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Who Shall We Admit to Our Club?

by Professor Lawrence Raful



“Please accept my resignation. I don’t care to belong to any club that will accept me as a member.”

Groucho Marx, *The Groucho Letters* (1967)

The Nebraska Supreme Court and the Supreme Court of Illinois have recently denied petitions from prospective applicants to the bar because each appellant failed to satisfy the respective state’s character and fitness requirements. On first reading of the two cases, I was troubled by the standards used, and so this article is an attempt, as much as anything, for me to work out in my mind how I feel about the positions each Court has taken in these cases. You’re invited to join me on this little excursion.

The Nebraska Supreme Court, in *In re Application of Converse*, 258 Neb. 159 (1999), affirmed the decision of the Nebraska State Bar Commission to deny Paul Converse’s request to take the 1998 Nebraska bar examination. Converse graduated from the University of South Dakota Law School and applied to sit for the bar exam in Nebraska, but the Commission denied his request because they found that he “lacked the requisite moral character for admission.” Converse, prone to hostile and disruptive behavior in law school, appealed to the Supreme Court on the grounds that the speech and conduct upon which the Commission’s denial was based, was protected by the First Amendment. The Court reviewed the Commission’s ruling *de novo* on the record, and a unanimous court

found that while Converse’s conduct may well be protected by the First Amendment, the Commission properly considered his conduct as part of the review.

A recent case from Illinois also focuses on the character and fitness issues. The Committee on Character and Fitness for the Third Appellate District of the Supreme Court of Illinois, with one dissent, decided in June, 1999 that Matthew Hale, who had graduated from law school and passed the state bar examination, did not meet the required character and fitness standards for admission to the bar. Hale, an avowed racist and head of a white supremacist organization, appealed to the Illinois Supreme Court for a full review of the Committee’s ruling. The Supreme Court, with one dissent, on November 12, 1999 denied Hale’s motion for oral argument and review.

Has the Nebraska Supreme Court excluded an applicant simply because he was different, perhaps odd, maybe even flamboyant? Has the Illinois Supreme Court denied an applicant admission because of political ideology and protected speech?

Admission to practice law in Nebraska, or in most states, is not mysterious business. If you graduate from an accredited law school, score a passing grade on the bar exam, and fulfill the character and fitness requirements imposed by the state’s highest court, you will be admitted to the bar. In legal ethics classes in law school, and in the textbooks we use in those classes, we don’t spend much time discussing admission to the bar, because the cases are relatively few and mostly uninteresting. The only discussion concerning the admission to practice standards is centered on what constitutes acceptable character and fitness.

Prior to this century, admission to the bar was by invitation only - that is, invitation to those of the proper heritage. Bar associations were organized and character and fitness standards were adopted in large cities in the East to keep people out, not to bring people in. Italian, Irish, and Jewish immigrants were deterred by such require-

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ments in the late 19th and early 20th centuries, and women and people of color were ostracized. However, the opening of new law schools in the early part of this century, many of which were designed for "new Americans," (like Creighton, for instance) hastened access to the bar for some of those previously excluded.

The U.S. Supreme Court has handed down a number of significant opinions that have molded modern bar admission practices. Two important principles come from those cases. The first is that character and fitness requirements must have a rational relationship to an attorney's fitness to practice law. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). Secondly, due process guarantees must be met in the determination of character and fitness. *Willner v. Committee on Character*, 373 U.S. 96 (1963). Although it has been challenged on a number of occasions as a vague standard, many courts have upheld the use of the term "good moral character" as a requirement for admission, if for no other reason than that the law profession has used the term for hundreds of years.

One of the most interesting set of cases to come before the U.S. Supreme Court were those dealing with oaths and political beliefs. While bar associations have never been as interested in keeping out applicants who admit to popular but illegal sexual activity, reckless or perhaps even immoral financial decisions, and even common criminal convictions, they were for a time vigilant in seeking out godless Communists and others with unpopular political views. A "trilogy" of famous Supreme Court cases in 1971 found the middle ground: you can't deny admission to practice based on membership in the Communist Party or other organizations, but you may ask if the applicant was a "knowing member" of an organization which advocated the violent overthrow of the government, and if so, did the applicant support that goal. Furthermore, the cases affirmed that each state may require an applicant to take an oath of loyalty to the U.S. Constitution. See *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), *In re Stolar*, 401 U.S. 23 (1971), and *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971).

Against that brief background of cases about admission to practice law, let's look at the applications of Converse and Hale.

The Nebraska State Bar Commission investigation revealed that Converse, in the words of the Court, is "prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one seeking admission to the Nebraska Bar." Converse, in his mid-40's while in law school, clearly was not a model law student. He vigorously wrote letters of protest and appeal to administrators, professors, newspapers, and judges. He called on students to adopt his disquieting views on numerous matters in the law school, and he accused faculty and deans of deceit, censorship, incompetence, and arrogance. While at times Converse had open to him certain administrative grievances procedures, he admitted that he routinely failed to use those procedures.

As a foundation for this decision, the Court relied on a similar denial of admission in an earlier case. *In re Appeal of Lane*, 249 Neb. 499 (1996). The Court characterized Converse in the same manner as it had described Lane: "disruptive, hostile,

intemperate, threatening, and turbulent." The Court noted that it seeks to find applicants who can prove their "honesty, reliability, diligence, and trustworthiness." And the Court, citing some of the U.S. Supreme Court cases mentioned above, noted that neither requiring an applicant to answer questions about previous behavior, nor the resulting investigation into those acts, is an infringement of a person's constitutional rights.

Even more to the point, the Court went out of its way to make sure that Converse knew that it was *not* denying his application because of what he said, *not* because of the letters he sent, *not* because of the newspapers columns he published, *not* because of the nude picture he insisted on posting in his study carrel, and *not* even because of the rude t-shirt with the caricature of the dean which he distributed. No, Mr. Converse, the Court wrote, we are not denying your petition because of your thoughts, but because of your deeds. Converse's failing was his humiliating and intimidating

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personal attacks on institutions and individuals with which he has disputes. The Court seeks applicants and lawyers who practice with self-restraint and seek to resolve disputes in a peaceful manner.

Contrast Converse with Hale of Illinois. Matthew Hale is Supreme Leader of the World Church of the Creator, an organization based on white supremacy and hatred of Jews, blacks and other people of color. Hale disavows violence and the forcible overthrow of the government. His church seeks to have members gain power through lawful, political, peaceful means, and once in power, it would organize the deportation of all people of color and all Jews.

Hale stated that he would affirm the oath to support the Constitution, although he would seek to have current interpretations revised. He would also support the Illinois ethics code, treating in a nondiscriminatory manner all lawyers, judges, clients and witnesses regardless of race or religion. Again, he stated that he would seek to have that particular section revised in accordance with his views. Evidence before the committee confirmed his testimony that while in law school, he had assisted, without racial animus, African American clients.

The Committee denied Hale's request for admission. It started by working its way through the now famous "trilogy" of 1971 U.S. Supreme Court cases (see above), appropriately citing *Baird v. Arizona* for the proposition that a state is prohibited from "excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." But then it makes a glacier-sized leap that the difference between *Baird* and Hale is that the petitioner in *Baird* held views in secret, while Hale espouses his views publicly. (Quite frankly, I didn't follow that line of reasoning.)

The Committee declared that the Bar and the courts stand for certain "fundamental truths," although since it posited these truths in this opinion and failed to cite any public document or court decision which institutionalizes these precepts, I must wonder if these are "fundamental truths" or simply value judgements of this particular group of people. It invokes the name of Thomas Jefferson to stand for the proposi-

tion that all men are created equal, and therefore it cannot let Hale destroy that value. Of course, if you want to play "dueling Jefferson quotes," you can also quote our third President when he said in his inaugural address: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is let free to combat it."

The Committee finally rested its decision on the proposition that the fundamental truths that it identified "must be preferred over the values found in the First Amendment." It finds support for this decision because the Supreme Court allowed enhanced penalties for hate crimes in *Wisconsin v. Mitchell*, 508 U.S. 476 (1992), which it interprets to mean that protecting society from this type of harm (racial hatred) trumps an individual's First Amendment rights. But the Committee has mis-read the opinion, and it is a mistake to base the Committee's result on *Wisconsin v. Mitchell*.

The U.S. Supreme Court overturned a hate crimes statute in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) and then later upheld



the Wisconsin hate crimes statute, but the differences in the two cases are most enlightening when using them to discuss bar admission standards. *R.A.V.* described the burning of a cross by white teenagers on the lawn of a black family that lived across the street from the petitioner. The teens were charged with violation of a St. Paul city ordinance, a so-called "Bias-Motivated Crime Ordinance" which provided that whoever places symbols "which one knows or has a reasonable grounds to know arouses anger, alarm or resentment in others on the basis of

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of race, color . . . shall be guilty of a misdemeanor.” Justice Scalia, writing for a somewhat fractured court, disagreed with St. Paul’s characterization of this statute as a “fighting words” ordinance (I am sure you remember *Chaplinsky v. New Hampshire* from Con Law class). Rather, he explained, the statute applies the fighting words formula only to those words that provoke hostility based on race, color, etc., i.e. “specified disfavored topics.” Scalia wrote that the Constitution “does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.” Further, he noted:

“ . . . the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. “

The Court, only a year later, addressed a slightly different issue in *Wisconsin v. Mitchell*. This case described a group of black teens who had just viewed the movie “Mississippi Burning” and decided that, in response to the attack in the movie when a black child is victimized by a white man, they would attack a white person. They went out to the street, observed a white boy walking towards them, and Mitchell said, among other things, “There goes a white boy; go get him.” They attacked the boy and a jury convicted Mitchell of aggravated battery. However, the jury also found that Mitchell had selected his victim because of the boy’s race, and the penalty was increased from two years to seven years under the Wisconsin penalty enhancement statute. The statute called for penalty enhancement when, among other provisions, the assailant “(I)ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person”

It would not surprise you that the Wisconsin Supreme Court denied the constitutionality of the statute, basing its decision on the year-old *R.A.V.* opinion. But Chief Justice Rehnquist, writing for an unanimous U.S. Supreme Court, explained that the previous case was about “bias-motivated hatred” and an ordinance which “proscribed a class of

fighting words” while the statute in this case is aimed at conduct unprotected by the First Amendment. “ Yes, the Chief Justice said, it’s fine to write a statute that takes into account inflicting societal harm, but the statute in this case singled out biased-inspired conduct, not bias-inspired words. The U.S. Supreme Court reversed the Wisconsin Supreme Court’s decision because the penalty enhancement statute did not violate the defendant’s free speech rights. The Illinois Committee on Character and Fitness then incorrectly used *Wisconsin*

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v. Mitchell as a basis for their decision, because in reality they considered Mr. Hale’s bias-motivated speech. The record did not reflect any bias-motivated criminal conduct.

One last quibble, personal rather than legal, with the Committee’s decision: in its eloquent and passionate conclusion, the majority quotes Justice Robert Jackson from an important 1943 case about the Bill of Rights, and then it reminds us that Justice Jackson was America’s chief prosecutor at the Nuremburg war trials. It quotes a paragraph about Jewish extermination from William L. Shirer’s famous investigation of Nazi Germany, *The Rise and Fall of the Third Reich*, and they remind us that like Hale, Hitler, too, gained power legally and constitutionally, and perhaps like Hitler, thoughts of extermination may be in Hale’s future.

Nonsense, utter nonsense, and what’s more, this is an insult to America! Germany in 1933 is **nothing** like American now, or years ago, or years from now. Take a look at

Daniel Goldhagen’s marvelous and absolutely chilling masterpiece *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust*. With all due respect to modern Germany, the German people of 1933 were not like any society in American history. Their mindset, their history, their form of government, their long held prejudices, and their *weltanschauung* had produced a political ideology that has never been replicated in American populist views. To raise the specter that in the future Matthew Hale would win wide-spread converts and duplicate in some way Nazi Germany is not only insulting to Americans, but it suggests an abysmal outlook and lack of any confidence in the continuation of the American way of life. Sure, we have our nut cases – the KKK and the Posse Comitatus still live in our country – but even in our darkest hours, the legacy of Peter Zenger, John Adams, Thomas Jefferson, and other heroes of freedom, lives on.

I don’t speak about the Nazi threat from isolation. I know what the Nazi’s did in World War II, because my mother, a Hungarian, wore the Yellow Star, rode the cattle car to concentration camps, and ended the war while barely surviving the now infamous Helmsbrecht Death March. My mom will be troubled when she reads that I am not sure that we can deny Matthew Hale a license to practice law, and it pains me even to suggest that this hate monger should belong to the same profession as I. But Mom is an American citizen now and she understands, I think, that the Bill of Rights is like no other document in the history of the world. If it’s to mean anything, it has to include scum like Hale. But I digress.

One member of the Hale panel dissented from the Committee decision, because until “there is such conduct, . . . belief . . . cannot be the basis of denial,” and the Rules of Discipline are the manner to protect the profession and the public. And that is the better use of *R.A.V.* and *Wisconsin v. Mitchell*. Hale has not broken the law, nor, supposedly, does he intend to break the law. Hale intends to support the Constitution and the rules of professional responsibility. If, later, Hale’s hateful conduct is based on hateful thought, then let’s throw the bum out. If it’s simply hateful thought, it should be protected.

Now here’s the real problem I have with the Hale case: Hale appealed the Committee’s

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denial to the Illinois Supreme Court. Many of us in the legal ethics arena were interested to see how that court would resolve this fascinating case. But amazingly enough, it whiffed. Without any opinion, and with one dissent, it declined to take the case. Score one point for the Nebraska Supreme Court, for it was at least willing to jump into the odious matter of Paul Converse's behavior.

Illinois Supreme Court Justice Heiple wrote the dissent, a strongly worded viewpoint that this "constitutional question deserves explicit, reasoned resolution by this court." Heiple mocks the Committee's opinion that the Hale case is not about First Amendment rights with his rejoinder that "to the contrary, this case clearly impacts . . . the first amendment to the federal Constitution." And Heiple worries about the fact that the Committee denied Hale's application because of what he might do in the future to violate the rules of professional

conduct. Heiple believes that the Supreme Court should take a close look at denial based on speculation and predictions. This dissenter's view is that this case is of such "significant constitutional magnitude" that the Supreme Court of Illinois, which has the sole power to admit and to disbar, has the obligation to review this decision.

It's my view that the Nebraska Supreme Court got it right. Conduct is different from belief, and our Court admitted that even limited antisocial conduct might not be enough to deny an applicant's petition for admission to our profession. But Converse had a history of conduct that we do not value nor approve, and it's conduct that's more than odd, different, weird or quirky. If a lawyer engaged in such conduct, the Bar Association would undoubtedly instigate a disciplinary review. As a matter of fact, you and I know of attorneys and judges who have been disciplined for behavior that mirrors some of Converse's characteristics.

The Hale case is tougher. I would have been happier if the Illinois Supreme Court took the case on review. I would have been even happier if it could have crafted an opinion that kept Hale from our profession, but I'm not certain it's possible. The Committee's decision is weak and leaves me unfulfilled. I don't admit to being a First Amendment scholar, but the line of reasoning just doesn't lay a strong foundation for me to believe that it is denying his application for something **other** than political ideology. And if that's what it is really doing, whether it knows it or not, it's unconstitutional. —

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