

BARBARIANS AT THE BAR: REGULATION OF THE LEGAL PROFESSION THROUGH THE ADMISSIONS PROCESS

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Character is like a tree and reputation is like its shadow. The shadow is what we think of it; the tree is the real thing.

—Abraham Lincoln

I. INTRODUCTION: THE “EXAM” YOU CAN’T PREPARE FOR

Gaining admission to the Bar is not easy. An undergraduate education, the LSAT, three intensive years at a law school, and the infamously difficult Bar exam (especially in my state, California) presumably screen out a fair share of potential attorneys from even pursuing a career in the legal field. Although difficult, these hurdles are comprehensible, with clear objectives. The applicant is fully aware of the expectations and requirements. Ultimately, the applicant’s success is contingent on hard work and preparation.

In addition to the Bar exam and the prerequisites necessary to take the Bar exam, there is a less well-known requirement Bar applicants must satisfy for entry to the Bar: the moral character requirement. The moral character requirement demands that each applicant seeking admission to the Bar bear the “burden of demonstrating to the appropriate body in charge that he or she possesses the character needed to successfully and ethically practice law.”¹ For those applicants potentially facing delayed admission or outright denial based on a failure to meet the character requirement, this task is easier said than done.

No uniform definition of “moral character” exists despite the inclusion of the character requirement in every state’s Bar admission process.² Because entering the mind of applicants is impossible,³ the

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1. Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 488 (2000).

2. Arpa B. Stepanian, Note, *Law Student Clerkships; Walking a Thin Line Requirement of “Good Moral Character” for Admission to the Bar*, 3 J. LEGAL ADVOC. & PRAC. 67, 68-69 (2001); see *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262-63 (1957).

3. Aaron M. Clemens, *Facing the Klieg Lights: Understanding the “Good Moral Character” Examination for Bar Applicants*, 40 AKRON L. REV. 255, 256 (2007) (citing *In re Maria*

determination of a person's moral character ultimately depends on the applicant's prior actions.⁴ The subjectivity inherent in predicting future wrongdoing based on prior actions poses a formidable obstacle not only for the applicants with a regrettable past, but for the examiners with the responsibility of determining an applicant's admissions fate.⁵ The United States Supreme Court, in *Schwartz v. Board of Bar Examiners*⁶ and *Konigsberg v. State Bar of California*, two definitive character examination cases in the mid-20th century, openly admit the fluidity of the character requirement calling it "unusually ambiguous"⁷ with "shadowy rather than precise bounds."⁸ The American Bar Association ("ABA") seconds this sentiment, admitting in the *Bar Examiner's Handbook* that "[n]o definition of what constitutes grounds for denial of admission on the basis of faulty character exists."⁹

Despite its subjectivity, the moral character requirement exists as a precautionary measure aimed at protecting consumers from substandard practitioners¹⁰ as well as preserving the professionalism of the law.¹¹ This is especially necessary now more than ever as the general population perceives lawyers as one of the most untrustworthy and corrupt group of professionals.¹² Not to mention that, in a post-Enron world, regulation and a focus on integrity is more popular now than ever in the distribution of occupational licenses.¹³ Although the proportion of applicants denied admission to the Bar is minute, estimated at one in five-hundred,¹⁴ the requirement persists in every state and commands a fairly large amount of time and money¹⁵ because of its necessity in

C. for Admission to the Bar of Md., 451 A.2d 655, 656 (1982) (Smith, J., dissenting)).

4. See *In re Maria C.*, 451 A.2d at 656 (Smith, J., dissenting).

5. See Richard R. Arnold, Jr., Comment, *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 73.

6. *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957).

7. *Konigsberg*, 353 U.S. at 263.

8. *Schwartz*, 353 U.S. at 249 (Frankfurter, J., concurring).

9. See THE BAR EXAMINERS' HANDBOOK 123 (Stuart Duhl ed., 2d ed. 1980).

10. See S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 15 (1987) (noting that a system of occupational licensing, such as admittance to the Bar, protects the public from "incompetents, charlatans, and quacks").

11. See *id.* at 5-6.

12. See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 809 (1998) ("When, in 1991, a national sample was asked to volunteer 'what profession or type of worker do you trust the least,' lawyers were far and away the most frequent response.").

13. See Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 FORDHAM L. REV. 333, 333 (2003).

14. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 516 (1985) (discussing estimates for forty-one states in 1982).

15. See *id.* at 512-15.

protecting the public and protecting the system of justice.

The underlying rationale behind the moral character requirement proves its necessity in Bar admissions. But this rationale must be reconciled with the problematic issues facing the system today. While the ABA has done much in uniformity of objectives and practices, setting forth relevant conduct that may “be treated as cause for further inquiry before the Bar examining authority,”¹⁶ there are several additional improvements which could be implemented both before and after the character and fitness examination that would benefit both the client and the lawyer. The ABA has led the way before in streamlining and justifying the standard of character and fitness and there is no need to stop now.

Part II of this Article traces the history of Bar admissions, the oldest form of regulation of the legal profession, particularly the evolution of the moral character standard. The shifting perceptions of moral character through history shed light on evolving prejudices, as evidenced by the exclusion of specific groups at certain times in America’s relatively short history.

The third Part of this Article evidences how far the moral character analysis has come, specifically addressing the rationale behind the moral character requirement as well as its necessity as a form of lawyer regulation and protection of the public as seen in the infamous case of Matthew Hale.¹⁷

Part IV of this Article explores several problems arising out of the indeterminacy of moral character as well as the insular composition of the character committee. The character committee’s subjective reliance on predictive techniques as well as the possible emergence of institutionalized discrimination against certain ostracized groups in society highlight the difficulties inherent in preemptive self-regulation.

The fifth Part of the Article discusses how the moral character requirement has actually benefited oppressed groups. Although in the past the arbitrariness of the moral character requirement was used to openly deny candidates on the basis of sex, race, religion, and/or political affiliation, the ABA has led the way in promoting civil rights to certain groups, like the Lesbian, Gay, Bisexual, Questioning, and Transgendered (“LGBT”) community, through its admissions procedures long before these rights were achieved publicly.

Lastly, Part VI of this Article offers suggestions and solutions to

16. CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS III.13 (1987), available at <http://www.abanet.org/legaled/publications/compguide2005/codeofstandards.pdf>.

17. *In re Hale*, Comm. on Character and Fitness (Ill. App. 3d 1998), as reprinted in GEOFFREY C. HAZARD, JR. ET. AL., *THE LAW AND ETHICS OF LAWYERING* 876 (3d ed. 1999).

the implementation of the moral character requirement by maintaining the importance and principle of regulation through the admissions process, but avoiding discrimination and indeterminacy.

II. FROM MOSES TO MCCARTHY: THE SUBJECTIVE EVOLUTION OF MORAL CHARACTER

A. *Ancient and European Focus on Morals*

The moral character requirement of the admissions process has a long history that can be traced back to concepts found in the Old Testament. When Moses “set about forming the government of [ancient] Israel,” God commanded him to choose God-fearing men who would enforce God’s will through the rule of law:¹⁸

You shall represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do. Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times¹⁹

Fearing God and exhibiting His divinity—specifically through trustworthiness and hatred of bribery—defined the requisite moral character for the rulers of ancient times.²⁰ This bound the concept of righteousness to the regulators of the law.

Like Moses, Aristotle in the fourth century B.C.E. believed public orators, namely lawyers and politicians, should be “men of good character” in order “to be effective in convincing . . . audience[s] of the rightness of their arguments”:²¹

But since rhetoric exists to affect the giving of decisions—the hearers decide between one political speaker and another, and a legal verdict *is* a decision—the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right Particularly in political oratory, but also in lawsuits, it adds much to an orator’s influence that his own character should look right and that he should be thought to

18. See Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV 1, 4 (2002).

19. See *id.* at 4 (citing *Exodus* 18:19-22 (Rev. Standard Version)).

20. *Exodus* 18:19-22 (Rev. Standard Version).

21. Ritter, *supra* note 18, at 4.

entertain the right feelings towards his hearers

There are three things which inspire confidence in the orator's own character—the three, namely, that induce us to believe a thing apart from any proof of it: good sense, good moral character, and goodwill.²²

Devolving from a focus on “righteousness,” Aristotle, in a more structured society based on the pursuit of reason, focused on “rightness.”

In the fifth century C.E., the Roman Theodosian Code “required that advocates be of ‘suitable character’ with past lives that were praiseworthy.”²³ The earliest form of licensing emerged in the thirteenth century in France when “a university chancellor issued teaching licenses (*licentia docendi*) in the fields of Law, Theology, and Medicine only to those candidates examined and recommended by the majority of the masters of the respective faculties”²⁴

In early seventeenth century England, statutory law “required that lawyers be ‘skillful’ and ‘honest.’”²⁵ “The relationship between the English Bar and the royal family played an important role in the adoption of ‘character’ as a professional requirement of lawyers in England.”²⁶

“By the eighteenth century, the British legal profession had a bifurcated structure”²⁷ with the upper branch consisting largely of barristers, who practiced in court and were regulated by autonomous Inns of Courts,²⁸ while “[t]he lower branch, consisting of solicitors, was governed by professional associations and rules of court, supplemented by statutory enactments.”²⁹ For the most part, wealth and social standing dictated the ability of barristers to practice. For instance, “[d]uring the eighteenth century, some Inns waived certification requirements for sons of powerful members, or for those with letters of recommendation from judges.”³⁰ Meanwhile, “the expense of legal education and establishing a practice at the Inns of Court largely restricted access” to those from families who could not afford it.³¹ In other cases, when *de facto*

22. *See id.* at 4-5 (citing ARISTOTLE, RHETORIC 90-91 (W. Rhys Roberts trans., 1954)).

23. Michael D. White, Comment, *Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?*, 48 U. CIN. L. REV. 876, 876 (1979).

24. Ritter, *supra* note 18, at 5.

25. *Id.*; *see also* Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visions of Good Moral Character*, 22 N. ILL. U. L. REV. 19, 19 (2001) (citing S.H. BAILEY & M.J. GUNN, SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 115 (3d ed. 1996)).

26. Roots, *supra* note 25, at 20.

27. Rhode, *supra* note 14, at 494.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

exclusion based on income failed, more egregious forms of restriction existed, as barristers excluded from Inn membership certain “unfit groups, including Catholics, tradesmen, journalists, and solicitors.”³² Unfortunately, “members occasionally couched their exclusivity in terms of personal integrity and character.”³³ “Apart from these caste-bound restraints, the profession’s upper branch made little systematic effort to probe the personal attributes of its members.”³⁴

For solicitors, fitness to practice “was governed less by class and more through formal regulation.”³⁵ The poor practice standards of solicitors prompted Parliament in the early eighteenth century “to pass a comprehensive statute requiring, *inter alia*, five years of apprenticeship and judicial examination of fitness and capacity for practice.”³⁶ For the most part, “[d]iscipline for immoral conduct was . . . lax. Disbarment rarely occurred even for . . . [major] offenses, and the profession enjoyed little public respect.”³⁷ By 1874, Parliament statutorily required of lawyers an apprenticeship as well as a judicial examination for fitness.³⁸

These early Anglican antecedents illustrate the subjectivity of the moral character requirement and its ability to serve as an egregious form of de facto exclusion in an increasingly democratizing society.

*B. Land of the Free (From Regulations):
The Unregulated Legal Market of the Nineteenth Century*

Across the Atlantic, in pre-Revolutionary America, lawyers enjoyed a substantially better reputation;³⁹ nevertheless, “several of the colonies sought to banish them altogether.”⁴⁰ Additionally, many members of the Bar remained loyal to the British crown and left the colonies during the American Revolution.⁴¹ After they left, the lawyers that remained were relatively incompetent but continued to practice

32. *Id.* (citing MICHAEL BIRKS, *GENTLEMEN OF THE LAW* 133 (1960); 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 19 (1938)).

33. Roots, *supra* note 25, at 20 (citing WILFRID R. PREST, *THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR 1590-1640*, at 48 (1986)).

34. Rhode, *supra* note 14, at 495.

35. *Id.*

36. *Id.* (citing HOLDSWORTH, *supra* note 32, at 54-55).

37. *Id.* (citing BIRKS, *supra* note 32, at 109).

38. Roots, *supra* note 25, at 20.

39. Ritter, *supra* note 18, at 6 (citing HISTORY OF THE COLUMBUS BAR ASSOCIATION, available at <http://www.cbalaw.org/about/history.php>).

40. *Id.*

41. *Id.* (citing HISTORY OF THE COLUMBUS BAR ASSOCIATION, *supra* note 39).

law.⁴² The remaining lawyers' professional "blood-suck[ing]" existence⁴³ came to be tolerated only because of character requirements imposed by various State Bar associations⁴⁴ "as well as apprenticeships and/or competency examinations."⁴⁵ The focus on character requirements is expressed most clearly in a nineteenth century essay on professional ethics, explaining that because lawyers control our "fortunes, reputations, domestic peace . . . nay, our liberty and life itself . . . [t]heir character must be not only without a stain, but without suspicion."⁴⁶

Yet by the nineteenth century, during the Jacksonian era, Bar admission requirements became increasingly less strict because of the perceived elitism of admission practices as contrary to democratic ideals.⁴⁷ A 1985 study financed by the Stanford Legal Research Fund found "almost no instances of denial of admission on character-related grounds" in the nineteenth century.⁴⁸

There were few requirements for entry into the Bar; almost anyone who desired to practice law could gain admittance.⁴⁹ For example, John Adams recorded in his diary how he met a tavern keeper who acted as "a sort of Lawyer among [tavern patrons] . . . plead[ing] some of their . . . [c]ases before the Justices and Arbitrators of the region."⁵⁰ In addition, in the 1830s, Alexis de Tocqueville wrote that "he often came across 'those who have been in turn lawyers, farmers, merchants, ministers of the Gospel, and doctors.'"⁵¹ In 1851, Indiana stipulated in its constitution "that 'every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.'"⁵² Coupled with the restrictions on voting rights, propertied white men defined moral character. Ohio only required applicants to certify that

42. *Id.*

43. Rhode, *supra* note 14, at 496 (quoting 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 17 (1965)).

44. See Roots, *supra* note 25, at 21.

45. Ritter, *supra* note 18, at 6.

46. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 172 (3d ed. 1869).

47. Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1195 (1995) (citing CHROUST, *supra* note 43, at 165-66).

48. Rhode, *supra* note 14, at 497.

49. See Hansen, *supra* note 47, at 1195-96.

50. Roots, *supra* note 25, at 21 (citing BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 6 (1993) (quoting 2 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 27 (L.H. Butterfield ed., 1961))).

51. *Id.* (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 403 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1988) (1966)).

52. Hansen, *supra* note 47, at 1195 (quoting *THE BAR EXAMINERS' HANDBOOK*, *supra* note 9, at 15 (quoting IND. CONST. art. 7, § 21 (1851))).

they “had ‘regularly and attentively studied law.’”⁵³ New Hampshire law, prior to the Civil War, “simply ‘provided that any citizen over twenty-one was entitled to be admitted to practice.’”⁵⁴ “By 1860, of the thirty-nine states, only nine had any specific requirements for admission to their Bar.”⁵⁵ When character did not specifically restrict admission, certain apprenticeship requirements did.⁵⁶

After the Civil War, the possession of moral character conflated with political posture in the readmission of Confederates into the Union. The United States Congress enacted legislation requiring attorneys who sought admission to the Federal Bar to swear an oath that they had not given aid or held any office under “any authority or pretended authority in hostility to the United States.”⁵⁷ In its decision on the matter in the case of *Ex parte Garland*, the Court refused to permit congressional exclusion of lawyers from the practice of law due to former association with the Confederacy; rather the Court held that although Congress may impose qualifying standards upon entrance to the Federal Bar, a court determines who is “qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed.”⁵⁸ In its decision the Court clarified that the power of determining who is qualified and who is not “is not an arbitrary and despotic one, to be exercised at pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by sound and just judicial discretion”⁵⁹ One of the only requirements the Court specified for the practice of law was that lawyers’ “private and professional character shall appear to be fair.”⁶⁰

“Although . . . moral character remained requisite for admission to the practice of law in many states, Bar membership was effectively open at the end of the Civil War to any and all male citizens who could produce a personal reference.”⁶¹ A personal reference was not a high hurdle to overcome, as “[a]ffidavits from personal references generally satisfied admission requirements, and such documents were easily

53. *Id.* (quoting CHROUST, *supra* note 43, at 168).

54. *Id.* at 1196 (quoting ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 9 (1983)).

55. Ritter, *supra* note 18, at 7.

56. *See* Hansen, *supra* note 47, at 1195.

57. *Ex parte Garland*, 71 U.S. 333, 335 (1866) (quoting Act to Prescribe an Oath of Office, and for Other Purposes, ch. 128, 12 Stat. 502 (1862), *repealed by* Act Prescribing an Oath of Office to be Taken by Persons from Whom Legal Disabilities Shall Have Been Removed, ch. 139, 15 Stat. 85 (1868)).

58. *Id.* at 347 (quoting *Ex parte Secombe*, 60 U.S. 9, 11 (1856)).

59. *Id.* (quoting *Secombe*, 60 U.S. at 13).

60. *Id.* at 336.

61. Ritter, *supra* note 18, at 7 (citing Rhode, *supra* note 14, at 497-98).

obtained.”⁶² During the Jacksonian era, while admission standards were being lowered or eliminated, “most states had some form of examination requirement for Bar admission, either in addition to or in lieu of a period of apprenticeship. However, the exams were inadequate because courts neither had the time nor the skills to administer a professional examination.”⁶³ As a result, the State Bar examination remained casual. An Illinois applicant remembered being examined by President Abraham Lincoln while Lincoln was in the bath:

He asked me in a desultory way the definition of a contract, and two or three fundamental questions, all of which I answered readily, and I thought, correctly. Beyond these meager inquiries . . . he asked nothing more. As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice and the various incidents and adventures that attended his start in the profession. The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all.⁶⁴

Despite the seemingly open admission process and de facto restriction of certain minority groups, women and blacks were excluded from admission to the Bar more conspicuously. Women were seen as timid, delicate, and polite.⁶⁵ Nineteenth century jurists felt that these alleged qualities thus precluded women from successfully practicing law.⁶⁶ Further, blacks faced outright racism, both in the North and, more intensely, in the South. In 1847, the Bar in Allegheny County, Pennsylvania, refused to admit George B. Vashon because he was black.⁶⁷ In Duval County, Florida, James Weldon Johnson, after passing his oral examination, recalled that one examiner, unprepared to witness the first black admitted to the Duval Bar, blurted out, “Well, I can’t forget he’s a nigger and I’ll be damned if I’ll stay here to see him admitted.”⁶⁸

62. Rhode, *supra* note 14, at 497-98 (citation omitted).

63. Hansen, *supra* note 47, at 1196.

64. *Id.* (quoting Joel Seligman, *Why the Bar Exam Should be Abolished*, JUR. DR., Aug.-Sept. 1978, at 48).

65. See Rhode, *supra* note 14, at 497.

66. See *id.* For example, one Justice wrote, “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of the civil life.” *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

67. See J. CLAY SMITH JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944*, at 152 (1993).

68. JAMES WELDON JOHNSON, *ALONG THIS WAY: THE AUTOBIOGRAPHY OF JAMES WELDON JOHNSON* 143 (1933), *quoted by* SMITH, *supra* note 67, at 279.

C. “Let’s Take it Outside”: Beatings, Canings, Stabbings, and Pistol Duels in the Nineteenth Century

Generally, law in the nineteenth century “seemed to attract a fire-breathing and intemperate breed of man.”⁶⁹ In 1801, the Tennessee legislature passed a law making dueling a crime and requiring that lawyers take an oath upon admission to the Bar that they would not engage in dueling.⁷⁰ In fact, it was found that ninety percent of duels that occurred in Tennessee were between lawyers.⁷¹ In one instance of intemperate lawyering, a “young Tennessee lawyer fatally stabbed a sketch artist after the artist drew him in a humorous and satirical fashion.”⁷² This is not to say such reckless and aggressive behavior was limited to Tennessee. In Arkansas, a “superior court judge killed another Arkansas superior court judge in a duel after the latter judge offended the former’s wife during a card game.”⁷³ In Illinois:

Abraham Lincoln, one of America’s greatest trial lawyers, as well as our sixteenth President, was forced to the very brink of a saber duel with the Illinois state auditor (another lawyer) after Lincoln was identified as the author of embarrassing newspaper articles written under an alias in 1842. Lincoln avoided violence only by apologizing in the moments before the duel.⁷⁴

The most well-known and adventurous dueling lawyer in the nineteenth century was the seventh President of the United States, Andrew Jackson. A decorated man in the military, Jackson certainly had exposure to extensive violence, but this violence transcended his military profession: Jackson partook in “at least 103 duels, fights, and altercations” in his career as a lawyer and judge.⁷⁵

“Legislative prohibitions against dueling posed [few] obstacle[s] to obstinate . . . duelists. Lawyers in states with strong anti-dueling laws simply arranged their skirmishes to take place on ground without such laws.”⁷⁶ For example, they would often duel on unregulated “Indian

69. Roots, *supra* note 25, at 22.

70. *Id.* at 23 (citing DON C. SEITZ, FAMOUS AMERICAN DUELS: WITH SOME ACCOUNT OF THE CAUSES THAT LED UP TO THEM AND THE MEN ENGAGED 29-30 (1966)).

71. *Id.* (citing SEITZ, *supra* note 70, at 30).

72. *Id.* at 24 (citing DICK STEWARD, DUELS AND THE ROOTS OF VIOLENCE IN MISSOURI 88 (2000)).

73. *Id.* (citing Lynn Foster, *Their Pride and Ornament: Judge Benjamin Johnson and the Federal Courts in Early Arkansas*, 22 U. ARK. LITTLE ROCK L. REV. 21, 30 (1999)).

74. *Id.* (citing HAMILTON COCHRAN, NOTED AMERICAN DUELS AND HOSTILE ENCOUNTERS 126-28 (1963)).

75. See Roots, *supra* note 25, at 30-31.

76. *Id.* at 25.

Country.”⁷⁷ Jackson’s most famous duel in 1806 against Charles Dickinson, another prominent Tennessee attorney, actually took place in Kentucky to avoid Tennessee’s anti-dueling statute.⁷⁸

In addition to dueling lawyers, violence and intemperance also prevailed among judges. One Florida judge heralded a lynch mob assault on a courthouse in the 1880s.⁷⁹ Stephen J. Field, one of the longest-serving United States Supreme Court justices as well as the architect of much of American constitutional law in the late nineteenth century, “was jailed and disbarred by a local judge for showing disrespect in the courtroom. Afterward, Field wore a pistol [on his person] in anticipation of a chance confrontation with [that specific] judge.”⁸⁰ Although Field actually followed the judge in public streets and saloons, he was later readmitted to the Bar.⁸¹ “Shortly after readmission . . . Field was disbarred again for similar disrespect in the courtroom of the same judge.”⁸² Nevertheless, he was later elected to the California Supreme Court in 1857,⁸³ and in 1863, nominated to the United States Supreme Court.⁸⁴

By the nineteenth century, lawyers and judges, the protectors of the law, were rarely disbarred or rejected for questionable activity and behavior that occurred in the past. In fact, according to Roger Roots, who has specifically studied morality among lawyers in the nineteenth century, “the record seems bare of any attempts at barring or disbarring such individuals from the practice of law for their activities outside the courtroom.”⁸⁵ Instead, “[d]enial of admission and disbarment were generally reserved for courtroom-related conduct or for serious crimes committed in the course of practicing law.”⁸⁶

77. *Id.*

78. *Id.* at 30.

79. See Rhode, *supra* note 14, at 498 n.23.

80. Roots, *supra* note 25, at 28 (citing CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 38-41 (1930)).

81. *Id.* (citing SWISHER, *supra* note 80, at 40).

82. *Id.* (citing SWISHER, *supra* note 80, at 42-43).

83. *Id.* (citing SWISHER, *supra* note 80, at 72-75).

84. *Id.* (citing SCHWARTZ, *supra* note 50, at 308).

85. Roots, *supra* note 25, at 34.

86. *Id.* Roots cites several cases of interest, including *Ex parte Wall*, 107 U.S. 265 (1883), in which the Court stated, “[W]here an attorney has been fraudulently admitted, or convicted (after admission) of felony, or other offense which renders him unfit to be continued an attorney, . . . the court will order him to be struck off the roll.” *Id.* at 273. This case involved the disbarment of an attorney who defended John Suratt. Suratt was an accused murderer of Abraham Lincoln. While the trial was pending:

[T]he defense attorney assaulted the presiding judge as the judge descended from the bench. The U.S. Supreme Court held that although the judge was justified in immediately disbarring the attorney from practice before his own court, the judge could

*D. When Morals Become Standardized and Anglicized:
The Turn-of-the-Century Shift Towards Targeted Regulation and the
Black and Jewish Response*

“The late nineteenth and early twentieth centuries witnessed a marked increase in interest in character certification across many professions.”⁸⁷ During this time, other professions also began restricting entry standards and initiating character requirements for occupational licensing.⁸⁸ These groups “included barbers, beauticians, embalmers, engineers, veterinarians, optometrists, geologists, shorthand reporters, commercial photographers, boxers, piano tuners, trainers of guide dogs for the blind, and—[interestingly] enough—vendors of erotica.”⁸⁹

“The radical democratization of Bar admissions prompted widespread calls for its reform in the later nineteenth century.”⁹⁰ Expanding post-war industrialization increased concern over the character certification and competency of lawyers to deal with the extensive legalization of the social economy.⁹¹ The ABA was founded in 1878 and “fronted the professional movement toward establishing more stringent and uniform standards for both competence and character.”⁹² At the time, the ABA defined its mission as “the advancement of the science of jurisprudence, the promotion of the administration of justice and a uniformity of legislation throughout the country”⁹³ A dissenting opinion in 1906 by a North Carolina judge in a licensure case articulated this redefined jurisprudential concern for moral character this way:

The public policy of our state has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public and to the proper administration of justice, than legal learning.⁹⁴

The moral character requirement for modern admissions gradually

not summarily disbar the attorney from practicing before other courts in the District of Columbia.

Roots, *supra* note 25, at 34 n.119 (internal citation omitted).

87. Rhode, *supra* note 14, at 498.

88. *Id.* at 499.

89. *Id.*

90. See Ritter, *supra* note 18, at 8.

91. *Id.*

92. *Id.*; see Profile of the American Bar Association (Feb. 2008), available at <http://www.abanet.org/media/profile.pdf>.

93. Profile of the American Bar Association, *supra* note 92.

94. *In re Applicants for License*, 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

evolved from an ideal into a more systematic and centralized form of regulation. “Between 1880 and 1920, states adopted additional entry procedures, such as publication of applicants’ names, probationary admissions, recommendations by the local Bar, court-directed inquiries, and investigation by character committees.”⁹⁵ “By 1917, three-quarters of the states had centralized certification authority in boards of bar examiners.”⁹⁶ By 1927, nearly two-thirds of all jurisdictions made “further efforts to strengthen character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures.”⁹⁷ Gradually, “these certification requirements . . . stiffened through the 1930s, [primarily] in response to efforts by the newly formed National Conference of Bar Examiners, and various bar associations.”⁹⁸

However, class and ethnic biases defined the implementation of the principle of moral character. Indeed, “[w]hile the quest [for moral character and fitness] was ‘aimed in principle against incompetence, crass commercialism, and unethical behavior,’ the ostensibly ‘ill-prepared’ and ‘morally weak’ candidates were often in fact ‘of foreign parentage, and, most pointedly, Jews.’”⁹⁹ Much of the initial drive for more stringent character scrutiny emerged “in response to an influx of Eastern European immigrants, which threatened the profession’s public standing. Nativist and ethnic prejudices during the 1920’s, coupled with economic pressures during the . . . Depression, [further] fueled [this] renewed drive for entry barriers.”¹⁰⁰ Character requirements were not the sole preventive measure. Other preventive measures in addition to the moral character requirement were created through institutionalized restrictive barriers towards immigrants, such as educational and ethical requirements which poor immigrants failed to possess, including thorough knowledge of the King’s English and the available funds for a law school education.¹⁰¹

Under Pennsylvania’s registration and preceptorship system in 1928, “prospective candidates faced a character investigation both at the

95. Rhode, *supra* note 14, at 499 (citing Clarence A. Lightner, *A More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar*, 38 REP. A.B.A. 775, 781-82 (1913)).

96. *Id.* (citing STEVENS, *supra* note 54, at 105 n.23).

97. *Id.* (citing Committee on Legal Education of the Massachusetts Bar Association, *Training for the Bar with Special Reference to the Admission Requirements in Massachusetts*, MASS. L.Q., Nov. 1929, at 44-78 (summarizing that state’s procedures)).

98. *Id.* (citing STEVENS, *supra* note 54, at 105 n.23).

99. *Id.* at 500 (quoting MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 173 (1977)).

100. *Id.* at 499-500.

101. *Id.* at 500.

beginning of law school and at the time of applying for admission to the state bar. . . . [t]he initial character interview afforded an opportunity to dissuade the ‘unworthy’ candidates from pursuing” law, which, at the time, involved a lot of applications from Jews.¹⁰² “Character and fitness requirements were directed mainly at southern European men since there were far more effective barriers to entrance for women and racial minorities.”¹⁰³ The subjectivity of an “unworthy” standard provided plenty of leeway for the rejection of a substantial number of individuals that, according to the justifications of examiners, had no “proper sense of right and wrong” and others that had no “moral or intellectual stamina.”¹⁰⁴ Ultimately, during the first eight years of the Philadelphia program, the focus on only admitting applicants with moral character reduced the proportion of Jews admitted by sixteen percent.¹⁰⁵

This is not to say these barriers went unchallenged. Blacks and Jews often allied together and fought against discrimination within the legal profession. For example, Ellis Rivers, a black graduate of Columbia Law School during the early twentieth century, had his application for membership to the New York State Bar Association rejected on the grounds of race.¹⁰⁶ Rivers worked with Louis Marshall to become admitted:

In 1923, Louis Marshall, who at the time was President of the American Jewish Committee and a member of the board of the NAACP, led a group of prominent lawyers that forced the New York State Bar Association to admit Rivers, and in 1929 Rivers became the first black admitted to the Association of the Bar of the City of New York. By 1942, Rivers, who had become a Manhattan prosecutor, attempted to break the color barrier of the [ABA]. When the ABA refused to admit him—solely on the basis of race—Jonah Goldstein, by this time a judge in New York City, resigned in protest. This led to other resignations, and in 1943 the ABA changed its policy declaring that membership was “not dependent upon race, creed or color.”¹⁰⁷

Similarly, in 1927, Hugh Ellwood Macbeth, Sr., a black graduate of Harvard Law School, “led a group of black and Jewish lawyers in successfully challenging the exclusion of both groups from the

102. *Id.*

103. Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers’ Characters*, 68 IND. L.J. 647, 649 (1993).

104. Rhode, *supra* note 14, at 501 (citing Walter C. Douglas, *The Pennsylvania System Governing Admission to the Bar*, 54 REP. A.B.A. 701, 703-05 (1929)).

105. *Id.*

106. Paul Finkelman, *Not Only the Judges’ Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 205 (1994) (reviewing SMITH, *supra* note 67).

107. *Id.*

California Bar Association.”¹⁰⁸

E. A Colorblind Court: The Subjugation of McCarthyism and the Emergence of Rationality

In most states, character certification after the 1930s grew more rigorous in form, becoming increasingly systematic, as definitions of virtue shifted with the national mood. During the mid-twentieth century, the rising fear of Communism and the pervasiveness of McCarthyism influenced several admission decisions as applicants were rejected for Communistic activities. Ultimately, via appeals, several monumental cases paved the way for the qualification of the moral character requirement with the practice of law. Today, a state’s standard for moral character in terms of Bar admissions must have some rational connection to the practice of law.¹⁰⁹

The most significant and popular case in Bar admissions was *Schware v. Board of Bar Examiners*, which qualified moral character with fitness to practice law.¹¹⁰ In that case, the application of the petitioner was denied on the ground that he had not shown good moral character, in view of his past membership in the Communist Party, his use of aliases, and his record of arrest.¹¹¹ In its decision, on certiorari, the Supreme Court of the United States reversed the judgment against Schware on the ground that the petitioner’s exclusion from the practice of law violated due process, since upon the record the New Mexico Supreme Court could not reasonably find that the petitioner had not shown good moral character.¹¹² In fact, the court found him to be “a man of high ideals with a deep sense of social justice” who actually used aliases “for the purpose of forestalling anti-Semitism in securing employment,”¹¹³ and, at the occasion of a mass arrest during a labor dispute, for the purpose of avoiding his being discharged as a striker.¹¹⁴ In its decision, the Court judged that any state qualification for Bar admission must “have a rational connection with the applicant’s fitness or capacity to practice law.”¹¹⁵ In *Schware*, the Supreme Court rejected the intrusion of McCarthyism, affirming that a Bar applicant’s political

108. *Id.*

109. *See* *Schware v. Bd. of Bar Exam’rs*, 353 U.S. 232, 246 (1957).

110. *See id.* at 239.

111. *Id.* at 240-45.

112. *Id.* at 247.

113. *Id.* at 240.

114. *Id.* at 241.

115. *Id.* at 239.

beliefs are sacred, unless they affect his ability to adequately practice.¹¹⁶

III. THE BENEFITS OF THE CURRENT MORAL CHARACTER REQUIREMENT

Whereas the history of the moral character requirement in Bar admissions during the nineteenth and early twentieth century illuminates a prejudicial moralist intrusion in the admissions process, the case of *Schwabe* alternatively illustrates a divergence from a regrettable past. Today, there is no question character committees focus more on judging an applicant's fitness to practice rather than subjectively attempting to discern an applicant's underlying moral character. Despite the exclusionary tactics of character screening in the past, all states continue to use a redefined, more formal and standard system of evaluating character as a requirement for present-day Bar admission. For the most part, only if an applicant is flagged with a substantially problematic history is his or her application up for review.

In principle, the ABA openly defends present character evaluations as necessary for both "the protection of the public and the system of justice,"¹¹⁷ and rightly so considering the public's perception of the legal profession, the need to preserve the dignity of the law, the extent of problems among current lawyers, and notable admissions cases in the past that have proved to exclude problematic figures.

A. *The Truth Hurts: The Need to Regulate Against Corrupt Lawyers*

The predominant justification for the inclusion of the moral character requirement in modern-day Bar admissions is to adequately protect the public. "Those involved in the character certification process have almost uniformly identified its central justification as protecting the public."¹¹⁸ In his concurring opinion in *Schwabe*, Justice Frankfurter observed, "all the interests of man that are comprised under the constitutional guarantees of 'life, liberty and property' are in the professional keeping of lawyers."¹¹⁹ The ABA agrees that it is the Bar's duty to protect the public against substandard practitioners.¹²⁰ The ABA, along with the National Conference of Bar Examiners and the

116. *Id.* at 246-47.

117. RECOMMENDED STANDARDS FOR BAR EXAMINERS, *supra* note 16, at III.13.

118. Rhode, *supra* note 14, at 507.

119. *Schwabe*, 353 U.S. at 247 (Frankfurter, J., concurring).

120. See MODEL CODE OF PROF'L RESPONSIBILITY EC 1-2 (1983) ("The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law.").

Association of American Law Schools, states that the public has an interest in securing representation by attorneys who have been certified as “worthy of the trust and confidence clients may reasonably place in their lawyers.”¹²¹ According to these organizations, testing for “minimal competence,” through the Bar examination and other standards is inadequate unless the system evaluates “character and fitness as those elements relate to the practice of law.”¹²² This system of character regulation assumes that the public will not be adequately protected against bad lawyers without investigations to eliminate less reputable individuals from attaining membership to the Bar. It is the ABA’s belief and duty to anyone in need of a lawyer that character standards will prevent unscrupulous individuals from joining the legal profession.

The Bar also seeks to protect its own image and the legal profession in general. A less recognized factor, but a determinative one, in character screening is the need to preserve, or more adequately, establish a sense of professionalism in law. A fairly recent Harris Poll illustrates the public’s lack of trust in lawyers.¹²³ When asked whether or not lawyers are trustworthy, 27% of respondents surveyed said they would trust lawyers to tell the truth, while 68% said they would not trust lawyers to tell the truth.¹²⁴ The results of the public opinion poll, which is assumedly based on prior experience along with popular culture, placed lawyers at the bottom of the ladder.¹²⁵ In a privately-funded study conducted by the ABA on the public’s perception of the legal profession, the ABA found that trust and confidence in lawyers is even worse than the Harris Poll indicated.¹²⁶ According to the study funded by the ABA, 14% clients felt “Extremely/Very Confident” in lawyers,¹²⁷ which is in stark contrast to other less stringently regulated professions, including medical care and accounting, which garnered a “fairly healthy” amount of confidence.¹²⁸

The ABA now seeks to screen out dishonest applicants through the moral character requirement in order to protect the public and the system

121. RECOMMENDED STANDARDS FOR BAR EXAM’RS, *supra* note 16, at III.7.

122. *Id.*

123. See Harris Interactive, Inc., *Doctors and Teachers Most Trusted Among 22 Occupations and Professions: Fewer Adults Trust the President to Tell the Truth: Actors and Lawyers at Bottom, with Pollsters also Fairing Poorly* (Aug. 8, 2006), http://www.harrisinteractive.com/harris_poll/index.asp?PID=688.

124. *Id.*

125. *See id.*

126. See PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 7 (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf>.

127. *Id.* at 50.

128. *Id.* at 49.

of justice, preserving the professionalism of the occupation as well as the fairness of the law. Even if only a minimal amount of applicants are rejected in the admissions process,¹²⁹ the Bar owes it to the public and the profession to stand behind pre-regulatory methods. With no character screening, the Bar cannot claim to protect the interests of the American people or the American system of justice as it waits for corrupt lawyers to emerge only after mishandling clients' trust and tainting the legal profession.

B. Does the Process Work?

The Infamous Admissions Rejection of Matthew F. Hale

In 1998, Matthew F. Hale received a Juris Doctor degree from Southern Illinois University School of Law at Carbondale¹³⁰ and successfully passed the Illinois State Bar examination in the same year.¹³¹ Despite fulfilling these requirements to practice law in the state of Illinois, a three-member Inquiry Panel "refused to certify him for admission to the Illinois Bar in February of 1999" because of his failure to prove he was of good moral character.¹³² While the majority of applicants up for review in 1998 were flagged because of admitting to prior criminal activity,¹³³ Hale's application was flagged because of a much more subjective reason: suspicion of his moral character and ability to practice law.¹³⁴

In October 1995, Hale became the head of an organization called the World Church of the Creator ("WCOTC"), which claims to be a religious organization, while Hale assumed the title of Pontifex Maximus (Latin for "Supreme Leader").¹³⁵ According to its founder, Ben Klassen, the WCOTC has as one of its major tenets the hatred of blacks, Jews, and other minorities.¹³⁶ This hatred peppers the commandments and literature of the WCOTC. For example,

the "Seventh Commandment" of Hale's religion [asks] members to show preferential treatment in business dealings to "members of your

129. See Ralph S. Brown, Jr. & John D. Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 497 (1953).

130. HAZARD, JR. ET. AL., *supra* note 17, at 876.

131. Richard L. Sloane, Note, *Barbarian at the Gates: 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, 417 (2002).

132. *Id.* at 420.

133. See Mark Schauerte, *Illinois Denies Law License to Vocal Racist*, ST. LOUIS POST-DISPATCH, Feb. 22, 1999, at A1.

134. See *id.*

135. HAZARD, JR. ET. AL., *supra* note 17, at 876.

136. *Id.*

own race”—meaning whites. The “Seventh Commandment” continues: “Phase out all dealings with Jews as soon as possible. Do not employ niggers or other coloreds. Have social contacts only with members of your own racial family.”¹³⁷

The underlying racism and anti-Semitism defining the WCOTC illustrates the extent of Hale’s bigotry: He was a self-professed racist and anti-Semite. As a result of these views, the Inquiry Panel in a majority opinion rejected Hale:

While Matthew Hale has not yet threatened to exterminate anyone, history tells us the extermination is sometimes not far behind when government power is held by persons of his racial views. The Bar of Illinois cannot certify someone as having good moral character and general fitness to practice law who has dedicated his life to inciting racial hatred for the purpose of implementing those views.¹³⁸

Hale appealed the decision before the Third District Character and Fitness Committee’s five-member panel on April 10, 1999.¹³⁹ In a complaint, Hale, “a well-known and vigorous advocate of racist and anti-Semitic ideas,” claimed that he “was barred from the legal profession and denied his livelihood because the individuals sitting on the Committee of Character and Fitness for the State of Illinois happened to disagree—strongly—with [his] political and religious views.”¹⁴⁰ His complaint continued, arguing that “[t]o describe the denial of [his] application to practice law, then, is to illustrate the profound dangers it poses to the most basic and valued liberties guaranteed to all citizens by the United States Constitution.”¹⁴¹ But Hale’s racism was not in question as much as the extent to which this racism would affect his fitness to practice. As in *Schwartz*, the case boiled down to Hale’s fitness to practice and adequately represent all of his clients regardless of their race or religious faith.

Ultimately, Hale was again denied admission with the opinion of the majority expressing: “The Bar of Illinois cannot certify someone as having good moral character and general fitness to practice law who has

137. Sloane, *supra* note 131, at 419-20 (quoting WORLD CHURCH OF THE CREATOR, WORLD CHURCH OF THE CREATOR MEMBERSHIP MANUAL 6, available at <http://www.archive.org> (search “Creator Membership Manual”; then follow “pdf” hyperlink) (last visited Aug. 26, 2008)).

138. HAZARD, JR. ET. AL., *supra* note 17, at 883-84.

139. Sloane, *supra* note 131, at 420-21 (citing Molly McDonough, *St. Louis Lawyer Can Represent Racist Before High Court: Justices*, CHICAGO DAILY BULL., Aug. 3, 1999, at 3).

140. Complaint at 2, *Hale v. Comm. on Character and Fitness*, 335 F.3d 678 (7th Cir. 2003) (No. 02-1716).

141. *Id.*

dedicated his life to inciting racial hatred.”¹⁴² Sure enough, following this decision, one of Hale’s closest friends and character witness, Benjamin Smith, went on a shooting spree targeting twenty minorities, killing two men, and wounding nine Orthodox Jews and African-Americans.¹⁴³ Certainly the anti-violence stance Hale claimed the WCOTC possessed was called into question, even more so after Hale essentially justified Smith’s violent acts as “an example of what happens when people at least perceive their freedom of speech is being disrupted.”¹⁴⁴

In the *Hale* case, the character committee read the writing on the wall and its regulatory procedures successfully precluded granting Hale the privilege to practice law by finding him unfit.

The good moral character requirement of the past, which served to subjectively prevent minority applicants from admission, is now almost completely integrated in the fitness to practice standard.¹⁴⁵ However, the prevalence of the moral relativism debate in *Hale* suggests that an applicant may have questionable moral character, as Hale evidently did, and still be admitted to the Bar. That is because what concerned the Committee more than judging the goodness of Hale’s character was the extent to which his character infringed on his duties as an attorney. Ultimately, the Committee’s decision was founded on Hale’s questionable credibility: although he said he could adequately defend and work with anyone, the Committee rightfully did not believe him.¹⁴⁶

C. *A Predictive Method With Predictive Results?*

Not all applicants applying to the Bar engage in such public displays of character like Hale. Thus, the need for a “rational connection” between an applicant’s moral character and the practice of law has resulted in heightened scrutiny of an applicant’s prior and current conduct as part of the Bar admission process.¹⁴⁷ Logically, character committees assume that if an applicant has committed misconduct in the past he or she will presumably act badly again. Although this is a rational premise, it is a controversial premise in the

142. HAZARD, JR. ET. AL., *supra* note 17, at 883-84.

143. Sloane, *supra* note 131, at 425.

144. Molly McDonough, *Spree Shooter, Would-be Lawyer Shared Racist Goal*, CHI. DAILY L. BULL., July 6, 1999, at 1.

145. *See Hale v. Ill. Comm. on Character & Fitness*, 335 F.3d 678, 680 (7th Cir. 2003).

146. *See id.* at 680-81.

147. *See* Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 86-92 (1984).

context of the Bar admissions process.¹⁴⁸ Indeed, it is impossible to say for certain whether Matthew Hale would have broken the law as a lawyer, although this author would bet that he would.

Several studies and major opinions contradict each other over whether a predictive technique works and if there is a correlation between applicants with problem histories who are admitted to the Bar and later disciplinary action. The Minnesota Board Bar of Examiners organized a small, confidential study supporting a correlation between problem histories and later disciplinary actions:

The Board is currently studying the records of a small sample of applicants who, subsequent to admission, were disciplined for professional misconduct. The study appears to indicate that those applicants who disclosed character and fitness problems upon application for admission are more likely than other applicants to engage in conduct which later results in professional discipline.¹⁴⁹

In the same breath, the Board clarified that regardless of the final outcome of the study, empirical evidence is unnecessary considering that common sense dictates that “an applicant with a track record of fraudulent conduct is more likely to engage in fraudulent practices as an attorney.”¹⁵⁰ Justice Brown, in a dissenting opinion in the *In re Applicants for License* matter, expressed the same justification for the admissions process arguing that

if the applicant passes the threshold of the Bar with a bad moral character, the chances are that his character will remain bad, and that he will become a disgrace, instead of an ornament, to his great calling, a curse, instead of a benefit, to his community, a Quirk, a Gammon, or a Snap, instead of a Davis, a Smith, or a Ruffin.¹⁵¹

Nevertheless, despite arguments for correlation and justification for the current system of judging moral character through subjective screening, the Michigan State Bar’s Regulation Counsel’s office finds no such correlation.¹⁵² In a study comparing outcomes of the Character and Fitness process with disciplinary actions subsequently taken against attorneys by the Attorney Discipline Board, the Michigan Bar explains

148. *Id.*

149. Baude, *supra* note 103, at 651 (quoting Letter from Margaret Fuller Cornielle, Dir., Minn. Bd. of Law Exam’rs, to Robert J. Munson, President, Minn. State Bar. Ass’n 8 (Sep. 3, 1991) [hereinafter Cornielle Letter]).

150. *Id.*

151. 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

152. D. Larkin Chenault, *It Begins With Character . . .*, 77 MICH. B.J. 138, 139 (1998) (discussing tracking in Michigan).

that “[i]nformal tracking in recent years has shown no correlation between ‘problem’ Character and Fitness histories and later disciplinary actions.”¹⁵³ That may be partially because in some states’ admissions process, the reliance on prior conduct as an indicative factor of future wrongdoing results in character committees scrutinizing an applicant’s “divorce, cohabitation, and even violation of fishing license statutes”¹⁵⁴ to determine character, despite the fact that several organized empirical research studies have established “no correlation between ‘problem’ applications and later disciplinary proceedings.”¹⁵⁵

IV. A SUBJECTIVE STANDARD: THE WOES OF INDETERMINACY

Although the rationale behind the moral character requirement is understandable, the current system’s indeterminacy and inconsistency poses major problems for applicants to the Bar and for the Board of Examiners vested with the responsibility of regulating the legal field. Although most states have come to define what constitutes “good [moral] character,” it can include such vague characteristics such as “honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, fiscal responsibility, physical ability to practice law, knowledge of the law, mental and emotional stability, and a commitment to the judicial process.”¹⁵⁶ Similarly, the ABA has general moral character factors like:

- unlawful conduct
- academic misconduct
- making of false statements, including omissions
- misconduct in employment
- acts involving dishonesty, fraud, deceit or misrepresentation
- abuse of the 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

153. *Id.*

154. Roots, *supra* note 25, at 35 (internal citations omitted).

155. *Id.* (citing Chenault, *supra* note 152, at 139).

156. Ratcliff, *supra* note 1, at 495 (“However, at least seventeen states avoid the problems involved in describing the relevant character traits that make up good character by not publishing guidelines.”).

- disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.¹⁵⁷

Although general standards are promoted by the ABA and several Bars, the insularity of state Bars caused by the confidentiality of previous admissions cases and the inherent subjectivity of the moral character requirement raise major issues.

The inherent subjectivity of the moral character requirement and the subsequent issues therein were highlighted in *Konigsberg v. State Bar of California*.¹⁵⁸ Konigsberg's application was flagged when it became apparent that Konigsberg attended Communist Party meetings in 1941, despite the fact that the Communist Party was a legitimate American political party at the time. Ultimately he was denied admission to the Bar, but not because his Communist ties related to any moral turpitude; rather, he was rejected because he refused to answer questions probing into his Communist ties, claiming that under the First and Fourteenth Amendments a state could not inquire into a person's political opinions or associations.¹⁵⁹ In the decision, Justice Hugo Black digressed and expressed his weariness with moral character being used as a requirement in Bar admissions:

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the 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.¹⁶⁰

The arbitrariness of the moral character requirement may no longer allow openly denying a candidate because of his or her sex, race, religion, and/or political affiliation as it did in the past, but its proclivity towards excluding whoever is deemed "unfit" naturally isolates certain groups of candidates as determined by the people who decide whether or not the applicant has good or bad moral character. Even though very few applicants have been formally denied admission, "the number deterred, delayed, or harassed [based on the moral character requirement] has been more substantial. In the absence of meaningful standards or

157. These eleven criteria for inquiry are set forth in: RECOMMENDED STANDARDS FOR BAR EXAMINERS, *supra* note 16, at III.13.

158. 353 U.S. 252, 262-63 (1957).

159. *Id.* at 258-59.

160. *Id.* at 262-63.

professional consensus, the filtering process has proved inconsistent, idiosyncratic, and . . . intrusive.”¹⁶¹

*A. To Be a God for a Day:
The Committee that Determines Good and Evil*

While the standard Bar exam is grounded in objectivity, the moral character requirement is not based on a score or a percentile; rather, a character committee or a Board of Bar Examiners determines whether or not an applicant demonstrates good moral character without using a grading system.¹⁶² In most every case, the character committee or Board of Bar Examiners is comprised only of lawyers.¹⁶³ In fact, “[l]ess than one quarter of all states allow for limited lay membership on such boards.”¹⁶⁴ In those states allowing lay participation in the screening process, laypersons generally represent a small minority of the total board and are generally chosen by members of the profession.¹⁶⁵ This promotion of a “professional image standard” reinforces “the beliefs that members of a profession hold toward that profession: what it is; what it should be; and what it should not be.”¹⁶⁶ The oversight of moral fitness is pretty much managed exclusively by members of the legal profession.¹⁶⁷

Laypersons are not the only group not represented on character committees: “The majority of committee members . . . come from large or medium-sized firms.”¹⁶⁸ As a result, “[p]ublic interest groups, solo practitioners, government employees, and academicians are rarely represented on character committees. The profession’s exclusion of entire segments of its own constituency as well as members of the lay public from membership on moral character committees necessarily limits the diversity of views represented on these committees.”¹⁶⁹ “Since bar organizations play a dominant role in selecting members, committees may . . . be skewed toward established, mainstream practitioners”¹⁷⁰ Describing moral fitness in terms of the shared experiences of only a few instead of in connection to the state’s purposes

161. Rhode, *supra* note 14, at 494.

162. See M.A. Cunningham, Comment, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 TUL. L. REV. 1015, 1024 (1992).

163. *Id.*

164. *Id.*

165. See Rhode, *supra* note 14, at 505.

166. See Cunningham, *supra* note 162, at 1021.

167. Rhode, *supra* note 14, at 505.

168. Cunningham, *supra* note 162, at 1025.

169. *Id.*

170. Rhode, *supra* note 14, at 506.

changes the moral fitness standard from an instrument of the state into a tool for a selected portion of the legal profession.¹⁷¹

Suspensions relating to the exclusion of nonconformist lawyers and laypersons from character committees are heightened because of the secrecy and confidentiality surrounding many State Bar organizations. For instance, in California, information may not be easily found regarding the makeup of the Moral Character Subcommittee, even after scouring the California State Bar Association's website¹⁷² and leaving three unreturned voicemails with the State Bar's Admissions Department by this author's law clerks.¹⁷³ Only after repeatedly telephoning the State Bar over the course of two weeks were the names of the eight people making up the Moral Character Subcommittee of the California State Bar eventually e-mailed.¹⁷⁴ Even then, these eight names alone meant very little, and an exhaustive Internet search for individual biographical information on each committee member did not prove very fruitful.

When the California State Bar was asked for the background of its committee members, the Bar claimed no such background records existed on file;¹⁷⁵ instead, it recommended a search on the State Bar's website,¹⁷⁶ which only registered a few matches, and those biographies were limited to name, business address, law school attended, and disciplinary record, if any. In Illinois (the home of the ABA) and in New York, no information could be found on each State Bar's respective website.¹⁷⁷ The Illinois State Bar did not respond to several requests this author's law clerks made by voicemail. The New York Bar, along with the Florida State Bar, explained that a request must be made in writing

171. Cunningham, *supra* note 162, at 1025.

172. See The State Bar of California, Committee of Bar Examiners, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10127&id=1085 (last visited August 26, 2008). The site states only that the Committee is "composed of 10 attorneys, including one young lawyer member admitted three years or less before the time of his or her appointment, and nine public members (who must not be members of the State Bar or admitted to practice before any court in the United States)." *Id.* It does not, however, provide any information on the individual members who comprise the Committee. See *id.*

173. Voice messages were left with the Admissions Department on May 31, June 5, and June 7, 2007.

174. E-mail from Diane Curtis, Public Information Officer, The State Bar of California, to Tom Sansani (June 12, 2007, 14:29 EST) (on file with the Hofstra Law Review).

175. E-mail from Diane Curtis, Public Information Officer, The State Bar of California, to Tom Sansani (June 13, 2007, 13:35 EST) (on file with the Hofstra Law Review).

176. E-mail from Diane Curtis, Public Information Officer, The State Bar of California, to Tom Sansani (June 13, 2007, 13:41 EST) (on file with the Hofstra Law Review).

177. See Illinois State Bar Association, <http://www.illinoisbar.org> (last visited May 23, 2008); New York State Bar Association, <http://www.nysba.org> (last visited May 23, 2008).

and then approved prior to information being released.¹⁷⁸ This is somewhat understandable to protect the identity of committee members from a potentially dangerous situation, but it seems unfair that a flagged applicant, whose history is laid bare for judgment, is incapable of exploring the character of his determiners. This author's inquiries demonstrate an insularity to character determination that, combined with the make-up of the committees, render the process perhaps too subjective.

*B. Ex-Felons and the Disabled:
The Outliers in Modern Day Admissions*

The inherent vagueness of the good moral character standard has resulted in newly-defined alienated groups. It is true that state Bars have come a long way from their past open discrimination against women, Blacks, and Jews. However, a strict focus on fitness to practice and scrutiny of prior records has resulted in the targeting of ex-felons and the mentally impaired.

Because prior criminal conduct is far and away the most common indicator of bad moral character for character committees, ex-felons, even those with records of good behavior in prison and post-prison, are primarily excluded from the legal profession. Bruce E. May argues that this prevents ex-felons from pursuing "gainful employment opportunities" in the law as well as many other occupational licensing professions.¹⁷⁹ In fact, one author opines that "[i]n some states virtually the only 'profession' open to an [ex-felon] is that of burglar; he is barred from other activities because he is presumed to be a person of bad moral character, regardless of the nature of the [crime] or its relevance to his intended occupation."¹⁸⁰ Although the far-reaching impact of licensing laws on ex-felons raises questions as to whether such laws violate Equal Protection, the rational basis requirement is nearly impossible to challenge on equal protection grounds because convicted felons are not considered a suspect class unless a state specifically provides them protection.¹⁸¹ Therefore if an ex-felon has a conviction for burglary, the character committee has a strong enough rational basis to question his or her moral character and ability to handle funds for clients, despite good behavior since the crime.

178. Telephone Conversation with Receptionist, Fla. State Bar (Aug. 1, 2007, 11:07 EST).

179. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 188 (1995).

180. Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 13 (1976).

181. See *Furst v. New York City Transit Auth.*, 631 F. Supp. 1331, 1336-37 (E.D.N.Y. 1986).

Ex-felons are not the only group targeted by current screening practices. A survey conducted by the Utah State Bar Association reveals that most states incorporate mental health inquiries in their Bar application evaluation.¹⁸² In terms of probing the character of a mentally disabled applicant, prior conduct is not as important for character committees as a current examination focusing on the applicant's fitness to practice with his or her mental disability. Indeed, "in the past few decades Bar admission authorities have made inquiries into treatment for mental disorders and substance abuse a routine component of . . . character screening."¹⁸³

These screening processes have come under fire since the enactment of the Americans with Disabilities Act ("ADA") of 1990.¹⁸⁴ The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁸⁵ Those who oppose intrusive mental health questions posed by Bar admissions authorities have pointed to the serious harms that can be inflicted by these inquiries, such as the embarrassment felt by applicants forced to disclose very private matters, delays in admission that often accompany the investigations following the discovery of a mental health issue, and the likelihood that the inquiries may deter some law students from obtaining counseling.¹⁸⁶

Although protecting the public is undoubtedly reason enough to allow these inquiries, scientific studies have demonstrated that "inquiries about mental illness and addiction do not elicit meaningful knowledge regarding competence."¹⁸⁷ Moreover, medical research has revealed the startling information that almost half the people treated by a mental health professional do not actually suffer from a mental illness.¹⁸⁸ Coupling this data with the fact that many people who do have a recognizable psychiatric condition never consult a mental health professional¹⁸⁹ proves that, even if a correlation existed, the current system of inquiry targets the wrong people (for example, people who are

182. Gail Edison, Comment, *Mental Health Status Inquiries on Bar Applications: Overbroad and Intrusive*, 43 U. KAN. L. REV. 869, 870 (1995) (citing Informal Survey of the Character and Fitness Comm. of the Utah State Bar (1994)).

183. Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 95 (2001).

184. *Id.*

185. 42 U.S.C. § 12101(b)(1) (2000).

186. Bauer, *supra* note 183, at 96.

187. Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Board to Comply with the ADA and Constitution*, 20 J. LEGIS. 147, 147 (1994).

188. *See id.* at 159.

189. *See id.*

dealing with their illness and being honest in revealing it) and fails to justify the accompanying potential injury to the law student previously discussed. Courts have thus far reached no consensus as to what, if any, questions about mental illness or substance abuse licensing agencies may pose to disabled candidates seeking admission to the Bar.¹⁹⁰

Although the character and fitness examination no longer discriminates in such blatant ways as in the past, the modern system's focus on a lawyer's fitness to practice, grounded in the scrutiny over prior criminal records and current medical records, has resulted in an over-inclusion of persons delayed or denied with a criminal record and the potentially mentally impaired. This author does not see this as changing with the ABA's 2008 adoption of Model Rules on Conditional Admission of students with impairments, which would conditionally grant admission to applicants who comply with the Lawyers Assistance Program and other requirements during a probationary period.¹⁹¹

That is because it does not change the problems inherent in the process of determining who gets admitted conditionally or unconditionally.

V. ON THE FRONT LINE: MORAL CHARACTER PAVING THE WAY FOR EQUALITY AND SOCIAL ADVANCEMENT

Although indeterminacy sometimes manifests itself negatively, as seen in the case of ex-felons and the disabled, admission procedures have often led the way in promoting equality through blind admission and an intentional focus on an applicant's fitness to practice. Indeed, in focusing solely on fitness to practice, discrimination in specific terms of race, religion, and political affiliation, which proved salient in the past, is for the most part subordinate to more general inhibitive character qualities that would prevent a lawyer from proper conduct. As a result, discrimination solely on grounds of sexual orientation has failed to permeate the Bar admissions process.

In recent decades, outside of Bar admissions, much has been done to advance the civil rights of the gay and lesbian community. For instance, the Local Law Enforcement Act ("LLEA") of 2005, more popularly known as the Hate Crimes Bill, was introduced in the Senate and was aimed at providing federal assistance to state and local

190. See Bauer, *supra* note 183, at 139-48 (discussing and contrasting court approaches to this issue).

191. MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW (Feb. 2008), available at www.abanet.org/legalservices/downloads/colap/ABAModelRule_ConditionalAdmission_Feb2008.pdf.

jurisdictions to prosecute hate crimes and branded violence motivated by a victim's "sexual orientation" as a hate crime.¹⁹² In May 2007, the House voted to "extend hate-crime protection to those victimized because of their sexuality."¹⁹³ In 2003, in *Lawrence v. Texas*, the Supreme Court struck down the criminalization of homosexual sodomy in Texas, holding that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment.¹⁹⁴ This decision overruled *Bowers v. Hardwick*, decided in 1986, when the Supreme Court upheld the criminalization of adult consensual private homosexual sodomy.¹⁹⁵ Indeed, on the whole, the civil rights and protections offered to the gay and lesbian community have steadily increased in recent decades.

Regardless of one's personal opinion on the morality of the issue, there is no denying that gays and lesbians, whether justly or not, are not afforded the same rights as heterosexuals. For example, under the "Don't Ask, Don't Tell" policy of the United States Armed Services, "gay and lesbian members of the armed forces have been discharged or denied reenlistment in cases where they have either engaged in homosexual activity, or revealed themselves to be gay or lesbian."¹⁹⁶ Moreover, the issue of "gay marriage" and equal rights afforded to gay couples through civil unions as well as gay adoption stand as salient political issues.¹⁹⁷

Yet, in admissions to the Bar, sexual orientation rarely, if ever, prevents an applicant from practicing law. Certainly, the subjectivity and indeterminacy of the moral character requirement enables the emergence of certain prejudices but not without a rational connection to one's fitness to practice. As such, although homosexual applicants may hypothetically be targeted and no specific measures have been placed to protect them, there have yet to be any appeals or complaints in admissions based on an applicant's sexual orientation:

That gay and lesbian aspirants to the practice of law *presently* have little to fear from Bar examiners and character committees . . . is a conclusion powerfully fortified by the existence of organizations

192. S. 1145, 109th Cong. § 249(2) (2005). This bill, however, never actually became law. S. 1145 [109th]: Local Law Enforcement Act of 2005, <http://www.govtrack.us/congress/bill.xpd?bill=s109-1145> (last visited Aug. 26, 2008).

193. David Stout, *House Votes to Expand Hate-Crime Protection*, N.Y. TIMES, May 4, 2007, at A19.

194. 539 U.S. 558, 578 (2003).

195. 478 U.S. 186, 196 (1986).

196. Joel Jay Finer, *Gay and Lesbian Applicants to the Bar: Even Lord Devlin Could Not Defend Exclusion, Circa 2000*, 10 COLUM. J. GENDER & L. 231, 242 (2000).

197. See Andrea Stone, *Drives to Ban Gay Adoption Heat Up in 16 States*, USA TODAY, Feb. 24, 2006, available at http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm.

among the judiciary, among attorneys in numerous jurisdictions, and among law students throughout the country, dedicated to advancing the legal rights of men and women whose fulfillment may best be attained by intimate association with those of the same sex.¹⁹⁸

The ABA, to its credit, has led the charge, adopting several resolutions in favor of laws “forbidding discrimination on the basis of sexual orientation in employment, housing, and public accommodations,”¹⁹⁹ as well as laws “prohibiting the disadvantaging of homosexuals with regard to adoption, child custody, and visitation rights.”²⁰⁰ Whereas certain sectors of government and private companies lag behind in the establishing of equal rights, the ABA, in its admissions process and outside of it, has steadfastly supported the gay and lesbian community.

VI. SOLUTIONS TO THE ADMISSIONS PROCESS: PROTECTING THE PUBLIC, JUSTICE, AND FUTURE LAWYERS

While it is true that great strides have been made in the admissions process, it should not be that the current discipline system relies almost completely upon “entry regulation to guarantee competence.”²⁰¹ Most state Bars simply do not have the funding to continually monitor lawyers for competence and character issues. Since many problems that inhibit a lawyer’s fitness to practice indisputably arise from the demands of the legal profession, more should be done to prevent these problems from arising both before and after admission. According to Benjamin Hoorn Barton, focus should be placed more on regulation through education and discipline than on subjective character screening in the admissions process.²⁰²

With the help of the ABA, law schools could stress the importance of ethical and moral behavior as a lawyer in classes while the students are in law school; indeed, moral character should not arise for the first time after an applicant has already passed the Bar examination and accepted a job offer. Unfortunately, this is a job for the Dean of Students, and that is a law school position that seldom carries the political clout that could be necessary to get the professors to comply.

198. Finer, *supra* note 196, at 260 (internal citations omitted).

199. *Id.* at 261 (citing Paul Marcotte, *House Affirms Gay Rights: Resolution Provokes Floor Fight*, A.B.A. J., Apr. 1989, at 125).

200. *Id.* (citing Jeffery G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, HUM. RTS., Spring 1999, at 7, 7).

201. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 486 (2001).

202. See *id.* at 485-86.

An easier solution could be for law schools to offer programs on drug and alcohol abuse/awareness and other issues that arise in their schools that implicate moral character, such as cheating. They could inform law students in the first year of law school about the moral character requirement and how moral character is determined, so that it is not a surprise when they apply for admittance to the Bar. This would allow students to actively think about what it means to be a professional while in law school. It could also assist them in laying a foundation of good moral character to present to their state committee if need be while they have three to four years to do so. Leslie Schiff, a lawyer in Louisiana and a past Louisiana Bar president, has started such a program at many law schools in Louisiana.²⁰³

The harder issue to remedy is the different state Bars' styles of character examinations. This author asked lawyers who comprise the Association of Professional Responsibility Lawyers listserv what can be done to improve this disparity. A lawyer on the listserv proposed that reciprocal admission to the Bar needs to become a reality across the United States. This means that if one Bar admits a lawyer, another Bar will not challenge the applicant on moral character grounds, mitigating any anti-competitive and protectionist impact by Bars in other jurisdictions.

But reciprocal discipline will not solve the problems inherent in an initial subjective determination. The ABA could help by standardizing the concept of moral character through narrowing inquiries into what is really relevant to the practice of law. In order to accomplish this, the ABA would have to conduct a study of admissions cases (all of them, even cases not available to the public); in particular who gets admitted and who does not. Only the ABA could do a thorough study, as this author learned by simply trying to get the names of Committee members in her state. If the number of admitted applicants in a state was racially and economically disproportionate to all those admitted into the legal field, we would find out quickly if there is a flaw in that state's system of looking at one's past as a determining factor of moral character and fitness to practice. Combining that study with a scrutiny of how many applicants with delayed admission actually go on to be disciplined would also shed some light on the issues raised by the subjectivity inherent in a moral character determination. A comprehensive study such as this might pave the way for a more sympathetic view towards applicants with problem histories as a result of merely situational

203. Leslie J. Schiff, <http://www.lsba.org/2007InsideLSBA/pastpresidents.asp> (last visited Aug. 26, 2008).

socioeconomic status and racial background, and provide more uniformity of results. Uniformity is a problem; this author has been asked more than once “What is an easy state to get admitted?”

In this author’s state, records of discipline, even if there is no published case, are available to anyone. However, unpublished admissions cases are not available at all, and that is the overwhelming majority of the cases. The ABA should pressure state Bars to publish admissions cases, retaining the confidentiality of the applicants by redacting their names, in order to allow analysis of what moral character is and evaluation of their process, even if only to level the playing field.

Moreover, applicants should have full access to the identities of the character committee members who will be determining their moral character. The fact that this information is kept confidential only perpetuates applicant anxiety and the perception of an equal playing field. A mandate that character committees diversify as much as possible to incorporate all types of lawyers, laypersons, and mental health experts will eliminate potential prejudices and biases from coloring admissions decisions. Indeed, if the system is meant to protect the public, then shouldn’t the public have a say on the admittance of applicants as opposed to a team of self-regulating lawyers?

Finally, bias and sensitivity training should be mandated for every committee member determining character. As this author has learned from attending many character interviews, some questions come off, even if unintentionally, as being harsh and judgmental, making the applicant fearful of responding. Add in to the mix that the applicant’s responses are tape-recorded, and you often end up with an applicant in tears.

This author’s experience with the California Moral Character Subcommittee has been fairly extensive, and surprisingly positive. But any subcommittee, even the California Bar’s, should be open to some scrutiny. It is through oversight by the courts and social pressure that the admissions process has made its strides in the past. And it is through more oversight that it will continue to evolve.