

THE "RIGHT" TO PRACTICE LAW

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I. Introduction

No one, it has often been said, has a constitutional "right" to practice law.¹ Nevertheless, a law license is "something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he [the lawyer] can only be deprived by the judgment of the court, for moral or professional delinquency."²

Even before admission to the Bar, one has certain rights. And in case of arbitrary or prejudiced action on the part of the committee on admissions, there seems to be a "case or controversy" which can be entertained by the courts.³

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¹ *In re Gibbs*, 35 Ariz. 346, 278 Pac. 371 (1929) (Right to practice law is not, like the right to engage in the ordinary business or occupation, a constitutional one.); *In re Cox*, 164 Kan. 160, 188 P.2d 652 (1948) (emphasizing that the right to practice law is a "privilege" and that the lawyer is a "quasi-public" official); *In re Thatcher*, 190 Fed. 969 (N.D. Ohio 1911) (an extraordinary privilege rather than a property right). Cf. *In re Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910); *In re Morse*, 98 Vt. 85, 126 Atl. 550 (1924); *Hulbert v. Mybeck*, 220 Ind. 530 44 N.E. 2d 830 (1942) (practising lawyer is not a holder of exclusive franchise and, therefore, can not enjoin unauthorized practice of law). The "right" to practice law is not privilege or immunity under Article IV or Amendment XIV. *In re Lockwood*, 154 U.S. 116, (1894); *Bradwell v. Illinois*, 16 Wall. (U.S.) 130 (1873). Cf. *Integration of Bar Case*, 244 Wis. 8, 11 N.W. 2d 603 (1943) (not within equal protection clause of Amendment XIV).

² *Ex parte Garland*, 71 U.S. 333, 379 (1867).

³ *In re Summers*, 325 U.S. 561 (1945); *Application of Kaufman*, 206 P.2d 528 (Idaho 1949). In England no one could become a barrister save with the consent and approval of his Inn of Court, and no reason had to be given for the Inn's failure to approve. The only remedy was by appeal to the twelve judges in their capacity as visitors of the Inns of Court. *In re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777 (1906) points out that Connecticut has a similar system, the local Bar taking the place of the Inns of Court. It was further stated that such a system of admissions conforms to due process, since it is suitable and proper for making sure that an attorney is of good character, and since it is sanctioned by established customs. The court can properly inquire whether the local Bar made a fair investigation before refusing its approval to an applicant; but that investigation can be private. *In re Keenan*, 313 Mass. 186, 47 N.E. 2d 13 (1943) states that the judiciary may adopt any procedure it deems appropriate to review proceedings relating to membership in the Bar.

The courts, however, will have to consider that the burden of proving good moral character is always on the applicant, so that he must demonstrate that his exclusion sprang from passion, bias or abuse of discretion.⁴ Moreover, the decision to exclude, as well as any judgment of disbarment, will be upheld although it was not reached with all the formalities of a civil or criminal trial, since for investigations to determine whether an individual is entitled to practice law, due process does not require trial by jury, confrontation of witnesses, or adherence to established rules of evidence.⁵

Very few jurisdictions now hold that admissions to the Bar are completely within the power of either the legislature or judiciary to the exclusion of the other. Generally there is a combination of the two: the legislature acting under the police power to set minimum requirements for the protection of the public, and the judiciary acting under its "inherent power" to protect the administration of justice through control of "officers of the court."⁶ The legislature cannot force issuance of a license to an applicant unless the courts are convinced of his qualifications.⁷

Some prerequisites for admission are universal, such as the requirements of age,—usually twenty-one,⁸—residence within the state in which the applicant intends to practice, and citizenship or eligibility for naturalization.⁹ There are

⁴ *Cf. In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926).

⁵ *Ex parte Wall*, 107 U.S. 265 (1883) (disbarment). *Cf. In re O'Brien's Petition*, *supra*, n. 3 (upholding privacy of investigation of applicant). It is stated in *In re Tracy*, 197 Minn. 35, 266 N.W. 88 (1936), that in passing upon such a question as who shall enjoy the privilege of practising law, courts must be permitted to determine for themselves what they will or will not consider to be competent evidence.

⁶ *In re Tracy*, *supra*, n. 5 (exhaustive citation); *Petition of Florida Bar Association*, 134 Fla. 351, 186 So. 280 (1938).

⁷ *Application of Kaufman*, *supra*, n. 3, gives an exhaustive citation of authorities and says that the legislature can not force the court to admit lawyers without Bar exams if the judiciary thinks such examinations are necessary. But *cf. In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906).

⁸ *In re Keenan*, 310 Mass. 166, 37 N.E. 2d 516 (1941).

⁹ *In re Pierce*, 189 Wis. 441, 207 N.W. 966 (1926); *Agg Large v. State Bar of Cal.*, 218 Cal. 334, 23 P.2d 288 (1933); *In re Admission to Bar*, 61 Neb. 58, 84 N.W. 611 (1900).

no longer restrictions as to race¹⁰ or sex.¹¹ Few states continue to allow the certificate of graduation from an accredited law school to suffice in fulfilling the educational requirements without any Bar examination;¹² some require a period of clerkship.¹³

In determining moral fitness—either in connection with an application for admission or with a disbarment proceeding—the court particularly inquires as to conduct involving “moral turpitude.” It seems settled that conduct sufficient to disbar an attorney justifies rejection of an applicant; but the converse may not be true.¹⁴ Convictions of crimes involving intentional wrongdoing¹⁵ in some states are conclusive as to unfit character;¹⁶ in others not. Some conflict of views also exists as to whether serious traffic violations

¹⁰ *Matter of Taylor*, 48 Md. 28, 30 Am. Rep. 451 (1878) (holding that Maryland's restriction of admissions to whites does not violate constitutionally protected privileges or immunities of colored applicant).

¹¹ *In re Lockwood*, 154 U.S. 116, (1894), and *Bradwell v. Illinois*, 16 Wall.(U.S.) 130, (1873) upheld the constitutionality of excluding female applicants. In the latter case the concurring opinion indicates some of the arguments against admitting women to the Bar.

¹² Wisconsin and West Virginia do not require such exams. *Cf. In re Admission of Certain Persons to Bar*, 211 Wis. 337, 247 N.W. 877 (1933). FLA. STAT. ANN. § 3903 (1943) exempts from Bar Exam graduates of certified Florida law-schools.

¹³ *Cf. In re Staub*, 99 N.J. L. 373, 123 Atl. 541 (1924).

¹⁴ *In re Alschuler*, 388 Ill. 492, 58 N.E. 2d 563 (1944); *In re Keenan*, *supra*, n. 8; *Bar Assoc. of Boston v. Greenhood*, 168 Mass. 169, 46 N.E. 568 (1897); 15 A.B.A.J 780 (1929). But see *Opinion of Justices*, 279 Mass. 607, 180 N.E. 725 (1932).

¹⁵ Crimes like fraud, *In re West*, 212 N.C. 189, 193 S.E. 134 (1933); forgery, *Spears v. State Bar of Cal.*, 211 Cal. 183, 294 Pac. 697 (1930); perjury, *In re Ulmer*, 208 Fed. 461 (N.D. Ohio 1913); adultery, *Grievance Comm. of Hartford Bar v. Broder*, 112 Conn. 263, 152 Atl. 292 (1930); extortion, *People ex rel. Healy v. McCauley*, 230 Ill. 208, 82 N.E. 612 (1907); embezzlement, *People v. Mead*, 29 Colo. 344, 68 Pac. 241 (1902); keeping a brothel for white and Negro girls, *In re Marsh*, 42 Utah 186, 129 Pac. 411 (1913); bigamy, *U. S. v. Williams*, 200 Fed. 538 (2d Cir. 1912).

¹⁶ There is no violation of equal protection or due process in making a conviction conclusive as to disbarment. *In re Casebier*, 129 Kan. 853, 284 Pac. 611 (1930). But an attorney can be disbarred for an indictable crime of which he has not been convicted. *Ex parte Wall*, 107 U.S. 265 (1883).

and violations of liquor laws¹⁷ constitute grounds for rejection or disbarment. Few courts, if any, will hold that objectionable personal mannerisms, vile language, or fornication are justifiable grounds for disbarment or rejection.¹⁸

Only one standard of conduct is said to exist for a member of the Bar; he cannot maintain one standard for the practice of law and another for his private life.¹⁹ Moreover, if once a person—either applicant or member of the Bar—falls below the proper standard, there is a presumption that he will remain delinquent; it is a difficult task for such a person to convince the grievance committee of his present good character, and that he is willing to conform to the required standards of the legal profession.

Concealment of charges of crimes involving moral turpitude is one of the most prevalent reasons for rejection of an applicant or for subsequent disbarment. Whether there was a conviction, acquittal or nolle prosequi is immaterial; a board of admissions wishes to make its own inquiry as to guilt, and concealment is a type of fraud barring such inquiry.²⁰

¹⁷ *State v. Johnson*, 174 N.C. 345, 93 S.E. 847 (1917); *State v. Edmunson*, 103 Ore. 243, 204 Pac. 619 (1922).

¹⁸ *In re Brown*, 389 Ill. 516, 59 N.E. 2d 855; (1945); *in re Washington*, 82 Kan. 829, 109 Pac. 700 (1910); *In re Mills*, 1 Mich. 392 (1850); *In re Elliott*, 73 Kan. 157, 84 Pac. 750 (1906); *People ex rel. Black v. Smith*, 209 Ill. 241, 124 N.E. 807 (1919); *In re Holton*, 36 R.I. 114, 89 Atl. 242 (1914); *In re Turner*, 104 Wash. 776, 176 Pac. 332 (1918); *Shaeffer v. State Bar of Cal.*, 26 Cal. 2d 739, 160 P. 2d 825 (1945); *In re Ellis*, 359 Mo. 231, 221 S.W. 2d 139 (1949); *In re Halpern*, 265 App. Div. 240, 38 N.Y.S. 2d 630 (1st Dept. 1942); *State v. Farmer*, 253 Wis. 232, 33 N.W. 2d 135 (1948); *In re Isserman*, 6 N.J. Misc. 146, 140 Atl. 253 (1928).

¹⁹ *Grievance Committee v. Broder*, *supra*, n. 15. *Cf. Bradway, Moral Turpitude As the Criterion of Offenses that Justify Disbarment*, 24 CAL. L.REV. 9 (1935); *Tucker, The Lawyer as a Business Man*, 3 AM. L. SCH. REV. 109 (1912); 79 U. OF PA. L. REV. 506 (1931); 5 TEMPLE L. Q. 649 (1931).

²⁰ *In re Patlak*, 368 Ill. 547, 15 N.E. 2d 309 (1938); *In re Phillips*, 17 Cal. 2d 55, 109 P.2d 344 (1941); *State v. Rogers*, 266 Wis. 39, 275 N.W. 910 (1937) (effect of pardon); *State v. Snyder*, 136 Fla. 875, 187 So. 381 (1939); *In re Rudd*, 310 Ky. 630, 221 S.W. 2d 688 (1949); *In re Bozarth*, 178 Okla. 427, 63 P.2d 726 (1936); *In re Doe*, 95 F.2d 386 (2d Cir. 1938); *In re Williams*, 342 Mo. 542, 122 S.W. 2d 882 (1938).

II. The Conscientious Objector

*In re Summers*²¹ exemplifies the attitude of the United States Supreme Court in allowing the states full rein over the interpretation of requisite moral standards as well as over admissions to the bar generally. Unless there is a clear contravention of constitutional rights, the Court will not intervene.

The Committee on Character and Fitness of the Illinois Bar held that Summers, an admitted conscientious objector, could not honestly swear to the oath of office to support the Illinois Constitution, due to a provision therein for calling all men of his age into the militia in case of an emergency. For that reason the Committee refused to issue a certificate that he was of such moral character as to be allowed admission to practice law in that state. The decision was upheld by the Illinois Supreme Court.

The United States Supreme Court, Justice Black dissenting, concluded that Summers had not been denied due process, and it emphasized that he was not barred because of his religion but because under the state interpretation of its constitution he could not take the oath of office in good faith.²² The majority relied on *United States v. Schwimmer*²³ and *United States v. Macintosh*,²⁴ which interpreted the Federal naturalization laws as denying naturalization to alien conscientious objectors who were unwilling to bear arms. *Girouard v. United States*²⁵ later overruled these cases on the statutory interpretation point, but apparently did not affect the validity of the *Summers* case as to the constitutional issue. However, it will undoubtedly influence state courts' interpretations of their states' requirements for admission to the bar, so far as willingness to serve the country is concerned.

²¹ 325 U.S. 561 (1945).

²² For similar result in case involving conscientious objectors who would not take required military training in land grant colleges, see *Hamilton v. Regents of California*, 293 U.S. 245 (1934).

²³ 279 U.S. 644 (1929).

²⁴ 283 U.S. 605 (1931).

²⁵ 328 U.S. 61 (1946).

Although ready to accept the *Girouard* approach and concede that conscientious objectors should not be denied law licenses, the writer advocates requiring a *great* amount of proof that *only an applicant's faith in religion* imposes mental reservations on any oath to serve his state or country. Otherwise, the Bar might be opening its doors to persons of the same ilk as some who, during World War II, were propelled into the ministry less by religious beliefs than by fear of the draft.

III. Communists

The *Summers* case involves the right to practice law of an extreme pacifist who is unwilling to bear arms in defense of the country. At the opposite pole is the Communist who asks admittance to a Bar which is an integral part of the institutions he seeks to destroy. No American case seems to have considered whether adherence to Communism is a proper ground for excluding an applicant from the practice of law; however, a Canadian case, *In re Martin*,²⁶ has passed directly thereon.

Martin, a diligent student of unquestioned morals, had satisfied all formal requirements for admission to the British Columbia Bar. The Benchers of the Law Society decided that since he was an admitted Communist or Marxian Socialist, Martin was not fit for membership in the Bar. They felt that even though Martin was willing to take the required oath of office, he could not do so "without any equivocation, mental evasion or secret reservation;" and indeed, that for him to take the oath would cast serious doubt on his intellectual honesty. On appeal, the Supreme Court of British Columbia refused to set aside the decision of the Benchers, irrespective of any hardship on the petitioner.

In the United States the conviction of the eleven Communist leaders,²⁷ if affirmed by the Supreme Court, would seem to suggest a similar result. If adherence to Communism violates a criminal statute—Section 3 of the Smith

²⁶ 1 D.L.R. 105 (1949); 2 D.L.R. 559 (1949).

²⁷ U.S. v. Dennis, 183 F.2d 201 (1950).

Sedition Act²⁸—and if that statute is constitutional, it would seem that the Bar is under no obligation to grant admittance to one who is violating the law. It would scarcely conduce to respect for our legal system to have as participants therein persons who are continuing to take part in what has been adjudicated an illegal conspiracy to overthrow the government.

Moreover, if a lawyer has been a Communist during the period that the Smith Act has been in force, his disbarment might be proper, for guilt of a substantial crime is usually considered a sufficient showing of bad character to justify disbarment. On the other hand, such a person might reply that until the prosecution of the Communist leaders, it was in no way clear that the Communist Party was violating the Smith Act. Accordingly, he could argue that something more than membership in the Party was necessary to show a state of mind that would imply moral unfitness.

Recently the American Bar Association adopted a resolution proposing that anyone who wished to become or remain a member of the Bar be required to take an oath "whether he is or ever has been a member or supporter of any organization that espouses the overthrow by force or by any illegal or unconstitutional means of the United States government or the government of any of the States or Territories of the United States." Under the resolution, if the affidavit reveals membership, the affiant is to be investigated to determine his fitness to be an attorney.²⁹

Opposition to this resolution has developed both on policy grounds and on the ground that it creates constitutional problems. A constitutional assault on this proposed loyalty oath would, however, have to reckon with several recent cases that have sustained the constitutionality of similar oaths. In *Communications Association v. Douds*³⁰ the Supreme Court upheld the loyalty oath required of union officers under the Taft-Hartley Act to the effect that affiant

²⁸ 62 STAT. 808 (1948), 18 U.S.C.A. § 2385 (1951).

²⁹ See 36 A.B.A. J. 922 (Nov. 1950). See also 37 A.B.A. J. 123 (Feb. 1951); 37 A.B.A.J. 320 (April 1951 (Resolution reaffirmed)).

³⁰ 339 U.S. 382 (1950).

was not a member of or "affiliated with" the Communist Party; indeed, by an equally divided vote, the Court even upheld that portion of the oath stating that the affiant does not "believe in" the overthrow of the United States Government "by force or by any illegal or unconstitutional means." The oath was justified as a proper exercise of the power over interstate commerce in order to prevent "political strikes."

More recently, in *Gerende v. Board of Supervisors of Elections of Baltimore City*,³¹ the Court upheld the affidavit required of political candidates under Maryland's Ober Law. This oath is to the effect that the candidate is not engaged "in one way or another in the attempt to overthrow the government by force or violence," and that he is not knowingly a member of a group engaged in such an attempt. As construed by the Maryland Court of Appeals,³² it does not require any affirmation as to the beliefs of the affiant.

Since the interest of the States in having lawyers who will uphold the system of administration of justice is scarcely less significant than the interest of the United States in having interstate commerce free from interruptions by Communist-fomented strikes, or the interest of the state in not having its ballots bear the names of Communist candidates, the Bar Association's suggested loyalty oath would seem to be sustainable. Especially is this so in view of the Supreme Court's policy—evidenced in the *Summers*³³ case—of allowing as much autonomy as possible to the states in determining who is entitled to practice in their courts.

Moreover, the *Douds* and the *Gerende* cases would support the proposed oath against any argument of vagueness. Apparently under those cases phrases like "supporter of" or "affiliated with" the Communist Party are not unconstitutionally ambiguous and sufficiently specify the wrong desired to be prevented.

Perhaps the proposed loyalty oath might be assailed as a bill of attainder within the constitutional prohibition as to

³¹ 19 L.W. 4209 (April 12, 1951).

³² *Shub v. Simpson*, 76 A.2d 332 (1950).

³³ *Supra*, n. 21.

either State or Federal action. *Cummings v. Missouri*³⁴ held it to be a bill of attainder for Missouri to require an oath from ministers, attorneys, and other types of professional men that they had not supported the Confederacy during the Civil War. Without such an oath they would not be allowed to continue in their professions. Cummings, a Catholic priest, successfully contended that this Missouri requirement, although directed towards a broad class, was nevertheless a legislative act inflicting punishment without judicial trial, the punishment being exclusion from the specified professions of anyone for whom taking the oath was an impossibility.

Ex parte Garland,³⁵ decided the same day, involved a Federal statute requiring a loyalty oath that one had never supported the Confederacy as a prerequisite for practice in the Supreme Court. The exclusion from the practice of law, "or from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct,"³⁶ and, being a legislative action directed toward an ascertainable group, was held to be a bill of attainder. The Court, in the *Doubs* case,³⁷ refused to call the loyalty oath provision of the Taft-Hartley Act a bill of attainder, one distinction being that this oath related only to present beliefs and future conduct rather than, as in the *Garland* and *Cummings* cases, to past conduct. Accordingly there was no exclusion from certain rights by virtue of past conduct³⁸—which the Court seemed to feel was necessary to constitute a bill of attainder.

Since exclusion from the practice of law can be a punishment, the American Bar Association's proposed loyalty

³⁴ 71 U.S. 277 (1867).

³⁵ 71 U.S. 333 (1867).

³⁶ *Id.* at p. 377.

³⁷ *Supra*, n. 30.

³⁸ One of the other leading authorities on bills of attainder is U.S. v. Lovett, 328 U.S. 303 (1946), which held unconstitutional a congressional attempt to keep Lovett and two other named individuals from holding government jobs. In the state courts, one of the most recent decisions on bills of attainder is that of the N.Y. Court of Appeals in regard to certain provisions of the Feinberg Law. See Thompson v. Wallin, 95 N.E. 2d 806 (1951).

oath might be a bill of attainder if it produced such exclusion. However, the oath is couched in such terms as to be merely a basis for an investigation and does not automatically result in exclusion; therefore, it does not seem to be punishment for past conduct as such. On the other hand, in view of the probable attitude of grievance committees that membership in the Communist Party is conclusive as to moral unfitness, and of the strong presumption of a continuance of moral unfitness, it is likely that in practice the oath would result in disbarment of most attorneys who at any time have been Communists or fellow-travelers.

The *Garland* case took great pains to emphasize that an attorney is unlike a civil servant holding an office created by the legislature, and to some extent it treated the practice of law as an "ordinary avocation." Under such an approach disbarment of lawyers who were former Communists—and requiring a loyalty oath from applicants for admission—would seem no more permissible than refusing to allow Communist plumbers to practice their trade. But the long emphasis on the right of the courts to limit admission only to persons of moral fitness signifies that in some respects an attorney is in an entirely different position from one who is engaged in an "ordinary avocation."³⁹ Moreover, the *Cummings* and *Garland* cases were decided during Reconstruction when the majority of the Supreme Court was probably desirous of being conciliatory to the vanquished South; accepted at face value the protestations of loyalty by defeated Confederates; and, in view of that acceptance, felt that past action of Confederates had no bearing on subsequent moral fitness to practice law. The current judicial attitude towards Communists, on the other hand, is scarcely conciliatory, for the courts are justly skeptical of claims that the Communist Party is not engaged in plotting revolution, and would be prone to assume that past disloyalty is still operative.

The *Cummings* and *Garland* cases also held the statutes there involved to be invalid as *ex post facto* laws. As to this

³⁹ See authorities cited in note 1.

point, too, the American Bar Association's proposal can be distinguished on the ground that the oath required is merely a prelude to investigation of *present* fitness, and not a punishment for past conduct.

Would the oath infringe the privilege against self-incrimination in that it might require disclosure of conduct which was a violation of the Smith Act, or which would at least tend to incriminate under the Smith Act? In view of the long tradition that an attorney must make full disclosure to grievance committees and that an applicant can not conceal anything which the Committee on Moral Fitness might feel to be relevant, the oath would seem to be sustainable. Certainly it goes no further than requiring a business man under OPA regulations to keep books which may incriminate him.⁴⁰ In both instances it can be cogently argued that if he wishes to avoid disclosure, the person involved should go into another business or profession.

IV. Conclusion

The "right" to practice Law is protected against arbitrary deprivation. However, it depends on high moral character and legal training. The State Bar is allowed great autonomy in determining moral fitness, and its determination will be sustained despite an incidental impingement on freedom of religion, speech, belief or political organization. Because of the high standing of lawyers in the community, the vital nature of the administration of justice, and the ability of a few dissident lawyers to bring justice into disrepute, the argument is strong that a state can require a loyalty oath—even a partially retrospective oath like that the American Bar Association proposes—to protect itself from subversion of such an important function. The counter-argument on both constitutional and policy grounds is that the state can not and should not go too far in making requirements that might lessen the ability of the Bar to be independent, and its willingness to handle unpopular cases.

⁴⁰ Cf. *Shapiro v. U.S.*, 335 U.S. 1 (1948).

