bar Examiners in *The Canadian Approach to Legal Education and Admission to the Bar*, 36 B. EXAMINER 6, 34 (1967).

⁵⁵Brown & Fasset, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 (1953). See also 7 C.J.S. *Attorney and Client* §§ 7(b), 12 (1937). It has not always been thought that character examination was necessary. Under chapter five of the NORTH CAROLINA REVISAL OF 1905 an applicant who demonstrated his competence in the law was entitled to be licensed. Ch. 963, § 3, [1818] N.C. Sess. L. 1436. The North Carolina Supreme Court read this statute as a prohibition against investigations into moral character. *In re Applicants for License*, 143 N.C. 31, 32-36 (1906). Did the threat of Communism contribute to the increasing scope of examination? See introductory paragraphs in *Baird*, 401 U.S. at 2-3; and *Stolar*, 401 U.S. at 24-25.

⁵⁶401 U.S. at 167.

There are arguments against any character examination by the bar, as there always are when constitutional rights are limited. However, it is well established that the states may, within limits, ask questions to ascertain the moral fitness of applicants before admitting them to the bar. The state has no right to unlimited inquiry and the applicant has no right to expect to be free from all inquiry. By prohibiting exclusion when there is no showing that an applicant has been a member of an organization with knowledge of its illegal goals and has entertained the specific intent to further those goals, the Court has extended the rights enjoyed by public employees to bar applicants.

DAVID M. RAPP

Constitutional Law—Equal Protection and the “Right” to Housing

In 1950 California voters adopted article XXXIV of the state constitution with the express purpose of bringing decisions of public housing authorities which involved the construction of “low rent housing” under the state’s mandatory referendum procedure.¹ Some twenty years later the Supreme Court of the United States, in *James v. Valtierra*,² upheld the constitutionality of article XXXIV against the charge that it denied equal protection of the law to persons who though eligible for low-rent housing lived in areas in which the referendums were defeated. More specifically, *James* raised the issue of whether the requirement of a referendum to construct “low rent housing” placed an unduly heavy burden upon low-income persons by singling them out from other classes of citizens eligible for public housing.

The case was first heard on the district level by a three-judge panel

“No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until” approved by the majority of the voters in the local electorate where it is to be developed, constructed, or acquired. CAL. CONST. art. XXXIV, § 1.

Article XXXIV was a response to the creation of housing authorities in each city and county in California. CAL. HEALTH & SAFETY CODE §§ 34240, 34327 (West 1967). These local bodies were given the power to borrow money and accept grants from the federal government through the United States Housing Act of 1937, 42 U.S.C. §§ 1401-1430 (1970). When the citizen-initiative referendum procedure of article IV, § 1 of the state constitution was held inapplicable to decisions of the local housing authorities in *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950), the stage was set for the passage of article XXXIV six months later.

²402 U.S. 137 (1971).