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The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black‡

INTRODUCTION

In its 1960 term the United States Supreme Court decided two cases, In re Anastaplo¹ and Konigsberg v. California,² dealing with the denial by a state of applicants for admission to its bar.³ Since the vice of both applicants was a refusal on principle to answer questions about Communist affiliations, the cases represent in perhaps its most poignant form the collision of values involved in our post World War II concerns with governmental scrutiny of individual loyalty. At the level of the Court, each set of values found its judicial champion, producing an extended and often brilliant debate between Justices Harlan and Black.⁴ It is our purpose in this comment to review that debate critically and to assess insofar as we can the underlying issues.⁵

³ The Court also decided a third Bar case, Cohen v. Hurley, 366 U.S. 117 (1961), on the April 24 decision day. Hurley involved the constitutionality of the disbarment of an attorney who invoked the privilege against self-incrimination in a state inquiry into “ambulance chasing.” In a 5 to 4 decision the Court upheld the state’s action. The case is an important new precedent on the Fifth Amendment, and richly deserves comment, but it seemed to us sufficiently removed from the special context of Anastaplo and Konigsberg to warrant our excluding it from the present discussion. It is noteworthy that in these three Bar cases the Supreme Court was divided 5 to 4 in affirming the state court decisions and that, in each case, one of the most distinguished of contemporary state court judges had registered a dissent: Justice Traynor of California in Konigsberg, Justice Schaefer of Illinois in Anastaplo, and Justice Fuld of New York in Hurley.

⁴ There has been considerable discussion recently of the quality of the Court’s performance, with some critics urging that it does not have time for the “collegial” discussion necessary for the thorough canvassing of the issues before it. See Hart, Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 HARV. L. REV. 84 (1959); Arnold, Professor Hart’s Theology, 73 HARV. L. REV. 1298 (1960); and compare Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). Whatever the merits of this criticism in other cases, the Black-Harlan debate in the Anastaplo and Konigsberg cases is an instance of an impressively careful review of the issues.

⁵ We deliberately put to one side two underlying issues that clamor for atten-
I. THE EARLY BACKGROUND

The general issue is that of the constitutionality under the federal constitution of a state's regulation of admission to or membership in its own bar. Presumably because the conditions for entry established by the states have been normally closely related to professional criteria of education and character, there has been little occasion in the past for constitutional challenge to bar standards. In fact, the state's right to control its own bar has almost, until very recently, been regarded as an area where the federal government should not intrude. In any event, until the 1957 decisions in the first Konigsberg case and in Schware v. New Mexico, there was very little constitutional law on the problem. However, two earlier decisions, Ex parte Garland in 1866 and In Re Summers in 1945, are still relevant and must also be discussed to set the frame for the current controversies.

Garland is well known as one of the Court's two historic pronouncements on bills of attainder, but it has a more specific relevance for us. The case arose in the aftermath of the Civil War and involved an 1865 federal statute requiring that all federal officeholders and all members of the federal bar take an oath disclaiming participation in the Confederacy. Garland, who had been admitted to the Supreme Court bar in 1860, was a citizen of Arkansas and went with his state in 1861 when she seceded. He served in the Congress of the Confederacy as a representative from Arkansas throughout the war. In 1865 he received a full pardon from the President for his participation in the Civil War and then sought readmission to the federal bar...
THE BAR ADMISSION CASES

without taking the oath. The Court in a five to four decision held that the oath was invalid and that Garland was entitled to admission. The Court reaffirmed the position it had taken in the companion case, *Cummings v. Missouri*,\(^\text{10}\) that the oath, since it penalized past conduct, operated as a bill of attainder and as *ex post facto* punishment, and held also that in any event the Presidential pardon had erased any guilt on Garland's part for participating in the Confederacy. "It is not," said Mr. Justice Field for the majority, "within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."\(^\text{11}\)

The *Garland* case does not reach the issues in the contemporary controversies. There is the special feature of the Presidential pardon, but the Court is explicit that this is only a supplementary ground for decision and that the oath is invalid generally. There is the fact that federal legislation is involved but again the Court by its reliance on *Cummings* suggests strongly that the result would have been the same had this been a state statute under attack. There are the special policy issues raised by the efforts at amnesty after the Civil War and the special vices of the oath required; and, since the case antedates the adoption of the Fourteenth Amendment, it can offer little guidance on the application of the general criteria of due process. And, finally, whereas Anastaplo and Konigsberg were applicants to the bar, Garland had already been admitted and the oath had the additional weakness of operating like a disbarment. Nevertheless, the case remains relevant as historic evidence of the Court's willingness to review, with vigor, qualifications laid down for the practice of law, and also because of its view as to what a lawyer is. A lawyer, the Court stresses, is not an officer of government who holds his place as a matter of governmental grace; he is an officer of the court.

Although the main thrust of the dissent is on the technical meaning of the attainder and *ex post facto* provisions, the relevance of *Garland* for today ironically comes out most sharply when we turn to the dissenting opinion of Mr. Justice Miller. The dissenters pick up themes which have strong reverberations in the opinions of the moment. We are reminded of the importance of judicial self-restraint — the holding of state or federal enactments unconstitutional "is the exercise of an extremely delicate power." The legislatures are as much under a duty to follow the Constitution as is the Court.

\(^{10}\) *4 Wall.* (71 U.S.) 277 (1866).

\(^{11}\) *Id.* at 381.
The substantive concerns which generated the post Civil War oaths appear not so different from those which, since World War II, have generated our policy against domestic Communism—the problem is seen as one of purging the ranks of traitors. The practice of law is "... a privilege and not an absolute right." Lawyers are subject to control to the same degree as government officials such as judges, clerks, marshals. And then we are told: "That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me too clear for argument."12

What emerges then, in the first constitutional battle a century ago over qualifications for the practice of law, is the testing of a national policy against subversion not very different from the policies of today. And the bar, along with other activities, is singled out as a sensitive area where the state has the right to require proof of loyalty to government and its institutions. Perhaps the greatest difference is that, in *Garland*, the rebellion has already occurred, and the state is looking back at past activities. The result is a test oath for lawyers which is held unconstitutional by a sharply divided Court. But it is clear after *Garland* that there are constitutional limits to the qualifications that can be set for the practice of law, even though those qualifications are dictated by a concern with national loyalty.

If the problem in *Garland* was that the petitioner had borne arms against the nation, the problem in *Summers* was that he refused to bear arms on its behalf. And if the *Garland* case is to be read as an indication of judicial willingness to scrutinize bar requirements, *Summers* strikes a very different note. It concerns the effort of Clyde Summers — now a distinguished professor of law at Yale and since 1951 a member of the New York Bar — to gain admission to the Illinois bar in 1945. Summers had satisfied all requirements for the bar, but was denied admission on the sole ground that he was a conscientious objector to military service and indeed to the use of violence under any circumstances.

The sincerity of his belief was not questioned, and thus the sole issue presented was whether his stand as a conscientious objector could constitutionally be used by Illinois to bar him from law practice. In a

12 Id. at 382, 385.
five to four decision, the Court, speaking through Mr. Justice Reed, held that the denial of admission did not offend the Constitution. There are two immediately arresting features of the case. First, Summers’ application failed because the Committee on Character and Fitness refused to certify him, and it did so not because of any doubts as to his character, but because it felt that his stand as a conscientious objector made it impossible for him in good faith to take the oath to support the Illinois Constitution, although Summers was quite willing to do so. What is notable here is that Illinois is turning an ordinary oath of allegiance into a test oath, a step which could have alarming consequences. Indeed it was later to deny Anastaplo admission in part on the same ground, although he too was willing to take the oath, and in fact had done so as a member of the armed forces.

Second, there was extraordinary difficulty in getting the case properly before the Court. There was no opinion below, because Illinois insisted that admission to the bar was a ministerial act like the appointment of a clerk or bailiff, and that therefore there was no judicial proceeding below yielding a case or controversy reviewable by the Supreme Court. The Court held that, regardless of what Illinois considered its procedure to be, the claim of admission to the bar and the denial of the claim by judicial order presented both a case and a controversy for judicial review by the Supreme Court. But what is striking is that some eighty years after Garland a major state should have regarded admission to its bar as so peculiarly within its province as not to permit any review by the Supreme Court.

In several respects Summers is a difficult decision to accept today. First, there is the classic difficulty of all conscientious objector cases, namely, the impact on the Quakers, a well-established and admired religious group. While Mr. Justice Reed does say that Illinois could not exclude men from the practice of law simply because they were Protestant, Catholic, Quaker or Jewish, Mr. Justice Black in dissent notes that this is precisely what the Illinois rule will mean in operation, and in fact the Quakers had filed an amicus brief stating that, under the tests applied to Summers, no Quaker acting in good faith could qualify for the Illinois bar. As a purely formal matter, it is true that the Quaker would not be barred because he was a Quaker but because he could not honestly take the oath, but the embarrassment to the good sense of the Court’s position remains and the majority’s handling of the point leaves something to be desired.
Second, there is the fact that Illinois was predicting that Summers’ belief would someday bring him into conflict with his obligations to the state. But here, as Mr. Justice Black points out, the prediction verges on the absurd. Illinois had not called up its militia since 1864 and there was no reason to believe that, should it ever have occasion to do so, it would not follow the federal policy of exempting conscientious objectors from military service. “Thus,” said Mr. Justice Black, “the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics.”

Third, the majority explicitly rested its decision on the naturalization cases such as Schwimmer and Macintosh, but these were overruled a year later in the Girouard case. And while it is true that the Girouard case went only to the construction of the federal statute and not to its constitutionality, it is difficult to believe that it did not deal a fatal blow to the already shaky prestige of Summers as a precedent.

In one respect, however, Summers casts a shadow over the future cases. The Court, confronted with an otherwise qualified applicant, approved a ruling of the Illinois Committee on Character and Fitness that in effect he lacked the requisite character for admission to the bar because he was a conscientious pacifist. It is true that the result can be squared with formal reasoning, as can most holdings, but that the Court chose to decide as it did in the teeth of the common sense absurdity of the result was to prove prophetic of its handling of the current controversies.

II. THE IMMEDIATE BACKGROUND: SCHWARVE

This brings us to the two 1957 cases, Konigsberg v. California and Schware v. New Mexico. In both the applicant won a constitutional victory, and the judicial climate of opinion appeared to have shifted back to that exhibited in Garland.

Schware, the only unanimous decision in the group of bar cases, is in many respects the single most impressive decision the Court has yet rendered in this area. Not only do the Court’s opinions represent a high water mark of official forgiveness for former Communists, but

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13 325 U.S. 561, 577 (1945).
the New Mexico decision, had it been allowed to stand, might well have expanded the state’s traditional concern with the character of applicants into something akin to the federal loyalty program, limited to applicants to the bar.

Since Schware was thirty-nine years old at the time of his application, his life history was far more complex than that of the usual applicant and is a saga of American Communism in the 1930’s. The Board of Examiners found in it three disturbing items on the basis of which they concluded “he failed to satisfy the Board of the requisite moral character.” He had at one time used aliases; he had been arrested several times; and for some eight years he had been a member of the Communist Party. Placed in their full context, however, these items took on a different appearance. Born of poor immigrant parents, Schware began to work at the age of nine. On leaving school he worked first in the glove industry and then as a longshoreman, and was active in union organizing. The use of an Italian alias at this time turned on a desire on his part to avoid anti-Semitism, particularly as it might affect his union activity.17

He was active in the maritime strikes of 1934 and was twice arrested on suspicion of criminal syndicalism in California, but each time charges were not pressed and he was released after a brief period. In 1940 he was arrested for violating the Neutrality Act by recruiting people for the Loyalist side in the Spanish Civil War. This time the matter proceeded as far as an indictment, but then the prosecution dropped the charges.

Thus, both the uses of an alias and the record of arrests were explained. The Communist affiliation was more complicated. He had joined the Young Communist League in 1932 in the depths of the depression, in his last year in high school when eighteen. He had remained a member until 1937 and then had rejoined, finally quitting in disillusionment after the Nazi-Soviet Pact in 1939.

His record since 1940 had been exemplary. He had served in the armed forces from 1944 to 1946 as a paratrooper. He then finished his college education and began the study of law in 1950. While in school he operated a business to support his wife and two children and

17 There was also an instance of the use of an alias when he was picked up in a mass arrest during a labor dispute in 1924. Mr. Justice Black regards this as inconsequential. See 353 U.S. 232, 241 (1957).
to pay the costs of his professional education. At the start of his law school work, he went to the Dean and disclosed his past Communist affiliation, and, on the Dean's advice, remained in school. His teachers, his fellow law students, his business associates, and his rabbi all joined in testifying as to his character.

The New Mexico Board of Examiners, in denying his application, cited the use of aliases and the record of arrests as well as the Communist affiliation; the state Supreme Court, in affirming the denial, stressed the Communist tie. The United States Supreme Court decision, although unanimous, provided two sets of opinions: a majority opinion by Mr. Justice Black and a concurring opinion by Mr. Justice Frankfurter in which Justices Clark and Harlan joined.

Mr. Justice Black examined each of the three damaging items in turn. He found nothing in the two uses of an alias that "would support an inference that petitioner had a bad moral character twenty years later." He also found nothing in the arrests on suspicion that would reflect on his character twenty years later. And as to the Neutrality Act arrest, he found, even assuming that there was a violation of the Act, no evidence of moral turpitude, given the then contemporary view of the Loyalist cause in the Spanish Civil War. Finally, he stresses the image of the Communist Party at the dates Schware was a member, noting its overt emphasis on full employment, racial equality, and social reform, and the absence of any evidence that petitioner knew of or shared in the illegal purposes of the Party. He then concludes that, even if the three damaging items are considered together as the state urged, in view of the petitioner's subsequent showing of good character over the past thirteen years, "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."18

The majority position is thus striking. The Court is willing to weigh New Mexico's judgment on these complicated facts and to find it so wanting in rational support as to be a denial of due process under the federal constitution.19 There is no deference here to any special claim of the state to determine who shall be members of its own bar. And, by implication, the Court here as in *Garland* is setting admission to the bar apart from the hiring of government employees, for we know

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19 In this the Court follows a path well marked out in other areas, *Fiske v. Kansas*, 274 U.S. 380 (1927).
the Court would not have set aside a discharge under the federal loyalty program predicated on this record.\textsuperscript{20}

The reach of the majority opinion is underscored by the concurring opinion of Mr. Justice Frankfurter. Unwilling to join in reviewing the "delicate judgment" of the Gestalt of character, he reads the opinion of the New Mexico Supreme Court as resting on the past Communist affiliation alone. He too paints a sympathetic picture of the young men drawn into Communism in the thirties "only to have their eyes later opened to reality." And he concludes: "To hold, as the Court did, that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted."\textsuperscript{21}

However one may judge the Court's full record in the bar admission cases, Schware remains an impressively liberal and important contribution.

III. THE IMMEDIATE BACKGROUND: KONIGSBERG I

The first Konigsberg case is integrally related to the 1961 decisions, and requires exploration in considerable detail to set the stage for discussion of Anastaplo and Konigsberg ii. It introduces the new issue discussed in the recent cases. Thus far, we have considered substantive qualifications, and, between Garland, Summers, and Schware, one can perhaps draw a rough line of the constitutionally permissible restrictions on entry to law practice. Konigsberg's application, however, raises a different problem: The question is not whether one who has this or that characteristic can be barred, but rather whether one who refuses to answer a relevant question can on that ground be barred.

Like Schware, Konigsberg at thirty-nine was older than the usual law student when he started his legal education at the University of Southern California in 1950. Once again the Court's review of his life history reads like the biographies that became so familiar under the federal loyalty program. There were certain disturbing items in his record and these, coupled with his refusal on principle to answer whether he had been a member of the Communist Party, appear to have led the California Committee to deny his application on the


\textsuperscript{21} 353 U.S. 232, 251 (1957).
ground that he had failed to dispel doubts both as to his good moral
cracter and as to his advocacy of overthrow of government by force
or violence, which California by statute had made an additional basis
for disqualification.

The California Supreme Court in a four to three decision affirmed
the action of the committee, and the United States Supreme Court
reversed and remanded in a five to three decision, with the majority
opinion again by Mr. Justice Black. Mr. Justice Frankfurter dissented
on a procedural point, and Justices Harlan and Clark agreed with
Frankfurter but went on to dissent on the merits.

The procedural point of Mr. Justice Frankfurter is worth atten-
tion, because, as in Summers, the petitioner was met at the outset with
the state's contention there was nothing for the Supreme Court to
review. The state argued that Konigsberg had not properly preserved
his constitutional objections in the proceedings before the California
court, and that the Court's decision might have rested on a state
procedural rule requiring that a contention be supported by argument
and the citation of authorities, which apparently Konigsberg had failed
to provide in the prescribed form. Since there was no opinion by the
California court, the argument was that it might have denied Konigs-
berg's application on this narrow procedural ground without reaching
the merits. If so, the state's decision would not have raised a federal
question.

Mr. Justice Black treats the point for what it is, a lawyer's after-
thought, and disposes of it impatiently. He reasons that the constitu-
tional objections loomed large in Konigsberg's argument before the
committee, and that it was difficult to believe that the California
Supreme Court split four to three on so small an issue as compliance
with this local procedural rule. He, therefore, feels it safe to conclude
that the California court had passed on the merits and that accordingly
the Supreme Court had jurisdiction. Mr. Justice Frankfurter, adhering,
as might be anticipated, to his belief in the importance in a federal
system of strict adherence to such niceties of jurisdiction, would have
sent the case back to California for certification as to whether or not
the court had passed on the merits. The only consequence would be
delay, and Mr. Justice Frankfurter adds: "The price of such delay is
small enough cost in the proper functioning of our federal system in
one of its important aspects."22

A. The Majority View of Mr. Justice Black

Turning to the merits, Mr. Justice Black drew a distinction which is to prove crucial. The question is whether California was treating the whole complex of the Konigsberg record as one on which to make an evidential determination, much as New Mexico had in the Schware case, or whether it was making the refusal to answer a question in and of itself the ground for barring the applicant. On the first approach the refusal to answer would be considered as evidence along with other items, and the issue would be one of weighing the entire record. On the second approach the other items in the record could be irrelevant, and the refusal to answer alone could have been decisive. He is very explicit about the distinction, and his language warrants quotation:

There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, ipso facto, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply. In our opinion, there is nothing in the record which indicates that the Committee, in a matter of such grave importance to Konigsberg, applied a brand new exclusionary rule to his application — all without telling him that it was doing so.23

Since he concludes California did not have an automatic exclusion rule, he carefully reserves for decision on some later day the constitutional issues that such a rule would raise:

If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is

23 Id. at 260-61.
constitutionally permissible. We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him.24

Thus on Mr. Justice Black's view Konigsberg raised precisely the same kind of issue dealt with in Schware — the rationality of the evidential judgment of the petitioner's character — and he proceeds to weigh the record in much the same fashion. There is much affirmative evidence in Konigsberg's favor: an excellent war record during which he was promoted to captain; strong testimonials from a Catholic priest, a rabbi, lawyers, doctors, professors, business men, and social workers, all of whom have known him intimately; and employment as a supervisor in the Department of Health in the District of Columbia and for the California State Relief Administration. Against this are three items which disturbed the committee: (1) testimony of an ex-Communist that he had attended meetings of the Party in 1941; (2) criticisms of certain public officials and policies; (3) the refusal to answer certain questions. The Committee found he had failed to dispel doubts both as to his character and as to his advocacy of violence.

Turning to the doubts as to character, Mr. Justice Black disposes first of the alleged Communist tie on several grounds. It was based on the testimony of a single ex-Communist witness. It went only to his having attended meetings in 1941 of what appears to have been "some kind of discussion group." There was some uncertainty in the identification, since the witness did not know Konigsberg except from the contact at these meetings. Further, Mr. Justice Black reasons that, even if it be assumed Konigsberg was a Party member in 1941, the issues are then in the same posture as in Schware.

The second item gives Mr. Justice Black little trouble. It concerns a series of editorials written by Konigsberg in 1950 for a local newspaper which were severely critical of the Korean War, "big business," racial discrimination, several decisions of the United States Supreme Court, and the California Tenney Committee. Mr. Justice Black sees in this nothing but that strong expression of political disagreements which democracy must permit. Nor do we.

Coming then to Konigsberg's refusal to answer whether he was a member of the Party or had known certain Communists, Mr. Justice Black reads him as objecting on constitutional principle to the ques-

24 *Id.* at 261-62.
tions, a position which he observes "was not frivolous." Accordingly, he holds that no inference of bad character can be drawn from his refusing to answer. There are two important points here which have relevance for our later discussion. First, a refusal to answer under the First Amendment is a very different matter from a refusal under the Fifth Amendment, whatever one's views of the privilege against self-incrimination. There is no tension between legal norms and common sense in the First Amendment silence, and there cannot rationally be an inference from the silence. Second, Mr. Justice Black finds it unnecessary for the purposes of the case to decide whether Konigsberg's constitutional position was right or wrong; it is enough that it was taken in good faith, and the problem is simply what evidential weight is to attach to such silence.

This disposes for him of any evidence in the record bearing on Konigsberg's character. He is left with the second wing of the committee position, that Konigsberg failed to dispel doubts as to his advocacy of violent overthrow. There are three items that bear on this. First, there is the testimony once again of Communist affiliation in 1941, but the one witness could not remember any statements of violence by Konigsberg or anyone else at the meetings in 1941. Second, there is an editorial in which Konigsberg called for militant support of [America's] noble ideals and the faith of her people." The state solemnly argued that "militant" bespoke violence, but Mr. Justice Black, with commendable restraint, characterized this as "far fetched." Finally, there was Konigsberg's direct denial before the Committee that he did advocate violent overthrow: "I answer specifically, I do not. I never did and I never will." And for good measure there was an editorial in which Konigsberg had said that such advocacy "is un-American . . . Those who preach it should be punished."

Having reviewed the record in this fashion, Mr. Justice Black is now ready to add up the totals. On the one hand there is the strong affirmative evidence of good character; on the other, there are the three or four separate items each of which he has found wanting. The result is as in Schware. There is no evidence in the record which "rationally justifies a finding" that Konigsberg is not admissible. The opinion concludes with an eloquent and relevant peroration on the importance "both to society and the bar itself that lawyers be uninhibited — free to think, speak, and act as members of an Independent Bar."25

25 Id. at 273.
In one respect, at least, the majority decision and opinion in *Konigsberg* is stronger than that in *Schware*. As against Schware's candor as to when he joined and when he left the Party, there is here Konigsberg's silence; he may or may not have been a member. Yet Mr. Justice Black is willing to invalidate the state's judgment on the particular record. Here again, as in *Schware*, the Court is emphatically disassociating bar admission proceedings from any analogies to federal loyalty programs for government employees, and here again there is a momentum toward the most vigorous judicial review on constitutional grounds of the state's action in selecting those who shall be eligible for its bar, and, incidently, those who may later become eligible to practice before the United States Supreme Court. Given the force of these two 1957 decisions, one is little prepared for the dénouement of *Konigsberg* II and *Anastaplo* in 1961.

**B. The Dissenting View of Mr. Justice Harlan**

Mr. Justice Harlan's dissent in *Konigsberg* I has been often admired as an example of hardheaded competence impeaching loose libertarian sentimentality.26

The most prominent feature of the dissent is an extensive and almost interminable set of excerpts from the hearing before the California Committee. Since Mr. Justice Harlan announces at the start that he is moved to dissent because "the record in my opinion reveals something quite different from that which the Court draws from it,"27 one may think that his purpose is to charge Mr. Justice Black with having been selective in dealing with the record and that it will look far different when the full story is told. The lengthy excerpts from the colloquy between Konigsberg and the Committee do not, however, materially alter the picture Mr. Justice Black has painted.28 And Mr. Justice Harlan's point, on closer analysis, appears to be simply that the Committee felt its inquiry was repeatedly blocked by Konigsberg's refusals to answer and that it had, therefore, less opportunity of testing the veracity of his denial of advocacy of violent overthrow than it needed.

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27 353 U.S. at 276.
28 The Harlan excerpts from the record do show the Committee members to have been articulate, patient, puzzled and decent as they pursued their inquiry and Konigsberg perhaps a little less articulate and clear as to the precise grounds of his refusal than might have been anticipated.
The dissent is not, however, without its difficulties and they plant the seeds for the 1961 results. The principal difficulty is that Mr. Justice Harlan is either unable or unwilling to grasp the central distinction on which the majority opinion rests, that is, that there is a difference between treating the refusal to answer as itself the basis for exclusion, and in considering all the evidence, along with the applicant's silence, when determining whether he has met his burden of proof. The distinction is not very subtle, and seems to us essential to a lawyer-like analysis. If the refusal to answer is in itself enough, then it cannot matter what other evidence is in the record; if, however, the problem is to weigh the whole record including whatever inferences can be drawn from the silence, then the other evidence is crucial and the outcome should depend upon the particular circumstances of the case. Mr. Justice Black was explicitly proceeding on the second route; and as he weighed the whole record, including the silence, he found in it no rational basis for refusing to admit Konigsberg. What, then, is Mr. Justice Harlan's objection? Is it that California had an automatic exclusion rule or is it that upon weighing the record, with due deference to the state's function in these matters, he thinks there was rational basis for doubt and for the finding that Konigsberg had failed to meet his burden of proof? Language can be culled from his opinion to support each of these incompatible possibilities.

At one point he tells us that the sole issue is whether it is constitutionally permissible for a state to hold that an applicant's refusal to answer questions "placed him in a position where he must be deemed to have failed to sustain his burden of proof," and that this issue is not susceptible to the "fragmentation to which the Court seeks to subject it." We do not think that emphasizing that the applicant has the burden of proof disposes of the Black distinction. If whenever an applicant fails to answer a pertinent question, he can be held to have failed to meet his burden of proof, regardless of what else is in the record, then this is presumably what Mr. Justice Black meant by treating the refusal as an independent ground for denial. If this is Mr. Justice Harlan's position, he has denied Mr. Justice Black's distinction while in fact embracing one wing of it.

But then, in almost the next sentence, he states that, "of course California has not laid down an abstract rule that refusal to answer any question under any circumstances ipso facto calls for denial of
admission to the Bar. But just because the State has no such abstract statutory rules does not mean that a Bar Committee cannot in a particular case conclude that failure to answer particular questions so blocks the inquiry that it is unable to certify the applicant as qualified."30 But this is precisely Mr. Justice Black's point about the evidential wing of his distinction. Of course, the refusal to answer a particular question may in the context of a particular record mean that the applicant fails to meet his burden of proof; and Mr. Justice Black was weighing the record in this case precisely for the purpose of seeing whether the applicant's silence had left the Committee with rational doubt.

At the very end of his opinion, Mr. Justice Harlan states: "[I]t seems to me altogether beyond question that a State may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area."31 But this is again the language of the automatic rule, and the circumstances of the particular case do not matter so long as the applicant has refused to answer. The result is that Mr. Justice Harlan appears to us finally to have embraced both wings of the distinction while denying it can be drawn. And the result is a muddle in which there is minimal communication between the dissent and the majority. If Mr. Justice Harlan is saying that any refusal can bar regardless of other circumstances, he is faced with the problem of the warning to the applicant, an issue he takes seriously four years later. If he is saying simply that he disagrees with Mr. Justice Black's appraisal of the Konigsberg record, he is faced with the difficulty that he has not met any of Black's points about the specific items in that record.

But there is a more serious difficulty with the Harlan view. He seems unwilling to recognize that the refusal to answer is keyed to an objection in principle as to the propriety of the question. The crux of the problem before the Court in these cases is what to do with the conscientious objector. In a telling passage late in his opinion Harlan asks rhetorically whether a committee could not deny an applicant who refused "with the utmost sincerity" to state his past addresses or the names of his former employers or his criminal record.32 The

30 Id. at 281. (Emphasis added.)
31 Id. at 311-12.
32 Id. at 311.
THE BAR ADMISSION CASES

analogy suggests the same basic confusion. Apparently Harlan sees little difference between an applicant who refuses to give the past addresses or the names of his employers and an applicant who is objecting that a question improperly invades his freedom of belief and opinion. This deprives the conscientious objection of its human quality and leaves it simply a blunt incomprehensible refusal to cooperate; Harlan thus evades the conflict of values that such cases raise by ignoring its existence.

Konigsberg I then emerges as a notably liberal decision, but an unstable precedent, because of the non-meeting of minds between the majority and the dissent.

IV. THE 1961 DECISIONS: KONIGSBERG II

The stage is now set for consideration of the current decisions of the Court.

It may be well to pause for a moment to consider what problems are still open for decision. Although in Schware the Court has passed on the eligibility of a former Communist, it is noteworthy that it has not as yet passed on the status of a current member of the Party, and, especially after Mr. Justice Harlan's construction of the Smith Act in the Yates case, one cannot say with assurance that a present member on that ground alone can be barred. Again it is not clear from Schware just how far back the Court will extend its doctrine of forgiveness to a former Communist. But what is most impressive after Garland, Schware, and Konigsberg I, is that not only will the Court review critically general qualifications of character and fitness, but it will also, as in Schware and Konigsberg I, review the evidential determinations of state bar committees in particular cases.

In cases where the issue turns on refusal to answer, it is clear that after Konigsberg I the Court is committed to weighing the silence with other evidence in the record to see if it rationally supports barring an applicant. Two important questions, however, are still left open. First, what will be the constitutional status of the state's action, when it operates under a rule that the refusal to answer a relevant question may in and of itself be a bar, and, second, what committee questions are constitutionally improper. Although Mr. Justice Harlan in Konigsberg I seems to assume that the questions asked the applicant were

constitutional, the majority are careful not to pass on that question. There are thus four different situations, depending on whether the question which the applicant declines to answer is proper or not and on whether the state is operating under an automatic exclusion rule or not.

Factually, *Konigsberg* II is almost the identical twin of *Konigsberg* I. The Supreme Court in 1957 had reversed the state's action and remanded the case "for further proceedings not inconsistent with this opinion." The California Bar Committee, having read Mr. Justice Black's opinion with care, recalled Konigsberg and asked him the same questions about Communist affiliation that he had refused to answer earlier. Konigsberg repeated his refusal to answer, offered additional affirmative evidence of good character, and repeated unequivocally his denial that he had ever advocated violent overthrow, adding that he had never knowingly been a member of any organization that so advocated. This time, however, the Committee made clear that it was considering the refusal as in and of itself a ground for denying the application, and gave Konigsberg adequate warning of its new rule.

The California Supreme Court, with two justices dissenting, affirmed; and the United States Supreme Court also affirmed, this time in a five to four decision.

Mr. Justice Harlan now writing for the majority finds three principal issues confronting him: 1) whether *Konigsberg* II can be reconciled with *Konigsberg* I; 2) whether the questions asked the applicant were constitutionally proper; and finally, 3) whether the automatic exclusion rule was constitutional.

### A. The Consistency of the Two Konigsberg Decisions

At first blush it might seem that consistency would prove the

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34 For those who like to count judges as an alternative to analyzing doctrine, it should be noted that there was one shift in the Court's personnel between 1957 and 1961. The 1957 decision had a five-man majority of Chief Justice Warren and Justices Black, Douglas, Brennan and Burton; Justices Harlan and Clark dissented on the merits; Justices Frankfurter and Whittaker dissented on procedural grounds. By 1961, Mr. Justice Stewart had replaced Mr. Justice Burton, and Justices Frankfurter and Whittaker had come to pass on the merits. The result: there is a new five-man majority voting the other way: Justices Harlan, Clark, Frankfurter, Whittaker and Stewart. Chief Justice Warren and Justices Black, Douglas, and Brennan stood firm and, without Burton, now form the four-man minority.
most troublesome issue for the Court. Having held in 1957 that Konigsberg could not be barred, there would appear to be difficulties in holding the exact opposite in 1961 — on the same record. But the point gives Mr. Justice Harlan little pause. If one accepts Black’s central distinction in 1957, the cases are of course cleanly consistent — it is evident that California now proceeding by way of the automatic exclusion rule is testing the precise issue Mr. Justice Black had expressly left open in 1957. The new and distinguishing circumstances are not a change in the facts as to Konigsberg but a change in the rationale offered by the California Committee. One cannot, therefore, complain about the Court’s resolution of the consistency issue, but it is at least amusing to watch Mr. Justice Harlan who professed in 1957 that he could not follow the Court’s reasoning in drawing the distinction, now vigorously use the distinction as the basis for reconciling the cases.35

B. The First Amendment Issue: “Balancing”

The constitutional propriety of the questions is a complex issue which Mr. Justice Harlan treats with admirable clarity. It is important to distinguish, as he does, between two situations in which a question might be challenged. The first is where the question is in pursuit of a substantive criterion itself invalid. Assume, for example, that belief in the truth of the theory of evolution is made a disqualification for the bar by a state. If then the applicant is asked whether he believes in evolution, he can challenge the constitutionality of the question, since it is being asked to see if he has improper opinions on this point. Mr. Justice Harlan would have no trouble in outlawing inquiries of this sort, but it should be emphasized that the bite of the First Amendment objection in such case goes primarily to the substantive criterion itself and not to the asking of the question.

35 There was another point of consistency debated by the Court, namely whether the rule could decently be changed with respect to Konigsberg himself in, so to speak, the middle of his case. In the California Supreme Court, Justice Peters had vigorously dissented on this ground alone, 52 Cal. 2d 769, 778, 344 P. 2d 777, 785 (1959). Mr. Justice Harlan, however, saw no constitutional infirmity here, and Mr. Justice Black did not reach the vice, for as he saw things there was no new rule: “...Konigsberg has been rejected on a ground that is unsupported by an authoritatively declared rule for the State of California. This alone would be enough for me to vote to reverse the judgment.” 366 U.S. 36, 58-59 (1957). Constitutional issues apart, it does seem ungracious of the members of the California Committee to have been so begrudging of the victory Konigsberg had won over them in the Supreme Court.
The second situation, however, is more complicated. In it the question is in pursuit of a valid substantive criterion and the question may have been asked for the purpose of testing the credibility of the applicant's denial. The best example of this is furnished by the case itself. California makes advocacy of violent overthrow a disqualification, and Mr. Justice Harlan holds that this is permissible. The questions asked the applicant about Communist affiliation are directed, on his view, to the exploration of the veracity of the answer on advocacy. Insofar as there is a First Amendment objection here it goes primarily to the asking of the question itself and to the compulsory disclosure involved. The issue is thus analogous to that raised in the Congressional Committee cases and in the recent series of other compulsory disclosure cases. Only the sanction is different: In the first group of cases, the sanction attaching to the expression of opinion is disqualification for the bar; in the second group, the sanctions are merely the consequences of disclosure.

Mr. Justice Harlan solves the issue rapidly by weighing the governmental interest in the disclosure against the probable impact on free speech of compelling it. He finds the government interest high in not having members of the bar who literally advocate violent overthrow of the government, and he finds the impact on free speech "minimal" since the question is asked in private.

Against this position, Mr. Justice Black marshals a vigorous dissent. He meets Mr. Justice Harlan on three points. First, he does not agree that the questions were in pursuit of a valid substantive criterion. Thus he argues that Konigsberg was asked about Communist affiliations in order to establish that he had at one time been a Communist and consequently to bar him on that ground. The majority, he charges, is "... simply refusing to look beyond the reasons given by the Committee to justify Konigsberg's rejection." Thus, for him the case is much the same as if Konigsberg had been asked about the theory of evolution. He finds it, therefore, a paradox that California can bar Konigsberg for refusal to answer questions which, even if answered in the affirmative, would have afforded no basis for a bar.

Mr. Justice Black pursues his contention by a second line of argument. He challenges the assumption that applicants can be barred

from the practice of law even if they advocate violent overthrow. Since
the controversial questions were asked, on the majority's assumption,
to establish whether or not there was such advocacy, Mr. Justice Black
again finds them constitutionally vulnerable. "I realize," he says, "that
there has been considerable talk, even in the opinions of this Court,
to the effect that 'advocacy' is not 'speech'. But with the highest respect
for those who believe there is such a distinction, I cannot agree with
it." Mr. Justice Black is here repeating his Smith Act dissent, and
there is merit in the basic view he espouses. But for our present
purposes, we need not pause to evaluate the point. It is enough that
this has not been the Court's position. It is, therefore, an easy step
to the conclusion that such criminal advocacy can be punished by
disqualification from the practice of law.

Mr. Justice Black has two main challenges left to the Harlan
opinion on the First Amendment point. He feels that the compulsory
disclosure of opinion involved in the question about Communism is
itself a sufficient deterrent on free speech to render the question
improper. As might be anticipated, he says the majority use of a
balancing test is wholly improper and thus joins issue with Harlan on
what appears to be a new and major philosophical dispute within the
Court. In fact, the Konigsberg opinions are likely to be remem-
ered longer and discussed more often in terms of the debate over
balancing than in terms of the decision on bar admissions. The "bal-
ancing" issue, although it covers a genuine point of disagreement,
seems to us to be phrased in an unfortunate way. It appears to be a
debate over whether Bill of Rights protections, and especially those of
the First Amendment, are "absolutes," or whether in their application
some "balancing" of competing interests is involved. As a matter of
rhetoric, we prefer the Black contention that the balancing was done
once and for all by the framers of the Constitution and that the Court
is not now free to reappraise the value of free speech.

But the actual point of disagreement is narrower and need not
involve such a general formulation. Mr. Justice Harlan would distin-
guish between direct total sanctions applied for the purpose of regu-
lating the content of speech, and regulation which has other primary

38 Id. at 70.
40 See Charles Black, Mr. Justice Black, the Supreme Court and the Bill of
purposes, but may incidentally, and as a by-product, impinge on speech. In the former category he would apply the First Amendment, like anyone else;41 and, if we revert again to the evolution example and assume for the sake of illustration a state statute making the dissemination of evolutionary theory a crime, Mr. Justice Harlan would not argue that the state's interest must be weighed against the deterrence, but would accept the balance of values struck by the framers. What leads him to talk of balancing is the second type of case where the interference with speech is indirect and incidental to the purposes of the law. Here he asserts that the state's interest in its primary purpose must be balanced against the indirect restraint on speech involved.42 He cites many cases fitting his point, including the littering cases and the sound truck cases, and adds: "It is in this class of cases that this Court has always placed rules compelling disclosure of prior associations as an incident of the informed exercise of a valid governmental function." Mr. Justice Stewart's opinion in Bates v. Little Rock,43 it might be noted, is evidence that the balancing does not always come down in favor of compelling disclosures.

Mr. Justice Black in rejoinder repeats in an eloquent and general form his conviction that the First Amendment is not to be "balanced away." His discussion ranges over a wide area and touches the opinions of Holmes and Brandeis, the merits of the clear and present danger test, and the unsoundness of the Beauharnais opinion.44 He then, however, moves in to meet Mr. Justice Harlan on Harlan's own ground. He agrees that in the street-regulation cases, where the ostensible purpose was to regulate traffic or to prevent littering, the Court "weighed" the reasons for the regulation against the diminution of "the exercise of rights so vital to the maintenance of democratic institutions." But he says these cases do not support the Harlan extrapolation from them. They were all cases of a procedural non-content regulation similar to the use of Roberts' Rules of Order in a town meeting (to

41 Perhaps not quite like anyone else since he has recently taken the position that the First Amendment applies with less stringency to the states via the Fourteenth than it does when applied directly to the federal government. See his concurring and dissenting opinion in Roth v. United States, 354 U.S. 476, 496 (1956); and see Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 21.

42 The best example of the balancing technique in actual operation is found in Judge Prettyman's opinion in Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948), a congressional committee case.


borrow a useful illustration from Alexander Meiklejohn of a permissible regulation of speech\(^{45}\). They regulated how and when, but not what or whether.

It has been apparent for years that our classic free speech theory was designed primarily to handle the case of the direct criminal sanction, and that something more is needed to handle the indirect sanction cases. The current case and many others to which balancing has been applied are basically different on Mr. Justice Black's view, since they involve the content of speech explicitly. And for him, any case in which a sanction, however indirect, is applied to the content of speech falls under the First Amendment ban. "The recognition that California has subjected 'speech and association to the deterrence of subsequent disclosure' is, under the First Amendment, sufficient in itself to render the action of the State unconstitutional . . . ."\(^{46}\) The issue is a major one and likely to occupy the Court in years to come; it is happily beyond our province to attempt resolution of it here. We stand with Black, though, in giving ground only grudgingly to those who would barter away basic individual rights to serve the supposed needs of big government.

Mr. Justice Black has still one more shot to fire at this segment of the majority opinion. Assuming for the sake of argument that a "penurious" balancing formula is to be used, he argues that proper application of it comes out with a different answer. As might be expected, he challenges the Court's weighing of each of the variables involved. First, he is doubtful about the state's interest in asking the question. Presumably that interest is to find out whether Konigsberg does advocate violent overthrow. But Konigsberg had already unequivocally stated that he does not, and in *Konigsberg* the Court has held that the record, even with his silence, does not afford a rational basis for doubting his answer. Hence, he argues that the Committee does not need the answer for the purpose of assessing whether Konigsberg advocates violent overthrow. "All we really have on the State's side of the scales is its desire to know whether Konigsberg was ever a member of the Communist Party."\(^{47}\)

Here, again, we touch a central point of disagreement between Black and Harlan. Mr. Justice Harlan assumes that the Committee

\(^{45}\) MEIKLEJOHN, POLITICAL FREEDOM 24-25 (1960).
\(^{47}\) Id. at 72.
had an actual interest in testing the veracity of Konigsberg’s denial of advocacy by further questioning. Mr. Justice Black, as we have seen, refuses to believe this was their real purpose and further finds the Konigsberg record so persuasive as to leave no rational basis for curiosity as to his Communist affiliations. His point serves to suggest here, as it will in Anastaplo, that the state’s insistence on having the question answered was more ceremonial than substantial, something akin really to a flag salute.48

He next turns to the other side of the scale — the impact on speech. He argues briefly that it would be more than “minimal” as to the applicant because the privacy of the Committee hearing in such matters is not likely to be preserved. Beyond this, we see two substantial considerations in the point. First, efforts to turn the hearings of committees on character and fitness into loyalty proceedings, however modestly they begin, are inherently expansible,49 and, if the Communist question is proper, it may bring in its wake a host of other questions. We have only to remember that the Konigsberg editorials were taken seriously, and that Anastaplo was asked about belief in God, the right of revolution, and whether he belonged to any organization on the Attorney General’s list. Hence, there is a lot to be said for stopping such inquiries at the threshold, particularly if they can be defended only as a test of credibility. Second, there is a special audience for character and fitness committees, as all law teachers know — the audience of young law students. They are likely to learn one way or another what is being asked. And they are certain to read any questions of this sort broadly as implying official scrutiny and surveillance of their opinions and associations. What really is at stake in these cases is the law student’s image of what kind of conformity the Bar will require.

These considerations serve perhaps to underscore a difficulty with the balancing approach, namely that it must balance imponderables — an ambiguous state interest that is frequently not candid against an

48 Credibility, after all, is a question of fact. After examining an applicant many times, on all sorts of questions, his refusal to answer one question on grounds of principle can have little real weight. See Steffen, The Prima Facie Case in Non-Jury Trials, 27 U. CHI. L. Rev. 94, 109-11 (1959).

49 Compare Justice Traynor in the case below: “Inquiry on the issue of advocacy of the unlawful overthrow of the government is a greedy camel; it does not easily take its leave. It has a way of moving on into the domain of lawful economic and political belief, speech and activity.” 52 Cal. 2d 769, 776, 344 P. 2d 777, 782 (1959).
THE BAR ADMISSION CASES

indeterminate and subtle impact on free speech. As Mr. Justice Black argues, so porous a test permits and indeed almost requires the judge to intrude his individual values into the case.

So much then for these First Amendment aspects of the cases. They have been examined in detail because of their implications for other kinds of cases and because it is relevant to assess what objections on policy are left to the conscientious objector who refuses to answer questions even after the Court has passed on their validity.

C. The First Amendment Issue: Speiser v. Randall

The dispute between Harlan and Black on First Amendment grounds is still not concluded. The task remains of making peace with the Court's decision in Speiser v. Randall which Mr. Justice Harlan recognizes as requiring distinction and which Mr. Justice Black urges as squarely in point. It might be added that so powerful is the pull of the Speiser case that, in the California Supreme Court, Justice Traynor predicated his dissent on it and, in the United States Supreme Court Mr. Justice Brennan added a special dissent resting on this point alone. Once again, the debate between Mr. Justice Black and Mr. Justice Harlan elaborates a complex net of analysis. And, once again, Konigsberg may prove more important as a precedent on a collateral point, this time in construing Speiser v. Randall, than as a precedent on bar admissions.

The Speiser case has its origin in a provision of the 1952 California Constitution which attaches certain disabilities to those who advocate violent overthrow, including specifically the denial of any tax exemption to them. The California legislature in implementing this provision enacted a statute requiring a non-advocacy oath of all taxpayers seeking a property tax exemption. Petitioners were World War II veterans who declined to take the oath and were refused a tax exemption on that ground. Thus far the case would simply appear to be one more example of the extending of test oaths to various lines of activity, and one might have thought the issue would be whether the loyalty oath technique could be extended to activity as remote from sensitive government service as the paying of taxes. The case thus comes close to the absurdity of requiring a loyalty oath of every

51 52 Cal. 2d 769, 774, 344 P. 2d 777, 780 (1959).
citizen and could have raised the question of how many indirect penalties could be cumulated on the heads of the domestic Communists. As to this aspect of the case, the majority of the United States Supreme Court, speaking through Mr. Justice Brennan, after noting that discriminatory tax provisions could violate the First Amendment as readily as any other form of sanction, assumed "... without deciding that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned."53

What gave Speiser its special importance, however, was a further point. Mr. Justice Brennan read the California law as not making the oath conclusive on the tax assessor, who was free to make his own determination of eligibility for the exemption. The result was that, on the issue of non-advocacy as well as on other tax issues, the taxpayer had the burden of proof. Thus, what became crucial about the law for the Court was not the exaction of the oath, but the procedural rule allocating the burden of proof. California's was read as providing that, to be eligible for a tax exemption, the taxpayer has to carry the burden of proving that he did not advocate violent overthrow.

Assuming then that California may deny tax exemptions to those who advocate violent overthrow, the Court moves to the decisive issue in the case — whether California can use this method of determining who in fact does advocate violent overthrow. And here it finds the unconstitutional vice. The line between legitimate and illegitimate speech is, we are told, finely drawn, and there is always in litigation a margin of error in fact-finding:

... Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — the margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the

53 357 U.S. 513, 520 (1958). However, Justices Black and Douglas concurring and Mr. Justice Clark dissenting were quite willing to decide the question the Court here is assuming only arguendo. Mr. Justice Black held that the provision was substantively bad and that California could not deny tax exemptions on this ground. He decried the wide-scale efforts to exact loyalty guarantees of everyone and wryly noted the oaths now required "of hunters and fishermen, wrestlers and boxers and junk dealers." Id. at 531. Mr. Justice Douglas, in his separate concurring opinion, made much the same point. Id. at 532. Mr. Justice Clark in dissent, on the other hand, sees no difficulty in deciding that California may withhold the tax exemption on this ground, arguing that, since the state may impose criminal sanctions, it may provide "... the far less severe measure of denying a tax exemption." Id. at 542.
trial of his guilt beyond a reasonable doubt. Due process demands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. . . . Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.54

The vice, the Court continues, is not merely that on occasion legitimate speech close to the danger zone will be penalized by denial of tax exemption, but that there will be repercussions on all who wish the exemption. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."55 The procedure, therefore, is bad because it places an unconstitutional burden on free speech; since the procedure is bad, the petitioners cannot be denied the exemption for refusing to take the oath — for refusing, that is, to take the first step in an invalid series.

The Speiser case was thus an extraordinary commitment to the values of free speech. One might well prefer the policy of allocating the burden of proof to the state where a penalty on speech is involved, but what is striking is that the Court raises this policy to the level of a constitutional requirement. What is striking, too, is that, although the sanctions on speech here would seem to be indirect and nonconsequential, Justices Harlan and Frankfurter concur silently and find no need to talk of balancing.

The problem then is to apply Speiser to Konigsberg II. The story begins with Justice Traynor's dissent in the California Supreme Court. Agreeing that Communism may be a rational disqualification for membership in the bar and that, therefore, questions about it are relevant and proper, he continues:

An applicant ordinarily has the burden of establishing his qualifications to practice law, and if he refuses to answer questions relevant to his qualifications, it is my opinion that this court is justified in denying him admission. Given the congressional and state legislative findings with regard to the Communist Party and the adjudications of guilt of its leaders of criminal advocacy, a question as to present or past membership in that party is relevant to the issue of possible criminal advocacy and hence to the applicant's qualifications.

54 Id. at 525-26.
55 Id. at 526.
Whatever its relevancy in a particular context, however, it is an extraordinary variant of the usual inquiry into crime, for the attendant burden of proof upon any one under question poses the immediate threat of prior restraint upon the free speech of all applicants. The possibility of inquiry into their free speech, the heavy burden upon them to establish its innocence, and the evil repercussions of inquiry despite innocence, would constrain them to speak their minds so non-committally that no one could ever mistake their innocuous words for advocacy. This grave danger to freedom of speech could be averted without loss to legitimate investigation by shifting the burden to the examiners. Confronted with a prima facie case, an applicant would then be obliged to rebut it.56

And he finds that such a procedure of shifting the burden to the examiners "is logically dictated" by Speiser. What Justice Traynor means, we take it, is that the state cannot properly insist upon an answer as to Communist ties in bar admission cases — where the applicant refuses to answer in good faith adherence to principle — unless it first lays a foundation for the suspicions implied in asking the question. Since the United States Supreme Court has already held that Konigsberg on the record had made out a prima facie case of character and non-advocacy of violence, the burden would rest on the state to come forward with evidence against him. Until the state made a prima facie showing, Konigsberg's silence would not be obstructive. Hence, under the Traynor formulation, the dilemma created by the refusal to answer is resolved and Konigsberg must be admitted.

Mr. Justice Harlan rejects the application of Speiser on several grounds. He argues that there is here no purpose to penalize speech and that the Court in Speiser had limited its decision to cases where such a purpose was present. But there seems to be quite as much purpose in one as in the other, only the sanctions are different. He next pounces upon the Court's effort in Speiser to distinguish Douds,57 Garner,58 and Gerende,59 where it had upheld non-Communist oaths for government employees. Mr. Justice Brennan had distinguished those cases on two grounds: First, that there was "... no attempt directly to control speech but rather to protect from an evil shown to be grave, some interest clearly within the sphere of governmental

concern . . ."; and the Court could find no comparable interest in the California tax statute before it; and, second, on the ground that the oath was conclusive there and, hence, the procedural vice found here was absent.

Mr. Justice Harlan proceeds to read the *Speiser* opinion as though the first distinction were the only one made. It is clear, however, that the second distinction is the more powerful, and he is left, therefore, with the real thrust of *Speiser* still to dispose of, the Court's preoccupation with the unconstitutionality of the procedural rule. He appears to be suggesting that for cases like *Garner, Douds*, and *Gerende*, where the public interest in qualified employees is at stake as contrasted to the more anemic state interest in *Speiser* in allocating tax exemptions, the Court would uphold a rule which left the burden of proof on the applicant on issues impinging on speech. Perhaps it would, and certainly it did not have to decide that issue in *Speiser*. But Mr. Justice Harlan's effort to distinguish *Speiser* on this ground does not take him very far.

Apparently sensitive to this difficulty, Harlan moves on to the burden of proof: "There is no unequivocal indication that California in this proceeding has placed upon petitioner the burden of proof of nonadvocacy of violent overthrow, as distinguished from its other requirement of 'good moral character.'" And until California decides who has the burden of proof of nonadvocacy, "the issue is not before us." One can pause to wonder a bit at the ease with which he has accepted, over the serious protests of Mr. Justice Black and Justice Peters of the California Supreme Court, the proposition that California now has an automatic exclusion rule, and the extreme caution he uses here in determining what the California burden of proof rule is. But what should be more embarrassing is his failure to remember what he had said in *Konigsberg*:

The following is what I believe to be an accurate statement of the issue to be decided. California makes it one of its requirements concerning admission to its Bar that no one be certified to the Supreme Court who advocates the overthrow of the Government of the United States or of California by force or violence. It also requires that an applicant be of good moral character. *The appli-

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60 357 U.S. 513, 527 (1958).
Mr. Justice Harlan’s handling of *Speiser* is a strange and unpersuasive performance, and Justices Black and Brennan score in their dissents. Mr. Justice Brennan reads *Speiser* as protecting the taxpayers from being denied an exemption by their refusal to answer until the state comes forward with sufficient proof, and he argues that the same rule must apply to *Konigsberg* “... unless mere whimsy governs this Court’s decisions in situations impossible rationally to distinguish.”

Mr. Justice Black in turn cites against Mr. Justice Harlan the Court’s second ground of distinguishing *Douds*, *Gerende*, and *Garner*, and argues that *Konigsberg* and *Speiser* are indistinguishable since the vice in both is that the applicant has the burden of proof on an issue affecting speech.

Since, as Justice Traynor indicated, it would be wise to avoid the dilemma of these cases by shifting the burden of proof and since the majority is unpersuasive in its efforts to escape the reach of *Speiser*, it seems regrettable the Court did not agree with Justice Traynor and apply *Speiser* to these cases. The failure to do so not only deprived the Court of an acceptable doctrinal route to the sensible resolution of the cases, but it also has left the standing of the important *Speiser* precedent in doubt.

**D. Constitutionality of the Automatic Exclusion Rule**

The complexity of the issues raised in *Konigsberg* II is such that there still remains one major issue to be considered. *Konigsberg* not only challenged the result on the ground of its inconsistency with the 1957 decision and on the ground that the question itself was unconstitutional, the two points which have occupied our analysis for so long, but he also argued that, even assuming the question was proper, the automatic exclusion rule was unconstitutional. This raises

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62 353 U.S. 252, 277 (1957). (Emphasis added.) The final sentence of his opinion in *Konigsberg* II suggests a further point. Discussing who had the burden on those complex factual elements which amount to forbidden advocacy of violent overthrow, he says: “[T]he Committee had assumed the burden of proving the affirmative of those elements, but was prevented from attempting to discharge that burden by the petitioner’s refusal to answer relevant questions.” 366 U.S. at 56. This appears to mean that, even if the Committee had the burden, the refusal to answer was still obstructive, which sets up a new and unanalyzed basis of exclusion.

THE BAR ADMISSION CASES

directly, at long last, the issue Mr. Justice Black had left open in his 1957 opinion.

This seems to us a promising issue and one that captures the common sense difficulty the case presents. But Mr. Justice Harlan’s handling of it is to our minds inadequate, and Mr. Justice Black oddly enough does not really argue the point in dissent, apparently preferring to use his ammunition on his First Amendment challenge. One is tempted to say that, despite the refined complexity of their analyses, both Justices Harlan and Black have let the central issue of the case escape their net. Mr. Justice Harlan devotes only two and a half pages to the merits of the rule. He first analogizes it to Rule 37(b) of the Federal Rules of Civil Procedure, which provides that in a civil action refusal to answer relevant questions may after due warning result in treating the questions for the purposes of the case as though they had been answered unfavorably to the refusing party, and may even result in dismissal of the suit of a party seeking affirmative action. That, as he sees it, is all that is involved here. But the analogy misses the special point of the bar admission cases. Here the applicant is refusing to answer on grounds of principle. He is not being simply evasive or noncooperative. Moreover, admission to the bar is not a litigation; the Bar Committee’s function is to decide as fairly as may be, whether, despite the refusal to answer, the applicant sufficiently shows good character.

It seems to us, however, that another line of analysis is called for here. Since the automatic rule actually operates to make refusal an independent ground for rejection, it must be regarded as a substantive criterion for distinguishing between applicants. It is then precisely like the rule which Justices Harlan and Frankfurter both rejected in Schware — a rule which differentiated sharply and absolutely between applicants who had at some time in the past been members of the Party, and applicants who had never been members. The Konigsberg rule in the same way differentiates sharply and absolutely between applicants who refuse to answer questions in a sensitive area and applicants who do not so refuse. This puts the matter in a different light.

The issue then is whether the rule provides a rational criterion for classifying applicants to the bar. We submit that it does not; it discriminates between applicants on grounds perversely unrelated to their character and intellectual integrity. The automatic rule means that an applicant, regardless of the strength of the rest of his record,
can be denied simply because he refuses to answer on principle a question he deems improper. If, however, we take the conscientious objector stance seriously — and there is much in American history to suggest that we should — the rule can only operate to prefer applicants who are willing to answer over those who on principle are not. But among those who will answer must be some insensitive to the possible impropriety of the question and many sensitive to it but persuaded to swallow their indignation in order to be admitted; whereas on the other side, assuming good faith, we have those who have this much courage in their convictions. The argument, therefore, is that the automatic rule is arbitrary in that it prefers the servile and insensitive to the courageous — and all under the rubric of a proceeding to determine good moral character.

To the layman, it is odd to find in the conscientious adherence to principle a basis for the determination that good character is wanting. And the layman, we submit, is right; any rule which operates to penalize a courageous show of character, and which prefers instead a docile compliance and cooperation with authority, is sufficiently unreasonable and arbitrary in operation to be unconstitutional.

This, then, is the point Mr. Justice Harlan fails to deal with; we turn to the points he does make on behalf of the automatic rule. He argues that there is nothing arbitrary about the application of the rule in this instance. It is true, he says, that the 1957 case had held that the testimony about 1941 affiliations and the refusal to answer could not rationally support adverse inferences as to petitioner's character qualifications. But then he says: "That was not to say, however, that these factors, singly or together, could not be regarded as leaving the investigatory record in sufficient uncertainty as constitutionally to permit application of the procedural rule which the State has now invoked."

This presumably means that, if the testimony as to Communist affiliation had not been in the record, there would not have been sufficient uncertainty. But if that is what it means, we have shifted doctrinal horses again, and are talking about evidential determinations of character and not about the automatic rule which operates independently of what else is in the record. And if that is what is being done, we are squarely inconsistent with the Konigsberg holding.

Further in the Anastaplo case, as we shall see, there is no comparable colorable item in the record; there is nothing, except the refusal to

64 Id. at 46.
answer. Yet Mr. Justice Harlan, relying on his decision here in *Konigsberg* II, finds no difficulty in affirming the ruling against Anastaplo.

One emerges from this extended examination of *Konigsberg* II with two impressions. First, that the doctrinal complexities generated are far removed from the simple equities of the case. Second, that the majority opinion of Mr. Justice Harlan is unpersuasive as to the relevance of *Speiser v. Randall*; that it is off the point on the merits of the automatic rule; and that it is insensitive to the oddity of shifting rules as to *Konigsberg* in the middle of his case. Further, he tends to slide back into his *Konigsberg* I dissent and treat the record evidentially while ostensibly applying the automatic rule. But, most unaccountably, he refuses to recognize that the difficulty of the case turns on the conscientious objection, and not on mere colorless refusal to answer. Thus, he fails to persuade or to educate us in the course of a long, complex and elegant logical exercise.

**V. THE 1961 DECISIONS: ANASTAPLO**

The companion 1961 case, *In re Anastaplo*, can now be dealt with briefly. It is one of the ironies of the flow of constitutional litigation that two cases come to the Court at the same time and that the Court chooses first to dispose of the issues in *Konigsberg*, and then to apply it as a precedent to *Anastaplo*. The issues might have been joined with greater clarity, and maybe, with different outcome, had the sequence been the other way around.65

Although the protracted hearings to which Anastaplo was exposed before the Illinois Bar Committee built up a formidable record, the details of that record are relevant primarily as a monument to the

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illiteracy and ineptness of committees on character and fitness as they embark on inquiries of this sort. In brief, the relevant facts are these: After graduation from law school in 1951, Anastaplo went before the Illinois Committee. He had been an excellent student, and there was nothing ambiguous in his record, which included strong testimonials from teachers, classmates and friends, and a strong war record as a bombardier. In filling out a routine questionnaire on the principles of the Constitution, he had quixotically listed the "right of revolution" as a basic American principle of government, remembering apparently the Declaration of Independence. This answer, however, alerted the Illinois Committee to the possibilities of subversion, and it began to question him on his views. Having had a broad background in philosophy and political science, Anastaplo was only too ready to elaborate on his views on revolution which seemed to come as a complete novelty to the members of the Committee. Early in the course of the hearings, he was asked, therefore, whether he was a member of the Party or belonged to any organization on the Attorney General's list. He declined to answer both questions on principle, and the impasse between him and the Committee, which was to last a decade, was firm. The hearings continued in much the same vein with a wide-ranging exploration of his views on a variety of topics, including especially the propriety of the Committee's questions. At one point, it might be noted, he was asked about his belief in God, but the question was later withdrawn. In brief, the record shows a bright, serious, articulate, stubborn, and possibly impertinent, young man jousting with a perplexed and baffled Committee. Viewed simply as a debate, Anastaplo has all the better of it.

At the conclusion the Committee refused to certify him for the Illinois Bar and the Illinois Supreme Court affirmed. Then, after Konigsberg 1 had come down in 1957, Anastaplo reapplied, a rehearing was refused by the Committee, but the Illinois Supreme Court, on his appeal, ordered the Committee to re-examine the case. A new set of hearings ensued in 1959 resembling in many ways the first set and running throughout the year. He was asked the same questions and again declined to answer. The Committee was unable to see anything in Konigsberg 1 which was controlling, and once again denied him admittance, but with a split vote of eleven to six and a strong minor-

66 The religious inquiries were based on Railroad Company v. Rockafellow, 17 Ill. 541 (1856) and, when applicant pointed out that this case had long since been repudiated, the Committee chairman stopped any further religious questioning.
ity report. The Illinois Supreme Court again affirmed the denial, but this time in a four to three decision which included a brief dissent by Justice Schaefer and a detailed and vigorous one by Justice Bristow, and the case finally came to the United States Supreme Court. In a five to four decision, the Court affirmed the Illinois action barring Anastaplo.

If one had invented a case to test the current policies of the Court, one could scarcely have come up with a better one. There is nothing in Anastaplo’s record to impeach him, except the refusal to answer; without derogating Konigsberg, Anastaplo’s record is far stronger and presents in pure form the issue of the consequences that may legitimately be attached to a refusal on principle to answer questions of a Bar Committee. In addition, there was the fact of his adherence to his position over the ten-year period during which he worked at various positions, including teaching in the Downtown College of the University of Chicago, and accumulated further affirmative character references.

There are a variety of details in the Anastaplo case which could have been used to distinguish it from Konigsberg ii, but it is Mr. Justice Harlan’s strategy to see the cases as presenting the same issues and, hence, to treat Anastaplo as foreclosed by the decision just made in Konigsberg. Thus as we have already noted, although the Anastaplo record contains no item like the 1941 affiliation in Konigsberg and thus would appear to have provided the uttermost test of the automatic exclusion, Mr. Justice Harlan disposes of the merits of such a rule as applied to Anastaplo in one short paragraph, without noting any of the differences in the two records. Again Illinois did not have a specific statutory provision, as did California, making advocacy of violent overthrow a separate grounds for disqualification. It had only the good character criterion. Thus, on close analysis, Mr. Justice Harlan would have found it difficult to make as to Anastaplo the argument about cross-examination to test the veracity of the denial of advocacy of violence of which he makes so much in Konigsberg ii.

At two points, however, Mr. Justice Harlan does deal with distinctive features of the Anastaplo record: the adequacy of the warning and the Illinois Committee’s concern with the right of revolution. It is his discussion of these points that makes up his opinion in Anastaplo.
A. The Warning

The warning issue leads Mr. Justice Harlan into difficulties that are wryly amusing, because Illinois certainly did not have the automatic exclusion rule with anything like the clarity of California. Even at the second set of hearings, with *Konigsberg* I before it, the Committee continued endlessly to interrogate Anastaplo after his refusal to answer, and the Committee's final report never grasps the basic *Konigsberg* I distinction. Inquiries by Anastaplo as to whether his refusal to answer could per se block his admission were answered, in one instance at least: "No, I am saying that your refusal to answer . . . could and might." Mr. Justice Harlan finds in the record, however, an adequate warning, culling several statements where the Committee tells Anastaplo it took the question seriously. Unless the Illinois Committee were asking questions frivolously, the mere fact that they were asked of course told Anastaplo that the Committee thought they were relevant. And had the Committee been attempting to assess the record as a whole, it would have said that refusal to answer "could and might" operate as a bar. It is, therefore, difficult to imagine what Mr. Justice Harlan would consider an inadequate warning.

Mr. Justice Harlan's insensitivity to the difficulty is illustrated by another passage where, referring to the above colloquy, he notes that the applicant was told that "his refusal to answer would not *ipso facto* result in his exclusion but that it 'could and might.'" This however, he adds, "... certainly did not give rise to constitutional infirmity. Even as to one charged with crime due process does not demand that he be Warned as to what specific sanction will be applied to him if he violates the law." Not the specific sanction, surely, but due process does require that there be a law.

To make the point we need only recall and compare the original language of Mr. Justice Black in *Konigsberg* I, which Mr. Justice Harlan is purportedly following:

There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee . . . that suggests that failure to answer a Bar Examiner's inquiry is *ipso facto* a basis for excluding an applicant from the bar, irrespective of how overwhelming is his showing of good character. . . . Serious questions of elemental fairness would be raised if the Committee

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68 Id. at 94.
had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable. ... 69

It seems clear to us that a committee operating in the context of the above passage, as the Illinois Committee must be taken to have been, would understand a question from the applicant as to whether his refusal was a per se bar to be an inquiry as to whether Illinois had, in Mr. Justice Black's language, made the refusal ipso facto a basis for exclusion irrespective of other proof — it would so understand the question, that is, if it in fact had the automatic rule. It appears, therefore, that the Illinois Committee did warn Anastaplo as accurately as it could of the rule it was operating under, and that the difficulty about the warning turns not on the absence of good faith in the Committee but on the absence of the automatic exclusion rule in Illinois. Mr. Justice Harlan, therefore, appears to have performed the neat feat of finding that Anastaplo was adequately warned of a rule Illinois was not in fact operating under.

It would be a mistake to make too much of the warning point, since at best it would result in a remand of the case and perhaps only serve to delay its final disposition. But if procedural niceties are important in other contexts, as the Court so often tells us, strict adherence to them would seem particularly appropriate for the rites by which a law student becomes a member of the Bar. And the prestige of a remand from the Court might well have affected the judgment of the Illinois Committee, already split eleven to six in the case.

B. The Right of Revolution

The second new feature in the Anastaplo case is the discussion of the right of revolution. If Konigsberg may be said to have raised the issue of the propriety of asking about Communist affiliation without laying a sufficient foundation for the question, Anastaplo raises the issue of so asking where the ostensible foundation is not merely insufficient but affirmatively improper. It is clear from the transcript of the hearings, as Mr. Justice Black spells out in dissent, that it was Anastaplo's position about the right of revolution that planted a seed of suspicion in the Committee's mind and led to the initial asking about Communist affiliations. The majority of the Committee in its

final report appears to have finally gotten the point straightened out, and expressly disavows any concern with applicant's views on revolution:

A majority of the Committee has arrived at the conclusion that the views expressed by the applicant with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines.70

However, in its final paragraph of findings, the Illinois Committee report makes it explicit that a minority of the Committee persisted in finding in these views on revolution affirmative evidence of lack of qualification.

Certain members of the Committee (who are included within the majority who believe that applicant's petition for a license should be denied because he has failed to meet the burden which is on him of establishing his proper character and fitness) are of the further opinion that the record demonstrates affirmatively applicant's lack of the character and fitness necessary for admission to the Bar. They base their views upon . . . (ii) applicant's view that circumstances might exist under which he would not abide by, and might advise other citizens not to abide by, final decrees of a court of law and to resist by force their enforcement by appropriate legal process, when considered in connection with his views as to the overthrow of the government by force and violence.71

It is an interesting and perhaps important by-product of the Anastaplo decision that it yields a ruling that opinions on the right of revolution, in the sense of the Declaration of Independence, are within the constitutionally protected area and that an applicant cannot be barred on these grounds. The ruling is made by implication in a footnote in the Harlan opinion where he expresses incredulity that the Committee could have been upset by the view that at some point revolution against tyranny is proper.72

Thus Mr. Justice Harlan is in total agreement with Mr. Justice Black as to the good sense of a right of revolution. What divides them

70 Report of the Committee on Character and Fitness [In Re George Anastaplo, N.R. 780] 7-8.
71 Id. at 21-22.
is what to do about the corruption of this case by the introduction of this question. Mr. Justice Harlan, staying carefully within the official findings, can find "nothing in the record which would justify our holding that the State has invoked its exclusionary refusal to answer rule as a mask for its disapproval of Petitioner's notion on the right to overthrow tyrannical government." Granting that some members of the Committee took the point seriously, he nevertheless concludes that "it is perfectly clear that the Illinois Bar Committee . . . regarded petitioner's refusal to cooperate in the committee examination of him as the basic and only reason for denial of certification." And he emphasizes further that "nothing in the State Court's opinion remotely suggests its approbation of these views of 'certain' Committee members."73

Mr. Justice Black in an eloquent and stirring dissent comes close to treating the Committee's action as having rested in reality on the right of revolution point. He is thus able to say: "The effect of the Court's 'balancing' here is that any State may now reject an applicant for admission to the Bar if he believes in the Declaration of Independence as strongly as Anastaplo and if he is willing to sacrifice his career and means of livelihood in defense of the freedoms of the First Amendment."74 It is tempting to reduce the case to these terms and to exploit the irony that our contemporary cold war psychology has caused many of us to be so fearful of revolution as to forget our own basic heritage in the Declaration of Independence.

It would seem, however, that Mr. Justice Black has overstated the point by about as much as Mr. Justice Harlan has understated it. There are limits to judicial realism and, in any event, here one must doubt that the real motivations of the Committee in denying Anastaplo were so closely linked to his views on revolution. Nevertheless, the outcome of the case was corrupted by the reliance of some members on this point, and a novel procedural issue was thus presented on review. Since the final Committee vote was only eleven to six and since the minority who were alienated by the right of revolution, on the Committee's own statement, were at least two and quite possibly more, it is not at all clear that the Committee had a majority uncontaminated by those who rejected the right of revolution. Further, it is not clear how other members might have voted had the majority been smaller, or what effect the participation of these members with an

73 Ibid.
74 Id. at 112.
unconstitutional view of revolution may have had on the others in the Committee discussions.

If we are permitted to analogize to a jury verdict in which some jurors were operating on a legally improper basis, there would seem to be a good deal wrong with the Committee hearings and findings due to the intrusion in them of this unconstitutional basis for decision. Here, as with the point about the warning, there would have been sufficient basis for the Court to remand the case for a hearing with the right of revolution explicitly withdrawn. As a practical matter, this too may have served only to delay the final denial of Anastaplo's admission, but it is not easy to say so. The Committee at least would have been confronted with the important fact, undoubtedly lost sight of in the course of the protracted hearings, that there was absolutely nothing in the record which originally warranted asking this applicant whether he had been a member of the Communist Party.

What is puzzling about Mr. Justice Harlan's response in both Anastaplo and Konigsberg II is his reluctance to use any of the doctrinal "handles" available to him to ameliorate the result. He could have escaped had he wanted to, and we are led to speculate on why he did not want to. The Anastaplo opinion contains a possible clue on this point:

... Finally, contrary to the assumption on which some of the arguments on behalf of Anastaplo seem to have proceeded, we do not understand that Illinois' exclusionary requirement will continue to operate to exclude Anastaplo from the bar any longer than he continues in his refusal to answer. We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands.75

Presumably Mr. Justice Harlan's position comes down to this: he does not disapprove of bar applicants refusing to answer questions in order to test the constitutionality of the questions. And he stands ready to review such issues when they are presented to him. Such challenges by the young to the authority of the old are all to the good. However, once the challenger has had his day in court and had a decision on the contested point, that, on Mr. Justice Harlan's view, should be the end of it. If he is proved correct in his challenge, his refusal to answer will

75 Id. at 96-97.
not affect his admission — it is constitutionally privileged silence. But if he is proved wrong and the question is held proper, Mr. Justice Harlan cannot see that there are any equities left. The challenger is no longer making a legal objection to authority; he is making a moral one and in terms of his own standards of morality. Thus, as a matter of policy, Mr. Justice Harlan presumably feels that nonconforming applicants are given all the protection they need under his set of rules. The only ones beyond the pale are those whose conscientious objection is so deep that they will still refuse to answer on principle questions which the Court holds are constitutionally proper. There will never be many of these and for them he has no regard. The unwilling applicant, unlike a witness at a Congressional hearing, does not decline to answer at his peril; there is always time for him to "purge his contempt." He holds the "key" to admission in his own hands.

The metaphor is apt but only if we accept the Harlan view of conscientious objection. Anastaplo does not hold the key to his admission in his hands. For the key can be used only at a price — the price of surrendering the position of principle he has adhered to over ten long years. We might as well say that the Jehovah's Witnesses children in the flag salute case held the key to admission in their hands. But for Mr. Justice Harlan this is not a great price now that the constitutional basis for the objection in principle has been erased. The adherence to principle at this stage is no longer admirable. It is just stubborn, anarchical, and possibly trivial. But we have only to recall the continuum of conscientious objectors, Socrates, Thoreau and many others, to appreciate how easy it is for sensible men to disagree deeply on the values here involved.

What divides Mr. Justice Harlan from Mr. Justice Black in the end are two points. Mr. Justice Black's adherence to free speech values is such that he thinks the questions are improper under the First Amendment and that, therefore, the applicant is deeply right in refusing to answer. Equally important, he sees values in the conscientious objection to the question, even when its propriety has been authoritatively settled. It is after all something like the dissenting opinion.

Someone once said of conscientious objectors: "Thank God we do have a few of them in our society and, thank God, we do not have

more of them.” And we surmise the cases pivot on differing conceptions of the value of the conscientious objector stance in this context. For Mr. Justice Harlan and the majority there is no virtue in this position and they refuse to see that the cases are flavored by it; there is for them only an intransigent refusal to answer relevant questions. For Justices Black, Douglas and Brennan and Chief Justice Warren there is deep sympathy for the position — it is perhaps what they might have done themselves had any one of them been in the applicant’s shoes — and the steadfast refusal to answer on these grounds is not obstructive, or merely neutral, it is admirable. We agree, for we suspect our society can ill-afford to lose the services of lawyers whose fatal vice is courageous adherence to principle.