THE POISON OF PROPENSITY: HOW CHARACTER AND FITNESS SACRIFICES THE "OTHERS" IN THE NAME OF "PROTECTION"

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"The policy of the law recognizes the difficulty of containing the effects of [propensity evidence] which, once dropped like poison in the juror's ear, 'swift as quicksilver it courses through the natural gates and alleys of the body.'"[1]

Admission to a state bar requires law-school graduates to, along with passing an exam, be certified as "fit" to practice law. A candidate's fitness is determined through a character-and-fitness investigation ("Character and Fitness"), intended to evaluate whether an applicant has the requisite character to practice and therefore protect the public from unfit or morally questionable attorneys. Mental illness is one of a number of factors—along with criminal convictions and credit history, to name a few—committees look at when evaluating whether an applicant is "fit" to practice law. Although Character and Fitness professes to look at current fitness, many states review applicants' past conduct or health status—neither of which are adequate measures of fitness. This improper focus suggests that fitness determinations are based on a poison prohibited by the Federal Rules of Evidence: using character evidence as a basis for proving conformity therewith. Stated simply, she's a bad person who has done bad things before, so she'll do bad things again, therefore she is guilty of this bad thing. This evidence cannot *be used to convict a person of a crime, even one as horrible as murder. Yet this is precisely the evidence state bars across the nation use to mark certain applicants as "other," subjecting them to further investigation, conditions, and even denying them the opportunity to practice law. This Note argues that states' Character and Fitness regime is ineffective and discriminatory. These flaws mandate a reform that allows bars to protect the public without sacrificing otherwise promising candidates.*

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1. R. v. Handy, [2002] 2 S.C.R. 908 (Can.) (quoting WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 5).

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"It could have happened to me."

That thought has surely crossed the minds of thousands of attorneys who were lucky enough to be admitted to practice in spite of a health status that threatened to prevent their admission—and indeed has prevented others.

"It could have happened to me."[2]

That is precisely what Melody Moezzi thought after being diagnosed with bipolar disorder in 2008, shortly after she had been sworn in.[3] At the time of her application, Moezzi was only diagnosed with major depressive disorder, which was not then a mandated disclosure, unlike today.[4]

It happened to Kathy Flaherty.[5]

A graduate of Harvard Law School, Flaherty was a successful member of both the New York and Massachusetts bars, despite being diagnosed with bipolar disorder.[6] In the mid-1990s she applied for admission to the Connecticut bar, but she was denied because of her mental illness.[7] She appealed the decision, "enduring a year of hearings about her mental health that one questioner characterized as 'torture.'"[8] Flaherty was ultimately admitted conditionally, requiring her to provide a doctor's report and affidavit twice a year to prove her fitness.[9] She was subjected to this for nine whole years.[10]

Mental illness is one of a number of factors—along with criminal convictions and credit history, to name a few—that bar-admission committees look at when evaluating whether an applicant is "fit" to practice law. A candidate's

2. Melody Moezzi, *Lawyers of Sound Mind?*, N.Y. TIMES (Aug. 5, 2013), http://www.nytimes.com/2013/08/06/opinion/lawyers-of-sound-mind.html.

3. *Id.*

4. *Id.*

5. *Id.*; *Beyond Murphy: Kathy Flaherty*, HOPE WORKS CMTY. (Oct. 6, 2015), https://hopeworkscommunity.wordpress.com/2015/10/06/beyond-murphy-kathy-flaherty/; *Kathy Flaherty*, AM. BAR ASS'N COMM'N ON DISABILITY RIGHTS., http://www.americanbar.org/groups/disabilityrights/initiatives_awards/spotlight/flaherty_k.html (last visited Nov. 15, 2017).

6. Moezzi, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

fitness is determined through a character-and-fitness investigation ("Character and Fitness").[11] The investigation is intended to evaluate whether an applicant has the requisite character to practice and, therefore, protect the public from unfit attorneys. Although Character and Fitness professes to look at *current* fitness, many states review applicants' past conduct or health status—neither of which are adequate measures of fitness. This improper focus suggests that fitness determinations are based on a poison prohibited by the Federal Rules of Evidence:[12] using character evidence to make propensity arguments against someone. Propensity arguments use character evidence as a basis for proving conformity therewith.[13] Stated simply, she is a bad person who has done bad things before, so she will do bad things again, therefore she is guilty of this bad thing. This evidence *cannot* be used to convict a person of a crime, even one as horrible as murder. Yet this is precisely the evidence state bars across the nation use to mark certain applicants as "other," subjecting them to further investigation, conditions, and even denying them the opportunity to practice law.

This Note argues that states' Character and Fitness regimes are ineffective and discriminatory. These flaws mandate a reform that allows state bars to protect the public without sacrificing otherwise promising candidates. Part II of this Note explores the history of Character and Fitness for bar admission. It discusses how the requirement affects the application process, as well as its pros and cons. Part III analyzes the tension between the Character and Fitness requirement and the Federal Rules of Evidence's prohibition of character evidence in practice. It then discusses prior attempts or proposed solutions to address the weakness of the admission requirement, arguing that they are inadequate. Lastly, it illustrates the overall ineffectiveness of Character and Fitness in actually preventing misconduct by practitioners. Part IV recommends that state bars instead adopt a requirement that focuses on the *current* conduct of law students and develop a system to more actively monitor practitioners' conduct and ensure accountability. It advocates for adopting a more aggressive license-renewal process, similar to the one used in Australian jurisdictions, so that practitioners' behavior may be more effectively monitored and addressed. It also recommends a public database that discloses certain types of practitioner misconduct to ensure public accountability. Part V concludes that, without such changes, Character and Fitness will continue to discriminate against applicants, particularly nonwhite students and those with mental-health diagnoses, and fail to deter or address misconduct in the legal industry.

11. In referring to "Character and Fitness" as an entity, I intend the term to encompass both the standard and the entire admissions process, including the individual questionnaire of a state bar, the subsequent investigation, additional hearings, etc.

12. FED. R. EVID. 404(a)(1). Although states have their own rules of evidence, they are mostly consistent with the federal rules and likewise ban the use of character evidence for propensity arguments.

13. FED. R. EVID. 404 advisory committee's note to 2000 amendment.

II. THE ADVENT OF THE POISON AND THE PLAGUE OF THE OTHER

"The first thing we do, let's kill all the lawyers."[14] The punchline of many lawyer jokes, this often-misunderstood Shakespearean line speaks to the important role lawyers have long held in society. In the play, the characters must kill the lawyers because only they could successfully oppose the planned uprising.[15] This perceived power strikes at the very heart of Character and Fitness: it is rooted in the noble purpose of ensuring that only the most trustworthy and honest enter the profession, thereby protecting the public from those who might abuse the power lawyers wield.

Despite these good intentions, Character and Fitness has a checkered history—much of which predates the existence of the United States. This Part explores the background of Character and Fitness and its subsequent development. First, it discusses the history of the admissions standard in England and its often-exclusionary use. It also explores its development into a more formal regulation of the legal profession and its transition in the United States. Next, it explains how Character and Fitness works in both the United States and foreign jurisdictions. It then discusses the purpose—and its necessity, according to advocates—of the admission requirement. Later, it explains the biggest criticisms of the admissions standard. Finally, it explores the attempts Character and Fitness proponents have made to address such criticism.

A. The History of Character and Fitness and Ethical Standards for Practitioners

Character and Fitness is not new. Indeed, the moral requirement to practice law has long been a cornerstone of admission.[16] And this prerequisite has not only survived for years, but also crossed oceans—finding its way to countries around the world.[17] This Section discusses the historical background of Character and Fitness requirements and its development in the United States.

1. English Roots

Requiring moral character in the practice of law "dates [back] to the Roman Theodesian Code," but its modern-day roots took hold in thirteenth-century England.[18] Today, the practice has spread to international jurisdictions, including the United States.[19] One of the professed principles behind the requirement is that attorneys must—or should—have "qualities of truth-speaking, of a high sense of honor, of granite discretion, [and] of the strictest

14. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2.
15. *Id.*
16. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985).
17. *Id.*
18. *Id.*
19. NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2016 vii (2016) [hereinafter 2016 BAR ADMISSIONS GUIDE], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2016_comp_guide.authcheckdam.pdf.

observance of fiduciary responsibility . . . ."[20] Although this formal character requirement spans nearly two millennia, little is known about the practical significance of the requirement.[21] What is known is that early on, moral prerequisites were used as an exclusionary tactic to benefit the social status of attorneys.[22] In eighteenth-century Britain, as is today, the practice of law was divided into two branches of practitioners: barristers, who defend clients in court, and solicitors, who do legal work outside of the courts.[23] The barristers, in particular, were typically men from wealthy families with a high social status.[24] Certification requirements for barrister admission were often waived for sons of these families, while strictly enforced to keep out others—men from "presumptively unfit groups, including Catholics, tradesmen, journalists, and solicitors."[25] Beyond this classist use, there is no evidence that there was any systematic approach to character requirements, nor that they served any practical significance.[26] Indeed, there is an "absence of recorded disciplinary cases or formal character screening."[27] While this is not to say such efforts were nonexistent, it is unclear to what extent "character mandates had content apart from etiquette and social status."[28]

A move toward a more formal regulation of fitness to practice ultimately developed later that century in response to "the abysmal level of practice among *solicitors*," namely because "[a]nyone could call himself a solicitor, and of those who did the vast majority . . . [had] no legal knowledge and little regard for their clients' interests."[29] As a result, solicitors were considered the second, more inferior, branch of British legal practice.[30] The Parliament passed a statute requiring a minimum number of years of apprenticeship and a formal "examination of fitness and capacity for practice" prior to admission.[31] The effect of this statute, however, appeared to serve as more of a series of boxes to be checked than an actual rigorous inquiry: regulation of immoral conduct was lax, and disbarment rarely occurred—leaving the profession with little respect.[32]

20. Schware v. Bd. of Bar Exam'rs., 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).
21. Rhode, *supra* note 16, at 494.
22. *Id.* at 494–95.
23. *Id.* at 494. *See also What is the Difference Between a Barrister and a Solicitor?*, BRIGHT KNOWLEDGE, https://www.brightknowledge.org/knowledge-bank/law-and-politics/careers-and-courses/what-is-the-difference-between-a-barrister-and-solicitor (last visited Nov. 14, 2017).
24. Rhode, *supra* note 16, at 494–97.
25. *Id.* at 494.
26. *Id.* at 495.
27. *Id.*
28. *Id.*
29. *Id.* (emphasis added); *see also* MICHAEL BIRKS, GENTLEMEN OF THE LAW 105 (1960).
30. Rhode, *supra* note 16, at 495.
31. *Id.*
32. *Id.*

2. Development in the United States

Character and Fitness found its way to the Thirteen Colonies. From there it spread, and today, every state in the United States "makes certification of character a prerequisite of practice."[33] While the admission requirement has transformed over the years, particularly through more modern jurisprudence, it functions much as it did historically.

a. Historical Transformation

Although the development of the American bar was deeply influenced by its British predecessors, there was actually very little substance—given the vague standards and haphazard enforcement—to inform American admissions standards.[34] In spite of this, the American system mimicked the English system in both form and substance, however lacking. Today, however, the American legal practice is not only structurally different (*e.g.*, one branch of practice rather than two) from that in Britain, but also many of the requirements for bar admission, such as legal education, have evolved.[35] Ironically, the one constant, the "fixed star"[36] so to speak, has been Character and Fitness.

Just as British practitioners had a poor reputation, the "morality of attorneys [was] a public concern" among the American colonies, with some attempting to ban the legal practice altogether.[37] That animus only increased in the years following the Revolutionary War, with lawyers derided as "'cursed hungry caterpillars' whose fees '[would] eat out the very Bowels of [the] common-wealth.'"[38] In response to this animus, a number of newly independent colonies began policing character for admission to practice law.[39] This approach persevered over the next two centuries: educational requirements ebbed and flowed, but moral-character mandates were ever present, though loosely enforced.[40] And despite the claimed need for moral-character requirements for admission, the industry's self-regulators seemed outright resistant to enforcing

33. *Id.* at 493.

34. *Id.* at 495–96.

35. *Id.* at 496.

36. *Id.*

37. *Id.*

38. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 83 (1973) (quoting HUGH T. LEFLER, NORTH CAROLINA HISTORY AS TOLD BY CONTEMPORARIES 87 (1956)).

39. Rhode, *supra* note 16, at 496–97 ("For example, during the eighteenth century, Massachusetts demanded references from three ministers; Virginia mandated certification from a local judge; and New York and South Carolina provided for examination by the court to determine whether the candidate was 'virtuous and of good fame' or manifested 'probity, honesty and good demeanor.'") (citing GERARD GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760–1840, at 10 (1979); WILLIAM H. BRYSON, LEGAL EDUCATION IN VIRGINIA: 1779–1979, A BIOGRAPHICAL APPROACH 11 (1982); 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 247–48, 267–68 (1965)).

40. *Id.* at 497. Indeed, there was varying discretion among the states to enforce character mandates, and there is little physical evidence of admission denial on character grounds, with one exception—women. *Id.* In the nineteenth century, women were considered morally unfit to practice law because of their "natural and proper timidity and delicacy," for the "peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, [were] surely not qualifications for forensic strife." Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring); *see also In re* Goodell, 39 Wis. 232, 245 (1875).

such requirements on actual practitioners. Indeed, attorneys who led lynch mobs were not disbarred from the practice.[41] As the profession continued to grow, however, the need for an official—and enforceable—regulation became evident. This led to the formalization of character screening as a prerequisite for practice.[42]

The legal profession—like others, such as teaching[43] and medicine[44]—saw an increased focus on character certification in the late nineteenth and early twentieth centuries.[45] This push for even higher standards led to the creation of the American Bar Association ("ABA") in 1878.[46] The ABA rallied together with law schools and local legal organizations to target "incompetence, crass commercialism, and unethical behavior" by attorneys.[47] But in reality, the stricter standards[48] were, again, born out of ulterior motives—the "morally weak" applicants targeted by these new standards were typically Jews.[49]

"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."[50] By 1917, three-fourths of states had appointed a board of bar examiners, which served as a central admission authority.[51] Ten years later, two-thirds of states had gone even further, requiring more committee oversight, mandatory interviews, and character inquiries.[52] While the economic realities of the Great Depression incentivized practitioners to make it harder to

41. *See Ex parte* Wall, 107 U.S. 265 (1883) (discussing the disbarment of an attorney from the federal bar after he led a lynch mob). *But see* HENRY S. DRINKER, LEGAL ETHICS 44–45 & n.19 (1953) (discussing how that same attorney was still admitted to the state bar and allowed to continue to practice).

42. Rhode, *supra* note 16, at 496.

43. Diane Ravitch, *A Brief History of Teacher Professionalism*, DEP'T EDUC. (last modified Aug. 23, 2003), http://www2.ed.gov/admins/tchrqual/learn/preparingteachersconference/ravitch.html.

44. *Doctor of Medicine Profession (MD)*, MEDLINEPLUS (July 5, 2017), https://medlineplus.gov/ency/article/001936.htm. (last visited Nov. 22, 2017).

45. Rhode, *supra* note 16, at 498.

46. *History of the American Bar Association*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/history.html (last visited Nov. 16, 2017).

47. MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 173 (1977).

48. These standards were not just character inquiries. In fact, much of them focused on better educational standards. But this itself was a form of racism. *See* Rhode, *supra* note 16, at 500 ("Proposals mandating a prescribed number of years of college and law school education would impede access for those lacking personal resolve and private means.").

49. LARSON, *supra* note 47; *see* Rhode, *supra* note 16, at 500 n.36 ("Of course, antisemitism in the legal profession was common before this period. In 1874, George Strong advocated 'either a college diploma or an examination including Latin' as requirements for admission to Columbia Law School, on the ground that this would 'keep out the little scrubs [German Jews mostly] whom the school now promotes from the grocery-counters . . . to be gentlemen of the Bar.'") (quoting D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, *in* 2 WOMEN AND THE LAW 231, 252 (D. Weisberg ed. 1982) (internal quotations omitted)).

50. Rhode, *supra* note 16, at 499 (citing Clarence A. Lightner, *A More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar*, 38 REP. AM. BAR ASS'N 775, 781–82 (1913)).

51. *See* CORINNE LATHROP GILB, HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT 63 (1966); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, 105 n.23 (1983).

52. *See* Comm. on Legal Educ. of the Mass. Bar Ass'n,
Training for the Bar with Special Reference to the Admission Requirements in Massachusetts, 15 MASS. L.Q., Nov. 1929, at 18–19 (describing the affidavit system as inadequate).

enter the profession,[53] much of the efforts were rooted in "[n]ativist and ethnic prejudices": practitioners sought to bar Eastern Europeans—who were increasingly immigrating to the United States—because they believed that their admission would "threaten the profession's public standing."[54]

Pennsylvania's 1928 admission practices are a telling example. Applicants were subject to a character investigation—often in the form of an interview—both prior to attending law school and then again before admission to the bar.[55] The pre-law-school interview attempted to vet and discourage "unworthy" applicants from entering school, particularly Jewish applicants.[56] But what made an applicant "unworthy" was ambiguous. A review of denials in one county showed that applicants were considered unworthy for being "dull," "colorless," "subnormal," "unprepossessing," "shifty," "smooth," "keen," "shrewd," "arrogant," "conceited," "surly," and "slovenly."[57] In some cities, as many as 7% of all applicants withdrew their application or were rejected by the bar. Some were surely discouraged from applying altogether, though there are no concrete statistics to confirm that.[58] Unsurprisingly, the admission process most impacted nonwhite applicants: admission of Jewish candidates dropped 16% and almost no black people were admitted.[59] The push for heightened admissions standards continued into the 1930s, thanks to the formation of state bar associations and the National Conference of Bar Examiners ("NCBE"),[60] who continued to advocate for stricter character requirements.[61]

The use of character evidence to ban "others" continued into the 1970s and was broadly extended to political associations and beliefs,[62] as will be discussed in the next Subsection.[63] It is worth noting that, historically, the number

53. Rhode, *supra* note 16, at 502. Examiners cited "an overcrowded bar [and] an abundance of candidates who have unquestioned character," as support for denying any "questionable" applicant. *Id.* (quoting *An Answer to the Problem of the Bootlegger's Son*, 1 B. EXAMINER 109, 110 (1932) (advocating for the denial of an applicant whose family ran a still); *see also id.* at 502 (quoting *A Standard for Character Committee*, 1 B. EXAMINER 311 (1932) (recommending the denial of an applicant convicted of a crime ten years prior—even though he had no subsequent offenses—because of an "abundance of attorneys already admitted, and many excellent candidates").

54. *Id.* at 499–500.

55. *See id.* at 501 (citing ESTHER L. BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 125–26 (1938)).

56. *See id.* at 501 (citing *Character Examination of Candidates*, 1 B. EXAMINER 63, 72 (1932)).

57. *Id.* at 501 (quoting Douglas, *The Pennsylvania System Governing Admission to the Bar*, 54 REP. AM. BAR ASS'N 701, 703–05 (1929)). Other candidates were rejected for lacking a "proper sense of right and wrong"; "moral or intellectual stamina"; "social duty"; "well-defined ideas on religion"; or for "[n]ot seeking admission for [the] best motives." *Id.* (quoting Douglas, *supra*).

58. *See* Rhode, *supra* note 16, at 501 (citing ESTHER L. BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 125–26 (1938)).

59. JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 127–28 (1976).

60. Founded in 1931, the NCBE is a nonprofit organization that today "develops the licensing tests used by most U.S. jurisdictions for admission to the bar." *About NCBE*, NAT'L CONFERENCE OF B. EXAMINERS, http://www.ncbex.org/about/ (last visited Nov. 16, 2017). One of the organization's current goals is to ensure "reasonable and uniform standards of education and character for eligibility for admission to the practice of law." *Id.*

61. *See* Rhode, *supra* note 16, at 499 (citing Collins, *Foreword*, 1 B. EXAM'R 1 (1931)); STEVENS, *supra* note 51, at 99–100.

62. Rhode, *supra* note 16, at 566–70.

63. *See infra* Section II.A.2.b.

of bar applicants formally denied has been relatively low,[64] a trend that remains much the same today.[65] "More recently, denial rates appear to range from 0.15% to 0.48%."[66] Relatedly, the progression of stricter admissions standards has not developed on its own. Disciplinary processes for practitioners who engage in misconduct "evolved in similar fashion, although policing practitioners has traditionally met with less enthusiasm than restricting entry."[67] But the stricter standards have not gone unchecked. As the next Subsection discusses, in recent decades, the Supreme Court has established some limitations on Character and Fitness, prohibiting states from using certain factors to deny admission.

b. Twentieth-Century Jurisprudence

Although the Supreme Court has found that moral standards are permissible for admission to the legal profession, it has placed limitations on the types of inquiries permissible under Character and Fitness. Specifically, the Court requires a rational relationship between the inquiry and potential fitness, and, as a result, it has deemed certain inquiries off-limits for failing to achieve that relationship.[68] Two seminal cases from 1957 shaped this limitation on today's Character and Fitness.

i. *Schware v. Board of Bar Examiners of New Mexico*[69]

In *Schware*, the Supreme Court upheld a due-process challenge to Character and Fitness, finding that because the applicant's prior misconduct was so far removed, and there was evidence of his rehabilitation, there was no rational relationship between the Character and Fitness inquiry and his overall fitness.[70] On his bar application, Rudolph Schware disclosed that he had used aliases from 1933 to 1937—to avoid the rampant anti-Semitic employment discrimination during the Great Depression—and that he had been arrested several times for activity in the Communist Party, though the charges were later

64. *See, e.g.*, Ralph S. Brown, Jr. & John D. Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 497 (1953) (estimating that less than 0.5% of applicants were rejected on character grounds among applicants in New York, Illinois, and California); Rhode *supra* note 16, at 516 (citing Will Shafroth, *Character Investigation–An Essential Element of the Bar Admission Process*, 18 B. EXAMINER 194, 198 (1949) (discussing data from California indicating that 0.5% of applicants were denied admission and another 0.5% abandoned their applications for character reasons)).

65. LESLIE C. LEVIN ET AL., A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE, LSAC GRANTS REP. SERIES 4 (2013) [hereinafter CONNECTICUT STUDY], https://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-13-01.pdf.

66. *Id.* at 4 n.20 ("R. David Stamm, former executive director of the Connecticut Bar Examining Committee, estimated that denial rates in Connecticut were consistently 1–2 people (0.14%) per year. Denial rates in Missouri during 2002–2008 ranged from 0.18% to 0.477%. Applicants may also drop out during the hearing process, although in Connecticut, only three did so from 1989 to 1992, and each of them was admitted to practice elsewhere. The number precluded from ever practicing law on character and fitness grounds is probably lower than suggested by the percentages above, because some applicants who are denied bar admission are given leave to reapply.") (citation omitted).

67. Rhode, *supra* note 16, at 502.

68. Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957).

69. *Id.* at 232.

70. *Id.* at 247.

dropped.[71] The committee subsequently denied Schware admission to the New Mexico Bar; he appealed the decision.[72] Schware explained the context of his past behavior, provided a number of character witnesses, and offered evidence attesting to his rehabilitated character.[73] After his hearing, the board affirmed his denial on the same grounds as the committee.[74]

The Supreme Court, however, rejected those grounds. It acknowledged that a state "can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."[75] Given the record in the case, the Court argued that the New Mexico Supreme Court could not "reasonably find that [Schware] had not shown good moral character."[76] Specifically, the Court emphasized that the "undisputed evidence in the record show[ed] Schware to be a man of high ideals with a deep sense of social justice."[77] Given that there was no evidence to the contrary and that the prior bad conduct occurred fifteen years earlier, the Court held that New Mexico had deprived Schware of his "due process in denying him the opportunity to qualify for the practice of law."[78] It reversed Schware's denial and remanded his case.[79]

ii. *Konigsberg v. State Bar of California*[80]

That same year, the Court held that past affiliation with the Communist Party was not a permissible reason to deny an applicant admission to the bar because it did not establish bad character.[81] In *Konigsberg*, the State Bar of California denied the applicant admission to practice law, alleging that the petitioner had failed to establish his moral character or to deny a desire to overthrow the government.[82] The bar investigated Konigsberg and questioned him almost exclusively about his political affiliations, specifically whether he was a Communist.[83] Konigsberg refused to answer the questions, and ultimately the bar denied him admission "on the ground that the evidence in the record raised substantial doubts about his character and his loyalty which he had failed to dispel."[84]

The Supreme Court held that the evidence did not "rationally support" the grounds for Konigsberg's denial.[85] It acknowledged that while the defini-

71. *Id.* at 234–37.
72. *Id.* at 238.
73. *Id.* at 235–36.
74. *Id.* at 238.
75. *Id.* at 239.
76. *Id.*
77. *Id.* at 240.
78. *Id.* at 247.
79. *Id.*
80. 353 U.S. 252 (1957).
81. *Id.* at 270.
82. *Id.* at 259.
83. *Id.* at 258.
84. *Id.* at 259.
85. *Id.* at 262.

tion of good moral character was not easily defined, the evidence must show that a reasonable person would have "substantial doubts" about the applicant's fitness.[86] Ultimately, the Court recognized that while a "bar composed of lawyers of good character is a worthy objective . . . ," states could not "exercise th[eir] power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association."[87] Thus, it reversed Konigsberg's denial and remanded his case.[88]

These cases show that Character and Fitness is not limitless, and they provide some direction to state bars as to what are acceptable and unacceptable inquiries. The Supreme Court, however, has given little guidance beyond this mandate that the inquiry be rationally related to fitness.

B. How Character and Fitness Works

Character and Fitness is typically a part of an application to a state bar, but practitioners are also subject to continuing conduct requirements. Although law schools also require applicants to submit a "character and fitness addendum" (sort of a "diet" version of Character and Fitness),[89] that is beyond the scope of this Note. While the process is straightforward on its face, Character and Fitness questions can require long and arduous answers, and the investigation can continue after the first round of inquiries. This Section discusses the process for United States' bar applicants as well as conduct standards for practitioners in both the United States and in some international jurisdictions.

1. The United States

Prior to admission, every state bar requires applicants to undergo a review of their character and their fitness.[90] While students may briefly touch on Character and Fitness in an ABA-mandated ethics class, they do not begin learning more about admissions standard until their third year of law school,[91] as they prepare for their bar application. In preparation for Character and Fitness, the ABA advises students to answer two questions personally:

> "1. Is there anything in my past (or my present) that might bring my character and fitness into question?"[92]

86. *See id.* at 264.

87. *Id.* at 273.

88. *Id.* at 274.

89. Christine Schrader, *Law School Application Requirements: Disclosure*, KAPLAN TEST PREP (Sept. 16, 2014), http://www.kaptest.com/blog/law-school-insider/2014/09/16/law-school-application-requirements-disclosure/.

90. 2016 BAR ADMISSIONS GUIDE, *supra* note 19, at vii; *see also* Mary Dunnewold, *The Other Hurdle: The Character and Fitness Requirement*, 42 STUDENT LAW. (Dec. 1, 2013), http://abaforlawstudents.com/2013/12/01/bar-hurdle-character-fitness-requirement/#sthash.IeAuiDkj.

91. At the University of Illinois, third-year students begin having meetings in the fall semester to discuss the process, though students do learn more about Character and Fitness during their required Professional Responsibility class, which they can take as either a second- or third-year student.

92. Lori Shaw, *What Does It Take to Satisfy Character and Fitness Requirements?*, 22 SYLLABUS, no. 2, 2009, http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/professionalism_whatdoesittaketosatisfychracterandfitnessrequire.html.

> And, if the answer to the first question is yes, then:
>
> "2. If my character is in question, what can I do now to begin to rehabilitate my reputation?"[93]

There is no clear guidance on what constitutes (or is even enough) rehabilitation. Once a candidate begins filling out their bar application, usually within six months of taking the bar exam,[94] he or she formally encounter the Character and Fitness questionnaire. In answering this questionnaire, students are subject to their state's professional rules of conduct.[95] In general, these rules establish what is appropriate and inappropriate practitioner conduct; violations make practitioners subject to discipline.[96] While these rules somewhat vary from state to state, for the most part they follow the ABA's Model Rules of Professional Conduct ("Model Rules").[97] Under Rule 8.1:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, 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, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.[98]

This is the only rule that pertains to an applicant before he or she is admitted to a bar.[99] Thus, an applicant is required to answer questions honestly, or risk discipline. Once an applicant completes the questionnaire, it is reviewed by the investigation entity (which in some states is a part of the bar itself, in others it's the NCBE).[100] Answers to these questions shape the depth and length of a subsequent investigation of an applicant.[101] Even after admission, practitioners are subject to investigation if disciplinary boards receive reports that their conduct does not conform with the practice's ethical standards, as outlined in a state's rules of professional conduct.[102]

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93. *Id.*

94. For example, in Illinois, the bar application for the July bar exam opens in January and can first be submitted in mid-February. *Information for Bar Exam Applicants*, ILL. BD. OF ADMISSIONS TO THE BAR, https://www.ilbaradmissions.org/appinfo.action?id=1 (last visited Nov. 16, 2017).

95. *Character and Fitness Investigations*, NAT'L CONFERENCE BAR EXAM'RS, http://www.ncbex.org/character-and-fitness (last visited Nov. 16, 2017).

96. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR. ASS'N 2016); MODEL RULES OF PROF'L CONDUCT r. 8.5 (AM. BAR. ASS'N 2016).

97. *Model Rules of Professional Conduct*, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Nov. 16, 2017).

98. MODEL RULES OF PROF'L CONDUCT r. 8.1 (AM. BAR ASS'N 2016). Rule 1.6 establishes the duty of client confidentiality. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

99. MODEL RULES OF PROF'L CONDUCT r. 8.1 (AM. BAR ASS'N 2016).

100. *Character and Fitness Investigations*, *supra* note 95.

101. *See infra* Subsection II.B.1.a.ii.

102. MODEL RULES OF PROF'L CONDUCT r. 8.5 (AM. BAR ASS'N 2016).

a. Bar Applicants

i. Preliminary Investigations

Character and Fitness operates in roughly the same way for admission to most state bars,[103] but the process varies in specificity and scope.[104] On a basic level, applicants have the burden of showing that they have good moral character.[105] This is established primarily through a questionnaire,[106] which is a part of their application to the bar, as well as through character affidavits submitted on behalf of applicants—by professors, former employers, etc.[107] Typically, the questionnaire covers "past criminal convictions or civil violations, academic or employment misconduct, compliance with court orders, financial irregularities, mental health or substance abuse issues, and disciplinary actions in other professional contexts."[108]

Once a bar application has been submitted, a committee with reviewing power investigates the applicant.[109] Twenty-four states and Washington, D.C., use the NCBE as their investigative service.[110] The other twenty-six states have their own internal review boards. The investigation may include things such as contacting schools, employers, courts, other parties identified in the application, or any other relevant information.[111] The investigative board then creates a report on an applicant. Based on this report, applicants are either notified that they have passed Character and Fitness or that they are under additional investigation. Certain types of questionnaire answers, "including unlawful conduct, academic misconduct, neglect of financial responsibilities, employment misconduct . . . violations of court orders . . . [e]vidence of mental or emotional instability [or] substance abuse issues" are likely to trigger further investigation.[112] Ensuing investigations dive deeper into the context behind these affirmative answers.

ii. Further Inquiries and Their Results

So, what happens if an applicant is flagged for further investigation? This inquiry tends to "focus on whether the applicant can show rehabilitation and [any] positive social contributions since the conduct."[113] Often the applicant is summoned for an in-person interview with the investigative body to clarify a discrepancy in his or her application, or provide context for certain disclo-

103. *See, e.g.*, Diane Van Aken, *Unraveling the Mystery of the Character and Fitness Process*, MICH. B. (2011).

104. Rhode, *supra* note 16, at 506.

105. Dunnewold, *supra* note 90.

106. NAT'L CONFERENCE OF B. EXAM'RS, REQUEST FOR PREPARATION OF CHARACTER REP. 13 (July 1, 2015) [hereinafter PREPARATION OF CHARACTER], http://www.ncbex.org/dmsdocument/134.

107. Mary Dunnewold, *supra* note 90.

108. *Id.*

109. *Character and Fitness Investigations*, *supra* note 95.

110. *Id.*

111. *Character and Fitness: Getting Started*, NAT'L CONFERENCE OF BAR EXAM'RS, http://www.ncbex.org/character-and-fitness (last visited Nov. 16, 2017).

112. Dunnewold, *supra* note 90.

113. *Id.*

sures.[114] Some state bars also require pending applicants to file supplemental questionnaires.[115]

After further investigation, applicants face a number of possible outcomes. They may subsequently be admitted once they provide the investigative body with added context, while others may be admitted with provisional licenses, conditioning their admission on things such as mandatory supervision or continued treatment for mental-health or substance-abuse issues.[116] Still, others may ultimately fail Character and Fitness and be denied admission to the bar, though many jurisdictions have an appeals process applicants can use if they are initially denied.[117] Once an applicant has been conclusively denied admission, there is typically a waiting period before they can apply again.[118] Overall, however, statistics show that relatively few applicants "are actually denied admission to the bar on character and fitness grounds," though it is challenging to find documented denial rates.[119] The most recent studies suggest that denial rates across all states are typically below .05%, suggesting that even if an applicant is further investigated, it is highly unlikely they will actually fail Character and Fitness.[120]

Character and Fitness standards do not diminish after admission. The Model Rules require that practitioners act in accordance with the requisite ethical standards as they practice law, and lawyers are required to renew their licenses annually to attest that they have undergone continuing legal education ("CLE")[121] to stay equipped to competently represent clients.[122]

b. Practitioners

In keeping with the spirit of protecting the public, practitioners can also be investigated, and even disciplined, for failing to act consistent with the ethical standards of practice, as outlined in their state's rules of professional conduct. The current Model Rules—which most state bars base their rules on—were adopted by the ABA House of Delegates in 1983; previously the ABA offered the *Model Code of Professional Conduct* and the *Canons of Profes-*

114. *Character and Fitness: Getting Started*, *supra* note 111.

115. *See, e.g.*, *Supplemental Affidavit Updating Original Application*, CONN. BAR EXAMINING COMM., https://www.jud.ct.gov/cbec/sup_affidavit.htm (last visited Nov. 16, 2017); *Application Instructions for Lawyer Admission to the Washington State Bar Association*, WASH. STATE B. (Aug. 7, 2017), http://www.wsba.org/~/media/Files/Licensing_Lawyer%20Conduct/Admissions/Application%20Instructions.ashx.

116. Dunnewold, *supra* note 90.

117. *See, e.g.*, Van Aken, *supra* note 103.

118. *See, e.g.*, *id.* (explaining Michigan's two-year waiting period before an applicant who has failed character and fitness can reapply to the bar).

119. CONNECTICUT STUDY, *supra* note 65.

120. *Id.* ("R. David Stamm, former executive director of the Connecticut Bar Examining Committee, estimated that denial rates in Connecticut were consistently 1–2 people (0.14%) per year. Denial rates in Missouri during 2002–2008 ranged from 0.18% to 0.477%. Applicants may also drop out during the hearing process, although in Connecticut, only three did so from 1989 to 1992, and each of them was admitted to practice elsewhere. The number precluded from ever practicing law on character and fitness grounds is probably lower than suggested by the percentages above, because some applicants who are denied bar admission are given leave to reapply.") (citation omitted).

121. *Mandatory CLE*, AM. BAR ASS'N, https://www.americanbar.org/cle/mandatory_cle.html (last visited Nov. 16, 2017).

122. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

sional Ethics.[123] The rules establish appropriate practitioner conduct that is ethical and professional, with requirements such as client confidentiality,[124] mandatory reporting of misconduct by other attorneys,[125] and a prohibition on conflicts of interest.[126] Attorneys who fail to comply with their jurisdiction's professional rules, or fail to report others who violate them, can face disciplinary action.[127]

While the disciplinary proceedings vary across jurisdictions, they are relatively similar. The process in Illinois can serve as a basic example. Alleged attorney misconduct is reported to Illinois' Attorney Registration and Disciplinary Commission ("ARDC").[128] The ARDC staff then conducts an initial investigation into the allegations.[129] After an investigation, the ARDC Administrator will either close a case for lack of sufficient evidence or refer it to the Inquiry Board[130] for further investigation.[131] Once the Inquiry Board investigates, it can then either choose to simply close the case, place the attorney on supervision, or vote to file a formal complaint with the ARDC's Hearing Board.[132] The Hearing Board then conducts evidentiary hearings for the case before it.[133] The Hearing Board will then either impose a sanction on the attorney—in the form of a reprimand, admonition, or financial penalty[134]—or recommend to the Illinois Supreme Court that an attorney face a more severe sanction,[135] such as probation, suspension, or disbarment.[136] After this step, there is a Review Board in place to hear appeals of Hearing Board decisions.[137] If a case does advance to the Illinois Supreme Court, the court decides whether, and how, to sanction a lawyer.[138] These proceedings, for the most part, are private, and there are no mandatory public databases disclosing such disci-

123. *Model Rules of Professional Conduct*, AM. BAR ASS'N CTR. FOR PROF'L RESP., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Nov. 16, 2017).

124. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

125. MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2016).

126. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016); MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2016).

127. MODEL RULES OF PROF'L CONDUCT r. 8.5 (AM. BAR ASS'N 2016).

128. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, HIGHLIGHTS: ANNUAL REPORT 2015 1 (2015) [hereinafter 2015 ARDC REP.], https://www.iardc.org/AnnualReport2015Highlights.pdf.

129. *Id.*

130. ANNUAL REPORT OF 2015, ATTORNEY REGISTRATION & DISCIPLINARY COMM'N 14, https://iardc.org/AnnualReport2015.pdf. In rare instances, a case will be filed directly with the Illinois Supreme Court. *See id.* at 14–15. But this is not commonplace. *Id.* In 2015, only 12 cases, or 2%, were sent directly to the Court after an initial investigation. *Id.* at 15.

131. *Id.* at 14.

132. *Id.*

133. *Id.* at 21.

134. For descriptions of such sanctions, see MODEL RULES FOR LAWYERS. DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2001).

135. *Id.*

136. *Id.*

137. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, *supra* note 130, at 24.

138. *Id.* at 25.

pline, although the ABA has attempted to establish a national, voluntary database.[139]

Despite this lengthy process, statistics show that few attorneys are actually disciplined for professional misconduct. Continuing with Illinois as our example, in 2015 there were 5,648 reports of attorney misconduct.[140] Allegations ranged from neglect of client matters to fraudulent activity to improper management of client funds.[141] Of those claims, 96% were dismissed during the first stage of the disciplinary process—after an initial investigation by ARDC staff.[142] Of the 4% that proceeded through the process, only 3% of the initial reports ended up before the Hearing Board.[143] Ultimately, 126 total sanctions were issued in 2015, meaning that an attorney charged with misconduct had a 2.2% chance of actually being sanctioned for that conduct.[144] Of the sanctions handed out, thirty-three lawyers were disbarred; fifty-seven were suspended; twenty-three were put on probation; nine were censured; and four were reprimanded.[145]

Although denials and discipline are rare, it is clear that moral requirements are still a "fixed star" in the practice of American law. But the United States focus on character requirements for both the admission into a bar and practice of law is not unique. A number of international jurisdictions rely on similar methods; their purpose is the same: protecting the public.

2. International Jurisdictions

Across the world, countries recognize the power lawyers have and the threat they pose if such power is abused. Thus, most international jurisdictions also require attorneys to have good moral character.[146] The justification is similar to that of the United States, and England before it: attorneys should be held to the highest standard given the amount of power they wield over others.[147] For the most part, international jurisdictions handle character requirements similarly, though there is some occasional variation.

139. *National Lawyer Regulatory Data Bank*, AM. BAR ASS'N CTR. FOR PROF'L RESP., https://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited Nov. 16, 2017).

140. 2015 ARDC REP., *supra* note 128, at 4.

141. *Id.*

142. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, *supra* note 130, at 16.

143. *Id.* at 14.

144. *Id.* at 25.

145. *Id.*

146. *See, e.g.*, *Suitability Test*, SOLICITORS REG. AUTHORITY. (Nov. 1, 2016), http://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page; *Call to the Bar*, LAW SOC'Y OF UPPER CAN., http://www.lsuc.on.ca/CalltoBar/ (last visited Nov. 16, 2017); *Lawyer Training Systems in the EU: France*, EURO. COMM. 1–2 (2014) (on file with author) [hereinafter EU TRAINING].

147. *Suitability Test, supra* note 146; *Call to the Bar*, *supra* note 146.

a. Europe and Canada

Most European countries, as well as Canadian jurisdictions, use a similar admission process as the United States, requiring specialized education, a character-and-fitness-type inquiry, and the passage of a licensing exam.[148] Similarly, these jurisdictions require their legal practitioners to abide by a code of conduct.[149] Additionally, some jurisdictions, similar to the United States, also require some form of continued education, which lawyers must disclose when they renew their license annually.[150] Others, however, do not.[151]

b. Australia

Australian jurisdictions also follow a similar structure in bar admission—requiring applicants to undergo special legal education and be "a fit and proper person to be admitted to the Australian legal profession."[152] To continue practicing, however, Australian jurisdictions subject their solicitors and barristers—whose jobs are similar to their United Kingdom counterparts—to a more thorough renewal process than most countries.[153] This renewal is different than simply participating in continuing legal education, the primary requirement in Untied States jurisdictions.[154] Australian practitioners are required to, in essence, reapply for bar admission each year.[155] To renew their license, solicitors and barristers must, among other things, show that they have complied with all laws regulating the practice of law, including showing good moral character.[156] Their renewal applications include questions similar to United States Character and Fitness questionnaires—asking about bankruptcy, violations of law, or other questionable conduct.[157] Applicants are also required by law to disclose

148. *Suitability Test*, *supra* note 146; *Call to the Bar*, *supra* note 146; EU TRAINING, *supra* note 146, at 1–2 (on file with author).

149. CODE OF CONDUCT FOR LAWS. IN THE EUR. UNION, CCBE, http://www.idhae.org/pdf/code 2002_en.pdf (last visited Nov. 16, 2017); *SRA Principles*, SOLICITORS REG. AUTHORITY, http://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page (last visited Nov. 16, 2017); *Codes of Professional Conduct*, CAN. BAR ASS'N, http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct (last visited Nov. 16, 2017).

150. *Compare* EU TRAINING, *supra* note 146, at 6, *with Mandatory CLE*, AM. BAR ASS'N, *supra* note 121.

151. EU TRAINING, *supra* note 146, at 3.

152. *Becoming a Solicitor in NSW*, LAW SOC'Y N.S.W., https://www.lawsociety.com.au/ForSolictors/practisinglawinnsw/becomingasolicitor/index.htm (last visited Nov. 16, 2017).

153. *Legislation and Rules*, LAW SOC'Y N.S.W., https://www.lawsociety.com.au/ForSolictors/professionalstandards/Ruleslegislation/index.htm (last visited Nov. 16, 2017).

154. *Mandatory CLE*, *supra* note 121.

155. *See, e.g.*, 4 Div. 1 § 37 Legal Profession Uniform Application Act (2014). For example, in New South Wales, practitioners must reapply from April to June of each year. *Your Practicing Certificate*, LAW SOC'Y N.S.W., https://www.lawsociety.com.au/ForSolictors/practisinglawinnsw/yourpractisingcertificate/index.htm (last visited Nov. 16, 2017).

156. *See, e.g.*, *Barristers' Applications*, LAW SOC'Y N.S.W., https://www.lawsociety.com.au/ForSolictors/practisinglawinnsw/yourpractisingcertificate/barristersapplications/index.htm (last visited Nov, 16, 2017).

157. *Application for Grant of an Australian Practising Certificate as a Solicitor and Membership of the Law Society of New South Wales*, LAW SOC'Y N.S.W., https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1304432.pdf (last visited Nov. 16, 2017).

any pertinent information not necessarily asked for.[158] Once the renewal application is submitted, regulatory bodies investigate the applicant to determine "whether a person is, or is no longer, a fit and proper person to hold a local practising certificate."[159] Considerations include violations of law, professional rules, certificate requirements, orders from tribunals or disciplinary bodies, or professional insurance requirements, among other things.[160] This investigation allows regulatory authorities to actively review all of a practitioner's recent conduct to ensure he or she is still fit to practice, rather than passively relying on reports of misconduct alone.

C. Proponents of Character and Fitness

Character and Fitness has come under increasing fire in recent years, as will be discussed later, but many support its continued use in the admission process, arguing that it is a necessary safeguard for the public. Proponents insist that such requirements are necessary for two primary reasons: to protect the public from immoral practitioners and to ensure professionalism in the practice of law.[161] Today, the NCBE contends that "public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers."[162] This thinking permeates both the education and admission of new lawyers. Indeed, discussions of Character and Fitness are typically incorporated into professional responsibility classes at law schools.[163] And members of modern-day admission committees have likened the need for Character and Fitness to "eliminating the diseased dogs before they inflict their first bite."[164] The need to ensure these protections—for both the public and the profession—outweigh, they argue, concerns about Character and Fitness, especially given that few applicants are actually punished or prohibited from admission.[165] This Section explores the two primary purposes of Character and Fitness and how the admissions standard achieve those purposes, according to proponents.

158. *Notice and Statement of an 'Automatic Show Cause Event*,' L. SOC'Y NEW SOUTH WALES, http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/1032984.pdf (last visited Nov. 16, 2017).

159. 3.5 Div. 4 § 89 Legal Profession Uniform Law Application Act (2014).

160. *Id.* § 95.

161. Rhode, *supra* note 16, at 507–12; David, S. Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. TOL. L. REV. 421, 424 (2009).

162. 2016 BAR ADMISSION GUIDE, *supra* note 19, at vii.

163. At the University of Illinois College of Law, students learn about Character and Fitness within the first couple of weeks of their Professional Responsibility class.

164. Rhode, *supra* note 16, at 509 (quoting Alderman, *Screening for Character and Fitness*, BAR EXAMINER, Feb. 1982, at 23, 24).

165. *Id.* at 500.

1. Protecting the Public and the System

Historically, the primary justification for Character and Fitness is the need to protect the public from bad attorneys—*i.e.*, those who are "morally unfit."[166] Advocates of Character and Fitness point to the power attorneys hold over clients, noting that "[s]ince our 'fortunes, reputations, domestic peace . . . nay, our liberty and life itself' rest in the hands of legal advocates, '[t]heir character must be not only without a stain, but without suspicion.'"[167] This justification has continued into the modern day. The NCBE argues that "[t]he public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law."[168]

Thus, Character and Fitness protects the public in two ways: (1) it protects the public from "morally unfit" lawyers; and (2) it deters questionable characters from even seeking to practice law to begin with.[169] Those in favor of Character and Fitness believe it is a critical component of admission, as it is thought "easier to refuse admittance to an immoral applicant than it is to disbar him after he is admitted," hence the emphasis on character-and-fitness-type inquiries prior to both enrollment in law school and admission to the bar.[170] This mindset is further illustrated in the low instances of practitioner discipline. Returning to Illinois as our example, of the 5,648 reports of attorney misconduct in 2015, only about .6% of those reports resulted in disbarment.[171] It can be argued that such low instances of discipline are the product of the effectiveness of Character and Fitness prior to admission. For example, many argue that admission committees need to know whether an applicant has a mental illness because it "can have a devastating impact upon an attorney's ability to meet the essential requirements for the practice of law."[172] Of the 128 attorneys sanctioned by Illinois's ARDC in 2015, 27% of them suffered from substance abuse or mental impairment.[173] Thus, Character and Fitness may have served the very purpose it was intended to: limiting the admission of additional mentally impaired applicants who might have "put the general public at risk for inadequate representation and jeopardize[d] the reputation of the profession."[174]

This interpretation is also consistent with two studies of attorney discipline. The first reviewed the admission files and discipline records of fifty-two Minnesota attorneys who were disciplined between 1982 and 1990 and found

166. "The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice." 2016 BAR ADMISSION GUIDE, *supra* note 19, at vii.

167. Rhode, *supra* note 16, at 507–08 (quoting George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS 172 (3d ed. 1869)).

168. 2016 BAR ADMISSION GUIDE, *supra* note 19, at vii.

169. Rhode, *supra* note 16, at 508 (citing Interview by Deborah Rhode with Exec. Sec'y, Tenn. Bd. of Bar Examiners (Oct. 15, 1982); Interview by Deborah Rhode with Admin. Ass't, S.C. Comm. on Bar Admissions (Sept. 23, 1982); Interview by Deborah Rhode with Chairman, S. Alabama Character & Fitness Comm. (July 7, 1983); Interview, Member, Mich. Bd. of Bar Examiners (July 12, 1983)).

170. Rhode, *supra* note 16, at 509 (quoting Alderman, *Screening for Character and Fitness*, B. EXAM'R, Feb. 1982, at 24).

171. 2015 ARDC REP., *supra* note 128, at 4–5.

172. Michael J. Herkov, *Mental Illness and the Practice of Law*, 44 B. EXAMINER 42, 51 (2013).

173. 2015 ARDC REP., *supra* note 128, at 5.

174. Herkov, *supra* note 172, at 47.

> that applicants who disclosed problematic histories in their bar applications were four times more likely to engage in professional misconduct than other applicants. They also concluded that disciplined lawyers were more likely to reveal evidence of certain types of misconduct in their admissions files (e.g., employment termination, possible substance abuse, etc.) than other bar applicants.[175]

A second study, conducted in Connecticut in 2013, looked at the admission files of attorneys admitted to practice in the state between 1989 and 1992.[176] It too found a slight association between practitioner discipline and affirmative answers to questions involving things such as criminal history, credit problems, and mental illness.[177] Thus, Character and Fitness may have some value in predicting future unethical misconduct. In predicting this behavior, and subsequently denying admission, Character and Fitness would seem to protect the public from attorney misconduct, as advocates insist it does.

2. Ensuring Professionalism

Advocates also argue that Character and Fitness protects the public by ensuring the highest practitioner conduct. Under this justification, Character and Fitness maintains the practice's professionalism—both in practice and in appearance.[178] Not only does this support the purpose of Character and Fitness, proponents also argue that it is consistent with the professional standards of other professions.

a. A "Common Identity"

Character and Fitness is a key element, advocates say, to defining the profession: sociologists argue that "the concept of a profession presupposes some sense of common identity."[179] Thus, barring admission of those with certain character traits establishes the bounds of what is morally acceptable within the profession, and it serves to deter reprehensible conduct by those already admitted to the profession.[180] Character and Fitness also formalizes the rite of entry into the profession, designating the license as a respectable and hard-earned achievement, rather than something automatically handed out after an application is complete.[181] This ensures "the administration of justice from

175. Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 775 BYU L. REV. 775, 793 (2014) [hereinafter *The Folly*].

176. *Id.* at 793–98.

177. *Id.*

178. Rhode, *supra* note 16, at 509 ("In both its instrumental and symbolic dimensions, the certification process provides an opportunity for affirming shared values.").

179. *Id.*

180. *See generally* HOWARD S. BECKER, OUTSIDER: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963); EMILE DURKEIM, THE DIVISION OF LABOR IN SOCIETY (George Simpson trans., 1933); EMILE DURKEIM, PROFESSIONAL ETHICS AND CIVIC MORALS (Bryan S. Turner ed., Cornelia Brookfield trans., 1957); PHILIP ELLIOT, THE SOCIOLOGY OF THE PROFESSIONS (1972); KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE (1966); Howard S. Becker, *The Nature of a Profession*, *in* NATIONAL SOCIETY FOR THE STUDY OF EDUCATION, EDUCATION FOR THE PROFESSION 27 (1962); William Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957).

181. Rhode, *supra* note 16, at 509–10.

those who might subvert it through subordination of perjury, misrepresentation, bribery, or the like."[182]

The appearance of professionalism also enhances the public's trust in the profession.[183] Attorneys have long been concerned about the public's "low regard for the profession," and the ABA has repeatedly classified the profession's public image as "the most urgent issues facing the bar."[184] Because of this, the common view is that the bad behavior of a single lawyer can exacerbate this perception and bring "disrepute to the whole profession," penalizing hardworking, ethical attorneys across the nation.[185] This implicates not only the economic monopoly the profession currently has over legal issues, but also its current status as a self-regulating profession, something that has been criticized.[186] Thus, Character and Fitness enhances the internal functioning of the profession as well as its interaction with the public. Proponents also point out that this method of self-regulation is consistent with how other professions identify and regulate.[187]

b. Other Licensing Professions have Similar Requirements

Lawyers aren't the only licensed professionals who are required to pass character-and-fitness-type standards to practice. Other professions hold their applicants to similar standards for admission into their academic programs and ultimate licensure. Doctors,[188] veterinarians,[189] dentists,[190] among others, must also pass moral requirements to be licensed by their state boards.[191] Law enforcement is another profession in which regulators have also sought to predict future bad behavior by reviewing past "dysfunctional behavior."[192] The pur-

182. *Id.* at 509.

183. *Id.* at 511 (citing Interview by Deborah Rhode with Member, Ill. Character and Fitness Comm., 3d Dist. (July 18, 1983) (explaining how character and fitness requirements can improve the "image of the profession which . . . is not the best image"); Interview by Deborah Rhode with Chairman, Nev. Bd. of Law Examiners (July 12, 1983) (describing the public perception of the profession as major objective of character and fitness requirements)).

184. Rhode, *supra* note 16, at 511.

185. *Id.*

186. *See generally* Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROFESSION 209 (2011).

187. MODEL RULES OF PROF'L CONDUCT pmbl. 10 (AM. BAR ASS'N 2016).

188. BD. OF PHYSICIANS, APPLICATION FOR INITIAL MEDICAL LICENSURE, MD. DEP'T OF HEALTH & HYGIENE 30 (2016), https://www.mbp.state.md.us/forms/dr_initial.pdf; *License to Practice Medicine and Surgery*, WIS. MED. EXAMINING BD., http://docs.legis.wisconsin.gov/code/admin_code/med/1.pdf (last visited Nov. 16, 2017).

189. *See, e.g.*, *Admissions Requirements*, PENNVET, http://www.vet.upenn.edu/education/admissions/requirements (last visited Nov. 16, 2017).

190. *Licensure by Credentials: General Qualifications for Licensure*, TEX. ST. BD. DENTAL EXAMINERS, https://www.tsbde.texas.gov/LicensureByCredentials.html (last visited Nov. 16, 2017).

191. One study looked at the medical-school records of 235 graduates who were subsequently disciplined by state medical boards and found that discipline was "strongly associated" with reports of unprofessional conduct in medical school. *The Folly*, *supra* note 175, at 792. Another study found that medical residents "with either low professionalism ratings on their Resident's Evaluation summary or a low score on the internal medicine certification examination had nearly twice the chance of being subsequently disciplined by a state licensing board as their colleagues." *Id.*

192. As Levin noted, "preemployment psychological testing has been administered to police officers for more than eighty-five years. Certain personality measures on the California Psychological Inventory relating to the Conscientiousness factor seem to predict dysfunctional job behaviors by law enforcement officers. Indi-

pose and goals of such requirements are much the same as they are for the legal profession: protecting the public.[193] Thus, these professions also engage in screening to predict future bad behavior in applicants, and those methods similarly rely on character and conduct.[194]

But critics of Character and Fitness dismiss the possible association between Character and Fitness disclosures and future discipline as miniscule. They reject it as a method to ensure professionalism, decrying Character and Fitness as useless and discriminatory.

D. Criticisms of Character and Fitness

Character and Fitness has become increasingly controversial. Critics lament that "[w]e have developed neither a coherent concept of professional character nor effective procedures to predict it. Rather, we have maintained a licensing ritual that too often has debased the ideals it seeks to sustain."[195] This is because, they contend, Character and Fitness fails to achieve its purpose and, in fact, harms the profession.[196] This Section explores the major critiques of Character and Fitness, particularly that it does not accurately predict future conduct and is discriminatory to certain applicants.

1. Character and Fitness Is Not Predictive

The rallying cry that Character and Fitness protects the public is, critics argue, undermined by a simple truth: research shows that prior bad acts do not predict future bad acts.[197] That is to say, just because someone has done a bad thing before does not mean he or she will do that bad thing—or any bad thing, for that matter—again. This is the very argument underlying the Federal Rules of Evidence,[198] which govern the admissibility of evidence in trials.

The predictive value of prior bad acts seems intuitive: if an applicant has shown disregard for the law in one sense, why would he or she not be more likely to do so again? Thus, we assume that character evidence informs us of a person's future behavior. Indeed, early psychological theories were grounded in the idea that "fundamental personality dispositions governed social conduct."[199] But, as both critics of character evidence and critics of Character and

viduals who engaged in certain dysfunctional behaviors such as marijuana use, driving under the influence, and conduct resulting in military court martials prior to becoming law enforcement officers had a higher probability of subsequent discipline than law enforcement officers who did not engage in such behaviors. Discrepancies, inconsistencies, or omissions by individuals when supplying life history information (*e.g.*, criminal activity, drug use, etc.) prior to being hired also significantly differentiated disciplined and never-disciplined law enforcement personnel." *Id.* at 791–92.

193. *See generally* Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, J. HEALTH CARE L. POL'Y 285 (2010).

194. *See e.g.*, *supra* notes 188–90.

195. Rhode, *supra* note 16, at 494.

196. *Id.*

197. *The Folly*, *supra* note 175, at 776; Leslie C. Levin et al., *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY 51, 52 (2015).

198. FED. R. EVID. 404(a)(1).

199. Rhode, *supra* note 16, at 557.

Fitness point out, social-science research indicates that this is hardly true.[200] Rather, studies suggest that "moral behavior [is] more a function of specific habits and contexts than of any general attributes."[201]

Similarly, critics argue that there is no significant correlation between prior bad acts and professional misconduct.[202] Only two published studies have been conducted to explore the relationship between prior conduct and subsequent discipline—the Minnesota and Connecticut studies previously discussed in Part II.C.1. While both studies suggested some correlation between past conduct/health status and future discipline, both have been called into question. Critics argue that the Minnesota study "did not report on the likelihood that an applicant with a prior history of misconduct would be subsequently disciplined,"[203] and that "the study was not conducted scientifically and involved a very small sample"—a fact later acknowledged by one of the researchers.[204] Relatedly, the researchers behind the Connecticut study said that "the baseline probability of discipline is so low that even a factor that more than doubles this probability—say, from 2.4% to 5%—has little predictive power."[205] Instead, the results may be tied to other social factors, such as the rank of an applicant's law school or the type of firm they practice in.[206]

In truth, the cause of misconduct is in fact an "enormously complicated question,"[207] and psychologists disagree on the general mechanics of ethical decision-making.[208] What is clear is that "[t]he factors that affect the resolution of ethical issues are . . . complex,"[209] making prediction of future decision-making or behavior difficult.[210] Research shows that "[c]ertain life events can influence behavior and modify trajectories," meaning events later in life could entirely alter a person's ethical behavior.[211] With respect to the legal profession, there is evidence that a lawyer's ethical decision-making is strongly influenced by his or her workplace.[212] Lawyers follow the example of other practitioners around them and are influenced by their office size, client resources,

200. *The Folly*, *supra* note 175; Levin et al., *supra* note 197.

201. Rhode, *supra* note 16, at 557.

202. *The Folly*, *supra* note 175, at 775 (citing Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, B. EXAMINER, Nov. 1992; Levin et al., *supra* note 197).

203. *The Folly*, *supra* note 175, at 793.

204. *Id.*

205. *Id.* at 796.

206. *Id.* at 796–97.

207. *Id.* at 789.

208. *Compare, e.g.*, LAWRENCE KOHLBERG ET AL., MORAL STAGES: A CURRENT FORMULATION AND RESPONSE TO CRITICS (1983), *with* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) (arguing that moral intuitionism drives decision-making more than rational thought).

209. *The Folly*, *supra* note 175, at 789 (citing Jennifer J. Kish-Gephart et al., *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCHOL. 1, 17–18 (2010)).

210. *Id.*

211. *Id.* at 790 (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609, 611, 621 (1990)).

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

and client demands—all of which are introduced in practice, after Character and Fitness occurs.[213]

Thus, Character and Fitness is ill-equipped, critics argue, to truly predict future misconduct from applicants, and therefore does not protect the public from "morally unfit" practitioners. But the ineffectiveness of Character and Fitness is not the only—or most egregious—critique of the admissions standard.

2. Character and Fitness Is Discriminatory

Critics of Character and Fitness also argue that not only do these inquiries lack predictability, they also come at a social cost.[214] Admissions committees make unfair—and even discriminatory—assumptions about an applicant.[215] Such assumptions trigger a process they describe as, at best, "embarrassing, stressful, and career-damaging for applicants who must explain to employers why their bar admission is delayed," and, at worst, a deterrent to promising applicants.[216] Moreover, many of these applicants will likely never be disciplined for misconduct.[217] The risk of such unfair and discriminatory assumptions is not unlike the criticism underlying the prohibition of character evidence in trial.[218] While the assumptions can impact many applicants, Character and Fitness critics are particularly concerned with two types of applicants they believe are subject to the most discrimination—those with mental illnesses and minorities.

a. The Special Problem with Mental Illness

Some of the most vulnerable applicants are students with mental illnesses. The prevalence of mental illness among law students and practitioners is no secret.[219] Out of concern for the impact mental illness might have on practitioners, state bars began requiring bar applicants to disclose mental illnesses as part of Character and Fitness.[220] Mental-health disclosures have been criticized over the last two decades,[221] most recently out of concern that they violate the

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

214. Rhode, *supra* note 16, at 554.

215. *Id.* at 589.

216. *The Folly*, *supra* note 175, at 779; Levin et al., *supra* note 197, at 52.

217. Levin et al., *supra* note 197.

218. FED. R. EVID. 404(a)(1); *see generally* GEORGE FISHER, EVIDENCE (3d ed. 2013).

219. *See, e.g.*, *Mental Health at Yale Law School*, YALE L. SCH. (2016), https://www.law.yale.edu/yls-today/yale-law-school-events/mental-health-yale-law-school.

220. Therese Esquerra, *Mental Illness Disclosure Requirements on State Bar Moral Character and Fitness Applications: A Qualitative Survey* (unpublished paper, George Washington Univ. Law Sch.) (on file with author).

221. Kelly R. Becton, Comment, *Attorneys: The Americans with Disabilities Act Should Not Impair the Regulation of the Legal Profession Where Mental Health is an Issue*, 49 OKLA. L. REV. 353, 353 (1996) (describing mental-health inquiries as "one of the most disputed issues to face boards of bar examiners in recent years").

Americans with Disabilities Act ("ADA").[222] The ADA currently classifies a person as disabled if, among other things, he or she has "a physical or mental impairment that substantially limits one or more major life activities . . . ."[223] The law was amended in 2008[224] to make it easier to establish a disability, specifically with mental illness. The official regulations expressly state that "[i]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia . . . ."[225] Thus, those with mental illness are afforded the same protections under the ADA as those with physical disabilities.[226] Courts have consistently held that such protections apply to state bars.[227] And while state bars do not inquire about an applicant's physical disability, they certainly ask mental-health-related questions. It is undisputed that the screening of applicants with mental illness is allowed, but "[t]he Code of Federal Regulations requires that any such screening be 'necessary' to achieve its stated purpose"—here, to protect the public.[228] In 2014, twenty-six states asked bar applicants about mental-health diagnoses and treatment as part of their Character and Fitness inquiry.[229]

Scholars are not the only ones concerned about mandatory mental-health disclosures. In 2014, the Department of Justice ("DOJ") began investigating the Louisiana Supreme Court's use of certain mental-health inquiries in the state's Character and Fitness. The DOJ found that "some, but not all, of the . . . [inquiries were] unduly broad and violate[d] the ADA."[230] The questions at issue were from the standard NCBE questionnaire, which the organization provides to states as a model for their Character and Fitness.[231] The DOJ and Louisiana Supreme Court ultimately entered into a settlement agreement, requiring that the court, among other things, revise its questions and pay $200,000 to various affected applicants.[232] Following the settlement, the NCBE also revised

222. 42 U.S.C. § 1201 *et seq*. (2012).

223. *Id.* § 1202.

224. 42 U.S.C. § 12101 *et seq*.

225. 29 C.F.R. § 1630.2(j)(3)(ii), (iii) (2016).

226. Title II of the ADA—which applies to both state and local government agencies, including state bar associations—establishes that "no 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 entity." 42 U.S.C. § 12132.

227. Alyssa Dragnich, *Have You Ever . . . ? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 680 (2015) (citing ACLU of Ind. v. Ind. State Bd. of Law Exam'rs, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *5–6 (S.D. Ind. Sept. 20, 2011); Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1492–93 (S.D. Fla. 1994)); *see also* 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, 128 (2001); 42 U.S.C. § 12132.

228. Dragnich, *supra* note 227, at 678 (citing 28 C.F.R. § 35.130(b)(8) (2014)).

229. *Id.* at 677.

230. Martha Neil, *DOJ Says Bar Official Violate the ADA by Asking Applicants Too Much About Their Mental Health*, A.B.A. J. (Feb. 12, 2014), http://www.abajournal.com/news/article/doj_says_bar_officials_violated_ada_by_asking_applicants_too_much_about_the/; *see also* The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89) [hereinafter DOJ Findings].

231. Neil, *supra* note 230; *see also* DOJ Findings, *supra* note 230.

232. Press Release, Dep't of Justice, *Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities*, DEP'T OF JUSTICE (Aug. 15, 2014), https://

its model inquiries (the questions used by Louisiana), though it "was careful not to concede that the DOJ's interpretation about the illegality of these questions was correct."[233] But the settlement had little national impact in the long term. Despite the criticism and the murky relationship between mental-health disclosures and the ADA, such inquiries are still a part of many states' Character and Fitness today. In 2015, following the settlement, the American Bar Association passed a resolution encouraging state bars to discontinue the practice of requiring mental-health disclosures.[234] While twelve states amended their mental-health questions following the DOJ investigation and settlement, they continue to ask some form of mental-health questions.[235]

Even with the amended questions, critics argue that the current use of mental-health inquiries is still troubling. As of 2015, twenty-four states used the revised NCBE questions,[236] which still asked about "conditions[s] or impairment[s]," including mental disorders and any subsequent treatment.[237] In total, seven states asked questions about specific mental-health diagnoses, such as bipolar disorder and schizophrenia.[238] Ten states asked questions about the impact of a mental illness on the applicant "if untreated."[239] Among the states that did not rely on the NCBE questions, seven still asked their own questions about mental-health diagnoses and treatment.[240] Most troubling to critics is that, "[i]n total, 14 states still ask application questions that violate the ADA."[241] And even in the few states that do not inquire about mental illness, if the Character and Fitness committee discovers such an illness during its investigation the applicant will be flagged and called in for further investigation, in the form of interviews and hearings.[242]

Although the ADA allows certain, otherwise illegal, inquiries if they are "'necessary' to achieve its stated purpose,"[243] critics argue that state bars cannot meet that burden.[244] First, they point to the general consensus that the diagnosis of a mental illness is not predictive of future behavior.

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www.justice.gov/opa/pr/department-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates.

233. Dragnich, *supra* note 227, at 703.

234. COMM'N ON DISABILITY RIGHTS SECTION OF CIVIL RIGHTS & SOC. JUSTICE., REP. TO THE HOUSE OF DELEGATES: RES. 102, ABA (2015).

235. Dragnich, *supra* note 227, at 677.

236. Alabama, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Vermont, Washington, and Wyoming. Dragnich, *supra* note 227, at 704 n.197. Georgia also asks additional questions of its own. *Id.*

237. *Id.* at 703.

238. Florida, Kentucky, Nevada, Ohio, Texas, Utah, and Virginia. Dragnich, *supra* note 227, at 704 & nn.198–99. It should be noted, however, that this is down from eighteen states in 2014 (Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Texas, Utah, and Virginia.). *Id.*

239. Arkansas, Florida, Kentucky, New Hampshire, Ohio, Oregon, Rhode Island, Virginia, West Virginia, and Wisconsin. *Id.* at 704.

240. Arkansas, Georgia, Hawaii, Iowa, Michigan, Minnesota, and South Carolina. *Id.* at 704 n.198.

241. Arkansas, Florida, Georgia, Kentucky, Minnesota, Nevada, New Hampshire, Ohio, Oregon, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.* at 705.

242. In this author's experience, the Illinois Character and Fitness Committee does precisely this.

243. *Id.* at 678 (citing 28 C.F.R. § 35.130(b)(8) (2014)).

244. *Id.*

> The data shows that there is no connection between asking about mental health on a bar application and future rates of attorney misconduct. These results mirror what psychologists and psychiatrists have said for years: that there is no connection between a diagnosis of mental illness and future misconduct as an attorney.[245]

Thus, they argue, "because bar examiners cannot show that their questions about mental health are necessary to protect the public, these questions violate the ADA."[246] Second, critics point to the humiliation applicants are subject to and the possible chilling effect that may have on bar applications.[247] States who inquire into mental illness require applicants to undergo an in-depth follow-up investigation, leaving applicants "ashamed and humiliated by being forced to provide details of their very difficult and personal circumstances to strangers."[248] To provide these required details, applicants are forced to "execute broad medical record release forms" and attend hearings before a committee "where they are required to answer additional questions about their treatment history."[249] As a result of these investigations, applicants' admission is delayed—which can "further embarrass[] the applicant," affect employment prospects, and serve as a "great source of inconvenience, distress, economic loss and even physical harm."[250]

Third, and relatedly, critics argue that such inquiries deter people from seeking help or undercut any active treatment. Deterring treatment, they assert, is "the biggest risk of requiring applicants to disclose their past mental health treatment . . . ."[251] Applicants may refrain from seeking much-needed treatment for fear that such action would negatively impact their bar application.[252] While "[i]t is impossible to measure precisely how many students forego treatment in fear of the bar application," critics insist that "no one doubts that the effect is real."[253] Even if students have been diagnosed and are seeking treatment for mental illness, "[m]andatory disclosures about mental health on bar applications may make the course of treatment less effective."[254] Full disclosure to a health professional is critical for effective treatment, but "applicants may be less forthcoming with their therapists and doctors" if they know

245. *Id.*
246. *Id.*
247. *Id.* at 683–84.
248. *Id.* at 684.
249. *Id.*
250. *Id.* at 686 (citing Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 678 (1997)). Indeed, some applicants may have to hire an attorney to represent them through the process, adding further financial burden. *See Stephanie L. Stewart*, MEYER LAW GROUP LLC, http://www.meyerlex.com/Lawyers/Stephanie-L-Stewart/ (describing Meyer's work representing applicants in Character and Fitness hearings) (last visited Nov. 15, 2017).
251. Dragnich, *supra* note 227, at 683 (citing Stephen T. Maher & Lori Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 IND. L. REV. 821, 830 (1990)); *see also* Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 445 (E.D. Va. 1995) (detailing arguments that mental-health inquiries have "the adverse effect of deterring mental health treatment and stigmatizing those who do seek treatment")).
252. *Id.* at 683–84.
253. *Id.* (citing Bauer, *supra* note 227). Dragnich says that "[s]ome authors argue that the applicants that the bar examiners should be most worried about are those applicants who are in need of treatment but have not sought it. . . . The reasoning is that applicants who are currently in treatment are likely to be more stable." *Id.*
254. *Id.* at 686.

that everything they say to them will be disclosed as part of Character and Fitness.[255] But this impact, and the general discrimination mentally ill applicants face, are not the only causes for concern, according to critics.[256]

b. Bad Acts as a Proxy for Race

Those opposed to Character and Fitness also fear the impact the admission requirement has on race. Because the justice system disparately impacts people of color and/or lower socioeconomic status, critics of Character and Fitness argue that the admissions standard disproportionately affects those applicants.[257] For example, every single jurisdiction inquires into past criminal conduct.[258] But such inquiries can have a disparate impact on poor and nonwhite applicants because they in turn "are subjected to disparate treatment in the criminal justice system."[259] It is no secret the criminal-justice system favors white Americans.

> Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences. African-American males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males. If current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males—compared to one of every seventeen white males.[260]

This is due, in part, to their more limited access to legal resources, leading people to plead "no contest" to criminal charges.[261] Critics insist that this manifests as a class bias in the admission process: "[t]o treat a single arrest as a strike against an otherwise qualified applicant disproportionately impacts persons from lower socioeconomic communities that are already under-served by lawyers."[262] Not only do these realities ultimately penalize nonwhite applicants

255. *Id.*

256. *Id.*

257. Susan Saab Fortney, *Law Student Admissions and Ethics—Rethinking Character and Fitness Inquiries*, 45 S. TEX. L. REV. 983, 991 (2004).

258. *See generally* 2016 BAR ADMISSION GUIDE, *supra* note 19.

259. *The Folly*, *supra* note 175, at 778 (citing Saab Fortney, *supra* note 257).

260. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf. Such disparities aren't simply the product of the legal system; they are also the result of the laws Congress passes. For example, possession of crack cocaine carries a much more severe penalty than powder cocaine, despite having "the same physiological and psychotropic effects." Kimbrough v. United States, 522 U.S. 85, 94 (2007). Critics of the criminal justice system point to the fact that "African-Americans are disproportionately more likely to be involved in the crack cocaine market," and "made up more than 80 percent of defendants in federal courts charged with crack cocaine offenses." Matthew Robinson & Marian Williams, *The Myth of a Fair Criminal Justice System*, 6 JUST. POL'Y J. 1, 2–3 (2009) (citing U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

261. Saab Fortney, *supra* note 257, at 992.

262. *Id.* at 991–92. Fortney's article specifically focuses on the character-and-fitness requirement for admission to *law school*, but the concern is the same for admission to the bar.

more than their white counterparts, they may also serve as a deterrant from ever even applying.[263]

These discriminatory implications are serious, and such critiques of Character and Fitness have not gone unheard. As the next Section discusses, proponents of the admissions standard have attempted to mitigate some of these concerns.

E. Attempts to Address Criticism

While many still zealously advocate for the use of Character and Fitness in the bar-admission process, states and proponents have taken steps to address the criticism, particularly with mental-health inquiries. This Section discusses the primary attempts to reform Character and Fitness. First, it explores the rise of conditional-admission programs that avoid outright denying mentally ill applicants while still giving bars more oversight of these candidates to protect the public. Next, it discusses a proposal to narrowly tailor mental-health questions to lessen some of the personal intrusion of Character and Fitness.

1. Provisional Licensing

As previously discussed, one of the growing concerns with Character and Fitness is that it violates the ADA. States introduced provisional-licensing (also called conditional-admission) programs as a way to address that concern while still allowing states to use Character and Fitness to protect the public.[264] Under these programs, candidates are admitted to a state bar with certain conditions, and they are monitored for a period of time before these conditions are terminated.[265] Conditions can include supervision by an admitted attorney, maintaining sobriety, drug tests, and various types of monitoring, including treatment for substance abuse and psychiatric or psychological treatment.[266] While some states have had these programs for decades,[267] conditional admission was first formally proposed to the ABA in 2006.[268] The Committee on Lawyers Assistance Programs proposed the Model Rule Conditional Admission to Practice Law to the ABA in order to, among other things, "reduce the apprehension of the result of a full disclosure of diagnosis, treatment and rehabilitation," while simultaneously enabling "bar admissions or disciplinary au-

263. *The Folly*, *supra* note 175, at 787.

264. *See generally* Stephanie Denzel, *Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 CONN. L. REV. 889 (2011).

265. *Id.*

266. Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147, 170–71 & n.148 (1994).

267. Florida has had its conditional admission program since 1986. Denzel, *supra* note 264, at 919.

268. *See* Robert L. Childers, *CoLAP Law School Assistance Committee to Submit Proposed Model Rule to ABA House of Delegates*, HIGHLIGHTS OF THE AM. BAR ASS'N COMM'N ON LAW ASSISTANCE PROGRAMS 1 (Fall 2006/Winter 2007), https://www.americanbar.org/content/dam/aba/publishing/highlights_newsletter/legalservices_colap_highlights_highlightsfall06winter07.authcheckdam.pdf.

thorities to act more quickly in the event of recurrence or relapse to minimize or prevent harm to the public."[269]

The ABA adopted the Model Rule in 2008; a revised version was adopted in 2009.[270] Twenty-one states adopted it within the year,[271] and today twenty-six states have such programs.[272] These programs tend to target four specific issues—substance abuse, mental disability, debt, and criminal history—with a catchall "other" category, though it is unclear what this category entails.[273] Under the Model Rule, conditional admission may not last longer than sixty months, but in actuality the timelines vary among states—some even have, or are considering, indefinite-length programs.[274]

2. Narrowly Tailoring Disclosure Requests

Some advocates of Character and Fitness argue for a different solution. They say that disclosure of mental-health and substance-abuse issues is important for the practice of law, but state bars could request such disclosures in a better way.[275] These proponents argue that by asking *more* narrowly tailored questions, bars would encourage disclosure so as to help mentally ill students become "effective lawyers."[276] Currently, "[o]pen-ended, subjective questioning is the most popular method among bar examiners and is endorsed by the National Conference of Bar Examiners in its sample application."[277] These questions generally inquire about a variety of issues and whether they might have an impact.[278] For example, one NCBE question asks:

> Do you currently have any condition or impairment (including but not limited to, substance abuse, alcohol abuse, or mental, emotional, or nervous disorder or condition) that in any way currently affects your ability to practice law in a competent and professional manner?[279]

The question leaves the definitions of "condition" and "impairment" open, making appropriate answers broad and subjective. Similarly, it is not clear what it means to "affect your ability to practice . . . ."[280] Narrowly tailored disclosures, on the other hand, inquire as to whether applicants have *ever* been

269. *Id.*

270. *See ABA OKs Conditional Admission to Bar for Would-Be Lawyers with Addiction, Mental Problems*, A.B.A. J. (Feb. 11, 2008), http://www.abajournal.com/news/article/aba_oks_conditional_admission_to_bar; *Model Rule on Conditional Admission to Practice Law*, AM. BAR ASS'N (Aug. 2009), https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session2_aba_model_rule_on_conditional_admission.authcheckdam.pdf.

271. Denzel, *supra* note 264, at 914 ("In 2009 twenty-one states had conditional-admission programs.").

272. 2016 BAR ADMISSION GUIDE, *supra* note 19, at 4–5.

273. *Id.*

274. *See, e.g.*, Denzel, *supra* note 264, at 919 (discussing Idaho's consideration of doing away with its two-year restriction in favor of an indefinite conditional admission program).

275. Andrew Stempien, Note, *Answering the Call of the Question: Reforming Mental Health Disclosure During Character and Fitness to Combat Mental Illness in the Legal Profession* 93 UNIV. DET. MERCY L. REV. 185, 185–87 (2016).

276. *Id.* at 186–87.

277. *Id.* at 197.

278. *Id.*

279. PREPARATION OF CHARACTER, *supra* note 106.

280. *Id.*

treated for *specific* conditions that can have *specific* impacts,[281] such as "whether the applicant has 'ever' been 'treated or counseled . . . for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life.'"[282]Although more intrusive, advocates of more narrowly tailored, status-based inquiries insist that it "gives bar associations the most information possible and help[s] them provide resources to those who need them."[283] While these questions directly ask about an applicant's status, rather than conduct, some courts have held that such inquiries do not violate the ADA.[284] Thus, proponents argue that "the competing interest of bar associations in soliciting disclosure and the bar applicant's interest in protecting privacy can best be balanced through asking a combination of narrowly tailored questions and subjective, open-ended questions that comport with the Americans with Disabilities Act."[285] As the next Section discusses, however, neither conditional-admission programs nor narrowly tailored questions solve the fundamental flaws of Character and Fitness.

III. THE POISON IN THE PROCESS

With the poison of propensity running through its veins, Character and Fitness's flaws raise the question: "if the character inquiry is continued, should it be continued in its current form?"[286] The answer is unequivocally no. Character and Fitness relies on a type of evidence that Congress found so unpredictive and prejudicial that it expressly prohibited it from use in criminal and civil proceedings.[287] This very prejudice manifests itself in the current Character and Fitness used by state bars across the nation. Further, Character and Fitness utterly fails to achieve its stated purpose, undercutting any argument—however deplorable—that justifies its discriminatory implications. This should give admission committees pause, especially when Character and Fitness harms and/or chills applicants, hurting the profession it purports to improve.

This Section analyzes the disturbing problems with Character and Fitness and failed attempts to mitigate the uglier side of the admissions standard. First, it discusses the tension between the Federal Rules of Evidence's prohibition of character evidence and the precise use of that evidence in Character and Fitness. Next, it analyzes how Character and Fitness actually harms the profession. Then, it reviews how conditional-admission programs and narrowly tailored questions are just as problematic as the current Character and Fitness regime. Finally, it exposes how state bars' misguided focus on admissions fails to actually protect the public from attorney misconduct.

281. Stempien, *supra* note 275, at 197.
282. Esquerra, *supra* note 220, at 9–10.
283. Stempien, *supra* note 275, at 197.
284. Applicants v. Tex. State Bd. of Law Exam'rs, No. A93CA740SS, 1994 WL 923404, at *9 (W.D. Tex. Oct. 11, 1994).
285. Stempien, *supra* note 275, at 186.
286. *The Folly*, *supra* note 175, at 798.
287. FED. R. EVID. 404(a)(1).

A. Character Evidence: Tension with the Federal Rules of Evidence

It cannot be overlooked that Character and Fitness stands in direct contradiction to a fundamental principle of evidence: the inadmissibility of character evidence to prove someone guilty or liable. Under FRE 404, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person *acted in accordance* with the character or trait."[288] This is also called propensity evidence.[289] "The problem with such evidence is not that it is not relevant. . . . Rather, the problem is that such evidence can cause *unfair prejudice*."[290] The primary concerns with character evidence are: (1) that jurors will give such evidence too much weight in their deliberations of the present charge, and (2) that jurors might use character to justify condemning someone regardless of the present charge or strength of evidence.[291] The latter concern has been described as a "preventative conviction"—protecting the public from potential future harm.[292] Congress was so concerned about these effects that FRE 404 expressly, and unequivocally, rejects the use of character evidence for propensity purposes, unlike other rules that give the judge discretion in weighing the prejudice.[293] Thus, FRE 404(a) represents the "judgment of Congress that *as a matter of law* the probative value of propensity evidence is substantially outweighed by the risk it poses . . . ."[294]

The prohibition on character evidence is also supported by the fact that character traits[295] are not predictive of future behavior. Empirical evidence has "not only failed to validate trait theory, especially its predictive attributes, but generally rejected it."[296] Rather, research shows "that behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior."[297] Thus, behavior is more likely the result of immediate circumstances.

> First, behavior depends on stimulus situations and is specific to the situation: response patterns even in highly similar situations often fail to be strongly related. Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories. The more dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the same individual. "Even seemingly trivial situational differences may reduce correlations to zero."[298]

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288. *Id.* (emphasis added).
289. FISHER, *supra* note 218, at 153.
290. *Id.* (emphasis added).
291. *Id.*
292. *Id.*
293. FED. R. EVID. 404(a)(1).
294. FISHER, *supra* note 218, at 154.
295. It should be noted that, while mental illness is not a traditional character trait, the stigma associated with it—that a person is dangerous or unstable—are arguably traits we assign to those diagnosed with such an illness.
296. Miguel A. Mèndez, *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters.,"* 49 HASTINGS L.J. 871, 878 (1998).
297. *Id.*
298. WALTER MISCHEL, PERSONALITY AND ASSESSMENT 177 (1968). *See also* FISHER, *supra* note 218, at 164.

Despite the recognition of the prejudicial effects of propensity arguments and the ineffectiveness of such evidence, this is, as the next Subsections address, precisely what state bars rely on when admitting applicants. Propensity is the sole basis underlying Character and Fitness: an applicant has done a bad thing(s) (*i.e.*, is "morally weak"[299]) before, so they will do that bad thing(s) again. In other words, they are "presumptively unfit,"[300] just as Catholics, Jews, journalists, and others used to be.[301] Hence, today's Character and Fitness results in the same prejudice Congress has expressly rejected in civil and criminal legal proceedings: it places too much weight on certain applicants' past conduct or status, harming otherwise qualified applicants and leading to "preventative" conditions or denials.

1. Character and Fitness Gives Too Much Weight to Past Acts

Many modern Character and Fitness inquiries are based solely on stigma. Applicants who have made "youthful mistakes"—what Character and Fitness critics classify as minor offenses when they were younger—may be subject to "unnamed and tangled impressions" of admission committees, even subconsciously, with little guidance on how to prove rehabilitation.[302] This prejudice, and the broad discretion of admission committees, is "devastating to an applicant's goals, livelihood, and reputation,"[303] despite the circumstances of the offense and the applicant's good-faith effort to reform.

Similarly, Character and Fitness gives weight to an applicant's health status, immediately marking an applicant as an "other," fit for further investigation. Returning to our example of mental-health inquiries, it is well-documented that there is plenty of fear and ignorance surrounding mental illness. As recently as 2009:

> 68% of Americans said they would not want a person with a mental illness to marry into their family, and 58% would not want a person with a mental illness in their workplace. Many people wrongly believe that individuals with a mental illness tend to be violent. In one study, although the participants agreed that there was a biochemical reason that caused depression, 45% of participants "believed depressed people are unpredictable, and [20%] said that depressed people tend to be dangerous."[304]

And those with mental illnesses are acutely aware of the way they are perceived. According to the Centers for Disease Control, "[o]nly 25% of adults with mental health symptoms believed that people are caring and sympathetic

299. LARSON, *supra* note 47, at 173. *See also* Rhode, *supra* note 16, at 500 n.36 ("Of course, antisemitism in the legal profession was common before this period. In 1874, George Strong advocated 'either a college diploma or an examination including Latin' as requirements for admission to Columbia Law School, on the ground that this would 'keep out the little scrubs [German Jews mostly] whom the school now promotes from the grocery-counters . . . to be gentlemen of the Bar.'").

300. Rhode, *supra* note 16, at 494.

301. *See supra* Part II.

302. Mitchell M. Simon, *What's Remorse Got to Do, Got to Do with It? Bar Admission for Those with Youthful Offenses*, 2010 MICH. ST. L. REV. 1001, 1003 (2010).

303. *Id.*

304. Dragnich, *supra* note 227, at 731 (quoting Sadie F. Dingfelder, *Stigma: Alive and Well*, MONITOR ON PSYCHOL. (June 2009), http://www.apa.org/monitor/2009/06/stigma.aspx).

to persons with mental illness."[305] A survey found that as many as 64% of law students "will not seek professional help for any mental health challenges because they fear the professional consequences,"[306] and a more recent study showed that many students specifically fear that they will not be admitted to the bar.[307]

This stigma and ignorance rears its ugly head in many states' Character and Fitness mental-health inquiries. For example, seven[308] state bar applications currently ask about specific diagnoses:

> The most common form of the specific diagnosis question asks: "In the past [5 or 10] years, have you been diagnosed with, been treated or sought counseling for bi-polar disorder, schizophrenia, paranoia, or any other psychiatric disorder, or have you ever been committed to any institution for the treatment of any such condition?"[309]

Questions such as these assume that people with these illnesses pose a threat. And the steps subsequently taken by admissions committees in response to these specific diagnoses rely on fear and ignorance of a diagnosis, rather than actual *current conduct* (whether a result of that diagnosis or not). For example, bipolar disorder has been described as "the disorder that laypeople most frequently misunderstand and fear."[310] Although "most individuals with this condition function quite well in their occupation,"[311] bipolar applicants "probably comprise a majority of the hearings, conditional admissions, and denials that result from mental health disclosures."[312] Thus, a mere diagnosis subjects candidates to what seems like an insurmountable presumption of unfitness, regardless of how healthy, functioning, and fit they are.

Even if one buys into the argument that the presence of a mental illness demands extra precautions to protect the public, there is evidence that admission committees give improper weight to evidence of mental health when deciding to admit an applicant. For example, an applicant with a substance-abuse problem applied to the bar after receiving treatment for more than three years prior to his application. He had been arrested once, but that occurred more than ten years earlier.[313] Despite his rehabilitation and the numerous character affidavits submitted on his behalf, including one from his therapist, he was deemed unfit and only conditionally admitted with supervision.[314] Similarly, a lawyer reapplied to the bar after having left ten years earlier as a result of dis-

305. *Stigma of Mental Illness*, CTRS. FOR DISEASE CONTROL, http://www.cdc.gov/mentalhealth/data_stats/mental-illness.htm (last visited Nov. 17, 2017).

306. *Starr Initiative on Character and Fitness*, DAVE NEE FOUND., http://www.daveneefoundation.org/programs/starr-initiative-on-character-and-fitness/ (last visited Nov. 17, 2017).

307. *See* Jerome M. Organ, et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Abuse and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 141–42 (2016).

308. Florida, Kentucky, Nevada, Ohio, Texas, Utah, and Virginia. Dragnich, *supra* note 228, at 704.

309. *Id.* at 705 (citing *Admission by Examination SCR 2.022 Attorney Applicants Summer 2015*, KY. OFFICE OF BAR ADMISSIONS (on file with author)).

310. *Id.* at 706.

311. *Id.* at 707 (citing Bauer, *supra* note 227 (quoting David L. Dunner & G. Andrew H. Benjamin, *Bipolar Affective Disorder (Manic Depressive Illness)*, B. EXAMINER, Nov. 1994, at 25, 28)).

312. *Id.* at 706.

313. Fla. Bd. of Bar Exam'rs *re* J.A.S., 658 So. 2d 515, 515–16 (Fla. 1995).

314. *Id.* at 516.

cipline; he had been sober the last nine years.[315] Despite his sobriety, no conduct issues since then, and a recommendation from his current employer, he too was deemed unfit for fear that the stress of practice would cause him to drink again.[316] He too was only conditionally admitted.[317]

These instances suggest that certain issues—be it substance abuse or prior arrests—are given too much weight (as will be discussed later, conditional admission is equally discriminatory and problematic), even in light of the passage of time and evidence of rehabilitation.

2. Character and Fitness Leads to "Preventative Convictions"

Character and Fitness inquiries also implicate Congress's concern about "preventative convictions," or in this case preventative conditions or denials. The concern with such convictions is that they will allow juries to automatically convict a defendant, "even if he should happen to be innocent momentarily," because they believe his prior bad act(s) "raise[] the odds" of future bad acts.[318] Thus, character evidence "[o]verpersuade[s] [juries] to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[319]

This is precisely how Character and Fitness is used: as a preventative measure (or in some cases, discipline) to protect the public. Certain affirmative answers (*e.g.*, convictions, mental health, debt) *per se* lead to investigation, conditional licensing, or denial because bar admission committees believe they significantly "raise[] the odds"[320] that an applicant will commit future bad acts and is therefore unfit to practice law. This denies applicants a fair opportunity to enter the profession, often for improper, discriminatory justifications. But, even if one is comfortable with preventative efforts, research directly contradicts the need for such preventative actions:[321] behavior is incredibly hard to predict, and it is more likely the result of one's environment or major life events than it is of character traits.[322] Although the studies in Minnesota and Connecticut have found *slight* correlations between prior behavior or health status, the validity of these studies should be questioned (and in fact have been by the very researchers who conducted them).[323]

315. Fla. Bd. of Bar Exam'rs *re* Barnett, 959 So. 2d 234, 234–37 (Fla. 2007) (per *curiam*).

316. *Id.* at 237.

317. *Id.*

318. Old Chief v. United States, 519 U.S. 172, 180–81 (1997).

319. Michelson v. United States, 335 U.S. 469, 476 (1948).

320. *Old Chief*, 519 U.S. at 180. In the instance of mental illness, while it is true there is a risk of relapse, this mindset overlooks the fact that consistent and active treatment can significantly reduce the chance of relapse. *See* Tori Rodriguez, *Bipolar Disorder Adherence, Relapse Benefit from Psychosocial Intervention*, PSYCHIATRY ADVISOR (Mar. 8, 2017), http://www.psychiatryadvisor.com/bipolar-disorder/bipolar-disorder-adherence-relapse-benefit-from-psychosocial-therapies/article/642887/.

321. *See supra* Part II.

322. *See* Nelson & Trubek, *supra* note 212, at 201; Sampson & Laub, *supra* note 211, at 611.

323. Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609, 619 (2001); *The Folly*, *supra* note 175, at 800–01.

One of the researchers behind the Minnesota study admitted that "the study was not conducted scientifically and involved a very small sample."[324] Leslie Levin, who led the study in Connecticut, continues to be critical of Character and Fitness despite her findings that there is a slight association between some factors and future discipline.[325] By Levin's own critique, although factors such as mental health and criminal convictions showed a small association, "the baseline probability of discipline is so low that even a factor that more than doubles this probability—say, from 2.4% to 5%—has little predictive power. Bar examining authorities would be unlikely to take significant action based on a predicted probability of future discipline as low as 5%."[326] Indeed, as has long been observed, it is difficult "to use statistical information to predict which law students [will] become disciplined lawyers when the base rate of discipline [is] so low."[327] Further, "when all the admissions data were used in a statistically rigorous fashion, the model yielded only two more correct predictions of who would be disciplined and no more correct predictions of who would not be disciplined."[328] So, "although it is possible that the character inquiry seeks information from applicants that predicts types of misconduct that do not result in discipline sanctions, there is presently no evidence that it does so. Nor is there evidence that Character and Fitness protects the public from lawyer misconduct."[329] The study may have identified candidates who would be unfit lawyers or may have gone on to become great lawyers. We cannot know.

Further, *per se* preventative measures as a response to certain disclosures run counter to the American Psychiatric Association's guidelines for inquiry by licensing boards, which states that:

> Prior psychiatric treatment is, per se, not relevant to the question of current impairment. It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding *current functioning* . . . The salient concern is always the individual's *current capacity* to function and/or current impairment.[330]

This is supported by the fact that the fear surrounding this stigma does not actually translate to practice. For example, "[p]eople diagnosed with bipolar disorder can be—and are—successful lawyers and judges."[331] In recent years,

324. Corneille, *supra* note 323, at 619; *The Folly*, *supra* note 175, at 800–01.

325. *The Folly*, *supra* note 175, at 796.

326. *Id.*

327. *Id.* at 796 n.130 (citing Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 A.B.A. J. 815, 817 (1972)).

328. *Id.*

329. *Id.* at 800 ("As noted, very few applicants are refused admission to the bar on character and fitness grounds. Those who are denied admission are sometimes given leave to reapply and later successfully do so."). "For example, during the period from 1993–2005, only 12 of the 47 applicants who were denied admission to the Ohio bar on character and fitness grounds were barred from reapplying. . . . [S]ome of the Ohio applicants who were initially denied admission subsequently reapplied and were admitted to the Ohio bar. Others who are denied admission in one jurisdiction are sometimes admitted elsewhere. In the Connecticut study, three applicants who were asked to participate in character and fitness hearings elected not pursue their Connecticut applications. Each of them was already admitted to another bar or was subsequently admitted in another jurisdiction." *Id.* at 800–01 nn. 150–51 (citing CONNECTICUT STUDY, *supra* note 65, at 4 n.20).

330. Stempien, *supra* note 275, at 195 (emphasis added).

331. Dragnich, *supra* note 227, at 707.

more and more successful practitioners and professors have come forward to disclose their mental-health status, their struggles with it, and, more importantly, their success in the profession despite their illness.[332] As a law professor diagnosed with bipolar disorder described it, they want "to demonstrate that those with mental illness can have full and satisfying professional and personal lives, and they need not and should not endure stigma or doubt as to their ability to perform their personal or employment duties."[333]

State bars should take this same position. They should reject the use of propensity arguments that mark some applicants as "other," as "diseased dogs."[334] As Melody Moezzi put it, "[l]egally, ethically and practically speaking, those of us living with mental illness should be judged by our deeds, not our diagnoses."[335] Indeed, admission should be based on a candidate's (current) conduct. State bars should admit in the same way they practice—free from overly prejudicial character evidence. Further, not only is Character and Fitness in tension with basic evidentiary principles, it is also detrimental to the very profession it is intended to enhance.

B. Character and Fitness: More Harm than Good

Sacrificing the "others" is not the only flaw in Character and Fitness. The admissions standard also falls short of achieving its other purpose: enhancing the legal profession. This Section discusses how Character and Fitness actually harms the profession more than it helps. First, it explores how the admission requirement fails to ensure professionalism among practitioners. Next, it analyzes the chilling effect Character and Fitness has, deterring applicants who may greatly contribute to the profession.

1. Character and Fitness Fails to Ensure Professionalism

Beyond protecting the public, Character and Fitness has been justified as ensuring professionalism among practitioners.[336] But it is not clear that the requirement actually achieves that. In reality, "it is difficult to test the impact, if any, of the character inquiry on lawyers' attitudes toward their duty to behave ethically after they enter practice."[337] Further, even if it has *some* impact at the beginning of a lawyer's career, as previously discussed,[338] research consistently shows that "many other factors—including office colleagues, client demands, concerns about reputation, and the threat of sanctions—have a powerful impact on lawyer conduct once they begin practice."[339] Additionally, there is little evidence that Character and Fitness enhances the public reputation of

332. *See, e.g.*, ELYN R. SAKS, THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS (2007); Moezzi, *supra* note 2. *See also* Dragnich, *supra* note 227, at 708.

333. Jones, *supra* note 331, at 373.

334. Rhode, *supra* note 16, at 509 (quoting Alderman, *Screening for Character and Fitness*, B. EXAMINER, Feb. 1982, at 23, 24).

335. Moezzi, *supra* note 2.

336. *See supra* Part II.

337. *The Folly*, *supra* note 175, at 802.

338. *See supra* Part II.

339. *The Folly*, *supra* note 175, at 802.

the profession. "It is difficult to assess to what extent the character and fitness inquiry promotes public trust in lawyers or a positive view of the legal profession more generally," but the general consensus is that "[t]he public's views of lawyers are, at best, ambivalent."[340] A 2016 poll showed that only 5% of the public viewed the legal profession "very positive[ly]," while 26% viewed it "somewhat positive[ly]."[341] Relatedly, a 2015 poll found that only 21% of respondents rated lawyers' honesty and trustworthiness as "high" or "very high."[342] It is also "unclear what the public actually knows about the bar's character and fitness requirement or whether its existence affects the public's views about lawyers."[343] If they are aware of the admission requirement, it hardly seems to be improving public opinion.

It is hard to argue that Character and Fitness is necessary when it fails to achieve either of its stated purposes. Further, not only does Character and Fitness fail to help the legal profession, it may also harm it, as the next Subsection discusses.

2. Character and Fitness Harms and Chills Otherwise Qualified Candidates

Although it is hard to measure the extent to which Character and Fitness deters applicants, there is evidence that it does have a chilling effect. For example, between August 1987 and October 1994, the Texas Board of Bar Examiners received thirty applications with affirmative answers to mental-health inquiries—nineteen of which were deemed "serious."[344] Of those nineteen cases, two applicants were terminated for failing to comply with further investigation.[345] Another two were set for hearings, but those never took place and the applicants never took further action.[346] Similarly, in 2011, four applicants to the Indiana bar withdrew their applications in response to further investigation of their mental health.[347] This means that at least eight applicants across two states—applicants who may have gone on to be great lawyers—stopped the process in response to further investigation on the basis of their mental health. And these are surely not the only instances when this has happened. Additionally, even if such numbers are small, it does not excuse the unnecessary and prejudicial impact of Character and Fitness. No applicant should be treated dif-

340. *Id.* at 803 (citing Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1424, 1460 (1999); LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 4 (2002), http://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf.

341. *Business and Industry Sector Ratings*, GALLUP (Aug. 3–7, 2016), http://www.gallup.com/poll/12748/business-industry-sector-ratings.aspx.

342. *Honesty/Ethics in Professions*, GALLUP (Dec. 2–6, 2015), http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx. Historically, this opinion of lawyers has never been higher than 27%, and it has fallen as low as 13%. *Id.*

343. *The Folly*, *supra* note 175, at 803.

344. Applicants v. Tex. State Bd. of Law Exam'rs, No. A 93 CA 740 SS, 1994 WL 923404, at *4 (W.D. Tex. Oct. 11, 1994).

345. *Id.*

346. *Id.*

347. ACLU of Ind. v. Ind. State Bd. of Law Exam'rs, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *3 (S.D. Ind. Sept. 20, 2011).

ferently simply because he or she has a diagnosis, much less a federally protected diagnosis.

Further, such statistics may not truly represent the requirement's chilling effect: discouraging candidates from even applying to a bar in the first place. Anecdotal evidence suggests that some potential applicants never even apply out of humiliation or fear of the reaction their diagnosis will trigger. Returning to the professor with bipolar disorder:

> He graduated Order of the Coif from Duke University School of Law, worked at Davis Polk & Wardwell in New York City, clerked for a judge on the Fifth Circuit Court of Appeals, taught at the University of Chicago Law School, and earned tenure at the Louis D. Brandeis School of Law at the University of Louisville . . . [but he] never applied for bar admission in Kentucky in part because that would have required him to disclose his bipolar diagnosis.[348]

Mandatory disclosure also deters applicants from seeking much-needed mental-health treatment for fear they will be denied bar admission. This in turn could impact their ability to practice, becoming a self-fulfilling prophecy of unfitness. A 2014 survey of law students at Yale Law School revealed that 70% of respondents struggled with mental illness.[349] Despite this prevalence, "students overwhelmingly feared exclusion and stigma from a variety of sources, including state bar associations, faculty, administrators, and peers."[350] This fear of stigma and otherness contributed, in part, to 30% of respondents failing to seek treatment.[351] Other studies have confirmed that students and practitioners alike are reluctant to seek help for fear of the stigma associated with their illness.[352] While many states include a disclaimer on their applications encouraging applicants to seek needed treatment with the promise that it will have no impact on the process, "the efficacy of these disclaimers is questionable because many applicants may not believe them and will continue to avoid treatment."[353] The fundamental flaws and damaging impact of Character and Fitness cannot be overlooked. It is true that some state bars and proponents of the admission requirement have proposed or enacted measures to address some of these flaws. As the next Subsection discusses, however, these solutions fall horribly short of the much-needed reform.

348. Dragnich, *supra* note 227, at 707–08.

349. FALLING THROUGH THE CRACKS: A REPORT ON MENTAL HEALTH AT YALE LAW SCHOOL, YALE L. SCH. MENTAL HEALTH ALLIANCE 3 (Dec. 2014), https://www.law.yale.edu/system/files/falling_through_the_cracks_120614.pdf. "Even in the unlikely scenario that zero nonrespondents faced mental health challenges, this would mean that nearly one third of the 650 students enrolled at YLS felt that they faced mental health challenges while in law school." *Id.*

350. *Id.* at 3.

351. *Id.* at 4.

352. *See, e.g.*, Jerome M. Organ et al., *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. 116–56 (Autumn 2016); Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016); Jerome M. Ogden et al., *Helping Law Students Get the Help They Need: An Analysis of Data Regarding Law Students' Reluctance to Seek Help and Policy recommendations for a Variety of Stakeholders*, B. EXAMINER 8 (Dec. 2015); Assoc. of Am. Law Schs., *Report to AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 55 (1994).

353. Dragnich, *supra* note 227, at 684.

C. Attempted and Proposed Solutions Are Inadequate

It should not go unnoticed that proponents of Character and Fitness have made some attempts to address the criticism of the admission requirement. Unfortunately, these attempts fail to truly remedy the issues—and in some cases are just as problematic. This Section discusses the shortcomings of attempted and proposed solutions. First, it analyzes how conditional-admission programs still treat applicants differently for improper reasons. Then, it discusses how narrowly tailored questions still rely on propensity arguments, failing to mitigate Character and Fitness's prejudicial impact.

However well-intentioned, conditional admission is no less discriminatory than current Character and Fitness practices because it treats applicants differently based on a status.[354] These programs are applied to applicants who are currently fit for practice, but happen to have a certain status or type of past conduct—mental health, criminal conviction, credit problems, etc. Despite their current fitness—through treatment or some form of rehabilitation—they are denied access to full and equal participation in the profession. Because they are subject to further investigation, monitoring, or requirements, conditional admission is not equal to the unconditional admission most applicants are granted. For example, during the DOJ investigation of Louisiana's Character and Fitness, the agency "also found that the state violate[d] the ADA in evaluating bar applications from individuals with a history of mental health issues and admitting them to practice conditionally."[355] The DOJ determined that provisional licensing was a discriminatory form of admission "because it was based on stereotypes of persons with disabilities . . ."[356]—that applicants with a mental illness are unstable. Stereotypes also underlie conditional admission for other categories: an applicant with a misdemeanor is dangerous, an applicant with a lot of debt is irresponsible, etc.

Relatedly, conditional admission is still based on a propensity argument. Returning to our example, even if applicants with a mental illness have been unstable in the past—which is likely what led to their diagnosis—that does not mean that they will be unstable in the future, especially an applicant whose *current conduct* shows dedication to staying healthy (through treatment, medication, etc.). The argument is essentially: they were unstable before, they'll be unstable again, therefore they are unfit and need constant monitoring to practice. Further, the fact that some states have[357]—and others are considering[358]—conditional-admission programs without definitive time limits is even more concerning. States could effectively create a permanent "second-class licensure"[359] within the profession that "leave[s] conditionally admitted attorneys in

354. *See generally* Denzel, *supra* note 264.

355. Neil, *supra* note 230.

356. DOJ Findings, *supra* note 230.

357. Stephanie Lyerly, Note, *Conditional Admission: A Step in the Right Direction*, 22 GEO. J. LEGAL ETHICS 299, 308–09 (2009).

358. Denzel, *supra* note 264, at 921 (discussing Idaho's consideration of doing away with its two-year restriction in favor of an indefinite conditional admission program).

359. *See generally id.*

the limbo of conditional admission forever."[360] Not only are these programs equally discriminatory, but they also fail to remedy the chilling effect Character and Fitness has on applicants. Disclosure still marks an applicant as "other," leading to a penalty in admission. For example, if applicants are reluctant to disclose their mental-health diagnoses or seek treatment for fear of personal and professional consequences, the prospect of conditional admission will make them no less likely to do so because they face precisely the same thing. Applicants will be subject to different treatment based solely on the stigma associated with their health status. They will still face a humiliating process requiring further investigation, interviews discussing incredibly personal information, and "unfettered access to their records."[361] This process can still delay any admission, putting employers on alert and further embarrassing applicants.

Narrowly tailored inquiries are equally problematic. These questions inherently rely on propensity arguments because they assume that the mere presence of an illness speaks to applicants' character and their fitness to practice. But the "presence of a mental illness or substance abuse no more impacts on an individual's character than the existence of coronary artery disease or cancer."[362] Forced disclosure demonstrates the very stigma that makes so many applicants hesitant to disclose their illness or seek help to begin with. The vast majority of admission boards do not "inquire about physical illness" or disability, further demonstrating the "prejudice against mental disorders and a basic misunderstanding of mental illness."[363] Character and Fitness advocates argue that applicants must surrender some privacy[364]—indeed NCBE president Erica Moeser went so far as to describe ADA concerns over Character and Fitness as "a misuse of a watershed of civil rights legislation"[365]—but the information's lack of predictive power seriously undermines this argument.

Ultimately, both of these solutions suffer from the same fatal flaws as states' current Character and Fitness: they still rely on propensity arguments; they are discriminatory; they do not actually solve the problems they purport to solve; and they, in fact, harm the profession by exacerbating stigma, deterring treatment, and harming or chilling applicants. All of these attempts illustrate state bars' fundamental misunderstanding of how to protect the public. As the next Section addresses, the root of this misunderstanding is a misguided focus.

D. Failure to Treat the Source

At the root of all of Character and Fitness's flaws is a simple truth that undermines the entire admissions standard: preventing admission does not actually address ethical issues within the profession. This Section analyzes state bars' misplaced focus on applicants rather than practitioners. First, it discusses

360. *Id.* at 928.
361. *Id.* at 927–28.
362. Coleman & Shellow, *supra* note 266, at 152.
363. *Id.* at 157.
364. *See* Richard L. Sloane, *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, 402–03 (2002).
365. Erica Moeser, *Yes: The Public Has a Right to Know About Instability*, A.B.A. J., Oct. 1994, at 36.

the lack of oversight of practitioners and the problem with that in light of available research. Next, it explores the failure of state bars to penalize practitioners for bad conduct and the implications for the profession.

1. There Is Little Oversight of Licensed Attorneys

Every year, there are thousands of complaints against practicing attorneys, but disciplinary proceedings are few and far between.[366] The NCBE claims that it is "easier to refuse admittance to an immoral applicant than it is to disbar him after he is admitted."[367] But this mindset is problematic for two reasons: (1) factors such as mental illness, youthful offenses, and credit history do not actually predict immoral behavior;[368] and (2) research shows that misconduct is likely the result of factors practitioners encounter after admission to the bar.[369] Further, it is not clear why disbarring, or even simply penalizing, attorneys is so much harder. Rather, it seems as though bars' own inaction is the evidence they rely on in making that argument. If state bars are truly interested in protecting the public, they would be better served to more actively monitor current practitioners' behavior. Currently, the only way to do this is through reports to disciplinary bodies, such as the Illinois ARDC. But actual disciplinary proceedings are rare—in 2015 only 4% of reported cases in Illinois even made it through the first round of review.[370] Although it is likely that many reports are unfounded complaints by unhappy clients, disciplinary boards' general hesitation to punish practitioners should raise questions about the sufficiency of the profession's self-regulation.[371] Further, investigation of these reports often only look at the single incident reported on and, thus, may not examine a practitioner's overall pattern of behavior, absent a serious prior sanction.[372] In fact, the only consistent active monitoring most state bars conduct is ensuring practitioners meet annual CLE requirements.[373] And even if there were more review, there is still very little threat of penalty.

366. *See* AM. BAR ASS'N CTR. PROF'L RESPONSIBILITY: STANDING COMM. ON DISCIPLINE, 2014 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) (2014) [hereinafter S.O.L.D. SURVEY], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_sold_final_results.authcheckdam.pdf; Neil Gordon, *Accountability: Misconduct and Punishment*, CTR. PUB. INTEGRITY (June 26, 2003), https://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment.

367. NAT'L CONFERENCE OF BAR EXAM'RS, BAR EXAMINERS HANDBOOK 73:4 (3d ed. 1991) [hereinafter NCBE HANDBOOK].

368. *See supra* Part II.

369. *Id.*

370. 2015 ARDC REP., *supra* note 128, at 4.

371. *See id.*

372. *Id.*

373. *See supra* Part II.

2. The Current Penalty System for Practitioners Lacks Teeth

As scarce as disciplinary proceedings are, actual penalties are even rarer;[374] and what penalties are ordered lack the teeth to truly deter bad conduct.[375] The purpose of lawyer discipline is no different than the goal of Character and Fitness for admission: protecting the public and ensuring professionalism among practitioners.[376] Stated another way, professional discipline, such as sanctions, "are lesser-included forms of punishment . . . that are designed to shape the individual lawyer's future conduct" and the conduct of others who observe such punishment.[377] But currently, attorneys could run a cost/benefit analysis of the disciplinary statistics and see that their misconduct is unlikely to be punished. The rarity of punishment has long led critics to describe bar disciplinary systems as "a Rube Goldberg kind of situation"—long and complicated and benefiting the accused lawyers, rather than the public.[378] Not only are there no actual penalties to deter future behavior, there are no mechanisms to allow for public accountability because the investigations are kept private.

If the goal is to protect the public, state bars need to be serious about monitoring and actually penalizing bad conduct by current practitioners. To make applicants the scapegoat of such a purpose only pays lip service to the duty and standards of professionalism that bar associations profess to ensure.

IV. THE CHARACTER AND FITNESS CURE

The ineffective and problematic nature of Character and Fitness raises the question: Why keep it at all? Critics do not rule out that possibility, but there is currently "no political will to eliminate [it] at this time,"[379] nor are there any alternative proposals. Rather than resign themselves to the current discriminatory and ineffective Character and Fitness regime, state bars should change their approach to deterring misconduct in the practice of law. This Part first argues that admission committees should reform Character and Fitness to focus solely on conduct rather than character. This reform should also prohibit asking *any* questions about health conditions, and instead use *current conduct*, monitored from the time an applicant enters law school, as the sole basis of fitness. This Part then advances the recommendation that, in light of research on the factors influencing behavior, more effort be made to monitor—and penalize—misconduct by current practitioners.

374. *See* S.O.L.D. SURVEY, *supra* note 366; Gordon, *supra* note 366.

375. *See* S.O.L.D. SURVEY, *supra* note 366.

376. *See, e.g.*, *In re* Gadda, 4 Cal. St. Bar Ct. 416 (2002); *In re* Light, 615 N.W.2d 164, 167 (S.D. 2000); *In re* Brady, 923 P.2d 836, 840 (Ariz. 1996); *In re* Harris, 890 S.W.2d 299, 302 (Mo. 1994); *In re* Merrill, 875 P.2d 128, 131 (Ariz. 1994); Discipline of Hopewell, 507 N.W.2d 911, 916 (S.D. 1993); Rosenthal v. State Bar, 738 P.2d 740, 742–43 (Cal. 1987); *In re* Hein, 516 A.2d 1105, 1107 (N.J. 1986).

377. Fred C. Zacharias, *The Purposes of Discipline*, 45 WM. & MARY L. REV. 675, 685 (2003).

378. Myrna Oliver, *Bar Procedures Do Little to Punish Incompetent Lawyers, Study Finds*, L.A. TIMES (June 3, 1987), http://articles.latimes.com/1987-06-03/news/mn-2736_1_state-bar.

379. *The Folly*, *supra* note 175, at 804 n.164.

A. Refocusing Character and Fitness

There is no dispute that attorneys should be held to the highest ethical standards, especially in light of the power they hold. But the current Character and Fitness regime focuses more on character (evidence) than current conduct, which actually speaks to an applicant's fitness to practice. This Section recommends that state bars modify their professional rules of conduct to apply all rules to students once they enter law school and to incorporate education on these rules prior to the start of school. It then advocates that fitness to practice should only be determined based on applicant conduct in accordance with these rules from the time they enter law school. Finally, it recommends permanently prohibiting any inquiries about health status.

1. Monitoring Current Conduct

Character evidence has consistently been shown to have little predictive power for future behavior. Instead of relying on inaccurate and prejudicial propensity arguments, state bars should focus more on applicants' current conduct to determine their character and fitness to practice. This could be done by specifically subjecting them to the professional rules of conduct that practitioners must follow. Under the ABA's Model Rules of Professional Conduct, bar applicants are only subject to the rule requiring honesty in admission applications;[380] the other rules do not apply until an applicant has been admitted to practice.

State bars could work with their state supreme courts to ensure that the rules are edited to apply to all applicants once they are officially enrolled in law school. Students would be put on notice and educated about their responsibilities during their first-year orientation, prior to the start of school. While this alone would not be enough education, further instruction could be incorporated into professionalism classes that schools offer their first-year students, consistent with ABA standards.[381] This, of course, would be further explored in the ABA-mandated professional-responsibility course students are already required to take as either a second- or third-year student. Thus, if students wish to join the profession, they must abide by its ethical rules in the three years leading up to admission. Although there are rules that would be irrelevant in a school setting, many would be directly applicable when determining an applicant's moral fitness to practice. For example, rules governing fraud[382] would be applicable to students who serve in leadership positions that require the handling of money on their organization's behalf.[383] Similarly, rules of confidentiality[384] would apply to students doing clinical work or aiding in the school's admission process. The duty to report misconduct[385] would also be

380. MODEL RULES OF PROF'L CONDUCT r. 8.1 (AM. BAR ASS'N 2016).

381. Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20 PROF'L LAW. 1, 17 (2010).

382. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2016).

383. *In re* Mustafa, 631 A.2d 45, 46 (D.C. 1993).

384. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

385. MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2016).

enforceable, much like the duty to report academic misconduct that many schools already have.[386]

Schools should also amend their code of conduct to require compliance with all state-bar rules of professional conduct. Thus, schools would document and report any additional misconduct covered by these rules in the same way they currently report academic violations to state bars during the admission process. Good conduct in law school would be a sign of rehabilitation, making prior bad acts irrelevant. Additionally, holding students to the same accountability as practitioners would show a good-faith attempt to achieve the purpose of Character and Fitness, rather than marking some applicants as "other" and relying on stereotypes and prejudicial propensity arguments against them for the appearance of "protection." But simply shifting the focus to monitoring current conduct is not sufficient. Admission committees must also be prohibited from inquiring into—or investigating solely based on—a person's health status or condition.

2. Prohibiting Inquiry into Conditions

The presence of a condition does not speak to a person's current fitness to practice. But bar-admission committees continue to turn a blind eye to this truth, insisting that this is a necessary pound of flesh that mentally ill applicants must concede.[387] And therein lies the absurdity of Character and Fitness: "When our bodies are sick[,] people extend their sympathy, bring us soup, offer up solutions. When our minds are sick[,] people tend to shy away from you, be afraid, or call you outright crazy."[388] Applicants need not fear the impact of a physical disability or illness on their Character and Fitness certification. But mentally ill applicants have no safe harbor, no sympathy. Instead, we equate their mental illness with moral failure, brand them as "diseased dogs,"[389] and argue that, if we prevent *even one* mentally ill applicant from doing harm,[390] then perpetuating the stigma is worth it. This mentality is a stain on the legal profession.

Thus, mandated health disclosures—such as those focusing on mental health or a history of substance abuse—must be prohibited. It is hard to argue that status-based inquiries do not violate the ADA given that they treat applicants differently solely on the basis of a disability. Mental illness is a disability the ADA is specifically intended to cover, making discrimination against even a single applicant unacceptable and illegal. Further, these inquiries are based on stigma that is both humiliating and poisonously prejudicial—the latter of which is precisely why propensity evidence is prohibited. They illustrate admission committees' ignorance and fear of the "other." It seems hard to argue

386. *See College of Law Honor Code and Code of Student Responsibility: Academic Year 2016–2017*, UNIV. OF ILL. COLL. OF LAW (on file with author).

387. Moeser, *supra* note 365.

388. Chelsea Fung, *FILMMAKER SPOTLIGHT: @ANNAAKANA!*, TUMBLR: HOLLYSHORTS FILM FESTIVAL (Oct. 27, 2014), http://hollyshortsff.tumblr.com/post/101097701361/filmmaker-spotlight-annaakana.

389. Rhode, *supra* note 16, at 509.

390. *See supra* Section II.C.

that a student should be penalized or prohibited from practice—and therefore deprived a livelihood—because of a diagnosis when the Federal Rules of Evidence prohibit convicting a defendant for murder because he or she has been previously convicted of murder.

A *per se* concern about certain conditions is not only misguided, it is unnecessary under a regime that focuses on conduct. If a student is not treating a condition, that will manifest itself in conduct. For example, untreated bipolar disorder can lead to trouble with the law or financial difficulties in manic periods.[391] Thus, concerning conduct would manifest itself if an applicant were not seeking treatment. This conduct would speak directly to the applicant's *current* fitness to practice and could be considered under a conduct-focused regime. If the evidence is in the conduct, it is not necessary to ask about an applicant's condition or health status. While this is a much-needed step, reforming Character and Fitness is not the only fix needed to provide all applicants a fair opportunity to practice law while also protecting the public.

B. Focus Character and Fitness Efforts on Practitioners

To truly protect the public and ensure professionalism, state bars must improve the way they monitor and penalize practitioner conduct. Admission committees seem to operate under the assumption that it is "easier to refuse admittance to an immoral applicant than it is to disbar him after he is admitted."[392] But this is wrongheaded. To truly address misconduct in the profession, state bars must focus on practitioners, rather than applicants. If research shows that behavior is influenced most by post-admission factors—such as firm size, conduct of peers, etc.—then character-and-fitness-type efforts must be focused on practitioner conduct. To do otherwise would fail to treat the wound but expect the bleeding to stop. This Section recommends that state bars require periodic, in-depth reviews of practitioner conduct during license renewal. It then advocates for public disclosure of certain levels of disciplinary proceedings to bolster public accountability and deter bad behavior

1. Require Periodic Relicensing for Practitioners

While state bars impose mandatory CLE requirements to annually renew a law license, review of practitioners' fitness to practice is primarily limited to disciplinary proceedings. This lack of oversight does little to ensure ethical practitioner conduct. United States bars should adopt Australia's more aggressive model and require practitioners to periodically reapply for—rather than simply renew—their license, during which point practitioners' behavior would be reviewed.[393] This would allow for a regular review of practitioners and would provide more oversight, which could be a firewall against regular mis-

391. DAVID J. MIKLOWITZ, THE BIPOLAR DISORDER SURVIVAL GUIDE: WHAT YOU AND YOUR FAMILY NEED TO KNOW 13–30 (2d. 2011).

392. NCBE HANDBOOK, *supra* note 367.

393. This idea was first suggested, as far as this author could find, by Leslie Levlin, the researcher behind the Connecticut Study previously discussed. *See The Folly*, *supra* note 175, at 815–16.

conduct. Like the Australian method, the re-application process would rely on a character-and-fitness-type questionnaire that looked only into conduct between the last re-application process and the current one, including the number and kinds of complaints about the lawyer to a regulatory body, any court sanctions the lawyer has received, his or her own encounters with the law, etc. The state bar's renewing body would review the application and conduct further investigation on the applicant before deciding if the attorney was *still fit* to practice law.

This review would enable state bars to observe patterns of behavior that might be worth addressing before the conduct is exacerbated and impose some conditions on re-admission—not unlike the way conditional-admission programs currently do for mentally ill applicants—to help correct the conduct. Such oversight and even minor conditions could serve as a deterrent against future bad behavior, and it would help identify potentially bad actors earlier than under the current system—where there is no discipline until *after* the bad conduct. Similarly, if the conduct was severe enough and had somehow avoided sanction, renewal boards could more aggressively address the conduct than they could under the current system. Although Australian jurisdictions go through this process annually, such a system would probably be unworkable given that United States jurisdictions are much larger. A five-year period, as has been suggested by Leslie Levin,[394] is likely more reasonable without undermining the effectiveness of the process. Further, this review could be streamlined with the current CLE review process, eventually making it easier. While this would increase administrative costs, state bars could offset such costs by requiring attorneys to pay fees when they apply, similar to those law students pay when first applying.

This targeted practitioner approach would better deter misconduct because it woudld be enforced during the time misconduct is likely to occur—after admission, as the result of certain working environments. While this process should better deter bad behavior, accountability is the final piece necessary to truly address misconduct in the legal profession and better protect the public.

2. Allow for Public Accountability

Accountability is a powerful tool that could aid state bars in ensuring professionalism and protecting the public. State bars should create some form of open database that allows the public to search attorneys to see certain kinds of disciplinary history. The ABA has attempted to do this with its National Lawyer Regulatory Data Bank, which it created in 1968.[395] The database is run by the ABA Standing Committee on Discipline and "is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States."[396] But, states *volunteer* information to the data-

394. *Id.*

395. *National Lawyer Regulatory Data Bank*, AM. BAR ASS'N CTR. FOR PROF'L RESP., https://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited Nov. 17, 2017).

396. *Id.*

base, so it is not clear how much is actually disclosed, and "[t]his service has been criticized as being under inclusive . . . ."[397] Further, the focus seems to be helping other disciplinary authorities, rather than the public, collect information on applicants, and the ABA charges fees to run a search of the database.[398]

States should adopt this idea by requiring court sanctions and certain levels of disciplinary proceedings to be documented in a public database that is searchable free of charge. Such databases, however, must have limits. Disclosing all reports against an attorney would be overly punitive because, as previously discussed, many reports are likely frivolous. Thus, states will need to strike the balance between necessary disclosure and protecting the reputation of innocent attorneys. How to exactly find that balance is beyond the scope of this Note; potential considerations, however, should include only disclosing cases that make it to a certain point in the disciplinary process, the type of information disclosed, etc.

Whatever that ultimate balance is, increasing the public accountability of the profession and monitoring practitioner conduct will truly protect the public. This reform, when paired with an admission process that focuses on current conduct, will help state bars achieve what Character and Fitness was intended to do while avoiding the poisonous and prejudicial pitfalls of the current admission requirement.

V. THE PLEA OF AN "OTHER"

"It happened to me."

I was, by all accounts, an incredibly successful law student. I graduated in the top 15% of my class, was editor-in-chief of this very law review, and was active in clinic, trial team, and moot court. But during my second year of law school, I lost my mind. I had a break down that led to a suicide attempt and hospitalization. I learned for the first time that I had bipolar disorder. Years of confusing struggles and months of unraveling were finally explained by the diagnosis, and that knowledge was initially a relief. Now I knew what I was fighting; now I knew how to fight it. But that relief vanished when I faced Character and Fitness. In the first draft of this Note I wrote: "I am one of the lucky ones. The Illinois bar is one of the few that does not ask about mental health." I thought I would be spared the pain and shame those like me face.

But I was wrong.

397. Moss Curtis, *supra* note 186, at 210–11.

398. *National Lawyer Regulatory Data Bank*, *supra* note 139; *Services*, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/services.html (last visited Nov. 15, 2017).

My diagnosis was discovered. I was marked as "other" and brought in for further investigation. Such investigations have been described as "torture."[399] Make no mistake, it is. I was asked incredibly personal details about some of the hardest experiences of my life. I was told that "it is a shame [I am] mentally ill because [I have] an otherwise stellar record." My circumstances, they said, were problematic because they called into question my ability to be trusted. I was treated as if I could not appreciate the responsibility and the stress of the profession I so desperately want to enter. And I was told again and again that I had to meet a high burden to prove that I was mentally stable.

That burden seems insurmountable.

My "stellar record" shows no signs of my illness. I have been treated regularly for two years (treatment I take seriously) and have not relapsed. But my *current* fitness does not matter: my treatment is not enough; my record is not enough. My accomplishments and successes might mean nothing, sacrificed at the altar of stigma. At the time of this writing, most of my peers have been sworn in. Following my interview, and after three painful weeks of waiting, I was notified that I must attend a hearing before an Inquiry Panel. I must again answer their questions, and I must provide more documented evidence of my "fitness" to practice. As of this writing, it has been a month since I was notified of my hearing, and yet no hearing has been scheduled. I was told to expect the process to take months—conditional admission, they said, takes a long time to set up. In the meantime, I have collected my "evidence": letters from doctors, personal references, and other documents—each more personal and painful than the next. I have been forced to share my disorder with my employer and people I would have otherwise never told. I spend every day hoping I will hear from the committee, that they will schedule my hearing, that this will be over; and I live in fear of losing my job if this process drags out. The pain and shame one feels during such a process is all-consuming. All you can do is try to contain those feelings and hope that each day brings you closer to admission—even if it is only conditional.

And I am not alone in this experience.

Every year it happens to those like me.

And every year it happens to qualified applicants who made a mistake when they were young, be it getting in trouble with the law or struggling with debt. These people may have much to offer. Look at Kathy Flaherty. Her work as both a legal advocate and mental-health advocate has had a far-reaching impact in Connecticut and beyond. Today, she is a member of the Board of Directors of Advocacy Unlimited, Lawyers Concerned for Lawyers-CT.[400] She

399. Moezzi, *supra* note 2.
400. *Kathy Flaherty*, *supra* note 5.

has used her legal experience and personal struggles to advocate for others through the National Mental Health Alliance, and she was appointed to the Connecticut governor's Sandy Hook Advisory Commission following the tragic elementary-school shooting in 2012.[401] Had she simply given up once the Connecticut bar denied her, she might not have gone on to do any of this work. She might have been defeated, resigning herself to be marked as "other," as unfit to practice—that loss would have been Connecticut's. It does not matter that denial numbers are low. No worthy candidate should be humiliated or denied admission based solely on the poison of propensity—which has time and again been proven useless and prejudicial. It is illegal, and it defies both research and our rules of evidence.

We are not "diseased dogs";[402] we will not bite. And we should not be stripped of our human dignity so that admissions committees can pretend that they are protecting the public. If state bars truly want to address lawyers' misconduct, then they need to focus on programs that monitor the *current* conduct of both applicants *and* practitioners. An admissions program that monitors the conduct of applicants during their time in law school and holds them to the same standards as practitioners will serve as a better measurement of fitness to practice. Additionally, the implementation of a more aggressive renewal program that reviews practitioner conduct will better address the bad behavior of current practitioners, which research suggests is where the true problem lies. If state bars are serious about protecting the public and ensuring professionalism, they need to toss aside poisonous propensity evidence. They need to enact real change to ensure that the "others" are given a fair opportunity and achieve the purpose of Character and Fitness. Until then, it is "character and fitness" in name only.

401. *Id.*

402. Rhode, *supra* note 16, at 509 (quoting Weckstein, *supra* note 389, at 23).