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Constitutional Law - Due Process - Disbarment of Attorney for Invoking Privilege against Self-Incrimination

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would be subjected to physical persecution[11] was modified by the present statute so as to *authorize* the action if the Attorney General's *opinion* was that the facts existed. This would indicate that the withholding of deportation under such circumstances rests wholly within the administrative judgment and opinion of the Attorney General or his delegate.[12] The courts may intervene when an alien has been denied appropriate procedural due process or a fair consideration of his application,[13] but, if these requirements have been met, they are powerless to modify the Attorney General's final decision.[14]

It has never been contended that the judiciary may pardon or mandamus the executive to pardon. It seems equally certain that the Attorney General's power of clemency in this instance is one which has been placed beyond the reach of the courts.[15]

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CONSTITUTIONAL LAW — DUE PROCESS — DISBARMENT OF ATTORNEY FOR INVOKING PRIVILEGE AGAINST SELF — INCRIMINATION — The Circuit Court ordered disbarment of an attorney for invoking the privilege against self-incrimination before a Senate sub-committee, when questioned in connection with alleged membership in the Communist Party. On appeal to the Supreme Court of Florida it was *held,* one justice dissenting, that the order be reversed. The mere invocation of the constitutional privilege against self-incrimination, is not sufficient to justify disbarment. *Sheiner v. State,* 82 So.2d 657 (Fla. 1955).

A state can dismiss certain types of employees for exercising the constitutional privilege against self-incrimination.[1] For example, the exercise of the privilege by a police officer is deemed incompatible with his prescribed

11. 64 Stat 1010 (1950), 8 U. S. C. §156 (1950).

12. U. S. *ex rel* Leong Choy Moon v. Shaughnessy, 218 F.2d 316 (2d Cir. 1954); U. S. *ex rel* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953) (The courts may not substitute their judgment for his). See also a communication to the Yale Law Journal from Senator Pat McCarran (D. Neb.), 17 January 1953: "The change in the language of the provision as it now appears in the Immigration and Nationality Act was motivated by a desire to clarify the provision to make it perfectly clear that a determination of whether or not the deportation of an alien should be withheld in such cases is solely within the discretion of the Attorney General."

13. U. S. *ex rel* Accardi v. Shaughnessy, 347 U. S. 260 (1954); U. S. *ex rel* Leong Choy Moon v. Shaughnessy, 218 F.2d 316 (2d Cir. 1954); U. S. *ex rel* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

14. Barreiro v. Brownell, 215 F.2d 585 (9th Cir. 1954) (Attorney General need not have suspended deportation even if alien had court judgment declaring eligibility); Sleddens v. Shaughnessy, 177 F.2d 363 (2d Cir. 1949).

15. U. S. *ex rel* Accardi v. Shaughnessy, 347 U. S. 260 (1954) (dissenting opinion).

1. The Fifth Amendment to the Federal Constitution provides that no person shall be compelled in any criminal case to be witness against himself. Similar provisions are found in all the state constitutions with the exception of Iowa and New Jersey, where the privilege against self-incrimination exists as part of the common law. State v. Height, 177 Iowa 650, 91 N.W. 935 (1902); State v. Miller, 71 N.J.L. 527, 60 Atl. 202 (1905); See 8 Wigmore, Evidence, §2252, p. 320, n. 1 & 2 (3rd ed. 1940). If the Fifth Amendment was literally interpreted the privilege could be inovked only in criminal actions. However, the courts have liberally construed both the federal and the state provisions, giving the clauses the same effect as the privilege had at common law. It can therefore be invoked in both civil and criminal proceedings. Christal v. Police Comm'n. of San Francisco, 33 Cal. App. 2d 264, 92 P.2d 416 (1936); *In re* Lemon, 15 Cal. App. 2d 82, 59 P.2d 213 (1936). A witness may not be contumacious in his refusal . To justify silence it must appear that the answer which might be given would have a direct tendency to incriminate. United States v. Weisman, 111 F.2d 260 (2d Cir. 1940); United States v. Flegenheimer, 82 F.2d 751 (2d Cir. 1936). However, a witness is not required to show that the testi-

duties.[2] In *McAuliffe v. City of Bedford*[3] the dismissal of a police officer for engaging in political activity contrary to police regulations was upheld. Mr. Justice Holmes, then sitting on the Supreme Court of Massachusetts, stated: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Applying the same reasoning, courts have upheld the dismissal of police officers for the exercise of the privilege against self-incrimination.[4] These decisions are consonant with the principle that because police officers are hired for the purpose of disclosing and preventing crime, any officer acquiring knowledge of facts tending to incriminate *any person* is under a duty to disclose such facts, and the refusal to do so is a violation of that duty.[5] On the basis of either a statute[6] or a board ruling,[7] teachers may be discharged for invoking the privilege when questioned as to communist affiliations.[8] In the absence of legislation, however, there have been virtually no dismissals because of the assertion of the privilege against self-incrimination, except in cases dealing with police officers.[9]

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mony he declines to give is certain to subject him to prosecution, or that it will prove the whole crime. It is sufficient that there be a reasonable possibility of prosecution, or that the answer, if given, would furnish a link in the chain of evidence needed to prosecute for a crime. Hoffman v. United States, 341 U. S. 479 (1951); Blau v. United States, 340 U. S. 159 (1950); People v. Schultz, 380 Ill. 539, 44 N.E.2d 601, 603 (1942) (dictum).

2. Christal v. Police Comm'n. of San Francisco, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949) (Refusal to sign an immunity waiver amounted to a refusal, in advance, to relinquish benefits of the constitutional privilege); Canteline v. McClellen, 282 N.Y. 166, 25 N.E.2d 972 (1940) (Police officer dismissed for violating provision of the New York Constitution, Art. I, §6, which provided for the removal of any public officer on his refusal to sign a wavier of immunity or answer any questions concerning his conduct in office).

3. 155 Mass. 216, 29 N.E. 517 (1892).

4. Cases cited note 2 *supra*.

5. "Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge which will tend to incriminate any person it is their duty to disclose such facts . . . .It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show that he himself has engaged in criminal activities." Christal v. Police Comm'n. of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (1939); See also Souder v. City of Philadelphia, 315 Pa. 1, 156 Atl. 245 (1931) (Police captain's refusal to answer specific charges was held "conduct unbecoming an officer" and was ground for dismissal by Civil Service Commission).

6. Daniman v. Board of Education of City of New York, 306 N.Y. 532, 119 N.E.2d 373 (1954) (Dismissal was in accordance with a provision of the City Charter which provided for the termination of employment upon the employee's refusal to testify).

7. Board of Education v. Wilkinson, 125 Cal. App.2d 100, 270 P.2d 82, 85 (1954) (Invoking privilege in face of school board's directive to disclose communist affiliations, thereby frustrating attempts to determine teaching qualifications, held to be an unprofessional act constituting ground for dismissal. The court said, "A teacher's employment in the public schools is a privilege, not a right. A condition implicit in that privilege is loyality to the government under which the school system functions. It is the duty of every teacher to answer proper questions in relation to his fitness to teach our youth, when put to him by a lawfully constituted body authorized to propound such questions.").

8. Faxon v. School Comm. of Boston, 331 Mass. 771, 120 N.E.2d 772 (1954) (Court affirmed dismissal in absence of statute or ruling requiring disclosure, stating that, "in a constitutional sense it seems to us to make no difference whether a teacher is dismissed because of statutory provisions expressly providing for such dismissal or, as in the present case, by an order of a public board acting within its statutory authority." However the fact that the teacher in this case was employed to serve "at discretion" leaves unanswered the question whether a teacher under contract or with tenure rights can be dismissed in absence of statute); See also Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (1952) (Statutory requirement that a teacher take an oath that he or she was not knowingly an advocate of or a member in any subversive organization was held valid).

9. See *Denying the Privilege Against Self-Incrimination To Public Officers*, 64 Harv. L. Rev. 987, 989 (1955).

Recently the Supreme Court of Illinois[10] upheld a refusal of admission to the bar of an applicant who refused to answer questions relating to his membership in the Communist Party. The court stated that granting the privilege to practice law is conditional not only upon taking an oath to support the federal and state constitutions,[11] but also upon proof of good citizenship, good moral character, and general fitness to practice law. This proof became impossible when the exercise of the privilege prevented the Committee from inquiring fully into the applicant's qualifications. A Canadian Court, in refusing an admitted communist admission to practice law said, ". . . Marxist philosophy of law and government, in its essence, is so inimical in theory and practice to our constitutional system and free society, that a person professing them is *eo ipso*, not a fit and proper person to practice law . . ."[13]

A denial of admission to the bar must be distinguished from disbarment. While the primary object of both proceedings is to maintain the integrity of the courts and protect the public,[14] an applicant for admission to the bar has the burden of establishing his fitness to be enrolled as an attorney.[15] In the disbarment proceeding, however, the burden of proof is on the challenging party,[16] and whether the interest an attorney has in his profession be called a property right, franchise, license, or privilege,[17] it is one of which he cannot be deprived without notice and an opportunity to defend.[18]

While several states have enacted statutes specifically enumerating the various grounds for disbarment,[19] it is usually held that the legislature cannot curtail judicial power to determine the moral and ethical qualifications of lawyers.[20] Generally speaking, any conduct on the part of an attorney evi-

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

11. See *In re* Summers, 325 U. S. 561 (1945) (Applicant whose convictions forbade him to bear arms in the defense of the state was denied admission to the bar on the ground that he could not take the oath of allegiance to support and defend the constitution of the state).

12. "When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions. . . " *In re* Anastaplo, 2 Ill.2d 471, 121 N.E.2d 826, 832 (1954); See *In re* Taylor, 309 Ky. 388, 217 S.W.2d 954 (1949) (Applicant for a license to practice law has duty to disclose all facts pertaining to his qualifications, *i.e.* all facts that would put the board of bar examiners or court on notice of any disqualifications).

13. Martin v. Law Society of British Columbia, 3 D.L.R. 173, 176 (1950).

14. *In re* Keenan, 310 Mass. 166, 37 N.E.2d 516 (1941); State v. Finn, 32 Or. 519, 52 Pac. 756 (1898); *In re* Egan, 52 S.D. 394, 218 N.W. 1 (1928).

15. *In re* Anastaplo, 2 Ill.2d 471, 121 N.E.2d 826 (1954); *in re* Keennan, 310 Mass. 166, 37 N.E.2d 516 (1941) (dictum).

16. *Re* Morford, 7 Ter. 144, 80 A.2d 429 (Del. 1951) (Charges must be proven by a convincing preponderance of the evidence); *In re* Fenn, 235 Mo. App. 24, 128 S.W.2d 657 (1939) (Dismissal of charges for lack of evidence); *In re* Wellcome, 23 Mont. 450, 59 Pac. 445 (1899) (Presumption of innocence until proven guilty); See Drinker, *Legal Ethics*, p. 46 (1953).

17. Application of Dodd, 131 Conn. 702, 42 A.2d 36 (1945) ("Attorney has a franchise which is a property right."); Lambdin v. State, 150 Fla. 814, 9 S.2d 192, 193 (1942) ("We practice law by the grace, not the right. The privilege to practice law is in no sense proprietory. The State may grant or refuse it, or may withdraw it from those who abuse it."); State v. Gozard, 70 S.D. 193, 16 N.W.2d 484 (1944) ("The right to practice law is not a vested or absolute right, nor is it a property right, but rather a permit ,license, franchise, or privilege granted upon demonstration of satisfactory moral fitness and legal and general learning.").

18. *Ex parte* Garland, 4 Wall. 333 (1866); *In re* Greer, 52 Ariz. 385, 81 P.2d 96 (1938); *In re* Metzenbaum, 22 Wash.2d 75, 154 P.2d 602 (1945) (dictum); See Drinker, *Legal Ethics*, p. 36 (1953) (Attorney before disbarment proceeding has no constitutional right to confront witness, and, except in Georgia, North Carolina, and Texas, no right to a trial by jury).

19. See *e.g.* N.D. Rev. Code §27-1402 (1943).

20. See 5 Ark. L. Rev. 411 (1950-51).

dencing his unfitness for the confidence and trust which attend the relationship of attorney and client, and his position as an officer of the court, constitutes a ground for disbarment.[21] Because adherence to the creed of any subversive organization is incompatible with an attorney's oath to uphold the laws of the federal and state government, membership in the Communist Party is generally deemed sufficient evidence of unfitness to practice law.[22] However, in the few cases that have arisen it has been held that the invocation of the privilege against self-incrimination does not *per se* constitute evidence of unfitness,[23] In the case of In re *Grae*,[24] an attorney who invoked the privilege refused to sign a waiver of immunity when called upon to testify in connection with an investigation into the unlawful practice of law. The court said, "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."[25] Similarily, an Illinois court[26] held that a judge's failure to sign a waiver of immunity before a grand jury murder investigation, did not constitute such a violation of his duty as a lawyer as to warrant disbarment. But, a different result was reached where an attorney who was charged with membership in the Communist Party failed to appear. The court concluded that because of the gravity of the charge the attorney, as an officer of the court, was under a duty to respond, and that his failure to do so constituted sufficient cause for disbarment.[27]

The American Bar Association has expressed the opinion that an attorney's invocation of the privilege against self-incrimination is sufficient ground for disbarment.[28] It reasons that the implications arising from the assertion[29] of the privilege are fatal to belief in his charcater and integrity. This, in addition to the enactment of the *Smith Act*[30] probably had great influence on the trial court's order for disbarment in the instant case

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21. *In re* Wells, 293 Ky. 201, 168 S.W.2d 730 (1943); *In re* Williams, 233 Mo. App. 1174, 128 S.W.2d 1098 (1939); *In re* Brown, 64 S.D. 87, 264 N.W. 521 (1936). The passing of worthless checks, selling of opium, seduction on the promise of marriage, adultery, commission of a crime and any misconduct involving moral turpitude have been held grounds for disbarment on the basis of professional unfitness, see 15 Mo. L. Rev. 309 (1950).

22. *In re* Anastaplo, 2 Ill.2d 471, 121 N.E.2d 826 (1954); *In re* Margolis, 269 Pa. 206, 112 Atl. 478 (1921); *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925) (Attorney by publicly advocating a general strike to force liberation of persons imprisoned for violations of acts directed against teachings advocated by I.W.W. violated his oath to uphold the law. Disbarment proper).

23. *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); *In re* Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940); *In re* Schneidkraut, 231 App. Div. 109, 246 N.Y.S. 505 (1930).

24. 282 N.Y. 428, 26 N.E.2d 963 (1940).

25. *Id.* at 967.

26. *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941).

27. Welanko's Case, 99 N.H. 413, 112 A.2d 50 (1955). See *In re* Turnquist, 206 Minn. 104, 287 N.W. 795 (1936) (Attorney defaulted and an order of discipline was entered upon the assumption that he was guilty as charged).

28. 40 A.B.A.J. 404, 405 (1954). See also 39 A.B.A.J. 344, 345 (1953) (Resolved that inquiries be made into Communist affiliations and that determination be had concerning fitness to practice law); 36 A.B.A.J. 948, 972 (1950) (Resolved that attorneys be required to take loyalty oath); L. Wright, *The Lawyer's Responsibility and the Fifth Amend.*, 34 Neb. L. Rev. 573 (1955).

29. Where attorney is charged with misconduct and he refuses to answer questions relating to the charge, an inference arises that the testimony if given, would have been unfavorable. Fish v. State Bar of California, 214 Cal. 215, 4 P.2d 937 (1931); *In re* Fenn, 235 Mo. App. 24, 128 S.W.2d 657, 665 (1939).

30. 54 Stat. 671, 18 U.S.C. §10 (1946) provides: "(a) It shall be unlawful for any person . . . (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with any such society, group, or assembly of persons, knowing the purposes thereof."

Experience has shown that the social and political overtones arising from the assertion of the constitutional privilege generally constitute an effective deterent to its exercise. But where they do not, the mere assertion of Fifth Amendment rights should not be made a substitute for competent evidence as the basis of a declaration of professional unfitness.

HAROLD W. E. ANDERSON

DIVORCE — DISPOSITION OF PROPERTY — WORKMAN'S COMPENSATION BENEFITS — Plaintiff obtained a divorce from her husband, the defendant, in a community property state. In effectuating a division of the community property, the court awarded to the defendant all of the weekly workman's compensation benefits he had been drawing following a totally and permanently disabling injury sustained during coverture. Plaintiff appealed this award on the ground that the weekly compensation benefits were paid the defendant in lieu of wages and since wages were community assets, she was entitled to share them with the defendant. The court *held* that the award be affirmed. Workmen's compensation benefits were not a part of the community property, but were personal to the defendant and his separate property. *Richards v. Richards,* 59 N. M. 308, 283 P.2d 881 (1955).

The origin of the community property system has never been positively determined,[1] but its foothold in the United States was gained in those sectors of the country originally under Spanish domination.[2] Because it was not a part of the common law, it has survived only by statute.[3] In a community property state all property acquired by the husband or wife during the marital relationship is a part of the community, except that received by gift, inheritance, or devise,[4] which is normally deemed the separate property of the recipient as is that belonging to either before marrige.[5]

It appears that of the eight states[6] using the community system four[7] have dealt directly with the problem in the principle case. Generally, damages received as compensation for injuries to either the husband[8] or wife[9] are held to fall into the community as property acquired during the marriage. This was the theory adopted by the Arizona court in deciding that the benefits of work-

1. Garazi v. Dastas, 204 U. S. 64, 78 (1907) (dictum).
2. Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897).
3. Nelson v. Nelson, 149 Minn. 285, 183 N.W. 354 (1921); Pridemore v. Duncan, 146 Okla. 70, 293 Pac. 266 (1930).
4. Wharburton v. White, 176 U. S. 484 (1900); Pedder v. Commissioner of Int. Rev., 60 F.2d 866 (9th Cir. 1932); Myer v. Kinzer, 12 Cal. 248 (1859).
5. Woods v. Maimy 69 F.2d 892 (9th Cir. 1934); Merren v. Commissioner of Int. Rev., 51 F.2d 44 (5th Cir. 1931); Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917).
6. 2 Tiffaney, Real Property, §437 (3rd Ed. 1939).
7. E.g. Dawson v. McNaney, 71 Ariz. 79, 223 P.2d 907 (1950); Northwestren Redwood Co. v. Industrial Accident Comm'n., 184 Call. 484, 194 Pac. 31 (1920); Brownfield v. Southern Amusement Co., 196 La. 74, 198 So. 656 (1940); Pickens v. Pickens, 125 Tex. 410, 83 S.W.2d 951 (1935).
8. Cavagnaro v. Delmas, 29 Cal. App.2d 352, 84 P.2d 274 (1938); Southwestern Engraving Co. of Dallas v. Hansen, 72 S.W.2d 344 (Tex. Civ. App. 1934); Flowers v. Smith, 80 S.W.2d 392, 393 (Tex. Civ. App. 1934) (dictum) (Damages for slander were held to be a part of the community). *Contra* Fredrickson & Watson Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940).
9. Cavagnaro v. Delmas, 29 Cal. App.2d 352, 84 P.2d 274 (1938); Swager v. Peterson, 49 Idaho 785, 291 Pac. 1049 (1930); Taylor v. Catalen, 140 Tex. 38, 166 S.W.2d 102, 104 (1940) (dictum).