

Notes

Admission to the Bar Following Conviction For Refusal of Induction

Part One: Constitutional Issues

No single institution has had a greater impact on the lives of the present younger generation than the Selective Service System during the Vietnam War. Because of the widespread opposition among the young to that conflict, the usual unquestioning, if grudging, acceptance of the military obligation has turned into doubt and even disavowal of the duty itself and a special aversion for performing it during the war. The desire to avoid service has led to studies, occupations, and even psychiatric treatments which were neither planned nor desired.¹ When actually faced with induction, a number have chosen to leave the country, while others have decided to enter the service and seek an assignment compatible with their reservations. Some, however, because of their conscientious objections to the military obligation, war in general, unjust wars, or solely this war, have felt compelled to refuse induction and face criminal prosecution for their act.

A conviction for the felony of draft refusal may have many adverse long-term consequences, such as loss of citizenship rights² and diminished private and public employment opportunities. Chief among those effects may be disqualification for those occupations which require state licensing.³ This Note will consider the relation of such a conviction to qualification for the legal profession. The problem, stated in legal terms, is whether a conviction for refusal of induction

1. Military Selective Service Act of 1967, 50 U.S.C. App. § 456(h) (authorizing student and occupational deferments); § 454(a) (requiring mental fitness for induction) (1968). Selective Service Regulations, 32 C.F.R. § 1622.25-1622.26 (student deferments); § 1622.20-1622.23 (occupational deferments); § 1628.1-1628.25 (regarding physical examinations) (1969).

2. 21 AM. JUR. 2d *Criminal Law* § 616-29 (1965); 26 AM. JUR. 2d *Elections* § 94 (1966).

3. Bradway, *Moral Turpitude as the Criterion of Offenses That Justify Disbarment*, 24 CALIF. L. REV. 9 (1935) [hereinafter cited as Bradway]; Graves, *Professional and Occupational Restrictions*, 13 TEMP. L.Q. 334 (1939); Monaghan, *The Constitution and Occupational Licensing in Massachusetts*, 41 B.U.L. REV. 157 (1961); Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 189 (1958); Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533 (1962); Note, *Disciplining the Attorney for Extra-Professional Misconduct*, 12 SYRACUSE L. REV. 487 (1961).

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can serve as the basis for a finding that an applicant fails to meet the character requirement for admission to the bar.⁴ The basic contention of Part One of this Note is that in light of the constitutional limitations on such a requirement, a conviction for conscientious draft refusal⁵ cannot be evidence of unfitness to practice law, and that an applicant whose record is satisfactory except for such a conviction should be admitted to the bar.

I. Structure and Procedure of the Admission Process⁶

Although every state makes some statutory provision for administration of the admission process, it is universally held that admission to the bar is a judicial and not a legislative function.⁷ The highest court in the state is always at the head of the admission structure. Because

4. To facilitate analysis of this issue, certain clarifying assumptions are necessary. First it is postulated that aside from the conviction, the applicant has a satisfactory record which he will have no difficulty verifying. Second, it is posited that the applicant will not seek to conceal his conviction or refuse to respond to inquiries regarding it. This assumption eliminates the problem of obstruction of the investigatory process dealt with in *Konigsberg v. State Bar*, 366 U.S. 36 (1961), and *In re Anastaplo*, 366 U.S. 82 (1961). The third supposition is that the applicant has had no controversial political associations which would raise the problem of disloyalty or lack of patriotism. The last assumption is that the state court will not construe the oath to support the Constitution, usually required of new lawyers, as requiring a willingness to bear arms, and thus preclude conscientious objectors from taking the oath. Illinois was held competent to do this in *In re Summers*, 325 U.S. 561 (1945), a case whose continued validity is however in serious doubt in the light of *Girouard v. United States*, 328 U.S. 61 (1946). Although these assumptions, particularly the one regarding political affiliations, may be attacked as naive, they are necessary to permit a direct, uncluttered consideration of the complex issue involved.

5. For the purposes of the arguments presented herein, it is irrelevant whether the conscientious objection is against all wars or only one war, is based on religious or on moral grounds, or precludes all or only some participation in the armed forces. Of course, the typical case today will involve a person whose objection is either selective or based on ethical grounds and who therefore does not fit within the statutory definition. Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (1968). After failing to obtain the exemption, he feels compelled to refuse induction. But the arguments are essentially the same if the person receives non-combatant conscientious objector status, but feels he cannot participate in the army at all, or receives a total exemption but feels he cannot even perform the required alternative civilian service. However, in such cases, and especially the latter type, bar committees and courts are likely to be more unsympathetic to the arguments suggested herein because the applicant received recognition of his belief and still refused to perform any service. See *In re Brooks*, 57 Wash. 2d 66, 355 P.2d 840 (1960). On the other hand, it is possible that the arguments presented as to the conscientious motive for the crime will be better received where the existence and sincerity of the beliefs have been officially certified by the Selective Service System. The above variations are, however, irrelevant for the purposes of this Note, and the only assumption made is that some sincere conscientious objection motivates the draft refusal. None of this is meant to suggest, of course, that there are no persons who refuse the draft because of fear, selfishness, or a desire to impress a peer group.

6. The information for this general description of structure and procedure was derived from examination of the statutes and rules in all the American jurisdictions. Citations are given only when the information was taken from other sources.

7. Annot., 144 A.L.R. 150, 176 (1943); 7 C.J.S. *Attorney and Client* §§ 5a, 6a (1937).

of that position, it is usually authorized to prescribe the rules for the admission process and at times even to create the necessary administrative units. In addition, it is always the forum of last resort for an admission applicant.

The most important body after the state supreme court is the Board of Law Examiners, Board of Governors or Board of Commissioners, as it is variously called. This body is responsible for administering the admissions system and making recommendations to the admitting court regarding applications. To carry out its functions, the Board, among other things, will establish a Committee on Character Fitness, as it is usually called, composed ordinarily of unpaid volunteer lawyers.⁸ They are charged with the duty of determining whether applicants to the bar meet the character requirement. That qualification is usually expressed as either "good moral character" or "moral fitness" and is normally prescribed by the statute, although sometimes formulated by the court. Specific criteria of fitness are rarely given, even in the often detailed rules of the courts and Boards, and it is therefore unusual to find mention of the relevance of a felony conviction.

The character investigation commences with the applicant's completion of a questionnaire.⁹ Typically, there is a question asking whether the applicant has ever been arrested, indicted or convicted of any crimes other than traffic violations and if so, the nature and circumstances of such offenses.¹⁰ The application will also usually request several character references, one or more of whom must be attorneys practicing in the jurisdiction. The applicant may submit as many additional supporting statements as he wishes.¹¹

Following receipt of the application, the character committee will begin its investigation. It may consult character references, contact associates and employers, and independently verify statements in the application. It may interview the applicant or hold a hearing to ques-

8. Jackson, *Character Requirements for Admission to the Bar*, 20 FORD. L. REV. 305, 316 (1951).

9. In some states, certification of good character is a requisite for taking the bar examination, while in others the character issue is only considered after successful completion of the exam. *Id.* at 305-08. This difference has no effect on the procedure used or the standard applied in judging character.

10. See, e.g., THE BAR EXAMINERS' HANDBOOK 73 (1968) (National Conference of Bar Examiners questionnaire for attorneys seeking admission in another state, question 17.b).

11. In close cases, a large number is not unusual. In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 235-36 (1957), the Court notes that the applicant submitted statements by all but one member of his law school graduating class and by all his available law professors. In *Konigsberg v. State Bar*, 353 U.S. 252, 264 (1957), mention is made of the applicant's submission of 42 written statements. Such an exhaustive set of recommendations may be most helpful if an adverse inference is drawn from the draft conviction. Pp. 1379-80 *infra*.

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tion him on any point relevant to its investigation.¹² It has been held that if the committee intends to deny admission for unfitness, procedural due process requires that the applicant be informed of the reasons and afforded a formal hearing to reply to the allegations.¹³ Since every state places the burden of proof as to character on the applicant,¹⁴ it would seem logical that due process requires a hearing so that every applicant may present his case, whether or not denial is threatened.

If after the entire investigation the character committee finds the applicant unfit, he almost always has a statutory right to judicial review, often by the state supreme court, although in some states an intermediate court hears the initial appeal. The scope of review varies; it may be limited to the "sufficiency of the evidence," or to determining whether there has been "abuse of discretion" or "arbitrary action" (the majority rule), or there may be de novo consideration.¹⁵ Clearly, constitutional objections would have to be reviewed under any rule, and where such claims arise, a chance, of course, exists for ultimate review by the United States Supreme Court.

II. Constitutional Limitations on the Character Requirement

Since bar admission is a state function, constitutional limitations regarding it derive from the fourteenth amendment. The nature of those restrictions is most simply described in the broad holding of a unanimous Supreme Court in the bar admission case of *Schwartz v. Board of Bar Examiners*: "A state cannot exclude a person from the practice of law or from any occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."¹⁶ This means that the basis of the action may not be arbitrary, unreasonable, or discriminatory.¹⁷ This protection was denied at one time on the theory that government licenses, expenditures, and employment were mere privileges bestowed by the

12. *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961).

13. *Willner v. Committee on Character*, 373 U.S. 96 (1963).

14. Annot., 64 A.L.R.2d 301, 311-14 (1959); 7 C.J.S. *Attorney and Client* § 11c (1937); *Konigsberg v. State Bar*, 366 U.S. 36, 40 n.4 (1961).

15. Annot., *supra* note 14, at 315; 7 C.J.S., *supra* note 14, at § 11c.

16. 353 U.S. 232, 238-39 (1957). *Accord*, *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 6 (1964); *Willner v. Committee on Character*, 373 U.S. 96, 102 (1963); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963).

17. *Cohen v. Hurley*, 366 U.S. 117, 122-23 (1961); *Douglas v. Noble*, 261 U.S. 165, 168 (1923); *Hawker v. New York*, 170 U.S. 189, 195, 196 (1898); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 373-74 (1886). See also *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856) for a similar standard for bar admissions in pre-fourteenth amendment days.

state and not rights belonging to the individual.¹⁸ But this distinction has been entirely eroded in a long line of cases starting with *Wieman v. Updegraff*,¹⁹ so the Court in *Schwartz* could dismiss the near-scholastic controversy with a footnote.²⁰

In explanation of what the state may ask of the applicant, the *Schwartz* Court stated:

A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.²¹

This basic standard applies to occupational licenses in general. Rigorous examinations may be required of dentists²² and doctors²³ to protect the public health "against the consequences of ignorance and incapacity"²⁴ and a good character may be demanded of physicians to prevent fraud or deception in the application of remedies.²⁵ But the applicant's race is not relevant to his ability and therefore not a permissible basis for denying him the right to operate a laundry.²⁶ Nor is past support of the Confederacy evidence of the unfitness of a priest "to administer the sacraments of his church"²⁷ or of a lawyer to practice before the Supreme Court.²⁸ In each case, the question is whether what is being required bears a direct and reasonable relationship to what may be properly protected.

In order to determine what character qualifications may reasonably be demanded of an applicant to the bar, it is necessary to consider first the purposes of state regulation of character in bar admissions. The

18. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968); Reich, *The New Property*, 73 YALE L.J. 733, 739-41 (1964). See, e.g., *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) (leading case, opinion by Holmes, J.).

19. 344 U.S. 183 (1952) (public employment); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956) (public employment); *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemption); *Flemming v. Nestor*, 363 U.S. 603 (1960) (Social Security benefits); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (public office); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (public employment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation benefits); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (public employment); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (public employment); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits).

20. 353 U.S. at 239 n.5.

21. *Id.* at 239.

22. *Douglas v. Noble*, 261 U.S. 165 (1923).

23. *Dent v. West Virginia*, 129 U.S. 114 (1889).

24. *Id.* at 122.

25. *Hawker v. New York*, 170 U.S. 189, 193-94 (1898).

26. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

27. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319 (1866).

28. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

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practice of law essentially entails relationships with two groups of people—the clients whom the attorney advises and represents, and the personnel of the courts, i.e., judges, jurors, witnesses, and opposing lawyers. The character requirement is primarily intended to protect these people and their interests from improper dealings. Thus the state is interested, for example, in preventing an attorney from stealing his clients' money, betraying their confidence or misleading them so as to stimulate litigation. Equally the state hopes to insulate the judicial system and its personnel from interference of any sort, such as bribery of jurors, subornation of perjury, or misrepresentations to a court.²⁹

Although most admission cases involving criminal convictions can be decided without rigorous analysis of the character standard, a recent case involving a young man several times convicted of misdemeanors for civil rights sit-ins forced the California Supreme Court to a careful consideration of the requirement.³⁰ Aware of the constitutional necessity of connecting character with fitness, the court sought to determine the functions of the standard and arrived at essentially the conclusion suggested above:

The purposes of investigation by the bar into an applicant's moral character should be limited to assurance that, if admitted, he will not obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court.³¹

The good moral character requirement can hence be restated as a demand that entering lawyers not possess personality traits which potentially threaten either their prospective clients' interests or the judicial process. Of course, the presence of dangerous characteristics can only be determined by an examination of past acts which either singly or in a pattern evidence the existence of such traits. For example,

29. As one commentator has summarized it:

Good character is required of an applicant both to assure future clients that they may employ his services with confidence that their interests will be protected and to guarantee that the candidate will not obstruct the administration of the judicial process.

Note, "Good Moral Character" As a Prerequisite for Admission to the Bar: Inferences to Be Drawn from Past Acts and Prior Membership in the Communist Party, 65 YALE L.J. 873, 878-79 (1956). See also Selinger & Schoen, "To Purify the Bar": A Constitutional Approach to Non-Professional Conduct, 5 NAT. RESOURCES J. 299, 351-52 (1965); Note, Admission to the Bar—"Good Moral Character"—Constitutional Protections, 45 N.C.L. REV. 1008, 1013 (1967); ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 1, EC1-2; *In re Monaghan*, 126 Vt. 53, 67-68, 222 A.2d 665, 676-77 (1966) (dissenting opinion).

30. *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

31. 65 Cal. 2d at 462, 421 P.2d at 87, 55 Cal. Rptr. at 239.

past acts of fraud or embezzlement may indicate a tendency to steal from or cheat others which represents a threat to future clients. Similarly, prior acts of bribery or misrepresentation may evidence an inclination to deceive which could interfere with the proper administration of justice. Thus, the character requirement entails a pair of inferences: the applicant must not have behaved in the past in a manner which would imply the existence of personality traits which in turn would suggest an unacceptable likelihood of future misbehavior affecting adversely the interests of clients or the system of justice.

Another objective of the character requirement sometimes suggested is protection of the reputation of the bar.³² This view is premised on the notion that the bar and the judicial system must display the appearance of purity as well as being pure in fact.³³ In effect, this means that each applicant to the bar must meet not only a functional professional standard of fitness but also satisfy a general lay sense of adequacy. Satisfaction of that standard, it is contended, would maintain a high respect for lawyers and the administration of justice.³⁴

There are several serious constitutional difficulties with this position. The first is that a standard defined as "conduct which discredits the reputation of the bar," or something similar,³⁵ is too vague and

32. Cf. Bradway, *supra* note 3, at 23; Selinger & Schoen, *supra* note 29, at 347; 55 CAL. L. REV. 899, 901, 907 (1967); Note, *Disciplining the Attorney for Extra-Professional Misconduct*, 12 SYRACUSE L. REV. 487, 494 (1961); Note, "Good Moral Character" As a Prerequisite for Admission to the Bar: Inferences to Be Drawn from Past Acts and Prior Membership in the Communist Party, 65 YALE L.J. 873, 879-80 (1956); H. DRINKER, LEGAL ETHICS 42, 44-46 (1953); W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 138 (1956); ABA CANONS OF PROFESSIONAL ETHICS Nos. 29, 32; ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 9, EC9-1, 9-6 (Final Draft, 1969). *E.g.*, Whitsitt v. Bar Rules Comm., 223 Ark. 860, 868-69, 269 S.W.2d 699, 703 (1954); *In re Rothrock*, 16 Cal. 2d 449, 459, 106 P.2d 907, 912 (1940); *In re Serritella*, 5 Ill. 2d 392, 398, 125 N.E.2d 531, 534 (1955); *In re Fischer*, 231 App. Div. 193, 202, 247 N.Y.S. 168, 179 (1930); *State ex rel. Bar Ass'n v. Ablah*, 348 P.2d 172, 175 (Okla. 1959); *In re Monaghan*, 126 Vt. 53, 58-59, 222 A.2d 665, 670 (1966).

Although all but one of the relevant cases are disbarment proceedings, several cases equate the admission and disbarment standards, and in any case the basic interests sought to be protected by character controls for lawyers are identical whether the regulation occurs on entrance to or potential exit from the profession. Pp. 1378-79 *infra*.

33. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 9.

34. This purpose would appear to be thwarted by permitting members of the profession to make this lay evaluation. One commentator realized this and suggested that members of the public be on the evaluating committee. Bradway, *supra* note 3, at 25-26.

35. "[A]ct has lowered prestige of the legal profession," Bradway, *supra* note 3, at 23; "does act reflect on honor and integrity of the bar," Note, *Disciplining the Attorney for Extra-Professional Misconduct*, *supra* note 3, at 494; "not to directly or indirectly reflect discredit or criticism on the administration of justice," *Bartos v. United States Dist. Court*, 19 F.2d 722, 726 (8th Cir. 1927); "conduct . . . that . . . would cast a serious reflection on the . . . reputation of the profession," *State v. Murrell*, 74 So. 2d 221, 244 (Fla. 1954); "misconduct such as to bring discredit upon the profession," *In re Wells*, 293 Ky. 205, 206, 165 S.W.2d 733, 734 (1943); "conduct . . . of a character to bring reproach upon the legal profession," *In re H— S—*, 69 S.W.2d 325, 327 (Mo. Ct. App. 1934);

ambiguous to meet due process requirements.³⁶ While the "good moral character" standard itself may also be arguably vague, it is, as Justice Frankfurter pointed out in his concurrence in *Schwartz*,³⁷ an old and familiar legal concept which has through use attained a degree of certainty and clarity. The "reputation" standard, on the other hand, comes with no such enlightening tradition or extensive use. Nor is it rooted in any statutory language; it is solely a creation of the judicial imagination. Thus judicial acceptance of the ambiguity of the "good moral character" requirement has no bearing on the constitutionality of a standard invoking "the reputation of the bar."³⁸

The due process concept of vagueness originated in a series of cases involving criminal statutes which were so unclear that they failed to provide adequate warning as to the specific conduct prohibited. An early case striking down a law punishing contractors who paid less than "the current rate of per diem wages in the locality where the work is performed,"³⁹ established the general rule:

"practices as cannot fail to bring discredit on the profession," "practices designed to bring . . . profession into disrepute," *State ex rel. Neb. State Bar Ass'n v. Wiebusch*, 153 Neb. 583, 588-89, 45 N.W.2d 583, 586-87 (1951); "brings . . . upon the profession to which he belongs . . . disgrace and ridicule," *In re Renehan*, 19 N.M. 640, 679 (1914).

36. Since the constitutional limitations require in this case a rational connection between the behavior or trait on which denial is grounded and the objectives of the regulation, the objectives in fact become the standards by which the behavior is judged. Thus it is valid to analyze the objectives as if they were statutory or regulatory standards.

37. 353 U.S. at 247-48.

38. Although courts accept and use the term "good moral character," there never has been a definitive decision as to its vagueness. The Supreme Court noted the possibility of such an objection in *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957):

[T]he term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

The Court there used state judicial interpretations to narrow the meaning of the term and avoid a constitutional decision. In the second *Konigsberg* case, the Court said that California required the applicant to bear "the burden of proof of 'good moral character'—a requirement whose validity is not, nor could well be, drawn in question here." 366 U.S. 36, 40-41 (1961). But Judge Motley, in her dissent in *LSCRR v. Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969), notes that the "requirement" which the opinion claims is beyond question is that of bearing the burden of proof, not that of "good moral character." She further notes that the petitioner there did not attack the standard for vagueness and thus the Supreme Court did not actually pass on the issue in that case, nor in any subsequent one. Although the majority in *Wadmond*, relying on that statement in the second *Konigsberg* case, gives the vagueness argument short shrift, *id.* at 124, Judge Motley treats the question as one of first impression and gives it lengthy consideration. Basically because of the standard's age and extensive use, noted by Justice Frankfurter in *Schwartz*, she at last finds the statute constitutional on its face, *id.* at 144 (dissenting opinion), but then goes on to find New York's application and implementation of it to be impermissibly vague and broad. *Id.* at 146 (dissenting opinion).

The term "moral turpitude," usually found in disbarment statutes and employed in admission cases because it is supposedly more specific and definite than "good moral character" (p. 1378 *infra*), has also been questioned on vagueness grounds. *Jordan v. DeGeorge*, 341 U.S. 223, 235 (1951) (Jackson, J., dissenting).

39. *Connally v. General Construction Co.*, 269 U.S. 385, 388 (1926).

[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.⁴⁰

In *United States v. Cohen Grocery Co.*,⁴¹ the Court held that a law which prohibited the setting of "an unjust or unreasonable rate or charge in the handling . . . [of] necessities,"⁴² lacked any "ascertainable standard of guilt" and that an attempt to enforce it "would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest"⁴³

This rule of vagueness is not restricted to criminal cases.⁴⁴ In a civil case involving the same statute as *Cohen Grocery*, the Court explained: "It was not the criminal penalty that was held invalid but exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."⁴⁵ That principle was reaffirmed recently in *Giaccio v. Pennsylvania*.⁴⁶ There the Court struck down a statute which empowered a jury to impose costs on one acquitted of a misdemeanor. Not finding any standards in the law, the Court examined the judicial glosses which permitted imposition of costs for conduct which was "reprehensible," "improper," or "outrageous to morality and justice" and concluded: "If used in a statute which imposed forfeitures, punishments, or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause."⁴⁷ Denial of admission to the bar entails a loss which is far greater than the sum Giaccio paid (\$230.95) and carries with it at least as great a stigma as that left on Giaccio's character. It is therefore also a "forfeiture" and must be as carefully scrutinized for vagueness.⁴⁸

40. *Id.* at 391.

41. 255 U.S. 81 (1921).

42. *Id.* at 86.

43. *Id.* at 89.

44. Other important cases finding an impermissible vagueness in criminal statutes are *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) and *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210 (1932).

45. *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925).

46. 382 U.S. 399, 402 (1966).

47. *Id.* at 404.

48. The suggestion that *Giaccio* provides a strong basis for attacking the character standards of state licensing statutes is made in Note, 1966 DUKE L.J. 792 (1966).

Other cases involving civil statutes in which the Court entertained vagueness challenges were *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (deportation) and *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (commitment to mental hospital). In another deportation case, a Circuit Court found impermissibly vague the standard of

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Applying a standard of "conduct which discredits the bar's reputation" would be, to paraphrase *Cohen Grocery*, like enforcing a standard of "all acts detrimental to the bar's interest," a standard which is actually no standard at all. Would a fraternity "hazing" prank be ruled as conduct discrediting the bar? Might a divorce and remarriage by a prospective lawyer be grounds for his exclusion? Whatever the nature of the acts considered, it is clear that law students of "common intelligence must necessarily guess"⁴⁹ as to whether that conduct falls within the broad dragnet of the "reputation" standard.

In addition to this due process vagueness attack, the proposed standard must face the objection that its ambiguity permits a construction encompassing activities protected by the first amendment. Fear of such a construction might inhibit the free exercise of such rights by those to be judged by the standard. The possibility of such a "chilling effect" has led the Supreme Court to strike down similarly overbroad standards as violative of the first amendment via the due process clause of the fourteenth amendment.

This "vagueness overbreadth" doctrine originated in criminal cases. In *Stromberg v. California*,⁵⁰ a law which prohibited the display of a flag as a "sign . . . of opposition to organized government" was held invalid because "a statute which is so vague and indefinite as to permit punishment of the fair use of this opportunity [for free political discussion] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."⁵¹ Statutes penalizing certain types of speech⁵² and publications featuring crime⁵³ were similarly struck down. Later development of this doctrine came in cases where public employees, usually teachers, were required to sign negative loyalty oaths or lose their jobs. In one case the Court questioned whether a conscientious employee could take an oath that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"⁵⁴ if he had voted for candidates of the Party or been a lawyer for a Communist. The complete lack of "any . . . terms susceptible of

"psychopathic personality" which, unlike the same standard in *Pearson*, had not received a detailed judicial interpretation. *Fleuti v. Rosenberg*, 302 F.2d 632 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963).

49. P. 1360 *supra*.

50. 283 U.S. 359 (1931).

51. *Id.* at 369.

52. *Herndon v. Lowry*, 301 U.S. 242 (1937).

53. *Winters v. New York*, 333 U.S. 507, 509-10 (1948). *See also Note, Void-for-l'agueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

54. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 279 n.1 (1961).

objective measurement"⁵⁵ made such a construction possible and thus rendered the oath impermissibly vague. Oaths requiring one "by precept and example to promote respect for the flag and the institutions of the United States"⁵⁶ and prohibiting "treasonable or seditious utterances"⁵⁷ were also invalidated because the phrases were so ambiguous as possibly to include protected speech and thereby discourage teachers from fully exercising their constitutional rights.⁵⁸

It is precisely such a danger that lurks in the vagueness of "conduct which discredits the bar's reputation." Would participation in a legal peace march or active support for Eldridge Cleaver's 1968 Presidential candidacy constitute actions which when committed by an attorney-to-be derogate the entire profession? Is support of the ACLU or employment with the California Rural Legal Assistance sufficiently notorious as to impugn the bar? The proposed standard is "lacking in terms susceptible of objective measurement" and might well sweep within its grasp activities protected by the first amendment, thereby deterring the valid exercise of those rights. It is therefore unconstitutionally overbroad and violative of the due process clause of the fourteenth amendment.

Having determined that the only legitimate objectives of the character requirement are protection of clients and of the administration of justice, it is now possible to inquire as to what conduct may permissibly be made the basis for denial of admission. Clearly automatic denial on the mere fact of conviction for any crime would be arbitrary. A conviction, for example, under a strict criminal liability food purity law, by itself, is no evidence of any character defect. And many other crimes, such as disorderly conduct or assault, which by their nature may raise questions as to the offender's character, could not, without evidence as to the surrounding circumstances, be determinative of the person's unfitness to advise clients or participate in the judicial process.⁵⁹ This principle was most simply stated in *Schware*: "In determining whether a person's character is good, the nature of the offense which he has committed must be taken into account."⁶⁰

55. *Id.* at 286.

56. *Baggett v. Bullitt*, 377 U.S. 360, 362 (1964).

57. *Keyishian v. Board of Regents*, 385 U.S. 589, 597 (1967).

58. See also *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

59. Two commentators specifically include in this category of crimes objection to military service on any grounds and encouraging others to violate the draft laws. *Selinger & Schoen, supra* note 29, at 353.

60. 353 U.S. at 243.

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One type of offense recognized as irrelevant to one's fitness for a licensed profession is a conviction for civil rights activities. In *Hallinan v. Committee of Bar Examiners*,⁶¹ the California Supreme Court considered the relevance to the applicant's fitness of several convictions for unlawful assembly, unlawful entry, and disturbing the peace, arising from civil rights sit-ins. After performing the functional analysis of the character requirement noted above, the court said: "Preliminarily, we note that every intentional violation of the law is not, *ipso facto*, grounds for excluding an individual from membership in the legal profession."⁶² It then went on to conclude that, because of their motivation, the offenses did not constitute evidence of a threat to the interests protected by the character requirement. In New York, the city council passed an ordinance expressly stating that no license shall be denied because of an arrest or conviction for civil rights demonstrations.⁶³

The importance of the surrounding circumstances is not limited to minor infractions or offenses perpetrated for a good end. In naturalization cases under the 1940 law which required "good moral character" during the five years immediately proceeding the citizenship application,⁶⁴ the courts had ample opportunity to consider the relevance of convictions for serious offenses. "Good moral character" was found and citizenship granted to men who had been convicted of first degree murder,⁶⁵ voluntary manslaughter,⁶⁶ negligent homicide,⁶⁷ assault with intent to murder⁶⁸ and attempted automobile larceny.⁶⁹ In each case, some extenuating circumstance was found, either in the commission of the crime or subsequently, to negate the impact of conviction. Of course, such cases do not prove that one convicted of first degree murder is fit to be a lawyer; but they do show that no conviction, regardless of the seriousness of the offense, is alone sufficient proof of a lack of good moral character.

The legal profession has long recognized that only some violations

61. 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

62. 65 Cal. 2d at 459. See *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 73 n.5, 435 P.2d 553, 557, 64 Cal. Rptr. 785, 789 (1968), for approval and reaffirmation of the principle. That case involved the sale of amphetamines without a prescription.

63. Civil Rights Demonstrators Protection Law, N.Y.C. ADMIN. CODE § AA51-1.0, 2.0 (1963).

64. Nationality Act of 1940, ch. 876, § 307, 54 Stat. 1137.

65. *Petition of Sperduti*, 81 F. Supp. 833 (M.D. Pa. 1949) and *In re Balestrieri*, 59 F. Supp. 181 (N.D. Cal. 1945).

66. *In re Bespatow*, 100 F. Supp. 44 (W.D. Pa. 1951).

67. *In re Ringnald*, 48 F. Supp. 975 (S.D. Cal. 1943).

68. *Marcantonio v. United States*, 185 F.2d 934 (4th Cir. 1950).

69. *United States v. Cunha*, 209 F.2d 326 (1st Cir. 1954).

of the law are relevant to a lawyer's fitness to perform his duties. This recognition has been capsulized in the phrase "crimes involving moral turpitude" which is almost universally a standard in disbarment statutes and has been frequently adopted in admission cases as a clarification of the "good moral character" requirement.⁷⁰ In *Konigsberg v. State Bar*,⁷¹ the Supreme Court found California law to define "good moral character" as "an absence of proven conduct or acts which have been historically considered as manifestations of moral turpitude."⁷² In *Hallinan*, the California Supreme Court, after confirming this as a proper statement of its law, concluded that the standards for disbarment and admission were therefore essentially identical.⁷³ Although New Mexico's admission standard is also "good moral character," the Court in *Schware*, when considering the Neutrality Act offense for which the applicant had been indicted, stated that "it does not seem that such an offense indicated moral turpitude."⁷⁴ The Court's only explanation for the use of the term is a footnote citing its presence in New Mexico's disbarment statute.⁷⁵ Although some commentators have assumed on the basis of *Schware* that the standards for admission and disbarment are the same,⁷⁶ the only conclusion clearly suggested is that a requirement that an applicant not have committed crimes of moral turpitude is rationally connected to his fitness as a lawyer, and hence a constitutionally permissible qualification.

In light of our earlier analysis of the due process elements of character fitness, however, it is clear that moral turpitude as used in admissions cases must be given a special meaning. The only constitutionally valid requirement is that one not have committed crimes or acts which demonstrate a personality trait that may endanger future clients or the judicial process. "Crimes involving moral turpitude" are therefore those offenses which necessarily entail or evidence such a trait.⁷⁷

70. "Moral turpitude" is most elusive of definition, and courts have often turned in desperation to the dictionary. Black's Law Dictionary suggests "an act of baseness, villainess, or depravity in the private and social duties which a man owes to his fellow man or society in general," BLACK'S LAW DICTIONARY 1160 (4th ed. 1951). The court in *Hallinan* employed this definition. Webster's explains turpitude as "inherent baseness or villainess of principles, words or actions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2469 (1968). Clearly the phrase denotes some serious deviation from accepted norms indicating basic evil or bad character.

71. 353 U.S. 252 (1957).

72. *Id.* at 263.

73. 65 Cal. 2d at 452-53.

74. 353 U.S. at 242.

75. *Id.* at 243 n.11.

76. 65 Cal. 2d at 452 n.5; see 55 CAL. L. REV. 899 n.1 *But see* pp. 1378-79 *infra*.

77. It would seem necessary to discuss the two cases in which the Supreme Court indicated, in contradiction to *Schware* and the arguments presented here, that it was

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The judicial use of "moral turpitude" raises a question as to the relevance of the public view of the morality of the crimes considered. The offense Schware allegedly committed was attempting to recruit American volunteers for the Spanish Loyalists. The Court first said, "It does not seem that such an offense indicated moral turpitude—even in 1940."⁷⁸ It then compared his activities to those of the many young men who helped defend England and China before the United States' entry into the war and said: "Few Americans would have regarded their conduct as evidence of moral turpitude."⁷⁹ In *Hallinan*, in determining the moral turpitude involved in the applicant's civil rights convictions, the court expressed

strong doubt that the leaders of the current civil rights movement are today or will in the future be looked upon as so lacking in

constitutionally permissible to base professional discipline on the mere fact of conviction for any crime. In *Barsky v. Board of Regents*, 347 U.S. 442 (1954), the Court upheld a six month suspension of a doctor's license for his conviction and six month jail sentence for refusing to bring certain documents before the House Un-American Activities Committee. Stressing the broad power of the state to regulate the practice of medicine to protect the public, the Court held that the rule that any crime was grounds for discipline was not so unreasonable as to violate due process. However in so concluding, the Court gave great weight to the fairness and flexibility of the New York procedure for administering discipline and little weight to the substantive rationality of the statute.

In *Hawker v. New York*, 170 U.S. 189 (1898), the Court upheld a conviction for unauthorized practice of medicine under a law prohibiting further practice after conviction for a crime. Although it admitted that the flat rule could cause hardship and unfairness in some cases, the Court said it was not arbitrary for a legislature to decide that anyone convicted of a crime lacked the necessary character to be a doctor. But the crime involved there was abortion which most clearly relates to a doctor's fitness to practice and thus on its specific facts, the holding in *Hawker* is not in conflict with *Schware*.

However, even the broader holding in both *Barsky* and *Hawker* is distinguishable from *Schware* on other grounds. *Schware* is an admission case and *Barsky* and in effect *Hawker* are disciplinary cases. As will be argued later (pp. 1378-79 *infra*) the standards in the former situation are, and ought to be, broader and more flexible than in the latter because actions done by an ordinary citizen are not to be viewed as harshly as the same conduct by licensed professionals charged in some sense with a public trust.

Furthermore, *Barsky* explicitly referred to the practice of medicine as a "privilege granted by the State under its substantial plenary power to fix the terms of admission." 347 U.S. at 451, and insofar as *Hawker* and *Barsky* rely on this view they have been overruled by *Schware* which explicitly repudiated the right-privilege distinction in determining due process validity. 353 U.S. at 239 n.5.

But perhaps this search to distinguish the cases is not necessary, as Justice Harlan indicates in his review of relevant past cases in his dissent in *Spevack v. Klein*, 385 U.S. 511, 523 (1967):

This Court has often held that the States have broad authority to devise both requirements for admission and standards of practice for those who wish to enter the professions, e.g., *Hawker v. New York*, 170 U.S. 189; *Dent v. West Virginia*, 129 U.S. 114; *Barsky v. Board of Regents*, 347 U.S. 442. The States may demand any qualifications which have "a rational connection with the applicant's fitness or capacity," *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239.

Thus *Schware* can be seen not as a deviation from but rather a refinement of the *Hawker-Barsky* position.

78. 353 U.S. at 242 (emphasis added).

79. *Id.* at 243.

moral qualification that they should for that reason alone be prevented from entering their chosen profession.⁸⁰

These statements imply that the meaning of moral turpitude depends on the contemporary community standards of morality. Such a view however is directly at odds with the thrust of both *Schware* and *Hallinan* towards a functional assessment of character fitness. If the elements of fitness can be determined by an examination of the professional responsibilities the applicant will bear, and if commission of crimes can be the basis for denial of admission only if shown to constitute a direct threat to the interests validly protected, then a shift in the public view of the morality of that conduct should have no relevance at all.⁸¹ Surely no court would alter its view of the unfitness of an applicant convicted of embezzlement should the public decide that the crime is not reprehensible if committed against the rich. Similarly, it should be irrelevant whether the public supported England more strongly than the Spanish Loyalists, or admired or scorned Martin Luther King, Jr. The Supreme Court has in fact upheld this very view in *Cummings v. Missouri*,⁸² where it invalidated an oath requiring many professionals to deny any complicity with the Confederacy. Even though it found that "the evasion of such service might be the subject of moral censure,"⁸³ the Court stated that:

There can be no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines and administer the sacraments of his church; nor can a fact of this kind . . . constitute any evidence of the unfitness of the attorney or counsellor to practice his profession.⁸⁴

80. 65 Cal. 2d at 461-62.

81. The leading case in the field of naturalization also defined the standard of "good moral character" as a test whether "moral feelings, now prevalent generally in this country [would] be outraged" by the conduct in question. *United States v. Francioso*, 164 F.2d 163 (2d Cir. 1947). But aliens do not have a right to citizenship and the elements of fitness for citizenship are much less susceptible of a functional determination. It is therefore much more validly arguable that the public view of morality should, in that field of law, bear on the decision as to good character.

82. 71 U.S. (4 Wall.) 277 (1866).

83. *Id.* at 327.

84. *Id.* at 319.

Because of the traditional ethical overtones of the phrase "moral turpitude" and because it might be argued that public opinion may affect the rationality of the connection between the act and moral fitness, some courts might consider society's view of a crime's morality. In such cases, any change in that view between the time of the crime's commission and the time of application for bar admission should be construed in the applicant's favor. If at the time of its commission, the crime was thought not to involve moral turpitude, the applicant may well have believed that the offense had a sort of societal sanction, and it would be grossly unfair to penalize him for that reliance. If, on the other hand, the offense was once, but is no longer, viewed as involving moral

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III. Relevance of a Conviction for Refusal of Induction to Fitness to Practice Law

The constitutional limitations on a character requirement for bar admission have now been established: Any requirement must be rationally related to fitness to practice law. Fitness consists solely of the absence of traits that might endanger clients or the judicial system. Denial of admission based on the mere fact of a criminal conviction is arbitrary because lacking in proof of a connection to unfitness. And "crimes involving moral turpitude" is a permissible standard only if construed to mean offenses which indicate characteristics potentially threatening the protected interests. It remains to confront the basic problem posed by this Part: Is conviction for refusal of induction a constitutionally valid basis for a finding of character unfitness?⁸⁵

The primary inquiry must be whether the nature of the offense itself supports an inference of dangerous character defects. The crime of draft refusal necessarily entails only two elements: actual knowledge of the obligation and deliberate refusal to comply with it.⁸⁶ "Malignity of purpose, depravity of disposition or fraud need not be shown."⁸⁷ The fact of conviction thus provides no indication of the moral stature of the applicant. The act's immediate effect on others is an extremely slight advancement of the date of induction for the registrants of the draft refuser's board following him in the order of the call. Since the refusal requires the induction of one more person to meet the board's quota, it means that one registrant each month will be called up one month earlier than anticipated.⁸⁸ It is of course possible that the refusal

turpitude, the latter view must be given weight for the issue is only raised and hence to be decided at the time of admission.

85. In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1865), where an oath required of all ministers and attorneys denying any complicity with the Confederacy was invalidated, the Court came close to deciding this very question. See p. 1366 *supra*. If an act such as flight to avoid the draft, which strongly suggests a lack of sense of obligation to one's country and was said by the Court to be morally reprehensible, is considered not to bear at all on fitness for the bar, then certainly the act of draft refusal which courts have stated does not reveal lack of patriotism or virtue, cannot constitute any evidence of an applicant's unfitness to be a lawyer. See pp. 1375-78 *infra*.

The *Cummings* case at least suggests that the oath was really a political qualification and hence invalid. If draft refusal is considered politically rather than morally motivated, denial of admission because of the political beliefs, rather than because of the relevance of the crime to fitness, would be a violation of the first amendment as incorporated in the due process clause of the fourteenth amendment.

86. Military Selective Service Act of 1967, 50 U.S.C. App. § 462(a) (1963).

87. In the Matter of S—, 5 I & N Dec., 425, 427 (1953) (administrative deportation decision finding draft refusal not to be a crime involving moral turpitude).

88. Military Selective Service Act of 1967, 50 U.S.C. App. § 455(a), (b) (1963) (quotas and order of call); Selective Service Regulations, 32 C.F.R. § 1631.1-1631.8 (1969) (quotas and order of call).

of one individual to serve will ultimately result in the induction of another who would not otherwise be called. However, this possible "injury" is both remote and uncertain; it certainly implies no intention or propensity on the part of the draft refuser to inflict harm on others. Thus so far as its legal elements and its impact on others are concerned, the act is a very personal one and does not in itself indicate a threat to future clients.

It will be assumed here that, as is in fact generally the case, the manner of the crime's commission also yields no unfavorable inference. The offense is usually committed in public at the induction center as the registrant refuses to take the symbolic step forward. Sometimes the individual will simply not report to the induction center, either communicating his intentions to his draft board⁸⁹ or to the district attorney or permitting the draft board to discover for itself the reason for his non-appearance. In any case, the crime is almost always committed in a way that will immediately bring the matter to the attention of law enforcement officers. Subsequent actions also often suggest a willingness to submit to rather than a desire to avoid prosecution. The charges themselves are often not contested; many plead guilty at the arraignment⁹⁰ or present no evidence to contradict the prosecutor's proof. Those who do contest their guilt usually claim only that they were misclassified in that they deserved conscientious objector status.⁹¹ None of the courses of action mentioned in any way indicate a denial of society's right to prosecute violations of its criminal laws, or an attempt to obstruct the judicial process.

Since moral turpitude is not a necessary element of the offense and since neither its consequences nor the manner of its commission re-

89. In a letter to the author dated July 22, 1969 (on file at the Yale Law Journal), Richard W. Petherbridge who was convicted of refusal to report for induction in 1942 and was admitted to the California bar in June, 1950, stated that he did not report to the induction center and simply wrote his draft board so informing them. It is noted in the opinion in *Otsuka v. Hite*, 64 Cal. 2d 596, 599, 414 P.2d 412, 415, 51 Cal. Rptr. 284, 287 (1966) that one of the plaintiffs informed his draft board of his decision and then surrendered himself instead to the New York District Attorney.

90. Mr. Petherbridge, in his letter cited in note 89 *supra*, said that he pleaded *nolo contendere*. Caleb Foote, who was twice convicted for refusing to report to civilian work camp and was admitted to the Pennsylvania bar in 1956, said, in a letter to the author dated August 1, 1969 (on file at the Yale Law Journal) that he both times tried to plead *nolo contendere*, was not allowed to, and then pleaded guilty.

91. The possibility that the refusal and conviction were based on improper classification was one of the reasons given by the Naturalization and Immigration Board for finding refusal of induction not to involve moral turpitude, *supra* note 87. The scope of judicial review of draft classification, "no basis in fact," *Estep v. United States*, 327 U.S. 114, 122 (1946), is so narrow that conviction does not establish that there was no error in classification. Thus the refusal may not have been a violation of a legal obligation but an assertion of a legal right.

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flects adversely on fitness to practice law, it is necessary to consider the vital issue of motivation. It is assumed here⁹² that the applicant's crime of draft refusal was motivated by a sincere conscientious objection to any participation in the military, either because of objection to all wars, to some wars or to the particular war in progress. He will probably have applied for conscientious objector status within the Selective Service System and have been denied it because he failed to meet the statutory requirement of an objection to "war in any form" grounded in "religious training and belief."⁹³ In some cases the applicant will have received non-combatant status from his draft board, a response viewed as inadequate by the total objector. Unable to obtain satisfactory recognition of his beliefs, he will have felt compelled to refuse induction. His motivation will thus have been some legally unacknowledged combination of ethical, humanitarian or religious principles dictating non-participation in the organized process of taking human lives. The question is whether such a motive is evidence of the lack of character rightfully demanded of a lawyer.

There is some direct authority for the proposition that refusal of induction for reasons of conscience does not indicate the kind of moral imperfection that disqualifies a person for a profession. *Matter of Koster v. Holz*⁹⁴ involved a denial of an application for an insurance broker's license because the applicant was found not to be a "competent and trustworthy person" (the statutory standard), a finding based solely on his conviction for refusal of induction. The New York Court of Appeals in a unanimous opinion stated that the applicant could have been denied conscientious objector status for either of two reasons. First, he might have been insincere, in which case he was trying to avoid service, and his subsequent refusal of induction would be evidence of bad character. Second, his objection might have been sincere but not within the statutory definition, in which case his offense was due to a deeply held conscientious belief. The court said that if the Superintendent of Insurance did not go behind the conviction, he would fail to distinguish those two possibilities, thereby perhaps denying an applicant a license "solely because he has adhered to his sincere personal beliefs" and establishing "a qualification for holding a broker's license that is in no sense conclusive as to the untrustworthiness or incompetency of the individual applicant or as to the professional

92. See note 5 *supra*.

93. Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (1968).

94. 3 N.Y.2d 639, 148 N.E.2d 287 (1958).

standards of brokers, and thus would be violative of due process."⁹⁵ The court then ordered a formal hearing at which the basis for denial of conscientious objector status was to be determined, and instructed that if the applicant's beliefs had been accepted as sincere but were simply not within the statute, "then denial of his application for a license where this is the only evidence of his untrustworthiness would be arbitrary and capricious."⁹⁶

If there is an answer to the position of the court in *Koster*, it must be this: Even if the elements of the crime, its effects, and the manner of its commission do not support an inference of unfitness, any intentional violation of the criminal law may be indicative of a tendency toward wrongdoing. Commission of a crime for a conscientious motive indicates rejection of the basic premise of a society governed by law, that the individual must subordinate his individual beliefs to those of the majority expressed in law. This rejection suggests that an applicant who alleges a conscientious motive is more likely than others to violate the legal prohibitions controlling the practice of law. Furthermore, the criminal law is essentially an expression of society's view of what is moral. Any intentional breach of the law suggests a rejection of society's moral values and hence the likelihood of failure to conform to them in circumstances confronted by a lawyer. Lastly, the conscientious com-

95. *Id.* at 647, citing *Schware* for this proposition.

96. *Id.* at 648. *But see In re Pontarelli*, 393 Ill. 310, 66 N.E.2d 83 (1946), in which a lawyer was disbarred following his conviction for draft refusal. The attorney had been denied conscientious objector status by both his draft and appeal boards. The court, relying on an Illinois case which held that a conviction in Federal Court is binding and that one could not try to show one's innocence in another case, refused to go behind his conviction to determine whether he was a sincere conscientious objector. That citation clearly shows that the court misinterpreted the request to go behind the record of conviction. That request was not, or should not have been, to determine whether he was a conscientious objector within the statutory definition and thus improperly convicted but rather a request to decide whether he in fact held some sort of conscientious objection which motivated his crime and would help determine the issue of moral turpitude. After refusing to go behind the conviction, the court held that the crime involved moral turpitude because it was "an obstruction of the recruiting and enlistment service." *Id.* at 315. That offense had been held to involve moral turpitude in the case of *In re Kerl*, 32 Idaho 737, 188 P. 40 (1920), which involved a conviction for false statements made with the intent to promote the success of the enemy, cause disloyalty and mutiny, or obstruct recruitment. Thus because of its refusal, for a mistaken reason, to go behind the conviction, the court was led to analogize the offense improperly to a crime of a wholly dissimilar nature which reflects much differently on a person's character. The invalidity of the *Pontarelli* holding is recognized in *Otsuka v. Hite*, 61 Cal. 2d 596, 612 n.15, 414 P.2d 412, 422 n.15, 51 Cal. Rptr. 284, 295 n.15 (1966). *See also In re Lindquist*, 216 Minn. 344, 12 N.W.2d 719 (1944) (lawyer convicted for refusal of induction disbarred after failing to appear at hearing to show cause why he should not be disbarred); *Matter of Greenberger*, 265 App. Div. 343, 38 N.Y.S.2d 758 (1942) (lawyer who pleaded guilty to failure to report for induction disbarred because New York law requires automatic disbarment following conviction for a felony); *Matter of Greenberger*, 278 App. Div. 925, 105 N.Y.S.2d 903 (1951) (reinstated). All of these cases are disbarment proceedings where, as argued later (pp. 1378-80 *infra*), stricter, less flexible standards are involved.

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mission of the specific crime of draft refusal shows a particular moral deficiency, lack of a sense of obligation to country. This moral flaw is analogous to a lack of respect for the rights of others and for society's institutions. Thus one can infer from it a greater than average likelihood of a lack of a sense of obligation to clients and to the judicial process.

The basic response to these contentions is that our society is general, and the law in particular, have long recognized an exception to the general premise that willful violation of the law reflects adversely on a person's character. This exception is grounded in our understanding and formulation of the relation between citizen and state. It is recognized that state exactions which are constitutionally valid and necessary in the eyes of the majority may come in conflict with the conscience of an individual. In such cases, the law, while properly punishing the legal violation, has always acknowledged the moral integrity of the violator. This recognition negates any inference of a general rejection of the obligation to obey the majority's laws or denial of the moral rules it enacts. Furthermore the specific state exaction of military service has long been regarded as one of those most legitimately subject to a conscientious objection. The existence in the draft law itself of an exemption for conscientious objectors and numerous judicial and administrative decisions all argue against drawing from the fact of objection any inference of a moral deficiency, such as lack of a sense of obligation to one's country.

The proposition that a conscientious violation of the law does not suggest a general non-acceptance of the rule of law or of society's moral code is most clearly supported by the decisions regarding naturalization of aliens who harbored conscientious doubts as to their ability to bear arms. In *United States v. Schwimmer*,⁹⁷ the Court held that a pacifist was not "attached to the principles of the Constitution"⁹⁸ as required by the naturalization law. Justice Holmes, in dissent, said with regard to the moral implications of beliefs like those held by the petitioner:

I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's beliefs and that I had not supposed hitherto that we regretted our inability to expel them because they believe more

97. 279 U.S. 644 (1929).

98. *Id.* at 646.

than some of us do in the teachings of the Sermon on the Mount.⁹⁹

In the subsequent case of *United States v. Macintosh*,¹⁰⁰ the Court held that aliens with conscientious objections could not take the oath of citizenship to support and defend the Constitution. Chief Justice Hughes, in a famous dissent, joined by Justices Brandeis, Holmes, and Stone, said:

While it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty.¹⁰¹

After reaffirming the power of the State to punish non-submission to its exactions, he said: "But in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens."¹⁰² These two dissents have gained significance not solely due to the eminence of the judges who joined in them. The views expressed in them were explicitly made the law of the land when *Schwimmer* and *Macintosh* were overruled in *Girouard v. United States*.¹⁰³ The Court there reasserted the morality of conscientious disobedience by saying:

The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State.¹⁰⁴

Similar acknowledgment of the moral rectitude of those who commit serious violations of the law in obedience to conscientious scruples is found in *Repouille v. United States*.¹⁰⁵ There the issue was whether an alien who had committed euthanasia on his thirteen year old, mentally incompetent, blind, mute and physically deformed son lacked

99. *Id.* at 655.

100. 283 U.S. 605 (1931).

101. *Id.* at 631.

102. *Id.* at 633.

103. 328 U.S. 61 (1946).

104. *Id.* at 68.

105. 165 F.2d 152 (2d Cir. 1947).

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the requisite "good moral character" for citizenship. Judge Learned Hand wrote for the Court:

[W]e all know that there are great numbers of people of the most unimpeachable virtue, who think it morally justifiable to put an end to a life so inexorably destined to be a burden to others Nor is it inevitably an answer to say that it must be immoral to do this, until the law provides security against the abuses which would inevitably follow, unless the practice were regulated. Many people—probably most people—do not make it a final ethical test of conduct that it shall not violate law; few of us exact of ourselves or of others the unflinching obedience of a Socrates. There being no lawful means of accomplishing an end, which they believe to be righteous in itself, there have always been conscientious persons who feel no scruple in acting in defiance of a law which is repugnant to their personal convictions and who even regard as martyrs those who suffer by doing so. In our own history, it is only necessary to recall the Abolitionists.¹⁰⁶

Although Hand found the crime in that case to be one still considered morally unjustifiable and hence indicative of lack of good character, his guiding principle was that a violation of the law, even one as serious as manslaughter, need not be inconsistent with a virtuous character.

This position was reiterated in *Hallinan v. Committee of Bar Examiners*,¹⁰⁷ a case more directly in point since it involved a determination of "good moral character" for admission to the bar. There, immediately after finding that Hallinan's civil rights sit-in convictions did not involve moral turpitude, the court said:

If we were to deny to every person who has engaged in . . . non-violent civil disobedience, and who has been convicted therefor, the right to enter a licensed profession, we would deprive the community of the services of many highly qualified persons of the highest moral courage.¹⁰⁸

The particular legal command to perform military service has long been singled out as the one most understandably subject to a conscientious objection. The reason for this is undoubtedly that acceptance of the obligation may well confront the individual with the ultimate moral question: May one kill another human being? The law defining the military obligation itself has long made provision

106. *Id.* at 153.

107. 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

108. *Id.* at 462; 421 P.2d at 87, 55 Cal. Rptr. at 239.

for those with conscientious scruples, and the exemption has been steadily broadened both by Congress and the courts.

The history of the exemption indicates an ever-increasing understanding of and willingness to recognize the almost infinite variety of possible conscientious objections to military service. The 1864 draft act provided combat exemptions for members of religious denominations which prohibited the bearing of arms.¹⁰⁹ In the 1917 law, those belonging to "a well-recognized religious sect . . . whose existing creed or principles forbid its members to participate in war in any form"¹¹⁰ were relieved of combatant duties. In 1940, the exemption was broadened to include "any person, who by reason of religious training and belief, is conscientiously opposed to participation in war in any form."¹¹¹ It also provided for complete exemption from military service for those opposed even to noncombatant duty. In 1948, Congress re-enacted the same clause but added this explanation:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociological or philosophical views or a merely personal moral code.¹¹²

In *United States v. Seeger*,¹¹³ the Supreme Court unanimously broadened the exemption by interpreting the phrase "belief in a relation to a Supreme Being" to mean a "belief that . . . occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."¹¹⁴ In 1967 Congress deleted the "Supreme Being" clause,¹¹⁵ an action which, whatever Congress' intentions, clearly makes for an even broader interpretation of "religious belief."¹¹⁶

109. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6. Military exemptions were originally established by the colonies, and were adopted by their successor states. *United States v. Seeger*, 380 U.S. 163, 170 (1965).

110. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76.

111. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885.

112. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604.

113. 380 U.S. 163 (1965).

114. *Id.* at 166.

115. Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (1968).

116. It can be argued from the legislative history that Congress intended by its change to narrow the exemption. *Hearings on S. 1432 Before the Senate Committee on Armed Services*, 90th Cong., 1st Sess. 20, 21, 34, 35, 617 (1967); *Hearings on the Extension of the Universal Military Training and Service Act Before the House Committee on Armed Services*, 90th Cong., 1st Sess. 2552, 2636 (1967) [hereinafter cited as *1967 House Hearings*]; H.R. REP. NO. 267, 90th Cong., 1st Sess. (1967), 90 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 1490 (1967); CONF. REP. NO. 346, 90th Cong., 1st Sess. (1967), 90 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 1516 (1967). But see 113 CONG.

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The *Seeger* decision in particular recognizes that however one defines the acceptable objection there will always be parallel beliefs which are equally conscientious and result in the same or similar objections. Beliefs such as a purely moral, non-religious objection to all or to some wars, or a Catholic or other religious objection solely to unjust wars, can occupy a place in the life of its possessor parallel to that filled by the more orthodox beliefs recognized by the statute. An applicant to the bar who holds such a parallel view and who refuses induction because he is unable to get the exemption is no more immoral, unpatriotic or likely to break laws than one who obtained recognition of his beliefs and hence was not compelled to break the law.¹¹⁷ The basic reason given for not further expanding the statutory recognition of conscientious beliefs is that a broader exemption would be extremely difficult to administer.¹¹⁸ But in the matter of bar admissions, where the number of such cases will be far fewer and the manpower, time, and resources available for the necessary investigations will be proportionately far greater, there is no valid reason for denying recognition to any objection to military service on grounds of conscience.

Judicial decisions in other areas of law have reaffirmed the national acceptance of conscientious objections to military service found in the draft law. Chief Justice Hughes in his dissent in *Macintosh*¹¹⁹ spoke of such objections in his discussion of the general issue of legal conflicts with conscience:

And we also know, in particular, that a promise to engage in war by bearing arms, or thus to engage in a war believed to be unjust, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct.¹²⁰

The same attitude prevailed in *Otsuka v. Hite*,¹²¹ where the California Supreme Court was called on to determine whether draft re-

REC. S8054 (daily ed. June 12, 1967); 113 CONG. REC. H6245, 6266 (daily ed. May 25, 1967).

One court has recently gone quite a bit beyond *Seeger* in broadening the exemption on constitutional grounds. *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969).

117. *Application of Steinbugler*, 297 N.Y. 713 (1947) (conscientious objection recognized by law is not evidence bearing upon character or fitness for admission to the bar).

118. *Cf. 1967 House Hearings* 2636 (testimony of Gen. Lewis Hershey, director of the Selective Service System).

119. P. 1372 *supra*.

120. 283 U.S. at 631-32.

121. 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

fusal constituted an "infamous crime" within the meaning of the state constitutional provision disenfranchising the perpetrator of such an offense. After finding the term to mean a crime which brands the offender "morally corrupt and dishonest" and a "threat to the integrity of the elective process,"¹²² the court turned to consider whether the plaintiffs had committed such a crime. It first noted that although their beliefs had been recognized by the Selective Service System, the classifications they received "required a greater degree of participation in the military effort than their religious and humanitarian principles would allow."¹²³ It then found that each man had been "impelled by obedience to a higher law and by religious and humanitarian concern for his fellow man" and that "the United States Supreme Court has recognized principles such as these to be worthy of the highest respect and protection,"¹²⁴ quoting *Girouard* and *Seeger* at length. On this basis, the court held that the plaintiffs' crime did not brand them as morally corrupt and dishonest men. In *Hallinan*, the same court, after referring to those who committed civil disobedience as "persons of the highest moral courage,"¹²⁵ analogized Hallinan's conduct to the draft refusals dealt with in *Otsuka* and went on to find that his crimes did not entail moral turpitude and therefore did not disqualify him to practice law. Thus it seems clear that the California court considers draft refusal no indication of moral corruption, dishonesty, or lack of a sense of obligation to others or to country, and therefore no evidence of unfitness to practice law.¹²⁶

122. *Id.* at 611.

123. *Id.* at 613.

124. *Id.*

125. P. 1373 *supra*.

126. *But see In re Brooks*, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961), where an attorney from another state who had received conscientious objector status but refused to perform alternative service was denied admission to the bar. Although the standard in Washington is "good moral character," the court appeared to rest its decision on a standard of good citizenship not relied on by the bar character committee nor enunciated in the statute. The court was very much irked by the fact of the applicant's refusal despite official recognition of his conscientious beliefs and referred to "his felonious denial of any duty related to the enjoyment of these individual liberties." It then concluded that:

A loyal and discerning citizen is aware of his great heritage of liberty and acknowledges his duty to do his share in preserving it. Without a sense of duty, the applicant does not measure up to the standard of citizenship rightly expected of an attorney at law. *Id.* at 69.

The opinion thus denies admission solely for lack of fitness as a citizen. This is a totally arbitrary requirement since it is unrelated to fitness as a lawyer. Furthermore, it creates a vague standard with constitutional infirmities similar to those noted in the suggested standard of "conduct which discredits the reputation of the bar," pp. 1358-62 *supra*. In any case, this decision is not a precedent for cases where the conscientious objection was not recognized by the Selective Service, since the case relies on the applicant's refusal to perform any service in spite of his favorable classification. The opinion in *Otsuka*

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A deportation case decided by the Naturalization and Immigration Board¹²⁷ indicates a similar conclusion as to the inferences to be drawn from draft refusal. The question was whether an alien who had refused induction had committed a crime involving moral turpitude and should therefore be deported. After reviewing the crime's elements and the manner of its commission, the Board went on to note that a conviction for draft refusal does not terminate liability for induction; thus it could not be motivated by cowardice or any lack of sense of obligation to country. Moreover, the Board noted:

Recognition in the law of the refusal of religious conscientious objectors to serve on the basis of conscience, and the respect for such refusal, makes it illogical to view as a depraved act refusal of other conscientious objectors who may be just as sincere as the first group but whose bases for objection rest on non-religious grounds.¹²⁸

Immediately following that statement, the Board gave a most succinct summary of all the reasons¹²⁹ why the crime of draft refusal does not involve moral turpitude:

The element just discussed; the fact that a depraved mind or purpose is not required for conviction; the possibility that the

termed the *Brooks* case not "persuasive." 64 Cal. 2d at 612, 414 P.2d at 422, 51 Cal. Rptr. at 295.

127. In the Matter of S—, 5 I & N Dec. 425 (1953).

128. *Id.* at 428.

129. One possible argument for conscientious draft refusers which has not been mentioned because it does not derive from general principles regarding bar admissions but rather from the particular motive of draft refusal was suggested sketchily in the petition for certiorari in *In re Brooks*, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961). This argument is best structured along the lines of a subsequent case, *Sherbert v. Verner*, 374 U.S. 398 (1968). The Supreme Court there held that a Seventh Day Adventist could not be disqualified for unemployment compensation benefits because she would not work on Saturdays for religious reasons. After finding that there was a clear burden on the free exercise of religion, since the woman had to violate a basic tenet of her religion or forfeit the benefits, the Court said that only a compelling state interest could justify such a burden. Finding only an interest in preventing fraudulent claims, which it found enforceable by less burdensome means, the Court held there was no justification for this infringement of religious freedom. A bar applicant could argue that his conscientious refusal of induction was an exercise of his religious freedom analogous to Mrs. Sherbert's refusal to work and as such could only be burdened when a substantial state interest compelled it. His conviction and sentence were of course justified by the country's overriding interest in raising an army. However denial of admission to the bar is a separate and further burden which must be justified by its own compelling state interest. Since his beliefs and past exercise of them do not indicate a threat to the only two compelling state interests—protection of client's interests and of the judicial process—there is no justification for the severe burden of exclusion from his chosen profession. Thus in addition to the general substantive due process argument which any applicant may use to combat a denial for conduct not rationally related to the functions of the character requirement, the conscientious draft refuser has an argument which turns on the same lack of rational connection but which is grounded in a specifically enumerated constitutional right, the freedom of religion.

conviction may be the result of ill advice or misclassification; the fact that the violation does not necessarily involve fraud and that it is an open act which of necessity is brought to the attention of law enforcement officers and which results not in evasion of service but punishment, followed by further subjection to service—all these matters compel the conclusion that the portion of the law under consideration does not define a crime which is base, vile, or depraved. Since a crime involving moral turpitude is not involved, the proceedings should be terminated.¹³⁰

Since the crime does not involve immorality or any antisocial tendencies, it cannot be evidence of a likelihood of misbehavior endangering clients or the administration of justice, and therefore is not indicative of unfitness to practice law.

IV. Breadth of the "Good Moral Character" Standard

Even an adverse finding on the question of the moral turpitude of draft refusal would not be conclusive of the character issue. The standard of "crime involving moral turpitude" has been imported into the admissions process from the disbarment statutes¹³¹ because it is more specific and has received greater judicial interpretation than the term "good moral character" and because it was realized that the objective of both proceedings is identical—the exclusion from the profession of all persons morally unfit to practice. But the use of "moral turpitude" in admission cases does not alter the fact that the statutory standards for admission are universally different from those for disbarment. Consideration of the possible explanations for this dissimilarity yields the conclusion that the "good moral character" requirement is in fact a broader and more flexible one than "moral turpitude."

The most common explanation for the difference in the standards is

130. 5 I & N Dec. at 428-29.

Some success apparently has been obtained with arguments such as these. In the petition for certiorari in *In re Brooks*, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961), there is a list of six men who were admitted to the bar, following conviction in four cases for refusal of induction, in one for refusal to report to civilian public service camp, and in the last for refusal to complete a questionnaire (a later conviction for refusal to work in camp was reversed). A seventh who had twice been convicted for draft refusal was permitted to take the bar exam in North Carolina, and was not admitted apparently only because of academic inadequacy. Petitioner's Brief for Certiorari at 22, *Application of Brooks*, 365 U.S. 813 (1961). Letters from three of these individuals and the widow of a fourth, detailing their personal experiences relating to admission to the bar, are on file at the Yale Law Journal.

131. Although some courts, like the one in *Hallinan*, explicitly decide that "moral turpitude" should be applied in admission cases, 65 Cal. 2d at 453, others, like the Supreme Court in *Schwabe*, simply assume its applicability, 353 U.S. at 242.

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that the practicing lawyer, unlike the bar applicant, has a property right, a vested interest, in his practice, and hence disbarment should only be inflicted where the breach of duty is clear and unforgivable.¹³² The California Supreme Court has recognized that this argument is untenable.¹³³ The applicant who has expended time, energy and a large amount of money on legal education has as much a right to practice as the practicing lawyer, and suffers a similar if perhaps somewhat less severe loss when excluded from the profession.¹³⁴

A second and more persuasive explanation is that certain acts are intolerable and justify immediate expulsion when committed by an attorney, who by virtue of his license and role as an officer of the court is endowed with something of a public trust. The same acts committed by an ordinary citizen at some time prior to asking for that trust cannot be taken as conclusive proof of inability at the time of the request to live up to that responsibility. Hence a broader inquiry must be made, and less inflexible rules used to determine fitness at the time of application. This is the only interpretation consistent with the use of the moral turpitude standard in admission cases. It would make no sense to use that standard if it were intended to provide the degree of protection only due practicing attorneys. But it is reasonable to employ the rule—as a first step in a broad investigation of character—to pinpoint past objectionable acts which require special attention from the examiners and thorough explanation by the applicant.

This theory seems substantiated by judicial practice. In *Schwartz*, the Supreme Court considered the inherent evil of each charge made against the applicant: the use of aliases, the arrests, the Neutrality Act indictment, and membership in the Communist Party. But in each case, although finding nothing actually wrong with the actions, it referred to the length of time elapsed since the events, and treated that factor as indicating the irrelevance of those events to Schwartz's

132. Cf. Note, "Good Moral Character" As a Prerequisite for Admission to the Bar: Inferences to Be Drawn from Past Acts and Prior Membership in the Communist Party, *supra* note 30, at 873-74 & nn.2-4; *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 451-52 & n.3 (1966).

133. 65 Cal. 2d at 452 n.3.

134. The organized bar appears to acknowledge this fact for its publications have frequently stated that one who has completed law school and passed the bar exam gains something of a vested right and that bar examiners and courts should be most careful not to disqualify them for character unfitness unless the case is clear and compelling. Powell, President of the ABA, *Comments on the Subject of the Panel Discussion (Character Aspects of Admission to the Bar)*, 34 THE BAR EXAMINER 116, 119 (1965); ABA, REPORT OF THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND ADMISSIONS TO PRACTICE LAW 145 (1951); A MANUAL FOR BAR EXAMINERS 112 (1951).

character at the time of application.¹³⁵ In *Otsuka v. Hite*, where the standard was commission of an "infamous crime," the Court made several references to the fact that twenty years had intervened since the offenses, during which time the plaintiffs had lived exemplary lives.¹³⁶ The dissent noted that these factors seemed to influence the court's finding that the crime did not brand the men morally corrupt and dishonest.¹³⁷ In *Hallinan*, the court said that most of the fistfights adduced as evidence of unfitness took place when the applicant was an adolescent, and held that "youth and inexperience" were mitigating circumstances.¹³⁸ Thus the courts have recognized that the discovery of an act or offense involving moral turpitude does not conclude an inquiry into good character, and that all evidence in mitigation of the crime and in proof of present good moral character is relevant¹³⁹ and must be considered by the examining body.¹⁴⁰

The most significant evidence that can be presented in mitigation of a crime held to entail moral turpitude and in proof of present good character is a presidential pardon.¹⁴¹ A pardon annuls the unfortunate

135. 353 U.S. at 241, 242, 243, 246.

136. 64 Cal. 2d at 593, 599, 606, 414 P.2d at 414, 415, 419, 51 Cal. Rptr. at 286, 287, 291.

137. *Id.* at 615, 51 Cal. Rptr. at 297, 414 P.2d at 425.

138. 65 Cal. 2d at 471, 421 P.2d at 93, 55 Cal. Rptr. at 245.

139. In *Schwartz*, the Court went so far as to suggest that one of the factors to be borne in mind, especially where minor doubts are raised by the evidence, is the state's "ample means" to discipline an admitted lawyer for future misconduct, 353 U.S. at 247 n.20.

140. It is settled administrative law that a trial-type (evidentiary) hearing is required for disputed adjudicative facts. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 412 (1958). Many cases hold that a license applicant's good character, trustworthiness, and fitness belong to that class of facts. *Id.* at 422-23. Thus a bar applicant could definitely testify at a hearing before the character committee as to the motives for his crime, past acts and statements which evidence the sincerity and consistency of his beliefs, his age and immaturity at the time of the crime, his good behavior before and especially since the crime, and any evidence of rehabilitation, if he desired to show that. Due process, however, is not generally thought to afford an argument-type administrative hearing at which the applicant can argue points of law or interpretation of facts. *Id.* at 434. Thus the character committee is not obligated to permit the applicant to argue that draft refusal is not a crime involving moral turpitude or that his conviction is not conclusive of his present moral character. Hence if the committee did not agree with the argument in the text, it might improperly exclude some of the types of evidence suggested above and the applicant would be powerless to change that decision without going to court. It is not clear in what category would fall evidence that his beliefs are in accord with traditional Western morality and accepted ethical principles. The applicant, of course, should insist that this is evidence of the "goodness" of his character and not argument on the legal issue of moral turpitude. Of course all issues, both legal and factual, may be argued before a reviewing court.

141. Presidential pardons can be obtained in two ways—either through a general amnesty or simultaneous pardon of a large group of similar offenders or through an individual application. On December 23, 1933, President Roosevelt proclaimed a pardon of all persons convicted under § 5 of the 1917 draft law, Act of May 18, 1917, ch. 15 § 5, 40 Stat. 76, which made failure or refusal to register for the draft a misdemeanor. Presidential Proclamation No. 2068. On December 23, 1946, President Truman established a Presidential Amnesty Board which was authorized to review the approximately 6000 convictions under the 1940 draft law and to make recommendations regarding

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stigma of conviction and represents that the person is sufficiently rehabilitated to take his equal place alongside other citizens.¹⁴² The draft refuser who has received a pardon can argue that, whatever moral imperfection the crime may have evidenced, by the time of the pardon's issuance he had changed sufficiently to be entrusted with the full rights of citizenship, among which is the right to follow one's chosen profession.

Those without pardons can present other evidence to establish present good moral character. One approach is to show in mitigation of the offense that one was young and immature at the time of its commission.¹⁴³ Another approach is to argue one's rehabilitation by showing subsequent good behavior. This approach was most strikingly successful in the citizenship cases involving much more serious crimes.¹⁴⁴ Evidence of subsequent good behavior may be the only proof available to the applicant who insists that he has not abandoned the principles which prompted the offense, and therefore cannot claim rehabilitation.¹⁴⁵

pardons. Executive order No. 9814, 11 Fed. Reg. 14645 (1946). Exactly a year later, December 23, 1947, pursuant to the recommendations of the Board, Truman granted full pardons to 1523 of those men. Presidential Proclamation No. 2762, 12 Fed. Reg. 8731-44 (1947).

The other way to obtain a pardon is by individual application. The procedures for obtaining such a pardon are to be found at 28 C.F.R. §§ 1.1-1.9 (1969).

142. In a letter to the author dated Aug. 25, 1969, on file at the Yale Law Journal, the United States Pardon Attorney stated that a pardon is granted if it is determined that "the petitioner has demonstrated over a reasonable period of time that he is rehabilitated and is living a useful and law-abiding life."

The specific effect of a pardon is to restore to the convicted person all of his civil rights, which may include his previous position and rights regarding a state license, office, or employment. 67 C.J.S. *Pardons* § 11 (1950); 39 Am. Jur. *Pardon, Reprieve and Amnesty* §§ 52, 59 (1942); *Slater v. Olson*, 230 Iowa 1005, 299 N.W. 879 (1941). The federal view of the meaning of a pardon is broader than that of most states. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *United States ex rel. Forino v. Garfinkel*, 69 F. Supp. 846, 848 (W.D. Pa. 1947); 67 C.J.S. *Pardons* § 11 (1950). Since refusal of induction is a federal crime, and the pardon is a presidential one, the federal interpretation of a pardon's effect should be binding, even in state court proceedings.

143. This approach proved quite successful in *In re Sullivan*, 57 Mont. 592, 189 P. 770 (1920), involving tardy objections to a lawyer's admission based on his statements during World War I that the country had no cause for war and that he had not and would not register for the draft. After condemning his conduct as lacking in moral fiber and worthy of contempt, the court said:

However we are not prepared to say that the applicant is so far deficient in moral character that he cannot become a useful member of society and an honorable and useful member of the bar. His youth, inexperience and immaturity of mind offer something in mitigation if not in excuse of his conduct.

Id. at 594-95, 189 P. at 770-71.

The court suspended him for 8 months but one feels certain that if the objections had been timely, the court would simply have admitted him with little more than a lecture.

144. Notes 65-69 *supra*.

145. Two other arguments were unsuccessfully suggested for such applicants in *In re Brooks*, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied* 365 U.S. 813 (1961). One was that the moral defect involved in the crime was temporary and terminated with the war which evoked it. The other was that the crime could have no future implications since the applicant had passed the age of draft liability.

Conclusion

In order to satisfy the due process clause of the fourteenth amendment, the character requirement for admission to the bar must be rationally related to one's fitness to practice law. The only legitimate purposes of the requirement are protection of future clients and the proper administration of justice. Therefore, the only permissible demand is that the applicant not possess a quality of character which threatens those interests. Conscientious refusal of induction, whether considered in terms of its legal elements, its inevitable effects, the manner of its commission or its motive, is not a crime which necessarily indicates such a quality and thus cannot constitutionally be the sole basis for denial of admission. Furthermore, an applicant must be permitted to rebut any adverse inference drawn from the conviction—the law asks not that one's past be spotless but only that one's present moral character be good.

Part Two: Survey of State Law

The purpose of this section is to review the procedures used by selected states to determine the character fitness of applicants who have been convicted of a felony such as draft refusal. Of course the constitutional issue in a refusal of bar admission grounded solely on the conviction is independent of state procedures and standards. Nevertheless, the peculiarities of his particular state are important to the applicant: if state law is favorable to him, he may never have to raise a constitutional issue at all, while the course of litigation at the state level will affect his chances if the applicant does have to go into federal court.

Although all states require applicants to establish their "good moral character," there is little uniformity in state law governing bar admissions.¹⁴⁶ Three important variables will govern the chances of success of draft law felons. First, some states have a statute prescribing the effect of a felony conviction on bar admission and/or disbarment, while others do not.¹⁴⁷ Second, most states have slightly different ways of

146. See generally Annot., 64 A.L.R. 2d 301 (1959); 7 AM. JUR. 2d *Attorneys at Law* §§ 8-11 (1963); 7 C.J.S. *Attorney and Client* §§ 4-11 (1937).

147. Compare pp. 1385-88 *infra* (California), pp. 1389-91 *infra* (District of Columbia), pp. 1391-94 *infra* (New York), and pp. 1400-01 *infra* (Texas), with pp. 1396-97 *infra* (Connecticut) and pp. 1398-99 *infra* (Illinois). See also APPENDIX, p. 1402 *infra*.

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defining—and methods of applying—a moral turpitude standard for determining the relevance of particular behavior to a bar applicant's moral character.¹⁴⁸ Several states, on the other hand, do not appear to apply such a standard at all.¹⁴⁹ The third variable is the scope of review by the state courts of the determinations of "fact" and "law" by the local bar's subcommittee on character.¹⁵⁰

Six jurisdictions were selected for detailed study.¹⁵¹ Three general types of statutory variation were discovered: (1) jurisdictions in which conviction of any felony or misdemeanor involving moral turpitude is specified by statute as "cause"¹⁵² for disbarment and in which there is de novo review in the courts (California and the District of Columbia); (2) jurisdictions in which there is no statutory provision regarding the effect of a criminal conviction of any kind on disbarment or bar admission and court review of character committee findings is strictly limited (Connecticut and Illinois); and (3) jurisdictions in which a convicted felon is prohibited by statute from practicing law (New York and Texas).¹⁵³

148. On the general subject of moral turpitude standards, see pp. 1363-72 *supra*. Compare, e.g., California (ad hoc consideration of all criminal behavior in terms of circumstance of its occurrence, its specific relevance to practice of law, and evidence of actor's subsequent rehabilitation), pp. 1385-88 *infra*; District of Columbia (rehabilitation of criminal actor not generally taken into account by character committee), pp. 1389-91 *infra*; Connecticut (vague moral turpitude standard with no indication that a functional approach would be used to determine the relevance of a criminal conviction to the practice of law), pp. 1396-97 *infra*; Illinois (confusion about the application of moral turpitude standards used in judging non-criminal behavior to criminal convictions), p. 1399 *infra*.

149. See, e.g., Texas, pp. 1400-01 *infra*.

150. For discussion of this variable in several jurisdictions, see pp. 1384-85 *infra* (California) p. 1389 *infra* (District of Columbia), p. 1391 *infra* (New York), pp. 1395-96 *infra* (Connecticut), p. 1398 *infra* (Illinois), p. 1400 *infra* (Texas).

151. Selections were made on the basis of the authors' subjective estimate that there are more draft felons as well as bar applicants in the jurisdictions chosen than there are in most, if not all, other jurisdictions.

152. Summary disbarment is not required by either the California or the District of Columbia statutes upon proof that the defendant has been convicted of a crime involving moral turpitude. Both statutes arguably allow the attorney-defendant to rebut a statutory claim that he should be disbarred, even though his conduct involved moral turpitude. In California the defendant's introduction of evidence of his rehabilitation presumably would allow such a rebuttal to succeed (see p. 1388 *infra*), although in the District of Columbia it would probably not be successful (see p. 1391 *infra*).

153. On the basis of these statutory variations, preliminary rough estimates of how draft law felons would fare in each state can be made: (1) jurisdictions like California and the District of Columbia would be most receptive to draft refusers because a moral turpitude standard binds administrative determinations by the bar, which, in turn, may be reviewed by the courts on the basis of that standard; (2) jurisdictions like Connecticut and Illinois would be less receptive to draft law felons because the bar is not necessarily bound to follow a moral turpitude standard, and its determinations may be reviewed by the courts only when there is a clear abuse of administrative discretion (see pp. 1394-98 *infra*); (3) jurisdictions like New York and Texas would be least receptive to draft law felons because no convict may practice law, even if his felony did not involve moral turpitude. Further analysis, however, reveals that the above generalizations are not always accurate. In the detailed studies below, for example, New York is shown to be

I. California

A. Admission Procedure

The State Bar is empowered by statute to promulgate rules regulating the character¹⁵⁴ investigations of bar applicants.¹⁵⁵ While the California Supreme Court is at the head of the admissions structure and may entertain a direct appeal by any applicant whose certification is refused by the Committee of Bar Examiners,¹⁵⁶ the Committee conducts a full investigation of the applicant's character in the first instance.¹⁵⁷ These investigations are in fact carried out by three-man subcommittees whose determinations the full committee may choose to review notwithstanding the applicant's right to appeal directly to the Supreme Court.¹⁵⁸

California procedures governing character inquiries are more precisely articulated by statute than those of any other American jurisdiction.¹⁵⁹ As in other states, the applicant has the burden of proof and must show by a preponderance of evidence that he possesses good

more receptive than both Connecticut and Illinois to the draft refuser who seeks bar admission, despite the existence of a per se rule in the former barring felons from the practice of law. See pp. 1391-94 *infra*.

154. CAL. BUS. & PROF. CODE § 6060(c) (West 1962).

155. RULES REGULATING ADMISSION TO PRACTICE OF LAW IN CAL. BUS. & PROF. CODE foll. § 6068 (West Supp. 1968).

156. *Id.* Rule I, § 11. See *March v. Comm. of Bar Examiners*, 63 Cal. Rptr. 399, 433 P.2d 191 (1967) (Supreme Court has full review powers over all aspects of a Committee of Examiners' hearing). It has been well established by California case law that the findings of the Committee of Examiners (or any subcommittee thereof), while given great weight, are not binding on the California Supreme Court. See, e.g., *In re Alkow*, 51 Cal. Rptr. 912, 415 P.2d 800 (1966), and cases cited therein.

157. CAL. BUS. & PROF. CODE foll. § 6068, Rule I, § 2 (West 1962).

158. *Id.* Rule X, § 101.1 (as amended to May 17, 1968). Upon denial of moral character certification by the Bar Examiners, an applicant must wait two years before reapplying for certification to the Examiners, unless "permission to reapply or petition earlier . . . is granted by the committee at the time of such denial." Reapplication after a second denial cannot be made earlier than one year after such denial. *Id.* Rule X, § 102.

159. Although "neither the hearsay rule nor any other technical rule of evidence need be observed," an applicant must be "advised of any and all information received by the committee adversely bearing on his moral character," and must "be given a reasonable opportunity to rebut or explain the same." CAL. BUS. & PROF. CODE foll. § 6068, Rule X, § 101 (as amended to May 17, 1968). Provisions are included for compulsory attendance of witnesses and production of documents; and for the notification of an applicant at least five days before his mandatory personal hearing. *Id.* Rule I, §§ 7-9. The applicant is given the right to a de novo hearing before the full committee on the basis of new evidence. *Id.* Rule X, § 101.8. The applicant also has the right to appeal to the full committee, and ultimately to the Supreme Court. *Id.* Rule X, § 101.7.

By recent amendment the subcommittee is specifically required to transmit to the full committee after each hearing "(i) a brief statement of the proceedings, (ii) the record of the subcommittee's investigation, (iii) findings of fact and a brief statement of its conclusions based thereon, and (iv) the subcommittee's report." *Id.* Rule X, § 101.5. The report as transmitted by the subcommittee constitutes a formal record of the admission proceedings concerning moral character on which all subsequent appeals are based. *Id.* Rule X, §§ 101.6-101.8.

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moral character.¹⁶⁰ Unlike many other jurisdictions, however, review by the Supreme Court of an adverse determination by the Committee of Bar Examiners is de novo since the court exercises original rather than appellate jurisdiction.¹⁶¹

B. Statutory Admission Standard

The statutory admission requirement in California states merely that the applicant "[b]e of good moral character."¹⁶² The applicant may establish prima facie proof of good moral character by submitting to the examiners favorable character references from members of the bar and bench.¹⁶³ While there is case law holding that an inquiry into moral fitness may be broader in scope for admission to the bar than for disbarment,¹⁶⁴ the same cases define "good moral character" as an absence of past conduct involving moral turpitude which would constitute statutory grounds for disbarment.¹⁶⁵ As the California Supreme Court has recognized, therefore, the difference between the admission and disbarment standard is "more apparent than real."¹⁶⁶

160. See generally *In re Clark*, 63 Cal. 2d 610, 612, 407 P.2d 993 (1965); *Schullman v. State Bar*, 59 Cal. 2d 590, 599, 381 P.2d 658, 663 (1963); *Rock v. State Bar*, 57 Cal. 2d 639, 642, 371 P.2d 308, 310 (1962); *Hatch v. State Bar*, 55 Cal. 2d 127, 128, 357 P.2d 1064 (1961); *Sullivan v. State Bar*, 50 Cal. 2d 491, 501, 326 P.2d 138, 144 (1958); *Webb v. State Bar*, 47 Cal. 2d 866, 868, 306 P.2d 458, 459 (1957); *Spears v. State Bar*, 211 Cal. 183, 294 P. 697 (1930). See also *Farley, Character Investigation of Applicants for Admission to the Bar*, 29 *ST. B. OF CALIF. J.* 454 (1954).

161. See n. 156 *supra*. See also *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 421 P.2d 76 (1966). It has been held that admission to the bar is an exercise of the inherent powers of the Supreme Court in California. *Brydonjack v. State Bar*, 208 Cal. 439, 443, 281 P. 1018, 1020 (1929). See also *In re Lavine*, 2 Cal. 2d 324, 41 P.2d 161 (1935); *In re Cate*, 273 P. 617 (App. 1928).

162. CALIF. BUS. & PROF. CODE § 6060(c) (West 1962).

163. See, e.g., *In re Stepsay*, 15 Cal. 2d 71, 76, 98 P.2d 489, 491, (1940) (professional references not prima facie proof of "good moral character, but entitled to a most respectful consideration").

164. *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 232, 421 P.2d 76, 80 (1966); *Spears v. State Bar*, 211 Cal. 183, 188, 294 P. 697, 699 (1930); *In re Wells*, 174 Cal. 467, 474-75, 163 P. 657, 661 (1917). It was stated in *Wells*, for example, and reaffirmed in *Spears*, that in a proceeding for admission, "[t]he court may receive any evidence which tends to show [the applicant's] character for honesty, integrity, and general morality, and may no doubt refuse admission upon proofs that might not establish his guilt of any of the acts declared to be causes for disbarment." 174 Cal. 467, 475 (1917).

165. *In re Wells*, 174 Cal. 467, 163 P. 657 (1917), and *Spears v. State Bar*, 211 Cal. 183, 294 P. 697 (1930), as well as other California cases approving denial of admission to the bar, have been cited to demonstrate that "good moral character" has traditionally been defined in California "in terms of an absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude.'" *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957); see also *In re Myerson*, 190 Md. 671, 59 A.2d 489, (1948).

166. *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 231, 421 P.2d 76, 81 (1966). The following footnote appears in the *Hallinan* opinion as further documentation of the "distinction without a difference" between the admission and disbarment standards of moral character:

Moreover, in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 242, 77 S. Ct. 752, 1 L. Ed. 2d 796, the United States Supreme Court appears to treat "moral turpi-

What constitutes proof of moral turpitude in California? The statutory language juxtaposes "moral turpitude" with "dishonesty or corruption,"¹⁶⁷ thus suggesting an emphasis on fraud and insincerity rather than on acts performed in good faith whether or not they are intentional violations of the law.¹⁶⁸ This interpretation is supported by the preponderance of California case law.¹⁶⁹ Under the moral turpitude standard, a felony conviction in California may be used to deny admission for lack of "good moral character" only where the conviction alone indicates a probability of professional misconduct.¹⁷⁰ As suggested by the California Supreme Court, the question asked by the Bar Examiners should always be, "does the petitioner's . . . felony conviction bear a direct relationship to his fitness to practice law?"¹⁷¹

tude" as the relevant criterion in reviewing a decision to refuse admission, even though the New Mexico statute, like our own statute, required a showing of good moral character on the part of the applicant. And in *Moura v. State Bar*, 18 Cal. 2d 31, 32, 112 P.2d 629, this court used "good moral character" as the standard in a disbarment case.

421 P.2d 76, 81 n.5 (1966).

167. CALIF. BUS & PROF. CODE § 6106 (West 1962). The statute also states that an attorney's act involving moral turpitude constitutes a cause for disbarment or suspension "whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not . . ." [Emphasis added.]. *Id.* § 6106. In these two minor but potentially significant ways, therefore, the statutory standard in California is more difficult to meet than per se felony conviction statutes like those in New York and Texas (*see pp.* 1391-94, 1400-01 *infra*).

168. Although an intent to commit physical violence against another person resulting in a criminal conviction was held not to involve moral turpitude, *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 421 P.2d 76 (1966), *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940), fraudulent behavior not resulting in criminal conviction has been held to fall within the moral turpitude standard: *Hatch v. State Bar* 9 Cal. Rptr. 808, 357 P.2d 1064 (1961) (evidence that attorney commingled client's funds with his own and converted same to his personal use without knowledge of client); *Honoroff v. State Bar*, 50 Cal. 2d 202, 323 P.2d 1003 (1958) (keeping of proper books of account, vouchers, receipts and checks had significant bearing on issue of attorney's honesty and professional conduct when his acts are called into question); *Noland v. State Bar*, 46 Cal. Rptr. 305, 405 P.2d 129 (1965) (prosecuting attorney advising unauthorized removal of names from master jury lists).

169. The following behavior has been held to constitute sufficient grounds for disbarment, suspension, or denial of admission to the bar in California: *Werner v. State Bar*, 24 Cal. 2d 611, 150 P.2d 892 (1944) (bribery); *Bryant v. State Bar*, 21 Cal. 2d 285, 131 P.2d 523 (1942) (complicity in usurious transaction); *Stephens v. State Bar*, 19 Cal. 2d 580, 122 P.2d 549 (1942) (misrepresentation); *Bruns v. State Bar*, 18 Cal. 2d 667, 117 P.2d 327 (1941) (taking money under false pretenses); *Moura v. State Bar*, 18 Cal. 2d 31, 112 P.2d 629 (1941) (misappropriation of client's funds); *Suspension of Hickman*, 18 Cal. 2d 71, 113 P.2d 1 (1941) (attempted grand theft); *Stanford v. State Bar of Calif.*, 15 Cal. 2d 721, 104 P.2d 635 (1940) (misuse of trust funds); *Barton v. State Bar*, 2 Cal. 2d 294, 40 P.2d 502 (1935) (attempted extortion); *Jacobs v. State Bar*, 219 Cal. 59, 25 P.2d 401 (1933) (violation of fiduciary responsibility); *Lantz v. State Bar*, 212 Cal. 213, 298 P. 497 (1931) (violation of fiduciary responsibility); *Spears v. State Bar*, 211 Cal. 183, 294 P. 697 (forgery); *In re Cruickshank*, 47 Cal. App. 496, 190 P. 1098 (1928) (embezzlement).

170. *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 421 P.2d 76 (1966). *See also pp.* 1364-67 *supra*; Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 541 (1962); *Standard of Conduct for Administrative License Revocation*, 44 CALIF. L. REV. 403, 405 (1956).

171. *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 421 P.2d 76, 93 (1966).

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The Supreme Court, in fact, has refined its moral turpitude test to require that cases be decided on all the circumstances, no single act or crime constituting conclusive evidence of bad moral character.¹⁷² Circumstances attendant upon the commission of the offense are crucial:¹⁷³ assault with a deadly weapon does not require the disbarment of an attorney when there was sufficient provocation to eliminate the stigma of moral turpitude from his actions,¹⁷⁴ but the manslaughter conviction of a driver who was not licensed because of poor vision is grounds for his disbarment since he was morally remiss to drive without a license.¹⁷⁵ A summary of the California standard—an excellent model for jurisdictions with less sophisticated methods of judging the moral character of a bar admission candidate—is found in *Hallinan v. Committee of Bar Examiners*:

There is certain conduct involving fraud, perjury, theft, embezzlement and bribery where there is no question but that moral turpitude is involved. On the other hand, because the law does not always coincide exactly with the principles of morality, there are cases that are crimes that would not necessarily involve moral turpitude.¹⁷⁶

As already noted, California case law strongly suggests that under this standard the crime of refusal of induction is not one involving moral turpitude and so does not justify denial of admission.¹⁷⁷ The only case indicating an opposite result is *In re O'Connell*,¹⁷⁸ a World War I disbarment suit which was decided before the adoption of a functional

172. "There is necessarily a field of doubtful cases where the determination as to whether moral turpitude was involved may fall on one or the other side of the line, depending upon the circumstances of the particular case." *In re Hatch*, 10 Cal. 2d 147, 150, 73 P.2d 885, 886 (1937). See also Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533, 543 (1962); *Standard of Conduct for Administrative License Revocation*, 44 CALIF. L. REV. 403, 406 (1956).

173. Engaging in fights resulting in assault convictions, for example, will not be regarded as involving moral turpitude unless it demonstrates "baseness, vileness and depravity." *Hallinan v. Comm. of Bar Examiners*, 55 Cal. Rptr. 228, 239, 421 P.2d 76, 93 (1966). "Youth and inexperience" have been held to constitute mitigating circumstances for judging conduct which would normally involve moral turpitude. *Dudney v. State Bar*, 214 Cal. 238, 240, 4 P.2d 770, 771 (1931).

174. *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940).

175. *In re Alkow*, 51 Cal. Rptr. 912, 415 P.2d 800 (1966).

176. 55 Cal. Rptr. 228, 421 P.2d 76, 85 (1966), citing *Baker v. Miller*, 236 Ind. 20, 24, 138 N.E.2d 145, 147 (1956).

177. *In Otsuka v. Hite*, 64 Cal. 2d 596, 599, 614 P.2d 412, 414 (1966), cited by the *Hallinan* court as one of the bases for its conclusion, a petitioner who had been denied conscientious objector status and later refused induction was held not to have committed a felony threatening "the integrity of the electoral process," and therefore was entitled to vote according to the functional approach to draft law convictions. See pp. 1380-81 *supra*.

178. 182 Cal. 786, 194 P. 1010 (1920).

approach to felony convictions by the California Supreme Court. Furthermore, O'Connell was convicted and disbarred for conspiracy to violate the Espionage Act of 1917, which made it unlawful to obstruct recruiting in time of war.¹⁷⁹

Even where a functional approach to the felonious behavior of a bar applicant creates a presumption of character deficiency sufficient to prevent his admission, the presumption can be overcome in California, unlike many other states,¹⁸⁰ by evidence that the applicant has been rehabilitated since the time he committed his felony.¹⁸¹ The importance of rehabilitation as a means of eliminating civil disabilities is underscored by the California Penal Code, which provides that convicted persons who have "fulfilled the conditions of [their] probation . . . shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which [they have] been convicted."¹⁸²

II. District of Columbia

A. Admission Procedure

The United States District Court for the District of Columbia is authorized by statute to "make such rules as it deems proper respecting examination, qualification, and admission of persons to membership in its bar, their censure, suspension, and expulsion."¹⁸³ Although it too

179. The only other reported attempt by a Selective Service felon to gain admission to the California bar is mentioned in a brief, in *Application of Brooks, Petitioner's Brief for Certiorari* at 22, 365 U.S. 813 (1961). This was an administrative proceeding which never reached the Supreme Court because the Bar Examiners certified the applicant's moral character and admitted him to the bar despite his induction refusal.

180. See, e.g., *District of Columbia*, pp. 1390-91 *infra*; *Texas*, p. 1401 *infra*.

181. Letters from members of the bar and others who have known and worked with an applicant attesting to his sincerity and good behavior since the commission of his offense have been held to rebut a presumption against his good moral character. See *March v. Comm. of Bar Examiners*, 63 Cal. Rptr. 399, 408, 433 P.2d 191, 200 (1967):

[E]ven on the assumption that [the petitioner's] . . . conduct constituted moral turpitude, it appears from a careful reading of the petitioner's testimony before the bar examiners that he has convincingly demonstrated his rehabilitation and that he is morally qualified to become a member of the bar.

Proof that rehabilitated behavior is not "a matter of expediency under pressure," however, can be difficult to establish. *Bernstein v. Comm. of Bar Examiners*, 70 Cal. Rptr. 106, 443 P.2d 570 (1968) (restitution of money wrongfully retained regarded by court as motivated by fear of prosecution and thus not sufficient evidence to establish rehabilitation). The case law holds that rehabilitation is a "state of mind" rather than any specific behavior. See, e.g., *In re Gaffney*, 28 Cal. 2d 761, 764, 171 P.2d 873, 874-75 (1946).

182. CAL. PENAL CODE § 1203.4 (West 1955).

183. 5 D.C. CODE ENCYCL. ANN. § 11-2101 (West 1966). See also *Lark v. West*, 182 F. Supp. 794 (D.D.C. 1960), *cert. denied*, 368 U.S. 865 (1961); *Brooks v. Laws*, 208 F.2d 18 (D.C. Cir. 1953); *Laughlin v. Clephane*, 77 F. Supp. 103 (D.D.C. 1947).

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stands at the head of the admission process, the District Court has not acted with the same specificity as the California court in controlling admission procedures. With regard to character examinations the court merely requires that "an exhaustive examination . . . be made either by the Committee [on Admissions and Grievances¹⁸⁴] or by an appropriate agency as to [an applicant's] . . . character and a favorable report be made thereon."¹⁸⁵ The court rules prescribe no particular procedures for conducting character hearings,¹⁸⁶ although there is some case law which sets up minimal standards of fair investigation.¹⁸⁷

Since there are few formalities in a character hearing and since the delegation of fact-finding responsibilities to the Committee eliminates all characteristics of a judicial proceeding from the Committee's determination,¹⁸⁸ the court cannot entertain a direct appeal by a rejected applicant.¹⁸⁹ To offset the apparent failure of the statute and court rules to provide a remedy for the applicant who has received prejudicial treatment at the hands of the Committee, the Court of Appeals has sanctioned an ornate and circuitous substitute for judicial review. A rejected applicant must begin a civil action against the Committee alleging abuse of discretion. Such a complaint will be entitled to a judicial hearing and will give the complainant a right to further appeal.¹⁹⁰ The practical effect of this procedure is to afford the aggrieved applicant a *de novo* judicial hearing not unlike the simpler California arrangement.¹⁹¹

B. Moral Turpitude Standard

A moral turpitude standard for assessing the functional relevance of criminal convictions to the practice of law in the District of Columbia is prescribed by statute for disbarment only.¹⁹² However the California

184. 9 D.C. CODE ENCYCL. ANN. U.S. Dist. Ct. Rules, D.C., Rule 93(a) (West 1967), as amended, (Supp. 1968).

185. *Id.* Rule 93(g).

186. Rule 93(g) merely requires that "an exhaustive examination" be conducted by the Committee.

187. See, e.g., *In re Carter*, 192 F.2d 15 (D.C. Cir. 1951), (procedural due process right to a hearing). See generally *Willner v. Comm. on Character*, 373 U.S. 96 (1963) (procedural due process right to hearing and information about grounds for denial of certification in bar admission proceedings).

188. *In re Jacobi*, 217 F.2d 668 (D.C. Cir. 1954). See also *Brooks v. Laws*, 208 F.2d 18 (D.C. Cir. 1953); *Carver v. Clephane* 137 F.2d 685 (D.C. Cir. 1943).

189. *In re Jacobi*, 217 F.2d 668 (D.C. Cir. 1954) (nothing in the application requires an entry in a court docket, open taking and recording of evidence, or judicial judgment or order, and thus nothing is appealable).

190. See *In re Jacobi*, 217 F.2d 668 (D.C. Cir. 1954); *Laughlin v. Clephane*, 77 F. Supp. 103 (D.D.C. 1947); *Carver v. Clephane*, 137 F.2d 685 (D.C. Cir. 1943).

191. See pp. 1384-85 *supra*.

192. 5 D.C. CODE ENCYCL. ANN. § 11-2103 (West 1966). The statute is slightly more

rule is that "good moral character"¹⁹³ is best demonstrated in an admission proceeding by showing an absence of past conduct involving moral turpitude would also seem to apply in the District because the statutes are similar and because there are no District of Columbia cases upholding the denial of admission to applicants convicted of crimes not involving moral turpitude.¹⁹⁴

The essence of moral turpitude, as it reflects on the practice of law, is fraudulent behavior which might poison the relationship between an attorney and his client or the court. An attorney's forgery conviction, for example, was ground for his disbarment because it "destroy[ed] the bond of confidence which must exist between a court and [a lawyer]."¹⁹⁵ It is doubtful that conviction for refusal of induction would alone constitute sufficient cause for a denial of admission under this standard. Unlike California, however, the District has no recorded professional licensing cases involving draft law felons.¹⁹⁶

In applying its moral turpitude standard the District differs from California in one highly significant way: felonies committed by attorneys or prospective attorneys are generally considered in terms of criminal categories rather than individual behavior, and it is hard to imagine extenuating circumstances which might make the Committee on Admissions and Grievances overlook a conviction categorized as involving moral turpitude. When a member of the bar, for example, was convicted of embezzling funds entrusted to him as a fiduciary, his

emphatic about the effect of a felony conviction than that of California, and reads as follows:

When a member of the bar of the United States District Court for the District of Columbia is convicted of an offense involving moral turpitude, and a duly certified copy of the final judgment of the conviction is presented to the court, the name of the member so convicted may thereupon, by order of the court, be struck from the roll of the members of the bar, and he shall thereafter cease to be a member thereof. Upon appeal from a judgment of conviction, and pending the final determination of the appeal, the court may order the suspension from practice of the convicted member of the bar; and upon reversal of the conviction, or the granting of a pardon, the court may vacate or modify the order

193. Neither the District of Columbia statute nor the District Court Rules use the phrase "good moral character," although the Rules require a "favorable report" by the Committee on Admissions and Grievances on an applicant's character. U.S. Dist. Ct. Rules, D.C., Rule 93(g), *supra* note 184. "Good moral character," however, is cited in case law as the standard an applicant must meet before the Committee. *See, e.g.,* Carver v. Clephane, 137 F.2d 685 (D.C. Cir. 1943). *Cf.,* Goldsmith v. United States Bd. of Tax Appeals, 4 F.2d 422 (D.C. Cir. 1925), *aff'd*, 270 U.S. 117 (1926).

194. Whether such denials might have occurred in unrecorded administrative proceedings, however, is unknown.

195. *In re Williams*, 158 F. Supp. 279, 281 (D.D.C. 1957), *aff'd*, 256 F.2d 888 (D.C. Cir. 1958). *See also* Lark v. West, 182 F. Supp. 794 (D.D.C. 1960) (conviction for mail fraud held to destroy relationship of lawyer to client and court).

196. There has, however, been at least one induction refuser who was admitted to the District Bar in an unrecorded administrative proceeding. *See* Application of Brooks, Petitioner's Brief for Certiorari at 22, 365 U.S. 813 (1961).

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"aberration or stress" did not warrant a lesser punishment than disbarment.¹⁹⁷

III. New York

A. Admission Procedure

Under the New York Judiciary Law the Appellate Division of the Supreme Court in each judicial district is empowered to certify that an applicant who has passed the New York State Bar Examination "possesses the character and general fitness requisite for an attorney and counsellor-at-law."¹⁹⁸ Each appellate division is authorized to appoint a separate committee on character and fitness to investigate applicants who reside in the division's judicial district.¹⁹⁹ While a committee may make a preliminary determination of the applicant's moral character, neither its standards nor its substantive findings are binding on the appellate division, which on appeal may conduct a de novo character investigation.²⁰⁰ Furthermore, review of a committee ruling by an appellate division may go to the whole record of the proceedings, since it is within the discretion of the justices "to permit to be divulged all or any part of such papers, records and documents" as shall have been compiled concerning the applicant.²⁰¹

B. *Per Se* Rule for New York Felony Convictions

Although there is no statutory provision in New York concerning the effect of a felony conviction in determining "character and general fitness"²⁰² for bar admission, such a conviction regardless of moral turpitude is a ground for summary disbarment under the New York Judiciary Law.²⁰³ Felonious behavior in New York, however, is re-

197. *In re Quimby*, 359 F.2d 257 (D.C. Cir. 1966). In another recent case upholding a disbarment order in a similar fact situation, a concurring opinion written by Circuit Judge (now Chief Justice) Burger warned that a circumstantial approach to felonies committed by members of the bar would "give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system whose functioning depends upon lawyers." *In re Ewers*, 379 F.2d 474, 476-77 (D.C. Cir. 1966). Such arguments raise the spectre of the "reputation of the bar" character standard, discussed at length above and rejected as unconstitutionally vague and violative of first amendment freedoms. See pp. 1358-63 *supra*.

198. N.Y. JUDICIARY LAW § 90.1.b (McKinney 1968). See generally Note, 20 FORDHAM L. REV. 305 (1951).

199. N.Y. JUDICIARY LAW §§ 90.1.a, 90.1.c (McKinney 1968).

200. See Application of Weiss, 24 App. Div. 2d 981, 265 N.Y.S.2d 146 (1965); Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (1944), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947).

201. N.Y. JUDICIARY LAW § 90.10 (McKinney 1968).

202. *Id.* § 90.1.a.

203. *Id.* § 90.4. The New York statute is similar to that of the District of Columbia

garded as perhaps even stronger evidence of disability in admission than in disbarment proceedings, as demonstrated by the rule that a bar applicant's acquittal in a criminal action is not *res judicata* upon the issue to be determined by a character committee.²⁰⁴

New York and jurisdictions with similar *per se* statutory rules on convicted felons therefore would appear to offer the most difficult possible hurdle for draft law felons seeking admission to the bar. This assessment is unwarranted, however, because the narrow statutory construction which the courts in New York have applied to the *per se* rule makes the New York statute considerably less forbidding to the convicted felon than an independent and substantially unreviewable character and fitness committee in a state like Connecticut or Illinois.²⁰⁵ The narrow reading of the *per se* rule which prevails in the New York courts interprets "felony convictions" to embrace "only those Federal felonies which are also felonies under the laws of [New York] State," and to exclude "such Federal felonies as are 'cognizable by [New York] laws as a misdemeanor or not at all.'"²⁰⁶ Federal felonies which have been held not to constitute grounds for summary disbarment, however, are limited generally to conspiratorial offenses specifically defined by statute as misdemeanors in New York.²⁰⁷

in all respects except for its highly significant lack of a moral turpitude provision: Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys. *Id.*

204. Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (1944), *aff'd*, 296 N.Y. 926, 73 N.E.2d 41 (1947) (acquittal in criminal action not deemed *res judicata* with regard to character investigation, since conduct not descending to level of criminal guilt may still present insuperable obstacles to bar admission if conduct evidences lack of requisite character for practice of law). Admission and disbarment standards are quite similar, however, since acquittal does not necessarily require reinstatement of an attorney after his disbarment. *In re Griffin*, 249 App. Div. 381, 292 N.Y.S. 833 (1937); *In re Stein*, 249 App. Div. 382, 292 N.Y.S. 828 (1937); *In re Marko*, 23 App. Div. 2d 442, 261 N.Y.S. 2d 302 (1965); *In re Ginsberg*, 1 N.Y. 2d 144, 134 N.E.2d 193 (1956).

205. See pp. 1395-96, 1398-99 *infra*.

206. *In re Donegan*, 282 N.Y. 285, 292, 26 N.E.2d 260, 263 (1940).

207. In *In re Donegan*, 282 N.Y. 285, 26 N.E.2d 260 (1940), an attorney who had been convicted of the federal felony of conspiring to commit mail fraud was not disbarred because "[u]nder the law of New York . . . conspiracy to commit a crime is only a misdemeanor." *Id.* at 287, 26 N.E.2d at 261. The Court of Appeals has sometimes refused to rule whether a non-conspiratorial federal felony which is only a misdemeanor under New York law is cognizable within the terms of N.Y. JUDICIARY LAW § 90.4 (McKinney 1968), since primary jurisdiction for such a ruling is reserved by that statute to the Appellate Division. See *In re Kaufman*, 245 N.Y. 423, 157 N.E. 730 (1927); *In re Lindheim*, 213 App. Div. 560, 211 N.Y.S. 261 (1925). In other cases, however, the court has been able to rule that federal felonies do fall under § 90.4. See *In re Hess*, 250 App. Div. 581, 295 N.Y.S. 82 (1937); *In re Wilhoit*, 220 App. Div. 132, 221 N.Y.S. 924 (1927); *In re Boetzel*, 191 App. Div. 881, 180 N.Y.S. 412 (1920).

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The vital question with respect to Selective Service felonies in New York, therefore, is whether they, like conspiratorial offenses, fall outside the purview of the per se felony conviction rule. *In re Greenberger*,²⁰⁸ the only case directly on point, seems to disregard the established New York rule requiring that federal felonies be classified by the courts as involving moral turpitude before the statutory exclusion can be applied. The case involved a defendant in a disbarment proceeding who had pleaded guilty to the federal charge of refusing induction.²⁰⁹ He made no appearance to contest the proceeding and did not appeal his disbarment. The court stated tersely: "Said crime is a felony. Pursuant to . . . the Judiciary Law, therefore, he should be disbarred."²¹⁰ But in a subsequent proceeding, Greenberger was reinstated,²¹¹ presumably either because he had received a presidential pardon or because he should not have been disbarred in the first place.

Despite *Greenberger*, however, the New York courts have often applied a moral turpitude standard to determine whether a federal crime not expressly defined as a felony under New York law should require summary disbarment. The Judiciary Law states that an attorney "who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice" may be censured, suspended or disbarred.²¹² The courts have construed this statutory language to mean that conduct which is not felonious under New York law must involve moral turpitude before it can justify disbarment. For example, an attorney who was convicted in a federal court of the felony of transporting stolen goods in interstate commerce was disbarred not for the bare fact of his conviction but because his crime involved moral turpitude.²¹³ In another disbarment case, concerning a federal felony conviction for conspiracy to defraud, the Appellate Division asserted that

208. 265 App. Div. 343, 38 N.Y.S.2d 758 (1942).

209. Since the decision is per curiam with no written opinion, it is unknown whether Greenberger's refusal was based on conscientious objection.

210. 265 App. Div. 343, 38 N.Y.S.2d 758 (1942). See also *In re Scanlon*, 12 App. Div. 2d 21, 207 N.Y.S. 2d 837 (1960); *In re Sobel*, 258 App. Div. 465, 17 N.Y.S. 2d 23 (1940); *In re Hodgskin*, 193 App. Div. 217, 183 N.Y.S. 401 (1920); cases cited note 207 *supra*.

211. *In re Greenberger*, 278 App. Div. 925, 105 N.Y.S.2d 903 (1951).

212. N.Y. JUDICIARY LAW § 90.2 (McKinney 1963). See, e.g., *In re Sheiman*, 277 App. Div. 39, 97 N.Y.S. 2d 715 (1950) (disbarment ordered upon evidence that attorney pleaded guilty to charge of bribing an officer of the Treasury Department of the United States); *In re Hiss*, 276 App. Div. 701, 96 N.Y.S.2d 850 (1950) (disbarment of attorney for knowingly and wilfully making false statements before a Grand Jury of the United States under oath); *In re Greenberg*, 19 App. Div. 2d 375, 243 N.Y.S.2d 752 (1963) (disbarment of attorney who submitted false statements to insurance carriers as to loss of earnings and injuries of clients); *In re Portnick*, 5 App. Div. 2d 16, 169 N.Y.S.2d 178 (1957) (disbarment of attorney for issuing fraudulent checks).

213. *In re Turley*, 268 App. Div. 706, 53 N.Y.S.2d 46 (1945).

the respondent may of course offer any available proof which might affect . . . the weight to be accorded . . . [the conviction] . . . [to] explain his participation or involvement in the crime charged; and which might serve to repel or negative any inference as to his moral turpitude by reason of the conviction.²¹⁴

The crime of induction refusal offers abundant opportunity to rebut an inference of moral turpitude. This was demonstrated by *Matter of Koster v. Holz*,²¹⁵ in which a Selective Service felon was held to have been improperly denied an insurance broker's license on the ground that his induction refusal might have been based on conscientious and sincere opposition to war and thus could not be presumed to constitute evidence of "untrustworthiness."²¹⁶

IV. Connecticut

A. Admission Procedure

The Superior Court is the head of the admissions structure in Connecticut²¹⁷ and its rules with regard to admission procedure have the force of statute.²¹⁸ The court has delegated virtually all investigatory

214. *In re Keogh*, 25 App. Div. 2d 499, 500, 267 N.Y.S. 2d 87, 89 (1966), *modified on other grounds sub nom.* *Keogh v. Richardson*, 17 N.Y.2d 479, 214 N.E.2d 163 (1966). *See also In re Darmstadt*, 35 App. Div. 285, 55 N.Y.S. 2d (1898) (attorney may show that crime did not involve moral turpitude, or that extenuating circumstances did not make criminal conviction sufficient cause for disbarment). *But see In re Patrick*, 136 App. Div. 450, 120 N.Y.S. 1006 (1910) (court cannot inquire into alleged procedural irregularity of conviction as an "extenuating circumstance" sufficient to mitigate the seriousness of the crime as it reflects on practice of law). *See also Barash v. Ass'n of Bar of City of N.Y.*, 20 N.Y.2d 154, 281 N.Y.S.2d 997, 228 N.E.2d 896 (1967) (dictum) (lawyer's felony conviction is ipso facto grounds for his disbarment); *In re Jonas*, 26 App. Div. 2d 87, 270 N.Y.S.2d 1021 (1966) (upon conviction of felony defendant automatically ceased to be an attorney).

215. 3 N.Y.2d 639, 171 N.Y.S.2d 65, 148 N.E.2d 287 (1958).

216. 3 N.Y.2d at 648, 171 N.Y.S.2d at 72, 148 N.E.2d at 294 (1958). *See* p. 1374 *supra*. In *Koster* the New York court reasoned that "[i]f it is determined upon evidence that the Selective Service Board believed the petitioner to be a sincere person, but one whose beliefs did not entitle him to conscientious objector status . . . , then the denial of his application for a license where this is the only evidence of untrustworthiness would be arbitrary and capricious." 3 N.Y.2d at 648, 171 N.Y.S.2d at 72. *See Schwartz, Administrative Law*, 33 N.Y.U. L. REV. 1090, 1091 (1958); McKay, *Constitutional Law*, 34 N.Y.U. L. REV. 1359, 1372-73 (1959). *See also* Application of Steinbugler, 297 N.Y. 713, 77 N.E.2d 16 (1947) (claim of exemption from military service on conscientious grounds, absent proof of disloyalty or insincerity, held not sufficient to justify exclusion from the bar).

The Illinois courts have grossly misinterpreted the meaning of such a judicial inquiry into the circumstances of a criminal conviction in order to determine its relevance to the practice of law. *See* p. 1399 *infra*.

Since at least one draft law felon has been admitted to the New York bar in an unrecorded administrative proceeding, the foregoing analysis of the New York per se felony conviction rule is more than purely speculative. *See* Petitioner's Brief for Certiorari at 22, Application of Brooks, 365 U.S. 813 (1961).

217. CONN. GEN. STAT. ANN. § 51-80 (West 1960).

218. Application of Dodd, 132 Conn. 237, 241, 43 A.2d 224, 226 (1945). *See also* State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (held that

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authority concerning moral character to the various county bar association examining committees.²¹⁹ This delegation is important since there is no Connecticut statute to define the relevance of felony convictions in a determination of moral character.²²⁰ The only guidelines for the county committees are regulations concerning admission qualifications "as to pre-law education, legal education, morals and fitness" propounded by a state Bar Examining Committee set up under the Superior Court rules.²²¹ The courts, however, have recently begun to establish procedural controls over the county committee investigations.²²²

The effect of the Superior Court's broad delegation of investigatory powers to the local examining committees is to reduce sharply the scope of judicial review of character rulings. An aggrieved applicant's appeal rights are limited to matters of law,²²³ of which there are few since "[p]roceedings for admission to the bar are not actions or suits at law,"²²⁴ and since there are no statutory character standards binding on the investigatory committees. The refusal of an examining committee to apply a moral turpitude standard to a convicted applicant, for

no statute can control judicial department in performance of its duty to decide who shall have privilege of practicing law); *Rosenthal v. State Bar Examining Comm.*, 116 Conn. 409, 165 A. 211 (1933) (admission of attorneys to bar held to be exclusive judicial function); *Mrotek v. Nair*, 4 Conn. Cir. 313, 231 A.2d 95 (1967) (rules of superior court judges regarding bar admission have effect of statute).

219. CONN. PRACTICE BOOK, *Rules for the Superior Court* § 4 (West 1966).

220. Unlike, e.g., California (see pp. 1385-86 *supra*), District of Columbia (see pp. 1389-90 *supra*), New York (see p. 1391 *supra*), and Texas (see p. 1400 *infra*).

221. CONN. PRACTICE BOOK, *Rules for the Superior Court* § 6 (West 1966). Such regulations are concerned with educational standards, but not generally with character and fitness standards.

222. See, e.g., *Application of Dinan*, 244 A.2d 608 (Conn. 1968), holding that where denial of application for admission to the bar depends on information supplied by a person whose reliability or veracity is brought into question by the applicant, procedural due process rights of confrontation and cross-examination must be afforded the applicant. This case overruled a contrary holding in *O'Brien's Petition*, 79 Conn. 46, 63 A. 777 (1906). See also *Willner v. Comm. of Bar Examiners*, 373 U.S. 96 (1963).

223. *Application of Plantamura*, 22 Conn. Supp. 213, 166 A.2d 859 (1961), *aff'd*, 149 Conn. 111, 176 A.2d 61 (1961), *cert. denied*, 369 U.S. 872 (1962) (review of committee denial of admission of foreign attorney on grounds that he had not met requirement of Conn. Practice Book § 8 that he have practiced at least 5 years in highest court of another state). See also *Application of Warren*, 149 Conn. 266, 178 A.2d 528 (1962) (no hearing de novo on factual determinations within discretion of bar committees); *Higgins v. Hartford Co. Bar*, 111 Conn. 47, 149 A. 415 (1930) (only matter for review upon committee's denial of application by candidate to take bar exam was whether committee acted fairly); *In re Westcott*, 66 Conn. 585, 34 A. 505 (1896) (appeal from disbarment proceeding is extremely limited since nature of bar committee order is so discretionary that court will only interfere in a "plain case").

But see *Application of Hunt*, 155 Conn. 186, 230 A.2d 432 (1967) (when no fact dispute exists as to applicant's compliance with the conditions of admission, whether compliance has occurred is a reviewable question of law).

224. *Heiberger v. Clark*, 148 Conn. 177, 169 A.2d 652 (1961).

example, would probably not raise a question of law since no such standard is binding on the committee.²²⁵ The leading interpretation of committee discretionary powers under the court rules²²⁶ suggests that a Connecticut court will

inquire whether the approval of the bar was withheld after a fair investigation of the facts. . . . This principle applies to cases such as the present, where the issue involves an exercise of the committee's discretion. It does not apply to cases involving specific requirements of the rules as to such things as age, residence, or graduation from an approved school—requirements over which the committee has no discretion.²²⁷

B. *Ambiguous Felony Conviction Standard*

The wide discretion exercised by the examining committees and the absence of a statutory moral turpitude standard combine to make it very difficult to ascertain Connecticut judicial policy regarding convicted felons who seek admission to the bar.²²⁸ The only reported Connecticut case in which the effect of a criminal conviction was at issue involved disbarment rather than admission. In *Grievance Committee of Hartford County Bar v. Broder*,²²⁹ an attorney's conviction for the crime of adultery was regarded by the court as an infamous crime involving moral turpitude, and thus indicative of moral unfitness for the profession. The decision implies that a functional approach is not used in Connecticut to determine the effect of criminal convictions,²³⁰ since it does not distinguish other less "infamous" types of criminal behavior from adultery. A recent disbarment case cites a currently

225. It would be possible to argue that the "law-fact" distinction is meaningless on the grounds that the Connecticut statutory requirements with regard to legal education, age, and other matters considered by the case law to be matters of "law" are specified in no greater detail than the statutory requirements with regard to character, generally considered by the courts to be matters of "fact."

226. CONN. PRACTICE BOOK, *Rules for the Superior Court* § 12 (West 1966).

227. Application of Warren, 149 Conn. 266, 273, 178 A.2d 528, 533 (1962). See also *Konigsberg v. State Bar of Calif.*, 353 U.S. 252 (1957) (federal constitutional requirement that the denial of bar admission by bar examining committee "have rational support in evidence").

228. There are judicial pronouncements, on the one hand, stating that higher moral standards are required for admission to the bar than for defense against disbarment, *O'Brien's Petition*, 79 Conn. 46, 63 A. 777 (1906) (dicta), and on the other hand, that morally deficient conduct which would keep applicants from becoming members of the bar also constitutes ground for disbarment, *In re Horwitz*, 21 Conn. Supp. 363, 154 A.2d 879 (1959).

229. 112 Conn. 269, 152 A.2d 292 (1930).

230. A functional approach is used in Connecticut in determining the relevance of non-criminal behavior to the moral fitness of a bar candidate. "The ultimate purpose of all regulations of the admission of attorneys is to assure the courts the assistance of advocates of ability, learning and sound character and to protect the public from incompetent and dishonest practitioners." *Rosenthal v. State Bar Examining Comm.*, 116 Conn. 409, 415, 165 A. 211, 213 (1933).

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controlling "standard of honor and honesty . . . [with] such an appreciation of the distinctions between right and wrong in the conduct of men toward each other as will make [the lawyer] a fit and safe person to engage in the practice of law."²³¹ It is unclear whether such a standard would be used to distinguish a Selective Service felon from an adulterer, and whether the standard would be applied in the arguably more rigorous²³² admission process as well as in disbarment.

V. Illinois

A. Admission Procedure

Character investigation procedures in Illinois are established by Supreme Court rule²³³ and administered by character and fitness committees appointed by the Supreme Court in each of the state's judicial districts.²³⁴ Prior to a Supreme Court amendment in 1937,²³⁵ Illinois procedures were extremely simple. The applicant merely submitted an affidavit

concerning his history and environments, together with affidavits of at least three respectable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based.²³⁶

In 1937, however, the importance of these affidavits as *prima facie* evidence of an applicant's good moral character was reduced by the Supreme Court's authorization of the county committees to conduct independent investigations, subpoena witnesses and hold hearings as Commissioners of the Court.²³⁷ The consequent inflation of the com-

231. Application of Koenig, 152 Conn. 125, 132, 204 A.2d 33, 36 (1964). See generally Note, 70 YALE L.J. 283 (1960).

232. See, e.g., O'Brien's Petition, 79 Conn. 46, 63 A. 777 (1906).

233. ILL. ANN. STAT. ch. 110A §§ 701, 708, 709 (Smith-Hurd 1968).

The Supreme Court bar admission rules have the force of statute in Illinois. *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937), cert. denied, 302 U.S. 728 (1937), reh. denied, 302 U.S. 777 (1937).

234. ILL. ANN. STAT. ch. 110A § 708(a) (Smith-Hurd 1968).

235. Jenner and Tone, *Historical and Practice Notes*, ILL. ANN. STAT. at 578 (Smith-Hurd 1956).

236. *Id.*

237. ILL. ANN. STAT. ch. 110A § 709 (Smith-Hurd 1968). This intensified scrutiny of applicants by the examining committees, however, does not appear to have produced an extraordinary number of denials of admission, at least during the first decade of Rule 709's operation. From 1938 to 1948 there were only eight admission denials on character grounds out of a total of 3,805 bar applicants. Sprecher, *Admission to Practice Law*, 46 ILL. L. REV. 811, 834 (1952).

mittees' investigative powers has not produced a corresponding growth of procedural rights for admission applicants, who are guaranteed only the minimal procedural protection afforded by federal constitutional doctrine.²³⁸

Judicial review of admission denials is authorized by a Supreme Court rule,²³⁹ thus making Illinois slightly more attractive procedurally to bar applicants with controversial character backgrounds than states like Connecticut.²⁴⁰ Nevertheless, an applicant has no right to a de novo judicial hearing of his claim, and will only be granted review on grounds that "the committee abused its discretion and that certain of his constitutional rights were infringed upon."²⁴¹

B. *Moral Turpitude*

The moral turpitude standard is a judicial creature in Illinois and there is no statutory provision concerning the effect of a felony conviction on either disbarment or admission proceedings.²⁴² Since the courts generally entertain appeals by aggrieved admission applicants only when constitutional questions are at issue,²⁴³ there have been only two reported decisions about the bearing of a felony conviction on the requisite moral character of an admission candidate. The existence of a pardon rather than the absence of moral turpitude was dispositive in both cases.²⁴⁴ A disbarment action against an attorney who had been

238. See *Willner v. Comm. of Bar Examiners*, 373 U.S. 96 (1963).

239. ILL. ANN. STAT. ch. 110A § 708(d) (Smith-Hurd 1968) states:

An applicant who has availed himself of his full hearing rights before the Committee on Character and Fitness and who deems himself aggrieved by the determination of the committee may, on notice to the committee, petition the Supreme Court for relief.

240. See pp. 1394-96 *supra*.

241. *In re Anastaplo*, 3 Ill. 2d 471, 474, 121 N.E.2d 826, 828 (1954), *cert. denied*, 348 U.S. 946 (1955). See also *In re Frank*, 293 Ill. 263, 127 N.E. 640 (1920); *In re Latimer*, 11 Ill. 2d 327, 143 N.E.2d 20 (1957), *cert. denied*, 355 U.S. 82 (1957).

242. The standard is prescribed neither by ILL. ANN. STAT. ch. 13 § 1 (Smith-Hurd 1963) (the general licensing statute for attorneys and counsellors), nor by ILL. ANN. STAT. ch. 110A §§ 708, 751 (Smith-Hurd 1968) (provisions governing character investigation and disbarment proceedings).

243. The three leading Illinois admission cases raising substantive questions about the moral character standard all concern problems created by the loyalty oath requirements of the Illinois Constitution and the State Bar Committee on Character and Fitness. *In re Summers*, 325 U.S. 561 (1945), *reh. denied*, 326 U.S. 807; *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), *cert. denied*, 348 U.S. 946 (1955); *In re Latimer*, 11 Ill. 2d 327, 143 N.E.2d 20 (1957).

244. *People ex rel. Deneen v. Coleman*, 210 Ill. 79, 71 N.E. 20 (1904) (attorney convicted of conspiracy to obtain money from insurance company by fraudulent means, pardoned without serving sentence; thirteen years later applied for bar admission; admitted on recommendation of attorney conversant with conviction and on evidence of complete rehabilitation); *People ex rel. Deneen v. Gilmore*, 214 Ill. 570, 73 N.E. 787 (1905) (attorney's conviction without pardon or evidence of rehabilitation sufficient to bar him from practice of law).

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convicted of tax evasion provides a typical example of how the Supreme Court treats the moral turpitude issue when felonious behavior is involved:

Without attempting to limit the meaning of the phrase, *we think it elementary that fraud or fraudulent conduct on the part of an attorney resulting in his conviction necessarily carries the connotation of moral turpitude.*²⁴⁵

It is unclear whether Illinois would apply a functional test to the determination of moral turpitude in the case of draft refusal. The only Illinois case which directly concerns the effect of a draft law conviction in bar admission or disciplinary proceedings was based on a clear misunderstanding of the issue.²⁴⁶ It was held in *In re Pontarelli*²⁴⁷ that the refusal of induction by a Selective Service registrant who had unsuccessfully sought conscientious objector status was a crime involving moral turpitude. The court justified its conclusion on the ground that it had no jurisdiction to review such a criminal conviction.²⁴⁸ As suggested above,²⁴⁹ however, the court in reviewing the applicant's "general fitness to practice law" had not been asked to review the admittedly valid conviction, but rather to determine the sincerity of the applicant's conscientious objection.²⁵⁰

245. *In re Teitelbaum*, 13 Ill. 2d 586, 589, 150 N.E.2d 873, 875 (1958) (emphasis added). See also *In re Sullivan*, 33 Ill. 2d 548, 213 N.E.2d 257 (1965) (filing fraudulent income tax return); *In re Crane*, 23 Ill. 2d 398, 178 N.E.2d 349 (1961) (income tax evasion); *In re Eaton*, 14 Ill. 2d 338, 152 N.E.2d 850 (1958) (mail fraud); *In re Needham*, 364 Ill. 65, 4 N.E.2d 19 (1936) (obtaining money through false pretenses).

246. See note 96 *supra*.

247. 393 Ill. 310, 66 N.E.2d 83 (1946).

248. *Id.* at 313, 66 N.E.2d at 84.

249. See pp. 1374, 1394 *supra*. The New York court in *Koster* managed to escape the 'relitigation fallacy' in a fact situation similar to the one in *Pontarelli* by correctly recognizing that the petitioner's induction refusal *might have been* based on conscientious and sincere opposition to war and thus could not be *presumed* to constitute evidence of dishonesty.

250. This 'relitigation fallacy' is a variation of the tendency in the District of Columbia courts to preclude any ad hoc consideration of a felony conviction on the basis of the circumstances surrounding the commission of the offense. See pp. 1390-91 *supra*. The Illinois Supreme Court asserted in *In re Teitelbaum*, 13 Ill. 2d 586, 590, 150 N.E.2d 873, 876 (1958), for example, that "we cannot go behind" the record of conviction. See also *In re Sullivan*, 33 Ill. 2d 548, 213 N.E.2d 257 (1965), *In re Needham*, 364 Ill. 65, 4 N.E.2d 19 (1936).

The Illinois courts are not alone, however, in their misconception of the functional approach: a similarly misleading discussion of *Pontarelli* in the context of "relitigating the conviction" may be found in an otherwise admirable sketch of the effect of Selective Service felony convictions on admission to the bar, written by members of a Harvard Law School draft study project. Beil and Cohen, *The Committee for Legal Research on the Draft, Effect of Selective Service Felony Conviction on Admission to the Bar* 6 (April 15, 1968).

VI. Texas

A. *Admission Procedure*

The Texas Board of Law Examiners is empowered by statute to conduct all admission proceedings, including investigations of applicants to determine whether they are "of such moral character . . . that it would be proper for [them] . . . to be licensed."²⁵¹ The Board is comprised of five lawyers who are appointed biennially by the Supreme Court.²⁵² Bar admissions in Texas, therefore, are accomplished directly through the court of highest jurisdiction under the guidance of its administrative arm: the court's statutory authority "shall not be delegated"²⁵³ and all admission standards are fashioned by the court itself.²⁵⁴ Although a bar admission candidate is nowhere specifically accorded any procedural rights in his character examination, a disbarment proceeding²⁵⁵ in Texas is conducted as a civil controversy in which the general rules of civil procedure apply.²⁵⁶ There is no right of appeal following a character hearing, since the hearing is carried out in an administrative wing of the state court of last resort.

B. *Per Se Rule Denying Admission and Requiring Disbarment of All Convicted Felons*

The Texas statute excluding felons from the practice of law is broader than that of any other jurisdiction:²⁵⁷

No person convicted of any felony shall receive a license as an attorney at law; or, if licensed, any court of record in which such a person may practice shall, on proof of a conviction of any felony, revoke his license and strike his name from the roll of attorneys.²⁵⁸

What few chinks can be detected in this statutory armor are limited to the disbarment side of the prohibition. There is some authority, for example, to support the proposition that disbarment for certain feloni-

251. TEX. CIV. STAT. ANN., tit. 14, art. 305 (Vernon 1959).

252. *Id.* art. 304.

253. *Id.* art. 303.6.

254. *Id.* art. 306.

255. Disbarment proceedings are conducted in "the district court of the county in which the attorney resides or where the act complained of occurred . . ." *Id.* art. 313.

256. See, e.g., *Burns v. State*, 76 S.W.2d 172 (Tex. Civ. App. 1935), *rev'd on other grounds*, 103 S.W.2d 960 (Tex. Com. App. 1937); *Houtchens v. State*, 63 S.W.2d 1011 (Tex. Com. App. 1933), *motion granted*, 74 S.W.2d 976 (Tex. Com. App. 1934); *Houtchens v. Mercer*, 119 Tex. 431, 29 S.W.2d 1031 (1930); *Scott v. State*, 86 Tex. 321, 24 S.W. 789 (1894).

257. Compare similar statutes with *per se* rules in Alabama (APPENDIX), Oklahoma (APPENDIX), New York (pp. 1391-94 *supra*), and Utah (APPENDIX).

258. TEX. CIV. STAT. ANN., tit. 14, art. 311 (Vernon 1959).

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ous behavior²⁵⁹ is compulsory within the terms of the statute only when an attorney commits a felony in his professional capacity, but not when he is acting as a "private" person.²⁶⁰ Furthermore, felony convictions obtained outside of Texas are at least arguably excepted from the exclusionary rule,²⁶¹ while a general exception to the rule has been made for felons who have received unconditional pardons for their convictions.²⁶²

259. See, e.g., *Jackson v. State*, 21 Tex. 668, 674 (1858) (no attorney to be removed for contempt conviction unless contempt involved professional conduct). See also TEX. CIV. STAT. ANN. tit. 14, art. 312 (Vernon 1959).

260. Cf. *So. Traffic Bureau v. Thompson*, 232 S.W.2d 742 (Tex. Civ. App. 1950) (dictum) (rule limiting practice of law to trained and qualified persons is founded on principle of public benefit and protection, and should not be extended beyond the requirements of the common good).

261. See *Francisco v. Bd. of Dental Examiners*, 149 S.W.2d 619, 622 (Tex. Civ. App. 1942) (dentist facing revocation of his professional license under a statute similar to the one applicable to lawyers in Texas successfully argued that the court must inquire into the circumstances of a felony conviction to ascertain whether a conviction could have been obtained in Texas).

262. See, e.g., *Scott v. State*, 25 S.W. 337 (Tex. Civ. App. 1894). The general hostility in Texas to any "relaxation" of bar admission standards is well illustrated by Cathey, *The Fifth Amendment: Its Protection of the Right to Become and Remain a Lawyer*, 30 TEX. B. J. 765 (1967), in which the recent constitutional decisions of the United States Supreme Court extending substantive due process rights to bar admission candidates and disbarment defendants are strongly criticized.

Appendix

STATES WITH STATUTORY PROVISIONS PRESCRIBING, OR ARGUABLY PRESCRIBING, PER SE DISBARMENT UPON PROOF OF FELONY CONVICTION

ALABAMA: "An attorney must be removed for the following causes by the Circuit Court: (1) upon his being convicted of a felony other than manslaughter, or of a misdemeanor involving moral turpitude; in either of which cases the record of his conviction is conclusive evidence." ALA. CODE tit. 46, § 49 (1958).

GEORGIA: "An attorney must be removed by the superior court of the county of his residence for the following causes: (1) upon his being convicted of any crime or misdemeanor involving moral turpitude. In either case the record of his conviction is conclusive evidence." GA. CODE ANN. § 9-501 (1936).

IOWA: "The following are sufficient causes for revocation or suspension: (1) when he [the attorney] has been convicted of a felony, or of a misdemeanor involving moral turpitude: in either of which cases the record of conviction is conclusive evidence." IOWA CODE ANN. § 610.24 (1950).

NEW MEXICO: "In the case of the conviction of an attorney of a felony or of a misdemeanor involving moral turpitude, the clerk . . . must . . . transmit to the Supreme Court . . . the record . . . , and the Supreme Court upon receipt of such record, after judgment of such conviction is filed, must enter an order disbarring such attorney." N.M. STAT. ANN. § 18-1-18 (1953).

NEW YORK: "Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys." N.Y. JUDICIARY LAW § 90(4) (McKinney 1968).

OKLAHOMA: "The court shall order [an attorney] . . . disbarred when the time for appeal [of his felony conviction] . . . has elapsed . . . or when the judgment of conviction has been affirmed on appeal." OKLA. STAT. ANN. tit. 5, ch. 1, App. 1, art. 7, pt. 2, § 7 (1966).

TEXAS: "No person convicted of a felony shall receive a license as an attorney at law; or, if licensed, any court of record in which such person may practice shall, on proof of a conviction of any felony, revoke his license and strike his name from the roll of attorneys." TEX. REV. CIV. STAT. ANN. art. 311 (1959).

Admission to the Bar Following Conviction

SOUTH DAKOTA: "The following are sufficient causes for revocation or suspension of an attorney and counselor's license: (1) conviction of a felony or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence; . . ." S.D. COMPILED LAWS § 16-19-2 (1967).

UTAH: "Upon conviction of an attorney and counselor of felony . . . the judgment of the Supreme Court must be that the name of the accused be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as an attorney or counselor in all the courts of the state." UTAH CODE ANN. § 78-51-37 (1953).