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COMMUNISM VERSUS STATE BAR ADMISSION

Recent decisions by the United States Supreme Court have raised the question of a state's power to deny an applicant admission to its bar where the applicant refuses to answer questions concerning his present or past political associations or freely admits he has been connected with groups classified as subversive organizations at some time. State courts have regarded such behavior as exhibiting a lack of good moral character or as evidence of inability to take loyalty oaths in good conscience. From one-third to one-half of the states require bar applicants to submit to a routine interview before a committee on character and fitness to guard against admission of undesirable applicants, and many other states request such an interview where the facts disclosed seem to warrant one.[1] Statutory laws requiring an applicant to prove his good moral character and take oaths of loyalty to the state and federal governments exist in almost every state.[2]

Just what constitutes good moral character and the extent of inquiry permissible into this facet of the bar examination is the major problem facing state and federal courts today in deciding these questions. The courts freely admit that the phrase "good moral character" or its counterpart "moral turpitude" cannot be defined with any degree of exactness.[3] As the phrase has been applied to bar admission it has been considered as being general in its application, including all the elements necessary to make up such a character, and being something more than an absence of bad character. Among the elements composing good moral character is the ability not to express oneself merely in negatives or take the line of least resistance, but to do the unpleasant thing if it is right, and not to do the pleasant thing if it is wrong.[4] It includes the elements of common honesty and veracity.[5]

An applicant, by seeking admission to a state bar, puts in issue his

1. Brown and Fassett, Loyalty Tests for Admission to the Bar, 20 U. of Chi. L. Rev. 480 (1953).
2. E.g., Wyo. Comp. Stat. § 2-102 (1945). ". . . If the court shall then find the applicant to be qualified to discharge the duties of an attorney and to be of good moral character, and worthy to be admitted, an order shall be entered admitting him to practice in all the courts of this state." Wyo. Comp. Stat. § 2-103 (1945). "No one shall be admitted to the bar of this State who shall not be a citizen of the United States, a bona fide resident of this State, at least twenty-one (21) years of age and a person of good moral character. . . ." Wyo. Comp. Stat. § 2-113 (1945). "No person shall be deemed admitted to the bar until he shall have taken an oath to the effect that he will support, obey, and defend the Constitution of the United States, and the constitution and laws of this state, . . ."
3. Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (dissenting opinion) (1951); U.S. ex rel. Iorio v. Day, 34 F.2d 920 (2d Cir. 1929), where Mr. Justice L. Hand in discussing what constitutes a crime involving moral turpitude stated, "All crimes violate some law; all deliberate crimes involve the intent to do so. Congress could not have meant to make the wilfulness of the act a test; it added as a condition that it must itself be shamefully immoral. . . While we must not, indeed, substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel."
4. In re Farmer, 191 N.C. 235, 131 S.E. 661 (1926).
5. In re O......., 73 Wis. 602, 42 N.W. 221 (1889).

moral fitness.[6] Although a few courts have held that their inquiry into the fitness of a bar applicant is limited to the certificate presented by him,[7] a majority of the courts favor looking behind the applicant's certificate in cases attended by suspicious circumstances.[8] An inquiry into the good moral character of an applicant for admission is broader in scope than the issue presented in a disbarment proceeding and may extend to his general character as well as to the particular acts.[9] It has been said that the fundamental issue on review of a bar committee's action in refusing to certify an applicant, is whether the committee acted fairly. In determining if the committee acted fairly, evidence of the applicant's qualifications may be ignored.[10]

An applicant (where inquiry into his good moral character is permissible) must bear the burden of proof of establishing his good moral standing.[11] The applicant also carries the affirmative duty to make a full disclosure of any charges preferred against him, regardless of their outcome, and he may be refused admission to the practice of law for making false statements on his application.[12] Although the applicant always bears the burden of proof, the burden of proceeding with the evidence may shift, and once the applicant has made a prima facie showing of his moral fitness to the board of bar examiners in accordance with the statutes or rules of the particular state, it is then incumbent upon those making objections to offer evidence and overcome the applicant's prima facie showing. Thus anyone making a specific charge against the applicant would be bound to offer proof of that charge and the applicant would not have the burden of proving the falsity of charges that were otherwise unsupported.[13]

A state cannot draw unfavorable inferences as to the moral character of the applicant where he refuses to answer on the ground that the inquiries are prohibited by the United States Constitution.[14] Nor can any inference of membership in the Communist Party be drawn from a person's refusal to answer questions regarding his possible membership or his association

6. Rosencranz v. Tidrington, 193 Ind. 472, 141 N.E. 58 (1923).
7. In re Bowers, 137 Tenn. 189, 194 S.W. 1093 (1917), rehearing denied, 137 Tenn. 193.
8. In re Peters, 221 App.Div. 607, 225 N.Y.S. 144 (1929), affirmed, 250 N.Y. 594; In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924).
9. Spears v. State Bar of California, 211 Cal. 183, 294 Pac. 697 (1930).
10. Higgins v. Hartford County Bar, 111 Conn. 47, 149 Atl. 415 (1930).
11. In re Garland, 219 Cal. 661, 28 P.2d 354 (1934); State ex rel. Board of Bar Examiners v. Poyntz, 152 Ore. 592, 52 P.2d 1141 (1935), rehearing denied, 54 P.2d 1212; In re Weinstein, 150 Ore. 1, 42 P.2d 744 (1935); Spears v. State Bar, supra note 9; In re Wells, 174 Cal. 467, 163 Pac. 657 (1917).
12. Spears v. State Bar, supra note 9.
13. Coleman v. Watts, 81 So. 2d 650 (Fla. 1955).
14. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed 692 (1956); Sheiner v. State of Florida, 82 So.2d 657 (Fla. 1955); Ex parte Marshall, 165 Miss. 523, 147 So. 791 (1933); Ullman v. U.S., 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956); Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 100 (1955); In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); Matter of Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940) .

with persons who are members.[15] However, the Florida Supreme Court has indicated by way of dicta that membership in the Communist Party is sufficient in itself to sustain a disbarment. The Florida court indicated that it is incumbent upon the state in a disbarment proceeding to prove membership, and the mere invoking of the Fifth Amendment by the accused is not evidence of such membership.[16]

In connection with this problem some courts have said that one may waive any constitutional or statutory privilege made for his benefit.[17] The courts following this view feel that the government is so interested in the character of bar members that limitations may be properly imposed on such rights as those set forth in the First Amendment.[18] Thus an applicant in these jurisdictions is deemed to have waived his right to invoke either the First or Fifth Amendments as a basis for refusing to answer inquiries into his political associations by applying for admission to the state bar. However, a majority of the courts are reluctant to find that a fundamental constitutional right has been waived.[19] The concensus is that no fundamental right essential to due process under the Fourteenth Amendment can be waived.[20] Some courts simply state that waiver of a constitutional right is not to be lightly inferred.[21]

The power to determine qualifications of candidates for bar admission is and has been essentially vested in the courts.[22] This power is not dependent upon either the constitution or statutes, and exists in all courts of record unless expressly restricted or prohibited by legislation.[23] A state through its courts may require high standards or qualifications, such as good moral character or proficiency in its law, but the qualifications must have a rational connection with the applicant's fitness or capacity to practice law.[24] Even when applying permissible standards, state officers cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards or where their action is invidiously discriminatory.[25] Thus a state may not exclude a person from practicing law for

15. U.S. v. Rumley, 345 U.S. 41, 73 S.Ct. 543, 94 L.Ed. 770 (concurring opinion) (1953); Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1944); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1942); Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939); DeJonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1936).
16. Sheiner v. State, supra note 14.
17. Taylor v. U.S., 229 F.2d 826 (8th Cir. 1956).
18. American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1949); In re Summers, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945).
19. Huffman v. Alexander, 197 Ore. 283, 251 P.2d 87 (1952), rehearing denied, 253 P.2d 289 (1953); McNinney v. U.S., 208 F.2d 844 (U.S.A.D.C., 1953); Emspak v. U.S., 349 U.S. 190, 75 S.Ct. 687, 99 L.Ed. ___ (1954).
20. Commonwealth v. Darcy, 362 Pa. 259, 66 A.2d 663 (1949), cert. denied, 338 U.S. 862.
21. Grudin v. U.S., 198 F.2d 610 (9th Cir. 1952); U.S. v. Gross, 137 F.Supp. 244 (S.D.N.Y. 1956).
22. Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932).
23. Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021, 139 Am.St.Rep. 1030 (1909).
24. Douglas v. Noble, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1922); Cummings v. State of Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867); Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1933).
25. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

any reason that contravenes the due process or equal protection clauses of the Fourteenth Amendment.[26]

The right to practice law is not a natural, inherent, or vested right, or one guaranteed by the Constitution, but a peculiar privilege granted only to those who demonstrate special fitness in intellectual attainment and moral character,[27] and who are prepared to satisfy reasonable requirements as to these qualifications.[28] Although the practice of law is classified as a privilege only,[29] or a matter of judicial discretion,[30] it is not merely a matter of the state's grace.[31]

The question of what part a man's political beliefs or associations play in his qualifications for bar membership is still open. On one side of the argument is the feeling that it is important to society and the bar itself that lawyers be unintimidated, that is, free to think, speak and act as members of an independent bar.[32] This idea is exemplied by the following quote:[33]

> "The dwindling role of the party since then (referring to the depression years of the 1930's, the United Front and the Second Front) strengthens our agreement with the bar examiner who wrote: 'Speaking solely for myself, I do not think that inquiry into political beliefs has any place in bar examination work. I think that the study of law is the best training anyone can have for becoming a good American and I do not think it should be cluttered up with investigations about political beliefs and whether or not the applicant happens to agree with what a majority of the people may or may not consider at the moment to be subversive.' "

On the other side of the argument is the belief that before an applicant may be admitted to the bar he must take an oath of office by which he swears to support the Constitution of his state and the United States.[34] The court, in assuring itself of the applicant's ability to take these oaths in good conscience, must presribe such qualifications as it may deem

26. Slochower v. Board of Higher Education, supra note 14.
27. In re Wilson, 76 Ariz. 49, 258 P.2d 433 (1953); Weirimont v. State, 101 Ark. 210, 142 S.W. 194 (1911); Re Durant, 80 Conn. 140, 67 Atl. 497 (1907); State v. Rosborough, 152 La. 945, 94 So. 858 (1922); Re Maddox, 93 Md. 727, 50 Atl. 487 (1901); Re Bailey, 50 Mont. 365, 146 Pac. 1101 (1915); Re Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 Pac. 703 (1912); Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021 (1909); Re Morse, 98 Vt. 85, 126 Atl. 550 (1924); Re Ellis, 118 Wash. 484, 203 Pac. 957 (1922); State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 Pac. 357 (1909).
28 In re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); In re Weinstein, 150 Ore. 1, 42 P.2d 744 (1935); Henington v. State Board of Bar Examiners, 60 N.M. 393, 291 P.2d 1108 (1956).
29. In re Greer, 52 Ariz. 385, 81 P.2d 96 (1938); Re Lavin, 59 Idaho 191, 81 P.2d 727 (1938).
30. Application of Stone, 74 Wyo. 389, 288 P.2d 767 (1955).
31. Ex parte Garland, 4 Wall. 333, 379, 18 L.Ed. 366 (1867).
32. Cammer v. U.S., 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 470 (1955).
33. Brown and Fassett, Loyalty Tests for Admission to the Bar, 20 U. of Chi. L. Rev. 480 (1953), citing from a letter from Robert E. Seiler, Esq., Secretary, Missouri Board of Bar Examiners (Oct. 27, 1952).
34. Corti v. Cooney, 191 Wis. 464, 211 N.W. 274 (1926).

necessary to protect itself and the public from objectionable persons.[35] In regard to the Communist Party particularly, exponents of this view feel that the primary consideration is the known characteristics or goals of the party.[36]

Having considered the inquiries pertinent to this problem, how have the courts actually dealt with the applicant whose history or attitude indicates possible subversive connections? In the cases to be discussed it will be noted that the courts have not always emphasized the same points or reached the same result. Following is a brief synopsis of three of the foremost cases in this field as of the date of this publication.

George Anastaplo, a graduate of the University of Illinois law school, successfully passed the Illinois bar written examination.[37] Under questioning from the Illinois Bar Committee on Character and Fitness he indicated that he believed in the doctrine of revolution and overthrow of the government by force of arms if this were the only means of accomplishing a desired end. He upheld this position when asked if he would do so if peaceful means for a change were provided in the existing government. When asked if he were ever a member of the Communist Party he refused to answer based on the belief he was not required to by the First and Fourteenth Amendments.[38] The committee refused to certify Anastaplo, whereupon he filed a petition and appeal to the Illinois Supreme Court asserting that the committee had abused its discretion. The Illinois Supreme Court held that the committee's inquires into Anastaplo's possible membership in the Communist Party were relevant to the determination of his good citizenship and his ability to take the oath of a lawyer in good conscience, and that his constitutional rights were not infringed by

35. Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1915); Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366 (1867); Spears v. State Bar, 211 Cal. 183, 294 Pac. 697 (1930); Re Collins, 188 Cal. 701, 206 Pac. 990 (1922); People ex rel. Chicago Bar Ass'n v. Wheeler, 259 Ill. 99, 102 N.E. 188 (1913); People ex rel. Healy v. Macauley, 230 Ill. 208, 82 N.E. 612 (1907); People ex rel. Deneen v. Smith, 200 Ill. 442, 66 N.E. 27 (1902); Rosencranz v. Tidrington, 193 Ind. 472, 141 N.E. 58 (1923).

36. American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1949), where Mr. Justice Jackson makes the following summary of differences in fact and law of the Communist Party from other substantial parties in the U.S.: "1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of the free electorate; 2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government; 3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. . . . 5. Every member of the Communist Party is an agent to execute the Communist program."

37. In re Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).

38. Brown and Fassett, Loyalty Tests for Admission to the Bar, 20 U. of Chi. L. Rev. 480 (1953), where the authors make the following statement: "There seems to be no indication whatever that George A. was in fact a Communist. He attracted the attention of the Committee by expounding, as one of the principles of the Constitution, the 'right of revolution' in Jeffersonian terms. Then, when a panel and later the full committee sought to inquire further into his political beliefs to detect, one supposes, the degree of communist influence, George A. refused on principle to answer questions about his political associations, reading habits, or anything else that would disclose any attitudes save those he himself chose to expound to the committee."

such inquiries. The court proceeded on the theory that loyalty to the Constitution is an inalienable condition to a lawyer's service as an officer of the court, Communist Party membership being incompatible with this loyalty. The court reiterated the rule that the practice of law is a privilege and not a right and in granting this privilege a state may impose any reasonable conditions within its control. The Illinois Court further asserted that if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Thus, in granting this privilege, the court felt that the state of Illinois was free to condition admission upon proof of good moral charatcer and upon the applicant's taking loyalty oaths to the state and federal governments. The Illinois court reasoned that when an applicant, knowing of such conditions, applied for admission and signified that he would take the oath of a lawyer, it was inconsistent with the privilege he sought that he should be permitted to defeat inquiry into his ability to fulfill such conditions by any claim of the right of free speech. In seeking admission, the petitioner was deemed to have waived his constitutional right of free speech against relevant inquiry. The Illinois court referred to a similar principle, applicable in the field of public employment, and indicated that it felt there was no reason why this principle could not be applied in the field of bar admission.[39] Anastaplo's refusal to answer which consequently prevented the committee from inquiring fully into his qualifications was held to justify the committee's refusal to certify.

The Supreme Court of California was called upon to deal with approximately this same problem when Rafael Konigsberg, a graduate of the University of Southern California law school, successfully passed his written examination for admission to the California bar.[40] Nevertheless he was refused certification to practice law on the 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 United States or California governments by unconstitutional means. Konigsberg had appeared before the Un-American Actvities Committee of the California Senate in 1948. An ex-Communist testified that she had seen Konigsberg at a Communist Party unit meeting in 1941. Konigsberg produced some forty-two well regarded and respected character witnesses, all claiming to have known him for a period of at least twenty years and crediting him with high moral character and standing. He asked the California Supreme Court to review the committee's refusal to certify him, contending that he had satisfactorily proved his good moral character and that the board's action deprived him of rights secured by the First and Fourteenth Amendments. The California Supreme Court

39. McAulifee v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); Druey v. Hurley, 339 Ill.App. 33, 88 N.E.2d 728 (1949); Joyce v. Board of Education, 325 Ill.App. 543, 60 N.E.2d 431 (1945); Faxon v. School Committee of Boston, Mass., 331 Mass. 531, 120 N.E.2d 772 (1954); Daniman v. Board of Education, 306 N.Y. 532, 110 N.E.2d 373 (1954).

40. Konigsberg v. State Bar of California, ... U.S. ...., 77, S.Ct. 722, ... L.Ed. .... (1957).

affirmed the state committee's action whereupon the United States Supreme Court granted certiorari.

Konigsberg reasserted that the committee had to comply with due process of law, indicating cases where arbitrary findings were offensive to due process.[41] The Supreme Court, in its majority opinion, sustained this contention stating that a person who is denied the right to practice law when he has met all the qualifications is denied due process and equal protection of the laws, said denial being both arbitrary and discriminatory. The Supreme Court also held that the California statutes could not be interpreted to equate the term "bad moral character"[42] with unorthodox political beliefs or membership in lawful political parties. The Supreme Court stated that no inference of bad moral character could be drawn from refusal to answer questions as to political opinions or associations, including the question of Communist Party membership, nor could past membership in that party support an inference that a bar applicant did not have the requisite good moral character required. The majority also indicated that they believed Konigsberg was willing answer all questions as to his loyalty except those directed to his political views and his connection, if any, with the Communist Party. The majority went on to state that Konigsberg's rejection could not be justified on the ground that he had obstructed the committee's inquiries as none of the committee members indicated at any time that he might be rejected on this ground alone. The majority then stated that failure to certify under these circumstances would raise serious questions of elemental fairness unless the applicant was first explicitly warned that he could be denied certification for refusing to answer the committee's inquiries.[43]

Three Supreme Court justices dissented and directly challenged this statement. The dissent asserted that an applicant who refuses to supply information relevant to his fitness may be deemed to have failed to establish his qualifications.[44] They reasoned that since the burden is on the applicant to satisfy the committee of his qualifications, this burden could not be sustained by silence to relevant inquiry. The dissent further asserted that the majority had agreed that the court could properly ask if an applicant was a Communist without violating any U. S. Constitutional guaranties, but for some reason they had not required an answer to this question.

Concurrently with the *Konigsberg* ruling the United States Supreme Court handed down a second decision reversing a state court finding that a bar applicant had failed to sustain the burden of proving his good moral

41. Wieman v. Updegraf, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1950); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930); Frost & Frost Trucking Co. v. Railroad Commission of State of California, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1925).
42. Stats. 1951, c. 179, p. 192, § 1 Deerings General Laws, Act 6064.1.
43. Citing, Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1947).
44. Citing, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909).

character in order to qualify for bar admission.[45] Rudolph Schware, a graduate of the University of New Mexico law school, was denied permission to take the New Mexico bar examination. The United States Supreme Court granted certiorari from the state court ruling. The New Mexico State Bar and State Supreme Court had both based their rejection of Schware's application upon his admitted past activities which included the use of several Italian aliases (he is Jewish), allegedly to secure employment; a prior arrest record including an arrest for violating the Neutrality Act of 1918 by recruiting troops to fight for the Loyalists in the Spanish Civil War (no formal charges were ever filed against him in any of the arrests),[46] and the fact that he had been a member of the Communist Party. Schware had joined the Young Communist League during his senior year in high school and later in 1934 had joined the Communist Party. He broke away from the party in 1937, rejoined for a short time in 1937, and finally severed all connections with the party in 1940. All of the objectionable acts of Schware had occured some fifteen years prior to his application for bar admission. He had voluntarily disclosed and discussed the effect of these acts with the Dean of the New Mexico law school prior to his enrollment there. Schware's position was further fortified by letters from almost every member of his graduating class vouching for his present good moral character.

The United States Supreme Court reaffirmed much of its reasoning set forth in the *Konigsberg* case and sustained the position of Schware's attorney to the effect that mere unorthodoxy in the field of political beliefs does not, as a matter of fair and logical inference, negative good moral character.[47] The Supreme Court stated that under our traditions, beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization, notoriously, do not subscribe unqualifiedly to all its platforms or principles. Therefore, indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.[48] The Court went on to state that Schware's activities of some fifteen years ago disclosed no such substantial doubts about his present good moral character as to prevent him from taking the bar examination.

Thus the position of the Supreme Court appears to be firmly established in line with recent decisions it has laid down on similar matters. This position is that the constitutional guaranties afforded by the First, Fifth and Fourteenth Amendments cannot be encroached upon merely to

45. Schware v. Board of Bar Examiners of the State of New Mexico, ... U.S. ......, 77 S.Ct. 752, ... L.Ed. ...... (1957).
46. See Spears v. State Bar, 211 Cal. 183, 294 Pac. 697 (1930), where the court indicates that it is not necessary to have formal charges filed to sustain a disbarment on the ground of bad moral character.
47. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1128 (1942).
48. Wiemen v. Updegraf, supra note 41; Joint Anti-Fascist Refugee Committee v. McGrath, supra note 41; Schneiderman v. U.S., 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed 1796 (1943).

avert some supposed but not actual danger. Admitting the state courts have a problem if they are to effectively curb subversive elements from entering their bars, nevertheless, such control cannot be exerted in derogation of the aforementioned rights. Possibly such control could be maintained under the ruling advanced in the *Anastaplo* case,[49] that is, failure to answer relevant inquiries justifies refusal to certify. However, there is some doubt that this ruling would be enforced in light of the suggestion in the *Konigsberg* case, that the applicant must first be expressly warned that he may be refused admission for this reason alone. Even in the event that the applicant was properly warned, there still exists some question regarding the Supreme Court's position if it were asked to uphold a state decision denying certification where the inquiries were not answered on the belief or grounds that they were privileged under the Constitution. The Supreme Court decision in the *Schware* case indicates that an applicant's good moral charatcer will be determined upon his present standing rather than his somewhat distant past actions. In the final analysis the tenor of the recent Supreme Court decisions and the continued existence of a peace-time economy indicate the possibility of a more relaxed attitude by state bar committees in certifying applicants to the bar where there is some question concerning their present or past political views or associations.

ROSS MERLIN BEYER

THE RIGHT TO USE WASTE WATER BEFORE IT RE-ENTERS THE STREAM

In the arid and semi-arid western states, the scarcity of and increasing need for water has focused attention on waste water. Waste water is water that has been permitted to waste or escape after it has served the purpose of the lawful claimant. It is also water that the lawful appropriator has allowed to seep from ditches, reservoirs, or canals and percolate from beneath his soil before the water can be beneficially used. Eventually, most of these waters will percolate or flow back to the stream from which they were appropriated. This article is concerned with the question of whether these waters can be appropriated after they have left the control of the original appropriator, and before they return to the stream from which they were appropriated.

In the recent Wyoming case of *Bower v. Big Horn Canal Ass'n,*[1] the plaintiff constructed drains and a ditch to collect seepage water from defendant's canal, and by pumping the water into a ditch and across a steel flume, he irrigated arid lands other than those upon which the seepage arose. The court held that such waters were subject to appropriation by

49. At this time there is no record that Anastaplo has ever attempted to appeal the Illinois Supreme Court decision to the U.S. Supreme Court.

1. .... Wyo. ...., 307 P.2d 593 (1957).