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The Other Bar Hurdle: An Examination of the Character and Fitness Requirement for Bar Admission

David L. Hudson Jr.

Andrea Gemignani

THE OTHER BAR HURDLE: AN EXAMINATION OF THE CHARACTER AND FITNESS REQUIREMENT FOR BAR ADMISSION

David L. Hudson, Jr.[1] and Andrea Gemignani[2]

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[1] David L. Hudson, Jr. is an assistant professor of law at Belmont University College of Law. He is the author, co-author, or co-editor of more than forty books. He regularly writes on ethics issues for the ABA Journal. He also regularly represents applicants in character and fitness proceedings before the Tennessee Board of Law Examiners.

[2] Andrea Gemignani is a visiting assistant professor of legal practice at Belmont University College of Law.

I. INTRODUCTION

To become a licensed attorney, law school graduates must pass the dreaded bar exam, a two or three-day,[3] grueling exam that has been characterized as a brutal and hellish experience.[4] Many attorneys describe the exam as "among the most painful experiences of their lives."[5] But, there is a lesser known yet equally as important hurdle that bar applicants also must overcome—the character and fitness inquiry. Applicants have the burden to show that they are morally fit to practice law.[6] They must reveal a plethora of personal information, dating back years or even decades, depending on the age of the applicant.[7] They must reveal arrests, convictions, speeding tickets, bankruptcies, court judgments, employment discharges, and much more.[8] For some applicants, this may prove to be the most challenging part of the admission process.[9]

In her seminal work in 1985, Professor Deborah Rhode explained the dual purposes of the character and fitness requirement: (1) protecting the public given their inherent vulnerability created by the disproportionate knowledge of lawyers and the required trust for essential matters, and (2) protecting the courts and administration of justice from those who are dishonest (disposed to perjury or bribery).[10] Rhode also opined that there had not previously been "comprehensive historical or empirical research on the American bar's character mandates, and no systematic scrutiny of their underlying premises."[11] Despite Rhode's effective scrutiny and the continued scholarly criticisms of the practice over the intervening thirty-six years, the character and fitness requirement remains an entrenched part of

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[3] The vast majority of bar exams are two days. However, a few states—such as Delaware—still have three-day long bar exams. *Board of Bar Examiners of the Supreme Court of Delaware*, DEL. CT., https://www.courts.delaware.gov/bbe/ [https://perma.cc/9VE9-RCQW].

[4] Abigail Johnson Hess, *'Literal Hell'—How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers*, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html [https://perma.cc/ZVP9-YZ77]; Joe Patrice, *Bar Examiners Need to Chill the Hell Out*, ABOVE THE LAW (Apr. 20, 2021), https://abovethelaw.com/2021/04/bar-examiners-need-to-chill-the-hell-out/ [https://perma.cc/GSX8-CRS7].

[5] *See* Hess, *supra* note 4.

[6] David L. Hudson, Jr., *Honesty Is the Best Policy for Character-and-Fitness Screenings*, 102 A.B.A. J. 22 (June 1, 2016), https://www.abajournal.com/magazine/article/honesty_is_the_best_policy_for_character_and_fitness_screenings [https://perma.cc/Y3RU-HNS7].

[7] *Id.*

[8] *Id.*

[9] Joseph A. Valerio, *The Impact of the Character and Fitness Honesty and Financial Responsibility Requirements on Underprivileged Groups*, 30 GEO. J. LEGAL ETHICS 1093, 1093 (2017).

[10] Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 508–09 (1985).

[11] *Id.* at 493.

the bar application process.[12] In fact, Rhode and others have referred to the character and fitness requirement as the one "fixed star" of the bar admission process.[13] Therefore, as the legal community focuses on revamping the dreaded bar exam to better fulfill its intended purpose,[14] reconsideration of the character and fitness inquiry as part of the attorney licensing process should be part of the discussion as well.[15]

This Article seeks to survey the criticisms, possible justifications, and proposals for change to the character and fitness requirements for admission to state bars in the United States. While there is some state variation, the general process and the requirement of proving "good moral character" are similar.[16] Therefore, while we will provide specific state examples to highlight inconsistencies of application, we will focus on the National Council of Bar Examiners ("NCBE") as a standard example, since it provides character and fitness investigations on behalf of almost half of the states.[17] Section II provides historical background regarding the character and fitness requirements, including the intended purpose and its discriminatory origins. Section III offers an overview of the current process for investigating character and fitness and identifies some of the common issues that trip up bar applicants. Section IV summarizes the many scholarly criticisms and highlights the inequities and unintended consequences of the current system. Section V seeks to explain the reasons why character and fitness investigations remain in all fifty states despite the many valid criticisms. Sections VI and VII outline some proposed changes to the character and fitness process, including a recommendation that states expand the appropriate use of conditional admission in cases that warrant valid concern but should not establish a flat bar. In conclusion, this Article acknowledges character and fitness inquiries in some form are likely here to stay,[18] and it seeks to highlight those proposals with the best chance of being implemented to improve the current process and identify the necessary next steps for meaningful change.[19]

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[12] *See id.*

[13] *Id.* at 496.

[14] *See* Stephanie Francis Ward, *Big Changes for Bar Exam Suggested by NCBE Testing Task Force*, A.B.A.J. (Jan. 4, 2021), https://www.abajournal.com/news/article/big-changes-for-bar-exam-suggested-by-ncbe-testing-task-force [https://perma.cc/D3P9-X47K].

[15] *See infra* Section V.

[16] *See infra* Section III*; see also, e.g.*, NAT'L CONF. BAR EXAM'RS & AM. BAR ASS'N., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (Judith A. Gundersen & Claire J. Guback eds. 2021), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf [https://perma.cc/RN5B-75TW] [hereinafter NCBE GUIDE] (listing bar admission requirements).

[17] *See id.* at 5–6 (listing which states use separate entities to evaluate character and fitness).

[18] *See infra* Section VIII.

[19] *See infra* Section VI.

II. BRIEF HISTORICAL BACKGROUND

The history of requiring advocates to demonstrate their moral fitness dates back to ancient times.[20] During fourth century BCE, Aristotle recommended that public orators be "men of good character" to be convincing in their presentations.[21] The Theodesian Code in fifth century CE required advocates to be of "suitable character."[22] English law, the foundation for much of American jurisprudence, required lawyers to be not only "skillful" but also "honest."[23]

In early America, during colonial times, lawyers often had to have references from ministers before practicing in the courts.[24] Other states simply required the good word of a practicing attorney or certification from a judge.[25] But character screening was sporadically enforced at best.[26] Some attorneys, such as future President Andrew Jackson and U.S. Senator Thomas Benton, were admitted to practice despite questionable conduct, such as engaging in duels.[27] Perhaps the most notorious historical example of a nefarious individual becoming an attorney was the infamous John Wesley Hardin, the so-called "Dark Angel of Texas," who killed thirty to forty men before becoming a lawyer.[28]

In the 1920s and 1930s, states began developing what has become the current character and fitness process, with requirements for applicants to demonstrate good moral character and special committees to interview candidates to test their fitness.[29] For example, the New York bar was one of the first to establish a character and fitness committee to interview prospective attorneys, and thus also one of the first to have its denial of admission challenged and overturned by courts that found their inquiries inappropriate.[30] The California bar, by contrast, proposed the development of a type of residency program for lawyers where attorneys could only be admitted to practice after studying under a licensed attorney and being

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[20] *See* Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1196 (2008).
[21] *Id.* at 1196–97.
[22] *Id.* at 1197.
[23] Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visons of Good Moral Character*, 22 N. ILL. U. L. REV. 19, 19 (2001).
[24] *See, e.g.,* Richard L. Sloane, *Barbarians at the Gate: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397, 407 (2002).
[25] *Id.*
[26] Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" as a Professional Credential*, 40 AKRON L. REV. 255, 258 (2007).
[27] *Id.* at 261–62.
[28] *See* LEON METZ, JOHN WESLEY HARDIN: DARK ANGEL OF TEXAS 211 (1996).
[29] *Attorney and Client—Character Requirements for Admission to the Bar*, 40 YALE L.J. 304, 304–05 (1930) (citing Holmgren, *A Synopsis of the Present Requirements for Admission to the Bar in the States and Territories of the United States*, 5 AM. L. S. REV. 735, 736 (1928)).
[30] *Id.* at 304 (citing *In re* Brennan, 243 N.Y.S. 705 (App. Div. 1930)).

recommended by that attorney for admission.[31] Similarly, around this time, scholars began to question the effectiveness and appropriateness of state character and fitness requirements more generally, including the outer boundaries of appropriate inquiry and the preference for a system that focused on demonstrated and observed conduct.[32]

From a historical perspective, the sporadic enforcement across the country was also riddled with discrimination.[33] Countless African American attorneys were denied admission to the bar, a pattern of stark racial exclusion.[34] Sometimes, racial minorities were denied admission by local character and fitness panels even though they cleared all requisite hurdles.[35]

In the late nineteenth century, character and fitness requirements also were used to justify the systematic exclusion of women from the practice of law.[36] The U.S. Supreme Court infamously upheld the exclusion of Myra Bradwell from the Illinois bar, based on its expressed belief that women did not possess the character necessary to be attorneys.[37]

Legal ethics expert Keith Swisher is correct when he warns that "the real story hardly reveals a time-honored tradition."[38] He recounts a history of discrimination in the early twentieth century against racial minorities, Eastern European immigrants, and a general desire of some in the bar to reduce competition by excluding others.[39]

In the 1950s and 1960s, the targets were Communists.[40] For example, the Illinois bar—just like it did to Myra Bradwell—infamously excluded University of Chicago instructor and researcher George Anastaplo because he refused to answer questions about whether he had been a member of the Communist Party, a denial upheld by the Supreme Court.[41] Fortunately, the Supreme Court explained in a similar case, involving an applicant who may have had previous ties to the Communist party, that "[a] State can require high standards of qualification, such as good moral character or proficiency

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[31] *Id.* (citing 1 STATE BAR OF CALIFORNIA, PROCEEDINGS 197 (1928)).

[32] *See, e.g., id.* at 304–05.

[33] Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection,"* 2018 U. ILL. L. REV. 345, 349 (2018) (noting that the character and fitness process has a "checkered history").

[34] John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 1, 2 (2021).

[35] *Id.*

[36] Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (noting that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"); *see also* Rhode, *supra* note 10, at 497 (noting that "[t]he only substantial group effectively excluded on grounds of character seems to have been women").

[37] *Bradwell*, 83 U.S. at 142 (1872) (Bradley, J., concurring).

[38] Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 ST. JOHN'S L. REV. 1037, 1040 (2008).

[39] *Id.* at 1040–41.

[40] *Id.* at 1042.

[41] *In re* Anastaplo, 366 U.S. 82, 96–97 (1961).

in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."[42] This requirement of rational connection is still the standard today.[43]

III. OVERVIEW OF CURRENT PROCESS AND COMMON FACTORS FOR DENIAL OF CHARACTER CERTIFICATION

A. Overview of Character and Fitness Process

In collaboration with the American Bar Association ("ABA") Committee on Legal Education and Admission to the Bar, the NCBE annually publishes a Comprehensive Guide to Bar Admission Requirements for all fifty states.[44] This Guide includes a Code of Recommended Standards with suggestions for how states should conduct character and fitness investigations and what should be considered relevant for admission.[45]

According to the NCBE Recommended Standards (and consistent with Rhode's identified dual purposes for character inquiries), the stated purpose of a character and fitness investigation is "protection of the public and the system of justice."[46] To this end, NCBE identifies the following factors as "relevant conduct" or red flags in bar examiners' investigations for prospective lawyers:

- unlawful conduct
- academic misconduct
- making of false statements, including omissions
- misconduct in employment
- acts involving dishonesty, fraud, deceit, or misrepresentation
- abuse of legal process
- neglect of financial responsibilities
- neglect of professional obligations
- violation of an order of a court
- evidence of mental or emotional instability
- evidence of drug or alcohol dependency
- denial of admission to the bar in another jurisdiction on character and fitness grounds
- disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any

[42] Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 239 (1957).
[43] *Id.*
[44] NCBE GUIDE, *supra* note 16.
[45] *Id.*
[46] *Id.* at vii.

jurisdiction[47]

In practice, this means bar examiners can (and do) ask applicants to reveal information about arrests for misdemeanors and traffic violations, oftentimes even if they occurred when the applicant was a minor or were dismissed or expunged.[48] Similarly, the NCBE's relevant conduct factors allow inquiry into many financial matters, such as unpaid credit card accounts, student loan debt, and even child support obligations.[49]

In fact, based on these identified categories of relevant conduct, the current NCBE sample Character and Fitness Application, which was most recently revised in January 2021, is thirty-six pages long and continues to seek extensive information regarding the applicant including:

- citizenship status
- all residences and employment for the previous ten years with contact information for verification
- any previous bar admission in any state or court
- any other professional licenses
- any prior grievances or discipline related to prior admission or licenses, including providing copies of any related complaint
- educational history for law school and college, including both academic and disciplinary warnings
- mental health and substance abuse conditions and treatment
- involvement in any civil actions, including for divorce or child support with a requirement to provide copies of all pleadings
- any traffic violations at any time involving alcohol or drugs, including providing copies of all related documents
- any other moving traffic violations within the last ten years, including matters that were dismissed or expunged
- all criminal arrests and charges, except those resolved in juvenile court, even if dismissed or otherwise resolved without conviction, including providing copies of all related documents
- Any defaulted loans, revoked credit accounts or other debt more than 120 days past due;

[47] *Id.* at viii.

[48] *See e.g.*, NAT'L CONF. BAR EXAM'RS, NCBE Character and Fitness Sample Application, https://www.ncbex.org/dmsdocument/134 [https://perma.cc/EJD6-NYWL] (last revised Jan. 12, 2021); *see also* NCBE GUIDE, *supra* note 16, at vii–ix.

[49] *See* NAT'L CONF. BAR EXAM'RS, *supra* note 16, at viii.

- Any bankruptcy petitions; and
- Six personal references (not previously provided to verify employment history).[50]

The NCBE uses this sample application (or something similar) to conduct character and fitness investigations on behalf of many states while other states conduct their own initial investigations seeking information on many similar grounds.[51] The application's expansiveness and intrusiveness alone raises questions about whether such an inquiry is necessary or relevant to the practice of law.[52] More specifically, critics have asked whether any or all of this required information actually furthers the cited protective purposes of the character and fitness requirements.[53]

To add to the burden on applicants, most states expressly require full disclosure of all requested information and make false statements or failure of disclosure a reason to deny admission.[54] Thus, the number one rule for bar applicants should be that it is better to reveal than to conceal. The duty of candor is paramount in the bar application process.[55] If a bar applicant fails to disclose key information, such as a DUI arrest in another state or academic misconduct charges in college or law school, the damage could be fatal to the person's chances for admission.[56] If a character and fitness committee views an applicant as dishonest, the applicant likely will not become a licensed attorney.[57]

Even after revealing such extensive personal information, for any individual who discloses prior conduct that raises a "red flag," the investigation is only just the beginning, and NCBE directs that bar examiners should consider all the following factors in determining whether

[50] NAT'L CONF. BAR EXAM'RS, *supra* note 48.

[51] *See id.*; NAT'L CONF. BAR EXAM'RS, *supra* note 16 ("On behalf of participating jurisdictions, NCBE conducts character and fitness investigations on applicants seeking a license to practice law. Not all jurisdictions use NCBE's investigation services.").

[52] *See* Leslie Levin, Christine Zozula & Peter Siegelman, *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 L. & SOC. INQUIRY 51, 52 (2015).

[53] *See, e.g.*, Rhode, *supra* note 10, at 509 (identifying the essential question for evaluating the character and fitness process as the effectiveness of the current system at actually identifying and excluding individuals who are likely to engage in future misconduct); *see also* NCBE GUIDE *supra* note 16, at vii ("The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice.").

[54] *See, e.g.*, Tenn. Sup. Ct. R.8, RPC 8.1 ("An applicant for admission to the bar . . . shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority . . .").

[55] Hudson, *supra* note 6.

[56] *See id.*; *see, e.g.*, *In re* Worthy, 991 N.E.2d 1131 (Ohio 2013); *In re* Wagner 893 N.E.2d 499 (Ohio 2008); *In re* Laughlin 922 So. 2d 475 (La. 2006).

[57] *See, e.g., In re* Payne, 715 S.E.2d 139 (Ga. 2011).

the conduct justifies denying admission.[58] Specifically, NCBE directs the states that:

> the following factors should be considered in assigning weight and significance to prior conduct:
>
> - the applicant's age at the time of the conduct
> - the recency of the conduct
> - the reliability of the information concerning the conduct
> - the seriousness of the conduct
> - the cumulative effect of conduct or information
> - the evidence of rehabilitation
> - the applicant's positive social contributions since the conduct
> - the applicant's candor in the admissions process
> - the materiality of any omissions or misrepresentations.[59]

In practice, this means some bar applicants face insurmountable hurdles, and many others face multiple (and time-consuming) layers of review beyond the initial written character and fitness application, including individual interviews with character and fitness committee members, the possibility of one or more hearings before a committee or the full Board of Bar Examiners in their state, and then the possibility of needing to appeal the Board's decision to the state supreme court to seek admission.[60] As explained in more detail below, individuals with criminal convictions (particularly felonies) and academic misconduct charges (particularly during law school) may face the most difficult hurdle during the character screening process.[61] In fact, a few states have rules that provide a significant barrier or a complete bar to admission for those applicants with a felony conviction.[62] However, all "red-flagged" applicants receive some form of correspondence from their state bar examiners, often in the form of a letter informing them

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[58] NCBE GUIDE, *supra* note 16, at ix.

[59] *Id.*

[60] *See, e.g.*, MD R. ATTORNEYS, RULE 19-103; *id.* at 19-204 (explaining Maryland's multi-layer system of character and fitness review for bar applicants).

[61] *See generally* Anthony J. Graniere & Hilary McHugh, *Are You in or Are You Out? The Effect of a Prior Criminal Conviction on Bar Admission & A Proposed National Uniform Standard*, 26 HOFSTRA LAB. & EMP. L.J. 223 (2008) (explaining the high bar individuals with criminal convictions face); Sydney Wright-Schaner, *The Immoral Character of "Good Moral Character"—The Discriminatory Potential of the Bar's Character and Fitness Determination in Jurisdictions Employing Categorical Rules Preventing or Impeding Former Felons from Being Barred*, 29 GEO. J. LEGAL ETHICS 1427, 1430 (2016) (explaining the difficulty former felons face in the character and fitness process).

[62] *See, e.g.*, IND. ADMISSION & DISCIPLINE R. 12(2) ("Anyone who has been convicted of a felony *prima facie* shall be deemed lacking the requisite of good moral character as defined in this section.") (emphasis added).

they have a show-cause hearing to address the Board of Law Examiners' concerns about their character and fitness.[63]

Keep in mind that bar applicants have the burden of showing by clear and convincing evidence that they possess the requisite degree of character and fitness.[64] As some critics have noted, this is a more burdensome standard than practicing attorneys who are charged with violations of professional conduct rules and are facing discipline or disbarment, since practicing attorneys do not bear the burden of proving their good character.[65] Additionally, while states often frame the obligation as a requirement for applicants to prove—by clear and convincing evidence—good moral character, including honesty and trustworthiness, the focus of the inquiry in practice is often on requiring applicants to explain prior misconduct rather than offer evidence of good conduct.[66] And, in at least some states, any questions of fitness are resolved against the applicant in favor of protecting the public.[67]

As part of its annual report, NCBE also provides data collected from each state about its requirements for bar admission. Relevant to this analysis of character and fitness requirements, NCBE reported for 2021 the following data:

- Eleven states report that they do not currently have published standards for character and fitness, despite requiring applicants to affirmatively prove that they have the requisite moral fitness to practice law.

- Eleven states also currently require applicants to be approved for admission based on character and fitness prior to being allowed to take the state's bar exam.

[63] Hudson, *supra* note 6.

[64] *See, e.g.*, OHIO GOV. BAR R. 1(11)(D)(1) (placing burden on applicant to prove good moral character by clear and convincing evidence); *see also* R.I. SUP. CT. R. Art. II, R. 4 (placing burden on applicant and requiring clear and convincing evidence).

[65] Rhode, *supra* note 10, at 547 (noting apparent double standard between applicants and practicing attorneys and the fact that "both substantive and procedural requirements are more solicitous of practitioners than applicants").

[66] *See* Swisher, *supra* note 38, at 1043–44 (explaining that "'good' moral character means the absence of proven 'misconduct'" and "the inqiury almost exclusively looks at past [bad] acts").

[67] *See, e.g.*, *In re* Admission to the Bar, 828 N.E.2d 484, 489 (Mass. 2005) (citing *In re* Prager, 661 N.E.2d 84, 100 (Mass. 1996), quoting *In Re* Jaffee, 874 P.2d 1299, 1302 (Or. 1994)).

- Twenty-three states have a process for conditional admission for some categories of individuals whose applications raise concerns about character and fitness based on things such as past substance abuse, criminal history, mental health concerns, or debt.[68]

The cases where courts have decided whether a bar applicant meets the character and fitness requirements for bar admission help illustrate the real-world implications of the current system.[69] However, as many scholars have noted, the cases reviewed by courts are only a subset of the potential applicants impacted by character and fitness rules.[70] Many persons likely avoid even applying to law school or for bar admission based on personal histories.[71] Other applicants are flagged for additional investigation but granted certification without needing to resort to court appeal.[72] Still, others are denied certification by state Character and Fitness Committees or by a state Board of Bar Examiners without the ability or inclination to appeal that decision in court.[73] Therefore, while it is generally accepted that a small percentage of applicants are actually denied admission on character and fitness grounds, the impact of employing this "moral" barrier to entry is greater than reflected in these numbers.[74]

B. Common Factors for Denial of Character Certification

As noted previously, honest and complete disclosure in response to all character and fitness questions (despite the extensive and intrusive inquiries)

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[68] *Chart 2: Character and Fitness Requirements*, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, https://reports.ncbex.org/comp-guide/charts/chart-2/ [https://perma.cc/5EFE-VFJ6].

[69] *See* Hadar Aviram, *Moral Character: Making Sense of the Experiences of Bar Applicants with Criminal Records*, 43 MAN. L.J. 1, 18 (2019); *see also* Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J. FORUM 759, 767 (2019).

[70] *See* Rhode, *supra* note 10, at 517 (noting deterrent effect of character requirements on both law school applicants and those who withdraw bar applications in the face of character challenges).

[71] Leslie Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 2014 BYU L. REV. 775, 777 (2014); *see also* Allyson McCain, *The Moral Character Evaluation: Proving That Your Past Does Not Define Your Future*, 61 GOLDEN GATE U. L. REV. BLOG (Apr. 21, 2019), https://ggulawreview.com/2019/04/21/the-moral-character-evaluation-proving-that-your-past-does-not-define-your-future/ [https://perma.cc/345X-4G9W] (noting the example of Bruce Reilly, who was previously convicted of second degree murder, graduated from law school in 2014 and has decided not to attempt bar admission based on past conviction).

[72] Rhode, *supra* note 10, at 516.

[73] Levin, *supra* note 71, at 783–84.

[74] Rhode, *supra* note 10, at 493–94.

is key to success.[75] One of the primary reasons cited by courts across the country for denying bar admission on character and fitness grounds is lack of candor.[76] Since proving good moral character is broadly tied to evidence of honesty and trustworthiness, the prominent role of lack of candor to justify denying admission appears consistent.[77] This lack of candor, however, appears to take many forms including: lack of full disclosure of past conduct on law school or bar applications, inconsistent or insufficient explanations for areas of concern identified by bar committees during their investigation, and failing to demonstrate sufficient appreciation for the seriousness of the underlying misconduct.[78] Lack of candor appears to be a catchall category for applicants who a board or court decided not to admit.[79] Even when Boards do not cite lack of candor as the primary reason for denying admission, it is regularly included as an additional justification along with other identified concerns to further support denying admission.[80]

Another broad (and sometimes vague) reason for exclusion is "willful disrespect for the law."[81] Like lack of candor, this justification for denying certification appears consistent with a fitness standard for individuals who will become officers of the court, but is also inconsistently interpreted and applied, and can take many forms.[82] At its core, disrespect for the law is the reason offered for excluding individuals with some kind of criminal history.[83] It may also be the reason offered for denying admission to individuals who have demonstrated disrespect for court orders or for individuals who participate in protests or otherwise challenge governmental or judicial authority more generally.[84] However, it has also been raised as a justification for denying character certification for immigrants who lack official

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[75] Hudson, *supra* note 6.

[76] Megan E. Davis, *Attorney Loses License for Lack of Candor in Application Process*, FLA. BAR NEWS (July 1, 2013), https://www.floridabar.org/the-florida-bar-news/attorney-loses-license-for-lack-of-candor-in-application-process/ [https://perma.cc/BS7K-K7PM].

[77] Hudson, *supra* note 6.

[78] *See e.g.*, *In re* Application of Brumbaugh, 2021 WL 983255 (Ohio 2021); *In re* Grundstein, 183 A.3d 574 (Vt. 2018); *In re* Huddleston, 777 S.E.2d 438 (Ga. 2015); *Matter of* Knight, 211 A.3d 265 (Ct. App. Md. 2019); *In re* Phillips, 175 A.3d 824 (Ct. App. Md. 2017).

[79] Memorandum from Bedford T. Bentley, Jr., Sec'y Md. State Bd. of Law Exam'rs to First Year Law Students (May 18, 2009), http://law.ubalt.edu/downloads/law_downloads/admiss_msbe_bar_letter.pdf [https://perma.cc/FQ5E-N7VQ].

[80] *See, e.g.*, *In re* Overall, 175 A.3d 666 (Md. 2017); Fla. Bd. of Bar Exam'rs re R.B.R., 609 So. 2d 1302 (Fla. 1992).

[81] *In re* Admission to the Bar, 729 N.E.2d 1085, 1088 (Mass. 2000).

[82] *See* Rhode, *supra* note 10, at 538.

[83] *See id.* at 537.

[84] *See id.* at 567; *see also, e.g.*, *In re* Anderson (Office of Attorney Licensing), 249 A.3d 305 (Vt. 2020); *In re* Comm. on Bar Admissions CFN-461218, 221 So.3d 835 (La. 2017) (denying application based on disreard for court orders); *In re* Chalupowski, 41 N.E.3d 51 (Ma. 2015).

documentation.[85]

Another related category for denying character and fitness certification, which may be a combination of the prior two categories, is a lack of respect for the character review process itself. Individuals whose admission is denied on these grounds are viewed by the review committee, board, or court as failing to take the character and fitness review process seriously, being uncooperative or evasive in response to committee requests, or even being actively hostile to committee members during review hearings.[86]

Another justification cited for denying admission is financial irresponsibility, which also may be a variation of disrespect for the law and the rights of others.[87] This may encompass individuals with significant student loan debt, especially when those loans are in default and the individual has not taken steps for responsible repayment.[88] It can also include individuals who have failed to pay their state or federal income taxes, and individuals who otherwise have unsatisfied judgments against them.[89] Sometimes it involves individuals who have filed bankruptcy, but only if the reason for the filing is viewed as irresponsible or an attempt to avoid legal obligations.[90]

Given the expansiveness of the character and fitness inquiry, the very real and significant impact it has on an individual's decisions to attend law school and ultimately to be able to work in their selected field, and the varied factors that can lead to a denial of bar admission, many critics have raised concerns about the current process and suggested improvements in the process to eliminate unintended consequences and more efficiently and

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[85] *See, e.g.*, *In re* Garcia, 315 P.3d 117 (Cal. 2014) (granting admission to an undocumented immigrant and addressing arguments of amici that status as an undocumented immigrant demonstrates a current violation of law); *see also* Paulo Edmundo Ochoa, *Education Without Documentation: As Plyler Students Reach New Heights, Will Their Status Make Them Morally Unfit to Practice Law?*, 34 T. JEFFERSON L. REV. 411 (2012).

[86] *See, e.g.*, *In re* A.S., 173 A.3d 1280 (R.I. 2017) (denying admission for displaying hostility to committee and resisting requests for information during review process).

[87] *See, e.g.*, *In re* Mikulin, 49 N.E.3d 287 (Ohio 2016) (noting financial irresponsibility demonstrated lack of respect for law); *In re* T.Z.-A.O., 105 A.3d 492 (Md. 2014); Artem M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M. L. REV. 383, 393–95 (2020).

[88] *In re* Griffin, 943 N.E.2d 1008 (Ohio 2011) (denying admission based on significant student loan debt and lack of plan for repayment); *see also* Kaela Raedel Munster, *A Double-Edged Sword: Student Loan Debt Provides Access to a Law Degree But May Ultimately Deny a Bar License*, 40 J. Coll. & U. L. 285 (2014).

[89] Fla. Bd. of Bar Exam'rs re B.U.U., 124 So. 3d 172 (Fla. 2013) (denying admission to applicant who failed to pay state or federal income taxes or to keep up with payment plans and noting that Florida attorneys had been disbarred for similar conduct).

[90] *See, e.g.*, *In re* Steffen, 261 P.3d 1254 (Or. 2011) (noting that filing for bankruptcy is not a hurdle to admission but that it was appropriate for the committee to investigate the circumstances of the bankruptcy because, when used to escape irresponsible financial behavior and mismanagement, it can be an appropriate factor in determining fitness).

effectively serve its intended purposes.[91]

IV. CRITICISMS OF THE CHARACTER AND FITNESS PROCESS

Many criticisms surrounding the character and fitness process are longstanding.[92] The criticisms fall into several broad categories but include variation and nuance as well. At the broadest level, critics question whether the character and fitness system effectively serves its intended purpose.[93] Specific criticisms include concerns that: (A) past conduct is a poor predictor of future behavior; (B) the lack of clear rules and inconsistent enforcement make the process too subjective and unpredictable; (C) creating insurmountable hurdles for individuals with prior criminal involvement is inconsistent with a justice system that claims to favor rehabilitation; (D) the current process is discriminatory with unintended consequences for individuals of color, individuals with disabilities, and possibly individuals of lower socioeconomic status as well; (E) the cost of implementing the character and fitness assessment is an unreasonable burden in terms of time and money that could be more effectively focused elsewhere; and (F) the current system for assessing character and fitness continues to raise constitutional concerns.[94]

A. Ineffective Proxy for Intended Purpose

A chief criticism of the character and fitness process is that there is little evidence the character and fitness process actually protects the public by removing those individuals from consideration that would be the most problematic as lawyers.[95] Ethics expert Leslie Levin wrote that "[t]here are enough questions about the value of the character and fitness inquiry to merit reconsidering the wisdom of continuing the inquiry as currently constituted."[96] Levin identified specific concerns about the questions asked as part of the character and fitness inquiry, noting that "[t]he questions are not derived from—nor have they ever been validated using—psychological assessment tools and it is unclear what they actually measure."[97] She acknowledged that it is "unlikely that any profession or regulatory body would license individuals who, at the time of application, are incarcerated

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[91] *See, e.g.*, Rhode, *supra* note 10; Levin, *supra* note 71.

[92] *See, e.g.*, Rhode, *supra* note 10 (identifying many of the criticisms of the character and fitness process still asserted today including: lack of clear definition, inconsistent enforcement, arbitrariness, lack of connection between prior conduct and future behavior, unfair impact of individuals with prior justice involvement, constitutional concerns, and the inefficiency and costs of the system).

[93] *See id.*

[94] *See id.*

[95] *See generally* Levin, *supra* note 71.

[96] *Id.* at 798.

[97] Levin et al., *supra* note 52, at 52.

for serious crimes or hospitalized for incapacitating psychological disorders," but she added that based on the lack of evidence of the predictive value of prior conduct on future action that "the current character inquiry appears to be an ineffective method of determining who *else* should be denied admission to the bar."[98]

Similarly, more than thirty-five years ago, Rhode identified that "[t]he critical empirical question" for evaluating the character and fitness process is to determine "the effectiveness of current procedures in identifying those likely to engage in future misconduct."[99] The answers that emerged in the intervening years are that it is not very effective at all. In fact, social science research consistently has shown that past conduct alone is not a good predictor of future behavior.[100] For example, research has shown that conduct is strongly influenced by situational factors and that character is not static.[101] Therefore, a system based primarily on a review of applicant's prior conduct, especially conduct lacking temporal proximity, is unlikely to further the intended purposes of protecting the public or protecting the judicial system because it is likely to be both under- and over-inclusive, screening out those who are unlikely to violate public trust, while admitting many who will. Rhode also noted that for many applicants, the character inquiry comes too soon, before they are faced with the stresses and challenges of legal practice (i.e., the situational factors) that are more likely connected to future conduct.[102]

B. Inherent Subjectivity, Implicit Bias, Arbitrary Application & Resulting Lack of Predictability

Another essential flaw with the process for evaluating character and fitness for admission to the bar that is repeatedly highlighted by critics is the simple fact that there is no one agreed upon definition of "good moral

[98] Levin, *supra* note 71, at 804.
[99] Rhode, *supra* note 10, at 509.
[100] Levin, *supra* note 71, at 775.
[101] Deborah Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 L. & SOC. INQUIRY 1027, 1028 (2018); *see also* W. Bradley Wendel, *Stephen Glass, Situational Forces, and the Fundamental Attribution Error*, 4 J. L. PERIODICAL LAB'Y OF LEGAL SCHOLARSHIP 99 (2014) (adding to the understanding of the implications of psychological research the concerns about fundamental attribution error, which is that people tend to attribute wrongdoing to character flaws without consideration of situational forces).
[102] Rhode, *supra* note 10, at 515–17.

character."[103] The term itself is vague.[104] In fact, in one of the few character and fitness challenges to reach the Supreme Court, Justice Hugo Black warned that the term "good moral character" was vague and could lead to problems:

> [T]he term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.[105]

While some states do attempt to define the term "good moral character," the definitions shed little light on the actual conduct that meets the standard or raises concerns, and several states still lack any written policies regarding good moral character despite requiring applicants to demonstrate it for bar admission.[106]

As a result of vague definitions and lack of clear rules, attempts to define "good moral character" necessarily draw on the subjective beliefs of examiners applying the standard and incorporating their implicit biases.[107] The inherent subjectivity leads to inconsistent and arguably palpably unfair results.[108]

The lack of consistency results in uneven application and enforcement.[109] Even the most cursory review of the case law illustrates the fact that apparently similar cases are not treated similarly in the context of evaluating character, either across or even within jurisdictions.[110] In a more

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[103] *See, e.g.*, Marcus Ratcliff, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 488 (2000) ("Unlike an absolute that may be found in science, the concept of character has no universally accepted definition; thus, a major problem arises. Ambiguous notions of good character coupled with vague tests for judging an applicant's character, have resulted in inconsistent results in bar admission cases.").

[104] *Id.* at 488–89 (attempting to define the requirement as "possess[ing] the character needed to successfully and ethically practice law").

[105] Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957).

[106] *See supra* text accompanying note 68.

[107] Michael C. Wallace, Sr., *Moral Character and Fitness Means More Than Just a Passing Score to the Board of Law Examiners*, 7 CHARLOTTE L. REV. 157, 161 (2016).

[108] *See, e.g.*, *In the Matter of Nash*, 257 P.3d 130 (Alaska 2011) (noting applicant had been previously admitted in Iowa and expressing concern of potential bias at board hearing level where admission was denied); *see also In re* Burke, 775 S.E.2d 815 (NC 2015) (noting applicant was previously admitted in D.C. but was denied admission in N.C.)

[109] *See* Swisher, *supra* note 38.

[110] *Compare In re* Phelps, 878 N.E.2d 1037 (Ohio 2007) (applicant denied admission in part because of two prior DUI arrests), *with In re* Beers, 118 P.3d 784 (Or. 2005) (applicant admitted despite criminal history including drug conviction); *compare In re* Wiesner, 94

recent article, Rhode criticizes the striking variation between states regarding the type of conduct that may result in denial of bar admission on character and fitness grounds.[111] She even provides stark examples of apparently inconsistent application where individuals with prior misconduct appearing minor on its face, such as criminal charges related to violating state fishing license laws, are denied admission, while those with more serious criminal conduct, such as child molestation, are admitted.[112] However, Rhode also acknowledges that "[o]ne fundamental challenge in crafting a reform agenda is how to balance competing values: consistent treatment of similar conduct, and individualized consideration of all the situational factors that affect conduct and influence our character judgments."[113]

C. Potentially Insurmountable Hurdle for Individuals with Prior Criminal Convictions

Beyond the general lack of clarity and inherent arbitrariness and bias, some critics believe the process is too unforgiving of those who have a felony on their record. One commentator explains it is a "herculean feat" for someone with a felony conviction to become a lawyer.[114]

While only three states (Kansas, Mississippi, and Texas) reported to NCBE in 2021 that felony convictions are an express bar to admission, in several other states, a felony conviction effectively bars admission for an extended time.[115] In Montana, for example, applicants with felony convictions are ineligible for admission until completion of their sentence or probation.[116] In Missouri, that period of inadmissibility extends for an additional five years after completion of their sentence or probation.[117] In Oregon, such applicants are ineligible indefinitely if the conviction would have led to disbarment for an individual who had been a practicing attorney at the time.[118]

In fact, in NCBE's 2021 Comprehensive Guide to Bar Admission Requirements ("NCBE Guide"), many state respondents elaborated on their claim that felony convictions are not an express bar to entry with supplemental remarks explaining that felony convictions do set a higher bar by creating a rebuttable presumption of lack of good moral character, trigger additional requirements for admission such as restoration of civil rights, or,

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A.D.3d 167 (N.Y. 2012) (attorney readmitted to bar despite serious criminal history), *with In re* Prager, 661 N.E.2d 84 (Mass. 1996) (applicant denied admission because of criminal history years earlier).

[111] Rhode, *supra* note 10, at 1034.

[112] *Id.*

[113] *Id.* at 1046.

[114] Wright-Schaner, *supra* note 61, at 1430.

[115] *See* NCBE GUIDE, *supra* note 16, at 6–7.

[116] *Id.*

[117] *Id.*

[118] *Id.*

at a minimum, require formal hearings prior to admission.[119] While not included in the NCBE Guide, according to the Ohio Supreme Court, Ohio law prohibits the Board of Commissioners on Character and Fitness from approving the character and fitness of an applicant who has been convicted of a felony until after the applicant is released from "parole, probation, community control, post-release control, or prison."[120] Ohio's heightened scrutiny also is triggered for individuals adjudicated delinquent as minors for conduct that would have been a felony if committed by an adult.[121] In fact, Ohio is one state that requires applicants to disclose all juvenile offenses, even if expunged from their record.[122]

Beyond these express requirements, the hurdles for previously justice-involved individuals are significantly higher than other applicants in all states.[123] One of the largest practical hurdles beyond the heightened scrutiny and time-consuming formal hearings is the express obligation for applicants with a criminal history to prove rehabilitation as a condition of admission.[124] As with other criteria, required evidence of rehabilitation varies greatly across jurisdictions.[125] However, it generally requires more than just proof that the individual has not committed any additional criminal acts (including sometimes even traffic offenses).[126] Instead, applicants have the burden to offer sufficient evidence that they made amends for their prior misconduct by giving back to the community and developing a consistent reputation for

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[119] *Id.*

[120] OHIO GOV. BAR R. I(13)(D)(5)(a)(i).

[121] *See, e.g.*, *In re* Morris, 175 N.E.3d 481 (Ohio 2021) (citing OHIO GOV.BAR R. I(13)(D)(5)(a) and I(14) requiring review by Board of Commissioners on Character and Fitness despite recommendation of admissions committee that the applicant satisfied requirements for character and fitness).

[122] OHIO GOV.BAR R. I(13)(D)(1) (noting that failure to provide requested information including information about "expungements and juvenile court proceedings" is grounds to disapprove application).

[123] *See* Simmons, *supra* note 69, at 760 n.7 (elaborating on "formerly justice-involved individuals").

[124] *See, e.g.*, *In re* Anonymous, 116 A.D.3d 62, 74 (N.Y. 2014) (holding that the test was "whether his post-conviction life has been so exemplary as to make amends for his crimes" with a higher bar for more severe crimes and that despite evidence that the applicant had lived a commendable life since being released from prison, including several positive character references from prominent individuals, his evidence lacked the "extraordinary achievements" that they were looking for given his past record).

[125] *Compare In re* Anonymous, 116 A.D.3d, *with In re* Wiesner, 94 A.D.3d 167 (N.Y. 2012) (holding that the applicant has finally proven sufficient rehabilitation on tenth application to the New York bar after being admitted and successfully practicing in several other jurisdictions). *See* Maureen M. Carr, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards*, 8 GEO. J. LEGAL ETHICS 367, 386 (1995) (explaining survey results to states about impact of criminal convictions and evidence of rehabilitation on bar admission).

[126] *See, e.g.*, *In re* Payne, 715 S.E.2d 139 (Ga. 2011) (holding that applicant with criminal conviction must prove "complete rehabilitation," which requires more than just being a functioning member of society who is married, holding a job, and supporting a family).

honesty and integrity, which is established by offering multiple exemplary character references from respected witnesses in the local legal community.[127] However, some courts, even when presented with multiple glowing references and evidence of significant pro bono work, find that the applicant's rehabilitation is still insufficient given the seriousness of their prior conduct.[128] Other courts have even expressly acknowledged that for some applicants, despite turning their life around after being released from prison, the barrier to admission is insurmountable.[129]

Tarra Simmons's admission to the bar by the Washington Supreme Court in 2018 after being denied character and fitness certification by the state Board of Bar Examiners is an often cited example of the failure of the current system with regard to individuals with prior criminal convictions.[130] Simmons had a long history of substance abuse, two criminal convictions, and two bankruptcies.[131] After she was released from prison, however, Simmons, by all accounts, turned her life around; she became the first in her family to attend college, then graduated from law school at the top of her class with a Skadden Fellowship.[132] Despite numerous glowing recommendations, six years of sobriety, no further criminal involvement, and significant community service, the Washington Board of Bar Examiners denied her application on character and fitness grounds.[133] Fortunately, the supreme court reversed this decision, and Simmons is practicing law, advocating for the rights of previously incarcerated individuals and bringing a unique perspective to the bar, which critics of the character review process view as beneficial to clients and the legal profession.[134]

In her own words, Simmons explained the board denied her application for two reasons:

> First, the majority of the Board concluded that my six years of

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[127] *See generally* Simmons, *supra* note 69; *see, e.g.*, *In re* Stephen Randall Glass on Admission, 316 P.3d 1199 (Cal. 2014) (denying admission because applicant failed to demonstrate he made amends for prior conduct by giving back to community or otherwise demonstrating exemplary conduct).

[128] *See, e.g.*, *In re* Dortch, 860 A.2d 346 (D.C. 2004) (noting that despite an "impressive array of strong character references," the applicant was denied due to the seriousness of his underlying felony conviction for murder).

[129] *In re* Matthews, 462 A.2d 165, 172 (N.J. 1983) ("[I]n the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.").

[130] *In re* Simmons, 414 P.3d 1111 (Wash. 2018); *see also* Jennifer Aronson, Comment, *Rules Versus Standards: A Moral Inquiry into Washington's Character & Fitness Hearing Process*, 95 WASH. L. REV. 997 (2020) (using Simmons' case as her opening example of the problems with the character and fitness process for formerly justice involved individuals); McCain, *supra* note 70.

[131] *Simmons*, 414 P.3d at 1112.

[132] *Id.* at 1113.

[133] *Id.* at 1113–14.

[134] *Id.*

> rehabilitative efforts were not enough; rather, my efforts were "tender," "still fragile," and "still in their infancy." Second, the Board concluded that I possessed an attitude displaying "a sense of entitlement to privileges and recognition beyond the reach of others" based on my advocacy for admission and the public recognition I had received because of some of my accomplishments.[135]

In other words, they did not like her attitude. As noted by the court, the board denied her admission to the bar in part because they decided she had not displayed sufficient remorse for her prior conduct.[136]

Simmons's experience thereby exemplifies one scholarly concern that bar applicants with prior criminal involvement, in addition to clearing higher hurdles for admission, also apparently need to sufficiently "perform" genuine remorse in order to convince board members that they are worthy of admission.[137] Based on interviews with formerly justice-involved individuals as well as individuals who evaluate bar applications for character and fitness, this commentator explained the fine line applicants felt required to walk between admitting guilt, explaining their prior conduct, and demonstrating sufficient rehabilitation—all without being perceived as deflecting responsibility or minimizing prior bad actions.[138] Even for those individuals who were ultimately admitted to practice, they experienced the process as being one of the worst in their lives.[139] The author also noted that the social science research shows an inability of others to accurately judge remorse (despite their own overestimations of their abilities).[140] When combined with cultural differences in the way individuals express remorse, this raises concerns that the current system is both inherently ineffective and potentially discriminatory.[141]

There are many other examples of exceptional attorneys who overcame felony convictions and are practicing law. Perhaps the most notable example in recent years is the celebrated case of Shon Hopwood (Simmons's attorney for her appeal before the Washington Supreme Court), who was convicted of robbing several banks and now teaches law at Georgetown University.[142] Another example is Nashville-based criminal

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[135] Simmons, *supra* note 69, at 767–68.

[136] *See id.*

[137] Aviram, *supra* note 69, at 18.

[138] *See id.* at 15 ("The most important service we offer people is framing. It's a delicate balance between explaining what happened to you in context and being seen as if you're deflecting blame for what you've done.").

[139] *Id.*

[140] *Id.* at 29.

[141] *Id.*

[142] Steve Kroft, *Meet a Convicted Felon Who Became a Georgetown Law Professor*, CBS NEWS (July 21, 2019), https://www.cbsnews.com/news/60-minutes-meet-a-convicted-felon-

defense attorney Keeda Haynes, who spent a few years in federal prison as a young woman and now is not only an efficacious criminal defense attorney but a noted public speaker at law conferences across the country.[143]

D. Continued Discriminatory Effects

1. Unintended Consequence of Discouraging Applicants of Color and Magnifying the Effects of a Discriminatory Criminal Justice System

Another criticism is that the process still is potentially discriminatory. While the process today is handled by professionals who do not engage in rank discrimination, one commentator warns that this process may have a "racially discriminatory impact" on African American applicants given iniquities in the criminal justice system.[144]

Much has been written about race discrimination in the criminal justice system in terms of arrests, prosecutions, and sentencing.[145] When combined with the sometimes insurmountable hurdle for bar applicants with prior criminal justice involvement, the attorney licensing system effectively magnifies this discrimination. Critics note that, in light of this connection, it is maybe not surprising that there is a concerning lack of diversity in law schools and among practicing lawyers.[146] As mentioned previously, part of the concern with the current system is that the relatively small number of applicants denied admission on character and fitness grounds is an underrepresentation of the true impact. Therefore, critics have explained that the current system has the unintended effects of discouraging applicants

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who-became-a-georgetown-law-professor-shon-hopwood-2019-07-21/ [https://perma.cc/FD2A-2D2T]; Susan Svrluga, *He Robbed Banks and Went to Prison. His Time There Put Him on Track for a New Job: Georgetown Law Professor*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/21/bank-robber-turned-georgetown-law-professor-is-just-getting-started-on-his-goals/ [https://perma.cc/NH35-7444].

[143] KEEDA HAYNES, BENDING THE ARC: MY JOURNEY FROM PRISON TO POLITICS (2021); Steven Hale, *Keeda Haynes Brings Something Different to the Public Defender's Office — Five Years Spent in Prison*, NASHVILLE SCENE, (Aug. 18, 2016), https://www.nashvillescene.com/news/coverstory/keeda-haynes-brings-something-different-to-the-public-defender-s-office-five-years-spent-in/article_caa8c851-e0ae-53d2-8e11-328f41fcd54d.html [https://perma.cc/C6ED-66QZ]; *A Tale of Two Inmates: The Human Toll of Incarceration*, CATO INST. (Mar./Apr. 2017), https://www.cato.org/policy-report/march/april-2017/tale-two-inmates-human-toll-incarceration [https://perma.cc/42NJ-WBSN?type=image].

[144] Wright-Schaner, *supra* note 61, at 1437.

[145] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION THE AGE OF COLORBLINDNESS (1st ed. 2010).

[146] Jay E. Mitchell, *Character and Fitness: The Underrepresentation of Black Men in Law*, A.B.A. (Mar. 8, 2017), https://www.americanbar.org/groups/litigation/committees/consumer/articles/2017/winter2017-character-and-fitness-the-underrepresentation-of-black-men-in-law/ [https://perma.cc/6YGZ-AG39].

of color from even seeking admission, and those who do seek admission may be denied or delayed, thereby continuing the cycle of underrepresentation of individuals of color in the bar.[147]

2. ADA Violations & Consequences for Applicants Seeking Needed Mental Health and Substance Abuse Treatment

Another criticism focuses on asking applicants about their mental health.[148] Mandatory mental health queries can raise concerns under the Americans with Disabilities Act of 1990 ("ADA"), as well as raising concerns about law student well-being and the likely effect of discouraging some individuals from seeking needed mental health support based on a fear that it may impact their ability to be admitted to the bar.[149]

The ADA is the federal law that protects individuals with disabilities from discrimination by seeking to ensure equal access to jobs, programs, and services.[150] In particular, Title II of the ADA ("Title II") prohibits public entities from excluding eligible individuals with disabilities from its programs and services.[151] As authorized by Congress, the U.S. Department of Justice ("DOJ") develops and enforces regulations to implement the protections guaranteed by the ADA.[152] Accordingly, state courts, boards of bar examiners, and character and fitness committees are considered "public entities" subject to the requirements of Title II.[153] And professional licensing is considered a benefit to which individuals cannot be excluded based solely on their status as an individual with a disability or based on stereotypes about

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[147] *Id.* (noting that the deterrent imposed by the character and fitness requirement is particularly pronounced when it comes to black men).

[148] David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, A.B.A. (Jan. 22, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing/ [https://perma.cc/7DUE-2AC7].

[149] *Id.*

[150] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 [hereinafter ADA].

[151] 42 U.S.C. §12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

[152] 42 U.S.C. §12134(a); 28 C.F.R. § 35.101 (2016).

[153] *See Department of Justice Reaches Agreement with Louisiana Supreme Court to Protect Bar Candidates with Disabilities*, U.S. DEP'T OF JUST. (Aug. 15, 2014), https://www.justice.gov/opa/pr/department-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates [https://perma.cc/57T7-A2J8] (defining the Louisiana court, committee on bar admissions and disciplinary board as public entities for purposes of the ADA) [hereinafter Press Release No. 14-860].

their abilities.[154] Therefore, state courts and bar examining authorities must comply with the ADA when developing and implementing rules for character and fitness assessments and certification.

In 2011, the DOJ began investigating the attorney licensing process in Louisiana, focusing on whether the state's character and fitness inquiry, related investigations, and resulting conditional admission violated the ADA.[155] At the time of the DOJ investigation, Louisiana used the NCBE character and fitness application, including three questions about mental health.[156] Specifically, as part of the mandatory application, candidates were required to answer questions about whether they had been diagnosed with specific mental health conditions.[157] They were also asked whether they had a mental or emotional condition that "in any way currently affects, or if untreated could affect [their] ability to practice law . . ." and whether they are receiving treatment for this condition.[158] Finally, they were asked whether they had ever raised their mental health condition as an explanation for their actions.[159] If an applicant responded affirmatively to any of these questions, their application was flagged for additional investigation, and they were required to provide the bar committee with detailed medical records (including treatment notes) and broad releases to allow investigators to talk to their treating providers.[160]

In its 2014 Letter of Finding ("LOF"), the DOJ determined these questions were unnecessarily intrusive and violated the ADA.[161] Specifically, it found that by asking questions about whether an individual had a mental health diagnosis or had received mental health treatment, the court and board were effectively treating individuals differently based solely on their status as an individual with a disability, rather than appropriately considering conduct relevant to their ability to practice law regardless of disability status.[162] At the same time, NCBE revised the challenged questions to address the concerns raised by the DOJ.[163] As part of its settlement

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[154] 28 C.F.R. § 35.130(b)(6) (prohibiting public entities from "administer[ing] a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination . . . .").

[155] Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Just., C.R. Div., to the Hon. Bernette J. Johnson, C.J., Louisiana Sup. Ct., et al. (Feb. 5, 2014) (on file with the DOJ), https://www.ada.gov/522ouisiana-bar-lof.pdf [https://perma.cc/YEW2-BNRD].

[156] *Id.* at 5.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 6.

[161] *Id.* at 18.

[162] *Id.* at 22–23.

[163] *Id.* at 18; Anna Stolley Persky, *State Bars May Probe Applicants' Behavior, But Not Mental Health Status, Says DOJ*, A.B.A. J. (June 1, 2014), https://www.abajournal.com/magazine/article/state_bars_may_probe_applicants_behavior_

agreement with the DOJ, the Louisiana court agreed to modify its questions as well to focus on conduct rather than diagnosis and treatment.[164]

As part of its investigation, the DOJ also considered the additional burdens placed on individuals who answered any of these questions about the applicant's mental health in the affirmative.[165] In particular, the DOJ expressed concern that these individuals were subjected to additional investigation and then were granted only conditional bar admission with burdensome requirements that violated the applicant's privacy rights in protected medical information and arguably interfered with their ability to practice law.[166] So, while some scholars advocate a move toward an expanded conditional admission process, such a process must be based on an individualized determination of the benefits of permitting conditional admission, rather than a categorical response to individuals who respond affirmatively to questions about mental health.

Even prior to the DOJ's 2014 LOF, DOJ provided advice to the Vermont Bar on a similar issue.[167] Meanwhile, other courts recognized the discriminatory effect of requiring bar applicants to answer questions about their disability status and subjecting such applicants to heightened burdens for admission.[168] This concern is amplified by social science research that finds no connection between mental health diagnosis and ability to practice law.[169]

Since the DOJ's finding, slow progress has been made by states to revise questions regarding mental health diagnoses and treatment, and to decrease or eliminate the overbroad requirements for applicants to provide bar examiners with complete copies of mental health records and blanket releases to seek information directly from treating professionals. According to the ABA Commission on Disability Rights, which compiles a comprehensive list annually of the mental health questions asked by each state as part of its character and fitness evaluation, as of 2020, only eight states completely eliminated all questions regarding mental health diagnosis and treatment.[170] Over half the states continue to either use the revised NCBE questions or adopt similar language for their mental health-

but_not_mental_health_status [https://perma.cc/K9AE-733J]; Jaffe & Stearns, *supra* note 148 (noting the 2014 change by NCBE to its mental health questions is response to the Louisiana decree).

[164] Press Release No. 14-860, *supra* note 153.

[165] Letter from Jocelyn Samuels, *supra* note 155, at 19.

[166] *Id.* at 27.

[167] *See id.* at 36–45.

[168] *See, e.g.*, Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995).

[169] *See, e.g.*, Lusk *supra* note 33, at 371–72.

[170] *See* A.B.A. COMM'N ON DISABILITY RTS., MENTAL HEALTH PROVISIONS IN STATE BAR EXAMS (2020), https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/mh-provisions-state-bar-exams.pdf [https://perma.cc/4RBW-LUWP].

related questions.[171] As of 2020, some states still effectively sought information that the DOJ found violated the ADA, including Florida, Kentucky, Nevada, and Texas, each of which seek information about specific diagnoses.[172] Florida also still expressly requires applicants to allow any treating professional to provide copies to the board of all requested records.[173] A federal district court in Kentucky went out of its way (in a recent decision that had to be dismissed on procedural grounds) to explain that the "bar bureaucracy" in Kentucky likely violated the ADA with its extensive questioning regarding an applicant's bipolar diagnosis, its intrusive medical records requests, and its "994-day" delay in admitting an applicant who successfully practiced in another state for eleven years.[174]

The current NCBE sample character and fitness questionnaire, which was revised in January 2021, continues to seek information regarding mental health conditions and treatment rather than limiting its inquiry to actual conduct.[175] While the NCBE reinserted the preamble language notifying applicants that seeking mental health treatment is not a bar to admission and somewhat revised the language for objectionable mental health questions, Question 30 continues to seek information regarding any "condition or impairment."[176] Specifically, the applicant is required to reveal "any [current] condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects [their] ability to practice law in a competent, ethical, and professional manner."[177] This question is similarly adopted by many states, including those that do not use NCBE to conduct their initial fitness inquiries.[178]

In addition to being invasive, and arguably discriminatory, such a question is speculative.[179] It asks the applicant to decide whether the bar examiners will view their conditions as likely to impact their legal practice. Moreover, this question sets applicants up for failure based on subsequent accusations of lack of candor for failing to reveal mental health conditions the applicant does not believe would impact their ability to practice law, but that a bar examiner or judge determines should have been disclosed.

Applicants also continue to be asked about the ameliorative effects of any treatment or monitoring and are required to describe the treatment and provide the name of their doctor or counselor. While the DOJ may

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[171] *See id.* at 3; *see also* Lusk, *supra* note 33, at 370.
[172] *See* A.B.A. COMM'N ON DISABILITY RTS., *supra* note 170, at 3.
[173] *Id.* at 8.
[174] Doe v. Sup. Ct. of Kentucky, 482 F. Supp. 3d 571, 576 (W.D. Ky. 2020).
[175] NAT'L CONF. BAR EXAM'RS, *supra* note 48 (question 30).
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] Jaffe & Stearns, *supra* note 148.

have accepted these (or similar) inquiries as part of its settlement agreement with Louisiana, lessening the concerns of ADA violations, the questions continue to stigmatize mental health and have the potential to discourage applicants from seeking needed treatment.[180] Given the current concerns about law student and lawyer well-being, this continues to raise grave concerns.

Specifically, a 2014 ABA-sponsored survey of law students at fifteen schools found forty-five percent of the law students who reported that they chose not to seek mental health treatment when needed cited fear of having to disclose this information on bar applications as the reason for not seeking treatment.[181] Combined with the study's findings of the prevalence of anxiety, depression, and substance abuse issues for attorneys, this study triggered a renewed interest in amending bar admission rules to eliminate (or significantly revise) mental health questions on character and fitness questionnaires.[182] With the current focus on prioritizing lawyer and law student well-being, the ABA and the Conference of Chief Justices both adopted resolutions to this effect.[183] It has also led law students and attorneys to advocate for change, and some states (either through legislation or changed court rules) to embrace change by eliminating mental health questions altogether.[184] However, some state supreme courts and state bars resist such changes.[185] Some even continue to assert that such invasive inquiries into mental health status are necessary and relevant to protecting

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[180] *Id.*

[181] Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).

[182] Jaffe & Stearns, *supra* note 148.

[183] Marilyn Cavicchia, *A New Look at Character and Fitness: Bar Leaders, Lawyers, Others Urge Elimination of Mental Health Questions*, A.B.A. (Jan-Feb, 2020) https://www.americanbar.org/groups/bar_services/publications/bar_leader/2019_20/january-february/a-new-look-at-character-and-fitness-bar-leaders-lawyers-others-urge-elimination-of-mental-health-questions/ [https://perma.cc/4SDR-QXEC] ("In August 2015, the ABA House of Delegates adopted Resolution 102, which urged licensing entities to remove questions about mental health history, diagnoses, and treatment, and to focus instead on conduct and behavior. In February 2019, the Conference of Chief Justices approved a substantially similar set of recommendations, Resolution 5.").

[184] *See, e.g.*, *id.* (highlighting actions taken by Virginia law students to advocate change to mental health rules for bar admission); *see also* Jillian Daley, *Putting the Emphasis on Conduct: Oregon State Bar Shifts Its Admissions Process Away from Mental Health and Substance Abuse Labels*, OR. ST. BAR BULL. 34, 35 (Feb./Mar. 2020), https://www.osbar.org/bulletin/issues/2020/2020FebruaryMarch/offline/download.pdf [https://perma.cc/2WNE-D4NQ] (noting Oregon Supreme Court's approval of new rules focused on conduct rather than conditions as recommended by the state bar's Fitness Task Force).

[185] *Id.*

the public despite evidence to the contrary.[186]

3. Socioeconomic Impact of Considering Financial Obligations

Historically, bar admission entry requirements effectively created "caste-based restraints," putting legal practice out of reach for anyone other than the highest socioeconomic classes.[187] Some critics argue that the consideration of financial responsibility and existing debts as part of the character and fitness evaluation effectively perpetuates this "caste-based" system.[188] Put differently, critics have suggested that the high costs of law school and the inevitability of significant student loan debt post-graduation for anyone other than the wealthiest students (or families) reinforces a class divide and creates a "double-edged sword" if bar applicants can be denied admission based on their debt.[189] Without incurring debt, students cannot gain the education required to become a lawyer, but by amassing significant debt, they jeopardize their chances for bar admission. As explained further below, the financial impact of the character and fitness review process itself can exacerbate the precarious economic situation for applicants whose approval is delayed because they are unable to secure legal jobs (and salaries) that would allow them to begin repaying their debts.

Concerns about allowing character and fitness committees to review applicants' financial situations may be further amplified by the current pandemic. For many Americans, the current COVID pandemic has resulted in lost jobs, changed family obligations, and significant medical costs, all of which have increased financial strains, especially for individuals who were already in precarious financial positions.

E. Direct Costs of Time & Money

The damage done by the current invasive process is not limited to those individuals who are denied admission. Even for those applicants who are lucky enough to survive the character review process and are ultimately granted admission to their state bar, the cost in terms of both time and

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[186] *See* Doe v. Supreme Court of Kentucky, 482 F.Supp.3d 571 (W.D. Ky 2020) (criticizing Kentucky bar's invasive inquiry into mental health issues as part of character and fitness); Ana P. V. Paladino, *Mental Health and the Legal Profession: The Florida Board of Bar Examiners Continues to Violate the Americans with Disabilities Act*, 50 STETSON L. REV. 295, 314 (2021) (explaining that Florida continues to ask questions about mental health as part of its character and fitness questionnaire after an amended preamble, stating the bar must assess mental health as part of satisfying its responsibility to protect the public); Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 AM. U. J. GENDER SOC. POL'Y & L. 537, 554 (2020) (explaining Indiana's continued use of invasive questions regarding mental health diagnosis are justified by assertion that they are necessary to determine fitness).

[187] Rhode, *supra* note 10, at 494–95.

[188] *Id.*

[189] Munster, *supra* note 88, at 285.

money are significant.[190] The cost of the investigations themselves, in terms of time and money dedicated by each state bar, is also not insignificant and arguably are resources that could be used in alternative ways to better serve the purposes of protecting the public and judicial system from unfit lawyers.[191] Some have even argued that the resource constraints make the investigations themselves less meaningful as well.[192]

A review of recent cases makes clear the often-extended timeline for any applicant who is flagged for investigation during the character and fitness process, including board or committee hearings and ultimate court review. For many applicants, this extended hearing process may delay their admission by a year or more.[193] Beyond the time itself, there are opportunity costs associated with this extended delay in terms of lost jobs, income, and experience.[194]

Imagine graduating from law school, passing the bar exam, possibly even securing a job with the firm of your choice, and then learning that your application was flagged for additional investigation by the Character and Fitness committee. At a minimum, you will likely not be inducted with your classmates. If the committee does not recommend certification after its review, or if the board exercises its discretion to review your application *sua sponte*, the character and fitness process can extend for even longer. Some applications are denied, with permission to reapply in a year or more.[195] Some applicants may seek admission for a decade or more before finally being admitted.[196] Without even calculating the direct monetary costs in terms of hiring an experienced attorney to represent you through the process, the costs in terms of not being able to secure a job in the legal profession in the meantime are significant.[197] As your peers accumulate experience and are promoted, you are left on the sideline, waiting to even

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[190] *See* Joukov & Caspar, *supra* note 87, at 397.

[191] *See, e.g.*, Rhode, *supra* note 10, at 566, 590.

[192] *See, e.g.*, *id.* at 512.

[193] *See, e.g.*, *In re* Nash, 257 P.3d 130 (Alaska 2011) (granting admission of applicant who originally sought admission in 2007 after being admitted in another state following an extensive character and fitness review there. The applicant was subjected to review by hearing officer who recommended admission and then hearing before board that denied admission despite psychological evaluation finding fitness and fifty-two letters of recommendation in what court determined was a biased hearing).

[194] *See* Joukov & Caspar, *supra* note 87, at 412.

[195] *See, e.g.*, *In re* Silva, 665 N.W.2d 592 (Neb. 2003) (applicant denied but allowed to reapply in two years).

[196] *See, e.g.*, *In re* Wiesner, 943 N.Y.S.2d 410 (N.Y. App. Div. 2012) (admitting applicant who first applied in 1995 on tenth application to bar).

[197] *See, e.g.*, *In re* Application of Griffin, 943 N.E.2d 1008, 1010 (Ohio 2011); *In re* G.W., 13 A.3d 194 (N.H. 2011) (illustrating individuals' circumstances who accumulated significant debt because of bar admission delay); *see also, e.g.*, Munster, *supra* note 88, at 315 (explaining how Robert Bowman's delayed admission caused his student loan debt to increase substantially due to accumulated fees for nonpayment).

begin. The result can be devastating in terms of defaulting on sizable student loans and amassing interest in the intervening years that may result in total debt that can never be repaid.

F. Constitutional Concerns

The character and fitness process, as currently applied, raises constitutional concerns under due process, equal protection, and the First Amendment.

1. Lack of Due

What Rhode identified more than thirty-five years ago as the "prevailing double standards for aspiring and admitted attorneys" continues to exist today.[198] Moreover, concerns about the vagueness of the "good moral character" standard and overbreadth in its potential application continue to raise due process concerns. In addition to the higher standards for bar applicants and bearing the burden of proving fitness, some applicants have noted that the waiting period for individuals with criminal convictions to be granted admission is longer for applicants than for attorneys who are disbarred for similar convictions to seek readmission.[199]

2. First Amendment Concerns and Social Media

Decades ago, the U.S. Supreme Court considered First Amendment challenges to bar authorities who sought to deny admission to individuals for refusing to answer questions about past affiliation with the Communist Party. While the court definitively decided that issue, even today, First Amendment concerns remain during the character and fitness process.[200] Rhode explained that "political beliefs may prompt denial for candidates who are unwilling to uphold the Constitution or who have knowingly joined organizations advocating violent overthrow of the government coupled with intent to do so."[201] Similarly, she cautioned that "[a]bolitionists, civil rights activists, suffragists and labor organizers—indeed, the architects of our constitutional framework—all were guilty of 'disrespect for law' in precisely the sense that bar examiners employ it."[202]

Despite First Amendment protections, law students must appreciate the reality that there are pitfalls to posting whatever they want on social

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[198] *See* Rhode, *supra* note 10, at 493.

[199] *See, e.g.*, *In re* McMillian, 617 S.E.2d 824, 828 (W. Va. 2005) (arguing that disbarred attorneys in West Virginia are only required to wait five years prior to seeking readmission while applicant with four-year-old conviction at time of initial application was required to wait an additional six years prior to being granted even conditional admission).

[200] Jessica Belle, *Social Media Policies for Character and Fitness Evaluations*, 8 WASH. J.L. TECH. & ARTS 107, 115–16 (2012).

[201] Rhode, *supra* note 10, at 567.

[202] *Id.* at 570.

media for the world to see.[203] One legal commentator bluntly states: "Aspiring lawyers need to understand that Internet activity is public behavior and conduct themselves accordingly."[204]

Critics have noted the potential implications of allowing bar examiners to access and review an applicant's social media accounts and posts as part of the character and fitness process.[205] However, the Florida bar has taken it one step further, by adopting a rule requiring applicants to disclose their social media accounts and provide their passwords so that bar examiners can review not only their public behavior, but their private content as well.[206]

It is one thing to punish a student for overtly racial or sexual harassment posted online, but the First Amendment protects those who hold different viewpoints and even much offensive speech.[207] Suppose a bar applicant holds strong political views and posted strong political statements either in support of or against Donald Trump or Joe Biden. This type of political speech remains the core type of speech the First Amendment was designed to protect.[208] Therefore, it should not be evaluated by bar examiners as a means for assessing moral fitness. Furthermore, as Justice Samuel Alito recently wrote, "[v]iewpoint discrimination is poison to a free society."[209] Even the NCBE acknowledges that "[c]onduct that is merely socially unacceptable is not relevant to character and fitness . . . and should not be considered."[210]

V. JUSTIFICATIONS

Despite detailed and valid criticisms raised repeatedly over many decades, the basic tenets of the character and fitness requirements for bar admission remain in place in all fifty states. As explained above, the primary justification for requiring prospective lawyers to demonstrate "good moral character" is that the public needs protection from dishonest or untrustworthy lawyers, a worthy intention. More specifically, given the inherent knowledge disparity between attorneys and clients and the sensitive matters that attorneys must handle, attorneys should be expected to prove their trustworthiness before being allowed to engage the public's trust.

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[203] Colleen T. Scarola, *What Happens on Social Media . . . Could Derail Your Legal Career: Teaching E-Professionalism in Experiential Learning*, 44 VT. L. REV. 165, 166 (2019).

[204] Michelle Morris, *The Legal Profession, Personal Responsibility, and the Internet*, 117 YALE L.J. FORUM 53 (2007), https://www.yalelawjournal.org/forum/the-legal-profession-personal-responsibility-and-the-internet [https://perma.cc/89LN-FQDD].

[205] *See* Belle, *supra* note 200, at 118–19.

[206] *Id.* at 113–14.

[207] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[208] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777–78 (1978); Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

[209] Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

[210] NAT'L CONF. OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION 2021, ix (2021).

It is worth noting as well that lawyers are not the only profession that requires applicants to demonstrate good moral character as a criterion for admission. Similar requirements exist in other fields requiring public trust (like doctors and pharmacists), especially where the public may be disadvantaged by a knowledge disparity.[211]

The secondary reason offered in support of character and fitness assessments is that attorneys are officers of the court, and as such, they should be expected to obey laws and respect the rights of others.[212] More specifically, the system of justice could be impaired if unfit individuals were allowed to practice law because judges, courts, and other attorneys need to be able to rely on attorneys to comply with rules of professional conduct that require honesty and ethical behavior.

Consistent with the Supreme Court's directive from 1957 that states can set high ethical standards for lawyers as long as the requirements have a "rational connection" to the practice of law, two legal commentators explain:

> The character and fitness process is appropriate when it identifies conduct that could adversely affect the applicant's ability to practice law. Examples of conduct might include an arrest for driving under the influence of alcohol; attendance problems in class, clinics, or externships; mismanaging personal funds; or the inability to meet deadlines. All of these are relevant and fair issues for evaluation.[213]

Moreover, many people would likely agree that there are examples of individuals who should not be entrusted with the professional responsibilities associated with practicing law, especially the need to protect the rights and interests of others. For example, character and fitness inquiries regarding prior professional misconduct, including disbarment and revocation of other professional licenses, appear directly related to an applicant's demonstrated ability to practice law.[214] Few would likely argue that individuals who have been disbarred permanently in other states should be allowed simply to turn around and practice in a neighboring state.

Therefore, applicants who have been disbarred in other states for violating client trust or abusing judicial process are justifiably denied subsequent admission in other states. Similarly, applicants who demonstrate a pattern of conduct, such as filing frivolous pro se lawsuits or of being held in contempt of court for failing to comply with judicial orders, especially when this conduct continues during law school and throughout the bar

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[211] *See, e.g.,* Paul F. Camenisch, *On the Matter of Good Moral Character*, 45 THE LINACRE Q. 273, 276 (1978 (discussing the need for doctors' good moral character during licensing board assessments).

[212] *See In re* McCool, 172 So. 3d 1058, 1077 (La. 2015).

[213] Jaffe & Stearns*, supra* note 148.

[214] Hudson, *supra* note 6.

application process, may lack the fitness to practice law based on their blatant abuse or disregard for the legal system. Additionally, applicants who engage in specific acts of dishonesty (such as embezzlement, fraud, or cheating in law school or on the bar exam) may not be currently fit to hold public trust, especially given a temporal proximity of such conduct to their application for bar admission.[215] While there is disagreement over the appropriate temporal connection between illegal or deceptive behavior and denial of admission, and many reject a specific bright line rule regarding required waiting periods, the ability of states to deny bar admission (at least temporarily) to individuals who recently displayed actual conduct that calls into question their trustworthiness appears reasonable. While a categorical ban or even presumption of unfitness is inappropriate for all individuals with prior justice involvement, some limitations may be appropriate.

A few real-world examples help illustrate the appropriateness of maintaining some reasonable inquiries and barriers to entry for attorneys who are entrusted with significant responsibilities for the well-being of others. A recent applicant for admission in Wisconsin was previously disbarred in Florida for misappropriating client trust funds and repeatedly abusing judicial process, including being held in civil contempt by multiple judges for disregarding court orders.[216] Similarly, a recent applicant in Vermont (after being rejected by the Wisconsin bar) was denied admission based on a pattern of disrespect for courts and a demonstrated lack of decorum in the courtroom, including contempt charges by three different judges.[217] A Massachusetts court likewise permanently denied admission to an applicant whose recent conduct (which was reported to the bar by three separate licensed Massachusetts attorneys) demonstrated "a willingness to abuse the legal system for purposes of harassment and intimidation of individuals with whom he has a dispute" and "a lack of civility and professionalism" based on personal attacks and frivolous bar complaints filed against the judge and attorneys involved in his divorce.[218] The Florida bar likewise permanently denied admission to the bar for a former physician whose medical license was revoked because "for over a decade, he improperly used his influence as a treating physician to engage in sexual

[215] *See, e.g.*, *In re* Harper, 38 N.E.3d 882, 883–85 (Ohio 2015) (denying the permanent admission of an individual who initially applied in 2000, failed the bar exam multiple times, worked as tax preparer in the intervening years, and was convicted in 2011 of aiding and abetting the filing of false tax returns over a four-year period after law school. The individual failed to fully disclose an IRS investigation and his own bankruptcy proceedings, which were dismissed for his failure to comply with court orders on bar applications. Additionally, in 2010, the individual filed a certification from his treating psychiatrist that said he was completely disabled by chronic fatigue syndrome, making him unable to perform even basic tasks without assistance, to seek a disability release from his student loans.).

[216] *See In re* Hammer, 944 N.W.2d 844, 845-47 (Wis. 2020).

[217] *See In re* Grundstein, 183 A.3d574, 588–89 (Vt. 2018) (cert. denied).

[218] *In re* Pansé, 38 N.E.3d 298, 300–01 (Mass. 2015).

activities with approximately twenty-five of his patients."[219] The court was persuaded by the fact that lesser conduct by a licensed attorney would result in permanent disbarment and that four separate medical boards had found his conduct sufficiently egregious to deny his application for a license.[220]

The requirement for attorneys to handle client funds provides another specific justification for considering some prior misconduct as part of the licensing process. Lawyers maintain trust accounts and must be good stewards in holding monies that should be dispersed to clients. A nasty word in attorney discipline circles is "commingling."[221] Records from attorney discipline proceedings confirm that lawyers facing financial strife have dipped into client funds.[222] Certainly, then it is reasonable for the character and fitness process to try to screen out those candidates who may be dishonest with financial affairs, steal money, or engage in similar conduct. Decades ago, Justice Felix Frankfurter wrote that good moral character should include the "strictest observance of fiduciary responsibility."[223]

To reiterate, the strongest argument in defense of a character and fitness hurdle is that there are some people who should not be allowed to practice law. They have demonstrated by their conduct that, when placed in stressful situations, they will not refrain from taking other people's money that has been entrusted to them or they have demonstrated other conduct that shows they lack the requisite degree of professional judgment to comply with the high ethical standards and code of professional conduct required of licensed attorneys.

Consider the case of John W. Mustafa II who, as a third-year law student at the University of California at Los Angeles, served as co-chief justice of the school's moot court team.[224] Over a five-month period, Mustafa wrote himself thirteen checks in the amount of $4,331.[225] He claimed that $1,000 was used to bail his sister out of jail.[226] Mustafa later admitted to the conduct and made restitution, paying back all of the money he had embezzled.[227]

Mustafa applied for bar admission in the District of Columbia with the support of strong character references from two law school professors, moot

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[219] *In re* Fla. Bd. of Bar Exam'rs, 144 So. 3d 532, 534 (Fla. 2014).
[220] *Id.* at 534–35.
[221] *See* William Vogeler, *Seven Deadly Sins Committed by New Lawyers*, FINDLAW: GREEDY ASSOC. (May 26, 2017), https://www.findlaw.com/legalblogs/greedy-associates/7-deadly-sins-committed-by-new-lawyers/ [https://perma.cc/DGR5-DQR8].
[222] *See, e.g.*, *In Re* Disciplinary Action against Eskola, 891 N.W.2d 294 (Minn. 2017); Iowa Sup. Ct. Disc. Bd. v. Guthrie, 901 N.W.2d 493 (Iowa 2017).
[223] Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).
[224] *In re* Mustafa, 631 A.2d 45, 46 (D.C. 1993).
[225] *Id.*
[226] *Id.*
[227] *Id.*

court members, employers, and others.[228] These references provided "powerful testimony" of Mustafa's good character and a reviewing committee recommended his admission.[229]

However, the District of Columbia Court of Appeals denied him admission.[230] The court reasoned that not enough time had elapsed since the embezzlement for Mustafa to be able to show that he possessed good moral character.[231] The result may seem harsh, but perhaps the District of Columbia judges knew something. In 1994, Mustafa earned admission to the California bar but later faced disciplinary proceedings for commingling client funds and resigned his bar membership in 2002.[232]

Consider also the infamous case of Matthew Hale, who graduated from Southern Illinois University School of Law and passed the Illinois bar exam in 1998, only to be denied admission by the committee on character and fitness grounds for his acknowledged racism and propagation of white supremacy.[233] Hale was the leader of a racist group known as the World Church of the Creator.[234]

After unsuccessful appeals in the state court system and a denial of review by the U.S. Supreme Court, Hale then filed a lawsuit in federal court, alleging a violation of his First Amendment rights of free speech and association.[235] Both a federal district court and the Seventh Circuit rejected his attempt to bypass the Illinois state courts and dismissed his lawsuit.[236] The Seventh Circuit bluntly wrote that Hale's "challenge to the Illinois Supreme Court's decision not to admit him to the bar has been adjudicated, and he must take any further complaints he has about the outcome of that adjudication to the state courts of Illinois."[237]

Hale's later conduct settled all doubts about his character, as he later was convicted of soliciting an undercover FBI informant to murder federal district court Judge Joan Lefkow, who had ruled against Hale in a trademark infringement case over the name Church of the Creator.[238] He received a forty-year prison term.[239]

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[228] *Id.* at 46–47.
[229] *Id.* at 47.
[230] *Id.* at 47–48.
[231] *Id.* at 48.
[232] *See* THE STATE BAR OF CAL., http://members.calbar.ca.gov/fal/Licensee/Detail/171355 [https://perma.cc/W8LM-FUXG] (listing John Wali Mustafa's attorney profile).
[233] Hale v. Comm. on Character & Fitness for Ill., 335 F.3d 678, 679–80 (7th Cir. 2003).
[234] *Id.* at 679.
[235] *Id.*
[236] *Id.* at 680–84.
[237] *Id.* at 684.
[238] *See* Jodi Wilgoren, *White Supremacist Is Held in Ordering Judge's Death*, N.Y. TIMES (Jan. 9, 2003), https://www.nytimes.com/2003/01/09/us/white-supremacist-is-held-in-ordering-judge-s-death.html [https://perma.cc/D9SJ-JUXJ].
[239] Matt O'Connor, *Hale Gets 40 Years for Plot to Kill Judge*, CHICAGO TRIB. (Apr. 7, 2005),

Beyond the specific examples of individuals who many would agree should not be entrusted with safeguarding and defending the rights of others, some scholars have noted that the disciplinary system and rules of professional conduct alone are not sufficient to protect clients or courts from "bad" lawyers because of the inherent flaws in the attorney discipline system.[240] Recent high-profile examples reinforce the fact that a disciplinary system alone may be insufficient to protect the system of justice from bad actors. In particular, there is concern that it can take many years for a dishonest attorney to be caught, and these "bad actors" may have caused significant and irreparable damage to their clients in the meantime.[241] The state bars are also more reluctant to remove a license once granted because of the impact on the individual's livelihood, which may counsel in favor of at least some initial barriers to entry.[242]

As further justification for maintaining some form of character and fitness inquiry, Rhode noted that there also may be a worthwhile symbolic effect of requiring applicants to demonstrate character and fitness as part of the admissions process.[243] She noted that there is value in trying to improve the image of lawyers and that maintaining a system of professional self-regulation, including appropriate barriers to entry, are a necessary part of building confidence in that system.[244] Rhode stated, "The appearance of moral oversight may help both to preempt the call for external involvement in bar governance processes, and to buttress justifications for banning unregulated (and hence potentially unethical) competitors."[245]

Ultimately, much of the justification for the current system seems to come down to the fact that there is general agreement that attorneys should be trustworthy, a disciplinary system alone is insufficient protection for the public, and no one has yet developed a better system for assessing integrity. While this justification may support the continued existence of some type of character and fitness requirement for bar admission, continued critical evaluation and even significant overhaul of the process to better serve this purpose still appears appropriate.

VI. REFORMING THE SYSTEM

As evidenced by the numerous and enduring criticisms, many argue

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https://www.chicagotribune.com/news/ct-xpm-2005-04-07-0504070253-story.html [https://perma.cc/4GJL-NMPG].

[240] Levin, *supra* note 71; Joukov & Caspar, *supra* note 87.

[241] *See* Dennis Beaver, *Warning Signs of a Dishonest Lawyer*, THE SENTINEL (Nov. 28, 2015), https://hanfordsentinel.com/print-specific/advice/warning-signs-of-a-dishonest-lawyer/article_a8ec28b2-4838-5ad9-9542-709e55b89f87.html [https://perma.cc/2GCD-5ZK2].

[242] *See, e.g.*, Rhode, *supra* note 10, at 509.

[243] *Id.* at 509–12.

[244] *Id.*

[245] *Id.* at 511.

that the current system needs reform. The process should be more transparent, the rules clearer and more consistently applied, in order to increase predictability and avoid discouraging applicants who made mistakes in their past from even attending law school or seeking admission. Bar examiners and courts should rely on social science research on recidivism and sobriety, and they should be required to demonstrate a viable connection between their areas of character inquiry and direct impact on an individual's ability to practice law. State bars should continue to move away from questions regarding mental health diagnoses and treatment, focusing on conduct and present ability. States can improve their process by approaching the character and fitness review with "modesty" and sensitivity, removing expectations for expressed remorse, and considering both gainful employment and success throughout the grueling experience of law school as sufficient evidence of rehabilitation for previously justice-involved individuals.[246] The list of possible improvements is long. Although, as Rhode noted, it is also sometimes in conflict with itself, explaining that clearer standards and bright-line rules conflict with individual assessments of current fitness despite past conduct.[247]

One individual calling for reform is the aforementioned Tarra Simmons. As someone experienced in the criminal justice system as a litigant, she is in an ideal position to advocate for effective reform of the system for other individuals with a criminal record.[248] Simmons expressed concern that the volunteer members of the committee who decided her case did not have access to the decisions of prior committees to ensure consistency and had so little formal guidance from the state supreme court at the time that their decision was necessarily subjective and impacted by their personal biases.[249] She advocates for training for the lawyers who serve on character and fitness boards, including training in implicit bias.[250] She also commended the court in her case for relying on the social science research on recidivism and sobriety, as appropriate evidence for determining current fitness despite prior criminal conduct.[251] Simmons supports an individual approach with flexibility.[252] She also supports a conditional character and fitness approval process prior to beginning law school for those with prior convictions, to allow applicants to make informed decisions about whether to pursue a law degree rather than investing significant time and money in law school only to learn after graduating or even after taking the bar exam that they will not be admitted to practice based on their past convictions.[253]

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[246] Aviram, *supra* note 69, at 32.
[247] *See* Rhode *supra* note 10, at 588–90.
[248] Simmons, *supra* note 69, at 759.
[249] *Id.* at 767.
[250] *Id.* at 769–70.
[251] *Id.* at 768.
[252] *Id.*
[253] *Id.* at 770.

VII. INCREASED USE OF CONDITIONAL ADMISSION

Finally, another proposed reform to improve the fairness of the system is to give character and fitness boards greater use of the power of conditional admission for those borderline applicants whose past conduct gives grounds for valid concern, but who have shown evidence of rehabilitation. More jurisdictions now employ the option of conditional admission when dealing with red-flag applicants.[254] In 1996, Florida became the first state to adopt a system of conditional admission.[255] In 2009, the ABA House of Delegates adopted the ABA Model Rule on Conditional Admission. It provides:

> **1. Conditional Admission.** An applicant who currently satisfies eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates recent successful rehabilitation from chemical dependency or successful treatment for mental or other illness, or from any other condition this Court deems appropriate, that has caused conduct that would otherwise have rendered the applicant currently unfit to practice law. The [Admissions Authority] shall recommend appropriate conditions that the applicant to the bar must comply with during the period of conditional admission.[256]

Under this process, a person is conditionally admitted for a period of time (usually from one year up to five years) under the guidance and supervision of a licensed attorney in good standing. If he or she makes it through that year without incident or trouble, then the person's admission becomes one for full admission. In this way, conditional admission allows an applicant the opportunity to be judged on their actual ability to practice law when placed in real-world stressful situations, similar to proposals for "residency-like" programs for law students, rather than relying on a backward-looking system that attempts to predict future behavior. Conditional admission gives bar regulators a little more leeway in addressing those who may have had problems in their past and offers something more than the all-or-nothing admit-or-deny option for applicants.

In some jurisdictions, conditional admission is limited. For

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[254] Use of conditional admission, however, must still be based on individual assessment and should not be used like it was in Louisiana, as a categorical response to all applicants who disclose a mental health diagnosis or any other category that triggers a red flag. *See Chart 2: Character and Fitness Requirements*, *supra* note 68; Letter from Jocelyn Samuels, *supra* note 155, at 27.

[255] Janice M. Holder, *Completing the Puzzle: Lawyer Assistance and Conditional Admission*, 49 DUQUESNE L. REV. 439, 446 (2011).

[256] MODEL RULE ON CONDITIONAL ADMISSION TO PRAC. L. (AM. BAR ASS'N 2009).

example, conditional admission may be available only to those applicants who are under a rehabilitative program for a substance abuse problem, a diagnosed mental or physical impairment, or a financial affairs problem (child support arrearage or bankruptcy).[257] Other states allow conditional admission for nearly any type of applicant whose history is cause for concern.[258] For example, Tennessee has a broader rule on conditional admission that allows the board to conditionally admit an applicant based on their financial problems, prior criminal history, or any other conduct that gives the character and fitness board cause for concern.[259] Maine has a similarly broad rule that allows for conditional admission when an applicant has failed to make the requisite showing of good moral character but has made a "good faith effort" to cure the problems in the past and "has in place a support system" including a responsible individual who can monitor the individual.[260]

VIII. CONCLUSION

Character screening is an endemic part of the lawyer licensing process, as it has been for a long time. Some form of screening is necessary,

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[257] Stuart Duhl, *Admission to the Bar in Illinois: A Historical Perspective for the Last Half Century and Beyond*, 36 S. ILL. U. L.J. 109, 119 (2011).

[258] *See* Tenn. Sup. Ct. R. 7, § 10.05(c) (noting that "The Board in its discretion may condition an applicant's admission by requiring compliance with conditions that are designed to detect behavior that could render the applicant unfit to practice law and to protect the clients and the public. The conditions shall be tailored to detect and deter conduct, conditions or behavior which could render an applicant unfit to practice law or pose a risk to clients or the public, and to encourage continued abstinence, treatment, remediation, counseling, or other support.").

[259] *See* Tenn. Sup. Ct. R. 7, § 10.05(b)(2) ("The Board may consent to entry of an Agreed Conditional Admission Order for an applicant based on the applicant's record and the recommendation of qualified professionals, when appropriate, and the determination that the applicant currently satisfies all requirements for admission and the applicable Character and Fitness Standard under section 6.01 while engaged in a sustained and effective course of treatment, remediation, or monitoring.").

[260] *See* ME. BAR ADMISS. R. 9A ("(a) Conditional Admission. Following a determination that an applicant has not produced satisfactory evidence of good character and fitness to practice law pursuant to Rule 9 and upon findings that: (1) the conditions that led to the determination that the applicant has not produced satisfactory evidence of good character and fitness to practice law are in the past and are not likely to recur; (2) the applicant has made and is making a good faith effort to cure or avoid the conditions that led to the determination; and (3) the applicant has in place a support system, including an identified responsible individual, to monitor and assist the applicant in maintaining good and ethical conduct and to regularly report on the applicant's progress and any problems to the Board of Overseers of the Bar; the Board, with the written consent of the applicant, may recommend to the Court that the applicant be admitted on a conditional basis. Provided, however, that a lawyer who has been disbarred or suspended from the practice of law or has resigned from the practice of law in another jurisdiction, and has not been reinstated to the practice of law in that other jurisdiction shall be ineligible for conditional admission pursuant to these Rules.").

as lawyers are officers of the court and fiduciaries with whom people repose a great deal of trust with their most intractable and important problems. But the process should be revamped to ensure it is fair and equitable. Any remaining vestiges of discrimination, whether against racial minorities or individuals with disabilities, must be eliminated. State bars and courts should continue to move toward awareness of social science research to determine appropriate evidence and factors for consideration in evaluating current moral character. Alternatives, such as an expansion of conditional admission or law student residency programs that focus on current fitness rather than past conduct, should be considered. In many instances, people who have made mistakes should not pay for those mistakes forever. Sometimes, people fall on hard financial times. A bad credit history should not necessarily preclude someone from becoming an attorney. Furthermore, a criminal conviction should not doom a person forever, provided they present credible evidence of rehabilitation and good acts. People should be given the benefit of the doubt when they present credible evidence that they have turned their lives around, without needing to perform remorse.[261] There is always the possibility of human redemption.[262]

[261] *See, e.g.*, *In Re* Sobin, 649 A.2d 589, 592 (D.C. 1994) ("We believe our decision today is consistent with encouraging individuals who have had past troubles to 'turn over a new leaf' and to seek admission to the Bar.").

[262] *See* Swisher, *supra* note 38, at 1063 ("[A] profession that routinely denies applicants for conduct that happened, on average, over nine years earlier—and often when applicants were fairly young—devalues forgiveness and redemption.").