Who Shall We Admit to Our Club?

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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.”


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-
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 rela-
tionship 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 chal-
lenged 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. Further-
more, 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.

Against that brief background of cases about
admission to practice law, let's look at the
applications of Converse and Hale.
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 judgments of this particular group of people. It invokes the name of Thomas Jefferson to stand for the proposition 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 misde-
meanor." 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 protec-
tion 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 in-
creased from two years to seven years under
the Wisconsin penalty enhancement statute.
The statute called for penalty enhancement
when, among other provisions, the assailant
“(1) intentionally selects the person against
whom the crime . . . is committed . . .
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
Nuremberg war trials. It quotes a para-
graph 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

“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.”

Daniel Goldhagen’s marvelous and abso-
lutely 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 politi-
cal 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 confi-
dence 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.

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Helmsbrecht Death March.
denial to the Illinois Supreme Court. Many
of us in the legal ethics arena were inter-
ested 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 Constitu-
tion.” And Heiple worries about the fact
that the Committee denied Hale’s applica-
tion 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
dissent’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.

THE PRESIDENT’S
CENTENNIAL
SEMINAR SERIES

February 18 Omaha

Standing Bear (Civil Rights Case)
1:30 - 4:30 p.m.

Coordinator: Rita L. Melgares

Presenters: The Honorable Edna Atkins,
Robert Broom, Milo Mumgaard,
and Edouardo Zendejas

The Durham Western Heritage Museum
801 South Tenth Street

Reception sponsored by the
Omaha Bar Association to
follow the seminar at 4:30 p.m.