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The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement

Leslie C. Levin *

*Nothing is so wretched or foolish as to anticipate misfortunes.
What madness is it to be expecting evil before it comes.*¹

INTRODUCTION

The bar's character and fitness requirement is based on the largely untested premise that an applicant's past history helps predict whether that individual possesses the moral character needed to be a trustworthy lawyer. The primary purpose of the character inquiry is to protect the public and the judicial system from potentially problematic lawyers.² The inquiry may also signal to the public that lawyers possess "good character" and deserve to be trusted with their important legal matters, thereby facilitating client representation and the administration of justice.³ An alternative—and more critical—characterization of this purpose is that it is designed to protect the legal profession's reputation in order to promote the profession's autonomy and its monopoly on the provision of legal services.⁴

* Professor of Law, University of Connecticut School of Law. This Article would not have been possible without the work of Christine Zozula and Peter Siegelman, who collaborated on the Connecticut study described in this Article and to whom I owe an enormous debt. I am also grateful to Jon Bauer for comments on an earlier draft of this Article.

1. LUCIUS ANNAEUS SENECA, EPISTULAE MORALES AD LUCILIUM C. 65 AD.

2. See NATIONAL CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2014 vii (Erica Moeser & Claire Huisman eds., 2014) [hereinafter COMPREHENSIVE GUIDE], available at http://www.ncbex.org/assets/media_files/CompGuide/CompGuide.pdf.

3. See Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255, 268 (2007); Mitchell M. Simon, *What's Remorse Got to Do, Got to Do with It?: Bar Admission for Those with Youthful Offenses*, 2010 MICH. ST. L. REV. 1001, 1011; Alice Woolley, *Tending the Bar: The "Good Character" Requirement for Law Society Admission*, 30 DALHOUSIE L.J. 27, 36 (2007).

4. See RICHARD L. ABEL, AMERICAN LAWYERS 70-73, 227 (1989); Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Characters*, 68 IND. L.J. 647, 649-50 (1993); Deborah L. Rhode, *Moral Character as a Professional*

As part of the character inquiry, bar authorities review information provided by bar applicants, law schools, and other sources relating to, *inter alia*, an applicant's academic history, criminal background, employment and financial history, and mental health.⁵ They use this information to determine whether the applicant possesses the present character and fitness required to practice law.⁶ The assumption is that "from evidence of past misconduct, bar examiners will be able to predict future behavior accurately enough to justify denying the applicant the chance to practice law."⁷ As a practical matter, very few bar applicants are denied admission on character and fitness grounds.⁸

There is no shortage of critiques of the character and fitness inquiry.⁹ Perhaps the most troubling is the absence of evidence that the inquiry actually protects the public by excluding applicants from the bar who will become problematic lawyers. Of course, it is impossible to prove what might have happened if individuals were not required to demonstrate good character as a condition of bar

Credential, 94 YALE L.J. 491, 509–12 (1985); Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 ST. JOHN'S L. REV. 1037, 1061–62 (2008); M.A. Cunningham, Comment, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 TUL. L. REV. 1015, 1026–29 (1992).

5. See COMPREHENSIVE GUIDE, *supra* note 2, at viii.

6. See *id.* at viii–ix.

7. Jennifer C. Clarke, *Conditional Admission of Applicants to the Bar: Protecting Public and Private Interests*, B. EXAMINER, May 1995, at 53, 59.

8. Only about one applicant per year is denied admission in Colorado. Colo. Supreme Court, Office of Attorney Regulation Counsel, *Annual Report 29* (2013), available at <https://www.coloradosupremecourt.com/pdfs/Regulation/2012%20Annual%20Report.pdf>. The estimated denial rates in Connecticut are 1–2 people (0.14%) per year. Telephone Interview with R. David Stamm, former Executive Director, Connecticut Bar Examining Committee (Jan. 8, 2008). Denial rates in some other states range from 0.18–1%. See Mo. Bd. of Law Exam'rs, *Frequently Asked Questions* (FAQs), MBLE.ORG, <https://www.mble.org/faq#360>; Supreme Court of Ohio & the Ohio Judicial System, *Character and Fitness Determinations*, SUP. CT. OHIO, <http://www.supremecourt.ohio.gov/AttySvcs/admissions/cfstats/default.asp> (last visited Sept. 26, 2014); see also Rhode, *supra* note 4, at 516 (reporting that in the 1980s, .2% of applicants were denied bar admission on character and fitness grounds).

9. See, e.g., Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93 (2001); Sonya Harrell Hoener, *Due Process Implications of the Rehabilitation Requirement in Character and Fitness Determinations in Bar Admissions*, 29 WHITTIER L. REV. 827 (2008); Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984); Rhode, *supra* note 4; Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331 (1995); Swisher, *supra* note 4.

admission. Perhaps the very few applicants who are denied bar admission would have caused great harm if they had been admitted to practice. Other people with problematic personal histories who are deterred by the character inquiry from even applying to law school may have engaged in misconduct if they had been admitted to the bar. It is also possible, however, that some people who would have become good lawyers are deterred from applying because of concerns that they would not be able to satisfy the character and fitness requirement.¹⁰

Another shortcoming of the character and fitness inquiry is that it is grounded in moral philosophy and in intuitions about human behavior—and not in psychological research. Indeed, “moral character” is an idea rooted in the philosophy of virtue ethics rather than in psychological concepts.¹¹ Virtue ethics posits that good character runs deep in those who possess it and is based on a combination of an individual’s virtues and the exercise of practical judgment.¹² Its orientation is normative. Research shows, however, that even “good” people lie—to themselves and to others.¹³ Most are dishonest at times, depending upon the circumstances and with whom they interact.¹⁴

Psychological research has also shown that personality—and not “character”—correlates with certain patterns of conduct. Personality can be distilled into five broad factors (e.g., Conscientiousness, Emotional Stability, etc.),¹⁵ and some of those factors appear to be correlated with ethical behavior. Yet personality alone does not

10. See John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 933 (2004); Rhode, *supra* note 4, at 520.

11. See Woolley, *supra* note 3, at 62. Virtue ethics posits that “it is our virtues of character which, when exercised through our practical judgment, will lead us to ethical action.” *Id.*

12. Alice Woolley & Jocelyn Stacey, *The Psychology of Good Character: The Past, Present and Future of Good Character Regulation in Canada*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 165, 170 (Kieran Tranter et al. eds., 2007).

13. See ALDER VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 2 (2d ed. 2008).

14. See DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES 27, 59, 239 (2012); Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 397 (2009).

15. See 4 COMPREHENSIVE HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 153 (Jay C. Thomas ed., 2004) [hereinafter COMPREHENSIVE HANDBOOK]. These are known as the “Big Five” factors. *Id.* at 153.

determine who will engage in unethical behavior. Factors leading to unethical choices at work are multi-determined by individual characteristics, the characteristics of the moral issue, and the organizational environment.¹⁶ Thus, it may be impossible to predict at the time of bar admission which applicants will become problematic lawyers.

The psychological research is consistent with sociological research, which indicates that the workplace strongly affects lawyers' ideas about professionalism and how lawyers should conduct themselves in practice.¹⁷ Indeed, lawyers often look to their "communities of practice," that is the "groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards."¹⁸ Lawyer conduct is not only affected by other lawyers they observe, but by, *inter alia*, office size, client resources, and client demands.¹⁹ These factors typically do not come into play until after the character and fitness inquiry occurs.

Thus, the character inquiry at the time of bar admission has uncertain value, yet it imposes some significant costs. For example, the inquiry into past criminal conduct may perpetuate racial and class biases, as people of color and the poor are subjected to disparate treatment in the criminal justice system.²⁰ The inquiry into a bar applicant's psychological history can be highly intrusive and deter some law students from seeking psychological help.²¹ The process

16. See, e.g., Jennifer J. Kish-Gephart et al., *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCH. 1, 17–18 (2010).

17. See ROBERT L. NELSON & DAVID M. TRUBEK, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 199–213 (Robert L. Nelson et al. eds., 1992).

18. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 6 (2001).

19. See, e.g., JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 166, 168 (1966); Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 3, 4 (Leslie C. Levin & Lynn Mather eds., 2012); Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *FORDHAM L. REV.* 837, 845–49, 862 (1998).

20. Susan Saab Fortney, *Law School Admissions and Ethics—Rethinking Character and Fitness Inquiries*, 45 *S. TEX. L. REV.* 983, 991–92 (2004); Swisher, *supra* note 4, at 1064.

21. Bauer, *supra* note 9, at 124–25, 150–52; Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and the Constitution*, 20 *J. LEGIS.* 147, 147 (1994); Letter from Jane

itself is costly and time consuming for applicants,²² especially if they are required to undergo a hearing. The process can also become embarrassing, stressful, and career-damaging for applicants who must explain to employers why their bar admission is delayed.²³

Only two published studies have sought to explore whether the information gathered during the character and fitness inquiry predicts who will later be disciplined. The first study looked at the information collected by the Minnesota State Board of Law Examiners during the bar admission process and at subsequent lawyer discipline.²⁴ Although the study results suggest that there is a relationship between certain pre-admission conduct and subsequent discipline, it was not a rigorously designed study.²⁵ A more recent study of Connecticut lawyers indicates that the information gathered during the character and fitness inquiry is of little use in predicting who will subsequently be disciplined.²⁶

Of course, the fact that the information revealed during the character and fitness inquiry does not strongly predict who will be a problematic lawyer does not mean that the inquiry is entirely without value. The inquiry is also thought to serve symbolic functions: it communicates to the public that lawyers are to be trusted, and conveys to lawyers that they are expected to conduct themselves in a responsible and trustworthy manner. If these are the main reasons for conducting the inquiry, however, it may be that the inquiry could be considerably streamlined so that it is less burdensome for applicants and does not deter those who might be good lawyers from applying to the bar.

Thierfeld Brown, Director of Student Services, Univ. of Conn. Law Sch., to Justice Peter T. Zarella, Chair, Rules Comm. of the Conn. Superior Court (May 18, 2010) (on file with author).

22. See *infra* notes 78–80 and accompanying text.

23. E.g., Bauer, *supra* note 9, at 114–15, 125; Testimony of Attorney David A. McGrath in Support of Proposed Amendments to Rules 2–5 to 2–9 of the Connecticut Superior Court Rules (May 24, 2010) (on file with author).

24. Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, B. EXAMINER, Nov. 1992, at 5.

25. Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609, 619 (2001). In contrast to the Minnesota study, informal tracking in Michigan revealed no correlation between “problem” pre-admissions history and subsequent discipline. D. Larkin Chenault, *It Begins with Character. . .*, MICH. B. J., Feb. 1998, at 138–39.

26. Leslie C. Levin et al., *The Questionable Character of the Bar’s Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY 51–85 (2015).

This Article looks at the empirical evidence to consider whether the bar's character and fitness inquiry should be continued as currently constituted and if not, what changes should be explored. Part I of the Article briefly describes the history of the character and fitness requirement and outlines the inquiry as currently conducted. Part II discusses some of the critiques of the inquiry, focusing primarily on the absence of evidence that the information elicited through the inquiry predicts future misconduct and on the reasons to question whether the information collected would be useful predictors of misconduct. It also highlights some of the costs associated with the inquiry. Part III explores what the psychological research reveals about the difficulty of predicting certain types of behavior. It also looks at the limited research available about which behaviors seem to predict problematic behavior in the workplace. Part IV discusses what can be learned from a study of Connecticut lawyers about the predictive value of the information obtained during the character and fitness inquiry. The study reveals that some of the information obtained very weakly predicts who might be later disciplined, but that even with rigorous statistical modeling, the predictive power of that information is very low. Moreover, the reasons why certain variables weakly predict discipline may have less to do with an individual's "character" than with other factors. Part V considers whether the character inquiry should be continued as currently constituted. Is it folly to continue with a process that assumes (incorrectly) that bar applicants who report certain problem histories are likely to engage in future misconduct? In light of evidence that only a very small number of people are ever excluded from the bar, and the limited predictive value of the character inquiry, the inquiry should only be conducted in an abbreviated form. The Article concludes with some suggestions for additional research to better determine which aspects of the character inquiry should be continued. It also considers some alternatives for protecting the public from potentially problematic lawyers.

I. THE MORAL CHARACTER AND FITNESS REQUIREMENT

A. History

The moral character requirement as a condition of bar admission pre-dates the Revolutionary War.²⁷ In the early years of the republic, many states required that bar applicants demonstrate good moral character.²⁸ It was only in the late nineteenth century, however, that efforts began in earnest to inquire systematically into the character and fitness of bar applicants. This took place within the broader context of the professional project, that is, the legal profession's efforts to attain market monopoly, social status, and autonomy.²⁹ It also coincided with an influx of immigrant lawyers, which fueled the bar's efforts to raise admission standards.³⁰ Richard Abel has noted that as the number of immigrants increased and "their sons sought to become lawyers, the profession tried to preserve its homogeneity and superior social status by requiring citizenship and imposing 'character' tests."³¹ Nativist and ethnic prejudices during the 1920s

27. In 1707, Maryland's Governor Seymour stated that no person shall be admitted to practice "until they have previously undergone an Examination of their Capacities honesty and good behaviour before us . . ." Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 AM. J. LEGAL HIST. 145, 146 (1973). In Virginia, persons desiring a law license in the 1740s were required to produce "a certificate from some county court, or other inferior court . . . of his probity, honesty, and good demeanor." ANTON-HERMANN CHROUST, 1 THE RISE OF THE LEGAL PROFESSION IN AMERICA 275 (1965) (quoting WILLIAM WALLER HENING, 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 345 (1819)); see also GERARD W. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840, at 10 (1979); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 26, 43 (1911).

28. See W. Raymond Blackard, *Requirements for Admission to the Bar in Revolutionary America*, 15 TENN. L. REV. 116, 121-23, 125 (1938) (describing good moral character or "integrity" requirements in Pennsylvania, Rhode Island, and New Jersey); GAWALT, *supra* note 27, at 60. In the 1840s, a few states eliminated all requirements for bar admission except a good moral character requirement. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 236-37 (3d ed. 2005).

29. See ABEL, *supra* note 4, at 25; TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 67-68 (1987); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 49-50 (1977); Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW'S CENTURY 294-97 (Austin Sarat et al. eds., 2002).

30. See JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 94-101 (1976).

31. ABEL, *supra* note 4, at 6; see also Rhode, *supra* note 4, at 499 (observing that "the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern

and economic pressures during the Great Depression fueled renewed calls for barriers to entry to the legal profession and resulted in efforts to stiffen “character” screening.³² By raising admission standards through formal legal education requirements, bar examinations, and the character and fitness inquiry, the bar sought to signal that lawyers possessed the technical expertise and moral fiber to be viewed as a profession and to be entrusted with legal work.³³

By 1928, virtually all of the states had a character and fitness requirement for bar admission.³⁴ The National Conference of Bar Examiners (“NCBE”) was formed in 1931 with the aim of “raising . . . the standards both as to knowledge of the law and fitness of character of those who are to become future members of the bar.”³⁵ Character inquiries often relied on letters of recommendation, on the publication of names of applicants seeking admission, or on interviews of applicants.³⁶ A few states used character questionnaires³⁷ which asked for information still sought on modern bar applications, such as prior residences, prior employment, and disciplinary history during college.³⁸

As character inquiries grew more probing, they were increasingly used to scrutinize—and sometimes exclude—bar applicants. Some applicants were denied admission because of their actual or suspected ties to the Communist party.³⁹ The character requirement was also used to exclude some applicants for conscientious objection to military service.⁴⁰ Applicants were subjected to extended character

European immigrants, which threatened the profession’s public standing”).

32. ABEL, *supra* note 4, at 72; Rhode, *supra* note 4, at 500–01.

33. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 272, 287, 361 (1950); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, *AM. B. FOUND. RES. J.* 159, 175–77 (1980); Quintin Johnstone, *The Unauthorized Practice Controversy, a Struggle Among Power Groups*, 4 *U. KAN. L. REV.* 1, 5 (1955).

34. *Training for the Bar, With Special Reference to the Admission Requirements in Massachusetts: A Report of the Committee on Legal Education of the Massachusetts Bar Association*, *MASS. L.Q.*, Nov. 1929, at 1, 44–78 [hereinafter *Training for the Bar*].

35. James C. Collins, *Forward*, *B. EXAMINER*, Nov. 1931, at 1.

36. ESTHER LUCILLE BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 123–24 (1938); HURST, *supra* note 33, at 284; *Training for the Bar*, *supra* note 34, at 18, 44–78.

37. *Training for the Bar*, *supra* note 34, at 62, 65.

38. *Character Examination of Candidates*, *B. EXAMINER*, Nov. 1931, at 63, 65, 74–77.

39. *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232 (1957).

40. *In re Summers*, 325 U.S. 561 (1945); *In re Brooks*, 355 P.2d 840 (Wash. 1960).

inquiries due to sexual orientation and lifestyle choices, such as cohabitation.⁴¹ In the 1970s, bar examiners began to regularly inquire into mental health history and soon thereafter, bar applicants were sometimes denied admission on that basis.⁴²

B. The Current Requirement

Every state and the District of Columbia conduct character and fitness inquiries as a condition of bar admission.⁴³ Although this inquiry begins in some jurisdictions during the first year of law school, the official character and fitness inquiry typically begins at the end of law school, when an applicant applies for bar admission.⁴⁴ It is usually conducted by a bar examining authority (or a character and fitness committee) that operates under the supervision of the state court. Applicants complete a lengthy questionnaire that asks for detailed information about past conduct and produce substantiating documentation such as criminal records, credit histories, driving records, and character references.⁴⁵ Law schools also provide information about their graduates' conduct and academic performance. The information is then reviewed by the bar examining authority for completeness and for any information that might reflect adversely on the applicant's character. A character and fitness hearing may be triggered by, *inter alia*, academic misconduct, prior unlawful

41. Rhode, *supra* note 4, at 578–81.

42. See *In re Ronwin*, 680 P.2d 107 (Ariz. 1983); *In re Martin-Trigona*, 302 N.E.2d 68 (Ill. 1973); Bauer, *supra* note 9, at 103.

43. COMPREHENSIVE GUIDE, *supra* note 2, at 4–5. The inquiry is also conducted, to a lesser extent, in many other countries. In Australia, Canada, England, Scotland, and South Africa, the question is whether the applicant is “fit and proper” to practice law. See G. E. DAL PONT, *LAWYERS’ PROFESSIONAL RESPONSIBILITY* 25 (3d ed. 2006); Woolley, *supra* note 3, at 60; *The Bar Training Regulations*, THE BAR TRIBUNALS & ADJUDICATION SERVICE 3 (Sept. 2013), <http://www.tbta.org.uk/wp-content/uploads/2013/07/Bar-Training-Regulations-2013.pdf>; The Law Soc’y of Scot., *The Fit and Proper Persons Test*, LAWSCOT.ORG.UK (2014), <http://www.lawscot.org.uk/education-and-careers/the-traineeship/starting-a-traineeship-soon/the-fit-and-proper-person-test>; Magda Slabbert, *The Requirement of Being a “Fit and Proper” Person for the Legal Profession*, 14 POTCHEFSTROOM ELECTRONIC L.J. 209, 209 (2011), available at <http://dspace.nwu.ac.za/bitstream/handle/10394/4683/2011x14x4FitandProperSlabbert.pdf?sequence=1>.

44. As a practical matter, the character screening process begins when law schools inquire about an applicant's personal history in their applications. See Dzienkowski, *supra* note 10, at 923. Certain misconduct may lead to denial of admission to law school. See Linda McGuire, *Lawyer or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 727 (2004).

45. See *supra* note 5 and accompanying text.

conduct, misconduct in employment, neglect of financial responsibilities, substance dependency, and evidence of psychological problems.⁴⁶ In a few states, felony convictions are automatically disqualifying, at least for a period of time.⁴⁷

Bar applicants bear the burden of proving that they possess the requisite good character for admission to the bar.⁴⁸ The criteria for demonstrating good character in the bar application process are, however, unclear. Good character is not directly defined by the NCBE, although it is manifested by a record of conduct that “justifies the trust of clients, adversaries, courts and others.”⁴⁹ A record revealing a significant deficiency in “honesty, trustworthiness, diligence, or reliability” may constitute a basis for denial of admission.⁵⁰

What do bar examining authorities actually consider when assessing an applicant’s character and fitness to practice law? The moral character inquiry seeks to determine “whether the *present* character and fitness of an applicant qualifies the applicant for admission.”⁵¹ The concern is whether the applicant, if admitted to practice, is likely to engage in wrongdoing. Bar examining authorities look at a variety of factors including, *inter alia*, the seriousness and recency of any misconduct, the cumulative effect of the conduct, and evidence of rehabilitation.⁵² Lack of candor during the character inquiry—rather than the past misconduct itself—is a common reason for denial of admission.⁵³ Applicants who fail to express remorse or take responsibility for their past misconduct often face difficulty gaining bar admission.⁵⁴

46. COMPREHENSIVE GUIDE, *supra* note 2, at viii.

47. *Id.* at 4–6.

48. *See, e.g.*, STATE BAR RULES MICH. R. 15(1)(15) (2013) (“An applicant has the burden of proving by clear and convincing evidence that he or she has the current good moral character and general fitness to warrant admission to the bar.”); *In re Payne*, 715 S.E.2d 139, 140 (Ga. 2011); *In re Brown*, 928 N.E.2d 445, 447 (Ohio 2010); *In re Nash*, 739 N.W.2d 71, 74 (Iowa 2007).

49. COMPREHENSIVE GUIDE, *supra* note 2, at viii. Some states have attempted to articulate additional conduct and qualities that reflect good moral character, although they are also quite general. *See, e.g.*, CONN. PRACTICE BOOK §2-5A (a) (2014), *available at* <http://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>.

50. COMPREHENSIVE GUIDE, *supra* note 2, at viii.

51. *Id.* at viii–ix (emphasis added).

52. *Id.* at ix; Stone, *supra* note 9, at 364–66.

53. *See* Clemens, *supra* note 3, at 299–301; Rhode, *supra* note 4, at 535, 544.

54. *See* Clemens, *supra* note 3, at 289; Hoener, *supra* note 9, at 842–46; Rhode, *supra*

II. SOME CRITIQUES OF THE CHARACTER AND FITNESS REQUIREMENT

Deborah Rhode's wide-ranging critique of the bar's character and fitness inquiry appeared almost thirty years ago, but remains relevant today. At that time, she described the inconsistent and subjective application of the character and fitness standards.⁵⁵ As she also observed, "the courts and examiners involved in certification have failed to confront the large volume of social science research that questions both the consistency and predictability of moral behavior."⁵⁶ She further argued that the bar's character and fitness inquiry cannot reasonably be expected to prevent admission of "problem" lawyers because "the current process is both too early and too late."⁵⁷ The inquiry occurs "too early" because it occurs before applicants have encountered the situational pressures of practice. It is "too late" because it occurs after applicants have invested thousands of dollars (now often more than \$100,000) in their legal education, making it harder for bar authorities to deny admission to applicants who have invested three years in law school and have often incurred substantial student loan debt.⁵⁸

The argument that the character and fitness inquiry comes "too early" to predict which applicants might become "problem" lawyers also finds support in the discipline statistics.⁵⁹ The most common recipients of lawyer discipline are middle-aged males.⁶⁰ These disciplined lawyers often report depression related to work or life circumstances, alcohol abuse, or family or financial crises.⁶¹ Their

note 4, at 545; Simon, *supra* note 3, at 1008, 1012–14.

55. Rhode, *supra* note 4, at 529–32, 538–44.

56. *Id.* at 556.

57. *Id.* at 515.

58. *Id.*

59. Of course, not all lawyer misconduct is detected or subject to discipline. Nevertheless, discipline appears to be the best available measure of lawyer misconduct. See Levin et al., *supra* note 26, at 60.

60. See RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 496 (2008); David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 547, 549 (1998); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 832–34 (2004); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 51 n.230 (1998).

61. ABEL, *supra* note 60, at 90–91, 265–67; Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 268–69 (1997);

problems with their marriages, their mortgages, and other life circumstances often arise years after the character and fitness inquiry occurs.⁶²

Moreover, practice setting strongly affects the likelihood of discipline, and this, too, is often not known until after the character and fitness inquiry occurs. Lawyers in solo and small firm practice receive over 90% of all discipline, even though they make up less than 50% of all practicing lawyers.⁶³ The reasons for this are complex. Disciplined lawyers tend to work in personal plight areas such as criminal law, family law, and personal injury.⁶⁴ Their clients are often emotional and vulnerable.⁶⁵ Unlike larger firm clients, who are repeat players in the legal system, the clients of solo and small firm lawyers may have no recourse against their lawyers except for the discipline process.⁶⁶ Moreover, solo and small firm lawyers often work in offices with inadequate administrative support, which can result in neglect of client matters—a common reason for discipline.⁶⁷ Discipline authorities may also find it easier to pursue complaints against these lawyers because the cases are less complex and the lawyers are less likely to hire counsel to defend themselves.⁶⁸

The argument that the character inquiry occurs too early to determine how an individual will behave in practice is further supported by studies suggesting that lawyers' behavior is significantly affected by office colleagues and firm culture.⁶⁹ This is due, in part, to the fact that the psychological pressure to conform to the

Carol M. Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 876–77 (2005); Levin, *supra* note 60, at 51–52.

62. See G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 241 (1990).

63. See CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005, at 5–6 (2012); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 313 (2004).

64. ABEL, *supra* note 60, at 64–65; Lynn Mather & Craig McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, in *LAWYERS IN PRACTICE*, *supra* note 19, at 63, 66; Levin, *supra* note 63, at 314.

65. ABEL, *supra* note 60, at 280, 506, 513.

66. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 826–29 (1992).

67. ABEL, *supra* note 60, at 56; Mather & McEwen, *supra* note 64, at 68.

68. See Levin, *supra* note 63, at 314.

69. See *supra* notes 17–18 and accompanying text; Mather & Levin, *supra* note 19, at 16; Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 691, 708 (2005); Suchman, *supra* note 19, at 862–63.

behavior of a group is powerful.⁷⁰ Lawyers often learn their responses to ethical challenges early in practice from other lawyers around them.⁷¹ Client resources and demands also shape lawyers' views and behaviors.⁷² Again, these factors do not come into play until after the character inquiry occurs.

The character and fitness inquiry has also been criticized on other grounds. Less affluent individuals may have more problematic credit histories than more affluent applicants and may therefore encounter more difficulty with bar admission. Questions about arrests, convictions, and traffic violations may disproportionately and adversely affect minorities, who tend to fare more poorly in the justice system due to racial profiling, discrimination, and the lack of counsel.⁷³ Potential law school applicants are concerned about revealing this information on law school applications.⁷⁴ This concern may deter some individuals who would otherwise be good lawyers from pursuing the law as a career.

Questions on the bar application about prior diagnosis of or treatment for psychological disorders have also engendered considerable criticism.⁷⁵ The criticism mostly focuses on the breadth and intrusiveness of the questions, which in some jurisdictions inquire about any psychological diagnosis or treatment over an extended time period. Commentators and others have questioned the predictive value of such questions, especially when those who have been previously treated for a psychological disorder may be more likely to address those problems successfully than those who

70. See, e.g., ELLIOT ARONSON, *THE SOCIAL ANIMAL* 25 (8th ed. 1999).

71. E.g., Levin, *supra* note 63, at 362–65.

72. See CARLIN, *supra* note 19, at 73–76; MATHER ET AL., *supra* note 18, at 77–78, 123–25.

73. See Fortney, *supra* note 20, at 990–94.

74. Some students reportedly do not apply to certain law schools to avoid disclosing adverse information on their applications. Dzienkowski, *supra* note 10, at 958 n.94. Posts on a website for law school applicants and potential applicants frequently ask for advice about the implications of past criminal charges or convictions. See, e.g., Louisiana2017, *Applying with Two Criminal Dismissals*, TOP-LAW-SCHOOLS.COM (Feb. 14, 2013, 12:44 PM), <http://www.top-law-schools.com/forums/viewtopic.php?f=2&t=204368>; mileena, *Law School Applicant with 11 Misdemeanor Convictions??*, TOP-LAW-SCHOOLS.COM (Feb. 14, 2013, 5:52 AM), <http://www.top-law-schools.com/forums/viewtopic.php?f=2&t=204352>.

75. See, e.g., Bauer, *supra* note 9; Coleman & Shellow, *supra* note 21, at 155–59; Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997); Kathi Pugh, *No: Mental Health Treatment Should Not Block a Career*, A.B.A. J., Oct. 1994, at 37.

have not sought treatment.⁷⁶ Critics have also noted that the broad nature of the questions deters some law students—who often need mental health treatment due to the stress engendered by law school—from seeking such treatment.⁷⁷

The character and fitness inquiry has other costs. The process is costly for applicants, who must pay for the character inquiry as part of the bar admission process and must also pay to obtain certain records required by bar authorities.⁷⁸ It is time-consuming, as applicants must often track down official records and other information going back ten or more years.⁷⁹ If an applicant is required to produce additional information or attend a hearing, the monetary and psychological costs associated with the process are significant.⁸⁰ In some cases, the hearing process may delay or jeopardize employment if the applicant must disclose to an employer why she has not yet been admitted to the bar. These are significant costs associated with a process that is thought to protect the public—with scant evidence that it actually does so.

III. PREDICTIONS OF FUTURE MISCONDUCT

Psychologists working from a variety of perspectives—e.g., cognitive, evolutionary, moral, personality, and social—are seeking to answer the question of what causes individuals to behave

76. Bauer, *supra* note 9, at 179–81, 221; Conn. Bar Ass'n, *Report of the Section on Human Rights & Opportunities & the Comm. on Disability Law on Proposed Resolution Concerning Inquiries into Mental Health Treatment of Bar Applicants* 5–6 (1994) (on file with author).

77. See *supra* note 21; Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 128 (2010).

78. In some states, the charge for the character and fitness inquiry is combined with the fee for taking the bar examination. In other jurisdictions, it is separate. For example, Arizona applicants pay a separate \$300 fee for a “Character Report.” *Schedule of Fees and Filing Deadlines for Admission to the Practice of Law in Arizona*, AZCOURTS.GOV (Jan. 1, 2012), <http://www.azcourts.gov/Portals/26/admis/2012/Miscellaneous/2012FeeSchedule.pdf>. Fees for filing the Illinois Character and Fitness Questionnaire range from \$100 to \$450, depending upon when the questionnaire is submitted. *Information for First and Second Year Law Students*, ILL. BOARD ADMISSIONS, <https://www.ilbaradmissions.org/appinfo.action?id=2> (last visited Aug. 26, 2014).

79. When I asked a non-random sample of law students how long it took them to complete the Connecticut bar application, they indicated that information gathering took anywhere from ten to forty hours to complete.

80. See *supra* notes 22–23 and accompanying text. In some cases, the costs include hiring a lawyer to represent them.

unethically. As it turns out, this is an enormously complicated question. There is significant disagreement about the *mechanisms* involved in ethical decision making: For example, does it involve prior reasoning and reflection, or moral intuitions that are justified after the fact?⁸¹ The *factors* that affect the resolution of ethical issues are also complex.⁸² Unsurprisingly, predictions about future unethical behavior can be even more difficult.

Some psychologists have attempted to predict behavior based on personality characteristics. Personality is measured by five broad factors—Agreeableness, Conscientiousness, Emotional Stability, Extraversion, and Openness to Experience—that are linked to certain patterns of conduct.⁸³ These factors seem to remain fairly consistent during adulthood.⁸⁴ Conscientiousness, in particular, is thought to be predictive of behavior in the workplace. Individuals exhibiting high Conscientiousness tend to be hard-working, reliable, organized and scrupulous.⁸⁵ Low Conscientiousness has been found to be the best predictor of counterproductive work behaviors, such as theft and rule violations.⁸⁶ Yet personality characteristics alone do not predict misconduct in the workplace. Other individual factors (e.g., demographics), social and interpersonal factors, and organizational factors predict counterproductive work behaviors.⁸⁷

Criminologists have also attempted to explain the factors that contribute to deviant behavior. They, too, have found that deviance seems to be determined by time-stable personal characteristics,

81. Compare, e.g., LAWRENCE KOHLBERG ET AL., MORAL STAGES: A CURRENT FORMULATION AND RESPONSE TO CRITICS (1983) with Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 815 (2001) (arguing that moral intuitionism and not rational thought drive decision making).

82. See, e.g., Kish-Gephart, *supra* note 16, at 17–18.

83. COMPREHENSIVE HANDBOOK, *supra* note 15, at 153.

84. *Id.*; Saul Fine et al., *Is Good Character Enough? The Effects of Situational Variables on the Relationship Between Integrity and Counterproductive Work Behaviors*, 20 HUM. RESOURCE MGMT. REV. 73, 74 (2010).

85. Charles D. Sarchione et al., *Prediction of Dysfunctional Job Behaviors Among Law Enforcement Officers*, 83 J. APPLIED PSYCHOL. 904, 904 (1998).

86. *Id.* at 905; Thomas H. Stone et al., *Predicting Workplace Misconduct Using Personality and Academic Behaviors*, in CRIME AND CORRUPTION IN ORGANIZATIONS: WHY IT OCCURS AND WHAT TO DO ABOUT IT 97, 101–02 (Ronald J. Burke et al. eds., 2011).

87. See, e.g., *supra* note 16 and accompanying text; Fine et al., *supra* note 84, at 74; Michael D. Mumford et al., *Field and Experience Influences on Ethical Decision Making in the Sciences*, 19 ETHICS & BEHAV. 263 (2009).

social bonds, and other situational factors.⁸⁸ For example, poor self-control—which correlates with a cluster of personal characteristics—has been found to be significantly related to the commission of certain offenses such as drunk driving and theft.⁸⁹ Yet opportunity and perceived risks and rewards also significantly affect the intention to offend.⁹⁰ Certain life events can influence behavior and modify trajectories.⁹¹ Job stability and strong marital attachments predict large negative effects on alcohol use and general deviance, at least in early adulthood.⁹² This is true both for individuals who have a prior history of delinquency and those who do not.⁹³

In light of substantial evidence that the factors influencing behavior are multi-determined, it is not surprising that attempts to predict certain behavior, even by trained clinicians, have met with only mixed success.⁹⁴ Efforts to predict violence by psychologists and psychiatrists based on clinical judgment are not especially accurate.⁹⁵ Predictions based on human judgments by a wide range of “experts” (e.g., psychiatrists, college counselors, judges, etc.) are often less reliable than those based on simple algorithmic models.⁹⁶

Of course, predictions about future conduct may be improved as we learn more about human behavior. For example, researchers are exploring whether certain behaviors, such as academic cheating, predict deviant behavior in the workplace.⁹⁷ They have found that

88. *E.g.*, Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 LAW & SOC'Y REV. 467, 467–72 (1993); Robert J. Sampson & John H. Laub, *Crime and Deviance Over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609, 610–11 (1990).

89. Those characteristics include, *inter alia*, impulsiveness, a lack of persistence, and a preference for risk. Nagin & Paternoster, *supra* note 88, at 477–78.

90. *Id.* at 489–91.

91. Sampson & Laub, *supra* note 88, at 611, 621.

92. *Id.* at 617, 620.

93. *Id.* at 622–24.

94. *See* Woolley & Stacey, *supra* note 12, at 178–79; Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process*, 40 FORDHAM URB. L.J. 139, 169 (2012).

95. *See, e.g.*, John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 406–07 (2006).

96. William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL., PUB. POL'Y & L. 293, 296–99 (1996); *see also* Monahan, *supra* note 95, at 408.

97. *E.g.*, Trevor S. Harding et al., *Does Academic Dishonesty Relate to Unethical Behavior*

students who engage in academic dishonesty in college are significantly more likely to engage in unethical behavior in clinical settings, engage in workplace dishonesty, or to otherwise violate the policies of their professional workplaces.⁹⁸ Academic dishonesty also correlates with measures of risky driving behaviors, high alcohol intake, illegal behaviors, and personal unreliability.⁹⁹ Most of the studies have been limited to undergraduate students, although a few have looked at graduate students.¹⁰⁰

Some professions have also sought to explore through other means whether it is possible to predict who will engage in problematic behavior in the workplace. For example, pre-employment psychological testing has been administered to police officers for more than eighty-five years.¹⁰¹ Certain personality measures on the California Psychological Inventory relating to the Conscientiousness factor seem to predict dysfunctional job behaviors by law enforcement officers.¹⁰² Individuals who engaged in certain dysfunctional behaviors such as marijuana use, driving under the influence, and conduct resulting in military court martial prior to becoming law enforcement officers had a higher probability of subsequent discipline than law enforcement officers who did not engage in such behaviors.¹⁰³ Discrepancies, inconsistencies, or omissions by individuals when supplying life history information (e.g., criminal activity, drug use, etc.) prior to

in Professional Practice? An Exploratory Study, 10 SCI. & ENGINEERING ETHICS 311 (2004); Gwena Lovett-Hooper et al., *Is Plagiarism a Forerunner of Other Deviance? Imagined Futures of Academically Dishonest Students*, 17 ETHICS & BEHAV. 323 (2007); Stone et al., *supra* note 86, at 110–11.

98. Harding et al., *supra* note 97, at 323; Gail A. Hilbert, *Involvement of Nursing Students in Unethical Classroom and Clinical Behaviors*, 1 J. PROF. NURSING 230, 232 (1985); Sarah Nonis & Cathy Owens Swift, *An Examination of the Relationship Between Academic Dishonesty and Workplace Dishonesty: A Multicampus Investigation*, 77 J. EDUC. FOR BUS. 69, 75 (2001); Stone et al., *supra* note 86, at 103–04.

99. See Kevin L. Blankenship & Bernard E. Whitley, Jr., *Relation of General Deviance to Academic Dishonesty*, 10 ETHICS & BEHAV. 1, 6 (2000); Joe Kerkvliet, *Cheating by Economics Students: A Comparison of Survey Results*, 25 J. ECON. EDUC. 121, 129 (1994).

100. See Donald L. McCabe et al., *Academic Dishonesty in Graduate Business Programs: Prevalence, Causes and Proposed Action*, 5 ACAD. MGMT. LEARNING & EDUC. 294 (2006); Nonis & Swift, *supra* note 98, at 69; Randi L. Sims, *The Relationship Between Academic Dishonesty and Unethical Business Practices*, 68 J. EDUC. FOR BUS. 207 (1993).

101. Martin Sellbom et al., *Identifying MMPI-2 Predictors of Police Officer Integrity and Misconduct*, 34 CRIM. JUST. & BEHAV. 985, 986 (2007).

102. Sarchione et al., *supra* note 85, at 909.

103. *Id.* at 910.

being hired also significantly differentiated disciplined and never-disciplined law enforcement personnel.¹⁰⁴

The medical profession is also seeking to determine whether it is possible to predict who will be a problem doctor. Maxine Papadakis et al. looked at the medical school records of 235 graduates disciplined by state medical boards and compared those records to a control group.¹⁰⁵ They found that disciplinary action by a medical board was strongly associated with prior unprofessional behavior reported in supervisors' narratives during medical school.¹⁰⁶ A different retrospective study of internal medicine residents found that residents with either low professionalism ratings on their Resident's Evaluation summary or a low score on the internal medicine certification examination had nearly twice the chance of being subsequently disciplined by a state licensing board as their colleagues.¹⁰⁷ Nevertheless, because most residents who performed poorly were not subsequently disciplined, unprofessional behavior during residency was only "a weak signal for the rare event of disciplinary action."¹⁰⁸

IV. THE PREDICTIVE VALUE OF THE CHARACTER AND FITNESS INQUIRY

Little is known about whether any of the individual factors that are considered during the U.S. character and fitness inquiry—e.g., prior criminal history, academic misconduct—are relevant to the question of who will subsequently engage in misconduct as a lawyer. The character and fitness questions are largely based on intuitions that certain past behavior indicates that the applicant poses a significant risk that he or she will engage in future misconduct. But with the possible exception of substance dependency, which has a

104. Michael J. Cuttler & Paul M. Muchinsky, *Prediction of Law Enforcement Training Performance and Dysfunctional Job Performance with General Mental Ability, Personality, and Life History Variables*, 33 CRIM. JUST. & BEHAV. 3, 10, 18 (2006); Sarchione et al., *supra* note 85, at 906, 909.

105. Maxine A. Papadakis et al., *Disciplinary Action by Medical Boards and Prior Behavior in Medical School*, 353 NEW ENG. J. MED. 2673, 2673 (2005).

106. *Id.* at 2679–80. Disciplinary action was less strongly associated with low MCAT scores and poor grades during the first two years of medical school. *Id.* at 2680.

107. Maxine A. Papadakis et al., *Performance During Internal Medicine Residency Training and Subsequent Disciplinary Action by State Licensing Boards*, 148 ANNALS INTERNAL MED. 869, 873–74 (2008).

108. *Id.* at 874.

significant relapse rate,¹⁰⁹ or certain serious untreated psychological conditions, there is little empirical evidence that the past problems will continue. Nor is there evidence that prior problem behavior (e.g., traffic violations, poor credit history) predicts that the individual will engage in future misconduct that will harm clients or the public.

Only two published studies have sought to explore whether there is a relationship between bar applicants who disclose “problem” history during the bar admissions process and the lawyers who are later disciplined. Based upon a review of fifty-two Minnesota attorneys’ records who had been disciplined from 1982 through 1990 and bar admissions files, Carl Baer and Margaret Corneille found that applicants who disclosed problematic histories in their bar applications were four times more likely to engage in professional misconduct than other applicants.¹¹⁰ They also concluded that disciplined lawyers were more likely to reveal evidence of certain types of misconduct in their admissions files (e.g., employment termination, possible substance abuse, etc.) than other bar applicants.¹¹¹ They did not report on the likelihood that an applicant with a prior history of misconduct would be subsequently disciplined. As Corneille later noted, “the study was not conducted scientifically and involved a very small sample.”¹¹²

A more recent study of Connecticut lawyers examined the relationship between the information gathered by the Connecticut Bar Examining Committee (“CBEC”) during the bar admissions process and subsequent lawyer discipline.¹¹³ The study included all 152 lawyers admitted to the Connecticut bar from 1989 through 1992 who had been subsequently disciplined. Additional lawyers admitted to the Connecticut bar from 1989 through 1992 who had never been disciplined were randomly selected from a population of approximately 6,000 lawyers. The final sample for the regression analysis totaled 1,343 lawyers.

Approximately 2.4% of all Connecticut lawyers admitted from 1989 through 1992 were disciplined through 2009.¹¹⁴ The average

109. *See infra* note 184.

110. Baer & Corneille, *supra* note 24, at 5.

111. *Id.* at 6–7.

112. Corneille, *supra* note 25, at 619.

113. A fuller description of the study appears at Levin et al., *supra* note 26, at 56–60.

114. *Id.* at 65.

length of time between admission and the filing of a grievance leading to a discipline sanction was 10.7 years. Among the disciplined lawyers, 58 (38.16%) were severely disciplined and 94 (61.84%) were less severely disciplined.¹¹⁵

At the time of bar application, there were some notable differences between the lawyers who were subsequently disciplined and those who were not. Male lawyers were disproportionately disciplined compared to female lawyers.¹¹⁶ Lawyers who were disciplined were more than twice as likely to report having had a pre-application psychological diagnosis/treatment as those who did not (4.1% vs. 1.9%). They were also substantially more likely to report having had a pre-application criminal conviction (5.6% vs. 2.1%), having had their driver's license suspended (13.1% vs. 5.4%), having had delinquent credit accounts (23.8% vs. 7.2%), and having attended a law school ranked in the bottom half (59% vs. 36.8%).¹¹⁷ At the same time, none of the disciplined lawyers reported bankruptcy on their applications, although four of the never-disciplined lawyers had previously declared bankruptcy.¹¹⁸ The rates of substance dependency and treatment did not significantly vary between the disciplined and never-disciplined groups.¹¹⁹ There were no reported instances of mental health diagnosis/treatment or substance dependency/treatment among those applicants who would go on to receive severe discipline. Instead, it was the less severely disciplined group which was significantly more likely to reveal a higher rate of mental health issues.¹²⁰

115. *Id.* at 61. "Severely" disciplined lawyers were suspended from practice for two or more years, disbarred, resigned and waived the right to reapply in response to charges of serious misconduct, received interim suspensions of indeterminate length, or were placed on disability/inactive status due to serious misconduct. "Less severely disciplined" lawyers received lesser sanctions, including shorter suspensions, reprimands, and conditions such as probation. *Id.*

116. While 16.6% of the disciplined lawyers were female, 40% of the entire lawyer sample was female. *Id.* at 59, 62–63. The overrepresentation of men among the disciplined lawyers is consistent with other studies of lawyer discipline. *See, e.g.*, Debra Moss Curtis & Billie Jo Kaufman, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1988–2002*, 28 NOVA L. REV. 669, 691–92 (2004); Hatamyar & Simmons, *supra* note 60, at 786, 800.

117. Levin et al., *supra* note 26, at 63.

118. *Id.*

119. *Id.*

120. *Id.* at 71.

Logistic regression analysis revealed that gender has a statistically significant effect ($p < .01$) on the probability of being disciplined: being male increases the probability of being disciplined by 2.5 percentage points as compared to being female.¹²¹ Certain other variables also affected the likelihood of discipline, but only modestly. Compared to graduating from law schools ranked in the bottom half, graduating from the top half of law schools reduces the probability of discipline by 1.7 percentage points and is statistically significant ($p < .01$).¹²² Higher law school grades are negatively associated with discipline risk ($p < .01$).¹²³ Each additional thousand dollars of student debt raises the probability of discipline by 0.04 percentage points ($p < .01$).¹²⁴ Having delinquent credit accounts increases the likelihood of discipline by about 2.7 percentage points ($p < .01$).¹²⁵ A prior criminal conviction is associated with roughly 1.1 percentage points greater chance of discipline, but was not statistically significant.¹²⁶ Traffic violations were associated with a higher discipline risk, with each additional violation adding slightly—about 0.4 percentage points—to the likelihood of discipline, and this effect was statistically significant ($p < .01$).¹²⁷

Finally, a prior mental health diagnosis/treatment was associated with a higher discipline risk. The effect was 2.2 percentage points and weakly significant ($p < .10$), but only for less severe discipline.¹²⁸ It should be noted that an applicant with a record of mental health diagnosis/treatment is still very unlikely to be disciplined; the probability of discipline for someone with no mental health diagnosis/treatment is only 2.4%, so having such problems only raises the probability of discipline to about 5%.

Efforts to create a statistical model based on admissions data to predict which applicants would subsequently be disciplined were unsuccessful. In an effort to create such a model, a predicted

121. *Id.* at 78.

122. *Id.* at 67, 69.

123. *Id.* at 67.

124. *Id.* at 66.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* Six of the twenty-nine lawyers who reported a mental health diagnosis or treatment when they applied to the Connecticut bar were subsequently disciplined (all less severely). None indicated on their bar applications that their psychological condition was serious (*e.g.*, involved a hospitalization). *Id.* at 77.

probability of discipline for each lawyer was calculated by feeding the values of all the variables into an estimated regression equation. If the model estimated a probability of discipline greater than 50%, it was treated as a prediction of discipline. The model correctly predicted all of the 1,198 non-disciplined lawyers. But it correctly predicted only two of the 145 (1.38%) disciplined lawyers.¹²⁹ Thus, when all the admissions data were used in a statistically rigorous fashion, the model yielded only two more correct predictions of who would be disciplined and no more correct predictions of who would not be disciplined.

The Connecticut study indicates that some factors known to the bar authorities at the time a bar candidate applies for admission are associated with a greater chance that the applicant will subsequently be disciplined. But the baseline probability of discipline is so low that even a factor that more than doubles this probability—say, from 2.4% to 5%—has little predictive power.¹³⁰ Bar examining authorities would be unlikely to take significant action based on a predicted probability of future discipline as low as 5%.

It is not clear why certain variables predict discipline. For some variables, the answer may have less to do with moral character than with other demographic and social factors.¹³¹ The rank of the applicant's law school—which predicts less severe discipline—provides one example. The law school attended affects students' career options.¹³² Lawyers who graduate from top-tier schools are more likely to go to large firms; lawyers who graduate from lower

129. *See id.* at 69. Although 152 of the lawyers admitted from 1989-1992 were subsequently disciplined, the admissions files of only 145 of those lawyers could be located for analysis.

130. More than 40 years ago, Alan Dershowitz anticipated the difficulty of trying to use statistical information to predict which law students would become disciplined lawyers when the base rate of discipline was so low. Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 A.B.A. J. 815, 817 (1972). He was especially concerned about false positives. *Id.* at 817-18. The Connecticut study data also raise this concern. For instance, applicants with a problematic credit history were slightly more likely to be disciplined, but the vast majority of applicants with a problem credit history were not disciplined. Levin et al., *supra* note 26, at 13. Denial of admission to bar applicants with a problem credit history would almost inevitably result in excluding applicants who would not have become problematic lawyers.

131. Levin et al., *supra* note 26, at 75-77.

132. *See, e.g.*, ABEL, *supra* note 4, at 218; JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 49-50 (2005).

tier schools are more likely to work in solo and small firms.¹³³ Solo and small firm lawyers are more likely to be disciplined, and lawyers in such settings are often disciplined for relatively low-level violations (e.g., neglect of client matters, failure to return phone calls) that may be due to inadequate office support.

The results indicating that bar applicants with delinquent credit accounts or with higher student debt load are more likely to be disciplined may have a similar explanation. Delinquent account holders may have problems managing their paperwork or may not take their legal obligations seriously. Such traits might also lead to lawyer discipline. An alternative explanation, however, is that these bar applicants may come from less affluent backgrounds.¹³⁴ Graduates of elite law schools are more likely to come from more affluent backgrounds¹³⁵ and may need to incur less student debt than other applicants. Those with a problematic credit history or greater student debt may come from less affluent backgrounds, and therefore may be more likely to attend local or lower-tier law schools. This, in turn, tends to funnel them towards working in solo or small law firms, where discipline is more likely to be imposed.

The Connecticut study relied exclusively on information that was available to the CBEC when it made its admissions decision, and that information may not fully reflect an applicant's true history. While some of this information could be verified (e.g., through Dean's Certificates, traffic records, and credit reports), some applicants may have failed to reveal other hard-to-discover history. For example, some applicants with a history of substance dependency may not have revealed this information on the bar application.¹³⁶ None of the applicants' files revealed discipline for academic misconduct, which is

133. See, e.g., ABEL, *supra* note 4, at 217–18; HEINZ ET AL., *supra* note 132, at 57–59; FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 98–101 (1981); RONIT DINOVIETZ ET AL., AM. BAR FOUND. & NALP FOUND., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 42 (2009), available at <http://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf>.

134. Levin et al., *supra* note 26, at 77.

135. See HEINZ ET AL., *supra* note 132, at 65.

136. The Connecticut study did not show that applicants with a history of substance dependency were more likely to be disciplined. It is noteworthy, however, that only about 1% of the Connecticut bar applicants reported substance dependency or treatment. During roughly that same time period, approximately 3.8% of law students reported using alcohol on a daily basis and .8 % reported daily use of illicit drugs. *Report of the AALS Special Committee on Problems of Substance Abuse in Law Schools*, 44 J. LEGAL EDUC. 35, 41 (1994).

surprising in light of the reported rates of cheating in academic settings.¹³⁷ Thus, the Connecticut study only reflects the predictive value of the information that is known to bar authorities and not the predictive value of applicants' complete histories.¹³⁸

V. RECONSIDERING THE CHARACTER AND FITNESS INQUIRY

There are enough questions about the value of the character and fitness inquiry to merit reconsidering the wisdom of continuing the inquiry as currently constituted. One approach might be for bar examiners to redouble their efforts to obtain more complete information about certain factors (e.g., academic misconduct, substance dependency) that they think might predict later misconduct, and to test whether those factors more strongly predict misconduct than the current research suggests. Given the low incidence of discipline (2.4%), however, it seems unlikely that even if bar examiners obtained complete information about bar applicants' histories, it would increase the predictive value of the information so greatly that it would merit denying admission to any particular individual on public protection grounds.

This raises at least two questions: First, if the character inquiry excludes very few applicants and the information obtained during the character inquiry only weakly predicts who will later be disciplined, should the inquiry be continued? And second, if the character inquiry is continued, should it be continued in its current form? In order to answer these questions, it is necessary to look more closely at the purposes of the character inquiry and to ask how well the inquiry serves those purposes. It is also necessary to consider what research might be needed concerning the relationship between actual past conduct (i.e., applicants' complete histories) and future behavior, and what alternative measures might be taken to protect the public.

137. See *infra* notes 173–74 and accompanying text; see also G.M. Filisko, *Not a Cheater? Are You Sure?*, STUDENT LAWYER (Dec. 13, 2012), http://www.americanbar.org/publications/student_lawyer/2012-13/dec/not_a_cheater.html (reporting that in one law school a handful of cheating charges proceed to a full charge each year).

138. The study also only reveals the predictive value of the information with respect to lawyer discipline and not all lawyer misconduct. The reason why this limitation does not appear significant is discussed *infra* notes 143–47 and accompanying text.

A. The Purposes Reconsidered

It is ironic that bar applicants bear the burden of demonstrating that they possess good character in the continued absence of reliable evidence that the character and fitness inquiry seeks information that identifies who will become a problematic lawyer. Indeed, there appears to be a negative relationship between some of the prior conduct asked about on bar applications (e.g., bankruptcy) and subsequent discipline.¹³⁹ Of course, lawyer discipline systems do not detect or sanction all lawyer misconduct—they miss or ignore a lot of it.¹⁴⁰ For instance, the overbilling of clients is not uncommon, but it is also not easy to detect.¹⁴¹ Legal malpractice actions may be adjudicated or settled without a discipline sanction. Conflicts of interest handled through disqualification motions in court rarely result in the additional imposition of lawyer discipline sanctions.¹⁴² Lawyers sometimes engage in misconduct that benefits their clients (e.g., misrepresentations), but is undetected by others. It is therefore possible that the character and fitness variables predict types of misconduct that are not typically the subject of discipline.

This seems unlikely, however, because the lawyer misconduct identified above is not materially different from the conduct for which lawyers receive disciplinary sanctions. For example, malpractice actions are often based on neglect, which is a common reason for discipline.¹⁴³ Lawyers who engage in conflicts of interest

139. See *supra* note 118 and accompanying text.

140. Discipline authorities have limited investigative resources and typically rely on complaints to learn of misconduct. See Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 891 (2006). Some rule violations are ignored. Fred Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 996 (2002). Certain disciplinary complaints are routinely diverted elsewhere or are simply not taken seriously. For example, fee disputes involving overreaching may be referred to mediation or arbitration programs. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 18 n.115 (2007). Discipline complaints filed by prisoners or complaints arising out of litigation are often viewed with skepticism by discipline authorities. See *id.* at 18.

141. See, e.g., Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 958 n.16 (2000); Margaret A. Jacobs, *Problem of Overbilling by Many Large Firms is Confirmed in Surveys*, WALL ST. J., Sept. 18, 1995, at B8.

142. See Richard E. Flamm, *Looking Ahead to Ethics 2015: Or Why I Still Do Not Get the ABA Model Conflict of Interest Rules*, 19 N. ILL. U. L. REV. 273, 276 (1999).

143. See Mather & McEwen, *supra* note 64, at 68. In addition, some lawyers sued for malpractice also receive disciplinary sanctions. See, e.g., *In re Moak*, 71 P.3d 343, 350 (Ariz.

outside the courtroom receive discipline sanctions.¹⁴⁴ Lawyers who deliberately overbill clients are disciplined,¹⁴⁵ as are lawyers who make misrepresentations to benefit their clients,¹⁴⁶ when their misconduct is detected. Thus, although it is possible that the character inquiry seeks information from applicants that predicts types of misconduct that do not result in discipline sanctions, there is presently no evidence that it does so.¹⁴⁷

Nor is there evidence that the character and fitness process protects the public from lawyer misconduct.¹⁴⁸ As noted, very few applicants are refused admission to the bar on character and fitness grounds.¹⁴⁹ Those who are denied admission are sometimes given leave to reapply and later successfully do so.¹⁵⁰ Others who are denied admission in one jurisdiction are sometimes admitted elsewhere.¹⁵¹ Admittedly, the few individuals who are denied

2003); *In re* Cohen, 8 P.3d 429, 431–32 (Colo. 1999); *In re* Behnke, 537 N.E.2d 326, 327 (Ill. 1989).

144. *See, e.g.*, Florida Bar v. Brown, 978 So. 2d 107 (Fla. 2008); *In re* Coleman, 793 N.W.2d 296 (Minn. 2011); *In re* Johnson, 84 P.3d 637 (Mont. 2004). Lawyers who are disqualified by courts for conflicts of interest also occasionally receive discipline sanctions. *See In re* Feeley, 881 P.2d 1146, 1147, 1149 (Ariz. 1994).

145. *See, e.g.*, *In re* Geheb, 845 N.E.2d 1025 (Ind. 2006); Attorney Grievance Comm'n v. Hess, 722 A.2d 905 (Md. 1999); *In re* Myerson, 679 N.Y.S.2d 136 (App. Div. 1998).

146. *See, e.g.*, Florida Bar v. Head, 84 So. 3d 292 (Fla. 2012); *In re* Galloway, 293 P.3d 696 (Kan. 2013).

147. It must be noted, however, that at least one type of lawyer misconduct so infrequently results in discipline sanctions that the Connecticut study sheds no light on whether the misconduct could be predicted by information available at the time of bar admission. Violations of the lawyer advertising rules are rarely the subject of discipline. *See* Zacharias, *supra* note 140, at 996. It seems unlikely, however, that bar applicants would be denied admission even if there were predictive information in their admissions files about their likelihood of engaging in this misconduct, because the advertising rules are not of great concern to regulators.

148. The possibility cannot be discounted that if all lawyer misconduct could be detected, a stronger relationship might be found between certain information revealed during the bar application process and subsequent lawyer misconduct. There is no way to test this empirically.

149. *See supra* note 8 and accompanying text.

150. For example, during the period from 1993–2005, only 12 of the 47 applicants who were denied admission to the Ohio bar on character and fitness grounds were barred from reapplying. Supreme Court of Ohio, *supra* note 8. My review of the cases and bar records revealed that some of the Ohio applicants who were initially denied admission subsequently reapplied and were admitted to the Ohio bar.

151. In the Connecticut study, three applicants who were asked to participate in character and fitness hearings elected not pursue their Connecticut applications. Each of them was already admitted to another bar or was subsequently admitted in another jurisdiction. *See* Leslie C. Levin et al., *A Study of the Relationship Between Bar Admissions Data and Subsequent*

admission to any bar may have done some very bad things if they had become lawyers, but this is impossible to prove.¹⁵² It is also conceivable that the mere existence of the character inquiry protects the public by deterring some people with problematic histories from attending law school due to concerns about gaining bar admission. Those who are deterred might have caused serious harm as lawyers. Conversely, they might have become good lawyers with great empathy for their clients. How they would have fared as lawyers is simply not known.

Another argument for the character inquiry on public protection grounds is that it subjects bar applicants with problematic pre-application histories to close scrutiny, thereby placing them on notice that they must comport themselves in a manner consistent with the highest professional values. Whether this experience with the character inquiry positively affects subsequent lawyer conduct is unclear. A confidential study of Florida bar applicants who were conditionally admitted to practice—primarily because of mental health or substance abuse issues¹⁵³—revealed that they were disproportionately likely to be disciplined over the next ten years.¹⁵⁴

Lawyer Discipline, LSAC GRANTS REPORT SERIES 4 n.20 (2013), available at [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-13-01.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-13-01.pdf).

152. One such individual is arguably Matthew Hale, a white supremacist who was denied admission to the Illinois bar largely because of his virulently racist views and because he had “dedicated his life to inciting racial hatred for the purpose of implementing those views.” Comm. on Character & Fitness for the Third Appellate Dist. of the Supreme Court of Illinois, *In re Hale* (Ill. 1998), as reprinted in *THE LAW AND ETHICS OF LAWYERING* 875, 884 (Geoffrey C. Hazard, Jr. et al. eds., 3d ed. 1999). He was subsequently arrested for soliciting an FBI informant to kill a federal judge and sentenced to a 40-year prison term for that crime. *Hale Convictions Upheld*, CHICAGO TRIB., May 31, 2006, at 12; John Kass, *Arrest Shrinks Hatemonger Down to Size*, CHICAGO TRIB., Jan. 9, 2003, at 2. It is impossible to know, however, whether Hale would have pursued a different path if he had been admitted to the Illinois bar.

153. Conditional admission in Florida is primarily reserved for applicants who disclose problems with substance abuse or mental health issues. FLORIDA BAR ADMISSION R. 3-22.5 (b).

154. FLA. BOARD BAR EXAMINERS, CHARACTER AND FITNESS COMMISSION, FINAL REPORT TO THE SUPREME COURT OF FLORIDA 30 (2009), available at http://www.florida.supremecourt.org/pub_info/documents/2009_FBBE_Character_Fitness_Report_Short_Version.pdf (citing Chad W. Buckendahl et al., *Predicting Disciplinary Problems Using Character and Fitness Issues of Florida Bar Applicants*). For example, of the 20 lawyers conditionally admitted in Florida 1998, four (20%) were subsequently disciplined and of the 24 lawyers conditionally admitted in 1999, six (25%) were subsequently disciplined. *Id.* The rate of discipline among this group is significantly higher than the 2.4% discipline rate among Connecticut lawyers and is higher than

These conditionally admitted lawyers were aware that they were being monitored for part of this period and yet some still engaged in misconduct. It is unclear, however, whether their misconduct was more likely to be detected, and these lawyers were more likely to be disciplined, because they were being monitored as conditionally admitted lawyers. Moreover, in some cases the discipline was imposed for failure to comply with the conditions of admission, such as routine drug monitoring, rather than for misconduct that is typically the subject of lawyer discipline.¹⁵⁵ Nevertheless, the study suggests that at least some of these individuals were not deterred from misconduct by the fact that they underwent close scrutiny during the character and fitness process.¹⁵⁶

One other public protection rationale for the character and fitness inquiry is that it serves a signaling function to lawyers by affirming shared values: it communicates that lawyers are expected to possess good moral character when they enter the profession and maintain it throughout their careers.¹⁵⁷ Again, it is difficult to test the impact, if any, of the character inquiry on lawyers' attitudes toward their duty to behave ethically after they enter practice. Even if the character inquiry serves a positive signaling function at the outset of lawyers' careers, many other factors—including office colleagues, client demands, concerns about reputation, and the threat of sanctions—have a powerful impact on lawyer conduct once they begin practice.¹⁵⁸ Assuming that the character inquiry conveys a

any other known discipline rate.

155. See, e.g., Florida Bar v. Barbieri, Case No. SC10-0857 (Fla. 2010) (report of the referee), available at http://www.floridasupremecourt.org/clerk/briefs/2010/801-1000/10-857_ROR_ada.pdf (reprimand for failing to appear for drug monitoring even though evidence indicated that lawyer remained sober); Florida Bar v. Cardwell, Case No. SC10-0857 (Fla. 2010) (report of the referee), available at http://www.floridasupremecourt.org/clerk/briefs/2010/1401-%201600/10-1403_%20RO R.pdf, *aff'd*, 75 So. 3d 1246 (Fla. 2011) (extension of conditional admission imposed as sanction for failure to appear for drug and alcohol monitoring even though all test results were negative).

156. See *In re Roberts*, 721 So. 2d 283 (Fla. 1998). The Florida study also raises the possibility that the bar examining authorities were correctly identifying some applicants who were likely to later engage in misconduct. Unfortunately, without knowing more about the reasons why the conditionally admitted lawyers' misconduct was detected or why they were sanctioned, it is not possible to determine whether this was the case. Efforts to obtain access to the study from Florida authorities have been unsuccessful.

157. See Rhode, *supra* note 4, at 509–10.

158. See Leslie C. Levin, *Immigration Lawyers and the Lying Client*, in *LAWYERS IN PRACTICE*, *supra* note 19, at 87, 103–04; Mather & Levin, *supra* note 19, at 4, 14, 16; *supra*

message to lawyers with any staying power, it is unclear that the inquiry must take its current form in order to signal to lawyers that they are expected to behave ethically.

In addition to protecting the public, the character and fitness inquiry may also serve other functions. For example, it may signal to the public that lawyers and the justice system can be trusted, thereby facilitating lawyer-client relations and encouraging respect for the courts. The character inquiry may also enhance the reputation and image of lawyers, thereby encouraging the public to use lawyers and advancing the professional project.¹⁵⁹

It is difficult to assess to what extent the character and fitness inquiry promotes public trust in lawyers or a positive view of the legal profession more generally. The public's views of lawyers are, at best, ambivalent.¹⁶⁰ A 2009 Gallup Poll revealed that only 25% of the public had a positive view of the legal profession.¹⁶¹ A more recent poll found that only 20% of respondents rated the honesty and trustworthiness of lawyers as "high" or "very high."¹⁶² It is unclear what the public actually knows about the bar's character and fitness requirement or whether its existence affects the public's views about lawyers. If the public were aware of the weak predictive value of the information considered during the character inquiry, the low number of applicants who are rejected on character and fitness grounds, or the fact that former felons are sometimes admitted to the bar,¹⁶³ it is far from clear that the process would contribute to a positive public

notes 17–19 and accompanying text. Other lawyers, in particular, can profoundly affect the ethical behavior of new lawyers shortly after they enter practice. See Levin, *supra* note 63, at 362–65.

159. See *supra* note 29 and accompanying text.

160. See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805, 808–11 (1998); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1424, 1460 (1999); LEO J. SHAPIRO & ASSOCIATES, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 4 (2002), available at <http://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf>.

161. Jeffrey M. Jones, *Automobile, Banking Industry Image Slides Further*, GALLUP ECONOMY (Aug. 17, 2009), <http://www.gallup.com/poll/122342/Automobile-Banking-Industry-Images-Slide-Further.aspx>.

162. *Honesty/Ethics in Professions*, GALLUP (Dec. 5–8, 2013), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx>. The public does, however, have a more positive view of its own lawyers. LEO J. SHAPIRO & ASSOCIATES, *supra* note 160, at 19–20.

163. See, e.g., *In re J.A.S.*, 658 So. 2d 515 (Fla. 1995); *In re A.T.*, 408 A.2d 1023 (Md. 1979).

perception of lawyers. Moreover, even if the character and fitness inquiry contributes in some way to public trust in lawyers, this does not mean that the character inquiry as currently constituted is required to instill that trust.

B. The Process Reconsidered

Notwithstanding the absence of evidence that an applicant's pre-application history strongly predicts future misconduct, it would be foolhardy—and probably futile—to argue for the complete elimination of the character inquiry.¹⁶⁴ It seems unlikely that any profession or regulatory body would license individuals who, at the time of application, are incarcerated for serious crimes or hospitalized for incapacitating psychological disorders. Yet the current character inquiry appears to be an ineffective method of determining who *else* should be denied admission to the bar. This section offers some thoughts about additional research that might shed light on who will become a problematic lawyer. It considers alternatives to the current character inquiry given the limited evidence that information collected during the inquiry actually predicts who might become a problematic lawyer. It also identifies some other measures that might be implemented to increase protection of the public.

1. Additional research

If bar applicants are going to be required to bear the burden of rebutting negative presumptions about their “character” based on their past histories, fairness dictates that there must be some demonstrated connection between applicants' pre-application histories and the likelihood of future misconduct. While the Connecticut study indicates that some prior conduct predicts future discipline, these pre-application variables only increase the likelihood of discipline by a few percentage points. Additional study is needed

164. Thirty years ago Rhode raised the possibility of eliminating the character and fitness inquiry and dealing with problematic lawyers through the discipline process. Rhode, *supra* note 4, at 585, 589. She viewed the appropriate question to be “whether resources now consumed in predicting professional misconduct would be better expended in detecting, deterring and redressing it.” *Id.* at 590. At that time, she noted that eliminating the inquiry was not unproblematic and that the lawyer discipline process was highly flawed. *Id.* at 585, 589–91. Today, the lawyer discipline system still fails to detect or sanction much misconduct. Levin, *supra* note 60, at 7 n.29. In any case, there is no political will to eliminate the character and fitness inquiry at this time.

to determine whether any of the information sought during the character inquiry more strongly predicts discipline than the Connecticut study suggests.

For instance, the Connecticut study revealed that never-disciplined lawyers were somewhat less likely to report prior criminal convictions at the time of bar admission than disciplined lawyers (2.1% v. 5.6%).¹⁶⁵ Although this difference only raises the likelihood of discipline by a few percentage points, the finding merits further study. The CBEC relied primarily on applicants' self-reporting of criminal convictions: It did not independently check bar applicants' criminal records. During the period 1989–1992, Connecticut bar applicants may not have disclosed all of their criminal convictions—including their juvenile records and expunged records—because they may have believed that they were not required to do so.¹⁶⁶ In order to better assess the true predictive value of pre-application criminal convictions, it is important to identify all of bar applicants' prior convictions and include them in the statistical analysis. States such as California, Florida, Michigan, and Texas, which require applicants to produce criminal record histories or fingerprints,¹⁶⁷ or Pennsylvania, which directly asks applicants about expunged or sealed criminal matters,¹⁶⁸ may be better positioned to study the actual relationship

165. See Levin et al., *supra* note 26, at 63.

166. Even though all jurisdictions ask about prior criminal convictions, some bar applicants believe that they do not need to reveal juvenile offenses or criminal convictions that have been expunged. See McGuire, *supra* note 44, at 717–18; Tim Gallagher, Note, *Innocent Until Proven Guilty? Not for Bar Applicants*, 31 J. LEGAL PROF. 297, 305 (2007). For example, a post on a discussion board asked, “I received a misdemeanor a few years back and I have since then expunged the incident. I noticed that some apps specify that you must disclose crimes even if they have been sealed or expunged but I was wondering if I would still need to disclose if they just ask ‘Have you ever been convicted of a felony or a misdemeanor or is any such charge now pending against you?’ without specifying any more?” hsk143, Comment to Character and Fitness Language Question, TOP-LAW-SCHOOLS.COM (Oct. 18, 2012, 9:01 AM), <http://www.top-law-schools.com/forums/viewtopic.php?f=2&t=196220>. It seems likely that twenty-five years ago, before some bar applications began to specify that they were seeking information not only about convictions, but also about expungements and pre-trial diversion, this information was not disclosed by many bar applicants.

167. *Moral Character Determination Instructions*, STATE BAR OF CAL., http://www.calbarxap.com/applications/CalBar/info/moral_character.html#fingerprints (last visited Nov. 6, 2014); *Checklist to File a Bar Application*, FLA. BOARD BAR EXAMINERS, <http://www.floridabarexam.org/public/main.nsf/checklistnereg.html> (last visited Nov. 6, 2014); *Michigan Bar Exam Application Instructions and Information*, STATE BAR MICH., 16 (2014), <http://www.michbar.org/professional/pdfs/instructions.pdf>; *Fingerprinting*, TEX. BOARD LAW EXAMINERS, <http://www.ble.state.tx.us>.

168. *Criminal – Criminal History*, PA. BOARD LAW EXAMINERS, <http://www.pabar>

between pre-application criminal convictions and subsequent lawyer misconduct.¹⁶⁹

Another area that deserves closer study is the possible connection between academic misconduct and subsequent lawyer discipline. As previously noted, some studies have shown a connection between academic cheating in college and graduate school and deviant behavior in the workplace.¹⁷⁰ No bar applicant in the Connecticut study reported any academic misconduct, which could mean that all those who were sanctioned for academic misconduct during college were denied admission to law school and that those who engaged in academic misconduct in law school were expelled, so that they were ineligible to apply to the bar.¹⁷¹ It seems more likely, however, that the absence of reported academic misconduct is due to a failure to detect academic misconduct or to attempts to address this misconduct informally rather than through law school disciplinary sanctions that must be reported to the bar.¹⁷² In the late 1980s—when many of the lawyers in the Connecticut study were in college—40–60% of undergraduates admitted to engaging in academic dishonesty.¹⁷³ A 2006 study revealed that 45% of law students admitted to cheating in law school at least once in the previous academic year.¹⁷⁴ A closer examination of the actual rate of

exam.org/faq/oba/QandI/85.htm (last updated Aug. 8, 2014).

169. Even if more complete information about criminal histories is obtained, it is important to control for practice setting, as applicants with criminal histories are more likely to have difficulty gaining admission to top-tier law schools and are therefore more likely to work in solo and small firm practices.

170. See *supra* notes 97–100 and accompanying text.

171. It is not always the case, however, that those who engage in academic misconduct during law school are expelled or precluded from admission to the bar. See, e.g., *In re Graham*, 100 So. 3d 299 (La. 2012); *In re Zbiegien*, 433 N.W.2d 871 (Minn. 1988).

172. Law schools may also be reluctant to report academic misconduct determinations to bar examining committees. I have heard one former law school dean state that he never reported students' academic misconduct to the bar during his long tenure as dean. I have also heard of cases in which academic misconduct was handled informally between the faculty member and the student to avoid the need to report the misconduct to the bar.

173. See Stephen F. Davis, *Academic Dishonesty in the 1990s*, PUBLIC PERSPECTIVE, Sept./Oct. 1993, at 26. A study of MIT students in 1991–1992 revealed similar results. ALBERTA LIPSON & NORMA MCGAVERN, UNDERGRADUATE ACADEMIC DISHONESTY AT MIT: RESULTS OF A STUDY OF UNDERGRADUATES, FACULTY, AND GRADUATE TEACHING ASSISTANTS 14 (MIT Colloquium Comm. ed., 1993).

174. See Emily Sachar, *MBA Students Cheat More Than Other Grad Students, Study Finds*, BLOOMBERG (Sept. 25, 2006), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aw7s9m0BmcBo>. It should

academic misconduct among disciplined and never-disciplined lawyers may reveal that pre-application academic misconduct is associated with subsequent lawyer discipline.

Further study is also needed to determine the relationship between pre-application psychological disorders and later discipline. As noted, the Connecticut study showed that prior diagnosis of, or treatment for, a psychological disorder was a weak predictor of less severe discipline. Five of the six disciplined Connecticut lawyers who had reported a previous psychological diagnosis/treatment on their applications only received a single reprimand¹⁷⁵ and they received the grievance leading to discipline more than ten years after they entered practice.¹⁷⁶ The low-level discipline among this group is not surprising. Those who seek psychological treatment may be less likely to cause serious harm than those with undiagnosed and untreated psychological disorders. Additional research is warranted, however, because the actual incidence of psychological diagnosis or treatment is probably higher among bar applicants than the Connecticut study suggests.¹⁷⁷ The true incidence of psychological disorders is no doubt substantially higher.¹⁷⁸ The focus of such research should be on the frequency

be noted that the response rate was only 13%. Lucia Graves, *Which Types of Students Cheat Most?*, U.S. NEWS & WORLD REPORT (Oct. 3, 2008), <http://www.usnews.com/education/articles/2008/10/03/which-types-of-students-cheat-most>.

175. See Levin et al., *supra* note 26, at 77–78. The sixth lawyer received a sanction of conditions for one matter, a reprimand for a second matter, and then was placed on disability/inactive status due to severe depression after receiving a third grievance.

176. See *id.* at 78. None of the five who received a single reprimand claimed that psychological disorders contributed to conduct that led to discipline, although two referenced stressors in their lives (*e.g.*, family issues, personal illness) during their discipline proceedings.

177. Only 29 lawyers in the Connecticut study (2.16%) reported any prior diagnosis of, or treatment for, a psychological disorder. *Id.* at 59. This rate is well below what would be expected in the law student population. See Hollee Schwartz Temple, *Speaking Up: Helping Law Students Break Through the Silence of Depression*, A.B.A. J., Feb. 2012, at 23, 23. In 1993, 26% of first-year law students surveyed at the University of Connecticut indicated that they had been diagnosed or received regular treatment for a mental disorder at some point in their lives. Bauer, *supra* note 9, at 105 n.37. About 10% of the U.S. population obtained mental health services in the health sector annually. See MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 15 (1999), available at <http://www.surgeongeneral.gov/library/mentalhealth/home.html>.

178. One study conducted in the 1980s found depression among 32% of first-year law students and 40% of third-year students in one state law school. Benjamin et al., *supra* note 62, at 234. A national study of the prevalence of serious psychological disorders from 1990–1992 (at the same time the individuals in the Connecticut study were applying to the bar) revealed that in any given year, approximately 6.2% of the population suffered from a serious mental

and consequences of serious psychological disorders that require treatment for an individual to function effectively in the workplace.¹⁷⁹ This research should include both review of admissions files and interviews with disciplined lawyers in an attempt to determine whether serious psychological disorders were present at the time of application that were not revealed on bar admissions forms and how, if at all, such disorders affected subsequent conduct.

Likewise, additional study of the significance of pre-application substance dependency is needed. Substance dependency is of great concern in the legal profession because of the number of lawyers involved in discipline proceedings who have substance problems.¹⁸⁰ The Connecticut study found that pre-application substance dependency or treatment for dependency does not predict discipline, but very few bar applicants (13 total) in the study reported substance dependency or treatment.¹⁸¹ This reported rate (.97%) almost certainly understates the true rate of substance dependency and treatment among applicants,¹⁸² as it is substantially less than the rate of alcohol dependency (7.2%) and drug dependency (2.8%) in the general population during that period.¹⁸³ Substance dependency can

illness that interfered with one or more major life activities. Ronald C. Kessler et al., *The Prevalence and Correlates of Untreated Serious Mental Illness*, 36 HEALTH SERVICES RES. 987, 989-90, 992 (2001).

179. Although research into the prevalence and level of psychological problems caused by the law school experience (*e.g.*, anxiety, depression, loss of self-esteem) also merit study, such problems are not relevant to the bar's character inquiry unless they impair the applicant's ability to function in the workplace.

180. See Stephen Anderson, *New Data Link Mental Impairment with Discipline*, ISBA B. NEWS, March 1, 1994, at 2 (reporting that use of drugs or alcohol was identified in records of almost one-fourth of all lawyers who appeared in formal hearings); Cynthia L. Spanhel, *The Impact of Impaired Attorneys on the Texas Grievance Process*, 52 TEX. B. J., 312, 312-13 (1989).

181. Levin et al., *supra* note 26, at 59. Only two of those lawyers were subsequently disciplined and both received less severe discipline. See Levin et al., *supra* note 151, at 19 n.71, 24.

182. See *supra* note 136.

183. See Ronald C. Kessler, *Lifetime and 12-Month Prevalence of DSM-III-R Psychiatric Disorders in the United States: Results from the National Comorbidity Study*, 51 ARCHIVES GEN. PSYCHIATRY 8, 12 (1994). Those figures reflect the percentage of individuals who reported dependency in the past twelve months. The rate of alcohol disorders alone among lawyers was 9.42%. See Frederick S. Stinson & Samar Farhar DeBakey, *Prevalence of DSM-III-R Alcohol Abuse and/or Dependence Among Selected Occupations*, 16 ALCOHOL HEALTH & RES. WORLD 165, 168 (1992) (reporting on both abuse and dependency).

be very difficult for bar authorities to detect if it is not disclosed by the applicant or is not otherwise revealed in the bar application (e.g., drug possession charges, DUIs). While those who are treated for substance dependency are likely to do better with remission than those who are not, even treated individuals who initially remit often relapse.¹⁸⁴ Highly educated professionals are not immune from relapse.¹⁸⁵ Relapse is often associated with stress¹⁸⁶—which is inherent in law practice. Thus, pre-application substance dependency and treatment deserve further research because relapse rates present some indication that past substance dependency may predict future behavior that could lead to lawyer misconduct.¹⁸⁷

Credit history also deserves further study, but for different reasons. The CBEC obtained credit histories from credit bureaus for all bar applicants, so it presumably obtained fairly complete information. As previously noted, the elevated rate of discipline (2.7 percentage points) for applicants with delinquent credit accounts may have been because these applicants were more likely to subsequently work in solo and small firms, where discipline is more

184. Rudolf H. Moos & Bernice S. Moos, *Rates and Predictors of Relapse After Natural and Treated Remission from Alcohol Use Disorders*, 101 *ADDICTION* 212, 217 (2006) (reporting that of individuals treated for alcohol problems who initially remitted, 40% of that group later relapsed). In some cases, the relapse rates following treatment for substance abuse are even higher. See Lance O. Bauer, *Predicting Relapse to Alcohol and Drug Abuse via Quantitative Electroencephalography*, 25 *NEUROPSYCHOPHARMACOLOGY* 332, 332 (2001); Jennifer Boyd Ritscher et al., *Relationship of Treatment Orientation and Continuing Care to Remission Among Substance Abuse Patients*, 53 *PSYCHIATRIC SERVICES* 595 (2002); Maureen A. Walton et al., *Individual and Social/Environmental Predictors of Alcohol and Drug Use 2 Years Following Substance Abuse Treatment*, 28 *ADDICTIVE BEHAV.* 627, 633 (2003).

185. See, e.g., Karen B. Domino et al., *Risk Factors for Relapse in Health Care Professionals with Substance Use Disorders*, 293 *JAMA* 1453, 1453 (2005); Emil J. Menk et al., *Success of Reentry into Anesthesiology Training Programs by Residents with a History of Substance Abuse*, 263 *JAMA* 3060, 3061–62 (1990).

186. Sandra A. Brown et al., *Stress, Vulnerability and Adult Alcohol Relapse*, 56 *J. STUD. ALCOHOL & DRUGS* 538 (1995); Rajita Sinha et al., *Translational and Reverse Translational Research on the Role of Stress in Drug Craving and Relapse*, 218 *PSYCHOPHARMACOLOGY* 69, 69–70 (2011).

187. This is not meant to suggest that applicants with a history of substance dependency automatically should be excluded from the bar, but rather that further research is needed to determine whether the actual (rather than the reported) rate of substance dependency predicts later misconduct. Even if that is the case, the risk of relapse varies depending upon a variety of factors. See, e.g., Domino et al., *supra* note 185, at 1457; Danielle E. Ramo & Sandra Brown, *Classes of Substance Abuse Relapse Situations: A Comparison of Adolescents and Adults*, 22 *PSYCHOL. ADDICTIVE BEHAV.* 372, 372 (2008); Walton et al., *supra* note 184, at 637–39. Each applicant should be considered on a case-by-case basis.

likely to be imposed.¹⁸⁸ The possibility cannot be discounted, however, that poor credit history is associated with behaviors and personal characteristics that are more likely to lead to discipline. For example, there is a significant relationship between lower credit scores and higher auto insurance losses.¹⁸⁹ There is also evidence of a relationship between certain psycho-behavioral characteristics, risky driving histories, and risky financial behaviors that can affect credit scores.¹⁹⁰ While the credit history information analyzed in the Connecticut study did not strongly predict future discipline, more research is needed to determine whether a more refined analysis would enable this information to be used to better predict future conduct.

A final area that deserves attention is bar authorities' reliance on expressions of remorse when making admissions decisions. Lack of remorse for past misconduct is frequently cited as a reason for denial of bar admission on character and fitness grounds.¹⁹¹ Yet remorse is "a poorly formulated concept, lacking clarity and uniformity in both its definition and the characteristics that signal its presence or absence."¹⁹² It is not a well-researched or well-recognized concept in the mental health community.¹⁹³ Reliance on expressions of remorse may be especially problematic because it assumes that (1) expressions of remorse by bar applicants genuinely reflect their views; (2) bar authorities can accurately assess their genuineness;¹⁹⁴ and (3) remorse

188. See *supra* note 63 and accompanying text.

189. BRUCE KELLISON ET AL., A STATISTICAL ANALYSIS OF THE RELATIONSHIP BETWEEN CREDIT HISTORY AND INSURANCE LOSSES 9 (Bureau of Bus. Research ed., 2003). The meaning of this data is complicated by the fact that those with lower credit scores may need money for their losses and may be more likely to submit insurance claims. Patrick L. Brockett & Linda L. Golden, *Biological and Psychobehavioral Correlates of Credit Scores and Automobile Insurance Losses: Toward an Explication of Why Credit Scoring Works*, 74 J. RISK & INS. 23, 34 (2007).

190. Brockett & Golden, *supra* note 189, at 26, 33–36.

191. See *supra* note 54 and accompanying text.

192. Rocksheng Zhong et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY & L. 39, 39 (2014).

193. See Stephen J. Morse, *Commentary: Reflections on Remorse*, 42 J. AM. ACAD. PSYCHIATRY & L. 49, 53–54 (2014).

194. See Mitchell Simon et al., *Apologies and Fitness to Practice Law: A Practical Framework for Evaluating Remorse in the Bar Admission Process*, 2012 J. PROF. LAW. 37, 58–59; see also Zhong et al., *supra* note 192, at 43, 47 (describing judges who expressed difficulty assessing whether expressions of remorse were genuine). Even forensic mental health professionals have little or no expertise in evaluating remorse. Morse, *supra* note 193, at 54, 55.

predicts future behavior.¹⁹⁵ The inquiry is complicated by the fact that the willingness to express remorse and the forms it takes differ by culture.¹⁹⁶ Moreover, the same misconduct can elicit two different emotions: guilt and shame. These emotions may have a different impact on the willingness to apologize¹⁹⁷ and on subsequent recidivism.¹⁹⁸ Personality differences may also affect expressions of remorse. Egotistical individuals who are high in narcissism and low in humility may have more difficulty apologizing and expressing remorse because doing so threatens their self-image.¹⁹⁹ Those who are shame-prone or have other markers of low well-being (e.g., low self-esteem, depression) are more likely to condemn themselves.²⁰⁰ The research does not reveal, however, which individuals are more likely to engage in future misconduct.

2. Other measures of future behavior

A more accurate assessment of the likelihood that a bar applicant will prove to be a problematic lawyer may come from psychological testing, but not for some time. Psychologists are making progress toward identifying the behaviors and personality characteristics that

195. Indeed, there is little evidence of a relationship between expressions of remorse and recidivism among convicted offenders. See, e.g., Morse, *supra* note 193, at 52; Michael J. Proeve et al., *Mitigation Without Definition: Remorse in the Criminal Justice System*, 32 AUSTL. & N.Z. J. CRIMINOLOGY 16, 23 (1999).

196. See Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You're Sorry Enough?*, 16 JUST. Q. 99, 117 (1999); Andrea Kleinsmith et al., *Recognizing Emotion from Postures: Cross-Cultural Differences*, in USER MODELING 2005, 50, 57 (Liliana Ardissono et al. eds., 2005); see generally Richard P. Bagozzi, *The Role of Culture and Gender in the Relationship Between Positive and Negative Affect*, 13 COGNITION & EMOTION 641, 668 (1999) (noting that culture fundamentally shapes how people express their affect).

197. June B. Tangney et al., *Shame, Guilt and Remorse: Implications for Offender Populations*, 22 J. FORENSIC PSYCHIATRY & PSYCHOL. 706, 707, 709–10 (2011).

198. Daniela Hossler et al., *Guilt and Shame as Predictors of Recidivism: A Longitudinal Study with Young Prisoners*, 35 CRIM. JUST. & BEHAV. 138, 146 (2008); Andrew Spice, *Remorse, Psychopathology, Psychopathic Characteristics, and Recidivism Among Adolescent Offenders 67–68* (Summer 2013) (unpublished Ph.D. dissertation, Simon Fraser University) (on file with author).

199. Mickie L. Fisher & Julie Juola Exline, *Self-Forgiveness Versus Excusing: The Roles of Remorse, Effort, and Acceptance of Responsibility*, 5 SELF & IDENTITY 127, 142 (2006); Nancy McWilliams & Stanley Lependorf, *Narcissistic Pathology of Everyday Life: The Denial of Remorse and Gratitude*, 26 CONTEMP. PSYCHOANALYSIS 430, 431, 439 (1990).

200. Fisher & Exline, *supra* note 199, at 142.

predict certain deviant behaviors in the workplace.²⁰¹ Their research, while promising, is not yet sufficiently developed to use for bar admissions purposes. The studies mostly involve undergraduate students and do not reveal whether the behaviors that predict misconduct when the subjects are students predict behavior years later in the workplace.

Another approach that may eventually deserve consideration is written integrity tests. Many companies use integrity tests to determine who will be a trustworthy employee in the workplace.²⁰² “Overt” integrity tests ask about attitudes toward theft and prior illegal behavior.²⁰³ Personality-based integrity tests attempt to determine an individual’s propensity for dishonesty based on personality attributes and focus on whether an individual is likely to engage in a wider range of counterproductive work behaviors.²⁰⁴ Both overt and personality-based integrity tests substantially correlate with the Big Five personality factors of “Conscientiousness,” “Agreeableness,” and “Emotional Stability.”²⁰⁵

Integrity tests are not presently appropriate for use in bar admissions decisions. The tests are controversial, both on legal grounds and because of questions about their validity.²⁰⁶ Integrity tests are only crude measures of who will be problematic in the workplace. For example, the Drug Avoidance and Honesty scales used in integrity tests only detect thirty percent of on-the-job abusers.²⁰⁷ At the same time, they yield many false positives.²⁰⁸ It is

201. See, e.g., *supra* notes 98–99 and accompanying text.

202. See Fine et al., *supra* note 84, at 88; Paul M. Mastrangelo & Jeffrey A. Jolton, *Predicting On-the-Job Substance Abuse with a Written Integrity Test*, EMP. RESPONSIBILITIES & RIGHTS J., June 2001, at 95, 97; Deniz S. Ones et al., *Integrity Tests Predict Counterproductive Work Behaviors and Job Performance Well: Comments on Van Iddekinge, Roth, Raymark, and Odle-Dusseau (2012)*, 97 J. APPLIED PSYCH. 537, 537 (2012).

203. COMPREHENSIVE HANDBOOK, *supra* note 15, at 150.

204. *Id.* at 150, 155.

205. *Id.* at 153; Christopher M. Berry et al., *A Review of Recent Developments in Integrity Test Research*, 60 PERSONNEL PSYCHOL. 271, 274 (2007). Conscientiousness is thought to measure several more specific traits, including reliability and unreliability. COMPREHENSIVE HANDBOOK, *supra* note 15, at 154.

206. The use of integrity tests is limited by statute in some states. See COMPREHENSIVE HANDBOOK, *supra* note 15, at 158. For one of the more recent attacks on integrity testing, see Chad H. Van Iddekinge, *The Critical Role of the Research Question, Inclusion Criteria, and Transparency in Meta-Analyses of Integrity Test Research: A Reply to Harris et al. (2012) and Ones, Viswesvaran, and Schmidt (2012)*, 97 J. APPLIED PSYCHOL. 543, 548 (2012).

207. Mastrangelo & Jolton, *supra* note 202, at 102.

also possible for individuals to “fake” their results.²⁰⁹ This is not to say that integrity testing or other testing could not play a role in assessing bar applicants in the future.²¹⁰ But in light of evidence that factors other than personality also affect ethical decision making, such tests should not be used to exclude applicants altogether. At most, they might be used as one tool in the assessment of applicants.

3. Other measures to protect the public

Even if certain pre-admission conduct predicts later lawyer discipline, fairness would dictate that before any individual applicant is denied admission to the bar, the risk of future misconduct should be substantial. But how substantial? At the moment, the increased risk presented by any of the character and fitness variables appears so minimal that it seems unlikely that bar admission would be denied on that basis. Moreover, even if, based on prior history, an applicant has a 50% chance of later being disciplined, that particular individual will not necessarily engage in subsequent misconduct. Is it fair to exclude that individual from the bar? And if not, how should bar authorities respond to the increased risk that the individual presents?

One modest response would be to require applicants who appear to pose a significant risk of becoming problematic lawyers to post a bond or to carry malpractice insurance. This would provide some clients with redress if the attorney engages in certain misconduct.²¹¹ For example, a bond or malpractice insurance would provide some compensation for clients whose lawyers neglect their matters or fail to perform competently.²¹² Neither would provide a complete

208. *Id.*; COMPREHENSIVE HANDBOOK, *supra* note 15, at 161; Fine et al., *supra* note 84, at 81; Mastrangelo & Jolton, *supra* note 202, at 102.

209. COMPREHENSIVE HANDBOOK, *supra* note 15, at 160–61; Berry et al., *supra* note 205, at 282.

210. For example, efforts are under way to develop tests, based in part on personality measures, that predict “lawyer effectiveness” after law school graduation. Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620, 628 (2011).

211. This requirement is arguably unfair to those lawyers who will never engage in misconduct, but the fact that all U.S. lawyers are not required to carry malpractice insurance is arguably even more unfair to the public. See Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 188–90, 197–200 (2012); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1588–89 (2009).

212. Bonding may be preferable as malpractice insurance would not protect clients from lawyers who steal from them or engage in other intentional misconduct. SUSAN SAAB FORTNEY

solution, however, as these requirements would not prevent misconduct. Nor would they ever adequately compensate clients who end up in removal proceedings or incarcerated because of their lawyers' misconduct.

Conditional admission of these applicants does not readily solve this problem. Conditional bar admission permits applicants to be admitted to the bar subject to certain conditions and monitoring.²¹³ It is usually only available to applicants who have demonstrated rehabilitation from substance dependency or successful treatment for psychological disorders.²¹⁴ Conditional admission has been criticized, in part, for being used with applicants who would otherwise have been admitted unconditionally.²¹⁵ There is also little evidence that it works to protect the public.²¹⁶ The conditional admission period is typically for less than five years,²¹⁷ and discipline is often first imposed more than ten years after bar admission occurs.²¹⁸ This is not an argument for making conditional admission indefinite. Conditional admission may unfairly burden applicants who would never become problematic lawyers. These burdens include bearing

& VINCENT R. JOHNSTON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 411 (2008).

213. Stephanie Lyerly, *Conditional Admission: A Step in the Right Direction*, 22 *GEO. J. LEGAL ETHICS* 299, 306 (2009).

214. ABA MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW R. 1 (2009); Stephanie Denzel, *Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 *CONN. L. REV.* 889, 917–18 (2011).

215. Denzel, *supra* note 214, at 914; Testimony of McGrath, *supra* note 23; cf. Michael J. Oths, *Conditional Admission in Idaho*, B. EXAMINER, Feb. 2002, at 12 (noting that since the conditional admission program was implemented applicants “who would have been admitted have had conditions attached”).

216. Although one confidential Florida study revealed a high rate of discipline among conditionally admitted lawyers, it is not clear how much of the discipline was for failure to comply with monitoring requirements and whether the discipline related to acts that did, or were likely to, harm clients or the public. See *supra* notes 154–55 and accompanying text. In contrast, Connecticut has had no notable problems with conditionally admitted lawyers. Denzel, *supra* note 214, at 899 n.59.

217. ABA MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW R. 4 (2009); Ind. Rules of Court, RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS R. 12, § 6(c) (2013). Some states do not specify the length of conditional admission. See, e.g., Ore. State Board of Bar Examiners, RULES FOR ADMISSION OF ATTORNEYS 6.15 (2012), available at http://www.osbar.org/_docs/rulesregs/admissions.pdf; Board of Bar Examiners, RULES AND REGULATIONS FOR ADMISSION TO PRACTICE LAW IN S.D. R. 16-16-17.1 (2014), available at <http://ujs.sd.gov/uploads/barexaminers/RReg.pdf>.

218. See, e.g., Levin et al, *supra* note 26, at 11.

the cost of the conditions—such as psychiatric evaluations and financial audits—which can be considerable.²¹⁹ Moreover, in some states, the fact that lawyers are conditionally admitted is known to the public,²²⁰ which can adversely affect lawyers' reputations and employment opportunities.

A variation on conditional admission would be to identify those applicants with significant risk factors ("SRF") based on their past histories, but admit them with the caveat that if they engage in minor misconduct, there will be a heavy presumption that they will be sanctioned as though they have been previously disciplined.²²¹ In the case of intentional misconduct, there would be a heavy presumption that they would be suspended from practice and required to reapply. Thus, for example, an SRF applicant with a history of previous convictions and other misconduct who has, for example, a 40% chance of engaging in future misconduct, would know that he would likely face suspension if he intentionally violates the rules of professional conduct. The risk of enhanced sanctions would not deter all such lawyers from misconduct, as some lawyers engage in serious misconduct (e.g., stealing client money) knowing that they will face suspension or disbarment if they are caught. This approach has the advantage, however, of not pre-judging applicants based on limited evidence that they will engage in misconduct. It would also enable courts and disciplinary authorities to incorporate the lawyer's past history into considerations about how best to protect the public when they impose discipline on SRF lawyers who actually engage in misconduct.

Another approach might be to require all lawyers to be periodically relicensed.²²² This approach is used in Australia, where admitted lawyers must apply for a practicing certificate annually in

219. See Denzel, *supra* note 214, at 913, 917.

220. See, e.g., N.D. ADMISSION TO PRACTICE R 8 (F) (2013). As a condition of admission, applicants may also be required to agree that regulators may contact their employers to discuss the conditionally admitted lawyer's performance. See Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Dept. of Justice, to the Hon. Bernette J. Johnson, Chief Justice of the Louisiana Supreme Court 15 (Feb. 5, 2014), available at <http://www.ada.gov/louisiana-bar-lof.pdf>.

221. In many cases, the initial discipline response to a grievance is diversion (which is not a sanction), a private admonition, or a public reprimand. Levin, *supra* note 60, at 9. But an SRF lawyer would receive a more serious sanction for the first offense than would ordinarily be imposed.

222. See, e.g., Jayne W. Barnard, *Renewable Bar Admission: A Template for Making "Professionalism" Real*, 25 J. LEGAL PROF. 1, 6 (2001).

order to continue to practice law.²²³ This permits regulators to more closely monitor the behavior of solicitors and to require them to show their fitness to practice before renewing their practice licenses.²²⁴ If there is evidence of substance abuse, for example, the regulatory body can then impose conditions for continuation of the license in order to protect the public.²²⁵ Although annual relicensing would be difficult in the United States—which has many more lawyers than Australia—periodic relicensing (e.g., every five years) would allow regulators to track the actual behavior of lawyers in practice, rather than make judgments at the outset of an applicant's career about whether that individual is likely to be a problem lawyer.

CONCLUSION

The character and fitness inquiry as currently constituted needs to be carefully reevaluated. In light of the limited predictive value of the information obtained during the character inquiry, it should be streamlined so that it is not so burdensome to applicants and costly to administer. Questions about past history that have no demonstrated relationship to future misconduct—or only weak predictive power—should be eliminated. Thus, for example, questions about bankruptcy and debt should be eliminated absent further evidence that they robustly predict future misconduct.

Further research is also needed. For example, it may be that criminal convictions, academic misconduct, or recent substance dependency predict later misconduct, but are not being reported to bar authorities. This would mean that better data collection methods might be needed rather than the elimination of certain questions from the character inquiry. Research is also needed to determine how well the character and fitness inquiry succeeds in protecting the public. For instance, what happens to individuals who are denied admission to the bar? Are they ultimately admitted elsewhere?²²⁶ And

223. See, e.g., *Legal Profession Act 2007* (QLD) s 49–50.

224. See Interview with David Franklin, Dir., Prof'l Standards, Queensl. Law Soc'y, in Brisbane, Austl. (Oct. 11, 2006) (on file with author).

225. See, e.g., *Legal Profession Act 2007* (QLD) s 52; *Legal Profession Regulation 2005* (NSW) reg 12 (2).

226. Anecdotally, we know that some individuals are never admitted to the bar. See, e.g., E. J. Montini, *Hamm's Journey: Convicted Killer to Model Citizen*, ARIZ. REPUBLIC, Feb. 7, 2010, at B1; *supra* note 152. We do not know, however, whether that is true for most individuals who are denied admission on character and fitness grounds.

if so, how do they conduct themselves in practice? Data from conditional admission programs should also be analyzed to determine whether those programs actually protect the public.

This research can only occur if bar regulators assist in this process. Regulators need to retain important records, compile relevant data,²²⁷ and make admissions and discipline information available to researchers subject to appropriate confidentiality agreements. It has been very difficult to obtain cooperation from regulators or courts for this purpose.²²⁸ I have heard from regulators who bemoan the lack of cooperation by other regulators within their own states and from well-respected academics who have attempted to obtain access to this information and been denied. Bar admission authorities cannot credibly claim that the character inquiry is needed to protect the public but then deny access to the information necessary to prove or disprove this claim. If they persist in this position, the burden of proof concerning an applicant's character and fitness to practice law should shift to bar authorities. Based on our current knowledge, bar authorities will be unable to meet that burden.

227. Bar regulators do not always maintain admissions files or records of diversion. *See* Baer & Corneille, *supra* note 24, at 6; Levin, *supra* note 140, at 2–6. Many also do not track important information. When writing this Article, I contacted some jurisdictions to ask about the incidence of discipline imposed on lawyers who were conditionally admitted. Of the three large jurisdictions that responded, two jurisdictions did not compile the information even for internal use.

228. For example, during the Connecticut study, I contacted other jurisdictions asking whether any of the Connecticut lawyers in the sample who were also admitted in that jurisdiction had received private discipline. Even though I was not asking about a particular individual (but rather about a group of lawyers on a list), in many cases regulators declined to answer to that question.

