

# THE TROUBLING RISE OF THE LEGAL PROFESSION'S GOOD MORAL CHARACTER

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## INTRODUCTION

*The requirement that applicants to the bar possess “good moral character,” although well-established . . . today, appears to be a relatively recent arrival to Anglo-Saxon jurisprudence. For much of American history attorneys distinguished themselves, not by good works and saintly disposition, but by acts of violence that would confine them to imprisonment if committed in modern America. . . .*

. . . .  
*. . . By the 1920s, states began to create “moral fitness committees,” inevitably composed of persons with spotless backgrounds. By the middle of the twentieth century, moral character investigations grew to encompass such matters as divorce, cohabitation, and even violation of fishing license statutes. While empirical research establishes no correlation between “problem” applications and later disciplinary proceedings, the modern character and fitness process is viewed as an important component in the maintenance of the legal profession’s public standing.<sup>1</sup>*

Under a reasonable working assumption, I had expected to show that the profession’s “good moral character” requirement for admission had returned to an all-time low.<sup>2</sup> That is, the following study of the published decisions and scholarly research should have proven that bar associations and state supreme courts had loosened significantly their views of disqualifying moral character. That conclusion would not have been the bad thing that one might assume.<sup>3</sup>

I was wrong. What the research instead shows is that strict moral character screening not only continues to thrive, but *it has reached an all-time high*. To be sure, character screeners have

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<sup>1</sup> Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visions of Good Moral Character*, 22 N. ILL. U. L. REV. 19, 19, 34–35 (2001) (footnotes omitted).

<sup>2</sup> Several commentators corroborated my initial assumption. See, e.g., Maureen M. Carr, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Standards*, 8 GEO. J. LEGAL ETHICS 367, 368 (1995) (“In recent years, cases and changing rules have highlighted the fact that bar admission committees and courts have become somewhat more forgiving in their acceptance of [applicants with criminal records] into the legal profession. *This position represents a change from earlier, stricter stances.*” (emphasis added)).

<sup>3</sup> Public safety rhetoric notwithstanding, most of the moral character barrier is merely a means of protecting the profession’s public image. That weak and self-protective justification should be abandoned or at least narrowly circumscribed. See *infra* Parts IV–V.

limited their use of truly irrelevant (and probably unconstitutional) inquiries, such as cohabitation and communism. With respect to this Article's primary concern, character screening in response to applicants' criminal records, however, the reported cases—and reported denials of admission—have never been higher. That is to say, the number of these cases has never been higher—not even close—in this country's entire history. Thus, what I had assumed was a dying vestige of an unreasonably unforgiving age is actually a fixed and growing epidemic in which the bar continues to exclude applicants who could do the work ethically, but who allegedly would tarnish the bar's public standing.

This Article ultimately demonstrates that the bar's "moral judges" have developed an unintelligible crucible through which to run problem applicants. Part I lists the surprisingly sinister history of moral character review. Part II provides an overview of its current application. Part III, through compiling and coding the published opinions over the last quarter century, documents the marked rise in character screening of applicants with criminal records. Part IV illustrates that character screening, as applied, is both perverse and unrealistic. Part V weighs the arguments for character review and determines that they are overwhelmingly baseless.<sup>4</sup> Part VI concludes by offering some parting advice to the participants in the character review process.

## I. THE CROOKED HISTORY OF AMERICAN CHARACTER REVIEW

While some have attempted to legitimize the "good moral character"<sup>5</sup> requirement by alluding to its long-standing roots,

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<sup>4</sup> After apparently cursory reviews of publicly available drafts of this Article, some commentators have denounced (inaccurate summaries of) my views as radical. Because of these misconceptions, I deny explicitly what was already implicit in the Article: I am not in favor of crime or immoral (or even amoral) character. Indeed, one of my "ground projects" is to infuse ethics into the practice of law. *See, e.g.*, Keith Swisher, *The Moral Judge*, 56 DRAKE L. REV. (forthcoming 2008) (articulating adjudicatory justice and anticipating the moral adjudicator). Unfortunately, as described in detail in this Article, the past and present "good moral character" requirement does not assist legal practice in this, or virtually any other, laudable goal. Nevertheless, the limited merit of character screening is acknowledged and addressed in Part V below and its limited future utility is discussed in the Conclusion.

<sup>5</sup> The most frequently quoted definition of "good moral character" is Justice Frankfurter's:

the real story hardly reveals a time-honored tradition.<sup>6</sup> Indeed, as we will see, the bar did not begin officially enforcing “good moral character” until well into the twentieth century.<sup>7</sup> Furthermore, when enforcement finally occurred, both its motivations and outcomes were extremely problematic.

American character screening “in form”—but not in practice—began appearing in the mid-seventeenth century in response to “animus against lawyers’ ‘blood-suck[ing]’ practices.”<sup>8</sup> State legislatures, therefore, “sought to impose character requirements for admission to the bar.”<sup>9</sup> The resulting statutes,

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One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to “life, liberty and property” are in the professional keeping of lawyers. . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as “moral character.”

Schwartz v. Bd. of Bar Exam'rs, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

<sup>6</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2 cmt. d (2000) (alluding to the fact that “as far back as the first bars in medieval England efforts have been made to screen candidates for the bar with respect to their character”). The Restatement does note, however, the inquiry’s long-standing problems occasioned by

the difficulty of defining the standards of character thought to be minimal, the difficulty of ensuring fair application of . . . standards under the claim of rigorous examination, and the overriding difficulty of predicting future professional conduct from a necessarily abbreviated personal history and the committee’s access to such past activities as are sufficiently public to be checked.

*Id.*

<sup>7</sup> There was, however, “one major exception to open membership”—women: United States Supreme Court Justice Stephen J. Field (a man who was arrested and disbarred more than once during his own career) was willing to allow a lynch mob killer to practice law but concluded that women should be barred from the practice because the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”

Roots, *supra* note 1, at 22 (quoting *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)) (footnotes omitted).

<sup>8</sup> Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496 (1985). Professor Rhode’s exhaustive article remains the preeminent work on the subject of moral character screening. This Article in part updates and expands some of her relevant conclusions using court decisions, scholarly studies, and commentary from the twenty-plus years since she published her article.

<sup>9</sup> *Id.* at 496–97 (noting requirements such as references from ministers and court examination).

however, appeared to be ineffectual or unused.<sup>10</sup> Indeed, in the entire nineteenth century, there were virtually no reported instances in which applicants were banned for their character.<sup>11</sup>

Character screening effectively arrived in the early twentieth century. By 1927, a supermajority of the states had “strengthen[ed] character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures.”<sup>12</sup> For the legal profession, the rise in character screening seems to have arisen from several problematic concerns: “Much of the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern European immigrants, which threatened the profession’s public standing. Nativist and ethnic prejudices during the 1920s, coupled with economic pressures during the Depression, fueled a renewed drive for entry barriers.”<sup>13</sup>

The operation proved successful; it dropped the admitted number of persons from “unworthy” groups.<sup>14</sup> The strict scrutiny did not end with ethnicity or gender. Instead, using the

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<sup>10</sup> *Id.*

<sup>11</sup> See *id.* at 497; Roots, *supra* note 1, at 21–22. Indeed, American attorneys and judges had a notable history of violence, for which they suffered no denials of admission or professional discipline. See Roots, *supra* note 1, at 22–34 (documenting numerous instances of undisciplined violence by famous and not-so-famous attorneys, judges, and two former Presidents).

<sup>12</sup> Rhode, *supra* note 8, at 499; see also ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 94–95 (1983) (discussing the rise of bar examiner committees in the states). The rise in character requirements paralleled that of other “professions” during the period, including “barbers, beauticians, embalmers, engineers, veterinarians, optometrists, geologists, shorthand reporters, commercial photographers, boxers, piano tuners, trainers of guide dogs for the blind, and—ironically enough—vendors of erotica.” Rhode, *supra* note 8, at 499.

<sup>13</sup> Rhode, *supra* note 8, at 499–500; see also *id.* at 500–01 (recounting an instance “[a]t the first National Bar Examiners Conference in 1933, [in which] the former Chairman of the ABA’s section on Legal Education and Admission acknowledged that ‘sometimes you have wonderful character evidence displayed even though the applicant is not well educated or his parents were born in Russia’” (quoting *Character Examination of Candidates*, 1 B. EXAMINER 63, 72 (1932))).

<sup>14</sup> See JEROLD S. AUERBACH, UNEQUAL JUSTICE 127 (1976); Rhode, *supra* note 8, at 501 (citing percentages); see also STEVENS, *supra* note 12, at 92–103 (discussing the ABA’s efforts to establish market controls in the early twentieth century, which included “ethnic” controls); Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers’ Characters*, 68 IND. L.J. 647, 648 (1993) (“Powerful historic accounts have argued that the reforms earlier in the century were more effective at elevating the income and status of the profession than at protecting the public.”).

justification that “‘with an overcrowded bar and an abundance of candidates who have unquestioned character,’” the bar excluded *all* perceived “problem” applicants, such as “radicals, religious fanatics, divorcees, fornicators, and any individual who challenged the profession’s anticompetitive ethical canons.”<sup>15</sup> The bar then went after communists, and although it achieved modest initial success in barring them, its ultimate defeat was memorialized in two famous Supreme Court opinions.

The Constitution finally caught up to arbitrary character review: Screening requirements henceforth had to have a rational connection to fitness to practice law.<sup>16</sup> At that point, in the late 1950s, one reasonably could have assumed—indeed, one reasonably could have demanded—that the bar would dismantle character review.<sup>17</sup> As we will see, however, such a reasonable assumption somehow never materialized.<sup>18</sup>

“Despite relatively powerful rhetoric and argument against such inquiries, . . . ex ante inquiries into character and fitness . . . remain a major feature of admission to the legal profession.”<sup>19</sup> Although the reported data generally do not suggest that large numbers are excluded through modern

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<sup>15</sup> Rhode, *supra* note 8, at 502 (quoting *An Answer to the Problem of the Bootlegger’s Son*, 1 B. EXAMINER 109, 110 (1932)).

<sup>16</sup> See *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263–64 (1957); *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 238–39 (1957) (holding that due process and equal protection require a rational connection between character screening and fitness to practice law). In *Konigsberg*, the Court stated that the bar’s moral character requirement was “a vague qualification, which is easily adapted to fit personal views and predilections, [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.” 353 U.S. at 263.

<sup>17</sup> See Baude, *supra* note 14, at 649. Patrick Baude has noted the troubling history of character review and the even more troubling persistence of it:

Among sociologists and historians of the legal profession, it is a common belief that these character and fitness restrictions were aimed at keeping the American bar as Anglo-Saxon as possible. . . . It seems clear that the requirements no longer serve their original purpose. Even more striking, it seems hard to see that the requirements serve *any* straightforward purpose.

*Id.* (footnote omitted).

<sup>18</sup> In fact, in the early 1970s, the bar even achieved a roundabout victory on the communism issue. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 165–66 (1971) (allowing committees to ask questions designed to discover communism and ultimately permitting committees to deny admission to applicants who refuse to answer their questions).

<sup>19</sup> John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 922–23 (2004) (footnote omitted).

character review, “the system’s greatest significance may lie in its deterrent and legitimating dimensions.”<sup>20</sup>

## II. THE MECHANICS OF MODERN CHARACTER REVIEW

Every state requires applicants to prove good moral character before admission to the bar.<sup>21</sup> Bar committees ordinarily screen applicants for the requisite good moral character.<sup>22</sup> In practice, “good” moral character means the absence of proven “misconduct.”<sup>23</sup> Thus, according to the bar, “relevant conduct” in this inquiry is all of the following:

[U]nlawful conduct; academic misconduct; making of false statements, including omissions;<sup>[24]</sup> misconduct in employment; acts involving dishonesty, fraud, deceit or misrepresentation; abuse of legal process; neglect of financial responsibilities; neglect of professional obligations; violation of an order of a court; evidence of mental or emotional instability; evidence of drug or alcohol dependency; denial of admission to the bar in another jurisdiction on character and fitness grounds;

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<sup>20</sup> Rhode, *supra* note 8, at 502.

<sup>21</sup> See NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 6–7 chart II (2007) [hereinafter NCBE GUIDE]; see also *id.* at vii (“A bar examiner should exhibit courage, judgment and moral stamina in refusing to recommend applicants . . . who lack moral character and fitness.”).

<sup>22</sup> Applicants bear the burden of showing good moral character, and they can be denied admission for failing to provide relevant (and even irrelevant) information to the committees. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.1(b) (2003) (requiring applicants to answer committee questions).

<sup>23</sup> Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 199 (1995) (“An Alabama court circularly defined ‘good moral character’ to practice law ‘as an absence of proven conduct or acts which have been historically considered manifestations of moral turpitude.’” (quoting *Reese v. Bd. of Comm’rs*, 379 So. 2d 564, 569 (Ala. 1980))); see, e.g., *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957) (noting that moral character is the “absence of proven conduct or acts which have been historically considered as manifestations of ‘moral turpitude’”).

<sup>24</sup> In order to “maintain[] the integrity of the profession,” the Model Rules of Professional Conduct echo this duty:

An applicant for admission to the bar . . . shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority . . . .  
MODEL RULES OF PROF’L CONDUCT R. 8.1 (2002).

disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.<sup>25</sup>

The ultimate question is “whether the *present* character and fitness of an applicant qualifies the applicant for admission,” even though the inquiry almost exclusively looks at past acts.<sup>26</sup> Every state bar application thus asks questions designed (sometimes crudely) to elicit this wealth of past “relevant conduct.”

To elicit past criminal records, in particular, both bar and law school applications make broad inquiries into applicants' past criminal conduct. A typical question asks, “Have you ever been arrested, cited for, or charged with a crime or a delinquent act?”<sup>27</sup> Law school applications ask similar questions. One law professor has suggested that the use and breadth of schools' questions have increased within the last decade or two.<sup>28</sup> In a 2003 survey, all of the top twenty law schools “ask[ed] [for] information about an applicant's conduct relating to the criminal laws.”<sup>29</sup> Fifteen of these schools, however, asked only about convictions, not arrests or charges.<sup>30</sup> Almost all of the Texas schools, in comparison, asked about arrests.<sup>31</sup>

In theory, however, applicants' criminal records—including felony convictions—do not preclude bar admission in nearly all of the states.<sup>32</sup> Only three states—Indiana, Missouri, and perhaps

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<sup>25</sup> NCBE GUIDE, *supra* note 21, ¶ 13, at viii; *see, e.g.*, ARIZ. SUP. CT. R. 36(b)(3).

<sup>26</sup> NCBE GUIDE, *supra* note 21, ¶ 15, at viii (emphasis added).

<sup>27</sup> DANIEL R. COQUILLETTE, REAL ETHICS FOR REAL LAWYERS 647 (2005) (excerpt from an Iowa bar application); *see also id.* at 654 (“Have you ever been charged with or been the subject of any investigation for a felony or misdemeanor other than a minor traffic charge?” (excerpt from a Massachusetts bar application)).

<sup>28</sup> Dzienkowski, *supra* note 19, at 923–24 (noting that the University of Texas added a criminal record question after 1988, and “suspect[ing] that during the last fifteen years, educational institutions have added questions to their applications with an idea to warn students about the bar process and to exclude applicants with serious character issues”).

<sup>29</sup> *Id.* at 927.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* The disparity could be explained partially by the subtle insecurity complex that many of the lower-ranked schools seem to exhibit. Given this (unproven) preoccupation with professional reputation and standing, then, they may be more likely to screen applicants who might bring negative publicity to their institution. *See infra* Parts V.A.1, V.A.4.

<sup>32</sup> *See Carr, supra* note 2, at 368–69 (citing NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (1994)). Some states have “five-year” rules—meaning that bar applicants cannot be admitted for a set

Oregon—apparently do not permit certain convicted felons to practice law, ever.<sup>33</sup> The rest of the states use a presumptive disqualification approach.<sup>34</sup> This approach requires that problem applicants prove that they are fully rehabilitated and possess present good moral character.<sup>35</sup> “For bar fitness purposes, rehabilitation is the reestablishment of the reputation of a person by his or her restoration to a useful and constructive place in society.”<sup>36</sup> In making these determinations, committees ostensibly balance all of the following factors:

[T]he applicant’s age at the time of the conduct; the recency of the conduct; the reliability of the information concerning the conduct; the seriousness of the conduct; the cumulative effect of conduct or information; the evidence of rehabilitation; the applicant’s positive social contributions since the conduct; the applicant’s candor in the admissions process; [and] the materiality of any omissions or misrepresentations.<sup>37</sup>

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number of years, usually five, following a felony conviction. *See infra* Conclusion.

<sup>33</sup> *See* NCBE GUIDE, *supra* note 21, at 6–7 chart II. Oregon apparently uses a problematically selective bar to felons. *See generally In re Beers*, 118 P.3d 784 (Or. 2005) (per curiam) (waiving court rule barring admission to applicants who have been convicted of a felony of moral turpitude, and admitting applicant who had been convicted thirteen years earlier of felony conspiracy to distribute cocaine and various misdemeanors, while minimally noting applicant’s lack of candor).

<sup>34</sup> Carr, *supra* note 2, at 383–84 (“The current majority approach of presumptive disqualification attempts to strike a balance among several competing concerns: protecting the public, safeguarding the image of the legal profession, and allowing a fully rehabilitated individual the opportunity to serve the community in the capacity of his or her choice.”).

<sup>35</sup> *See id.* at 384. Some courts employ a “two-step inquiry”:

We first consider whether the applicant has satisfied the burden of proving complete rehabilitation from the character deficits that led to the commission of the crime. If not, our inquiry ends and we will deny the application. If the applicant proves complete rehabilitation, we then decide whether the applicant has otherwise demonstrated present good moral character.

*In re King*, 136 P.3d 878, 882 (Ariz. 2006) (denying admission to applicant who had committed attempted murder using a firearm almost twenty years earlier).

<sup>36</sup> Carr, *supra* note 2, at 386 (quoting *In re Cason*, 294 S.E.2d 520, 522–23 (Ga. 1982) (internal quotation marks omitted)); *see also id.* (noting that examiners “assess whether the problems of the past continue and, if they do not, whether the applicant’s life has changed in ways that suggest the problems are unlikely to recur” (internal quotation marks omitted)).

<sup>37</sup> NCBE GUIDE, *supra* note 21, ¶ 15, at viii; *see, e.g.*, ARIZ. SUP. CT. R. 36(b)(4); MONT. R.P. COMM. ON CHAR. & FIT. § 4(c).

In effect, the difficulty of establishing rehabilitation and therefore good moral character “is determined by the gravity of the past criminal conduct.”<sup>38</sup>

As courts have admitted frankly, “[i]n the case of extremely damning past misconduct, . . . a showing of rehabilitation may be virtually impossible to make.”<sup>39</sup>

### III. THE PUZZLING RISE OF MODERN CHARACTER REVIEW

This part documents the troubling rise in character screening for past criminal conduct. It reveals an increase of puzzling proportions over the last quarter century. Before we turn to the numbers, however, the following section briefly describes the general methodology for compiling and coding the cases and offers some cautionary remarks concerning the data.

#### A. *Methodology and Disclaimers*

This research builds on Professor Rhode's seminal work in this area.<sup>40</sup> In doing so, it briefly compares her half-century's worth of data to this Article's (nearly) quarter-century's worth. George Blum's annotation greatly assisted my research.<sup>41</sup> Those citations were then supplemented through searches on Westlaw's electronic database. It still should be noted that it is quite possible that a few opinions were not found. If that in fact is the case, it fortunately does not affect my conclusions; indeed, more cases would corroborate them further.<sup>42</sup> With respect to the

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<sup>38</sup> *In re King*, 136 P.3d at 882.

<sup>39</sup> *Id.* (quoting *In re Mathews*, 462 A.2d 165, 176 (N.J. 1983) (internal quotation marks omitted)); *In re T.J.S.*, 692 A.2d 498, 502 (N.H. 1997) (quoting *In re Mathews*, 462 A.2d at 176); see also *In re Dortch*, 486 S.E.2d 311, 320 (W. Va. 1997) (“[W]e agree with the majority of states that an applicant who has previously been convicted of a felony or other serious crime carries a heavy burden of persuading this Court that he presently possesses good moral character sufficient to be invited into the legal community of this State.”).

<sup>40</sup> See generally Rhode, *supra* note 8.

<sup>41</sup> See generally George L. Blum, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 3 A.L.R.6TH 49 (2005).

<sup>42</sup> See *infra* Parts IV–V. In short, even if there were more (discernible) character opinions, and even if in those opinions state supreme courts admitted the applicants, it still would mean that committees are denying higher numbers of applicants. See also *infra* note 43 and accompanying text (explaining the skewed reporting of admissions and denials).

cases in general, however, there are several reasons to use these numbers cautiously: “First, unless bar admission authorities seek to block an applicant’s admission on moral character grounds, the result of the moral character assessment is generally not reported. . . . Second, courts are often cursory in describing the underlying facts and in offering the rationales for their decisions in moral character cases.”<sup>43</sup> Indeed, many published decisions provide little-to-no facts or law.<sup>44</sup>

Furthermore, for comparison purposes, there are also internal reasons to view these numbers with caution. The first fifty years’ worth of comparison derives exclusively from another author’s published work. Among other difficulties, our collection and categorization may not match perfectly.<sup>45</sup> As we will see, the resonating points do not hinge on such potentialities, but they should be kept in mind.

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<sup>43</sup> Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 69–70 (1984).

<sup>44</sup> See, e.g., *In re Sanderson*, 875 A.2d 702, 702–03 (Md. 2005) (ordering admission without listing underlying facts); see also *In re Brown*, 895 A.2d 1050, 1062–63 (Md. 2006) (Bell, C.J., dissenting) (implying that many, if not most, of the sixty-five Maryland character cases in the last thirty years were disposed of by a brief order).

<sup>45</sup> I have tried to alleviate this problem by conforming my own results to Professor Rhode’s presentation and categorization.

*B. Results*TABLE ONE: PUBLISHED OPINIONS INVOLVING CRIMINAL RECORD CHARACTER REVIEW, 1931 TO 1971<sup>46</sup>

	Admitted	Denied	Remanded	Total Cases
Criminal Record*	3	7	0	10
Felonies	1	2	0	3
Non-Felonies	2	4	0	6
Unspecified	0	1	0	1
Additional Factors**	0	4	0	4

\* Criminal record, for present purposes, includes arrests, charges, and indictments, regardless of ultimate convictions.<sup>47</sup>

\*\* Additional factors are any instances of non-criminal misconduct, the most frequent of which is alleged lack of candor during the screening process.

<sup>46</sup> As indicated above, tables one and two use Professor Rhode's data; the format for all three tables was adapted from her Tables 5 and 6. *See* Rhode, *supra* note 8, at 537 tbls.5 & 6.

<sup>47</sup> It is not entirely clear, however, that Professor Rhode's study uses the same definition as is being used in the present study. *See infra* Table Three; *see also* Blum, *supra* note 41, at 49 n.2 (using the same definition). This definition, of course, excludes conduct that may be criminal in nature but is not accompanied at least by an arrest. *See, e.g., In re Mustafa*, 631 A.2d 45, 46-48 (D.C. 1993) (denying admission to applicant who converted funds in his law school's moot court account approximately three years earlier; noting that, although applicant admitted to the wrongdoing, he had not been arrested).

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TABLE TWO: PUBLISHED OPINIONS INVOLVING CRIMINAL RECORD CHARACTER REVIEW, 1972 TO 1982<sup>48</sup>

	Admitted	Denied	Remanded	Total Cases
Criminal Record*	13	12	2	27
Felonies	3	1	2	6
Non-Felonies	3	3	0	6
Unspecified	7	8	0	15
Additional Factors**	6	8	1	15

\* Criminal record, for present purposes, includes arrests, charges, and indictments, regardless of ultimate convictions.

\*\* Additional factors are any instances of non-criminal misconduct, the most frequent of which is alleged lack of candor during the screening process.

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<sup>48</sup> See *supra* note 46.

TABLE THREE: PUBLISHED OPINIONS INVOLVING CRIMINAL RECORD  
CHARACTER REVIEW, 1983 TO 2006<sup>49</sup>

	Admitted	Denied	Remanded	Total Cases
Criminal Record*	25	60	3	88
Felonies	8	26	1	35
Misdemeanors	2	7	0	9
Unspecified	15	27	2	44
Additional Factors**	7	45	0	52

\* Criminal record, for present purposes, includes arrests, charges, and indictments, regardless of ultimate convictions.

\*\* Additional factors are any instances of non-criminal misconduct, the most frequent of which is alleged lack of candor during the screening process.

<sup>49</sup> These numbers do not include cases in which the underlying criminal conduct was not at issue. Such cases could include, for example, a remand to rule on the issue for the first time, or the violation of a local rule that required any applicant who had been admitted in another state to be in good standing in that state at the time of application. *E.g.*, *In re Adornato*, 301 F. Supp. 2d 416, 418 (D.V.I. 2004) (denying admission to applicant who had been admitted in another state, but then was disbarred in that state); *Ex parte Wilkerson*, 758 So. 2d 544, 548-49 (Ala. 1999) (ordering Alabama State Bar to rule for the first time). It is unclear whether Professor Rhode's numbers include such cases.

Three other clarifications should be made. First, as in Professor Rhode's study, remands with instructions to admit are coded as admitted. Second, cases are not double-counted within the same jurisdiction. If (as happens often) the applicant reappears after a denial of admission, only the most recent published decision—whether that disposition is to admit, deny, or remand—is counted. Finally, suspended or disbarred attorneys' recertification determinations are not counted.

*C. Potential Reasons for the Rise*

There are numerous potential explanations for the marked increase in character review over the last quarter century.<sup>50</sup> Such explanations might include rises in the following: (1) the general population; (2) “flexible” admission standards that may give “problem” applicants more hope, causing them to apply more frequently than in the past;<sup>51</sup> (3) crime rates;<sup>52</sup> (4) the bar’s protectionism and sensitivity to professional reputation;<sup>53</sup> (5) reported cases generally; and (6) the use or thoroughness of background checks. Indeed, even the Watergate scandal may have had an effect on the sharp rise since the 1970s—by the expansive push for more ethical regulation in its aftermath.<sup>54</sup>

The most obvious contributing factor to the increase, however, is the significant rise in lawyers and bar applicants. In 1985, for example, there were 655,191 lawyers, with a population to lawyer ratio of 360:1.<sup>55</sup> By 2000, there were 1,066,328 lawyers, with a population to lawyer ratio of 264:1.<sup>56</sup> Similar growth rates occurred over a significant portion of Professor Rhode’s study as well.<sup>57</sup>

The point, however, is not to control for variables, crunch the numbers, and determine error rates; the point is much less complex: The problem has gotten worse, not better. The numbers show that in the first half-century’s worth of data (1931 through 1982), there were a *total of thirty-seven reported cases* involving criminal record character review. My study shows *eighty-eight cases* in the last twenty-four years, which is more

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<sup>50</sup> See *supra* Table Three. I again thank Rick Fraser, J.D./M.B.A. Candidate, University of Chicago, for his helpful data analysis.

<sup>51</sup> See, e.g., Carr, *supra* note 2, at 368 (discussing an apparent shift to “flexible” character review standards).

<sup>52</sup> Cf. Dzienkowski, *supra* 19, at 940 (estimating that a recent rise in criminal record disclosure on law school applications “is due in part to raising the age for consumption of alcohol and the recent increase in the war on drugs”).

<sup>53</sup> See *infra* Parts IV–V.

<sup>54</sup> See, e.g., STEVENS, *supra* note 12, at 237 (“Indeed, after Watergate, legal ethics became almost an industry in itself.”).

<sup>55</sup> Clara N. Carson & Barbara A. Curran, Am. Bar Found., *Growth and Gender Diversity: A Statistical Profile of the Legal Profession in 2000*, RESEARCHING LAW, Winter 2005, at 1 tbl.1.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* (noting, for example, that numbers roughly doubled between 1960 and 1985).

than twice the amount in less than half the time.<sup>58</sup> The data also show a huge time lapse between the date of applicants' criminal conduct and the date of application and a two-to-one ratio of denials to admissions, which are discussed below.

#### IV. ILLUSTRATIONS OF MODERN CHARACTER REVIEW IN THEORY AND APPLICATION

The following Charts illustrate that modern character screening is both unrealistic and perverse. As currently applied, two related factors—the seriousness of the past criminal activity and rehabilitation—lead to these bizarre results: “[I]n the case of extremely damning past misconduct, . . . a showing of rehabilitation may be virtually impossible to make.”<sup>59</sup> In other words, the “weight of the added burden of demonstrating complete rehabilitation is determined by the gravity of the past criminal conduct.”<sup>60</sup>

Thus, the worse the past crime, the higher the requisite showing of present good moral character. This novel requirement—one that is unprecedented in moral philosophy—is unrealistic because few, if any, human beings can meet the high character threshold actually applied.<sup>61</sup> Furthermore, it is perverse because the few that actually do meet the threshold—or at least come closer than admitted attorneys—nevertheless are denied admission. It is unfortunate indeed that such exceptionally virtuous applicants are not allowed to practice law.<sup>62</sup> Finally, their exclusion may deprive the profession of a

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<sup>58</sup> For a listing of the criminal conduct involved, the time elapsed since the date of applicants' convictions, and the additional factors cited, see Appendices One through Three below.

<sup>59</sup> See cases cited *supra* note 39.

<sup>60</sup> *In re King*, 136 P.3d 878, 882 (Ariz. 2006).

<sup>61</sup> In fact, the bar treats many of these applicants unfairly by nitpicking at any misstep in their post-criminal behavior. The most common, and often technical, misstep is alleged lack of candor on the applicants' law school application or during the screening process concerning the underlying criminal misconduct. See, e.g., *In re Wright*, 690 P.2d 1134, 1135 (Wash. 1984) (en banc) (denying admission to applicant and noting that “[i]n his application . . . Wright represented that he was charged with possession of .25 gram[s] of heroin [when i]n fact he pleaded guilty to possession of .65 gram[s]” (emphasis added)); *infra* Part IV.C.

<sup>62</sup> See, e.g., *infra* Part IV.B.3, Chart Three, and Part IV.C; see also Carr, *supra* note 2, at 370 (noting that, as a result of the exclusionary practices generally, “the community may be denied the service of an active and dedicated individual who, quite possibly, has learned from past mistakes and who may now be more committed than many to ensuring that justice is served”).

uniquely beneficial perspective—one that offers, among other traits, an insider’s understanding of the criminal justice system and the client’s point of view.

A. *Methodology*

The methodology is rather uncomplicated, and it at first mimics the current character inquiry.<sup>63</sup> The dots or arrows represent morally relevant events. I use the word “event” in the hope of not offending moral philosophers, many of whom prefer not to base normative theory in discrete actions. An event, then, could represent evidence of a particular virtue or vice, among other moral concepts. The inquiry focuses on all events before time *T*, which is the date of application. I chose to end the illustrations just before screening because, as we will see, courts often misconstrue events during screening, and these subsequent events are frequently unrelated to applicants’ underlying criminal record. The Charts also reflect a somewhat Aristotelian ascension of character over an applicant’s lifespan.<sup>64</sup>

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<sup>63</sup> See, e.g., Banks McDowell, *The Usefulness of “Good Moral Character,”* 33 WASHBURN L.J. 323, 326 (1994).

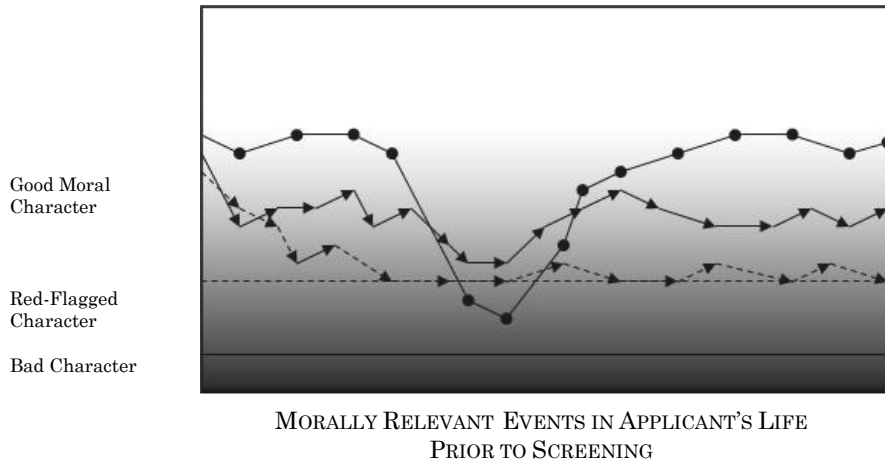
Many, if not most, people are usually of good moral character, but not always . . . They range along a continuum, usually acting above minimum standards, but at times falling below. Those who assess moral character are asked to make a global judgment, applying a complex set of criteria to reach a black and white, either-or decision.

*Id.*

<sup>64</sup> I balked at placing babies and young children in a low moral dimension, however, for hopefully obvious reasons. The long ascension after “bad” character events represents not only the necessary improvement in moral character, but also the necessary temporal distance from the negative event. Both factors—rehabilitation and length of time since misconduct—play a key role in assessing character. See, e.g., NCBE GUIDE, *supra* note 21, ¶ 15, at viii (listing factors); *supra* Part II.

B. Character Review in Application and Theory

CHART ONE: APPLICANTS POSSESSING "GOOD" MORAL CHARACTER UNDER THE CURRENT APPROACH



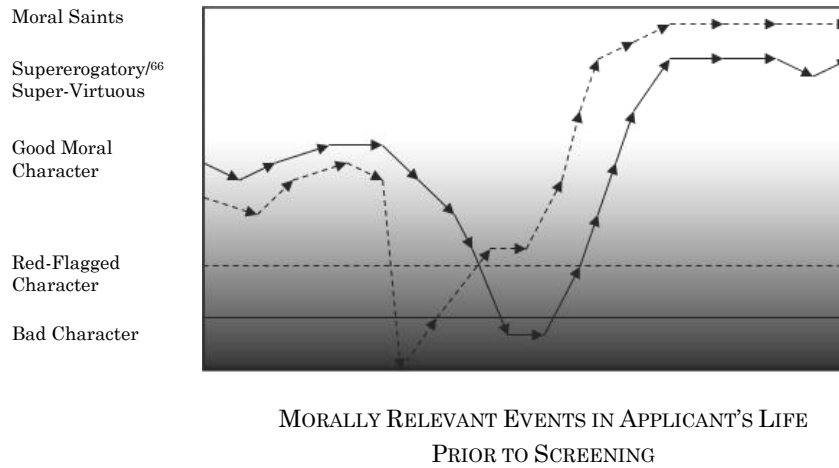
- Applicant One: Questionable but Good Moral Character
- ▶ Applicant Two: Good Moral Character
- - - -▶ Applicant Three: Good Moral Character (The "Holmesian Bad Man")

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*THE TROUBLING RISE*

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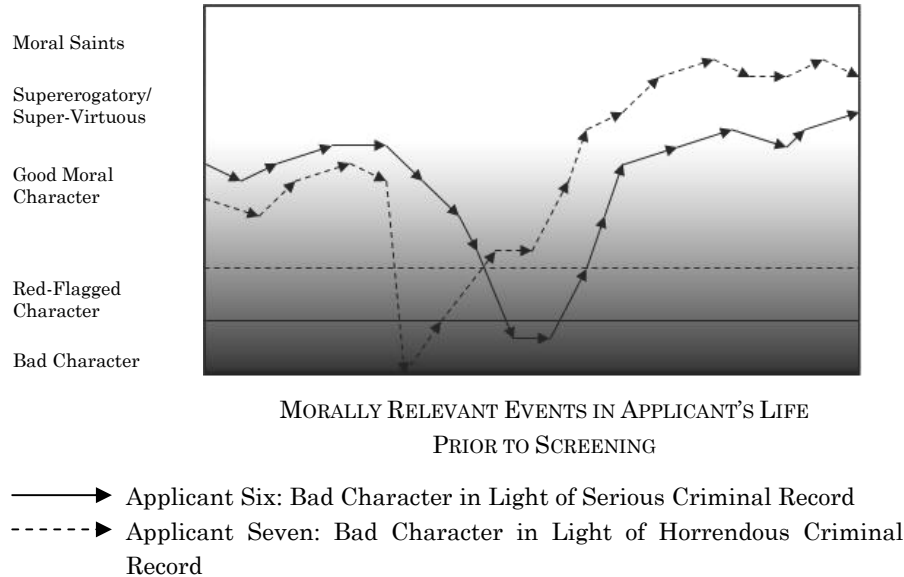
CHART TWO: APPLICANTS POSSESSING BAD BUT  
 “REHABILITATED” MORAL CHARACTER (IN THEORY) UNDER THE CURRENT  
 APPROACH<sup>65</sup>



<sup>65</sup> This Chart is marked “in theory” because most, if not all, human behavior falls short.

<sup>66</sup> Supererogatory acts are those above and beyond the call of moral duty. See, e.g., DAVID HEYD, SUPEREROGATION: ITS STATUS IN ETHICAL THEORY 1 (1982).

CHART THREE: APPLICANTS POSSESSING "BAD" MORAL CHARACTER  
UNDER THE CURRENT APPROACH



### C. Preliminary Conclusions

The point of the preceding illustrations is not only to criticize enforcement, because such a limited criticism would be incomplete. An objector could concede that enforcement is failing while legitimately maintaining that the applicants in Chart Three should be denied admission. The solution would not be to "open the floodgates," but to extend enforcement to those who admittedly are falling below the screening radar (such as Applicants Two and Three in Chart One). The criticism, however, properly goes beyond inadequate enforcement.

The more important problem is that these applicants clearly should have been admitted.<sup>67</sup> *In re King* is the prototypical example of the problem.<sup>68</sup> First, the applicant presented

<sup>67</sup> Indeed, they arguably are more deserving of admission than the applicants passing the standard screening. *See supra* Chart One (listing, among other admitted applicants, the "Holmesian bad man," who had never engaged in a morally good act in his life). In Chart Three, for example, Applicants Six and Seven would not be admitted even though they have better moral character than Applicants One through Three in Chart One, who would be admitted.

<sup>68</sup> 136 P.3d 878, 886 (Ariz. 2006) (denying admission to an applicant who had

countless and consistent letters, witnesses, and affidavits attesting to his present good moral character. Second, and even more remarkably, he had been admitted and practiced law “in good standing with the Texas Bar [since 1994] and ha[d] never been the subject of a disciplinary grievance or sanction.”<sup>69</sup>

The court nevertheless refused to admit the applicant, stressing that in light of his “extremely damning past misconduct . . . a showing of rehabilitation may be virtually impossible to make.”<sup>70</sup> In convincing itself that the applicant had failed to make this “virtually impossible” showing, the court proceeded to engage in a hyper-technical inquisition of the applicant’s behavior. Unsurprisingly, it managed to convince itself that this “impossible” showing had not been met relying on inconsistencies in the applicant’s recounting of the offense (notwithstanding the fact that the applicant did not remember the events at issue because he undisputedly had been intoxicated—to the point of having to be virtually carried by officers at the time of the crime). The court also claimed that the applicant had not received enough alcohol counseling in the twenty-eight years since the crime.<sup>71</sup>

Unfortunately, this hyper-technical fetish for trivialities in applicants’ lives is not confined to one case. The cases are replete with instances of exaggerated inconsistencies and harsh condemnations of morally ambiguous events.<sup>72</sup> Appendix I lists

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committed attempted murder using a firearm twenty-eight years earlier).

<sup>69</sup> *Id.* at 887 (Hurwitz, J., dissenting).

<sup>70</sup> *Id.* at 882 (majority opinion) (quoting *In re Mathews*, 462 A.2d 165, 176 (N.J. 1983)); *see also id.* (“The weight of the added burden of demonstrating complete rehabilitation is determined by the gravity of the past criminal conduct.”); *In re Gossage*, 5 P.3d 186, 203 (Cal. 2000) (denying admission to applicant who had committed voluntary manslaughter and noting that he failed to sustain the “heavy burden of proving his own rehabilitation”); *In re Dortch*, 486 S.E.2d 311, 320 (W. Va. 1997) (“[W]e agree with the majority of states that an applicant who has previously been convicted of a felony or other serious crime carries a heavy burden of persuading this Court that he presently possesses good moral character sufficient to be invited into the legal community of this State.”).

<sup>71</sup> *See In re King*, 136 P.3d at 886.

<sup>72</sup> *See, e.g., In re Hamm*, 123 P.3d 652, 662 (Ariz. 2005); *see also id.* at 658 (“Indeed, we are aware of no instance in which a person convicted of first-degree murder has been admitted to the practice of law.”); *In re T.J.S.*, 692 A.2d 498, 502 (N.H. 1997) (denying applicant in part because his description of his eleven-year-old convictions was “too articulate, glib and adept at explaining away his past behavior”); *In re Wright*, 690 P.2d 1134, 1135, 1137 (Wash. 1984) (en banc) (denying admission to applicant who was convicted of second-degree murder and possession of heroine approximately ten years earlier and citing a lack of remorse and alleged

sixty denials of admission in the last twenty-four years; a denounced technicality or moral ambiguity can be found in nearly every one of them.<sup>73</sup> This intellectual dishonesty is unbecoming of the bar.<sup>74</sup> It is quite obvious that even an applicant who had managed to achieve mythical perfection would have been denied admission.<sup>75</sup>

Moreover, requiring moral sainthood is not necessarily desirable. A prominent philosopher has argued, for example, that people generally neither want their friends to be, nor their children to become, moral saints.<sup>76</sup> Furthermore, it is unclear whether a true moral saint would choose to become a lawyer; presumably, she would do so only if taking the time to become a lawyer would result in the optimum amount of good to others—and that is not a likely scenario. Finally, one might well wonder whether a moral saint would make a good lawyer.<sup>77</sup>

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unauthorized practice of law). In *In re Hamm*, the court cited, among other questionable factors, an alleged instance of plagiarism of a Supreme Court case in the applicant's brief to the court. A review of the opinion and the source of the alleged plagiarism—in addition to the standard legal practice of liberally borrowing from language in cases—leaves one wholly unconvinced that the applicant plagiarized. See *In re Hamm*, 123 P.3d at 661.

<sup>73</sup> It is true, however, that many of these cases contain misconduct that is not trivial or ambiguous. Even in those cases, however, important factors—like successful rehabilitation and community service—are ignored or discounted.

<sup>74</sup> Cf., e.g., *Iao v. Gonzales*, 400 F.3d 530 (7th Cir. 2005) (criticizing the Board of Immigration Appeals and an immigration judge for intellectual dishonesty and arbitrariness in making credibility determinations and denying asylum applications); *infra* Part V. Because of the obvious interrelation in these matters, my use of the term “bar” includes the “bench” as well.

<sup>75</sup> See *In re Dortch*, 486 S.E.2d at 321 (“Though Mr. Dortch may have demonstrated that he has been rehabilitated, we believe the horrendous crime of which he was the prime conspirator outweighs his present good deeds. Indeed, the magnitude of his crimes constitutes an ‘indelibly negative mark’ on this applicant’s record.” (quoting *In re Avcollie*, 637 A.2d 409, 412 (Conn. Super. Ct. 1993))); *infra* Part V; see also *In re Hamm*, 123 P.3d at 658 (“Indeed, we are aware of no instance in which a person convicted of first-degree murder has been admitted to the practice of law.”).

<sup>76</sup> See Susan Wolf, *Moral Saints*, 79 J. PHIL. 419, 431–34 (1982) (arguing that moral saints, among other problematic traits, would be single-minded and uninteresting). She also notes that it is unclear “whether there are any moral saints.” *Id.* at 419. Mahatma Gandhi and Mother Teresa are perhaps the only popular images, and few choose to follow their example.

<sup>77</sup> The question is more provocative than meritorious: As noted above, for one, an applicant who has overcome a criminal past might bring uniquely good qualities to the practice.

With these perverse features of character review in mind, the following section discusses the strength of its underlying justifications.

## V. THE MERIT OF MODERN CHARACTER REVIEW

This part addresses many, if not most, of the arguments for character screening. Overwhelmingly, it concludes that character screening is meritless. Its one meritorious feature is discussed last, because it points us in the right direction for the future of character screening in the Conclusion.

### A. *Problems and False Justifications*

#### 1. Self-Image: A Shallow Justification

*[A] consideration should be the reputation of the bar. If the crime is truly shocking, a court should deny admission—even if it concludes that the applicant has completely turned around—out of a decent respect for public opinion. The mass murderer Ted Bundy was once a law student. If he had won release from prison instead of being executed, are there any circumstances under which he might have been admitted to the bar? I hope not.*<sup>78</sup>

Undisputedly, character review is supposed to be concerned solely with *present* good moral character.<sup>79</sup> A review of the cases denying admission makes this claim untenable in reality.<sup>80</sup> The median number of years since denied applicants' last offense is *nine years*, with the mean over ten years.<sup>81</sup> The median number of years since admitted applicants' last offense is also nine years, with the mean over nine years.<sup>82</sup> This fact, in and of itself,

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<sup>78</sup> Stephen Gillers, *The Prudent Jurist*, LEGAL AFF., May/June 2004, [http://www.legalaffairs.org/issues/May-June-2004/pj\\_mayjun04.msp](http://www.legalaffairs.org/issues/May-June-2004/pj_mayjun04.msp). The mass-murderer hypothetical is a common argument for screening.

<sup>79</sup> See *supra* Part II.

<sup>80</sup> See *infra* Appendix I (listing circumstances of the sixty published denials of admission over the last quarter century).

<sup>81</sup> The average is 10.27 years (N = 56). See *infra* Appendix I. Four cases did not list the years elapsed since date of conviction or (if no conviction) date of offense. See *infra* Appendix I. In general, the overall time in years would be slightly *higher*, because applicants usually are not convicted until months or years after the date of their offense.

<sup>82</sup> The average is 9.5 (N = 24). See *infra* Appendix II. One case did not list the years elapsed since date of conviction or date of offense. See *infra* Appendix II.

suggests perversity.<sup>83</sup> A crucial factor in assessing rehabilitation and good moral character is the amount of time since the criminal conduct.<sup>84</sup> We should expect, then, that admitted applicants would have longer periods without event.

Yet, the years elapsed are virtually identical.<sup>85</sup> Clearly, another factor—the seriousness and nature of the offense—is doing the lion's share of the work. That is because the worse the crime, the more likely it offends the bar's reputation and self-image.<sup>86</sup> Furthermore, this fact partially suggests an explanation for the bar's pitiful forgiveness rate (i.e., that applicants are more than twice as likely to be denied admission in a published opinion). As Table Three shows, applicants over the last quarter century have been denied sixty times, while being admitted only twenty-five times.<sup>87</sup> Published opinions—*public* opinions—are not where applicants want to be. It is reasonable to suspect that the bar routinely admits “problem” applicants under the radar.<sup>88</sup> The problem applicants who are

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<sup>83</sup> See, e.g., *In re Haukebo*, 352 N.W.2d 752, 754 (Minn. 1984) (“[B]ecause the evaluation is to be made of the applicant's present moral character, any pattern of immoral behavior must be sufficiently continuous or current to permit a reasonable inference that similar conduct can currently occur or may likely occur in the future.” (citing *In re Dileo*, 307 So. 2d 362 (La. 1975))).

<sup>84</sup> See *supra* Part II and note 83. This factor is in addition to applicant's age at the time of the conduct.

<sup>85</sup> Actually, the number in years is *higher* for denials, but the numbers are so close, and given the variation in sample sizes, there is no statistical difference between admissions and denials. The median for all of the cases, including the three remands, is nine as well, and the average is 9.90 (N = 82). The standard deviation for the Deny group is 6.72 years. For the Admit group, it is 4.61 years. A two-sample *t*-test shows a *t*-statistic of 0.58 and a corresponding *p*-value of 0.57. In other words, we cannot reject the null hypothesis that the two means are equal at the 0.05 level.

<sup>86</sup> See Rhode, *supra* note 8, at 512.

To prevent or deter individuals from entering a profession in order to promote the reputation, autonomy, or monopoly of existing members is troubling on constitutional as well as public policy grounds. Taken to its logical extreme, this rationale would support exclusion of any applicant whose conduct the local bar deemed unbecoming or likely to taint its public image. Particularly in a profession charged with safeguarding the rights of the unpopular, the price of such unbounded licensing discretion could be substantial.

*Id.*

<sup>87</sup> See *supra* Part III.B.3.

<sup>88</sup> This assumption is consistent with our experiences in Arizona, as well as the judicially noticeable facts that such large numbers of Americans have been arrested for or convicted of at least one crime (e.g., DUI/DWI or drug offenses) and all Americans arguably have committed at least some moral misconduct, yet the total number of moral character opinions is relatively low (involving significantly less

not admitted this way, however, have to resort to appeal to the state supreme court. There, the applicants risk a disposition in a published opinion. When that occurs, it is little wonder that the denial rate is so high: The bar is making an official, public statement concerning its integrity and priesthood.<sup>89</sup>

Thus, what the bar is really concerned with is “reputable character,” not “good moral character.”<sup>90</sup> Reputable character—the reputation of one’s character in the relevant community—obviously is not equivalent to good moral character: “A person may have a good character but suffer from a bad reputation.”<sup>91</sup> Indeed, “a person may have a *bad character* but enjoy a good reputation.”<sup>92</sup> The three charts above testify to these facts.<sup>93</sup> It therefore is difficult—nearly impossible actually—to fathom how the bar’s inquiry bears a rational relationship to the fitness to practice law.<sup>94</sup>

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than five percent of all applicants). Nevertheless, it should be disclaimed that no satisfactory study documents the number of “problem” applicants (assuming a satisfactory definition of “problem”) who have been admitted without published opinions.

<sup>89</sup> See Rhode, *supra* note 8, at 510 (“Bar rhetoric traditionally has cast lawyers as ‘sentinels’ and ‘high priests’ at the portals of justice. That self-portrait demands at least the pretense of purity.”).

<sup>90</sup> May, *supra* note 23, at 200–01; see, e.g., Fla. Bd. of Bar Exam’rs *re* M.L.B., 766 So. 2d 994 (Fla. 2000) (examining applicant’s public reputation to determine whether he had rehabilitated himself following his criminal conduct); *In re* Cason, 294 S.E.2d 520, 522 (Ga. 1982) (“For bar fitness purposes, rehabilitation is the reestablishment of the reputation of a person by his or her restoration to a useful and constructive place in society.”); Elizabeth Gepford McCulley, Note, *School of Sharks? Bar Fitness Requirements of Good Moral Character and the Role of Law Schools*, 14 GEO. J. LEGAL ETHICS 839, 865 (2001) (proposing several forms of character review in order to increase “the public’s image of lawyers”).

<sup>91</sup> May, *supra* note 23, at 200–01.

<sup>92</sup> *Id.* at 201 (emphasis added); cf. NICCOLO MACHIAVELLI, *THE PRINCE* (Daniel Donno trans., Bantam Books 2003) (1532).

<sup>93</sup> In Chart Three, for example, Applicants Six and Seven would not be admitted even though they have better moral character than Applicants One through Three in Chart One, who would be admitted.

<sup>94</sup> Unless, of course, the bar ludicrously defines fitness to practice law as fitness not to tarnish the bar’s reputation by having engaged in certain types of criminal activity many years earlier. See, e.g., McChrystal, *supra* note 43, at 88 n.91.

To permit a concern for the public image of the profession to stand as an independent basis for denying bar admission on moral character grounds substantially departs from the requirement that denial be based on conduct rationally connected with the applicant’s fitness or capacity to practice law. Adverse public reaction . . . cannot be tantamount to unfitness to practice law, if unfitness to practice law is to be defined in a principled (i.e., rational) way.

This rabbit hole is deeper still. The bar is not concerned with reputable character in any meaningful sense. As we have seen, it routinely denies applicants of present reputable character.<sup>95</sup> Such denials would be wholly arbitrary under a reputable character standard. Instead, the bar is more concerned with “reputable *relational* character”—that is, whether an applicant’s past conduct is consistent with the bar’s perceived self-image.<sup>96</sup> This outlandish definition reconciles the cases—“fitness” to practice law is fitness to cohere with the bar’s exalted self-image. This shallow vanity is unbecoming of an otherwise noble profession.<sup>97</sup>

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*Id.* The psychological effect of the bar’s regime is also questionable:

It might be argued that people who think about legal careers at some formative psychological moment abandon their hopes, perhaps even unconsciously, because they realize that lawyers have high standards of moral character but that they themselves have such moral deficiencies that an alternative career, perhaps as a drug dealer or a physician in Minnesota, [which dropped its good moral character requirement,] would be more appropriate. The argument, in other words, is that the actual operation of character and fitness standards is irrelevant—what matters is the public perception. One could image such a mental process in the dream world of the American Bar Association seventy-five years ago, but not in our culture, not in a generation of L.A. Law watchers.

Baude, *supra* note 14, at 654.

<sup>95</sup> These applicants present countless testimonials of their solid reputable character, not only in the community generally, but in the legal community as well. See *supra* Part IV.C; see also *infra* Appendix I (citing cases denying admission to applicants).

<sup>96</sup> An applicant whose misconduct is inconsistent with this pristine priesthood of justice simply does not fit. Rhode, *supra* note 8, at 510; cf. *In re Easton*, 692 P.2d 592, 596 (Or. 1984) (per curiam) (denying applicant in part because he “holds a consistently low and cynical opinion of lawyers and lawyers’ conduct”).

<sup>97</sup> Professor Patrick Baude has suggested a stinging explanation for the persistence of character screening, which he argues serves two covert goals:

On the one hand is the project of convincing potential customers that their lawyers will not cheat or otherwise harm them. This is an essential part of marketing any business: the contractor is bonded, the drug smuggler allows on-site inspection, and the lawyer can, at least implicitly, draw upon the *public* institutions regulating the bar to vouch for her integrity. . . .

The other project is the Weberian enterprise of justifying the privileges of lawyers in the political and economic sphere. . . .

The practical success of lawyers is in part dependent on preventing the public from seeing clearly the difference between the two projects. . . . The rule, the rhetoric, and the image of “character and fitness” are each a means of making these two distinct projects appear to be united. *But a large group cannot create illusions of this sort without coming to believe them. And what a group comes to believe has a way of becoming true.*

Baude, *supra* note 14, at 650 (emphasis added).

## 2. The Displaced Values of Forgiveness and Redemption

The preceding data and conclusions reveal an impoverished role for forgiveness and redemption.<sup>98</sup> “The concept that human redemption is possible and valuable is both well established in law and premised upon long-standing, even ancient traditions.”<sup>99</sup> On the surface, courts repeatedly “have stated that no offense is so grave as to preclude a showing of present moral fitness.”<sup>100</sup>

As they have (probably inadvertently) admitted, however, “an applicant’s subsequent exemplary behavior cannot lessen the enormity of an earlier offense.”<sup>101</sup> The Supreme Court of Appeals of West Virginia plainly tipped the bar’s hand in its ruling: “Though Mr. Dortch may have demonstrated that he has been rehabilitated, we believe the horrendous crime of which he was the prime conspirator outweighs his present good deeds. Indeed, the magnitude of his crimes constitutes an ‘indelibly negative mark’ on this applicant’s record.”<sup>102</sup> In fact, the bar’s record generally reveals a poor appreciation of the values of forgiveness and redemption.<sup>103</sup> Moreover, it reveals a mistaken impression of “indelibly” negative marks; vicious acts are not necessarily signs of irreversibly evil character.<sup>104</sup>

In sum, a profession that routinely denies applicants for conduct that happened, on average, over nine years earlier—and

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<sup>98</sup> Carr, *supra* note 2, at 372 (“Our legal system, with its origins in the Judeo-Christian ethos of repentance, forgiveness, and redemption, is not unforgiving. Lawyers should not be less inclined to forgiveness than the law itself, especially where rehabilitation appears to have been accomplished.”).

<sup>99</sup> *In re Prager*, 661 N.E.2d 84, 92 (Mass. 1996) (denying admission to applicant who was convicted of four drug felonies relating to his large marijuana smuggling operation approximately eight years earlier).

<sup>100</sup> *Id.* at 91.

<sup>101</sup> *In re Krule*, 741 N.E.2d 259, 265 (Ill. 2000) (denying admission to applicant who was convicted of felony theft for an insurance fraud scheme approximately thirteen years earlier, citing also a lack of candor in law school applications).

<sup>102</sup> *In re Dortch*, 486 S.E.2d 311, 321 (W. Va. 1997) (quoting *In re Avcollie*, 637 A.2d 409, 412 (Conn. Super. Ct. 1993)) (denying admission to applicant who was convicted of second-degree murder, conspiracy, and attempted armed robbery approximately twenty-three years earlier); *see also In re Hamm*, 123 P.3d 652, 658 (Ariz. 2005) (“Indeed, we are aware of no instance in which a person convicted of first-degree murder has been admitted to the practice of law.”).

<sup>103</sup> *See supra* Table Three; *infra* Appendix I.

<sup>104</sup> *See generally* PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007) (documenting the heavy impact of “situational forces” on human misbehavior).

often when applicants were fairly young—devalues forgiveness and redemption.<sup>105</sup>

### 3. Additional Condemnation: Arbitrariness, Class Oppression, and Public Perception

The inconsistent and even arbitrary application of the character standard has been well documented elsewhere.<sup>106</sup> The standards are applied differently from state to state, within states, and applicant to applicant. Furthermore, the bar has managed somehow to overlook that “empirical research establishes no correlation between ‘problem’ applications and later disciplinary proceedings.”<sup>107</sup> Although I fully agree with these criticisms, I do not wish to rehash them here; they currently are uncontested truths.

Several other negative attributes should be addressed instead. First, emphasis on criminal records disproportionately impacts certain racial groups and socioeconomic classes. To a large extent, this problematic phenomenon is undisputed and commonly known: “Empirical studies indicate that persons from lower socioeconomic areas are more likely to be arrested than persons living in higher income areas. Studies also note racial differences in arrest rates for adults as well [as] juveniles.”<sup>108</sup>

Second, these requirements—which are not limited to the legal profession—often preclude felons from meaningful work.<sup>109</sup> Effectively, they are permanent outcasts, but living and struggling among us. Moreover, one might point out argumentatively that if the bar really cared about the public, it

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<sup>105</sup> See *supra* Part V.A.1 (listing the mean and median amounts of time between conviction and date of opinion).

<sup>106</sup> See May, *supra* note 23, at 190–91, 197–200; see also Baude, *supra* note 14, at 650–51 (noting that Professor Rhode’s conclusion “that the screening process is of little or no use” has neither been seriously attacked nor refuted, and that “browsing through current publications of the National Conference of Bar Examiners will reveal that Professor Rhode’s work is generally accepted as a valuable scholarly study of the process rather than dismissed as a radical critique”); Rhode, *supra* note 8, at 529–46.

<sup>107</sup> Roots, *supra* note 1, at 35 (citing D. Larkin Chenault, *It Begins with Character . . .*, 77 MICH. B.J. 138, 139 (1998)); see also Rhode, *supra* note 8, at 555–62 (citing studies).

<sup>108</sup> Susan Saab Fortney, *Law Student Admissions and Ethics—Rethinking Character and Fitness Inquiries*, 45 S. TEX. L. REV. 983, 991 (2004) (footnotes omitted) (citing studies).

<sup>109</sup> See May, *supra* note 23, at 190–91, 193–94.

would lower its exclusionary practice in order to help lower crime: By employing felons, society reduces the criminal recidivism rate.<sup>110</sup> In sum, then, character screening causes de facto discrimination and may hurt society in other important ways as well.

Finally, there is a false justification for character screening that warrants only a cursory review and rebuttal. This argument attempts to justify the current character screening regime “by the widespread perception that a state-issued license to practice law manifests state endorsement of character, and that the licensed individual is a person of honesty and integrity.”<sup>111</sup> While the argument may be facially appealing, it is completely meritless in reality for at least three reasons: (1) the bar *itself* creates any “widespread perception” that does exist, and can disclaim it at any point, which is not likely to happen any time soon; (2) there is little to no evidence of this widespread perception in any event;<sup>112</sup> and (3) the current screening regime does not catch most of the problem applicants—indeed, as we saw above, it often excludes applicants with particularly *good* present moral character. Thus, the justification is either self-created and self-perpetuated or nonexistent; either way, it is (an attempt at) outright false advertising. And when this justification is removed, we see that the current regime is arbitrary and oppressive.

#### 4. The Misplaced Legal Education Objection

*I am troubled by a public institution that uses taxpayer dollars to educate an individual who will have significant trouble in obtaining bar membership. Also, it is easy to understand how deans of a public school will go to great lengths to avoid adverse publicity.*<sup>113</sup>

The legal education objection goes something like the following: Because the purpose of law schools is to train lawyers,

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<sup>110</sup> *Id.* at 187–88 (citing studies).

<sup>111</sup> Carr, *supra* note 2, at 372–73 & n.26 (citing, but noting that this source is more equivocal on the proposition, STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 554 (3d ed. 1992)).

<sup>112</sup> Indeed, the evidence suggests the contrary. *E.g.*, McCulley, *supra* note 90, at 839, 869 (noting the “decline in the public’s perception of the morality of lawyers”).

<sup>113</sup> See Dzienkowski, *supra* note 19, at 937 (emphasis added) (footnote omitted).

law schools should not admit applicants who cannot be admitted to the bar due to character screening concerns. The problem with this argument is that it is nearly impossible to conclude that the sole purpose of legal education is to make lawyers. Once that truth is conceded, the objection loses its force.<sup>114</sup>

Legal education does not exist merely for “Hessian” training purposes. Harvard Law School—the second oldest, longest running, and arguably the best law school in the country—corroborated this fact in one of its first recruiting efforts: “The design of this Institution is to afford a complete course of legal education for gentlemen intended for the bar in any of the United States; *and* elementary instruction for gentlemen not destined for the bar, but desirous of qualifying themselves either for public life, or for commercial business.”<sup>115</sup> Furthermore, in many other countries, law is not taught at trade schools, but as part of a liberal arts education.<sup>116</sup>

Indeed, any other concept of law effectively trivializes it. In no other academic discipline (save, but to a lesser extent, medicine) do we demand that graduates apply it in the market.<sup>117</sup> It is more than implicit in such an argument that law is meaningless without clients.<sup>118</sup> It is, however, certainly conceivable—perhaps even democratically required—that citizens *qua* citizens should want to learn the laws of the land

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<sup>114</sup> See *id.* (acknowledging that “*if* a law school education has a benefit to a student, regardless of whether or not that student joins a bar association, then the character and fitness inquiry may be less important” (emphasis added)). It is ironic that a law professor would have to ask such a question.

<sup>115</sup> CATALOGUE OF THE OFFICERS AND STUDENTS OF HARVARD UNIVERSITY FOR THE ACADEMICAL YEAR 1838–9, at 28 (Folson, Wells, & Thurston 1838). Furthermore, the first university “chair” in law was not established for today’s trade school purposes, but as part of a liberal arts education. See STEVENS, *supra* note 12, at 4–5 (discussing the first American chair in law established at the University of Virginia). Even back then, however, trade school roots were taking hold. See *id.* at 5 (discussing the university “mergers” between the “academic” and “practical” sides of legal education).

<sup>116</sup> Cf. STEVENS, *supra* note 12, at 4–5 (discussing the history of liberal legal education in America and some of its European counterparts).

<sup>117</sup> The mere thought of it must be terrifying—and perhaps even demeaning—to philosophers (among many others).

<sup>118</sup> Even conceding, *arguendo*, that law is useless without clients, the student can be her own client. See, e.g., STEVENS, *supra* note 12, at 21 (suggesting that approximately *one-half* of the impetus for the University of Georgia Law School was to provide training for “young men who intend to devote themselves to the honorable employment of cultivating the estates they inherit from their fathers,” and noting the same impetus at New York University).

and the processes by which they are adopted and enforced. Moreover, surely law has some significant academic usefulness in and of itself. Again, its use in other countries—and our own<sup>119</sup>—as a liberal arts background testifies to that fact.

The point here is not to convince the reader that law should be solely academic. It is not to win the academic answer for the age-old question, “Was the law school essentially a professional school, or was it instead an academic area of the university?”<sup>120</sup> The point is much less ambitious: There is academic value in legal education. The categorical arguments to the contrary are mistaken, or at least overstated.<sup>121</sup> Thus, the legal education objection logically does not preclude enrolling students who desire a legal education without bar membership.<sup>122</sup>

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After the preceding arguments have been rejected, and the discriminatory effect of character review flagged, the kernel of merit in the system can finally be explored.

### *B. The Limited Merit of Character Screening*

There is this much—and only this much—merit to the whole system: Once corrupt or professionally deficient actors have entered the legal profession, they often do a grave amount of harm before they are brought before the attorney disciplinary authorities.<sup>123</sup> Even then, they may not be disbarred the first

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<sup>119</sup> Yale, for instance, offered a Bachelor of Civil Laws in the late nineteenth century. STEVENS, *supra* note 12, at 39. Today, most major universities offer undergraduate legal education through pre-law, political science, and justice studies curricula. *See id.* at 233 (“The idea of teaching law in the undergraduate degree as a liberal subject—stressing its historical, philosophical, and social science aspects—[has] achieved a new respectability.”).

<sup>120</sup> *Id.* at 135; *see also* McCulley, *supra* note 90, at 855.

<sup>121</sup> *Cf.* STEVENS, *supra* note 12, at 135 (noting the belief—still held by many educators—that the “law school ha[s] a moral duty to fulfill *both* functions” (emphasis added)).

<sup>122</sup> As noted in the Conclusion below, law schools still have a duty to apprise problem applicants of the fact that they may be ineligible for bar admission because most students, of course, attend law school with the intent to become licensed attorneys.

<sup>123</sup> I thank Andrew Kaufman, Harvard Law School, for reminding me of this sad fact. *See, e.g.,* COQUILLETTE, *supra* note 27, at 613–14 (“[O]nce a morally bad lawyer has been detected and suspended, a lot of harm will have been done. In my experience, the harm to clients and others by such a lawyer cannot be made up by malpractice actions and money damages. Lives are well and truly ruined by such

time through the disciplinary process, and more damage may accrue to innocent clients until the second or third time. Thus, character screening, in theory, could help to prevent these walking travesties of justice from being admitted.<sup>124</sup>

The problem is that we do not know how to do it. This approach, for example, mandates prospective—as opposed to the customarily reactive—law-abidingness investigations. Yet, there is *no* evidence of our ability to *predict* the malpracticing attorney.<sup>125</sup> Perhaps someday we will have models to guide the delicate inquiries necessary to predict future moral judgments from past misconduct in different contexts, but today such models are noticeably absent from the legal profession.<sup>126</sup> Moreover, as the questions on bar applications demonstrate, prospective investigations are extremely destructive to applicants' privacy.<sup>127</sup> Finally, we should not forget that it is the bar that is charged with disciplining bad attorneys. It is difficult to justify instrumentally punishing applicants—who have never committed any attorney misconduct—because the bar's own

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people.”).

<sup>124</sup> We must be careful always to take the public safety rationale with a grain or two of salt. *See, e.g.,* Baude, *supra* note 14, at 648 (“What is touted as consumer protection—the admission process, restrictions on unauthorized practice, and judicial oversight—is just a cleverly disguised guild arrangement.”). Rhode states:

To prevent or deter individuals from entering a profession in order to promote the reputation, autonomy, or monopoly of existing members is troubling on constitutional as well as public policy grounds. Taken to its logical extreme, this rationale would support exclusion of any applicant whose conduct the local bar deemed unbecoming or likely to taint its public image. Particularly in a profession charged with safeguarding the rights of the unpopular, the price of such unbounded licensing discretion could be substantial.

Rhode, *supra* note 8, at 512.

<sup>125</sup> *See* Rhode, *supra* note 8, at 555–62 (citing numerous studies); *see also* Carrie Menkel-Meadow, *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*, 21 PACE L. REV. 365, 389 (2001) (arguing that the legal profession should focus on attorney discipline—not character screening—and noting that “[p]redictions in advance of how particular people will behave later [are] notoriously unreliable, particularly when experts disagree about how predictive and stable ‘character’ is, especially in an age of the ‘post-modern’ self” (footnote omitted)).

<sup>126</sup> Given the highly situational nature of moral behavior, their development will be difficult. *See* Deborah L. Rhode, *Where Is the Leadership in Moral Leadership?*, in MORAL LEADERSHIP 23–33 (Deborah L. Rhode ed., 2006).

<sup>127</sup> Rhode, *supra* note 8, at 574–75. She also raises First Amendment and due process concerns. *Id.* at 566–74.

disciplinary enforcement is not what it should be.<sup>128</sup> A fair solution seems to be more enforcement, not premature exclusion.

Therefore, Professor Rhode's recommendation over twenty years ago—namely, dismantle character screening and reallocate the saved resources to attorney disciplinary enforcement—rings as true today as it did then.<sup>129</sup>

#### CONCLUSION: PARTING ADVICE FOR PARTICIPANTS IN THE CHARACTER REVIEW PROCESS

To note that the preceding discussion has been negative would be an understatement. Its negativity in no way implies that good moral character should not be promoted; it should be. But promoted—not perverted, devalued, and misappropriated for the bar's reputation and self-image.<sup>130</sup>

To change the mood to a more positive one, the following advice is offered to the participants in the process, namely applicants, committees, courts, and law schools. Concededly, there is little to offer applicants; they should stay out of trouble—but they already have for years.<sup>131</sup> The most important advice, beyond doubt, is to disclose—in meticulous detail—everything concerning criminal records. Committees and courts routinely deny applicants in part for candor problems (whether actual or misconstrued).<sup>132</sup>

For the committees and courts, a compromise position is offered. The proposed rule should read roughly: Applicants convicted of a felony offense are ineligible to apply for admission to the bar until the later of (a) five years from the date of conviction or (b) completion of sentence, including probation or

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<sup>128</sup> See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (listing some of the flaws in the bar's self-regulated disciplinary regime).

<sup>129</sup> As noted above, the most likely reason that this approach has not been implemented is its perceived "damage to the profession's image." Carr, *supra* note 2, at 374; see also Rhode, *supra* note 8, at 585.

<sup>130</sup> Cf., e.g., McDowell, *supra* note 63, at 334 (arguing that character screening should be abandoned while maintaining that attorneys' actual good character should be promoted).

<sup>131</sup> See *supra* Part V.A.1.

<sup>132</sup> See *supra* Part II (discussing factors in bar admissions); *supra* Table Three (noting that alleged lack of candor during the screening process is an "additional factor" in criminal record character reviews); *infra* Appendix I (listing lack of candor as a factor in most denials of admission); see also MODEL RULES OF PROF'L CONDUCT R. 8.1 (2003) (requiring truthfulness of bar applicants).

parole.<sup>133</sup> Part (a) reflects a compromise by imposing a categorical (yet generally reasonable) ban on admission for five years after the applicants' date of felony conviction. It serves the bar by assuring that applicants will not bring with them negative publicity regarding recent criminal convictions;<sup>134</sup> it does not disserve applicants seriously because five years approximates the amount of time that should be needed to get their lives back in order and complete law school.

Part (b) partially adopts the current regime.<sup>135</sup> That is, most states render ineligible applicants who still are serving their sentence, including probation or parole. As a practical matter, current prisoners will not be able to apply for the bar (unless, certain exceptions aside, they had graduated from an ABA-accredited law school and taken the bar exam before being imprisoned). The temporary preclusion of probationers and parolees does come up, however, but it makes some sense.

Such applicants are subject to various restrictions on their rights and liberties.<sup>136</sup> As a result, they would not have the same range—certainly range of motion—as other attorneys.<sup>137</sup> That,

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<sup>133</sup> See, e.g., MONT. R.P. COMM. ON CHAR. AND FIT. § 4(h) (“An applicant found guilty of a felony is conclusively presumed not to have present good moral character and fitness. The presumption ceases upon completion of the sentence and/or period of probation.”). Some states effectively impose longer bans. See, e.g., MO. SUP. CT. R. 8.04(a) (barring admission to felons for five years *after* the completion of their sentence); TEX. B. ADMISSION R. IV(d)(2). In their current form, these rules are unsatisfactory because five years from the completion of sentence imposes an unreasonably long waiting requirement. By the time of completion of probation or parole, applicants have completed their time in prison (if any) and most have been living as problem-free citizens for years. Indeed, the period of probation or parole provides behavioral monitoring that non-felon applicants lack.

<sup>134</sup> It also, of course, automatically screens those applicants—and only those applicants—who cannot refrain from criminal activity over a significant period of time.

<sup>135</sup> As noted above, however, it is mitigated. See, e.g., MO. SUP. CT. R. 8.04(a) (barring admission to felons for five years *after* the completion of their sentence); TEX. B. ADMISSION R. IV(d)(2). Such rules often place an unreasonably long ban on applicants. See *supra* note 133.

<sup>136</sup> See, e.g., *In re Dortch*, 860 A.2d 346, 363 (D.C. 2004) (holding, alternatively, that applicant was not “fit” to be admitted because he was still on parole).

<sup>137</sup> *Id.* at 362.

Parolees are subject to ongoing official oversight and supervision, restrictions on their activities, and reincarceration for violating the conditions of their release. They remain subject to various civil disabilities as well. In the District of Columbia and elsewhere, for example, a person on parole for a felony offense is disqualified from serving as a juror.

*Id.*

however, could be remedied by limiting the scope of representation in writing; similar solutions are reached ethically between attorneys and prospective clients everyday. The more important problem would be the conflict of interest that would arise if probationers and parolees were to practice criminal law. It is quite reasonable to assume that such attorneys could not advocate fully against the same officials (prosecutors and probation officers), or at least the same departments, that literally control whether they return to jail or prison.<sup>138</sup> This concern, of course, is applicable only to criminal practice, and even that conflict likely could be avoided by an expansion or interpretation of Model Rule 1.7 to bar criminal practice temporarily.<sup>139</sup>

Finally, law schools should continue what they are doing—nothing (or nearly nothing).<sup>140</sup> Although most law schools ask criminal record questions on the law school application, it is the rare law school that actually screens for character.<sup>141</sup> With respect to questioning, however, law schools should ask only those questions designed to ensure institutional safety and academic integrity.<sup>142</sup> Relatedly, and obviously, they should not ask questions seeking information that they do not use.<sup>143</sup>

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<sup>138</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003) (barring representation whenever "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer"); see also *In re Culpepper*, 770 F. Supp. 366, 374 (E.D. Mich. 1991) (holding parolee ineligible for admission in part out of similar concern).

<sup>139</sup> See generally MODEL RULES OF PROF'L CONDUCT R. 1.7. Of course, the Model Rules disfavors restrictions on the right to practice in other contexts. *Id.* R. 5.6.

<sup>140</sup> Their inaction is justified:

Schools are reluctant to make a serious effort to condition entrance on character requirements for a variety of justifiable reasons: first, the difficulty of obtaining sufficient reliable evidence; second, the possibility that character might change or be improved in the course of professional education; and finally, a profession's expertise may be studied and mastered by those who have no intention of ever practicing.

McDowell, *supra* note 63, at 328.

<sup>141</sup> See, e.g., Dzienkowski, *supra* note 19, at 923, 940; McCulley, *supra* note 90, at 855.

<sup>142</sup> See Rhode, *supra* note 8, at 590 (noting that law schools' "institutional concerns dictate a certain degree of scrutiny, irrespective of what the bar formally requires").

<sup>143</sup> Dzienkowski, *supra* note 19, at 933. Furthermore, to elicit information that is used, law schools should be (more) careful not to draft ambiguous or otherwise inept questions. See *id.*

Furthermore, they should warn applicants that (1) bar committees may deny admission to applicants on the basis of their criminal record,<sup>144</sup> and (2) lack of candor on a law school application regarding criminal record is often grounds, or partial grounds, for denial of admission to the bar.<sup>145</sup> Again, to their credit, “most law schools tend to exclude consideration of character and fitness except in . . . serious cases.”<sup>146</sup> They should continue to do so and not let the bar’s poor example influence their practices. As with the profession, law school reputation in and of itself does not justify applicant screening or, even worse, denial of admission. Law schools (and the bar) can take some comfort in knowing that “[l]aw schools’ academic criteria already exclude a large percentage of serious offenders.”<sup>147</sup>

With that said, we have exhausted the discernable bases of character review. It should proceed no further than the foregoing compromises, and even the compromises should not be implemented as means of grounding and legitimating the regime, but as steps toward dismantling it. The time has come—belatedly—to forgive and forget this troubling mark on the legal profession’s good moral character.

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<sup>144</sup> See, e.g., *id.* at 936 (“Individuals with serious character issues may decide not to invest the time and money necessary to attend and complete law school.”).

<sup>145</sup> See *id.* at 952–53, 55 (drafting a sample warning). Some law school applications properly warn applicants that, “‘when in doubt’” regarding a question’s scope, “‘err on the side of full disclosure.’” *Id.* at 953 (quoting a University of Michigan Law School application).

<sup>146</sup> See *id.* at 940.

<sup>147</sup> Rhode, *supra* note 8, at 590.

APPENDIX I: APPLICANTS DENIED ADMISSION FOR BAD  
CHARACTER: 1983 TO 2006

1. *In re* G.L.S., 745 F.2d 856, 859–60 (4th Cir. 1984) (denying federal admission because applicant had been convicted of bank robbery sixteen years earlier, and also citing lack of candor relating to his time spent in prison).
2. *In re* King, 136 P.3d 878, 884, 886 (Ariz. 2006) (denying admission to applicant who was convicted of attempted murder using a firearm twenty-eight years earlier, and also citing lack of candor and remorse).
3. *In re* Hamm, 123 P.3d 652, 662 (Ariz. 2005) (denying admission to applicant who had committed first-degree murder during a drug deal thirty-one years earlier, citing also lack of candor and remorse).
4. *In re* Gossage, 5 P.3d 186, 202–03 (Cal. 2000) (denying admission to applicant who had committed the voluntary manslaughter of his sister twenty-five years earlier in addition to sixteen other convictions or unprosecuted crimes occurring as recently as eighteen years earlier, and also citing lack of candor for failure to disclose thirteen of his seventeen convictions).
5. *In re* Menna, 905 P.2d 944, 945 (Cal. 1995) (denying admission to disbarred, out-of-state attorney for “felony convictions for theft of client funds, failure to file a state income tax return, and manufacture of methamphetamine” over ten years earlier).
6. *Seide v. Comm. of Bar Exam’rs*, 782 P.2d 602, 603, 605 (Cal. 1989) (denying admission because applicant had several arrests during law school and one conviction for drug trafficking shortly thereafter, although applicant had a clean record for seven years by the time of decision).
7. *In re* Dortch, 860 A.2d 346, 361–63 (D.C. 2004) (denying admission to applicant who had committed second-degree murder, attempted armed robbery, and conspiracy thirty years earlier, and holding alternatively that applicant was not “fit” to be admitted because he was still serving parole time).
8. *In re* Wells, 815 A.2d 771, 772 (D.C. 2003) (denying admission to suspended, out-of-state attorney who had

been convicted of misdemeanor battery approximately sixteen years earlier).

9. *In re Demos*, 579 A.2d 668, 673–74 (D.C. 1990) (en banc) (denying admission to applicant who had been convicted of contempt and investigated for unauthorized practice of law approximately five years earlier).
10. Fla. Bd. of Bar Exam'rs *re T.J.F.*, 770 So. 2d 676, 678–79 (Fla. 2000) (denying applicant who had been charged with theft three years earlier, citing also lack of candor and additional, though uncharged, “unlawful” conduct).
11. Fla. Bd. of Bar Exam'rs *re M.L.B.*, 766 So. 2d 994, 994–96 (Fla. 2000) (denying admission to applicant who had been convicted of grand theft from his employer right before entering law school, citing also lack of candor).
12. Fla. Bd. of Bar Exam'rs *re G.J.G.*, 709 So. 2d 1377, 1381 (Fla. 1998) (per curiam) (denying applicant who had been charged, but not convicted, of aggravated assault approximately six years earlier, and also citing additional factors including lack of candor and cheating on bar examination nine years earlier).
13. Fla. Bd. of Bar Exam'rs *re R.B.R.*, 609 So. 2d 1302, 1302–04 (Fla. 1992) (per curiam) (denying admission to applicant who had been convicted of using a telephone to facilitate the commission of a felony approximately thirteen years earlier, and also citing numerous instances of lack of candor).
14. Fla. Bd. of Bar Exam'rs *re R.D.I.*, 581 So. 2d 27, 30–31 (Fla. 1991) (per curiam) (denying applicant who had been charged with larceny and likely had engaged in other criminal activity approximately eleven years earlier, citing also lack of candor).
15. *In re Adams*, 540 S.E.2d 609, 610 (Ga. 2001) (per curiam) (denying admission to applicant who had been convicted of misdemeanor battery and had been involved in a separate instance of domestic violence approximately thirteen years earlier, and also citing lack of candor).
16. *In re K.S.L.*, 495 S.E.2d 276, 277–78 (Ga. 1998) (per curiam) (denying applicant who had been arrested for entering cars with criminal intent to steal money

approximately eight years before, citing additional factor of alleged plagiarism of a law school paper).

17. *In re J.W.N.*, 463 S.E.2d 114, 115–16 (Ga. 1995) (per curiam) (denying applicant who had been convicted of reckless driving, assault, and threatening phone calls, among other instances of misconduct, approximately six years earlier, and also citing questionable business practices).
18. *In re W.D.P.*, 91 P.3d 1078, 1079–80, 1092 (Haw. 2004) (per curiam) (denying admission to out-of-state attorney who had been convicted of “feloniously engag[ing] in lewd fondling or touching” of his minor daughters approximately seven years earlier, although his conviction was reversed on appeal, citing also numerous instances of alleged misconduct).
19. *In re Krule*, 741 N.E.2d 259, 265 (Ill. 2000) (denying admission to applicant who had been convicted of felony theft for an insurance fraud scheme approximately thirteen years earlier, and also citing lack of candor in law school applications).
20. *In re Glenville*, 565 N.E.2d 623, 627–29 (Ill. 1990) (denying admission to applicant who had been convicted of misdemeanor theft and had been arrested on several other occasions approximately six years earlier, and also citing applicant’s alleged lack of candor).
21. *In re Childress*, 561 N.E.2d 614, 620–21 (Ill. 1990) (denying applicant who had been convicted of rape and robbery sixteen years earlier, and also citing lack of candor regarding the convictions on law school applications).
22. *In re Peterson*, 439 N.W.2d 165, 169 (Iowa 1989) (denying admission to applicant who was convicted of felony breaking and entering and possession of burglary tools and misdemeanor assault approximately thirteen years earlier, citing lack of candor regarding convictions during screening process).
23. *In re Vendt*, 924 So. 2d 89, 89–90 (La. 2006) (per curiam) (denying admission to applicant who was convicted of “three misdemeanor charges—simple battery, criminal mischief, and aggravated assault”—and was charged

originally with second-degree murder approximately six years ago).

24. *In re Laughlin*, 922 So. 2d 475, 476–77 (La. 2006) (per curiam) (denying admission to applicant who was convicted of driving while intoxicated and a felony drug offense at least six years earlier, and also citing lack of candor regarding offenses in his law school application).
25. *In re Hinson-Lyles*, 864 So. 2d 108, 111–12 (La. 2003) (per curiam) (denying applicant who was convicted of “two counts of felony carnal knowledge of a juvenile and one count of indecent behavior with a juvenile” approximately four years earlier).
26. *In re Brown*, 895 A.2d 1050, 1057–59 (Md. 2006) (denying admission to applicant who was convicted of bank fraud approximately fifteen years earlier, and also citing lack of candor).
27. *In re Hyland*, 663 A.2d 1309, 1310, 1317–18 (Md. 1995) (denying admission to out-of-state attorney who, before law school, “was convicted of fifteen counts of failure to file state sales tax returns” approximately nine years earlier, citing also lack of candor, among other factors).
28. *In re Jeb F.*, 558 A.2d 378, 378–79 (Md. 1989) (denying admission to applicant who had been convicted and later absolved of all liability for armed robbery without specifying date of original conviction).
29. *In re Charles M.*, 545 A.2d 7, 12 (Md. 1988) (denying applicant who was arrested for fraud by check approximately eleven years earlier, and also citing financial instability and lack of candor).
30. *In re George B.*, 466 A.2d 1286, 1286 (Md. 1983) (denying admission to applicant who was convicted of attempted armed bank robbery over nine years earlier).
31. *In re Admission to Bar of Commonwealth (Krohn)*, 828 N.E.2d 484, 487 (Mass. 2005) (denying admission to applicant who had been convicted of felony conspiracy and extortion approximately twenty-eight years earlier, and also citing other alleged misconduct).
32. *In re Prager*, 661 N.E.2d 84, 86–87 (Mass. 1996) (denying admission to applicant who had been convicted of four drug felonies relating to his large marijuana smuggling operation approximately eight years earlier).

33. *In re* Noske, 470 N.W.2d 116, 116–18 (Minn. 1991) (denying admission to applicant who had been convicted of assault approximately one year earlier, and also citing several instances of misconduct).
34. *In re* Brown, 467 N.W.2d 622, 623 (Minn. 1991) (denying admission to applicant who had been convicted of second-degree arson approximately five years earlier).
35. *In re* Matt, 829 P.2d 625, 625, 628, 630 (Mont. 1992) (denying admission to out-of-state attorney who was charged with conspiracy to possess cocaine ten years earlier, and also citing lack of candor).
36. *In re* Roger MM, 96 A.D.2d 1133, 1133, 466 N.Y.S.2d 873, 873 (3d Dep't 1983) (denying admission to applicant who was convicted of bank robbery and first-degree murder).
37. *In re* Moore, 303 S.E.2d 810, 815, 817 (N.C. 1983) (denying admission to applicant who was convicted of assault and battery upon a female and second-degree murder approximately seventeen years earlier, and also citing lack of candor and threatening and belligerent statements made approximately nine years earlier).
38. *In re* Elkins, 302 S.E.2d 215, 216, 217, 221 (N.C. 1983) (denying admission to applicant who was convicted of “illegal entry and secretly peeping into a room occupied by a female person” approximately eight years earlier, and also citing lack of candor).
39. *In re* T.J.S., 692 A.2d 498, 500–02 (N.H. 1997) (denying admission to applicant who was convicted of felonious sexual assault approximately eleven years earlier, and also citing lack of candor).
40. *In re* Dickens, 832 N.E.2d 725, 726, 728 (Ohio 2005) (per curiam) (denying admission to applicant who was charged with “two disorderly conduct charges, two harassment charges, a menacing charge, and a menacing-by-stalking charge,” and also citing numerous instances of misconduct).
41. *In re* Bagne, 808 N.E.2d 372, 373, 375 (Ohio 2004) (denying admission to applicant who was convicted of aggravated assault approximately thirteen years earlier, and also citing lack of candor).

42. *In re Hampton*, 791 N.E.2d 962, 962, 963 (Ohio 2003) (per curiam) (denying admission to applicant who was charged six different times with operating a motor vehicle while intoxicated, with the last arrest occurring approximately two years earlier).
43. *In re Barilatz*, 746 N.E.2d 188, 188–89 (Ohio 2001) (per curiam) (denying admission to applicant who was convicted of misdemeanor possession of a concealed weapon in addition to having been jailed for contempt of court and failures to pay child support approximately seventeen years ago, and also citing lack of candor during the screening process).
44. *In re Kapel*, 717 N.E.2d 704, 704, 705 (Ohio 1999) (per curiam) (denying admission permanently to applicant who was charged with menacing and theft—charges that were later dropped—and with trespassing while trying to recover his automobile from a transmission shop, and who at another time was convicted of disorderly conduct approximately two years earlier); see also *In re Kapel*, 651 N.E.2d 955, 956 (Ohio 1995) (per curiam) (denying same applicant).
45. *In re Cureton*, 717 N.E.2d 285, 285, 286 (Ohio 1999) (per curiam) (denying admission to applicant who was convicted of disorderly conduct approximately one year earlier, and also citing business misconduct).
46. *In re Nerren*, 681 N.E.2d 906, 907 (Ohio 1997) (per curiam) (denying admission permanently to suspended, out-of-state attorney who was convicted of misdemeanor falsification and custodial interference approximately one year earlier, and also citing lack of candor and additional misconduct).
47. *In re Mitchell*, 679 N.E.2d 1127, 1127–28 (Ohio 1997) (per curiam) (denying admission to applicant who was convicted of misuse of credit card, forgery, and attempted transport of an unloaded weapon—in addition to having been charged with ticket scalping, approximately six years earlier—and also citing additional alleged misconduct).
48. *In re Keita*, 656 N.E.2d 620, 622–23 (Ohio 1995) (per curiam) (denying admission permanently to applicant who was convicted of armed robbery approximately

twenty-three years ago, and also citing lack of candor and other misconduct).

49. *In re Carroll*, 572 N.E.2d 657, 658 (Ohio 1991) (per curiam) (denying admission to applicant who was charged with possession of marijuana, receiving stolen property, and assault approximately ten years earlier, and also citing lack of candor).
50. *Bean v. State ex rel. Okla. Bd. of Bar Exam'rs (In re Bean)*, 766 P.2d 955, 957, 958 (Okla. 1988) (denying admission to applicant who was convicted of misdemeanor possession of marijuana and controlled drugs, simple assault, and driving while intoxicated approximately four years earlier, and also noting that applicant may be unfit to practice law in light of his alcohol problems).
51. *Vaughn v. Bd. of Bar Exam'rs for the Okla. Bar Ass'n*, 759 P.2d 1026 1028, 1031 (Okla. 1988) (denying admission to applicant who was charged with sodomy, lewd molestation, and second-degree rape approximately five years earlier).
52. *In re Covington*, 50 P.3d 233, 233, 234, 238 (Or. 2002) (en banc) (denying admission to applicant who was charged with manufacture and distribution of marijuana approximately six years earlier, and also noting concern that applicant was unfit in light of his drug problems).
53. *In re Fine*, 736 P.2d 183, 186, 187–88, 191 (Or. 1987) (per curiam) (denying admission to applicant who was convicted of felony conspiracy and flight to avoid prosecution, which arose out of applicant's participation in a university bombing, approximately eleven years earlier, and also citing lack of candor during screening in applicant's testimony regarding the bombing).
54. *In re Easton*, 692 P.2d 592, 594–96 (Or. 1984) (per curiam) (denying admission to applicant who was convicted of felony custodial interference and held in contempt of court approximately seven years earlier, and also citing lack of candor and other misconduct).
55. *In re Roots*, 762 A.2d 1161, 1164, 1165, 1170 (R.I. 2000) (per curiam) (denying admission to applicant who was convicted of possession of an unregistered firearm, resisting arrest with violence, and shoplifting

approximately eight years earlier, and also citing lack of candor and other misconduct).

56. *In re Wright*, 690 P.2d 1134, 1134–37 (Wash. 1984) (en banc) (denying admission to applicant who was convicted of second-degree murder and possession of heroin approximately ten years earlier, and also citing lack of remorse and alleged unauthorized practice of law).
57. *In re Dortch*, 486 S.E.2d 311, 313 (W. Va. 1997) (denying admission to applicant who was convicted of second-degree murder, conspiracy, and attempted armed robbery approximately twenty-three years earlier).
58. *Frasher v. W. Va. Bd. of Law Exam'rs*, 408 S.E.2d 675, 676–77, 682 (W. Va. 1991) (denying admission to applicant who was convicted of driving under the influence on three occasions approximately three years earlier, and also citing numerous traffic offenses and apparent alcohol dependency).
59. *In re Heckmann*, 556 N.W.2d 746, 747, 748 (Wis. 1996) (per curiam) (denying admission to applicant who was convicted of underage drinking on three separate occasions, disorderly conduct, and driving without a license approximately three years earlier, and also citing lack of candor).
60. *In re Martin*, 510 N.W.2d 687, 687–89 (Wis. 1994) (per curiam) (denying admission to applicant who was convicted of forgery and seven counts of aiding and abetting transportation of forged checks approximately sixteen years earlier, and also citing lack of candor on applications).

APPENDIX II: APPLICANTS ADMITTED FOR DEMONSTRATING  
REHABILITATED CHARACTER: 1983 TO 2006<sup>148</sup>

1. *Hightower v. State Bar of Cal.*, 666 P.2d 10, 11–12, 14 (Cal. 1983) (admitting applicant who had engaged in three instances of unauthorized practice of law and had been convicted of contempt arising out of one of those instances approximately six years earlier).
2. *In re Kleppin*, 768 A.2d 1010, 1013, 1018 (D.C. 2001) (per curiam) (admitting applicant who had been denied admission in Florida, despite his conviction for conspiracy to distribute marijuana ten years earlier, but noting that applicant failed to disclose the conviction on one of his law school applications).
3. *In re Manville*, 538 A.2d 1128, 1134–35 (D.C. 1998) (en banc) (admitting *three applicants* who had been convicted of manslaughter, attempted armed robbery of a bank, and selling narcotics over ten years before their applications).
4. *In re Sobin*, 649 A.2d 589, 589 (D.C. 1994) (admitting applicant “despite . . . [his] felony convictions for conspiracy to manufacture a controlled substance and aiding and abetting both interstate prostitution and interstate transportation in aid of interstate racketeering” approximately seven years earlier).
5. *In re Polin*, 630 A.2d 1140, 1141–42 (D.C. 1993) (admitting applicant who had been convicted of conspiracy to distribute cocaine approximately nine years earlier).
6. Fla. Bd. of Bar Exam’rs *re D.M.J.*, 586 So. 2d 1049, 1049–51 (Fla. 1991) (per curiam) (admitting applicant despite concluding that applicant had engaged in a conspiracy to import cocaine twelve years earlier, although applicant had been acquitted in his criminal trial).

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<sup>148</sup> *In re Ansell* is not included because its disposition is unclear. *See In re Ansell*, 788 So. 2d 1172, 1173 & n.1 (La. 2001) (per curiam) (admitting applicant conditionally who had entered a deferred prosecution agreement for possession of marijuana and possession of drug paraphernalia at least two years earlier). *But see In re Ansell*, 801 So. 2d 1064, 1064 (La. 2001) (ordering applicant’s conditional admission revoked pending further hearings).

7. *In re VMF*, 491 So. 2d 1104, 1104, 1107 (Fla. 1986) (per curiam) (admitting applicant who had been charged with possession and delivery of marijuana approximately nine years earlier, but noting applicant's lack of candor during screening).
8. *In re Bryant*, 922 So. 2d 471, 471–72 (La. 2006) (per curiam) (admitting applicant who was convicted of possession of cocaine with intent to distribute approximately eleven years earlier, and also citing delinquent credit accounts).
9. *In re Hughes*, 594 A.2d 1098, 1099 (Me. 1991), *aff'd*, 608 A.2d 1220, 1221 (Me. 1992) (admitting resigned, out-of-state attorney who was convicted, approximately eleven years earlier, of two counts of false statements on real estate closing forms in an effort to divert funds from clients).
10. *In re James G.*, 462 A.2d 1198, 1199, 1202 (Md. 1983) (admitting applicant who had been convicted of “forgery,” “uttering,” and assault, and who had been charged with—but not convicted of—two separate murders approximately thirteen years earlier).
11. *In re Birmingham*, 866 P.2d 1150, 1151–52 (Nev. 1994) (admitting applicant who was convicted of conspiracy to distribute marijuana eleven years earlier).
12. *In re Strait*, 577 A.2d 149, 150, 157–58 (N.J. 1990) (admitting applicant who was charged with possession of cocaine and narcotics paraphernalia in addition to having been convicted of various drug and assault offenses approximately five years earlier, and rejecting committee's finding of lack of candor).
13. *In re Newhall*, 143 A.D.2d 293, 294, 532 N.Y.S.2d 179, 180 (3d Dep't 1988) (admitting applicant who was convicted of assault in the second degree approximately nine years earlier).
14. *In re Kesselman*, 100 A.D.2d 606, 606, 473 N.Y.S.2d 826, 826–27 (2d Dep't 1984) (admitting applicant who was convicted of criminal sale of a controlled substance in the third degree approximately seven years earlier).
15. *In re Beers*, 118 P.3d 784, 785, 791 (Or. 2005) (per curiam) (admitting applicant who was convicted of felony conspiracy to distribute cocaine in addition to

having been convicted of various misdemeanors approximately thirteen years earlier, but noting minimally a lack of candor).

16. *In re Jaffee*, 874 P.2d 1299, 1300–01, 1305 (Or. 1994) (per curiam) (admitting previously denied, out-of-state attorney who eight years earlier was convicted of manufacture of marijuana and who violated probation by threatening violence and possessing firearms, noting that in California the applicant-attorney had been suspended but was later reinstated).
17. *In re Tobiga*, 791 P.2d 830, 834–35 (Or. 1990) (admitting applicant who was charged with shoplifting approximately five years earlier and noting, but rejecting, lack of candor concerns).
18. *In re Rowell*, 754 P.2d 905, 906–07, 910 (Or. 1988) (per curiam) (admitting applicant who was convicted of possession of marijuana with intent to sell and possession of cocaine in addition to other illegal drug activity approximately seven years earlier).
19. *In re Ogilvie*, 623 N.W.2d 55, 56, 58 (S.D. 2001) (admitting applicant who was convicted twice for driving under the influence and accused of abusive behavior toward his former girlfriend).
20. *Tex. State Bd. of Law Exam'rs v. Malloy*, 793 S.W.2d 753, 758–60 (Tex. App. 1990) (admitting applicant who, two years prior, was charged with two low-class misdemeanors and another charge that ultimately was dismissed because the rules of court barred the committee below from considering such misdemeanors and offenses, and noting, but discounting, applicant's apparently resistant and cursory responses on his bar application).
21. *In re McMillian*, 617 S.E.2d 824, 827, 830 (W. Va. 2005) (per curiam) (admitting previously denied applicant who was convicted of felony wiretapping approximately ten years earlier, and also citing concerns regarding applicant's discharge from a previous job approximately eighteen years earlier).
22. *In re Vanderperren*, 661 N.W.2d 27, 33–34, 41 (Wis. 2003) (per curiam) (remanding with instructions to admit applicant who was “‘cited for three alcohol-

related offenses, six motor vehicle offenses, and one offense each for assault, trespass, disorderly conduct, fraudulently obtaining a driver's license and using it to operate a motor vehicle, and for resisting arrest' " approximately four years earlier, and also citing lack of candor (quoting the board's Finding of Fact 3.A)).

23. *In re Rippl*, 639 N.W.2d 553, 555–56, 560, 562 (Wis. 2002) (per curiam) (admitting applicant who was convicted of misdemeanor theft and cited for disorderly conduct approximately four years earlier, but noting psychological instability).

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APPENDIX III: CASES REMANDING MORAL CHARACTER  
DETERMINATIONS: 1983 TO 2006

1. *Scott v. State Bar Examining Comm.*, 601 A.2d 1021, 1023, 1030 (Conn. 1992) (remanding trial court's grant of admission to applicant who had been convicted of possessing marijuana, among other offenses, approximately seven years earlier).
2. *In re Watts*, 557 A.2d 601, 602 n.3, 603 (D.C. 1989) (remanding for further proceedings committee's denial of admission despite the fact that applicant had been convicted of two different felonious thefts during law school approximately ten years earlier).
3. *In re Haukebo*, 352 N.W.2d 752, 753, 756 (Minn. 1984) (remanding for further proceedings committee's denial of applicant who had been convicted of three counts of driving while intoxicated approximately three years earlier).