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Erratum

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WHO WATCHES THE WATCHMEN? CHARACTER AND FITNESS PANELS AND THE ONEROUS DEMANDS IMPOSED ON BAR APPLICANTS

Artem M. Joukov* & Samantha M. Caspar**

*A lifetime of good citizenship is worth very little if . . . it cannot withstand the suspicions which apparently were the basis for the Committee's action.*¹

—The United States Supreme Court, reversing a character and fitness panel.

This Article discusses the onerous requirements that state bars sometimes impose on bar applicants to prove good moral character despite the vague definition of the term and the apparently limitless amount of evidence that a character and fitness panel can rely on to deny or delay admission. We present recent examples of decisions that beg the question of whether state bars are really preventing the entry of the unethical into the profession or simply screening out applicants that panelists dislike. We also discuss at least one potential problem highlighted within the process by COVID-19. This Article argues that while most bar applicants pass the character and fitness portion of their bar application without problems, history shows that the potential for arbitrary decisions is so high that this potential should be eliminated. The changes we propose should come either voluntarily, as state bars appropriately adjust their rules to notify applicants of what conduct is truly prohibited, or via a ruling from the United States Supreme Court, which has already established some constitutional requirements for the process that have apparently been forgotten.

INTRODUCTION

For most law school graduates, the character and fitness portion of the bar application is just a technicality: they submit their application, supplement it with information about minor traffic citations, and attach recommendations from law

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1. *Konigsberg v. State Bar*, 353 U.S. 252, 273–74 (1957).

professors and other lawyers that attest to their good moral character and standing. Ordinarily, the character and fitness evaluation goes smoothly, even without a hearing,² and the aspiring lawyer goes on to what many consider to be the real challenge: the bar examination. But for some individuals, the bar examination is the least of their concern. For those individuals unlucky enough to have caught the eye of a character and fitness panel, it becomes a battle to sit for the bar examination at all.

Unlike the many nervous graduates who control their own destiny when it comes to bar passage, a few individuals face the challenge of justifying something they can no longer change: their past. For these students, the bar application can become a nightmare even before the examination. Sometimes, their plight is so notable, so seemingly inconsistent, and so arbitrary, that it begs the questions: who is making the decisions regarding the character and fitness of aspiring lawyers and why are these decisions so seemingly inconsistent with our general sense of (legal) morality? Moreover, why are prospective lawyers subjected to a quasi-criminal process that many practicing lawyers would find objectionable when applied to actual criminals? The questions do not get any easier when comparing the relatively innocent conduct of some applicants denied the right to practice law to the severe misconduct of seasoned lawyers who continue to practice largely unhindered by the ethical investigation process.

This problem has come to light in many ways recently. Not only did several potentially qualified individuals lose the opportunity for bar admission in recent years, but graduating law students and at least one law school have exhibited apprehension about the process in light of COVID-19.³ Even applicants' attempts to avoid the dangers of the virus by expressing their objections against a dangerous examination practice⁴ have been met with speculation: a law school suggested that their advocacy for reducing the dangers of public bar examination testing might negatively affect their chances of admission based on character and fitness concerns.⁵ Normally, one would expect First Amendment principles to protect law students in such an instance,⁶ but even individuals running a Michigan law school cannot be sure, exhibiting fears that law students would be attacked by character and fitness panelists for mere advocacy in favor of a sensible cause.⁷ These fears highlight the problem: that character and fitness panels can use a limitless list of reasons to deny individuals admission to a state bar, which is precisely what should change.

2. See Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection"*, 2018 U. ILL. L. REV. 345, 359 (2018).

3. Joe Patrice, *Law School Implies Diploma Privilege Advocates Could Get Dinged on Character and Fitness*, ABOVE THE LAW (Jul. 6, 2020), <https://abovethelaw.com/2020/07/law-school-implies-diploma-privilege-advocates-could-get-dinged-on-character-fitness/> [https://perma.cc/U6GJ-53SZ]; Alex Morey, *FIRE objects after Wayne State Law School says students can't criticize bar exam*, FIRE (July 14, 2020), <https://www.thefire.org/fire-objects-after-wayne-state-law-school-says-students-cant-criticize-bar-exam/> [https://perma.cc/GNM6-AVF4].

4. This practice involves cramming thousands of students from all over the country in an enclosed room for two to three days.

5. Patrice, *supra* note 3; Morey, *supra* note 3.

6. *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

7. Patrice, *supra* note 3; Morey, *supra* note 3.

To be fair, some applicants *should* be screened from becoming lawyers. It would be difficult for anyone to argue that individuals guilty of severe criminal offenses either in the United States or abroad should serve as officers of the court in a profession created largely to ensure compliance with the law. There may also be conduct that does not rise to the level of a criminal act that proves troubling, and perhaps disqualifying, in some instances. The problem is that the undefined nature of conduct that excludes a person from legal practice and the “holistic” view of the bar application that many character and fitness panelists take. The view grants almost unlimited discretion to these ethical watchmen to disqualify anyone they please from legal practice – and when no one watches the watchmen, the results can be onerous, unjust, and surprisingly unbecoming of the legal profession. Therefore, even relatively innocent applicants have some chance of facing significant problems with their applications, making this an important topic for all.

In Part I, this Article will demonstrate, at least anecdotally, how much variation there can be between the rationale and ultimate outcome of character and fitness panel decisions across various jurisdictions. Because some legal contributions to this field have been made already, we will refer the reader to the authors who preceded us for the background of the character and fitness application process and historically notable cases. Part II of this Article will cover some of the potentially dubious grounds for denial or delay of admission, especially given the unclear definition of what “good moral character” really is. Part III of this Article will argue that subjecting bar applicants to a character evaluation process based on unlisted and unspecified factors that vary in multitude and definition is the very definition of a due process violation. Here, this Article will suggest adding additional checks and balances to the current system that would ensure future lawyers are treated more consistently with the legal principles they are expected to protect.

I. PART I: THE CHARACTER AND FITNESS PROCESS

To properly make the argument that character and fitness panels may possess a dangerous level of discretion that might lead to their abuse of the process, this Article will refer the reader to the overview, history, and varying requirements of the character and fitness evaluation process. We build on the works of prior authors, so rather than reciting all of the factual instances where character and fitness inquiries seem to have gone astray (which are almost too numerous for any one article), we will refer the reader to these sources, discussing within our work only instances left unexamined, instances which exemplify the problem of unrestrained character and fitness committees most poignantly, and constitutional arguments that remain unraised.

For a historical background of the character and fitness inquiry, as well as attitudes of the inquirers, we would suggest Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491 (1985). This work also lists a significant number of cases (more than 100 pages of them) demonstrating the troubled history of the character and fitness evaluation process that correctly anticipates some problems faced by applicants even today, such as marijuana use, which has remained

prevalent in the United States.⁸ Lindsey Ruta Lusk, Note, *The Poison of Propensity: How Character and Fitness Sacrifices the “Others” in the Name of “Protection”*, 2018 U. ILL. L. REV. 345 (2018) provides an update, including more recent cases that fail to abide by general constitutional principles (including the authors’ own experiences). These articles lay the factual foundation for our legal analysis, and we will highlight some of the facts cited therein without fully reciting them here. Other important sources include Mary Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, 42 STUDENT LAW. 16 (2013) and Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar’s Character and Fitness Requirement*, 2014 BYU L. REV. 775 (2014).

What these sources establish beyond all doubt is that character and fitness panel members hold the future of young law students in their hands with little oversight or statutory and procedural guidance for how to proceed.⁹ Character and fitness panels can deny admission outright, forcing the applicant into an expensive appeals process that is not guaranteed to succeed.¹⁰ Character and fitness panels also possess the authority to withdraw applications from consideration if the panel members consider the applications incomplete,¹¹ perhaps even punishing applicants for small and irrelevant omissions.¹² Finally, the investigation of the applicant can become so prolonged that the applicant misses out on years of legal practice.¹³ Such delay in bar admission itself can have a significant cost, coupled with a noteworthy effect on the applicant’s reputation that results from the remainder of his or her classmates gaining admission immediately while his or her evaluation alone takes enough time to draw suspicion.¹⁴ And while some of the examples presented in the aforementioned works (such as increased scrutiny due to the homosexuality of the applicant)¹⁵ may have fallen by the wayside today,¹⁶ many others still apparently persist.

The history of character and fitness panels in the United States represents a balancing act between the legal profession trying to regulate itself and the onerous imposition of very broad standards of morality and decency on individuals who lacked the connections to effectively combat discrimination, prejudice, and

8. Samantha M. Caspar & Artem M. Joukov, *The Implications of Marijuana Legalization on the Prevalence and Severity of Schizophrenia*, 28 HEALTH MATRIX 175 (2018).

9. See Lusk, *supra* note 2, at 356.

10. See Mary Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, 42 STUDENT LAW. 16, 16 (2013).

11. See *Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character and Fitness Committee*, NEV. CT. RULES, https://www.leg.state.nv.us/courtrules/SCR_Addenda.html [<https://perma.cc/XVA2-6HER>].

12. See *In re McKinney*, 134 Ohio St. 3d 260 (2012). Michele McKinney’s application to the Ohio Bar was rejected in 2011 based on her apparent “lack of candor” regarding her employment with a Cincinnati law firm during her first year of law school. *Id.*

13. See Brian Cuban, *When Bar Examiners Become Mental Health Experts*, ABOVE THE LAW (Jan. 10, 2018, 10:03 AM), <https://abovethelaw.com/2018/01/when-bar-examiners-become-mental-health-experts/> [<https://perma.cc/N47N-VPSE>].

14. *Id.*

15. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491, 534, 539 (1985).

16. *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

arbitrariness in character and fitness decisions. The infamous case of *Bradwell v. State*,¹⁷ which involved the Illinois Bar denying admission to Ms. Bradwell because she was a woman,¹⁸ comes to mind. The United States Supreme Court upheld this decision, which apparently still has not been directly overruled, with a nearly unanimous vote (8-1).¹⁹ Over time, the process became more and more widespread, and the causes for denied admission became more reasonable.²⁰ Even the United States Supreme Court began to occasionally take notice of certain injustices promulgated by character and fitness panels, stopping and reversing those decisions.²¹

Different states can have immensely different character and fitness requirements, as each state has the independent authority to regulate bar admission within its jurisdiction.²² This Article will not list all of the differences between the fifty states, the District of Columbia, the various United States territories, and the ethical standards federal court admission,²³ but a few examples should prove demonstrative. For example, Virginia describes an applicant of good moral character as someone “whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them.”²⁴ North Carolina defines good moral character as including, but not limited to, “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary and personal responsibility and of the laws of North Carolina and of the United States and a respect for the rights and property of other persons.”²⁵

Both standards leave much to interpretation. For Virginia, it almost appears that justifying the trust of others is the standard rather than actually being trustworthy. If that was really the case, then many individuals who engaged in unjust, improper, and even criminal conduct might qualify to become lawyers in Virginia. After all, history has no shortage of scam artists who gained the people’s trust for a long time and had a “record of conduct” that, on the surface, showed no propensity for dishonesty or unfair dealings. In fact, many may have gained public trust through their record of conduct and never faced apprehension at all. Perhaps even more alarming, individuals who *appear* to have a record that suggests some moral impurities may be excluded from bar membership even though their actual moral character is not so flawed. It is entirely possible for someone to act in a way that does

17. 83 U.S. 130 (1873).

18. *Id.*

19. *Id.* at 130, 142. We should note that while we find no decision specifically citing *Bradwell* and overruling it within the jurisprudence of the United States Supreme Court, we cannot imagine that it would survive scrutiny under equal protection principles if re-examined today.

20. See Rhode, *supra* note 15, at 495.

21. See *id.*

22. See *Hawkins v. Moss*, 503 F.2d 1171, 1175 (4th Cir. 1974) (“The power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy; in fact, it is a power in the exercise of which the state has ‘a substantial interest.’”).

23. Federal courts often rely on state bar determinations regarding the ethics of a particular lawyer to grant bar membership in a federal court. See FED. R. APP. P. 46.

24. VA. SUP. CT. R. 1A:1 annot.

25. *Character and Fitness Guidelines*, BOARD OF L. EXAMINERS OF THE ST. OF N.C., <https://www.ncble.org/character-and-fitness-guidelines> [<https://perma.cc/58R5-MP73>].

not necessarily inspire public trust while actually being trustworthy. Can the Virginia Bar exclude someone for the mere appearance of impropriety, even once it receives convincing evidence disproving the alleged misconduct?

Of course, this is perhaps a very close reading of the Virginia requirements, one that may sow discord in an otherwise sound definition of what a good prospective applicant might bring to the Virginia Bar. Yet, if this reading of the requirement is not the right one, what is? Taken in its full form, the definition cannot help but to leave a future applicant puzzled. Virginia's standard provides no examples of acceptable and unacceptable acts, states no clear elements that would justify admission or denial, and ultimately leaves to the discretion of the character and fitness panel the decision of who is and is not worthy. In criminal cases, the Due Process Clause specifically guards against allowing the jury to make a decision of this type: the jurors must decide only whether very specific elements of a crime are met. It is not a juror's place to decide on the ambiguous general morality of a person, and the Due Process Clause ensures that by forbidding prosecution under vague criminal statutes;²⁶ a courtesy apparently not extended to Virginia Bar applicants.

The North Carolina Bar, clearly aware of the ambiguity problem, does much better. By presenting a series of limited examples of what constitutes moral and immoral conduct, the North Carolina Bar actually allows the applicant to cling to some hope that by engaging in certain behaviors and avoiding others, he or she could be somewhat sure of admission. However, even this standard creates some degree of confusion in marginal cases. Since North Carolina defines moral character as something that includes the examples, but is not limited to them, an applicant might begin to wonder what other ethereal requirements exist.

Unclear about this requirement, the applicant might also begin to question others. For example, the observance of fiduciary responsibility has quite a bit to do with accumulation and proper disposition of debt. Yet, how much debt is too much? Does the reason for the debt matter? Should it matter at all if debt payments are timely? Or even if they are untimely? Perhaps something like abiding by the laws of the state and the United States seem like a clearer guideline, but in a country where many people have a myriad of minor legal violations (including very minor civil and traffic offenses), this too might not be the helpful guide it appears to be. After all, there are *so many* laws a person can violate. How much can a failure to adhere to one law hurt an applicant? What about failure to adhere to two laws? Does it matter what laws are broken? Does it matter if the person is charged? Convicted? Harshly sentenced? Pardoned?

Reasonable minds can certainly differ when it comes to the above questions. This even includes the reasonable minds of character and fitness panelists. For example, Lynne Burke applied to both the North Carolina and the District of Columbia bars. After successfully passing each state's bar examination, she was required to appear before the North Carolina Board of Bar Examiners.²⁷ Ms. Burke had forty felony and misdemeanor convictions, the majority of which were for writing worthless checks, misdemeanor thefts, and traffic offenses.²⁸ The District of

26. See generally U.S. CONST. amend. XIV, § 1.

27. *In re Burke*, 775 S.E.2d 815, 817 (N.C. 2015).

28. *Id.* at 817, 820.

Columbia eventually granted Ms. Burke a law license, but North Carolina did not.²⁹ Upon philosophical inquiry, it is difficult to blame North Carolina for its reluctance: Ms. Burke did violate the law at least forty different times.³⁰ On the other hand, the District of Columbia Bar apparently thought that Ms. Burke would prove to be a fine lawyer (although the District of Columbia Bar does not appear to define “good moral character” as specifically as North Carolina does).³¹ Furthermore, Ms. Burke appears to have remained in good standing with the District of Columbia Bar since her admission to this day, somewhat vindicating the District of Columbia but throwing doubt on the decision of North Carolina (and perhaps other jurisdictions) to pay such close attention to the prior acts of an apparently reformed individual.³²

The main question arises again: why is there a difference in Ms. Burke’s treatment depending on jurisdictions? Given the fact that this is the same individual being considered for admission at the same time during her career, there is a strong argument that the deciding factor may have simply been the particular opinions of the particular panels reviewing Ms. Burke’s character. Perhaps even more important is the precedent this decision might have set for the District of Columbia: having admitted a forty-time convict, it is difficult to see how the District of Columbia Bar can justify denying admission to anyone on the basis of character again. Perhaps individuals who have committed more serious offenses than Ms. Burke would have something to fear, but applicants with less severe crimes should receive no scrutiny whatsoever (perhaps even resulting in the removal of the reporting requirement for individuals with minor offenses). If Ms. Burke can join the bar, why should less criminally-inclined individuals even be required to announce their prior criminal conduct? So long as their misadventures do not arise to the level of Ms. Burke’s, the Equal Protection Clause should require their admission.³³

Jurisprudence from the Alabama Supreme Court should also make one wonder how anyone could be denied the right to practice law in that state. *Reese v. Board of Commissioners of the Alabama State Bar*, which is apparently still good law in Alabama, presents a truly remarkable case of an applicant joining the bar despite strong evidence for exclusion.³⁴ This case, rather than presenting an example of an applicant who is arbitrarily denied admission, presents an example of just how

29. *Id.* at 817, 818.

30. *Id.* at 817.

31. *See id.*

32. *See Meet Burke’s Law, BURKE’S L.,* <https://sites.google.com/lynnburkelaw.com/burkeslaw/meet-burkes-law> [https://perma.cc/55CM-9TMQ]; *see also Find a Member Search Results, D.C. BAR,* <https://join.dcbbar.org/eweb/DynamicPage.aspx?Site=dcbar&WebCode=FindMemberResults> [https://perma.cc/SY3X-UTUR] (showing that Ms. Burke was in good standing with the District of Columbia Bar as of October 27, 2019).

33. *See generally* U.S. CONST. amend. XIV, § 1. The Equal Protection Clause might require significant similarities between individuals to ensure equal treatment, but the lack of similarity between most applicants and Ms. Burke should play significantly in their favor since it is unlikely that they too have forty misdemeanor and felony convictions, almost requiring a more favorable review by the District of Columbia Bar.

34. *Reese v. Bd. of Comm’rs*, 379 So. 2d 564 (Ala. 1980).

much negative character evidence an applicant can survive without losing his or her right to admission in Alabama.³⁵

Charles Reese applied to the Alabama State Bar for certification as a law student, where the application required him to disclose prior criminal offenses.³⁶ Mr. Reese disclosed charges of Driving Under the Influence of Drugs and Disorderly Conduct, but upon investigation, the Alabama State Bar discovered that these were hardly the only offenses Mr. Reese had (allegedly) committed.³⁷ When Mr. Reese testified before the Committee on Character and Fitness at his hearing, the Committee directly asked Mr. Reese whether he fully disclosed everything about his criminal record.³⁸ Mr. Reese replied that he did.³⁹ Yet, when the Committee confronted him with his prior unreported crimes, Mr. Reese relented, stating that he did, in fact, commit other offenses.⁴⁰ At another hearing, he disclosed even more run-ins with the law, according to the record before the Alabama Supreme Court.⁴¹

Perhaps some readers might suspect that Mr. Reese forgot one or two minor traffic infractions and should not be held responsible for mere forgetfulness. However, the footnotes of the case prove otherwise. Mr. Reese, while not always indicted or charged by information, had several arrests and convictions everywhere from California, to Mexico, to Florida, to Tennessee.⁴² He was arrested as a runaway in 1965, illegally hopped a freight train in 1967, and received a conviction, as well as a sixteen-day jail sentence, in Tijuana, Mexico in the same year (an experience anyone would be unlikely to forget).⁴³ Mr. Reese, who had a busy 1967, also managed to be arrested on charges of burglary and delinquency of a minor all in one night while in San Diego, California.⁴⁴ In Flagstaff, Arizona of the same year, Mr. Reese received a fourteen-day jail sentence for hitchhiking.⁴⁵ Mr. Reese fervently claimed he remembered only being in jail for four days, despite his apparent lack of memory of the entire event until confronted by the Character and Fitness Panel.⁴⁶ The rest of that year went better for Mr. Reese: he avoided a conviction for Possession of Marijuana after his arrest because the trial court suppressed the evidence against him.⁴⁷

About six years later, though, it was evident that Mr. Reese did not immediately abandon his life of minor misdeeds. He forfeited a bond in Tennessee for another Driving Under the Influence charge⁴⁸ and once again engaged in

35. *See id.*

36. *Id.* at 565–66.

37. *Id.* at 566.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 567 n.1.

43. *Id.*

44. *Id.*

45. *Id.* at 985.

46. *Id.*

47. *Id.*

48. *Id.* It is unclear from the record in the Supreme Court's opinion if those charges were still pending at the time of his character and fitness hearings.

Disorderly Conduct.⁴⁹ Mr. Reese also had a separate arrest “for possessing an open can of beer in a moving vehicle,” where he ultimately received an apparent conviction accompanied by a fine.⁵⁰ In 1974, Mr. Reese was once again under arrest for drug possession, but he escaped the long arm of the law because the court ultimately dismissed the matter.⁵¹ As recently as one year prior to his application for certification as a law student, Mr. Reese once again crossed paths with authorities, being arrested for driving with a broken headlight.⁵²

This long list of crimes and convictions, many of them undisclosed (despite a requirement to do so and direct questioning from the Character and Fitness Committee), led the Character and Fitness Committee to deny Mr. Reese certification as a law student despite twenty-eight letters of recommendation from lawyers, judges, and other members of the community.⁵³ It was unclear whether these community members knew of Mr. Reese’s misdeeds or whether Mr. Reese fully disclosed those misdeeds to them (which he failed to do before the Committee).⁵⁴ However, relying on these letters, the Alabama Supreme Court declared that denying Mr. Reese certification was a mistake.⁵⁵

Arguing that the three letters *against* Mr. Reese’s character should not count against him due to Mr. Reese’s inability to cross-examine the witnesses,⁵⁶ the Court accepted the twenty-eight accounts of his good character.⁵⁷ The Court set aside Mr. Reese’s apparent lack of candor with the Committee, stating that this dishonesty did not sufficiently weigh on his moral character.⁵⁸ The Court seemed to believe that the minor nature of some of the offenses Mr. Reese committed, and the fact that he did not receive convictions for all of them, may have properly allowed him to omit these from his report to the Committee.⁵⁹ Finally, relying on federal precedent, the Court ultimately concluded that Mr. Reese’s proof of “good moral character” via twenty-eight letters of recommendation received insufficient rebuttal from the Alabama State Bar to deny him admission.⁶⁰ Thus, Mr. Reese was certified as a law student, later allowed to join the bar as a lawyer, and still practices law in Alabama to this very day, apparently without incident.⁶¹

Several conclusions can be drawn from Mr. Reese’s certification as a law student and subsequent admission to the Alabama State Bar.⁶² On the one hand, it seems that almost no amount of dishonesty with the Committee or minor criminal

49. *Id.* at 568 n.1.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 568.

54. *See id.*

55. *Id.* at 569–70.

56. *See id.* at 568. The letters included objections to his certification by his father’s secretary, a concerned citizen, and an individual who alleged Reese broke the law while in law school. *Id.*

57. *Id.* at 569. There appears to be no indication whether the Alabama State Bar had an opportunity to cross-examine Reese’s proponents. *See id.*

58. *See id.* at 568.

59. *See id.* at 569.

60. *Id.*

61. *See* REESE & REESE ATTORNEYS, P.C., <https://alabamalaw.net/> [<https://perma.cc/Z7PG-VKM8>].

62. *Reese*, 379 So. 2d. 565

convictions should lead to the denial of a bar application in Alabama. If such conduct did lead to a denial, then there would undoubtedly be an equal protection violation: all applicants should receive the same protections that Mr. Reese did and should face no harsher evaluation.⁶³ On the other hand, it also suggests the apparent arbitrariness of the Committee's inquiry to begin with: Mr. Reese has been practicing law in Alabama without mishap despite his past, seemingly proving (at least anecdotally) that even a significant amount of mischief in youth does not prevent a lawyer from being perfectly capable of conducting himself ethically in the decades to come.

II. PART II: TROUBLING GROUNDS FOR DENYING ADMISSION

Reviewing Ms. Burke's case⁶⁴ in light of more successful (but perhaps equally troubled) applicants helps demonstrate some of the potential inconsistencies in evaluating applicants' character. The fitness or unfitness of an aspiring lawyer for practicing law can be in the eyes of the beholder. In some ways, Ms. Burke was lucky: she received the opportunity to become a member of at least one bar. The same is true of Mr. Reese: he received the chance to prove himself as a lawyer, and he emerged as a successful one.⁶⁵ Some law students are not so lucky, and often as a result of actions some would consider to be less flagrant than Ms. Burke's and Mr. Reese's numerous criminal offenses and encounters with the law.⁶⁶

A. Neglecting Financial Responsibilities

Imagine spending three years of your life in law school, incurring hundreds of thousands of dollars in debt, and finally passing the bar examination on your fourth try only to be denied admission to the bar for a reason that arguably has no bearing on your ability to practice law. For any law school student, this scenario sounds like a nightmare, but this is exactly what happened to Robert Bowman.⁶⁷ Mr. Bowman was a recent law school graduate who put himself through community college, working during school, and then incurred student loans to complete college, graduate school, and law school.⁶⁸ He sat for the New York bar examination multiple times, passing the examination on his fourth attempt.⁶⁹ The committee of New York lawyers that reviews bar applications interviewed Mr. Bowman, recommending his approval as an attorney and calling his persistence "remarkable."⁷⁰ However, a few months later, five New York appellate judges decided that Mr. Bowman's student loans should bar him from becoming an attorney.⁷¹ Accordingly, and based solely on

63. See generally U.S. CONST. amend. XIV, § 1.

64. *In re Burke*, 775 S.E.2d 815 (N.C. 2015).

65. See REESE & REESE ATTORNEYS, P.C., *supra* note 56.

66. See Lusk, *supra* note 2.

67. *In re Anonymous*, 875 N.Y.S.2d 925 (App. Div. 2009) (per curiam); Elie Mystal, *\$400,000 in Student Debt = Character & Fitness Fail*, ABOVE THE LAW (Jul. 2, 2009), abovethelaw.com/2009/07/400000-in-student-debt-character-fitness-fail/ [https://perma.cc/4LAZ-XS8B].

68. *Id.*

69. *Id.*

70. *Id.*

71. See *id.* at 925–26.

the large amount of his outstanding student loans, Mr. Bowman failed the character and fitness investigation and was denied admission to the New York Bar.⁷²

Mr. Bowman honestly disclosed various student loans on his character and fitness questionnaire, with balances totaling approximately \$430,000.⁷³ The loans were delinquent, but Mr. Bowman “professe[d] [his] good faith intentions to pay them.”⁷⁴ In denying his admission to the New York Bar, the Court stated that “[Mr. Bowman] has not made any substantial payments on the loans. He has not been flexible in his discussions with the loan servicers. Under all the circumstances herein, we conclude that applicant has not presently established the character and general fitness requisite for an attorney and counselor-at-law.”⁷⁵ This decision was upheld on appeal by the Appellate Division of New York’s Supreme Court, with the Court stating that his admission should be denied because “[h]is application demonstrates a course of action amounting to neglect of financial responsibilities with respect to the student loans he has accumulated.”⁷⁶

Neither the Character and Fitness Committee nor the Court sufficiently explained why Mr. Bowman’s student debt made him unfit to practice law, though perhaps here, the Character and Fitness Committee is not to blame, since it actually certified Mr. Bowman as an attorney only to be reversed on appeal. The courts of appeal, without any satisfying explanation, treated it as a given that being unable (or perhaps unwilling) to make loan payments rendered one incapable of being an ethical lawyer.⁷⁷ The circumstances surrounding Mr. Bowman’s student debt were the only factors the appellate courts relied on in denying his admission, setting some troubling precedent for the future that the Character and Fitness Committee may be forced to follow.⁷⁸

Perhaps Mr. Bowman should apply to the District of Columbia Bar: after all, his failure to pay loans that various institutions willingly gave him seems to pale in comparison with forty convictions for crimes and misdemeanors.⁷⁹ The Alabama State Bar should be his next stop, where he can hope to convince a character and fitness panel that his debt pales in comparison with the “misconduct” of Mr. Reese.⁸⁰ Unfortunately, Mr. Bowman’s denial of admission is not an unusual or isolated incident. Rather, each year, several law school graduates are devastated to discover that, for reasons having nothing to do with the bar examination, they will not be permitted to practice law.⁸¹ Given the significant time and investment in obtaining a

72. *Id.*

73. *Id.* at 925.

74. *Id.*

75. *Id.* at 925–26.

76. *In re Anonymous*, 889 N.Y.S.2d 713, 714 (App. Div. 2009) (per curiam).

77. *See id.*; *see also In re Anonymous*, 875 N.Y.S.2d at 926.

78. *See In re Anonymous*, 875 N.Y.S.2d at 926.

79. *See In re Burke*, 775 S.E.2d 815, 817 (N.C. 2015).

80. *See Reese v. Bd. of Comm’rs*, 379 So. 2d 564 (Ala. 1980).

81. *See* Leslie C. Levin, *The Character and Fitness Inquiry: Can We Predict “Problem” Lawyers?*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session3_can_we_predict_problems.pdf [<https://perma.cc/2K95-QPQY>].

law school education,⁸² being denied admission can have a devastating impact on a law school graduate not only in terms of finances but reputation as well. Even if the applicant eventually gains admission, that will not cure the initial impact on personal and professional relationships that are affected by news of denial.

Most bar candidates are likely aware that a criminal history may cause issues with passing a character and fitness evaluation, but many candidates may not realize that financial problems can also bar a candidate from practicing law.⁸³ Although all states have varying standards when it comes to evaluating an individual's character and fitness to practice law, many jurisdictions ask applicants questions about student debt.⁸⁴ Some states mandate that bar candidates list their student loans and provide specific information regarding the amount due and the status of each loan.⁸⁵ Most states ask candidates specific questions about student loans and also inquire as to whether individuals have ever defaulted on their loans.⁸⁶ It is difficult to understand how student loan debt is highly relevant to the practice of law,⁸⁷ as "borrowing student debt just means that someone had to do what millions of people are required to do in order to earn a law degree."⁸⁸ Despite many individuals' need to use student loans to complete a legal education, though, the denial of bar admission on grounds of student debt is not limited to Mr. Bowman in New York.

82. Law school takes an average of three years to complete and is a hefty investment. In the 2017-2018 academic year, the average cost of tuition and fees at a private law school was \$49,095 per year, compared to \$27,591 per year at a public in-state law school and \$40,725 per year at a public out-of-state law school. Ilana Kowarski, *See the Price, Payoff of Law School Before Enrolling*, U.S. NEWS (Mar. 12, 2019, 9:00 AM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-03-21/understand-the-cost-payoff-of-law-school-before-getting-a-jd> [https://perma.cc/8V2N-B3JE]. The average law school debt for a graduate amounts to \$112,776, with a high percentage of law school graduates regularly amassing more than \$150,000 in student loan debt. Julissa Treviño, *What Is the Average Law School Debt?*, NITRO (May 13, 2019), <https://www.nitrocollege.com/blog/average-law-school-debt> [https://perma.cc/DA9F-A7CK]. At certain law schools, 90% of graduates graduate with student loan debt. *Id.*

83. See Jordan Rothman, *The Bar Character and Fitness Process Is Flawed When It Comes to Student Loans*, ABOVE THE LAW (June 20, 2018, 2:14 PM), <https://abovethelaw.com/2018/06/the-bar-character-and-fitness-process-is-flawed-when-it-comes-to-student-loans/> [https://perma.cc/9XJL-GX9D].

84. *Id.*

85. *Id.*

86. *Id.*

87. Perhaps some may argue that loan balances can be indicative of a lawyer who would make poor business decisions, take too much financial risk, or even be incentivized to appropriate client funds to cover his debts. The first two arguments would be mere questions about how good of a businessman or businesswoman the lawyer would be, which does not appear to be a relevant *ethical* inquiry. Such considerations would be particularly irrelevant in situations when the lawyer has no plans to lead a firm of his own but merely make a salary at the firm of another or by working with a government office. The final argument, that a lawyer may be tempted to appropriate client funds to cover his debts, seems to presuppose a serious violation simply because of a potential motive. It would be troubling indeed if bar applicants were to be excluded for the mere existence of a possible motive, since potential motives exist with respect to many vices, with or without the pressure of student debt, and since character and fitness panels could use the existence of such motives in an arbitrary and random manner to exclude any applicant with whom they take issue.

88. Rothman, *supra* note 83.

In Ohio, another applicant's student loan debt appeared to be the primary reason the applicant failed to display the character and fitness required to join the Ohio Bar.⁸⁹ Hassan Griffin applied to take the February of 2010 Ohio Bar Examination.⁹⁰ The Columbus Bar Association Admissions Committee reviewed Mr. Griffin's application and NCBE report and interviewed him.⁹¹ In December of 2009, the Committee issued a report "certifying that the applicant possessed the character, fitness, and moral qualification required for admission to the practice of law and recommended that the applicant be approved."⁹² However, the Board of Commissioners on Character and Fitness was concerned about Mr. Griffin's finances and therefore launched an investigation into his debt.⁹³

The Ohio Supreme Court discovered that Mr. Griffin owed approximately \$170,000 in student loans when he graduated from law school.⁹⁴ Mr. Griffin also owed \$16,500 in credit card debt, although the credit card debt seemed far less concerning to the Court than his student loans.⁹⁵ Since finishing his first year of law school, Mr. Griffin had worked part-time at the Franklin County Public Defender's Office, earning \$12 per hour, and he had not made any payments on his student loans.⁹⁶ Based on these facts, the Court found that Mr. Griffin had "neglected his personal financial obligations by electing to maintain his part-time employment with the Public Defender's Office in the hope that it will lead to a full-time position upon passage of the bar exam, rather than seeking full-time employment," and therefore, Mr. Griffin lacked the proper character and fitness required to practice law.⁹⁷

Decisions of this sort raise legitimate questions, not only with respect to who cannot join the bar, but also with respect to all those individuals who do join the bar. It is difficult to conclude that Mr. Griffin's conduct was greatly immoral: it is true that he did not pay a debt that he owed (presumably because he could not with only part-time employment), but that seems to bear little relation as to whether he would be a dishonest, unjust, and unethical lawyer. In fact, Mr. Griffin's employment at the Public Defender's Office, where law school graduates can work for ten years after graduation to earn student loan forgiveness,⁹⁸ was probably a sound financial decision. Nevertheless, that did not seem to fit into the calculus of the Ohio Supreme Court.⁹⁹

Surprisingly, the above is not the most alarming part of the Court's decision: the Court did not (and likely could not) cite any evidence that suggests failure to repay student loans correlates with unethical conduct as a lawyer.¹⁰⁰ Furthermore, it

89. See *In re Griffin*, 128 Ohio St. 3d 301, 2011-Ohio-20, 943 N.E.2d 1008, at ¶ 1 (per curiam).

90. *Id.* at 301, 2011-Ohio-20 ¶ 2, 943 N.E.2d at 1008.

91. *Id.* at 301, 2011-Ohio-20 ¶ 2, 943 N.E.2d at 1008–09.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 302–03, 2011-Ohio-20 ¶ 9, 943 N.E.2d at 1010.

98. See *Public Service Loan Forgiveness Program*, FED. STUDENT AID: AN OFF. OF THE U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> [https://perma.cc/LCK9-2Q3R].

99. See *Griffin*, 128 Ohio St. 3d at 303, 2011-Ohio-20 ¶ 10, 943 N.E.2d at 1010.

100. See *id.* at 303, 2011-Ohio-20 ¶ 9, 943 N.E.2d at 1010.

seems particularly unjust to Mr. Griffin to be denied admission for working part-time, since this was likely the most he could do to later obtain full-time employment and eventually gain loan forgiveness.¹⁰¹ Finally, in light of some of the earlier cases discussed above, which ultimately led to the admission of far more culpable candidates to the bar,¹⁰² it is difficult to justify the denial of admission to Mr. Griffin as well as to any future law school graduates who will face similar struggles upon exiting law school.¹⁰³

B. Mental Health and Substance Abuse

Unlike the aforementioned Mr. Bowman, Atticus¹⁰⁴ passed the bar examination on his first attempt, and submitted his character and fitness application.¹⁰⁵ Atticus provided the Character and Fitness Committee with all requested records and was then invited to attend an in-person interview.¹⁰⁶ The interviewer asked Atticus if his parents had been divorced, following up the question with whether Atticus was currently taking any medication and if he saw a psychologist.¹⁰⁷ Atticus truthfully disclosed to the interviewer that his parents were divorced and he was seeing a psychologist to obtain medication for Attention-Deficit/Hyperactivity Disorder (“ADHD”).¹⁰⁸ After this disclosure, the Committee on Character and Fitness required Atticus to meet with a Committee psychologist for a mental health evaluation to determine whether he was “prepared to practice” law.¹⁰⁹ The Committee then mandated that Atticus also have weekly therapy sessions for six months with a private therapist that he was forced to pay for himself.¹¹⁰ The private therapist would provide the Committee with monthly progress reports, as well as

101. As many law school graduates discover, working for the public defender’s office upon graduation is hardly easy and often involves a significant time commitment along with the accompanying dangers of having unsatisfied clients with criminal backgrounds. These are challenges that many higher-paid lawyers never face, and many would commend Mr. Griffin for choosing a profession that provides such an important service to indigent criminal defendants without the compensation public defenders likely deserve. Once again, in the eyes of a different evaluator of character, Mr. Griffin’s choice might be considered an ethical one rather than the opposite.

102. See *In re Burke*, 775 S.E.2d 815 (N.C. 2015); *Reese v. Bd. of Comm’rs*, 379 So. 2d 564 (Ala. 1980).

103. Law school tuition, like collegiate tuition in general, has continued to rise, requiring many aspiring lawyers to take on more and more debt to obtain a degree. See *Understanding the Rising Costs of Higher Education*, BEST VALUE SCH., <https://www.bestvalueschools.com/understanding-the-rising-costs-of-higher-education/> [https://perma.cc/5ZFC-Z4S5]. Ironically, it is likely that the existence of student loan options has increased the cost of tuition, placing law students into a Catch-22 situation: either they forsake their dreams of becoming a lawyer or they take out massive student loans that, in the eyes of the wrong evaluator of character, may prevent the individual from ever becoming a lawyer due to initial inability to pay.

104. This individual’s name has been changed to reference the fictional lawyer Atticus Finch due to privacy concerns.

105. Cuban, *supra* note 13.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

with a follow-up evaluation, at the end of the six month period.¹¹¹ Atticus was finally licensed to practice law two long years after passing the bar examination, losing not only the fees he was forced to incur for the therapist's services, but also, and most importantly, years of salary and experience he would have otherwise gained.¹¹²

Keep in mind, while the mental stability of a bar applicant may be an important indicator of his or her future ability to represent clients in stressful situations, there was no indication that Atticus's case warranted this type of attention.¹¹³ First, the Committee on Character and Fitness had a significant amount of history on Atticus, including his admission to and graduation from law school.¹¹⁴ There was no hint of misconduct that could be connected to ADHD, his parents' divorce, or otherwise.¹¹⁵ There was no indication that this aspiring lawyer, who possessed all the knowledge and poise of someone who could graduate from law school and pass the bar examination without incident, needed to be psychologically monitored by the bar.¹¹⁶ There was even less indication that he deserved to be held back from practicing law for two years, losing out on valuable experience, 24 months of earnings, and the ability to claim the sought-after prize of most people who successfully obtain a law degree: admission to the state bar.¹¹⁷ Whether a decision like this would have survived constitutional scrutiny by the state or the United States Supreme Court remains to be seen, but it seems that Atticus faced requirements to join the state bar that proved more severe than some of the punishments often levied on lawyers who actually commit misconduct.¹¹⁸

Despite Atticus's delay in admission, he may be considered fortunate, as he was ultimately admitted to the bar.¹¹⁹ Although the proportion of applicants that are denied admission to the bar for character and fitness reasons is small, estimated at one in five-hundred, the requirement demands a large investment in time and money and is extremely significant for those individuals who are denied admission.¹²⁰ Notwithstanding concerns that questions relating to mental health conditions and substance abuse may violate the Americans with Disabilities Act, most character and

111. *Id.*

112. *Id.*

113. *See id.* There are many important reasons mental health plays a role in determining attorney fitness, one of them being the increased propensity to engage in activity that runs afoul of the law. Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way to Treatment*, 20 NEV. L.J. 547, 553–55 (2020); Samantha M. Caspar & Artem M. Joukov, *Worse Than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution*, 47 HASTINGS CONST. L.Q. 499, 504 (2020) (“Many [mental] illnesses have the potential to result in criminal misconduct[.]”). If the profession wishes to project the appearance that lawyers uphold the law, it may be expedient to apply scrutiny to characteristics that correlate with unlawful conduct.

114. *See* Cuban, *supra* note 13.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2002).

119. *See* Cuban, *supra* note 13; Melody Moezzi, *Lawyers of Sound Mind?*, N.Y. TIMES (Aug. 5, 2013), <https://www.nytimes.com/2013/08/06/opinion/lawyers-of-sound-mind.html> [https://perma.cc/7228-2LY5].

120. *See* Rhode, *supra* note 15, at 520–21, 546.

fitness questionnaires include such questions.¹²¹ Several states have narrowed their questions to require applicants to disclose mental health issues that have occurred during specific time periods, such as during the past five years, or inquire into only severe psychiatric disorders, such as bipolar disorder or schizophrenia.¹²² Other states may ask only about current conditions that may impair the individual's ability to practice law.¹²³

Yet let us return to student debt for a moment, since this will likely impact law applicants far more severely in the future due to its prevalence in higher education. One of the main purposes of the character and fitness requirement is to protect the public from dishonest and incompetent attorneys,¹²⁴ and this Article does not debate the importance of this goal. It is typical for attorneys to handle large amounts of client money and also commonly serve as fiduciaries that are entrusted with managing clients' assets.¹²⁵ Dishonest attorneys may further "take advantage of unsophisticated clients when billing hours."¹²⁶ Therefore, a bar applicant with a serious criminal history should be heavily scrutinized.¹²⁷

In fact, this is where we draw a distinction between the solutions we propose and those suggested by Lusk. Lusk states that inquiry into prior criminal misconduct runs contrary to Federal Rule of Evidence 404, and thereby should be omitted from the character and fitness inquiry altogether.¹²⁸ She argues that this disproportionate focus on the past is inappropriate in determining whether an applicant should be admitted because it would be impermissible, at trial, to introduce a suspect's prior crimes to prove the one currently in dispute.¹²⁹ Rather, she suggests that character and fitness panels focus on conduct more closely related to the profession and closer to the date of consideration.¹³⁰ We differ with respect to her interpretation of Rule 404 and with respect to how action-in-conformity principles should apply in character and fitness inquiries.

First, Federal Rule of Evidence 404 and its state counterparts (which might be more relevant for state bar inquiries) would not exclude the character evidence to which Lusk objects.¹³¹ Evidence of prior bad acts may generally forbid parading past

121. Dunnewold, *supra* note 10, at 17.

122. *Id.*

123. *Id.*

124. Andrew Hall, *Failing Character and Fitness Due to Law School Debt*, 56 ARIZ. L. REV. 589, 595 (2014). The board of bar examiners "assumes that a history of prior unlawful conduct, dishonesty, or lack of trustworthiness is a significant factor in predicting future dishonesty or misconduct as a practicing lawyer." Richard R. Jr. Arnold, *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 67–68 (1997).

125. See Hall, *supra* note 124, at 595.

126. *Id.* at 596.

127. See *id.* We focus on serious criminal history, since we recognize that criminal history in general is not difficult to acquire within the American legal system. *Gamble v. United States*, 139 S. Ct. 1960, (2018) (Gorsuch, J., dissenting) ("[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime") (quoting and citing William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 ALA. LAW. 225 (July 2015). *Republished by the MISES INSTITUTE.*).

128. Lusk, *supra* note 2, at 348, 367, 369, 376–78.

129. *Id.*

130. Lusk, *supra* note 2, at 378–82, 388–90.

131. THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 84–112 (5th ed. 2012) ("Character or a trait of character is sometimes, though infrequently, an 'essential element' of a charge

acts before the finder of fact to prove the one in question; however, this is not the case when *character is at issue* (including the character trait of honesty and integrity, for example).¹³² Since character is naturally determined by the sum of prior acts, prior acts become both relevant and admissible.¹³³ This conclusion can be substantiated by several examples, notably in self-defense: if the alleged murder victim in the case had a character reputation for violence known to the defendant, and the defendant killed to defend himself due to fear of this reputation, the reputation is relevant and admissible.¹³⁴ Acts that led to the formation of an opinion by the defendant of the victim's propensity for violence (or the formation of the victim's reputation for violence within the community), may also be admissible.¹³⁵ In other cases, such as child custody, prior misdeeds toward the children would certainly be considered in determining whether the character of the parent is one where he or she should retain custody.¹³⁶ Finally, the Federal Rules of Evidence evaluate the honesty of a witness, in part, by relying on his or her misdeeds.¹³⁷ Convictions are of particular interest.¹³⁸ Hence, relying on similar instances of past

claim or defense. In these circumstances, where character itself is at the heart of a charge, claim, or defense, such evidence is admissible, both in civil and criminal cases. . . .") (citing *Hampton v. United States*, 425 U.S. 484 (1976)). See FED. R. EVID. 405 (permitting proof of character by reputation, opinion, or specific acts); DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 317–87 (2d ed. 2008) ("[T]he substantive law sometimes makes character an issue in a case, making its admission necessary. . . . If evidence law categorically prohibited all such evidence, the fact-finder would be shielded from much useful—and even occasionally required—information."); STEVEN I. FRIEDLAND ET AL., EVIDENCE: LAW AND PRACTICE 91–125, 140–223 (4th ed. 2010); Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL ADVOC. 459, 471 n.60 (2018); Artem M. Joukov, *Isn't That Hearsay Anyway?: How the Federal Hearsay Rule Can Serve as a Map to the Confrontation Clause*, 63 WAYNE L. REV. 337, 358 n.125 (2018); Knapp v. State, 79 N.E. 1076 (1907); see generally *Michelson v. United States*, 335 U.S. 469 (1948); see generally *Huddleston v. United States*, 485 U.S. 681 (1988). For other rules of evidence that permit the introduction of prior bad acts to establish traits like credibility, honesty, and integrity, we refer the reader to FED. R. EVID. 607–609 (permitting impeachment by reputation of dishonesty, opinion of dishonesty, prior instances of dishonesty, and prior criminal convictions). Furthermore, FED. R. EVID. 1101–03 limit the applicability of the Federal Rules of Evidence in ways that exclude character and fitness determinations. While some rules of evidence might be followed within character and fitness hearings, it is clear that character and fitness panels are not bound by state or federal evidence rules. Hence, inconsistency between the Federal Rules of Evidence and the evidence considered by character and fitness panels may not be a sound basis to argue against the consideration of such evidence.

132. MAUET & WOLFSON, *supra* note 131; *Hampton*, 425 U.S. 484. See FED. R. EVID. 405 (permitting proof of character by reputation, opinion, or specific acts); LEONARD & GOLD, *supra* note 131; STEVEN I. FRIEDLAND ET AL., *supra* note 131; FED. R. EVID. 607–609.

133. *Id.*

134. MAUET & WOLFSON, *supra* note 131; *Hampton*, 425 U.S. 484. See FED. R. EVID. 405 (permitting proof of character by reputation, opinion, or specific acts); LEONARD & GOLD, *supra* note 131; STEVEN I. FRIEDLAND ET AL., *supra* note 131; Knapp, 79 N.E. 1076.

135. MAUET & WOLFSON, *supra* note 131; *Hampton*, 425 U.S. 484. See FED. R. EVID. 405 (permitting proof of character by reputation, opinion, or specific acts); LEONARD & GOLD, *supra* note 131; STEVEN I. FRIEDLAND ET AL., *supra* note 131.

136. *Id.*

137. FED. R. EVID. 607–609.

138. FED. R. EVID. 609.

conduct to determine the honesty of a future lawyer hardly runs afoul of the Federal Rules of Evidence.¹³⁹

Furthermore, Lusk's analysis of the Federal Rules of Evidence rules may be too reliant on a comparison to a trial for an already-committed crime. The character and fitness inquiry, however, is not designed to try a lawyer for *past* crimes but to determine whether *future* harm is likely to occur. This is a more speculative inquiry, to be sure, but it is precisely the kind of inquiry where character evidence is important. Just like a judge determining which parent should receive custody based on prior misconduct, the idea is to rely on the past to avoid a disastrous future.¹⁴⁰ Of course, the only study worth mentioning on the prediction accuracy of the character and fitness process shows only slight predictive value for lawyer misconduct based on prior crimes.¹⁴¹ Purely from the perspective of Rule 404, however, the evidence can be made available to the fact-finder without breaching evidence principles.¹⁴²

Turning back to debt, which courts and character and fitness committees now apparently view as negatively as past criminal acts, we would argue that the imposed standards risk exposing a broad range of applicants to undue scrutiny. There is a significant difference between an individual who takes out a personal loan to live lavishly beyond what he or she can afford and an individual who takes out student loans for the purpose of increasing his or her earning potential by seeking the necessary education to join the legal profession. There is sufficient reason to be wary of entrusting the former with clients' assets, but the latter should not be considered irresponsible. Rather, "one could well argue that if anything, it tends to show that he is responsible—he is taking initiative to better himself and improve his outlook through education, in reliance on data showing that despite all the naysayers, a [*Juris Doctor* degree] still greatly increases average lifetime earning potential."¹⁴³

Incurring high levels of student debt, even from a law school that has poor job placement statistics, is not necessarily considered financially irresponsible. For example, Mr. Bowman or Mr. Griffin may have incurred high levels of student debt in reliance on the federal Public Service Loan Forgiveness Program.¹⁴⁴ Yet, this potential factor was not one that either court considered in their respective cases.¹⁴⁵ The fact that these students entered into a voluntary, legal transaction with either the United States Government or another loan servicer should not be held against them:

139. MAUET & WOLFSON, *supra* note 131; *Hampton*, 425 U.S. 484. See FED. R. EVID. 405 (permitting proof of character by reputation, opinion, or *specific acts*); LEONARD & GOLD, *supra* note 131; STEVEN I. FRIEDLAND ET AL., *supra* note 131; FED. R. EVID. 607–609.

140. MAUET & WOLFSON, *supra* note 131, at 87 (“[I]n a child custody case, one parent may offer evidence of the violent character of the other parent. It is offered to prove the parent is unfit because the parent is violent.”); LEONARD & GOLD, *supra* note 131; STEVEN I. FRIEDLAND ET AL., *supra* note 131.

141. Lusk, *supra* note 2, at 378–82, 388–90; *But see* MAUET & WOLFSON, *supra* note 131, at 87 (“Common experience tells us that a person is likely to act consistently with the kind of person he really is: his ‘character.’”).

142. MAUET & WOLFSON, *supra* note 131; *Hampton*, 425 U.S. 484. See FED. R. EVID. 405 (permitting proof of character by reputation, opinion, or *specific acts*); LEONARD & GOLD, *supra* note 131; STEVEN I. FRIEDLAND ET AL., *supra* note 131; FED. R. EVID. 607–609.

143. Hall, *supra* note 124, at 596 (italics deleted).

144. See *Public Service Loan Forgiveness Program*, *supra* note 98.

145. See *In re Griffin*, 128 Ohio St. 3d 300, 2011-Ohio-20, 943 N.E.2d 1008; *In re Anonymous*, 875 N.Y.S.2d 925 (2009) (per curiam).

it certainly would not be held against admitted lawyers who just fell upon hard times and could not repay their debts.¹⁴⁶ When the often wealthy lawyers who sit on character and fitness panels deny admission to law school graduates impoverished by several years of very expensive education, it creates the appearance of the haves laying a trap for the have-nots: something state bars nationwide should seek to avoid. Furthermore,

it is difficult to miss the irony of bar applicants being rejected precisely because of their bar application preparation efforts, namely attending law school at great cost. Courts and committees are essentially telling applicants they cannot practice law to earn money because they borrowed a lot of money to prepare to practice law.¹⁴⁷

The New Hampshire Supreme Court stated in *In re G.W.* that “the duty to pay one’s debts is not contingent upon finding the employment of one’s choice.”¹⁴⁸ However, “in an age where six-figure law school debt is already the rule rather than the exception, and where wages at nonlegal middle-class jobs have long stagnated in real terms, that is an unsatisfying argument.”¹⁴⁹ A Kentucky judge wondered “how a young law graduate with poor parents and a substantial student loan debt is expected to earn the money to pay that debt if denied the opportunity to practice the profession which was the *raison d’être* for the incurrence of the debt.”¹⁵⁰ Routine denial of admission on these grounds carries the danger of taking character and fitness panels back to the time when the wealthy were easily granted access to become barristers while the poor received no such deference.¹⁵¹

C. Objections to Testing During COVID-19?

Finally, and perhaps most alarmingly, there have been discussions of potential character and fitness implications for law students simply advocating to be admitted on the basis of their law school diploma.¹⁵² This advocacy arises from an obvious national (and worldwide) emergency: the spread of COVID-19.¹⁵³ This virus, commonly referred to as Coronavirus, has spread like wildfire across the United States, disrupting business activity both due to the illnesses and deaths of workers and due to government regulations on business practices and quarantines.¹⁵⁴

146. The authors are aware of no Model Rule of Professional Conduct that would impose sanctions on lawyers who are poor managers of their own personal debts, even if they ultimately go bankrupt or cannot repay what they owe. Just because a lawyer is bad with money does not make him or her a bad or unethical lawyer.

147. Hall, *supra* note 124, at 597.

148. 13 A.3d 194, 199 (N.H. 2011).

149. Hall, *supra* note 124, at 597.

150. Character & Fitness Comm. Off. of Bar Admissions v. Jones, 62 S.W.3d 28, 33 (Ky. 2001) (Cooper, J., dissenting).

151. Lusk, *supra* note 2, at 350; Rhode, *supra* note 15, at 494–95.

152. Patrice, *supra* note 3; Morey, *supra* note 3.

153. Patrice, *supra* note 3; Morey, *supra* note 3.

154. *Coronavirus: A timeline of how the deadly COVID-19 outbreak is evolving*, PHARMACEUTICAL TECHNOLOGY (May 11, 2020), <https://www.pharmaceutical-technology.com/news/coronavirus-a->

Because of these problems, the transmission of the virus from person-to-person in enclosed spaces via droplets, the high number of infected and potentially infected members of the United States population, and the highly contagious nature of the disease, some law school graduates voiced objections to taking the bar examination locked in a room full of thousands of strangers for two to three days.¹⁵⁵ After all, if the virus justified the release of hardened criminals from jails and prisons, and justified the prosecution of otherwise innocent individuals for quarantine violations, why would it not justify the release of law students from a room where they were almost guaranteed to become ill?¹⁵⁶

timeline-of-how-the-deadly-outbreak-evolved [https://perma.cc/QJ6D-H2CC]; Caroline Kantis, et. al, *Updated: Timeline of the Coronavirus*, THINK GLOBAL HEALTH (Apr. 2020), <https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus> [https://perma.cc/TD8H-FXY4]; Aylin Woodward, *You're less likely to catch the coronavirus outdoors, but the amount of time you spend near other people matters most*, BUSINESS INSIDER (May 17, 2020), <https://www.businessinsider.com/risk-of-coronavirus-transmission-lower-outdoors-evidence-2020-5> [https://perma.cc/VRU7-DM2Z]; Julie Mazziotta, *The Risk of Getting Coronavirus Outdoors is Low — If Precautions Are Taken*, PEOPLE HEALTH (May 18, 2020), <https://people.com/health/risk-getting-coronavirus-outdoors-low-with-precautions> [https://perma.cc/ZJ37-DC6H]; Sigal Samuel, *Why you're unlikely to get the coronavirus from runners or cyclists*, VOX (June 3, 2020), <https://www.vox.com/future-perfect/2020/4/24/21233226/coronavirus-runners-cyclists-airborne-infectious-dose> [https://perma.cc/XD94-6U7E]; Erin Billups, *Risk of Coronavirus Transmission is Lower Outdoors, Experts Say*, BAY NEWS 9 (May 22, 2020), <https://www.baynews9.com/fl/tampa/coronavirus/2020/05/21/risk-of-coronavirus-transmission-is-lower-outdoors-experts-say> [https://perma.cc/P2WW-BM65]; *Does Coronavirus Spread Outside*, ROCHESTER REGIONAL HEALTH (May 29, 2020), <https://www.rochesterregional.org/news/2020/05/coronavirus-spread-outside> [https://perma.cc/8F59-4U2X]; Kea Wilson, *Chinese Study Finds Outdoor Activities Safe From COVID*, STREETBLOG USA (May 15, 2020), <https://usa.streetsblog.org/2020/05/15/chinese-study-finds-outdoor-activities-safe-from-covid> [https://perma.cc/5FWQ-S9QW]; Holly Yan & Scottie Andrew, *You asked, we're answering: Your top coronavirus questions*, CNN (June 26, 2020), <https://www.cnn.com/interactive/2020/health/coronavirus-questions-answers> [https://perma.cc/4ZQQ-ZBM8].

155. Patrice, *supra* note 3; Morey, *supra* note 3.

156. Allison Schaefer, *California honeymooners arrested for violating Hawaii mandatory passenger quarantine*, STAR ADVERTISER (May 1, 2020), <https://www.staradvertiser.com/2020/05/01/breaking-news/california-honeymooners-arrested-for-violating-hawaii-mandatory-passenger-quarantine> [https://perma.cc/5TKK-R222]; Kevin Johnson & Richard Wolf, *Enforcing the shutdown: Law enforcement grapples with policing stay-at-home orders, social distancing, quarantines*, USA TODAY (Apr. 2, 2020), <https://www.usatoday.com/story/news/politics/2020/04/02/coronavirus-police-fines-jail-breaking-stay-home-orders/5104704002> [https://perma.cc/4QYA-XADB]; Robert Gearty, *3 Massachusetts golfers arrested for violating Rhode Island coronavirus quarantine order: police*, FOX NEWS (Apr. 4, 2020), <https://www.foxnews.com/us/3-massachusetts-golfers-arrested-for-violating-rhode-island-coronavirus-quarantine-order-police> [https://perma.cc/VS86-VYRX]; Jason Murdock, *Florida Man Breaks Quarantine Order to Travel Around Hawaii, is Arrested by Police*, NEWSWEEK (Apr. 2, 2020), <https://www.newsweek.com/florida-man-breaks-hawaii-coronavirus-quarantine-arrested-kauai-police-1495672> [https://perma.cc/E5RZ-5FRH]; Lee Brown, *SWAT team arrests armed 'vigilantes' defying lockdown in Texas Bar*, NEW YORK POST (May 6, 2020), <https://nypost.com/2020/05/06/swat-team-arrests-armed-vigilantes-helping-bar-defy-lockdown> [https://perma.cc/C4ZB-MXGG]; David K. Li, *Dallas salon owner gets 7 days in jail for reopening during coronavirus lockdown*, NBC NEWS (May 5, 2020), <https://www.nbcnews.com/news/us-news/dallas-salon-owner-gets-7-days-jail-reopening-during-coronavirus-n1200836> [https://perma.cc/4J4U-2AMX]; Fletcher Page, *Hamilton County Prosecutor Joe Deters on stay-at-home violators: 'Sit your butt in a jail'*, FOX19NOW.COM (Apr. 5, 2020), <https://www.fox19.com/2020/04/05/hamilton-county-prosecutor-joe-deters-stay-at-home-violators-sit-your-butt-jail> [https://perma.cc/6VUF-4B4G]; Cameron Knight, *Deters hopes felony charge and high bond for corona-order violator sets example*, CINCINNATI.COM (Apr. 6, 2020),

Yet, this advocacy by the students was decried by at least one school: Wayne State University in Michigan.¹⁵⁷ The school sent out a warning, telling the students that their advocacy may create problems for them on the character and fitness portion of their application to join the state bar.¹⁵⁸ When a law school, which is full of highly educated legal scholars and likely many past and current practitioners, has to warn students that they might receive additional scrutiny due to their free speech concerning a highly relevant matter of public and policy concern, there is a clear problem.¹⁵⁹ Law students should not be fearful of advocating to lessen the spread of a serious, deadly disease.¹⁶⁰ Not only is there an overriding threat to life and health, but students have a First Amendment right to advocate for reasonable changes to the admissions process.¹⁶¹ The fact that anyone's admission status could even be conceivably threatened by a character and fitness panel simply because of

<https://www.cincinnati.com/story/news/2020/04/06/deters-hopes-felony-charge-and-high-bond-corona-order-violator-sets-example/2954955001> [https://perma.cc/Z2RB-QZ35]; Sharon Coolidge, *Court filing: Man in OTR gathering video punished more harshly because he's black*, CINCINNATI.COM (Apr. 6, 2020), <https://www.cincinnati.com/story/news/2020/04/14/court-filing-black-man-violating-stay-home-order-punished-unfairly/2982831001> [https://perma.cc/4SSZ-BSXD]; Dominick Mastrangelo, *'Sit your butt in a jail': Ohio prosecutor has 'no patience for' violators of stay-at-home order*, WASHINGTON EXAMINER, (Apr. 5, 2020), <https://www.washingtonexaminer.com/news/sit-your-butt-in-a-jail-ohio-prosecutor-has-no-patience-for-violators-of-stay-at-home-order> [https://perma.cc/S3DS-3FVC]; Scott Morefield, *Ohio Prosecutor To Stay-At-Home Violators: 'You Can Sit There And Kill Yourself' In Jail*, DAILY CALLER (Apr. 2020), <https://dailycaller.com/2020/04/05/ohio-prosecutor-joe-deters-stay-at-home-kill-yourself-violators-coronavirus> [https://perma.cc/JEG2-4HZU]; John Eligon, *'It's a Slap in the Face': Victims Are Angered as Jails Free Inmates*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/us/coronavirus-jail-inmates-released.html> [https://perma.cc/9UTC-SJPU]; Ernesto Londono et al., *As Coronavirus Strikes Prisons, Hundreds of Thousands Are Released*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/26/world/americas/coronavirus-brazil-prisons.html> [https://perma.cc/W4RH-L5XW]; Timothy Bella, *Inmates tried to infect themselves with the coronavirus to get early release, Los Angeles County sheriff says*, WASH. POST (May 12, 2020), <https://www.washingtonpost.com/nation/2020/05/12/inmates-coronavirus-infect-los-angeles> [https://perma.cc/B85M-WJFJ]; Nick Givas, *Over 16K US inmates have been released as coronavirus crisis has progressed*, FOX NEWS (Apr. 16, 2020), <https://www.foxnews.com/us/here-is-how-many-prisoners-have-been-released-covid-19> [https://perma.cc/UHZ5-WBEL]; Katelyn Newman, *For Prisoners Released Due to COVID-19, a Different World Awaits*, U.S. NEWS (Apr. 15, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-04-15/prisoners-released-due-to-coronavirus-enter-a-different-world>; Jonathan Choe, *Prisoners released from facilities to limit COVID-19 spread arrested again for crimes*, KOMONEWS (May 8, 2020), <https://komonews.com/news/coronavirus/prisoners-released-from-facilities-to-limit-covid-19-spread-arrested-again-for-crimes> [https://perma.cc/BSW8-93U7]; Marisa Kendall, *Coronavirus: Mass jail, prison releases leave some Bay Area inmates on the streets*, THE MERCURY NEWS (Apr. 27, 2020), <https://www.mercurynews.com/2020/04/27/coronavirus-mass-jail-prison-releases-leave-some-inmates-on-the-streets> [https://perma.cc/H5H7-QUS9]; Emily Hoerner, *Hundreds of Illinois prisoners released as COVID-19 spreads, but few elderly see reprieve*, INJUSTICEWATCH (May 6, 2020), <https://www.injusticewatch.org/news/prisons-and-jails/2020/hundreds-of-illinois-prisoners-released-as-covid-19-spreads-but-few-elderly-see-reprieve> [https://perma.cc/TJV6-ZVLF].

157. Patrice, *supra* note 3; Morey, *supra* note 3.

158. Patrice, *supra* note 3; Morey, *supra* note 3.

159. Patrice, *supra* note 3; Morey, *supra* note 3.

160. Patrice, *supra* note 3; Morey, *supra* note 3.

161. Patrice, *supra* note 3; Morey, *supra* note 3.

verbal objections perfectly encapsulates the problem.¹⁶² If law school leadership feels the need to actually send a warning to its students about the power of character and fitness panelists to punish the students for speaking, then perhaps it is time that this power is curtailed to avoid chilling the freedoms of expression and speech.¹⁶³

III. PART III: PROPOSED CHANGES TO THE CHARACTER AND FITNESS PROCESS

The character and fitness process that impacts aspiring bar applicants across the United States leaves more to be desired. It appears that in some instances, lawyers are less willing to afford applicants to their profession the very rights to due process and equal protection that the legal profession insists on for everyone else.¹⁶⁴ This is not just ironic — it is plainly wrong and perhaps even unconstitutional.¹⁶⁵ The fact that most legal applicants do not encounter significant problems with the character and fitness portion of their applications¹⁶⁶ should not lessen the resolve to change this system: while current victims are few, the system leaves the possibility for many more in the future.¹⁶⁷ Since when should we have to wait until the number of unfairly treated individuals has reached a critical mass to stop an injustice from happening? As legal professionals, we should act now to cure the wrongs of the past and to prevent their reoccurrence in the future.

Unfortunately, practicing lawyers who themselves have survived the scrutiny of the bar might feel it is a rite of passage. More cynically, some practitioners may view it as an opportunity to exclude future competitors from the profession.¹⁶⁸ Others may look to the low number of denials as a sign that the process is working smoothly and as intended.¹⁶⁹ Hence, the proposed solutions we include below have the benefit of novelty but may lack the popular support necessary to be codified in statute, bar rules, or constitutional case law. This Article endeavors to argue in favor of these solutions, however, since it is clear that leaving the system “as is” does not result in a fair outcome.

First, we should attempt to articulate what the legal profession should require of a fair set of rules governing admission. Law schools should not be left wondering whether their law students would be denied bar admission for advocating

162. Patrice, *supra* note 3; Morey, *supra* note 3.

163. Patrice, *supra* note 3; Morey, *supra* note 3.

164. See Theresa Keeley, Comment, *Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level*, 6 U. PA. J. CONST. L. 844 (2004).

165. *Id.* at 871.

166. Rhode, *supra* note 15, at 517.

167. See *id.*

168. Rhode, *supra* note 15, at 502 (“As examiners frequently argued, with an overcrowded bar and an abundance of candidates who have unquestioned character, any doubts should be resolved against admission.”) (internal citations and quotations omitted).

169. Rhode, *supra* note 15, at 516–17. In today’s popular literary culture, this should draw comparison to the Hunger Games: the system must be working, since only a few tributes are selected proportionally to the population, and even those selected still have some chance of survival. Likewise, only a few lawyers find themselves excluded by character and fitness committees, and they will have some chance of gaining admittance upon appeal to state (or federal) courts.

against dangerous testing practices in the time of COVID-19, for example.¹⁷⁰ The rules should be clear. Law students should not be left guessing what conduct is acceptable, what conduct is not acceptable, and the varying nature of penalties that might accompany the various types of potential misconduct. Second, the rules governing both the application for bar membership and the evaluation of applications should be narrowly tailored to screen for “good moral character.” This suggested requirement sounds somewhat obvious, but it is clear that prior character inquiries have gone well beyond the question of “good moral character,” almost always to the detriment of the bar applicant.¹⁷¹ The narrow tailoring requirement would also apply to the collection of information: law students should not be required to submit voluminous applications if the volume does nothing or almost nothing to aid in character evaluation except raise its cost.

Thirdly, character and fitness panels should have some “skin in the game.” Specifically, if decisions by a particular member of a character and fitness panel are overturned a significant number of times, it is entirely proper for that panelist to be removed from future panels because his or her ethical compass does not accurately reflect the ethical standards of the profession. Additionally, state bar rules should significantly limit the amount of time the bar or the character and fitness panel has to evaluate an application: an applicant’s career should not be placed on hold for months if not years simply due to the failure of the bar to timely evaluate an application. Such delay is not the applicant’s fault, and to deprive the applicant of a significant property right to practice his or her profession due to a dragging evaluation process is the definition of putting blame where it does not belong.

Finally, more comprehensive reforms might become necessary if lawyers are unwilling to properly police their profession via bar rules or statutes, perhaps even involving the United States Supreme Court. As history has demonstrated, the Court speaks on the subject of bar admissions rarely, but it has not been shy about striking down unreasonable bar requirements.¹⁷² Given the right case, the United States Supreme Court might do so again, even if its ruling only impacts a handful of aspiring lawyers each year.¹⁷³

A. Clearly Defined Requirements

The specific meaning of “good moral character” is somewhat of a mystery, as the application of this requirement is inconsistent among states, and even within states.¹⁷⁴ In fact, a member of the character and fitness committee explained that

170. Patrice, *supra* note 3; Morey, *supra* note 3.

171. See, e.g., *supra* note 15, at 579 n.409 (describing an inquiry into cohabitation that apparently proved so intrusive the couple chose to marry out of expediency).

172. See *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 239 (1957) (“A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.”); see also Rhode, *supra* note 10, at 529, 566–68.

173. See *Schwartz*, 352 U.S. 232; Rhode, *supra* note 15, at 529, 566–68.

174. Michael C. Wallace, Sr., *Moral Character and Fitness Means More Than Just a Passing Score to the Board of Law Examiners*, 7 CHARLOTTE L. REV. 157 (2016). “[N]o litmus test exists by which to determine whether an applicant possesses the good moral character requisite for admission to the Bar of Maryland.” *In re James G.*, 462 A.2d 1198, 1200 (Md. 1983).

individual members of the committee may have different viewpoints on the definition of “good moral character,” and therefore, results may vary depending on the particular committee member when he or she reviews an individual’s character and fitness application.¹⁷⁵ The committee’s findings are upheld absent a finding that its decision was arbitrary or capricious.¹⁷⁶

The vague nature of the character and fitness evaluation underscores a potential hypocrisy within the legal profession.¹⁷⁷ Lawyers usually fight against vagueness, striking vague statutes as inapplicable within the criminal code,¹⁷⁸ construing vague contractual provisions against the drafter of the contract,¹⁷⁹ and in conflicts between the government and the citizen, construing vague provisions in favor of the citizen.¹⁸⁰ It seems counterintuitive to believe that all of these other parties deserve protections from vagueness, yet aspiring lawyers do not. Rather, lawyers should protect aspiring lawyers just as much as they protect everyone else.

Whatever rules or procedures state bars adopt in the future, whether mandated by case law or democratically promulgated, should include protections from the vague nature of the definition of “good moral character.” Particularly, these definitions should not be open to interpretation that could easily lead to discrimination. That includes more traditional forms of discrimination, such as race, gender, and national origin, as well as less traditional (or less recognized) forms of discrimination, including viewpoint discrimination based on written or stated opinions or beliefs,¹⁸¹ discrimination against those of lower socio-economic classes, and discrimination against individuals who lack connections in the legal profession.¹⁸² These forms of discrimination are troubling, and to leave a character and fitness panel unwatched and unguided by clear rules leaves ample room for prejudice rather than justice to decide the matter.

175. Peter Ash, M.D., *Predicting the Future Behavior of Bar Applicants*, B. EXAMINER, Dec. 2013, at 6. See also *Cord v. Gibb*, 254 S.E.2d 71, 72 (Va. 1979), for a scenario where a single female applicant cohabitated with a male, and the Character and Fitness Committee found that she lacked an honest demeanor and good moral character as a result. Although the United States Supreme Court overturned this decision, the case shows that individual committee members likely interject their own ideology when considering an individual’s application. See *id.* at 73.

176. *Chin v. N.Y. State Bd. of Law Exam’rs*, 461 N.Y.S.2d 211 (1983).

177. Mitchell M. Simon, *What’s Remorse Got to Do, Got to Do with it? Bar Admission for Those with Youthful Offenses*, 2010 MICH. ST. L. REV. 1001, 1010–11.

178. *Clarity in Criminal Statutes: The Void for Vagueness Doctrine*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/clarity-in-criminal-statutes-the-void-for-vagueness-doctrine> [<https://perma.cc/U2S5-LHQ7>].

179. James J. Sienicki & Mike Yates, *Contract Interpretation: How Courts Resolve Ambiguities in Contract Documents*, SNELL & WILMER (Mar. 13, 2012), [<https://perma.cc/URP9-VVXK>].

180. See generally *Void for Vagueness*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/void_for_vagueness [<https://perma.cc/D9RC-N594>] (presenting the void-for-vagueness doctrine in various contexts).

181. Patrice, *supra* note 3; Morey, *supra* note 3.

182. Furthermore, discrimination on the basis of political viewpoints *when voiced by groups of a particular ethnicity, race, or nationality*, would also violate the United States Constitution. Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 43, 95 (2018) (“The application of the First Amendment should be even-handed, regardless of the speakers or their national origin.”).

Well-defined rules would also provide law students with a clear map for admission: avoid these behaviors and you will receive a bar card. This is the only fair method of carrying out the character and fitness process. It is not just or honest to require aspiring lawyers to complete or nearly complete law school prior to applying for the character and fitness process, only to deny their bar applications based on conduct that the applicants could not have known would prevent admission. It is true that new types of misconduct may be invented that a clear rule does not contemplate, just as new, un contemplated immoral acts can occur prior to their criminalization. Yet this is the risk society must take, because the slight plausibility of new and unaccounted-for wrongs should not stop the law from enumerating the ones that are known. If a few lawyers engage in previously unthought-of misconduct, let them join the bar anyway: the very next year, these wrongs can be added to the list of improprieties leading to disbarment, and these lawyers would be gone from the profession as quickly as they entered it if they continue to engage in the misconduct. In return, though, the multitude of mostly law-abiding lawyers would experience the relief of having clear-cut rules leading to their admission to practice, which should be considered a worthy trade-off.

One way to do this has been staring lawyers in the face almost as long as the character and fitness process has been around: the Model Rules of Professional Conduct.¹⁸³ These rules, traditionally applied to individuals who have already joined the bar to set forth a clear and precise code of conduct, can be extended as a protection to law students. State bars should consider imposing a limitation on character and fitness panels: if the panel cannot demonstrate conduct on behalf of the applicant that would violate the Model Rules of Professional Conduct, the panel cannot deny or delay that applicant's admission. This action would officially enshrine the Model Rules of Professional Conduct as a safety-valve for students who are already required to learn these standards of conduct as part of their American Bar Association-mandated course and as part of their preparations for the Multistate Professional Responsibility Examination. Furthermore, these rules would allow students to see a clearer picture of what specific conduct is prohibited as elaborated on by bar decisions, opinions, rule comments, and prior state and federal Supreme Court cases. Bar applicants should have the option, if they so choose, to have their conduct analyzed under these rules: then, the choice to have their character held to the standard of practicing lawyers will be made on their own free will and the student will gain the advantage of only having to prove that his or her conduct complied with a limited set of fairly clear guidelines.

From an equality standpoint, prior literature has already established that the character and fitness process can result in holding bar applicants to a higher standard than applied to actual lawyers accused of misconduct.¹⁸⁴ This is obviously unequal, and there appears to be little justification for this approach.¹⁸⁵ If the approach was to hold long-time lawyers to a higher standard, that would make sense: having spent a significant amount of time practicing law, these lawyers should know with specificity what qualifies as misconduct and should have the necessary skills and

183. See generally MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018).

184. Rhode, *supra* note 15, at 546–54.

185. *Id.*

experience to avoid that misconduct. Hence, a more stringent standard may be appropriate.

Yet, the current character and fitness evaluation process turns this concept on its head: rather than imposing stricter rules with respect to character on the experienced lawyers, the current framework imposes these standards on the aspiring lawyers who have had no opportunity to learn by practicing law at all.¹⁸⁶ It is the younger, less-experienced individuals who apply to the bar that must meet the burden of proof to qualify as lawyers of upstanding character.¹⁸⁷ Those already admitted have nothing to show: the bar must prove a very specific act of misconduct against them for any sanctions to be imposed.¹⁸⁸ Allowing law students the right to invoke the Model Rules of Professional Conduct as a shield could at least partially cure this imbalance.

Some may argue that it would be quite difficult to apply the Model Rules of Professional Conduct to non-lawyers, since those rules largely concern the practice of law (which bar applicants should have avoided prior to joining the state bar, except when approved to practice as law students). However, the Rules are not limited to legal practice; rather, they encompass prohibitions against conduct like criminal involvement that would cast doubt upon a lawyer's ethical qualities.¹⁸⁹ Those rules could be used to evaluate bar applicants and would aid in the evaluation of whether the committed crimes, civil violations, and traffic infractions should really exclude an individual from practice. The rules that deal with legal practice would only come into play if the bar applicant practiced as a lawyer in other jurisdictions or engaged in activities significantly similar to those of practicing law (such as drafting motions, billing, and other legal documents as a law clerk).¹⁹⁰ Since many law students engage in such activities before joining the bar,¹⁹¹ this would be a wholesome test of their future fitness as ethical lawyers, just like the test of clerking for a law firm helps the law firm determine whether the clerks would make sound associate attorneys in the future.¹⁹² More importantly, the Model Rules of Professional Conduct would be a test that allowed all of the parties to the character and fitness evaluation process to know and comprehend the rules, which would

186. See Dunnewold, *supra* note 10; Rhode, *supra* note 15, at 546–54.

187. *Id.*

188. See MODEL RULES OF PROF'L CONDUCT, PREAMBLE; MODEL RULES OF PROF'L CONDUCT, r. 1.2(d) (AM. BAR ASS'N 2019) (providing an example of conduct that would subject an attorney to discipline).

189. MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 2019).

190. See *Model Definition*, AM. BAR ASS'N (Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/ [<https://perma.cc/ZQ6Z-7AV9>] (discussing a 2003 American Bar Association task force's establishment of a model definition of the practice of law and providing recommended definitions).

191. See generally Alexis Blue, *First-Year Law Students Head to Summer Jobs Across U.S.*, UA NEWS (May 31, 2013), <https://uanews.arizona.edu/story/first-year-law-students-head-to-summer-jobs-across-u-s-beyond> [<https://perma.cc/4NCC-AEPJ>].

192. See generally Teresa Lo, *Getting a BigLaw Summer Associate Job: All You Need to Know*, LAW CROSSING (2018), <https://www.lawcrossing.com/article/900047985/Getting-a-BigLaw-Summer-Associate-Job-All-You-Need-to-Know/> [<https://perma.cc/8NKB-8MLM>].

increase the fairness of the process and extend to law students the protections from vagueness the law extends to everyone else.

B. Replacement of Character and Fitness Panel Members

In addition to invoking the Model Rules of Professional Conduct in their defense, law students should be protected from character and fitness panelists that render inaccurate decisions. The compensation amount that is extended to members of character and fitness panels varies depending on the state.¹⁹³ However, let us assume that the lawyers and sometimes lay persons who sit on these panels have an interest (social, pecuniary, or otherwise) in remaining thereon. What better way to inspire panelists to make unprejudiced decisions than by removing those who make decisions that are prejudiced? States should seriously consider removal and replacement of character and fitness panel members who find themselves routinely reversed on appeal. This process may be the only accountability scheme that would truly ensure that individuals who sit on these panels interpret the law like their job depended on it.

It may seem harsh to hold character and fitness panelists responsible for incorrectly interpreting close questions of law. Yet there is nothing inherently improper or inhumane about holding deciders accountable, particularly when the legal questions are *not* close. If young law students are going to face severe scrutiny and ultimately have their application denied by a character and fitness panel, it seems only fair that the panelists suffer some discomfort when their decision is reversed. The costs of a character and fitness panel needlessly delaying or improperly denying an application to the bar is substantial, and these improper denials have historically occurred many times, often to the disadvantage of racial or ethnic minorities, the poor, and women.¹⁹⁴ When character and fitness panels treat applicants to the profession unjustly, souring their experience with the state bar before their practice even begins, there is an externality. The panelists should be incentivized to avoid that externality by paying for poor decisions with their jobs: the same fate to which they condemn unadmitted applicants and show no fear of suffering themselves.¹⁹⁵

Arguments against this proposal might come from the same place as arguments against replacing judges or other judicial officers simply because they make unpopular or legally incorrect decisions: the law is subjective, so who is to say what is truly correct? Should character and fitness panelists really be punished for making unpopular decisions? This potential punishment would limit their quasi-judicial independence! All these arguments tend to favor individuals who are usually well-established lawyers, who often should know better, who would suffer little from

193. Compare, e.g., KAN. SUP. CT. R. 701 ("Each member of the Committee shall receive, as compensation for his or her services," \$2,500 per year), with N.H. SUP. CT. R. 42 (II)(b) ("Members of the Committee shall receive no compensation for services, but their reasonable expenses shall be paid by the Board.").

194. Lusk, *supra* note 2, at 373; Rhode, *supra* note 15, at 493.

195. Available records from 1932 to 1982 suggest that the odds of reversal or remand for reconsideration of a denied application are non-trivial: courts ruled in favor of the applicant 37% of the time, remanding an additional 7%. Rhode, *supra* note 15, at 517, 535–56. These statistics do not include reversals against the applicant when appealed by the bar, which raises the number of "incorrect" decisions by character and fitness panelists even higher. Rhode, *supra* note 15, at 535–56.

replacement, and who impose a significant burden on bar applicants to whom they deny admission. Panelists are not judges and deal with a much simpler decision in many cases. Panelists would not suffer greatly for being honorably discharged from their duties: unlike the applicants to whom they unjustly denied admission, they will still remain members of the bar without a disciplinary mark on their record. They will be able to pursue other profitable endeavors in legal practice, something a wrongfully rejected applicant cannot do. The oversight and replacement of watchmen who stray from the requirements of the law would allow character and fitness panels to gain diverse perspectives from new members and become more inclusive both of different people and different opinions.

The burden on the panelists does not have to be onerous: state bars can determine how many annual or career mistakes should result in replacement. However, the number should not be arbitrarily high, where almost all panelists, no matter the merits of their decisions, ultimately avoid replacement. State bars should actively combat the problem of reversed decisions, keeping in mind that every denial of admission that is successfully reversed on appeal may represent several more improper denials where the applicants either gave up or could not afford representation to fight the case on appeal. Therefore, state bars should ensure there is a significant disincentive for excluding qualified bar applicants, and they should enforce this penalty against character and fitness panelists who ultimately act against the best interests of both aspiring lawyers and the state bar by denying or delaying bar admission.

C. Admission Delayed is Admission Denied

This Article has already presented a few examples of unreasonable delay that costs applicants a significant amount of time when it comes to practicing law. The problem is that these examples are just the cases that make the newspapers. Many other cases become delayed for one reason or another simply because the bar cannot confirm certain information or desires additional investigative digging to uncover potentially relevant (or sometimes wholly irrelevant) evidence with respect to the bar application.¹⁹⁶ There may be a good reason for the bar to delay an application for additional investigation in some instances, but this always results in a cost to the applicant, and the bar often has enough information to decide in the first place. Confirming every job an applicant has ever had should not be a priority over quickly confirming eligible candidates to become bar members.

Some state bars that require a law student application prior to a bar application end up penalizing law students and lawyers who did not anticipate having to apply to that particular state bar after either graduation or a few years of practice.¹⁹⁷ The penalty sounds innocent enough: if an applicant did not submit an application as a law student, his or her application will take additional time to process.¹⁹⁸ For some

196. Rhode, *supra* note 15, at 563 (“New York examiners have been known ‘to defer decision endlessly, until the applicant withdraws or abandons his application.’ This strategy has the administrative advantage of avoiding direct confrontation with the candidate, the possibility of reversal on appeal, and tedious paperwork.”) (internal citations omitted).

197. See, e.g., *State Bar Information*, CAL. W. SCH. OF LAW (2018), <https://www.cwsl.edu/registration-and-records/student-records-and-services/state-bar-information> [<https://perma.cc/KS4H-ASC9>].

198. *Id.*

lawyers, though, this indeterminate amount of additional time can turn into several months and sometimes years.¹⁹⁹ This rule and the process that accompanies it tend to disadvantage lawyers from other states from entering the jurisdiction.²⁰⁰ If the bar openly stated that its purpose was to exclude or delay applicants from other jurisdictions, the rule would likely be declared unconstitutional under the Privileges and Immunities Clause.²⁰¹ However, because the rule has a seemingly noble purpose, it may be able to avoid a constitutional challenge. But do these state bars really need that much additional time to investigate an applicant, particularly if he or she has practiced without problems in a different jurisdiction? Federal appellate courts, including the United States Supreme Court, seem to admit lawyers without question to federal bars so long as those lawyers are barred in a state within the United States (for three years, in the case of the United States Supreme Court).²⁰² Given this trust for state jurisdictions by the federal government, what justifies the skepticism of fellow state bars?

State bars that take a significant amount of time post-application to determine eligibility to practice law may not always reflect the delay for applications considered incomplete, withdrawn, or under prolonged investigation in their acceptance or denial statistics. After all, these applicants have not been “denied” admission for character purposes (yet). However, the effect is identical: the applicant may have to reapply in the next possible period if his or her application is deemed incomplete.²⁰³ He or she may be required to wait an indeterminate amount of time beyond the usual decision date without a hearing.²⁰⁴ In the meantime, state bar investigators might be pursuing information that, in the grand scheme of things, is irrelevant even if discovered.²⁰⁵

The information the bar seeks might concern some act that should not be used against an applicant to deny admission anyway, such as a thirty-year-old ticket for speeding. The information may show that the individual held controversial views, though that too should not be a basis for exclusion.²⁰⁶ Finally, the character and fitness panel might be waiting for delayed information from sources other than the applicant when the aspiring lawyer can do nothing to speed the production of these materials. In all of these situations, the fate of the applicant is no longer in his or her hands, is no longer being determined due to his or her conduct and should not stall his or her bar admission.

To diffuse this threat, aspiring lawyers should be able to invoke their right to a speedy determination of character, or at least receive a conditional admission to

199. *Character and Fitness Process*, COLO. SUP. CT., <https://coloradosupremecourt.com/PDF/BLE/CharaFitProcess.pdf> [<https://perma.cc/36VS-3YJE>].

200. See Roni Elias, *The Pros and Cons of Multiple Bar Admissions*, FED. BAR ASS'N (Mar. 2017), <http://www.fedbar.org/Divisions/Law-Student-Division/The-Law-Student-Lounge/March-2017/The-Pros-and-Cons-of-Multiple-Bar-Admissions.aspx2017> [<https://perma.cc/JHJ9-KM2R>].

201. See *Supreme Court v. Piper*, 470 U.S. 274, 283 (1985); U.S. CONST. amend. XI, art. IV.

202. John Okray, *Attorney Admission Practices in the US Federal Courts*, THE FED. LAW., Sept. 2016, at 41.

203. See Rhode, *supra* note 15, at 515–17.

204. See *id.*

205. See *id.*

206. *Konigsberg v. State Bar*, 353 U.S. 252 (1957) (overturning the State Committee of Bar Examiners' denial of applicant because he was a member of the Communist Party).

practice while the state bar conducts its research. The conditionally-admitted lawyers would be allowed to practice and would be required to follow every rule applied to other lawyers. The state bar would be allowed to investigate to the extent it believes necessary, but that investigation would not impede the right of the aspiring lawyer to make a living. In the alternate case that the lawyer requests a speedy determination of character and the hearing that this would necessitate, the character and fitness panel and/or the state bar counsel handling the case would either have to rebut the student's proof of good character within a short but reasonable time or they would have to show a compelling reason for a continuance. If the bar can do neither, it is only fair that the law student who demonstrated his or her character by completing law school, obtaining the necessary letters of recommendation, and submitting a costly application to the bar be permitted to prove his or her worth during examination and become a lawyer.

Recognizing that admission to the bar is an important property right that allows the law school graduate access to a (sometimes) lucrative career, it is not difficult to see how delaying that admission for no just cause is an imposition against a person's constitutional rights. Courts have already recognized the existence of a similar problem for individuals accused of a crime: being on bond conditions, or worse, incarcerated, while the government endlessly builds its case is a significant disadvantage.²⁰⁷ Thus, the accused has the right to a speedy trial.²⁰⁸ While being denied admission to the bar might not be as severe as jail time, it can be costlier than bond in many criminal cases,²⁰⁹ and to avoid this injustice, law school graduates should also have that right.

D. The United States Supreme Court and Narrow Tailoring

A more extreme solution is for the United States Supreme Court to intervene in the process, as it had done a few times previously, and to solidify the right to practice law as a fundamental right under the Privileges and Immunities Clause, under the Due Process Clause, or both. The Court has already called the right to practice law "fundamental" on at least one occasion, and the right appears to be as old as (and even older than) the nation itself.²¹⁰ Since the very inception of the United States and until the twentieth century, men who took upon themselves the

207. See generally Tim Morris, *Imprisoning 1,300 People 4 Years Without Trial is a Crime*, NOLA.COM (Apr. 11, 2018, 11:30 AM), https://www.nola.com/opinions/index.ssf/2018/04/imprisoning_people_4_years_wit.html [https://perma.cc/4FTX-2HPZ].

208. See generally U.S. CONST. amend. VI.

209. The average bail for felonies is \$55,400, and a bail bond is typically 10 percent of the total bail amount. Dan Kopf, *America's Peculiar Bail System*, PRICEONOMICS (May 26, 2015), <https://priceonomics.com/americas-peculiar-bail-system/> [https://perma.cc/QLF2-T59U]; 1ST CLASS BAIL BONDS, <https://www.1stclassbailbonds.com/how-much-does-a-bail-bond-cost/> [https://perma.cc/8NEK-49HF]. On the other hand, the average law school debt amounts to \$112,776, with a high percentage of law school graduates regularly amassing more than \$150,000 in student loan debt. Julissa Treviño, *What Is the Average Law School Debt?*, NITRO COLLEGE, <https://www.nitrocollege.com/blog/average-law-school-debt> [https://perma.cc/MM27-2HLR].

210. See *Supreme Court v. Piper*, 470 U.S. 274, 281–83 (1985) (holding the practice of law is a "fundamental right" afforded protection of the Privileges and Immunities Clause) (citing *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978)).

burden of studying law and ultimately gained the required knowledge have been permitted to practice it without the involvement of character and fitness panels.²¹¹ Many of the founding fathers of the United States were lawyers, and even those who were not were highly educated in the law and legal theory.²¹² This is reflected in the Declaration of Independence, in the United States Constitution, and in the many other writings associated with the United States' formation.²¹³ It may be only natural, then, for the United States Supreme Court to declare the qualified applicant's right to practice law fundamental due to its historical significance, its past jurisprudence, and the apparent unwillingness of the profession to create safeguards that prevent arbitrary and capricious decisions in certain cases.

If state bars are unwilling to give law students fair notice of what conduct is and is not acceptable through clear requirements such as the Model Rules of Professional Conduct, it may be imperative for the United States Supreme Court to step in and protect the rights of bar applicants. This would not be the first time the United States' highest court stood up for aspiring lawyers.²¹⁴ The United States Supreme Court has already recognized that a character and fitness evaluation hearing is a quasi-criminal proceeding, which requires basic protection of the applicant's rights.²¹⁵ Furthermore, the Court has noted that applicant's rights mirror those of criminal defendants, which might very well include the right to be made aware of the specific charges against the applicant's character and to be properly put on notice by the bar's rules that the alleged misconduct is in fact misconduct.²¹⁶

Unfortunately, not many cases from state bars make it to the United States Supreme Court. Many of the examples discussed earlier did not make it that far.²¹⁷ No public defender offices exist to appeal these cases to save the aspiring lawyers great expense. Sometimes, it may be less expensive and less time-intensive for a young applicant to simply wait for a character and fitness panel to decide their case differently upon re-application²¹⁸ or to comply with the unnecessary and

211. Selena E. Molina, *The Roots of Our Legal System: The Foundation for Growth*, TYL, Fall 2015, at 8, 9.

212. *How Many of the Founding Fathers Were Lawyers*, STATE BAR OF MICH. BLOG (July 4, 2011), <https://sbmblog.typepad.com/sbm-blog/2011/07/how-many-of-the-founding-fathers-were-lawyers.html> [<https://perma.cc/GT3W-Y28U>]; *Data on the Framers of the Constitution*, U.S. CONSTITUTION, <https://www.usconstitution.net/constframedata.html> [<https://perma.cc/L4VE-JSVV>]; *Signers of The Declaration of Independence*, U.S. CONSTITUTION, [usconstitution.net/declarsigndata.html](https://www.usconstitution.net/declarsigndata.html) [<https://perma.cc/N79B-9DXJ>]; *Meet the Framers of the Constitution*, NATIONAL ARCHIVES (2018), <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/C8RU-C7LN>]; *Signers of the Declaration of Independence*, NATIONAL ARCHIVES (2019), <https://www.archives.gov/founding-docs/signers-factsheet#page-header> [<https://perma.cc/93G3-ZZ8R>].

213. *Id.*

214. *See, e.g.,* *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

215. *Id.* at 257–58, 262, 263.

216. Simon, *supra* note 177.

217. *See, e.g.,* *In re Burke*, 775 S.E.2d 815 (N.C. 2015); *In re Griffin*, 128 Ohio St. 3d 300, 2011-Ohio-20, 943 N.E.2d 1008; *In re Anonymous*, 875 N.Y.S.2d 925 (2009) (per curiam); *Reese v. Bd. of Comm'rs*, 379 So. 2d 565 (Ala. 1980).

218. Viewed cynically, character and fitness panels may sometimes use this as a form of punishment by not admitting the applicant on his or her first attempt but admitting them in the following application cycle on virtually identical facts. Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's*

overreaching requirements imposed upon something as personal as mental health treatments.²¹⁹ Unlike an individual who is convicted of a major criminal offense and must either appeal or spend significant time in prison, aspiring lawyers do not face such a dire choice: they can even apply to other state bars in hopes of a different outcome or use their *Juris Doctor* degree to work in another field.²²⁰ Therefore, the right case may not come before the United States Supreme Court for quite some time. Yet, when it does come, the Court should recognize that it is representative of many other silent bar applicants (or those dissuaded from applying by the difficulty of the process) and should consider the case with significant attention.

While intervention by the United States Supreme Court might seem extreme, this would not be the first time that it happened. Take as an example the 1950s case of *Konigsberg v. State Bar of California*.²²¹ In that case, Mr. Konigsberg did not incur a debt or commit a minor violation of the law.²²² Rather, he stood accused of advocating for the overthrow of the United States and California governments (something his speeches, writings, and affiliations could have the tendency to demonstrate if read in a particular light).²²³ Mr. Konigsberg, in his younger years, allegedly spent some time attending Communist meetings, potentially belonging to the party and perhaps even advocating for the overthrow of the governments of California and the United States.²²⁴ Potentially due to the historical backdrop of McCarthyism,²²⁵ the California Bar's Character and Fitness Evaluation Panel viewed these actions very negatively, denying Mr. Konigsberg the right to join.²²⁶ The California Supreme Court denied his petition for review without opinion.²²⁷ Mr. Konigsberg sought certiorari review with the United States Supreme Court.²²⁸

Reviewing the record, the United States Supreme Court noted the unrelenting nature of Mr. Konigsberg at his hearing before the California Bar.²²⁹ "Konigsberg repeatedly objected to questions about his beliefs and associations[,] asserting that such inquiries infringed rights guaranteed him by the First and Fourteenth Amendments."²³⁰ The aspiring lawyer believed strongly that forbidding

Character and Fitness Requirement, 2014 BYU L. REV. 775, 800 n.150 (2014); Lusk, *supra* note 2, at 359.

219. See Cuban, *supra* note 13. To compound the problem, this necessitates testimony or affidavits issued by psychology, which may be open to various evidentiary challenges to their reliability under *Frye*, *Daubert*, or whatever standard for the admission of such evidence a particular jurisdiction might adopt (if any) for their character and fitness hearings. See generally Artem M. Joukov, *Who's the Expert? Frye and Daubert in Alabama*, 47 CUMB. L. REV. 275 (2017).

220. See Lainie Peterson, *What Can I Do With a Juris Doctor Degree?*, CHRON, <https://work.chron.com/can-juris-doctor-degrec-6771.html> [<https://perma.cc/38DJ-H36X>].

221. 353 U.S. 252 (1957).

222. *Cf. id.* at 253.

223. *Id.* at 267–68, 259, 260 n.13.

224. *Id.*

225. Paul J. Achter, *McCarthyism*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/McCarthyism> [<https://perma.cc/38H9-337R>].

226. See *Konigsberg*, 353 U.S. at 259.

227. *Id.* at 254.

228. *Id.*

229. See *id.*

230. *Id.* at 255.

him bar membership as a result of his voiced opinions would infringe severely upon his First Amendment rights.²³¹ Citing *Wieman v. Updegraff*²³² and *Joint Anti-Fascist Refugee Committee v. McGrath*²³³ to oppose arbitrary decisions by the state bar, the applicant ultimately refused to answer questions aimed mostly at determining whether he had once been a member of the Communist Party.²³⁴ Nevertheless, the California Bar and the California Supreme Court denied him admission.²³⁵

The United States Supreme Court reversed the California Bar and the California Supreme Court,²³⁶ which was a particularly strong move in light of the political and geopolitical climate.²³⁷ Refusing to hold the applicant's beliefs or affiliations against him, the United States Supreme Court established several constitutional safeguards for bar admission,²³⁸ which, judging by the denials of admission discussed earlier, character and fitness panels have long forgotten. First, the Court recognized the grave nature of a character and fitness inquiry:

While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.²³⁹

The above is no less true today than it was in 1957, except that law school tuition today greatly exceeds the amount Mr. Konigsberg spent in the 1950s (even adjusted for inflation).²⁴⁰

The United States Supreme Court went even further.²⁴¹ Noting that Mr. Konigsberg had been denied admission on the basis of a virtually unwritten rule, it viewed with great scrutiny the California Bar's argument that mere refusal to answer a question could be used against an applicant²⁴²:

Serious questions of elemental fairness would be raised if the Committee had excluded Mr. Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral

231. *See id.* at 269.

232. 344 U.S. 183 (1952).

233. 341 U.S. 123 (1951).

234. *Konigsberg*, 353 U.S. at 269.

235. *See id.* at 252.

236. *See id.* at 274.

237. *Id.*; *McCarthyism*, *supra* note 225.

238. *Konigsberg*, 353 U.S. at 274.

239. *Id.* at 257–58.

240. Paul Campos, *60 Years of Law School Tuition Increases in the Context of American Family Income, LAW, GUNS & MONEY* (Feb. 7, 2015, 12:29 PM), <http://www.lawyersgunsmoneyblog.com/2015/02/60-years-law-school-tuition-increases-context-american-family-income> [https://perma.cc/QM2K-P966].

241. *See Konigsberg*, 353 U.S. at 252.

242. *See id.* at 260–61.

character and loyalty were unimpeachable, and then giving him a chance to comply.²⁴³

This is an important rule, raising questions about recent refusals to admit applicants across the country for cases associated with student loan debt: even if aspiring lawyers receive some notice that their prior financial status might be considered in the character evaluation process, there appears to be little notice that this alone could lead to a denial of admission despite proof of good moral character.²⁴⁴

The United States Supreme Court declined to engage in a complex inquiry as to whether Mr. *Konigsberg's* case constituted a violation of his civil liberties beyond the Due Process and Equal Protection Clauses, stating that the evidence on the record only left one question to decide: whether sufficient evidence justified Mr. *Konigsberg's* exclusion.²⁴⁵ Finding that no such evidence existed, the Court held that the California Bar violated Mr. *Konigsberg's* rights to equal protection and due process, arbitrarily denying him the right to practice.²⁴⁶ In doing so, the Court also spelled out some important considerations behind the phrase "good moral character:"

The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.²⁴⁷

The Court, explaining its decision, turned to the forty-two letters of reference for Mr. *Konigsberg* from recommenders of almost every walk of life.²⁴⁸ Many of these individuals recommended Mr. *Konigsberg* without reservation, noting his honesty, advocacy for civil rights, principles, integrity, competence, affection for his family, and loyalty to his country.²⁴⁹ Noting that these values "have traditionally been the kind of qualities that make up good moral character," the United States Supreme Court then turned to the applicant's background, which included immigration to the United States from Austria at the age of eight, significant educational accomplishments, honorable service in the military, and ultimately matriculation to and graduation from law school.²⁵⁰ When weighed against the Bar's evidence that Mr. *Konigsberg* attended meetings of the Communist Party, criticized public officials, and refused to answer certain questions, the United States Supreme Court could find no cause justifying a denial of admission.²⁵¹ Upon review of Mr.

243. *Id.* at 261.

244. *Id.*

245. *See id.*

246. *See id.* at 262.

247. *Id.* at 262–63.

248. *See id.* at 264.

249. *See id.* at 265.

250. *Id.* at 265–66.

251. *See id.*

Konigsberg's record, it is difficult to see how any other conclusion could be reached, and yet this aspiring lawyer had to push his case all the way to the United States Supreme Court just to proclaim that simple truth.²⁵²

The Court even showed a level of judicial neutrality when considering Mr. Konigsberg's case that one would hope could be attributed to all who preside over the fate of bar applicants.²⁵³ It took in stride Mr. Konigsberg's harsh criticism of its own jurisprudence in *Dennis v. United States*,²⁵⁴ noting that Mr. Konigsberg's disagreement with the Court and his claims that the Court did not do its duty made no foul mark upon his character.²⁵⁵ In fact, punishing these remarks under "the guise of determining 'moral character'" did not make such punishment proper under the First Amendment.²⁵⁶ It concluded: "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action."²⁵⁷

These principles seem to have been lost when it came to deciding the case of Atticus, or Mr. Bowman, or many of the other applicants denied the status of barred lawyer.²⁵⁸ While many bar applicants do not begin their legal education at 39 years of age with a backdrop of significant military and academic accomplishments like Mr. Konigsberg did, the imputation of inability to practice law due to student debt, minor law violations, or mental health problems that are held readily in check appears to violate the United States Constitution so flagrantly that applicants denied on these bases should consider raising a case with the United States Supreme Court.²⁵⁹ While denials of bar applications is not an issue that impacts a great number of people, clearly the United States Supreme Court has previously found the actions of some bars so offensive that it still considered and reversed their decisions as repugnant to basic constitutional principles.²⁶⁰

Schware v. Board of Bar Examiners,²⁶¹ another case decided by the United States Supreme Court in 1957, further embraces the concept that aspiring applicants to the legal profession deserve to have their rights protected.²⁶² New Mexico attempted to deny Rudolph Schware his license to practice law on similar grounds to those raised by the California Bar against Mr. Konigsberg.²⁶³ Mr. Schware honestly disclosed several aliases and arrests as part of his application.²⁶⁴ Upon arriving to take the bar examination, the New Mexico Bar turned him away based on its

252. *See id.*

253. *See id.*

254. *Id.* at 268.

255. *Id.* at 269.

256. *Id.*

257. *Id.* at 273–74.

258. *See Bradwell v. Illinois*, 83 U.S. 130 (1873); *Reese v. Bd. of Comm'rs*, 379 So. 2d 565 (Ala. 1980); *In re Anonymous*, 875 N.Y.S.2d 925 (2009) (per curiam); *In re Burke*, 775 S.E.2d 815 (N.C. 2015); *In re Griffin*, 128 Ohio St. 3d 300, 2011-Ohio-20, 943 N.E.2d 1008; Cuban, *supra* note 8.

259. U.S. CONST.; U.S. CONST. amend. XIV.

260. *See, e.g., Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957); Rhode, *supra* note 10.

261. *Schware*, 353 U.S. 232.

262. *Id.*

263. *See id.* at 234.

264. *Id.*

character and fitness evaluation of the applicant, as voted unanimously by the Character and Fitness Panel.²⁶⁵ A unanimous United States Supreme Court reversed.²⁶⁶

Upon discovering he would not receive permission from the New Mexico Bar to sit for the examination, Mr. Schware asked for a formal hearing and invited his wife, rabbi, and secretary to his law school dean to testify on his behalf.²⁶⁷ Mr. Schware also produced a letter of recommendation from every classmate from his law school class except one vouching for his good character.²⁶⁸ The only remaining classmate said nothing negative about Mr. Schware, merely avoiding comment.²⁶⁹ Mr. Schware testified, and bar counsel had ample opportunity to cross-examine the applicant.²⁷⁰ The following account apparently led New Mexico to decline him membership to the New Mexico Bar.²⁷¹

Mr. Schware grew up a son of immigrants in a poor section of New York.²⁷² Enthusiastic for socialist reform in the wake of the Great Depression, and following somewhat in his father's footsteps, he came to support the socialist movement, unions, and the Young Communist League (eventually becoming a member at the age of eighteen).²⁷³ To avoid discrimination at the only jobs he could find, Mr. Schware changed his Jewish surname to Di Caprio and his first name to Rudolph.²⁷⁴ Under this name, he successfully led the unionization effort in a glove factory, and he continued to work as "Di Caprio" to avoid further problems.²⁷⁵ Two of Mr. Schware's arrests occurred when he took part in various contentious strikes in the 1930s, and these arrests yielded no charges, trials, or convictions.²⁷⁶ Mr. Schware did give an alias to the police upon his arrest so that he would not be fired as a striker.²⁷⁷

When Mr. Schware's father died in 1937, Mr. Schware left the Communist Party, though he later returned.²⁷⁸ Authorities arrested Mr. Schware for violating the Neutrality Act of 1917 for inducing men to volunteer to fight in the Spanish Civil war on behalf of the Loyalists.²⁷⁹ Mr. Schware quit the Communist Party later that year.²⁸⁰ Entering the armed forces of the United States in 1944, Mr. Schware served as a paratrooper in New Guinea until his honorable discharge in 1946.²⁸¹ While serving, he showed religious conviction, reading the Bible regularly to an illiterate

265. *Id.*

266. *Id.* at 247.

267. *Id.* at 235.

268. *See id.*

269. *Id.*

270. *Id.*

271. *See id.* at 236.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 237.

277. *Id.* at 241.

278. *See id.* at 237.

279. *See id.*

280. *See id.*

281. *See id.* at 237-38.

soldier (something he continued to do with law books while helping sight-impaired students in law school).²⁸² Schware finished college in 1950, and upon entering the University of New Mexico School of Law, spoke with the dean directly about his past.²⁸³ “The dean told him to remain in school and put behind him what had happened years before.”²⁸⁴ Mr. Schware graduated with exemplary conduct, but with the badges of his past still clinging to him, he received no favorable treatment from the New Mexico Bar.²⁸⁵

A nearly unanimous New Mexico Supreme Court affirmed the Bar’s decision, leaving Mr. Schware little choice but to appeal to the United States Supreme Court on due process and equal protection grounds.²⁸⁶ His efforts were rewarded.²⁸⁷ The United States Supreme Court showed little hesitation in reversing the New Mexico Supreme Court and the New Mexico Bar.²⁸⁸ In an opinion similar to *Konigsberg*, the United States Supreme Court declared that there must be a rational connection between an applicant’s fitness and capacity to practice law and the evidence being considered against him.²⁸⁹ Being of a particular race, religion, or party could not serve as a proper cause to deny bar admission.²⁹⁰ The Court also found no problem with Mr. Schware’s use of aliases, which were employed not to defraud but to avoid losing his position due to discrimination.²⁹¹

The Court also considered Mr. Schware’s arrests, putting forth a crucial rule for bar character and fitness evaluations: “The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”²⁹² Analyzing Mr. Schware’s arrest for violating the Neutrality Act of 1917, the Court stated that Mr. Schware was never prosecuted after indictment.²⁹³ Even if Mr. Schware was guilty, the Court did not view recruiting Americans to fight in the Spanish Civil War on the eve of America’s engagement in World War II as a crime of moral turpitude.²⁹⁴ Likewise, membership in the Communist Party could bear no ill witness against Mr. Schware, since “[m]ere unorthodoxy (in the field of political and social ideas) does not as a matter of fair and logical inference negat[e] ‘good moral character.’”²⁹⁵

In these two cases, the United States Supreme Court faced state character and fitness decisions that *could* have been justified from a *certain* point of view.²⁹⁶ However, these decisions *could not* be justified from a *reasonable* point of view.²⁹⁷

282. *See id.* at 240.

283. *See id.* at 238.

284. *Id.* at 238.

285. *See id.*

286. *See id.*

287. *Id.*

288. *See id.* at 247.

289. *See id.* at 239.

290. *See id.*

291. *See id.* at 240–41.

292. *Id.* at 241.

293. *See id.* at 242.

294. *See id.*

295. *Id.* at 244.

296. *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Schware*, 353 U.S. 232.

297. *Id.*

Putting aside political prejudices, the Court found no trouble in ruling the decisions arbitrary because they were *at best* arbitrary.²⁹⁸ At worst, they were discriminatory decisions aimed at keeping members of a minority with rational but diverse political beliefs from joining the legal profession.²⁹⁹ It would seem that these United States Supreme Court decisions should have been enough to prevent arbitrary exclusions from practice in the late-twentieth and early twenty-first century.³⁰⁰ Many aforementioned cases that never made it to the High Court bear witness that this was not so.³⁰¹

It is difficult to see the United States Supreme Court of 1957 approving the delay in admission that Atticus received on account of his parents' divorce and his well-managed ADHD: this evidence hardly rebutted proof that he was an able candidate of good moral character.³⁰² The same is true for applicants whose debts prevented their admission.³⁰³ When the highest Court in the land declares that alleged membership in the Communist Party, refusal to answer questions posed by a state bar, several arrests, recruitment of Americans to fight in foreign wars, and use of aliases cannot justify a denial of admission,³⁰⁴ why would legally incurred student debt ever result in a denial of an otherwise qualified applicant? Some of the reasons used by the respective state bars for admission, delay, or denial might be new, but they are no less unreasonable.³⁰⁵

The United States Supreme Court has now spoken at least twice on the importance of giving bar applicants the benefit of the doubt when the evidence against them cannot be rationally construed to rebut proof of good character. But state bars have shown that they are not listening.³⁰⁶ So the United States Supreme Court, if it becomes involved again, might take a more drastic step. Having already declared discrimination against out-of-state applicants unconstitutional under the Privileges and Immunities Clause,³⁰⁷ it has demonstrated that the right to practice law is a "fundamental right" in at least some sense. The Court can take the next step and suggest that this right is so crucial to the birth, founding, and growth of the United States that, for sufficiently educated individuals, it should be considered fundamental under the Due Process Clause as well.

Not a single one of the Founding Fathers that practiced law as a profession had to satisfy a character and fitness panel of his character with respect to either his

298. *Id.*

299. *Id.*

300. *Id.*

301. See, e.g., *Reese v. Bd. of Comm'rs*, 379 So. 2d 564 (Ala. 1980); *In re Anonymous*, 875 N.Y.S.2d 925 (2009) (per curiam); *In re Burke*, 775 S.E.2d 815 (N.C. 2015); *In re Griffin*, 128 Ohio St. 3d 300, 2011-Ohio-20, 943 N.E.2d 1008.

302. *Cuban*, *supra* note 13.

303. *Moezzi*, *supra* note 119.

304. See *Konigsberg v. State Bar*, 353 U.S. 252, 267-71 (1957); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 240-45 (1957).

305. See, e.g., *Reese*, 379 So. 2d 564; *Anonymous*, 875 N.Y.S.2d 925; *Burke*, 775 S.E.2d 815; *Griffin*, 2011-Ohio-20.

306. *Id.*

307. See *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

mental status or his past conduct.³⁰⁸ Arguably, the ability of many of the Founding Fathers to practice law³⁰⁹ proved crucial to the formation of the United States as a nation, resulting in legal governing documents like the United States Constitution that have withstood the test of time. The practice of law was a right that continued to be exercised without character and fitness panels for a significant amount of time by individuals who never attended law school at all.³¹⁰ In fact, the practice of law is even a right afforded to individuals who represent themselves, whether they are legally educated or not: an individual can, regardless of his past character or education, act as his own lawyer in the vast majority of cases.³¹¹ If individuals who may have significant indicators of dishonesty can practice law on their own behalf, with all of the potential for misleading the court, other parties, and the jury, then denying individuals with far better moral standing in the community the right to represent others begins to seem more arbitrary.

The ability of individuals to become lawyers and represent clients without a character and fitness evaluation preceded the nation's formation in colonial times and continued until the twentieth century.³¹² Given that same-sex marriage has been granted fundamental right status after approximately 15 years of acceptance in various United States jurisdictions,³¹³ it seems only proper that the profession that made that decision possible should receive similar protections after nearly 250 years of lawyers joining the bar without the sometimes arbitrary approval of a character and fitness panel. The United States Supreme Court can leave bars the ability to strike particularly unethical candidates where there is a compelling state interest, but unless state bars begin to show restraint and deference to the United States Supreme Court in the few cases that are singled out for denial of admission, the United States Supreme Court may decide that these decisive bodies do not handle the right to practice law with the care it deserves. It can then act to protect the profession by

308. Lusk, *supra* note 2. However, we should note that while examination by a character and fitness panel did not take place in a manner consistent with today's procedures, some colonial courts did require proof of good character, whether in the form of a certificate from a court or otherwise. See Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 2014 BYU L. REV. 775, 781 (2014).

309. *How Many of the Founding Fathers Were Lawyers*, STATE BAR OF MICH. BLOG (July 4, 2011), <https://sbmblog.typepad.com/sbm-blog/2011/07/how-many-of-the-founding-fathers-were-lawyers.html> [<https://perma.cc/GT3W-Y28U>]; *Data on the Framers of the Constitution*, U.S. CONSTITUTION, <https://www.usconstitution.net/constframedata.html> [<https://perma.cc/L4VE-JSVV>]; *Signers of The Declaration of Independence*, U.S. CONSTITUTION, [usconstitution.net/declarsigndata.html](https://www.usconstitution.net/declarsigndata.html) [<https://perma.cc/N79B-9DXJ>]; *Meet the Framers of the Constitution*, NATIONAL ARCHIVES (2018), <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/C8RU-C7LN>]; *Signers of the Declaration of Independence*, NATIONAL ARCHIVES (2019), <https://www.archives.gov/founding-docs/signers-factsheet#page-header> [<https://perma.cc/93G3-ZZ8R>].

310. Lusk, *supra* note 2.

311. *Self-Representation*, JUSTIA, <https://law.justia.com/constitution/us/amendment-06/16-self-representation.html> [<https://perma.cc/SCT5-V3HU>].

312. Lusk, *supra* note 2.

313. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05, 2630 (2015).

making the practice of one of America's oldest professions³¹⁴ not only an "important property right,"³¹⁵ but a fundamental one.

This Article makes no suggestion that this should be the first step in correcting the problems with the state bar admission process. It may not even be an eventuality, since unenumerated fundamental rights recognized under the Substantive Due Process Clause are rare indeed.³¹⁶ However, *Obergefell* opens the door to the recognition of other rights wider than it has been before.³¹⁷ While the membership of the United States Supreme Court has changed somewhat since that decision, perhaps rebalancing the Court to a more conservative majority,³¹⁸ this does not prevent the current Justices from protecting aspiring members of their own profession.

The United States Supreme Court might consider certain professions fundamental to the survival, maintenance, and growth of the nation. These professions, which serve the public good as well as the good of the professional, might gain protection beyond that of a property right alone. Being high on the list of those professions, law should receive a significant amount of consideration for additional constitutional protections. If the United States Supreme Court indeed declares it a fundamental right to practice law for those that can demonstrate the academic aptitude, merely providing procedural due process for the denial of that right will not be enough: without a compelling reason to deny an applicant access to the profession, and narrowly tailored rules warranting denial, state bars should open their doors wider and prevent the unjust exclusion of individuals simply because of minor peculiarities in their profile.

This requirement of narrow tailoring is particularly important in light of the broadness of the character and fitness inquiry outlined above. When it comes to character and fitness evaluations, narrow tailoring should eliminate all the collateral considerations that have apparently influenced the evaluation of applications in the past. Questions regarding the *character* and *fitness* of lawyers must be only those closely related to *character* and *fitness*.

Character and fitness evaluation rules conforming to the narrow tailoring requirement would prevent an inquiry into character that goes beyond materially relevant evidence. This modification would undoubtedly enhance the process, both by streamlining the decision and limiting the scope of evidence that must be gathered. Character and fitness panels would no longer require the applicant to wait an indeterminate amount of time to gather all the *possible* evidence about his or her

314. See generally *Origins of American Law*, LUMEN LEARNING, <https://courses.lumenlearning.com/boundless-politicalscience/chapter/origins-of-american-law> [<https://perma.cc/KBP7-87TZ>].

315. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

316. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006).

317. See *Obergefell*, 135 S. Ct. at 2643 (2015) (Alito, J., dissenting) ("If a bare majority of Justices can invent a new right . . . the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.").

318. Adam Liptak and Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html> [<https://perma.cc/Z9TP-VEAQ>]. Artem M. Joukov, *A Second Opinion: Can Windsor v. United States Survive President Trump's Supreme Court?*, 27 J.L. & POL'Y 327, 334-35 (2019).

character. Such a process could take anywhere from months to years, all at the discretion of particular character evaluators. In the meantime, the applicant loses months or years of compensation as an attorney and valuable knowledge about the practice of law that is learned only by actually practicing law.

Rather, the character and fitness panel should only require information that has a strong tendency to establish or negate a person's character. Requiring the applicant to list a multitude of addresses, every occupation the person has ever held, and affidavits from all the individual's prior employers would almost assuredly be curtailed by this rule and with good reason. Where a person lived at the age of eighteen is unlikely to affect his or her fitness for the practice of law. If the applicant fails to provide that information, his application should suffer no delay. Additionally, law students are well-known for making brief, six-week to twelve-week pilgrimages each summer semester to clerk at law firms, various public offices, non-profit organizations, private companies, and on behalf of judges. Omitting an address of one of these destinations either due to lack of memory or a rush to complete an already lengthy application should neither harm an applicant nor delay his or her admission.

Finally, documents such as letters from employers, many of whom may be too occupied with other things to write to a state bar, or who may forget to draft a letter or not understand its importance (particularly if they are not in the legal profession), should not delay or deny admission. Even a negative experience at a job many years ago should not hold an applicant back: many applicants to the bar (and members of the bar) have been fired for one reason or another. To allow their former employers to hold the applicants' legal career in their hands seems to almost ask for trouble. If the affidavits are returned, great. If not, that should be acceptable too: what matters is that the investigation uncovers no substantiated evidence of misconduct weighing on a person's character.³¹⁹ The requirements of similar documents from other entities (such as other state or federal bars) should also receive the same approach: if the documents are late or missing through no fault of the applicant, it seems remarkably unjust to assume that they contain negative information, or that the applicant is responsible for the fact that they are missing. Such information may be important in determining a person's good character, but since the individual already provided *prima facie* evidence of good character in the form of at least some recommendations,³²⁰ the duty to rebut is now upon the bar, and unavailable evidence is no substitute for actual evidence.

Narrowly tailoring the inquiry is a direct path to obtaining evidence that meets that goal without imposing unnecessary strain on an already stressed applicant studying night-and-day for the state bar examination. In a sense, the state bars should consider it a positive too: by considering mainstream evidence that would tend to

319. We could find no evidence of a reward offered to former employers in exchange for returning these documents to state bars or any compulsory powers that the bar might have to require such production (or at least no record of an exercise of this power). Therefore, if even state bars cannot require the production of honest responses from past employers, why should the task fall on the shoulders of the applicant or result in delay or adverse inference?

320. See NAT'L CONFERENCE OF BAR EXAM'RS, AM. BAR ASSN'N, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS* 2018, at vii, viii (Judith A. Gundersen & Claire J. Guback eds., 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2018_ncbe_comp_guide.authcheckdam.pdf [<https://perma.cc/D5M8-H5MF>].

prove or disprove good character, the bar would save a significant amount of time and expense researching irrelevant or marginally relevant information that, even if negative, should not prevent an individual from obtaining a license to practice law.³²¹ Presumably, the state bar has an interest in making sure that applicants receive a license to practice if they are of sound character and know the law. Why go to such great lengths to exclude perfectly qualified individuals?

Instead of gathering marginally relevant evidence such as that of ADHD medications, parents' divorces, or student loans that are large but likely manageable, the bar should consider the implication of having several young lawyers begin their interaction with the professional governing body on a negative note. An experience like the ones mentioned earlier in the Article is likely to follow a lawyer for the rest of his or her life and will likely impact his or her relatives, friends, acquaintances, and business partners. The applicant may feel betrayed by a profession that claims to defend the rights of individuals but which so callously discards the applicant's desire to be treated fairly and to join in the fight for civil liberties. Even if the applicant ultimately achieves admission, he or she will likely always view the state bar with suspicion, perhaps even with disdain, and that outcome is both regrettable and unnecessary for the profession to merely screen applicants for major character flaws.

CONCLUSION

The irony of the legal profession denying its own aspiring members the rights it guarantees to everyone else is somewhat stunning: equal protection and due process should be extended to every bar applicant and should be strictly observed in character and fitness determinations, just as the United States Supreme Court has already mandated.³²² Yet, the apparent refusal to comply with such powerful jurisprudence underscores a truth that is only too evident in the legal profession: that lawyers can be prejudiced, too. That includes prejudice and at best arbitrary judgment toward future members of the legal profession, which becomes all the more enraging if exhibited based on a law student's advocacy against prolonged group test-taking in the era of COVID-19.³²³ So, if we continue to advertise the legal profession as one that tends to the needs of justice, we must stop treating future aspiring lawyers unjustly, even if that only occurs in a select number of cases.

State bar decisions that have attracted enough attention to be documented in newspaper articles or appellate court cases sometimes comprise an unpleasant portrait of the character and fitness process: one where historically, minorities and the unpopular received harsh treatment and a denial of an important property right.³²⁴ Close inspection of more recent cases shows that the results are sometimes no less arbitrary in the present day, despite United States Supreme Court decisions that

321. See Rhode, *supra* note 15, at 563–66 (describing the expenses associated with the review of lengthy applications that pry in potentially irrelevant details and provide a dubious level of protection).

322. Cf. *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, (1957); *Reese v. Bd. of Comm'rs*, 379 So. 2d 565 (Ala. 1980).

323. Patrice, *supra* note 3; Morey, *supra* note 3.

324. See *Konigsberg*, 353 U.S. 252; *Schware*, 353 U.S. 232.

should prevent state bars from unfairly targeting certain law school graduates.³²⁵ This Article suggests that bar applicants should have important tools to protect themselves, such as invoking adherence to the Model Rules of Professional Conduct as a defense, receiving a speedy character determination, and yes, even receiving greater protections from the United States Supreme Court (since the prior protections apparently receive little attention from various state bars).

This Article hopes to help bring awareness to a problem and suggest proactive ways to fix it: the decisions of some character and fitness panelists are so legally and constitutionally improper that they raise serious questions about the almost limitless discretion.³²⁶ We are not blind to the fact that character and fitness panels also exclude individuals from practice who, in fact, should be excluded.³²⁷ This Article only suggests that the wrong decisions are so obviously wrong that they should be avoided 100 percent of the time, regardless of how few applicants are affected overall.³²⁸ Because such decisions have not been avoided despite a sordid history, this Article can only conclude that these decisions emanate from ethical watchmen with insufficient legal guidance or a result of their inherent prejudices.³²⁹ The solutions we propose, upon implementation, will give aspiring lawyers the guidance they need to avoid questions about their character upon application to a state bar. The benefits this would bring should be more than enough for state bars, and perhaps the United States Supreme Court, to rethink the treatment of aspiring applicants to the legal profession. It should also lead to the imposition of greater monitoring of the watchmen of our profession, holding them accountable for decisions that conform with neither law nor common sense.

325. *Id.*

326. *See, e.g., Reese*, 379 So. 2d 564; *In re Anonymous*, 875 N.Y.S.2d 925 (2009) (per curiam); *In re Burke*, 775 S.E.2d 815 (N.C. 2015); *In re Griffin*, 2011-Ohio-20.

327. 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 2016 vii (Erica Moeser & Claire J. Guback eds., 2016), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuideToBarAdmissions/2016_comp_guide.authcheckdam.pdf [<https://perma.cc/XTS6-K7WJ>].

328. *See Rhode, supra* note 10.

329. *See id.*