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## Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process

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## REHABILITATING LAWYERS: PERCEPTIONS OF DEVIANCE AND ITS CURES IN THE LAWYER REINSTATEMENT PROCESS

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### ABSTRACT

State courts' approach to lawyer admissions and discipline has not changed fundamentally in the past century. Courts still place faith in the idea that "moral character" is a stable trait that reliably predicts whether an individual will be honest in any given situation. Although research in neuroscience, cognitive science, psychiatry, research psychology, and behavioral economics (collectively "cognitive and social science") has influenced prevailing concepts of personality and trustworthiness, courts to date have not considered whether they might change or refine their approach to "moral character" in light of scientific insights. This Article examines whether courts should reevaluate how they decide whether to allow lawyers to return to law practice after suspension or disbarment for impermissibly deceptive conduct. The Article describes courts' traditional approach, discusses some of the relevant scientific literature, and suggests some possible

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This Article references various social and cognitive science articles and books. Neuroscience, cognitive science, research psychology, and behavioral economics all contribute to current understandings about personality and behavior. While we are not experts in any of these fields, we believe that insights from those disciplines, based upon widely-cited, peer-reviewed publications, might be valuable to explain lawyers' deviance and its possible cures. Any errors, of course, are the authors' alone.

reasons why courts appear not to have considered such scientific insights. The Article concludes with some thoughts about the utility of the role of scientific research in the disciplinary process.

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#### INTRODUCTION

Prior to the conference on Julius Henry Cohen's book, *The Law: Business or Profession?*, the authors of this Article began a discussion about lawyers who commit serious wrongdoing resulting in suspension or disbarment. Many of those lawyers sought readmission at some later point and we wondered whether those lawyers were demonstrably better people by the time they sought readmission to the practice.

We were particularly interested in those lawyers who engaged in serious deceit: impulsively stealing clients' money, swindling people in investment schemes, or profoundly deceiving clients about fundamental aspects of cases (such as whether a complaint was even filed). We did not focus on lawyers suffering from disabling depression or wrestling with a substance disorder that may have explained their misbehavior, but on those whose deceptive behavior was not readily explicable, perhaps not even to themselves.

Our first inquiry was why lawyers jeopardized their livelihoods by engaging in serious dishonesty. Were these bad-acting lawyers always corrupt, or was their dishonesty anomalous? The research led us to consider whether honesty is a relatively stable personality trait, as many presume, or whether generally honest individuals are capable of serious dishonesty. We also wondered how courts decide whether lawyers suspended or disbarred for dishonest acts are worthy to return to practice. We were not confident that courts had a solid grip

on either why people committed such deceptive acts or whether they were reformed. These conversations were the antecedents for this Article, which was prepared in connection with a conference on Julius Henry Cohen's 1916 book, *The Law: Business or Profession?*

Cohen's book provides a window into how courts, assisted by bar associations, handled misconduct and discipline in the early twentieth century. It turns out that nearly one hundred years later, despite remarkable advances in all aspects of cognitive and social science, courts proceed much the way they did in Cohen's day—they rely on aphorisms and intuition to decide whether lawyers are ethically fit to practice.

In this Article, we examine the process of suspension, disbarment, and readmission in light of some twentieth and twenty-first century scientific knowledge. We begin by looking at professional discipline a century ago, during Cohen's time. Joining the chorus of those who question "character" as immutable and predictable, we then consider more contemporary cases in which courts decide that lawyers are sufficiently rehabilitated and investigate how courts make such decisions. Focusing on the concept of deception, we sketch out some of the insights that cognitive and social sciences offer on the subject. We ask whether science may illuminate the problems of understanding, predicting, and preventing deceptive behavior. Finally, we discuss possible reasons why courts have eschewed help from those outside the legal profession to understand deceptive behavior, choosing instead to carry on as they have done for over a century. Our modest proposal is that in keeping with twenty-first century thought, a useful first step might be to systematically collect and analyze data on a large-scale basis to find out what happens to lawyers who are reinstated after disbarment or suspension.

### I. A CENTURY OF PROFESSIONAL DISCIPLINE: DEVIANCE AND REHABILITATION

Writing almost a century ago from his perspective as a leader of the New York bar, Julius Henry Cohen depicted the attorney disciplinary process as playing a central role in how the legal profession justifies and defines itself. Cohen opened his 1916 book, *The Law: Business or Profession?*,<sup>1</sup> with a chapter titled "Disbarment," setting forth his view, which he illustrated by describing the attorney disciplinary process in New York City and summarizing cases in which lawyers

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1. JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916).

were sanctioned for misconduct. Cohen touted the collaboration of “the Bench and Bar” in the process.<sup>2</sup>

Cohen envisioned a reciprocal relationship between professionalism and discipline. On the one hand, to maintain the practice of law as a profession, it was essential to have professional regulation. The profession must enunciate high standards of conduct for the public’s protection and “purge” itself “of those who fall below the standards.”<sup>3</sup> On the other hand, a robust, well-functioning disciplinary process required lawyers’ willing participation, which would not be forthcoming absent a sense of commitment to the law as a profession. Cohen warned: “Take away the conception of the practice of law as a profession—make it a business—and at once you destroy the very basis of professional discipline.”<sup>4</sup>

Cohen was describing the formal disciplinary process in its infancy, coinciding with the rise of bar associations.<sup>5</sup> State courts had exercised authority to admit lawyers to practice, announced standards of conduct, and disbarred or otherwise sanctioned lawyers for violating those standards.<sup>6</sup> Although courts had limited resources to devote to the disciplinary role, informal regulation within small,

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2. *Id.* at 23 (“The community *is* interested—vitaly interested in knowing that wrongdoing on the part of its lawyers is more readily ascertained and more quickly punished than any other wrongdoing in the community.”).

3. *Id.* at 22–23.

4. *Id.*

5. New York City’s Association of the Bar was founded in 1870. *See About the New York City Bar Association*, N.Y.C. B. ASS’N, <http://www.nycbar.org/about-us/overview-about-us> (last visited Mar. 4, 2013). Other bar associations arose around the same time. The New York State Bar Association was founded in 1877. *See* N.Y. ST. B. ASS’N, <http://www.nysba.org> (last visited Mar. 4, 2013). The American Bar Association was founded in Saratoga, New York, in 1878. *See History of the American Bar Association*, ABA, [http://www.americanbar.org/utility/about\\_the\\_aba/history.html](http://www.americanbar.org/utility/about_the_aba/history.html) (last visited Mar. 4, 2013). And the Rochester Bar Association (now the Monroe County Bar Association) was founded in 1892. *See About the Monroe County Bar Association*, MONROE COUNTY B. ASS’N, <http://www.mcba.org/AboutUs/> (last visited Mar. 4, 2013). The New York County Lawyers’ Association, in which Cohen became a leading figure, was founded in 1908 in response to other bar associations’ exclusionary policies. By the 1890s, New York courts began to turn to local bar associations to initiate and prosecute disciplinary proceedings. *See, e.g.*, *Matter of Dorthy*, 44 N.E. 1123 (N.Y. 1896) (disciplinary prosecution by the Rochester Bar Association); *In re Mashbir*, 45 N.Y.S. 1144 (App. Div. 1897) (disciplinary prosecution by the Association of the Bar).

6. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 73 (2009). Criminal prosecutors have also served a regulatory role in situations where lawyers’ misconduct crossed criminal lines. *See generally* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998).

homogenous local bars may have helped fill the gap until immigration in the late nineteenth and early twentieth centuries led to the growth of elite urban bars.

Courts began to delegate disciplinary authority to state and local bar associations. For example, New York's intermediate appellate court authorized the Grievance Committee of New York City's Association of the Bar to investigate and prosecute New York City lawyers and conduct disciplinary hearings, subject to that court's review.<sup>7</sup> Participating lawyers volunteered time and bar associations contributed the operating costs.<sup>8</sup> These efforts gave Cohen and others reason to claim pride in the law as a self-regulating profession.

The contemporary disciplinary process directly descended from the one Cohen described and his contemporaries would recognize it.<sup>9</sup> The process still exists to adjudicate claims of lawyer misconduct and impose sanctions ranging from censure or suspension to disbarment for misconduct. The objective remains largely to purge the profession of those who cannot be trusted to uphold the professional standards in the future. The need for good decisions about misbehaving lawyers has never been more important. Complaints against lawyers for ethical violations continue unabated and surveys among lawyers themselves suggest perhaps a greater willingness to engage in forms of deceptive practice.<sup>10</sup>

Although the organized bar's role has been eliminated in many states, lawyers still dominate the process. In New York, for example, disciplinary prosecutions are now conducted by full-time staff lawyers functioning as an arm of the state intermediate appellate court, but volunteer lawyers still review evidence and make recommendations.

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7. See GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970, at 351-71 (1970). For a discussion of a disciplinary proceeding from Cohen's era, see Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 375-86 (2007).

8. COHEN, *supra* note 1, at 4-5, 20-21.

9. For a discussion of the evolution of lawyer disciplinary systems, see Mary Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (1994). Among the many insightful studies of the contemporary disciplinary process are: RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS (2008) [hereinafter ABEL, LAWYERS IN THE DOCK]; RICHARD L. ABEL, LAWYERS ON TRIAL (2010) [hereinafter ABEL, LAWYERS ON TRIAL]; Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998).

10. See Professor Ross's survey data on lawyers' willingness and acceptance of bill padding, discussed *infra* at note 84.

In the federal district courts of New York, the bar takes a greater role: volunteer lawyers are appointed on an ad hoc basis to serve as disciplinary prosecutors. Lawyers do not have exclusive authority to regulate themselves, but they may still stake a claim to be members of a substantially “self-regulating” profession.<sup>11</sup>

One might expect that over the period ranging from Cohen’s time to the present, courts would have developed an increasingly sophisticated understanding of lawyer deviance, not only from deciding many cases, but from following developments outside the field of attorney discipline. But in fact, how courts decide which sanctioned lawyers should be allowed to resume the practice of law has not significantly evolved over the past century.

When deciding whether to admit applicants to the bar, state judiciaries insist that successful applicants must possess good moral character, and the question of character returns to center stage once a suspended or disbarred lawyer seeks to return to practice. In this respect, courts’ decision-making about discipline and reinstatement remains virtually unchanged from their approach a century ago during the time of Julius Henry Cohen. Focusing on fairly predictable factors such as remorse and claims of rehabilitation, judges make seemingly intuitive decisions about whether a candidate’s “good character” has been restored. Courts assume that a lawyer’s “character” determines and predicts her behavior in both her personal and professional life; that a lawyer’s character is relatively constant but that some who engage in misconduct because of deficient character can later be rehabilitated (i.e., they can change and improve their character); and finally, that courts can differentiate between the changed and the unchanged. Although science has progressed in explaining behavior in the intervening century, courts have made virtually no use of insights from other disciplines in structuring their disciplinary decision-making.

In light of the wealth of information about human behavior that has developed since Cohen’s time, we explore whether scientific insights can be useful to courts in the reinstatement process. We narrow our inquiry to lawyers who were sanctioned for conduct involving deception, a recurring subject in disciplinary proceedings. Drawing on social and cognitive science, we note that contrary to courts’ oft-stated beliefs, deceptive behaviors—at least at low levels—

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11. See generally Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

are more widespread than believed. Although only a small percentage of people are consistently and dangerously dishonest, most people are dishonest to some degree.<sup>12</sup>

As Deborah Rhode's seminal work on character in the admissions and disciplinary processes would suggest,<sup>13</sup> the idea that lawyers have a consistent and honest "character" is essentially flawed. We believe that courts' predictions about whether readmitted lawyers will reoffend are based on little more than guesswork. While cognitive and social science insights may not make these predictions much easier, they may offer ways to understand and curb dishonest behavior in the profession generally and in readmitted lawyers specifically.

## II. THE ATTORNEY DISCIPLINARY SYSTEM: ASSUMPTIONS, OBJECTIVES, AND DECISION-MAKING

The courts' stated objectives in disciplining lawyers have remained constant since Cohen's day:<sup>14</sup> to protect clients, courts, and the public from lawyers who cannot be trusted to abide by professional standards in the future.<sup>15</sup> Disciplinary sanctions are not expressly intended to be punitive or to serve as a deterrent, although in reality those may often be courts' principal objectives in imposing them.

An evaluation of the lawyer's present "character" often serves as a proxy for a prediction about whether the lawyer in question will transgress again in the future.<sup>16</sup> The determination mirrors one made in the admissions process, which weeds out candidates (in small numbers) whose prior behavior suggests that they are likely to engage in professional misconduct.<sup>17</sup> As the principal goal of the disciplinary

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12. See discussion *infra* in Part III: "Cognitive and Social Science Insights into Lawyer Dishonesty."

13. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

14. Lawyer discipline may serve additional, unarticulated objectives. See generally Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).

15. COHEN, *supra* note 1, at 4 ("It is our duty to . . . protect the State and the public from lawyers who prostitute the authority given to them for personal gain by imposing on or defrauding their clients or the tribunals which are instituted to administer the law and protect those whose rights and interests are committed to their care." (quoting *Matter of Flannery*, 135 N.Y.S. 612, 614 (App. Div. 1912)) (internal quotation marks omitted)).

16. See, e.g., *D.C. Bar v. Kleindienst*, 345 A.2d 146, 147 (D.C. 1975).

17. See, e.g., *Matter of Wiesner*, 943 N.Y.S.2d 410 (App. Div. 2012). In Cohen's day, lawyers were instructed to "aid in guarding the Bar against the admission to the



function is to prevent harm rather than punish misconduct, courts often suspend or disbar lawyers even for misconduct committed outside their professional role, including for criminal or dishonest acts in their personal dealings.<sup>18</sup> Courts believe that personal wrongdoing denotes a dishonest or law-breaking character that will equally influence the lawyer's professional conduct.

Courts assume that individuals possess either good (e.g., honest or law-abiding) character or bad character, and that character is a general predictor of future conduct. Thus, those with dishonest character, even in their personal lives, are more likely to act dishonestly in professional dealings. Courts envision good character to be an essential element in regulating the profession and protecting the public.<sup>19</sup>

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profession of candidates unfit or unqualified because deficient in either moral character or education." ABA CANONS OF PROF'L ETHICS Canon 29 (1908) (quoted in COHEN, *supra* note 1, at 331). The seminal work on the use of "moral character" in the attorney licensing process in the United States is Rhode, *supra* note 13. For a history of the use of "moral character" in this process, see Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1196–1208 (2008). For a discussion of the role of "character" in Canada's admissions process, see Alice Woolley, *Tending the Bar: The "Good Character" Requirement for Law Society Admission*, 30 DALHOUSIE L.J. 27 (2007). For additional commentary, see Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255 (2007); Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection Upon Bar Admissions*, 39 CAL. W. L. REV. 1 (2002); Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 ST. JOHN'S L. REV. 1037 (2008); Richard R. Arnold, Jr., Comment, *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 99; Maureen M. Carr, Note, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards*, 8 GEO. J. LEGAL ETHICS 367, 384–85 (1995); Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487 (2000).

18. See *Baker v. Commonwealth*, 73 Ky. 592, 597–98 (1874) ("[W]hen an attorney commits an act, whether in the discharge of his duties as attorney or not, showing such a want of personal or professional honesty as renders him unworthy of public confidence, it is not only the province but the duty of the court, upon a proper and legitimate presentation of the case, to strike his name from the roll of attorneys. . . . He has by his own misconduct divested himself of qualifications that were indispensable to the practice of his profession; and while he may regard the judgment depriving him of that right as a punishment for the offense, the action of the court is based alone upon the ground of public policy and for the public good.").

19. Rhode, *supra* note 13, at 507–08. While decisions concerning admission and readmission differ in various ways, we believe that there is substantial overlap in decision-making in both categories.

We question these assumptions. As Professor Rhode and other scholars explain, character is an amorphous concept and courts' decisions about it lack uniformity.<sup>20</sup> The Supreme Court has similarly commented on the difficulty of defining character, noting that the term is "unusually ambiguous" and "can be defined in an almost unlimited number of ways for any definition that will necessarily reflect the attitudes, experiences, and prejudices of the definer."<sup>21</sup> Historically, the use of character as a requirement for admission to the bar has implicated issues of status, social class, race, and gender.<sup>22</sup> Professor Rhode illustrates the problem with reference to the first National Bar Examiners Conference in 1933, at which it was noted that "sometimes you have wonderful character evidence displayed even though the applicant is not well educated or his parents were born in Russia."<sup>23</sup> At times, character has been a thinly veiled justification to limit the admission of immigrant groups, women, minorities, or those who belonged to unpopular political groups, such as the communist party.<sup>24</sup> Finally, even if we are able to agree on a definition of character, there is little reason to believe that good or bad character is either consistent or predictable in most given individuals.<sup>25</sup>

If one were to accept the significance of "character" as a consistent state, a rational approach to discipline would be permanently to disbar every lawyer who is found to have engaged in serious misconduct, on the theory that the lawyer probably lacks the requisite character to practice law and the lawyer's character is unlikely to change. Most courts have not adopted this approach, presumably

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20. *Id.* at 529–32; *see also* Ritter, *supra* note 17, at 11 (commenting that the criteria for "moral fitness to practice law . . . has remained notably indeterminate").

21. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957).

22. *See* Rhode, *supra* note 13, at 499–503.

23. *Id.* at 500–01 (citing *Character Examination of Candidates*, 1 B. EXAMINER 63, 72 (1932) (quoting George H. Smith)). Pertinent to our discussion, researchers at the University of California, Berkeley and the University of Toronto found a strong correlation between social class and unethical behavior. Contrary to the suggestions from the early twentieth century, the relationship correlates *higher* social class with unethical behavior. *See* Paul K. Piff et al., *Higher Social Class Predicts Increased Unethical Behavior*, 109 PROC. NAT'L ACAD. SCI. 4086, 4088 (2012), *available at* <http://www.pnas.org/content/109/11/4086.full.pdf> (concluding that the pursuit of self-interest, which is a fundamental motive among the elite in society, is associated with increased desire for wealth and status, which can promote wrongdoing).

24. *Accord Konigsberg*, 353 U.S. at 267; Rhode, *supra* note 13, at 499–503; Swisher, *supra* note 17, at 1040–44.

25. *See* Rhode, *supra* note 13, at 559 ("The situational nature of moral conduct makes predictions of behavior uncertain under any circumstances . . .").

considering it too harsh,<sup>26</sup> although a handful of states have adopted permanent disbarment rules that prohibit the disbarred lawyer from ever seeking readmission.<sup>27</sup> Most states permit reinstatement after disbarment, which generally results in a lengthy suspension rather than permanent banishment from the practice. In those states, the courts attempt to strike a balance between protecting the public from “bad” lawyers—i.e., those who are likely to re-offend—and the interest in readmitting those for whom past misconduct was aberrational.

This leads to the challenge at the heart of professional regulation: how can courts or their surrogates predict which individuals who offend are likely or unlikely to re-offend? In the disciplinary process, this question might be raised at either of two stages. It might be raised when the lawyer is initially sanctioned for misconduct, but is more likely raised when she seeks reinstatement or readmission.<sup>28</sup> Most states require lawyers who have been suspended for a significant period to prove they have the requisite character to practice law.<sup>29</sup> Likewise, in most states, lawyers who are disbarred are not permanently excluded from the profession but after a substantial period of time may seek readmission.<sup>30</sup> In either case, the sanctioned individual will have the burden of proving he or she has been

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26. As the Supreme Judicial Court of Massachusetts noted in a reinstatement proceeding, “[a] fundamental precept of our system is that persons can be rehabilitated. . . . [That] redemption is possible and valuable is both well established in law and premised upon long-standing, even ancient traditions.” *In re Ellis*, 930 N.E.2d 724, 726 (Mass. 2010) (citations omitted) (internal quotation marks omitted).

27. For a more detailed discussion of permanent disbarment, see Brian Finkelstein, Comment, *Should Permanent Disbarment Be Permanent?*, 20 GEO. J. LEGAL ETHICS 587, 590–91 (2007). See also James R. Zazzali, *The Whys and Hows of Permanent Disbarment: New Jersey’s Wilson Rule*, 21 GEO. J. LEGAL ETHICS 311, 337 n.224 (2008) (listing states that have permanent disbarment rules).

28. For a collection of decisions on reinstatement and readmission, see generally M. C. Dransfield, *Reinstatement of Attorney After Disbarment, Suspension or Resignation*, 70 A.L.R.2d 268 (1960).

29. See ABA JOINT COMM. ON PROF’L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS B.2.3, B.2.10 (2005). The result is that, in reality, the length of suspension tends to be significantly longer than the period of suspension established by the court. Many suspended lawyers wait longer than required to appear for reinstatement, and the period of time required successfully to navigate the reinstatement process adds additional time. See generally Brian K. Pinaire et al., *“Philadelphia Lawyers”: Policing the Law in Pennsylvania*, 2012 ABA J. PROF. LAW. 137.

30. See ABA JOINT COMM. ON PROF’L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS B.2.2, B.2.10 (2005).

rehabilitated.<sup>31</sup> Thus, courts have opportunities to make predictions about lawyers' future conduct and could develop data about whether their predictions prove correct and what considerations predict future disciplinary misconduct. If they chose to, courts could learn from the data.

In fact, courts do not make predictions about sanctioned lawyers' future conduct as often as one might expect. At the initial sanctioning stage, courts often avoid the question of whether the lawyer is likely to re-offend, because an appropriate sanction can be determined without regard to this question. The disciplinary process serves secondary purposes, aside from public protection, such as to identify and condemn conduct by lawyers that transgresses the profession's norms.<sup>32</sup> Consequently, lawyers may be sanctioned for misconduct without regard to the likelihood that they will engage in future misconduct. When a lawyer engages in egregious misconduct, the court may disbar the lawyer simply to express the extent of the court's disapproval or to ensure public confidence in the legal profession. Administrative and proportionality considerations may also allow courts to avoid delving into lawyers' propensity to re-offend. If the lawyer's wrongdoing was merely technical, unintentional, or in an area of legal ambiguity, the court may impose a trivial sanction in the belief that the misconduct was so minor that there is no reason to question the lawyer's character and that suspension or disbarment would, in any case, be excessive.<sup>33</sup>

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31. See, e.g., *In re Lord*, 910 A.2d 1, 6 (Pa. 2006) ("Petitioner has . . . [the] burden of proving by clear and convincing evidence that his resumption of the practice of law at this time would not have a detrimental impact on the integrity and standing of the bar, the administration of justice or the public interest, and that he has the moral qualifications, competency and learning in the law required for admission to practice law."). See generally Kimberly A. Lacey, Note, *Second Chances: The Procedure, Principles, and Problems with Reinstatement of Attorneys After Disbarment*, 14 GEO. J. LEGAL ETHICS 1117 (2001). As both a legal and practical matter, the burden is probably higher on those seeking readmission after disbarment than those seeking reinstatement after suspension. See, e.g., ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 101:3012 (citing *In re Pier*, 561 N.W.2d 297, 300 (S.D. 1997) ("[A] court should be slow to disbar, but it should be even slower to [readmit] . . .")).

32. See COHEN, *supra* note 1, at 4 ("It is our duty to condemn conduct that tends to impair or defeat the administration of justice or degrade the usefulness of the profession.").

33. The professional conduct rules might be read as reflecting an assumption that certain misconduct, by its nature, has no bearing on a lawyer's character. Lawyers must generally report non-confidential knowledge of another lawyer's disciplinary violation, but only if the misconduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ABA MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2012).

Even when the lawyer's propensity to commit future misconduct seems to be important, the court may impose a sanction allowing it to bypass the question of character. Suspending the lawyer has the practical effect of requiring that individual to demonstrate the requisite character as a condition of reinstatement. In New York, for example, any lawyer suspended for longer than six months must apply for reinstatement, as would be true of a disbarred lawyer seeking to practice law.<sup>34</sup> The lawyer is placed in professional purgatory but is not cast out of the profession permanently. The suspension might be read as an expression of agnosticism about the lawyer's character, which is in part why a lawyer concerned about his reputation would much prefer it to disbarment. The court need not express a judgment about the lawyer's character and propensity to engage in future misconduct unless and until the lawyer seeks reinstatement. Presumably, many lawyers who were suspended for significant periods or disbarred never seek to regain their law licenses because, for example, they have moved on to other pursuits, doubt that they could resume law practice successfully, or think it unlikely that they can make a compelling application.

Because courts may avoid or defer character determinations, their disciplinary decisions can be ambiguous as to whether the court is predicting that the lawyer in question will re-offend. A lengthy suspension or disbarment may reflect a judgment that the lawyer poses a future risk of professional misconduct, but these sanctions may simply reflect a decision that harsh punishment is necessary for other reasons, or that the character determination is best left unresolved. On the other hand, courts sometimes do make character judgments, if only implicitly. A censure or a short suspension for misconduct that could have merited a more serious sanction presupposes that the court regarded the misconduct as aberrational.

This practice was as true in Cohen's day as today. In addition to describing instances in which lawyers were disbarred or suspended because of serious misconduct committed either within or outside the practice of law,<sup>35</sup> Cohen described two instances in which lawyers were merely censured for significant misconduct,<sup>36</sup> apparently based

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34. See, e.g., 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 603.14(3) (2012).

35. See COHEN, *supra* note 1, at 3–4.

36. Cohen discusses *Matter of Lauterbach*, 155 N.Y.S. 478 (App. Div. 1915), which involved a senior commercial lawyer, once a candidate for national office, who was censured. COHEN, *supra* note 1, at 5; see also *id.* at 21 (discussing lawyer who was ordered to cease practicing law unless he repaid money wrongly obtained from a

on judgments that the individuals in question were unlikely to offend again. Not surprisingly, it appears that both lawyers treated sympathetically by the disciplinary authorities (and Cohen) were members of the professional elite.

In contrast, at the reinstatement or readmission stage of the disciplinary process, it would seem more difficult to dodge the question of the applicant's "character" or likely future conduct. Conventionally, the individual seeking to resume the practice of law must demonstrate "rehabilitation"<sup>37</sup>—that is, that the character flaws that led to prior misconduct have now been corrected.<sup>38</sup> Underlying this requirement are the assumptions that at least some individuals' characters are mutable and that the courts are capable of discerning those whose character has improved.

Even in the post-sanction process, courts may avoid predicting whether the applicant can be relied on to follow the rules. The court may deny a motion for reinstatement or readmission for reasons independent of the applicant's propensity to commit misconduct. The prior misconduct may have been so egregious that public respect for the profession would be diminished by restoring the lawyer's license even if the court itself was confident in the lawyer's rehabilitation.<sup>39</sup> It may also be that the possibility of recidivism, however small, may be unacceptable because the court and the profession would be embarrassed if the readmitted lawyer re-offended. But in this context, courts cannot systematically avoid making judgments. Especially when suspended lawyers seek reinstatement, courts,

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client, and who was then loaned the money to make the repayment by a lawyer engaged in the disciplinary process).

37. See, e.g., *In re Wigoda*, 395 N.E.2d 571, 574 (Ill. 1979) ("Rehabilitation, the most important consideration in reinstatement proceedings, is a matter of one's 'return' to a beneficial, constructive and trustworthy role.").

38. At least in theory, an alternative approach might be to seek to convince the court that prior misconduct was an aberration—i.e., that the lawyer has possessed good character all along. This is unpromising for several reasons, including that courts presume that serious misconduct is an expression of bad character. Courts may dismiss applicants as lacking necessary candor or insight if they say that they have always possessed good character and have no explanation for their aberrational bad acts. Further, lawyers cannot 'plead in the alternative.' As discussed below, full acknowledgment of wrongdoing and contrition are considered preconditions of rehabilitation. A claim that serious misconduct was simply an inexplicable aberration may be viewed as a minimization of one's misconduct.

39. See, e.g., *Hughes v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn.*, 259 S.W.3d 631 (Tenn. 2008) (denying readmission because of the nature of the prior misconduct, even though applicant had the requisite character to practice law).

having implicitly left the door open to the lawyer's reinstatement, must sometimes decide whether the applicant now has the requisite character to practice law.

Many courts do not seem to explicitly engage the question of the applicant's likely *future* conduct; rather, they content themselves with determining whether the applicant has proven he is of current good moral character by considering his behavior since disbarment.<sup>40</sup> It is possible that courts realize the complicated and often erroneous nature of predicting future behavior and choose to examine current known conduct instead. However, as courts believe that the prediction of future behavior (such as dangerousness) is a subject appropriate for courtroom analysis,<sup>41</sup> something else may be at issue here.

It appears that courts consider proof of other factors—such as acknowledgment of wrongdoing and remorse—as evidence of improved character.<sup>42</sup> And if character has improved, courts seem to assume—rightly or wrongly—that such good character will continue.

One might expect courts to demand that sanctioned lawyers demonstrate insight into why they acted wrongfully in the past—e.g., why they took money from a client's account, falsified a document, lied to a client or judge, committed a crime—and what has changed so

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40. *See, e.g., In re* Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001) (determining that the disbarring conduct, the level of remorse and acknowledgment of wrongdoing, and amount of time passed since disbarment were all critical factors); *see also In re* Roundtree, 503 A.2d 1211, 1217 (D.C. 1985) (considering the following factors: "(1) the nature and circumstances of the misconduct for which the attorney was disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent new ones; (4) the attorney's present character; and (5) the attorney's present qualifications and competence to practice law").

Massachusetts uses a similar set of criteria:

- (1) the nature of the original offense for which the petitioner was disbarred;
- (2) the petitioner's character, maturity, and experience at the time he was disbarred;
- (3) the petitioner's occupation and conduct in the time since his disbarment;
- (4) the time elapsed since the disbarment;
- and (5) the petitioner's present competence in legal skills.

*In re* Ellis, 930 N.E.2d 724, 726 (Mass. 2010). "This test allows the court to weigh the circumstances concerning the petitioner's misconduct against his subsequent actions that show rehabilitation." *Id.*

41. *See, e.g., Kansas v. Crane*, 534 U.S. 407 (2002) (finding the inability to control one's dangerous behavior as grounds for civil commitment following criminal sentence for sexual violence); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (discussing future dangerousness in a death penalty hearing).

42. *See* sources cited *supra* note 40.

that they can be counted on not to do the same, or engage in other misconduct, in the future.<sup>43</sup> But published opinions do not seem to emphasize this,<sup>44</sup> and often do not seem to expect it.<sup>45</sup>

In some cases, it may be clear why the lawyer has changed. He may have had a substance abuse problem or a serious medical or psychiatric condition that has since been cured or controlled with treatment, allowing courts to believe he is essentially a changed person.<sup>46</sup> In many cases, however, there will not be such a ready explanation for why the lawyer previously violated professional standards or why he can be trusted not to do so again. What explanations will persuade the court? The case law does not reveal any clear theory of how lawyers become rehabilitated. Perhaps courts are unwilling to be too explicit for fear that they will be giving insincere lawyers a blueprint for how to regain admission. But the

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43. This requirement may be an important element in deciding that lawyers are again fit for the practice. Making individuals more self-aware (being called upon in public to account for one's behavior, for example) can "heighten awareness of discrepancies between behavior and salient personal standards, creating pressure to act in accordance with standards." C. Daniel Batson et al., *Moral Hypocrisy: Appearing Moral to Oneself Without Being So*, 77 J. PERSONALITY & SOC. PSYCHOL. 525, 529 (1999).

44. See *In re* Reinstatement of Wiederholt, 24 P.3d 1219 (Alaska 2001); See, e.g., *In re* Reinstatement of Grier, 737 A.2d 1076, 1084 (Md. 1999) (Raker, J., dissenting) (criticizing court's reinstatement of lawyer, in part, because his responses to questions demonstrated "a lack of insight into the underlying problems that brought him to the attention of the Attorney Grievance Commission in the first place").

45. See, *In re* Reinstatement of Grier, 737 A.2d at 1084 (Raker, J., dissenting); *In re* Reinstatement of Ramirez, 719 N.W.2d 920, 921 (Minn. 2006) (in determining whether to reinstate a disbarred lawyer, "the court considers proof of moral change, the attorney's recognition of wrongful conduct, the length of time since the misconduct and disbarment, the seriousness of the original misconduct, the attorney's physical or mental illness or pressures that are susceptible to correction, and the attorney's intellectual competency to practice law"). But see *In re* Kerr, 675 A.2d 59, 65 & n.1 (D.C. 1996) (noting that disbarred lawyer "sought to develop insight into her own psychology, so as to assure that the past transgressions are not repeated").

46. See, e.g., *Mullison v. People*, 61 P.3d 504, 510 (Colo. 2002) (readmitting a disbarred lawyer whose professional misconduct was attributable to drug abuse upon finding that the applicant "ha[d] undergone a fundamental character change" by recovering from his drug addiction, engaging in community service, and acknowledging and expressing sincere remorse for his misconduct). On the general problems of substance abuse and mental illness in the legal profession, see J. Nick Badgerow, *Apocalypse at Law: The Four Horsemen of the Modern Bar—Drugs, Alcohol, Gambling and Depression*, 18 PROF. LAW. 1, 2 (2007); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93 (2001); Michael L. Perlin, "Baby, Look Inside Your Mirror": *The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589 (2008).



professional literature and informal conversations with lawyers working in the disciplinary process also do not reveal any theory.

Courts do identify two preconditions for rehabilitation: acknowledgement of the prior misconduct and remorse.<sup>47</sup> There may be room for disagreement about whether the lawyer's acknowledgment is sufficiently full, or whether the lawyer has understated the extent of his or her misconduct, its seriousness, or its consequences. Likewise, there may be room for disagreement about whether expressions of contrition are sufficiently sincere. Both of these preconditions call for subjective determinations.

Courts also identify various types of circumstantial evidence from which they may infer that rehabilitation has occurred. At minimum, the applicant must have refrained from misconduct during the period of suspension or disbarment.<sup>48</sup> Literally "getting religion" may be viewed as an affirmative indication of reform.<sup>49</sup> Good, charitable works during the period of suspension or disbarment are also among the indicia. But a cynic might wonder how much weight these deserve. "Character" may not be as unvarying as courts sometimes assume—e.g., one can abide by high personal standards but low

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47. Compare *Wiederholt*, 24 P.3d at 1226 (denying a disbarred lawyer's reinstatement, finding that lack of remorse, failure to accept responsibility, and minimization of prior misconduct made it likely that he would reoffend) with *In re King*, 868 P.2d 941, 943 (Ariz. 1994) (reinstating a suspended lawyer who "accepted absolute responsibility for his actions, and exhibited sincere remorse").

48. See *In re Peterson*, 274 N.W.2d 922, 926 (Minn. 1979) (denying a disbarred lawyer's readmission where he "has not conducted himself in a manner to induce the confidence of this court in his professional morality. His conduct continues to be tainted by misrepresentations, flagrant disregard for the sanction of disbarment, and lack of appreciation for the ethical code governing attorneys."). A national study of state disciplinary processes published by the ABA in 1970 identified, among other deficiencies, undue liberality in readmitting disbarred lawyers. The study highlighted the subjectivity of courts' and disciplinary agencies' approach to the question of rehabilitation. For example, one bar president conceded that he did not know what rehabilitation meant in the disciplinary context, as distinguished from the theological context in which it "implied an acknowledgement of the commission of sin, a contrite heart, a true spirit of repentance," and observed that "[a]s nearly as I can figure by our procedures, rehabilitation means that for some period of time following disbarment the man has not been in trouble." ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 153 (1970).

49. See *Meiklejohn v. People*, No. 10PDJ113, 2011 Colo. Discipl. LEXIS 7, at \*16 (Colo. 2011); *Lefly v. People*, 167 P.3d 215, 218 (Colo. 2007). Cohen envisioned professional regulation in similarly theological terms. See, e.g., COHEN, *supra* note 1, at 23 ("[F]or sinning, the punishment is certain."); *id.* at 42 (a lawyer "is a member of his profession" with "the unpleasant task of segregating his weak and sinning brothers from the rest of the community").

professional ones.<sup>50</sup> Moreover, even a formerly bad lawyer who wants to resume practicing could dedicate some time to joining a church or performing good works. Courts rely on the testimony of reputable character witnesses as another indication.<sup>51</sup> None of this says anything about differences in the mental processes of those who act wrongly and law-abidingly, how those processes can be transformed, and how one ascertains whether transformation has occurred.

The dearth of discussion about why lawyers commit wrongdoing and how they can change reflects the basically intuitive and subjective nature of courts' inquiry. There is little effort to explain, for example, what kind of insight a lawyer is expected to have into his or her reasons for initially engaging in misconduct and how his or her thinking must change to prevent similar behavior in the future. There is also little explanation of how courts can detect opportunists who engage in good works and other charitable endeavors, not for altruistic motivations, but simply to develop a record to present to the court. Finally, courts do not appear to make efforts to collect or analyze data about recidivism by reinstated and readmitted lawyers. The result is that judges, or lawyers to whom courts delegate authority, appear to place significant weight on their untested moral intuitions.

### III. COGNITIVE AND SOCIAL SCIENCE INSIGHTS INTO LAWYER DISHONESTY

While the contemporary disciplinary process has not changed fundamentally since Cohen's day, the fund of scientific knowledge about behavior has increased significantly. Courts have simply ignored the scientific developments in personality theory from the last century, choosing to cling to "good character" as its defining standard.<sup>52</sup> We wonder how different the reinstatement and readmission processes might look if courts considered social and cognitive sciences. In undertaking this inquiry, we focus on lawyer dishonesty rather than on all species of misconduct. In exploring whether dishonesty is constant and predictable, we do not propose

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50. See, e.g., *In re Peterson*, 274 N.W.2d 922 (Minn. 1979) ("A person may, as Petitioner here, be well regarded by friends, refrain from smoking and drinking, participate in church activities, and yet lack a sense of professional rectitude.").

51. See, e.g., *In re Groshong*, 413 N.E.2d 1266, 1268 (Ill. 1980); *Ex parte Marshall*, 147 So. 791, 792 (Miss. 1933); see also *In re Johnston*, 162 P.3d 922 (Okla. 2007); *In re Stapleton*, 880 A.2d 1213 (Pa. 2005).

52. See *supra* Part II.

sweeping and concrete reforms of the disciplinary process but simply explore the significance of its essential conservatism: might the courts be missing out on an opportunity to do better?

If one hopes to focus on a particular wrongdoing or a particular trait, deception is a sensible place to start. The concept is less vague and bias-laden than “bad character” and most of the decisions to disbar lawyers involve acts of deception: the lawyer steals or “borrows” money from a client without consent,<sup>53</sup> secretly acts against the best interest of the client,<sup>54</sup> lies about critical work alleged to be completed on the client’s behalf,<sup>55</sup> takes advantage of a client in a deceptive manner,<sup>56</sup> intentionally misleads a court,<sup>57</sup> or commits a felony which by its nature includes some element of deception.<sup>58</sup> While some lawyers are suspended or disbarred solely for neglect of multiple matters due to substance abuse issues or depressive events, many of those cases involve the lawyer deceiving the client about the state of the cases.<sup>59</sup>

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53. See, e.g., Attorney Grievance Comm’n of Md. v. Agiliga, 31 A.3d 103 (Md. 2011) (disbarring attorney who commingled and appropriated client funds).

54. See, e.g., Orr v. Ky. Bar Ass’n, 355 S.W.3d 449 (Ky. 2011) (attorney permanently disbarred after forging clients’ names to sell property, fabricating the names of people to whom he claimed to have sold property, lying about his actions, converting the money to pay personal debts, and misleading bar investigators).

55. See State ex rel. Okla. Bar Ass’n v. Shomber, 227 P.3d 157 (Okla. 2009) (attorney charged clients for work she never performed or performed in a grossly negligent matter, gave clients false information about the status of their cases, and never returned unearned fees).

56. See, e.g., In re Bark, 72 So. 3d 853 (La. 2011) (disbarment warranted when lawyer encouraged clients and others to invest in his fraudulent scheme).

57. See, e.g., In re Clark’s Case, 37 A.3d 327 (N.H. 2006) (disbarring an attorney for making a false statement in a bankruptcy filing on behalf of a client). “The privilege of practicing law does not come without the concomitant responsibility of truth, candor, and honesty. Because no single transgression reflects more negatively on the legal profession than a lie, attorney misconduct involving dishonesty justifies disbarment.” *Id.* (quoting *In re Young’s Case*, 913 A.2d 727 (N.H. 2006)).

58. See, e.g., Disciplinary Counsel v. Zaccagnini, 955 N.E.2d 977 (Ohio 2011) (disbarring attorney who was convicted of conspiring with partner to obtain more than twenty-one million dollars in commercial appraisal contracts).

59. See, e.g., Disciplinary Counsel v. Hoppel, 950 N.E.2d 171 (Ohio 2011) (suspending an attorney for two years for failing to perform work, misrepresenting the status of work, and purchasing cocaine with fees); State ex rel. Okla. Bar Ass’n v. Beasley, 142 P.3d 410 (Okla. 2006) (suspending an alcoholic lawyer who took money and did not perform work, deceived clients about the state of their cases, did not communicate with clients, and failed to respond to bar inquiries).

Many cognitive and social scientists (as well as philosophers) claim, contrary to common understanding, that humans are very good liars.<sup>60</sup> And while most of us believe we are essentially honest and value honesty as a virtue,<sup>61</sup> it turns out that nearly everyone lies frequently, spontaneously, and often unconsciously.<sup>62</sup> Research consistently suggests that across various populations and professions, many people do cheat a little in fairly predictable ways—which would likely include all the lawyers with good character.<sup>63</sup> Finally, while people are good liars, they do not seem to be good lie detectors: the average person's ability to detect deception in a face-to-face interaction with another individual may be only modestly better than chance.<sup>64</sup> That inability likely extends to judges deciding whether those seeking readmission have changed their ways.

Deception is often separated into two categories: pro-social lies to maintain social norms, such as those designed to avoid awkwardness and unkindness;<sup>65</sup> and self-oriented lies intended to benefit the liar: to increase his wealth or position, avoid punishment, or obtain some

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60. See DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012); DAVID LIVINGSTON SMITH, *WHY WE LIE* 12–13 (2004); ALDER VRIJ, *DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 2* (2d ed. 2008); Daniel D. Langleben, & Jane C. Moriarty, *Using Brain Imaging for Lie Detection: Where Science, Law & Policy Collide*, PSYCHOL. PUB. POL'Y & L. (forthcoming 2013) (discussing studies); Sean A. Spence et al., *A Cognitive Neurobiological Account of Deception: Evidence from Functional Neuroimaging*, 359 PHIL. TRANS. R. SOC. LOND. B. 1755, 1755–62 (2004). The length of this Article precludes an in-depth discussion of the deeper philosophical concepts of truth and dishonesty that undergird any exploration of the subject. Rather, our focus is primarily on published experimental studies performed in the last several decades.

61. Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633, 633–34 (2008) (citing multiple studies about views of honesty).

62. See SMITH, *supra* note 60, at 15; VRIJ, *supra* note 60, at 22 (collecting studies on the frequency of lying and concluding that lying is a fact of everyday life and occurs frequently).

63. ARIELY, *supra* note 60, at 238 (“[A]ll of us are perfectly capable of cheating a little bit.”). His study notes, however, that bankers cheated more than junior politicians—by a margin of two-to-one. *Id.* at 243.

64. Paul Eckman & Maureen O’Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 913–20 (1991); accord VRIJ, *supra* note 60, at 141–88 (collecting and discussing studies about the accuracy rates of lay persons in detecting truth and deception). There may be disagreement about whether these studies accurately match real-life decisions. See, e.g., Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2567–71 (2008) (discussing studies).

65. As the late neuroscience researcher Sean Spence pointed out, “precisely truthful communication at all times would be difficult and perhaps rather brutal.” Spence et al., *supra* note 60, at 1756.

benefit.<sup>66</sup> Deception is an ability that develops naturally during childhood and only individuals with neurodevelopmental disorders (e.g., autism) do not develop this ability,<sup>67</sup> which suggests that deception may be an essential aspect of human functioning.

The disciplinary system approaches the seriousness of and reasons for deception by focusing on the degree of harm to the victim or the profession.<sup>68</sup> To date, to the best of our knowledge, no one has been disciplined for lying about one's height in an online dating site<sup>69</sup> or for other minor misrepresentations. In the last few decades, the disciplinary system has declined to bring disciplinary charges against philandering lawyers—although this was not always the case.<sup>70</sup> Some

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66. VRIJ, *supra* note 60, at 19. The Court of Appeals for the Ninth Circuit, however, collected dozens of reasons for lying:

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy (“No, I don't live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you've gotten skinny”); to avoid recriminations (“I only lost \$10 at poker”); to prevent grief (“The doc says you're getting better”); to maintain domestic tranquility (“She's just a friend”); to avoid social stigma (“I just haven't met the right woman”); for career advancement (“I'm sooo lucky to have a smart boss like you”); to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you so much”); to defeat an objective (“I'm allergic to latex”); to make an exit (“It's not you, it's me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There's nothing wrong”); to get someone off your back (“I'll call you about lunch”); to escape a nudnik (“My mother's on the other line”); to namedrop (“We go way back”); to set up a surprise party (“I need help moving the piano”); to buy time (“I'm on my way”); to keep up appearances (“We're not talking divorce”); to avoid taking out the trash (“My back hurts”); to duck an obligation (“I've got a headache”); to maintain a public image (“I go to church every Sunday”); to make a point (“Ich bin ein Berliner”); to save face (“I had too much to drink”); to humor (“Correct as usual, King Friday”); to avoid embarrassment (“That wasn't me”); to curry favor (“I've read all your books”); to get a clerkship (“You're the greatest living jurist”); to save a dollar (“I gave at the office”); or to maintain innocence (“There are eight tiny reindeer on the rooftop”).

United States v. Alvarez, 638 F.3d 666, 674–75 (9th Cir. 2011)

67. Spence et al., *supra* note 60, at 1755 (citing studies).

68. Again, this intuitive judgment may be misguided. As small forms of deception are successful, the deceiver may be buoyed by the success and move to greater misdeeds.

69. People frequently lie by exaggerating their own physical attributes in matchmaking contexts. See Zoe Chance et al., *Temporal View of the Costs and Benefits of Self-Deception*, 108 PROC. NAT'L ACAD. SCI. 15655, 15655 (2011) (citing studies).

70. See, e.g., Grievance Comm. of Hartford Cnty. Bar v. Broder, 152 A. 292 (Conn. 1930) (disbarring attorney for adultery, which was then a felony). Broder was convicted and sent to prison. In deciding whether disbarment was appropriate, the

legal misrepresentations are also labeled acceptable forms of deceit, even by the Model Rules of Professional Conduct, which exclude certain deceptive statements related to settlement of a case.<sup>71</sup>

On the other hand, many types of dishonesty are dealt with harshly in both the criminal and disciplinary systems. When lawyers intentionally mislead the court<sup>72</sup> or their clients,<sup>73</sup> such conduct may result in severe penalties, including the loss of one's license to practice.<sup>74</sup> Misappropriating funds from clients is most often a disbarring offense and in some states will lead to permanent disbarment (colloquially termed a "professional death penalty").<sup>75</sup>

Dishonest acts culminating in a felony conviction may result in disbarment and convictions for perjury often result in disbarment, as occurred when Vice Presidential Chief of Staff and Presidential Assistant, I. Lewis Libby, was convicted of that crime.<sup>76</sup> But between social lies and perjury convictions lies vast acreage.

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Supreme Court of Connecticut noted that "adultery was conduct involving moral turpitude, and, under our law, an infamous crime, since the penalty might be imprisonment in the state's prison. It was indicative of . . . 'moral unfitnes for the profession' . . ." *Id.* at 294. Having sexual relations with clients, however, is grounds for professional discipline in many states. *See* ABA MODEL RULE PROF'L CONDUCT 1.8(j) (2012) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

71. ABA MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2012) ("Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category . . .").

72. *See, e.g., In re Clark's case*, 37 A.3d 327 (N.H. 2012) (disbarment appropriate for intentionally misleading the Bankruptcy court).

73. *Orr v. Ky. Bar Ass'n*, 355 S.W.3d 449 (Ky. 2011) (attorney permanently disbarred after forging clients' names to sell property, fabricating the names of people to whom he claimed to have sold property, lying about what he had done, converting the money to pay personal debts, and misleading bar investigators); *In re Bark*, 72 So. 3d 853 (La. 2011) (disbarment warranted when lawyer encouraged clients and others to invest in his fraudulent scheme); *State ex rel. Counsel for Discipline of Neb. Sup. Ct. v. Bouda*, 806 N.W.2d 879 (Neb. 2011) (lawyer disbarred after engaging in an elaborate series of misrepresentations to his client, stealing money, and neglecting matters causing a *caus* to be issued for his client's arrest).

74. *See In re Crossen*, 880 N.E.2d 352 (Mass. 2008) (disbarring lawyer who had arranged a job interview for an in-house position with a non-existent corporation for a judicial law clerk to convince her to provide evidence the lawyer could use in a motion to disqualify judge).

75. *Zazzali*, *supra* note 27, at 318 (discussing the New Jersey rules that permanently disbar lawyers for misappropriating funds).

76. *See In re Libby*, 945 A.2d 1169 (D.C. 2008) (disbarring I. Lewis ("Scooter") Libby upon conviction for perjury and related crimes). Libby was convicted of

Many lawyers engage in deceit that raises serious concerns about fitness to practice: how many lawyers “cheat a little” on their taxes, pad their hours “a bit,” or lie to clients about how well the lawyer actually performed in hearing when the client was not there? Apparently the government collected about three hundred billion dollars less in taxes paid than in taxes owed, due to underreporting.<sup>77</sup> Lawyers are undoubtedly represented in this group. Given that nearly all are dishonest to some degree, is there a bright line between essentially honest and essentially dishonest? Although courts seem to operate on the assumption of such a bright line, we are less sanguine on the subject.

One theory of why those who consider themselves honest commit acts of dishonesty is that they balance the risks and rewards of the dishonesty against an internal view of self that is affected by the value system around them.<sup>78</sup> People’s innate level of honesty can be affected by the mores of those with whom they interact.<sup>79</sup> Consider this slight twist on a social science experiment: If the government left pencils on the tables in the courtroom, would you take a few with you when you left? Would you do the same thing if you were at your colleague’s desk writing a note? Would you take a quarter off her desk? While there are many possible answers, we assume that some lawyers would take the pencils from the courtroom but would be loath to take their colleague’s pencils and would never even consider

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violating 18 U.S.C. § 1621 (2006) (providing that perjury is punishable by fine or by imprisonment of not greater than five years). *See also* Matter of Reid, 512 N.Y.S.2d 114 (App. Div. 1987) (disbarring an attorney upon conviction of perjury in New York state court, violating Penal Law § 210.15).

77. Mazar et al., *supra* note 61, at 633.

78. *Id.* at 634.

79. Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 397 (2009) (discussing the results of studies to determine the effect of peer influence on unethical behavior and finding that a group’s willingness to engage in dishonesty may increase when a member of the group to which participants identify commits an act of dishonesty); *accord* ARIELY, *supra* note 60, at 246 (concluding we “catch” dishonesty from others). Leslie Levin also addresses how peers influence attorneys’ ethical norms, exploring the interaction between social psychology and attorney discipline. *See* Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and From Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1556–59 (2009) (explaining how lawyers’ ethical views are informed by those with whom they interact frequently); *see also* ABEL, *LAWYERS IN THE DOCK*, *supra* note 9; Leslie C. Levin, *The Ethical World of Small Firm and Solo Practitioners*, 41 HOUS. L. REV. 309, 376–81 (2004) (discussing the relationship between psychological processes and ethical practice).

taking the money. Taking something from an identifiable person feels like “stealing,” as does filching the quarter.<sup>80</sup>

Our conceptions about honesty are also influenced by peers and what has become accepted practice. Many people who are dishonest to some degree in paying taxes or puffing up their work-related expenses still think of themselves as honest, believing they are doing what is socially acceptable,<sup>81</sup> akin to “puffing” in negotiations. Thus, our sense of moral behavior is affected by both common practice and the moral compasses of those with whom we associate.<sup>82</sup> This may explain, for example, why some lawyers pad their hours, overbill, or double bill.<sup>83</sup> According to Professor Ross’s 2006–2007 survey, over 30% of lawyers who responded double-billed; more than 30% “recycled” work from one client and charged the second client; and most lawyers believed that padding bills occurs on a regular basis.<sup>84</sup> According to Professor Ross, the number of lawyers engaged in such behavior has *increased* significantly while the number who find the behavior morally objectionable has *decreased* substantially between his 1995–1996 survey and the more recent one.<sup>85</sup> There is often

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80. See Mazar et al., *supra* note 61, at 634 (using a related hypothetical).

81. *Id.* at 643.

82. See Gino et al., *supra* note 79, at 397–98; Levin, *supra* note 79, at 1555–56.

83. For discussions of the problem, see, e.g., Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 208, 208–09 (1999); Douglas R. Richmond, *A Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 66–67 (2008).

84. William G. Ross, *Billing Ethics Survey for Attorneys*, WILLIAM G. ROSS, [http://www.williamgeorgeross.com/pdfs/phpESP%20v1%207\\_with%20omissions%20for%20posting.pdf](http://www.williamgeorgeross.com/pdfs/phpESP%20v1%207_with%20omissions%20for%20posting.pdf) (last visited Feb. 12, 2013). Professor Ross notes on his website that between the 1995–1996 survey and the 2006–2007 survey, lawyers’ belief that such behavior was unethical also decreased. See William G. Ross, *Attorney Billing Surveys*, WILLIAM G. ROSS, <http://www.williamgeorgeross.com/surveys.html> (last visited Mar. 2, 2013).

85. Professor Ross concludes about the survey:

[A]pproximately two-thirds of the respondents to the 2006–07 survey and 1995–96 surveys stated that they had specific knowledge of bill padding. Moreover, the attorneys who responded to the most recent survey seemed, on the whole, to be less ethical in their billing practices than those who responded to the earlier surveys. For example, 54.6 percent admitted that the prospect of billing additional time had at least sometimes influenced their decision to do work that they otherwise would not have performed, compared with only 40.3 percent in the 1996 survey. Similarly, the percentage of attorneys who admitted that they had engaged in “double billing” rose from 23 percent in 1996–96 to 34.7 percent in 2006–07. *The percentage of the attorneys who believed that this practice was unethical fell from 64.7 percent in 1995–96 to only 51.8 percent in 2006–07, even though*



substantial pressure to increase billable hours, and as more lawyers in a given firm engage in dishonest behavior, the behavior itself becomes more regularized and feels less immoral. Perhaps lawyers are “catching” the cheating bug from their colleagues.<sup>86</sup> Research suggests that the “ethical climate and ethical culture are important predictors of the frequency of unethical acts within groups and organizational settings.”<sup>87</sup>

With the example of solo practitioners being over-represented in the disciplinary system,<sup>88</sup> one may theorize that the absence of any group to disapprove of improper behavior may be part of the reason lawyers can engage in the self-deception necessary to engage in professional misconduct. Since positive peer pressure helps keep people honest, perhaps the lack of positive peer pressure negatively affects behavior as well.

For most of us, our conscience, formed in part internally and in part by our environment, governs the extent and degree of our deceptive behavior. Most people are neither unnaturally honest nor wholly dishonest; we all fall somewhere on a spectrum and various factors may affect our behavior, including pressures encountered and the perceived risk of detection. Thus, predicting the likelihood of a given individual’s deceptiveness in the future is a complicated and possibly futile task.

There are undoubtedly groups of people who do fall outside of the normal range on the deceptive/honest continuum and easily engage in serious dishonesty involving vast sums of money or others’ property. For example, psychopaths—a very small fraction of the population<sup>89</sup>—routinely engage in deception: “Psychopaths use

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*this practice has been condemned by the American Bar Association and most commentators who have discussed the issue.*

See William G. Ross, *Attorney Billing Surveys*, WILLIAM G. ROSS, <http://www.williamgeorgeross.com/surveys.html> (last visited Mar. 2, 2013) (emphasis added).

86. See ARIELY, *supra* note 60, at 191–216.

87. Gino et al., *supra* note 79, at 397.

88. Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Firm Practitioners*, 70 FORDHAM L. REV. 847, 847–48 n.3 (2001).

89. Psychopathy is generally estimated at roughly one percent of the general population. ROBERT D. HARE, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 196 (Theodore Millon et al. eds., 1998). Robert Hare, a leading expert on the subject, has defined psychopathy as a “constellation of affective, interpersonal, and behavioral characteristics, including egocentricity; impulsivity; irresponsibility; shallow emotions; lack of empathy, guilt, or remorse;

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deception to exploit others . . . , and lie more persistently and blatantly, with considerably more panache than do most other people.”<sup>90</sup> For many years, little research was done on psychopathy in the non-violent criminal population. Few thought psychopaths were in the general population, due to their often-extreme behaviors and predilection for criminal behavior. In the last few decades however, with the recognition that much white-collar crime and utterly unacceptable behavior occurs in business and the professions, there has been renewed interest and research in corporate psychopathy.<sup>91</sup>

Some of the cases involving disbarment seem to involve such manipulative, callous and deceptive behavior that it is reasonable to assume that psychopathy (or another serious personality disorder involving callous deception) may explain the behavior. But for many cases involving acts resulting in suspension and disbarment, it is quite possible the lawyers involved were similar to many lawyers who act ethically. They just made unethically deceptive choices.

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pathological lying; manipulateness; and the persistent violation of social norms and expectations.” *Id.* at 188 (internal citations omitted). While psychopaths are well-represented in the violently criminal populations, they are also “well represented in . . . swindlers and con artists, mercenaries, corrupt politicians, [and] unethical lawyers and doctors.” *Id.* at 196. *See generally* THE PSYCHOPATH: THEORY, RESEARCH, AND PRACTICE (Hugues Hervé & John C. Yuille eds., 2007) [hereinafter THE PSYCHOPATH] (providing a comprehensive review of current research in the study of psychopathy).

Psychopathy has substantial overlap with antisocial personality disorder. *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR § 301.7 (4th ed. 2000). There are differences between them, however, that are well beyond the scope of this Article. For a more complete explanation of the differences, see Kent A. Kiehl, *A Cognitive Neuroscience Perspective on Psychopathy: Evidence for Paralimbic System Dysfunction*, 142 PSYCHIATRY RES. 107, 109 (2006).

We recognize that other forms of personality disorders and mental illness may explain lawyers’ unethical behavior but mention psychopathy due to its accepted relation to deception. Barry S. Cooper & John C. Yuille, *Psychopathy and Deception*, in THE PSYCHOPATH, *supra* at 487–503 (discussing how deception is a critical aspect of psychopathy). For more on the various personality disorders and mental illnesses that involve deceptive traits, see generally AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (4th ed. 2000); VRIJ, *supra* note 60, at 30–34 (discussing the relationship of personality types and deception).

90. VRIJ, *supra* note 60, at 31 (citations omitted).

91. Paul Babiak, *From Darkness Into the Light: Psychopathy in Industrial and Organizational Psychology*, in THE PSYCHOPATH, *supra* note 89, at 411–28.

It is not just the company lawyers keep that may influence the honesty; self-deception may also partially explain lawyer deviance.<sup>92</sup> While humans are good at lying to other people, we seem to also excel at lying to ourselves, particularly when the facts conflict with our self-perception.<sup>93</sup> Self-deception is apparently not a conscious process; we may “lack awareness [of] . . . both the contents and processes involved.”<sup>94</sup> The intriguing concept of self-deception is a matter of much debate and discussion among philosophers and scientists.<sup>95</sup> We all wonder why we would be so capable of lying to ourselves about matters small and large but have no conscious appreciation for engaging in this behavior.

We deceive ourselves for various reasons, some positive and some not. More favorable hypotheses “are more pleasant to contemplate than unfavorable ones and tend to come more readily to mind”<sup>96</sup> and most people wish to maintain a positive self-image.<sup>97</sup> As Nicholas Epley and Erin Whitchurch note, “Flattering information about the self is accepted readily, whereas threatening information is evaluated more critically and ultimately derogated . . . [which may allow] people to form a more desirable image of their traits and abilities than reality might allow.”<sup>98</sup> These interpretations of self-deception are largely

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92. There are multiple reasons why individuals commit unethically deceptive acts, as explained by Professor Abel in *LAWYERS IN THE DOCK*, *supra* note 9, and Professor Levin in *Bad Apples, Bad Lawyers*, *supra* note 79, at 1555 (discussing the “various social and psychological processes [that] propel the lawyer down the path to deviance”). Nonetheless, we focus here on two behaviors we believe are critical.

93. IAN LESLIE, *BORN LIARS: WHY WE CAN'T LIVE WITHOUT DECEIT* 185 (2011).

94. Ruben C. Gur & Harold A. Sackheim, *Self-Deception: A Concept in Search of a Phenomenon*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 147, 149 (1979). While the concept of self-deception is much discussed by philosophers and studied by social scientists, the concept has not yet been tested by cognitive neuroscientists using fMRI methods. Thus, some argue that self-deception is a just a *suggested* mechanism that removes the troubling thought from consideration but that the existence of this mechanism is still unproven. *See, e.g.*, John R. Monterosso & Daniel D. Langleben, *Homo Economicus' Soul*, 45 *J. MARKETING RES.* 645, 648–49 (2008) (“We speculate that brain activity associated with labeling self-signals as unwanted and keeping them from entering awareness may help distinguish self- from other-deception.” (emphasis added)).

95. Danica Mijovic-Prelec & Drazen Prelec, *Self-Deception as Self-Signalling: A Model and Experimental Evidence*, 365 *PHIL. TRANS. R. SOC. B.* 227, 228 (2010) (noting that two thousand years of “speculation and commentary have failed to exhaust the topic or forge a consensus interpretation”); *see also* ALFRED R. MELE, *SELF-DECEPTION UNMASKED* (2001); Gur & Sackheim, *supra* note 94.

96. MELE, *supra* note 95, at 30.

97. *See* Chance et al., *supra* note 69, at 15655.

98. Nicholas Epley & Erin Whitchurch, *Mirror, Mirror on the Wall: Enhancement in Self-Recognition*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 1159,

positive and go a long way to allowing us to live among others as social animals.

The role of burnishing our self-image cannot be understated. When asked to evaluate their abilities in comparison to peers, all but seven percent of college professors believed they were better than average at their work.<sup>99</sup> These results are replicable throughout the populations in the United States; we are Lake Wobegoners, believing we are all above average.<sup>100</sup> Of course, reality cannot match our beliefs, but there are some positive reasons for such widespread self-deception. According to some who study mental health, the better-adjusted see themselves far more positively (and inaccurately) than those who are depressed; counter-intuitively, it may be the depressives who see the world more accurately.<sup>101</sup> Thus, self-deception is consistent with mental health “because there are positive correlations between having these illusions and a positive sense of self, satisfying social relationships, caring about others, happiness, the ability to set goals and sustain the motivation and persistence to achieve them, the ability to cope effectively with setbacks and change, and productive, creative work.”<sup>102</sup>

Not surprisingly, self-deception is often not so benign, as is clear from addiction studies. A primary problem in treating addiction is the failure of most individuals to recognize the need for therapeutic help. In fact, “more than 80% of addicted individuals fail to seek treatment.”<sup>103</sup> A common explanation for the failure to self-recognize addiction is “denial” or self-deception. Given that many addicts suffer terrible consequences as a partial result of self-deception, it

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1159 (2008). In this study, individuals were allowed to select a picture of themselves that was accurate or had been morphed to be more attractive or less attractive. *Id.* Participants were more likely to recognize an attractively enhanced version rather than their actual photograph. *Id.* Interestingly, this enhanced recognition applies to close friends but not to strangers. *Id.*

99. See SMITH, *supra* note 60, at 25 (discussing the oft-cited work of T. GILOVICH, *HOW WE KNOW WHAT ISN'T SO* (1991)).

100. See HARRY C. TRIANDIS, *FOOLING OURSELVES: SELF-DECEPTION IN POLITICS, RELIGION, AND TERRORISM* 45 (2009); see also DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 182 (rev. & expanded ed. 2009) (discussing the “Lake Wobegone effect” of self-deception, also known as the positivity bias).

101. SMITH, *supra* note 60, at 27-28.

102. TRIANDIS, *supra* note 100, at 30.

103. Rita Z. Goldstein et al., *The Neurocircuitry of Impaired Insight in Drug Addiction*, 13 *TRENDS IN COGNITIVE SCI.* 372, 372 (2009).

hardly seems like the benign concept described in the preceding paragraphs.

Self-deception has another decidedly dark side that can be used to manipulate us into behavior that is harmful to others.<sup>104</sup> Lawyers who engage in deceptive behavior often employ self-deception to allow them to live an unscrupulous life while simultaneously maintaining a positive self-image.<sup>105</sup> Some social science researchers have termed this concept “moral hypocrisy,” where one engages in self-deception to “avoid perceiving discrepancies between their self-serving actions and their moral standards.”<sup>106</sup> The concept of moral hypocrisy—which operates on an other-than-conscious level—may explain the situation of otherwise good lawyers committing bad acts.

Self-deception is also used in the deception of others. Shielding matters from our conscious mind better shields them from others and thus, the deceiver is less likely to exhibit the stress known to accompany deception.<sup>107</sup> Some theorists posit that deception of others is intimately linked to our ability to deceive ourselves.<sup>108</sup> Lawyers may convince themselves that they are really just “borrowing” money from their client fund account or that the clients from whom they steal are really not very good people. These lawyers use self-deception both to engage in the immoral behavior and to deceive others.

The social science research collectively suggests that when lawyers act deceptively, they can convince themselves that the behavior is acceptable both by using self-deception and by drawing on the moral beliefs of chosen friends and associates. One could argue that many lawyers are not terribly different in kind from those who are

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104. See, e.g., Batson et al., *supra* note 43, at 525 (discussing how “people who sincerely value morality . . . [and value the] interests of others, can act in ways that seem to show a blatant disregard for the moral principles they hold dear”). In this study, the authors posit that one way to appear moral to oneself while violating one’s morals standards is to engage in self-deception. Accord Roy F. Baumeister & Leonard S. Newman, *Self-Regulation of Cognitive Inference and Decision Processes*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 3, 3 (1994).

105. See Batson et al., *supra* note 43, at 534–35 (discussing an experiment showing how people can act unethically and still maintain a view of themselves as moral). Interestingly, this ability was adversely affected by positioning a mirror in front of the subjects while they made a choice to be more or less ethical in their decision making. *Id.* at 534. Apparently, “seeing yourself” as immoral may affect behavior. *Id.*

106. *Id.* at 525–27.

107. See SMITH, *supra* note 60, at 76 (discussing the work of Robert Trivers).

108. Robert Trivers, *The Elements of a Scientific Theory of Self-Deception*, 907 ANNALS N.Y. ACAD. SCI. 114, 115 (2000).

suspended or disbarred; the latter may just have been more able to engage in some serious self-deception or are influenced by less-than-honest companions.<sup>109</sup> And social science data suggest various ways that we can encourage people to be more honest (at least in studies).<sup>110</sup>

Perhaps there are ways for judges (and the rest of us) to learn from the science. But what we still do not know—and on which we believe that science might provide helpful input—is who will continue to be unethically deceptive in the future. There is a wealth of social science and neuroscience that might inform the courts about deceptive behavior, yet courts continue on much the way they did in the era of Julius Henry Cohen—believing they can accurately judge character and that they can predict behavior.

#### IV. CAN SCIENCE IMPROVE JUDICIAL DECISIONS ABOUT REINSTATEMENT?

Once admitted to the bar, there is seemingly an assumption that law graduates are and will continue to be honest.<sup>111</sup> When disbarred or suspended lawyers seek reinstatement, this assumption is no longer justified. Courts must therefore find ways to determine which past behaviors are meaningfully correlated with future honesty or future dishonesty. Cognitive and social science knowledge might prove helpful to courts.

In some suspension and disbarment cases, the past deception is so extreme as to raise a red flag: stealing large amounts of money from clients; forging documents; lying repeatedly to the courts and clients; and engaging in complicated forms of deception involving various

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109. We are excluding from this consideration those lawyers whose mental health or substance abuse disorders were a primary causative agent in their suspension or disbarment. The effects of altered thinking due to mental illness or substance abuse invoke different concerns about rational versus irrational decision making.

110. See, e.g., Batson et al., *supra* note 43, at 534 (requiring people to watch themselves in a mirror while acting reduced dishonesty); ARIELY, *supra* note 60, at 246–54 (suggesting that reminding people about ethical obligations and making subjects responsible for the acts of others reduces dishonesty).

111. Professor Barnard has made an intriguing proposal that bar admission ought to be a renewable process, with “360 degree reviews” at various points in one’s career. Jayne W. Barnard, *Renewable Bar Admission: A Template for Making “Professionalism” Real*, 25 J. LEGAL PROF. 1 (2001). While it is an interesting proposal that might well encourage more honest behavior, it seems both complicated and unlikely to gain traction with the bar.

parties.<sup>112</sup> In short, these seriously deceptive acts seem well outside of the normal range of dishonesty and deceptiveness.<sup>113</sup> The more extreme cases may indicate that the lawyer has an underlying personality disorder (such as psychopathy) and poses a continuing danger to the public if allowed to return to practice.<sup>114</sup> Experts on the subject (such as psychiatrists) might be helpful in alerting courts about individuals with serious personality disorder, but courts seem willing to make decisions without the aid of experts, relying largely on their own experience and intuition in decisions. While their native practice may be good enough, we believe it might be helpful in protecting the public to know more, if that is indeed possible, about who is likely to reoffend. If the public interest is the overarching concern when deciding whether to reinstate lawyers, then courts should focus on the factors that are meaningfully correlated with seriously dishonest behavior.

The cases involving less egregious behavior also pose equally complicated questions related to future behavior: will the lawyer be deceptive in future dealings, continue to engage in self-deception so as to feel good while doing wrong, and seek out colleagues and companions who will encourage (or will not discourage) bad behavior? Answering these questions is far from simple, but courts continue to rely on their own experience and intuition, disregarding

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112. There is a range of opinions on what might constitute sufficiently extreme behavior. For example, the Pennsylvania Supreme Court remarked that the crimes of misappropriating two million dollars and committing perjury were not so egregious as to bar the court from even considering the petition for reinstatement. *See In re Greenberg*, 749 A.2d 434 (Pa. 2000). The court ultimately declined to readmit Greenberg when he sought readmission nine years after disbarment, finding his readmission would have a detrimental effect on the standing of the bar and would subvert the public interest. *Id.* at 436. But curiously, the court did not find the theft of two million dollars so egregious as to bar consideration of his petition. Contrary to some courts, however, Pennsylvania at least gives a nod to considering whether the severity of the original charge should preclude the court from even considering reinstatement. *Id.* at 438. Other courts disagree with that backward-look, finding less is needed: “A firm resolve to live a correct life evidenced by outward manifestation sufficient to convince a reasonable mind clearly that the person has reformed is only required. In restoring a disbarred attorney, the principal question is whether that particular attorney would be safe to assist in administering justice if readmitted . . . .” *In re Holt*, No. 2011-BR-00600-SCT., 2012 WL 852654, at \*2 (Miss. Mar. 15, 2012) (quoting *Phillips v. Miss. State Bar*, 427 So.2d 1380, 1382 (Miss. 1983)).

113. Of course, the data on lawyer discipline might change dramatically if more lawyers were suspended or disbarred for padding hours.

114. David Thornton & Linda Blud, *The Influence of Psychopathic Traits on Response to Treatment*, in *THE PSYCHOPATH*, *supra* note 89, at 505 (discussing the lack of empirical evidence about successful treatment models).

potential insights from science that might be helpful. Predicting future behavior is an exceptionally complex endeavor that even experts often get wrong,<sup>115</sup> as is clear from the literature about predictions of future dangerousness in death penalty hearings and cases involving the release of sexual predators.<sup>116</sup> Rather than relying on intuitive judgment, courts may benefit from empirical data to gauge the likelihood of future unethical behavior.<sup>117</sup>

Although this Article does not suggest any particular way in which courts should proceed, we do believe that gathering data about reinstated attorneys might be a useful first step.<sup>118</sup> For example, it would be helpful to know, at a minimum, how many lawyers who are suspended and permitted to return to practice reoffend, and what types of original wrongdoing are correlated with future wrongdoing.<sup>119</sup> Perhaps the data will reveal that courts do a good job at weeding out re-offenders. But if we are to take wrongdoing, redemption, and protection of the public seriously, we need to know whether the methods used by courts to determine fitness to return to practice are reliable and valid.<sup>120</sup>

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115. See Rhode, *supra* note 13, at 559–60 (discussing experts' inability to predict future behavior with accuracy).

116. See *Barefoot v. Estelle*, 463 U.S. 880, 928 (1983) (Blackmun, J., dissenting) (noting that based upon the opinion of mental health professionals as *amici*, predictions of dangerousness are wrong “two times out of three”). According to social science experts, clinical judgments about predictions of dangerousness are still quite poor. “Little has transpired . . . to increase confidence in the ability of psychologists or psychiatrists, using their unstructured clinical judgment, to accurately assess violence risk.” John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 406 (2006). See generally Richard Rogers & Rebecca L. Jackson, *Sexually Violent Predators: The Risky Enterprise of Risk Assessment*, 44 J. AM. ACAD. PSYCHIATRY & L. 523 (2005) (explaining the complexities and shortcomings of attempting to predict which sexually violent predators will reoffend); Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L. J. 275, 283–93 (2006) (analyzing, inter alia, the benefits and shortcomings of the various predictive methodologies).

117. Professor Monahan notes that when experts employ risk assessment instruments with multiple predictor variables, their accuracy increases. See Monahan, *supra* note 116, at 409–10.

118. For a detailed discussion about the need for better data in law, see Gillian K. Hadfield, *Judging Science: An Essay on the Unscientific Basis of Beliefs About the Impact of Legal Rules on Science and the Need for Better Data About Law*, 14 J.L. & POL'Y 137 (2006).

119. Data on disciplined lawyers might also be correlated with data on law school discipline to see whether there is a relationship between them.

120. This is not to say that an empirical study on this issue is not problematic. First, the degree of lawyer discipline is far below the rate of lawyer misconduct.



As a separate matter, we also wonder whether social science discoveries could be helpful to courts in structuring how lawyers return to practice. For example, studies suggest that reminding people about their ethical obligations and monitoring their conduct may help keep them focused on honest behavior, at least in the short term.<sup>121</sup> Requiring lawyers to explain their past behavior and account for the ethical lapses might be beneficial in preventing future unethical and deceptive behavior.<sup>122</sup> Courts could also consider monitoring the behavior of reinstated lawyers through the use of a mentoring system, where reinstated lawyers and an assigned mentor must check in with the court on a regular schedule.<sup>123</sup> Many people in addiction recovery make use of sponsors to assure continued sobriety and compliance with sobriety programs. Those with serious mental illnesses are often required to have periodic consultations with physicians to assure compliance with medication regimes. In the criminal justice system, the use of long probationary terms is common upon release from prison.<sup>124</sup> The obligation to meet with a monitor on a regular basis may help to ensure continuing good behavior. We do not endorse any of these findings but only offer these insights that could be helpful to courts.

We do not mean to suggest, however, that cognitive and social science provide a panacea for the disciplinary system. On the contrary, there is much disagreement about the proper role of science

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Second, lawyers who have a prior suspension or disbarment may not be treated the same as other lawyers—even small examples of misconduct may generate a greater response from disciplinary authorities than is the norm. Third, there is no real way to evaluate courts' decisions to prevent disbarred or suspended lawyers from returning to the practice, as that group will be outside the purview of the disciplinary system. Finally, there will always be problems and disputes around both the accuracy of the data collection and the meaningful analysis of that data that are common to all such endeavors.

121. ARIELY, *supra* note 60, at 39–53 (discussing the prophylactic role ethics reminders have in reducing cheating on tests, but noting their often short-term effect).

122. Batson et al., *supra* note 43, at 529 (claiming that by making individuals more self-aware—such as being called upon in public to account for one's behavior—can “heighten awareness of discrepancies between behavior and salient personal standards, creating pressure to act in accord with standards”).

123. Professor Barnard's concept of the “systematic periodic performance evaluation” for all lawyers dovetails with the concept of monitoring lawyers who have already been in trouble. *See* Barnard, *supra* note 111.

124. In the federal criminal system, 18 U.S.C. § 3583(b) mandates terms of one to five years for monitored probation after sentences are concluded. 18 U.S.C.A. § 3583(b) (West 2013); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 (2004) (sentencing guidelines that suggest long monitored probation after release).

in the courts.<sup>125</sup> Scientific discoveries are often the product of small laboratory studies that hold little meaning for application outside the lab. They may be plagued by small sample size, poorly designed experiments, questionable statistical analysis, or conclusions that constitute an unwarranted leap from the data generated. Moreover, there is often disagreement among the scientists themselves about the proper use of social science data in the court system,<sup>126</sup> and reliance on social science risks the possibility of “reducing human beings to data points.”<sup>127</sup> However, we do think there is something to be learned from those who study behavior and that such knowledge might be helpful to courts in deciding whether to reinstate lawyers.<sup>128</sup>

#### V. WHY DOES THE TRADITIONAL APPROACH PERSIST WITHOUT REGARD TO POTENTIAL SOCIAL SCIENCE INSIGHTS?

In recent decades, courts have drawn on social science understandings and methodologies in a wide variety of contexts. Science-based experts testify to assist both judges and juries in making a host of decisions in both civil and criminal trials.<sup>129</sup> The

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125. For a small sample of the literature, see generally DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* (1999); ROBIN FELDMAN, *THE ROLE OF SCIENCE IN LAW* (2009); SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA* (1995); and Susan Haack, *Irreconcilable Differences? The Troubled Marriage of Science and Law*, 72 *LAW & CONTEMP. PROBS.* 1 (2009).

126. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (providing a contemporary example where scientists disagreed about the proper use of social science in the courtroom). For an explanation of some aspects of the disagreement, see generally Gregory Mitchell et al., *Beyond Context: Social Facts as Case-Specific Evidence*, 60 *EMORY L. J.* 1109 (2011).

127. FELDMAN, *supra* note 125, at 151–52.

128. We expressly do not suggest any particular method for courts to become acquainted with this social science learning. We simply submit that perhaps science can be a helpful adjuvant to courts making these difficult decisions.

129. Scientific evidence has become a prominent aspect of civil and criminal trials in the twenty years since *Daubert v. Merrell Dow Pharmaceuticals, Inc.* was decided. 509 U.S. 529 (1993). For one commentator’s discussion of some aspects of this change, see, e.g., David L. Faigman, *The Law’s Scientific Revolution: Reflections and Ruminations on the Law’s Use of Experts in Year Seven of the Revolution*, 57 *WASH. & LEE L. REV.* 661 (2000) (discussing the revolutionary change in science and law following the Supreme Courts’ trilogy on expert evidence). The use of social science in legal decision making, however, certainly is not without controversy. *See, e.g.,* FELDMAN, *supra* note 125, at 148–52 (discussing the shortcomings of the Supreme Court’s reliance upon and understanding of science in its decisions); Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and The Law*, 44 *LAW & SOC’Y REV.* 515 (2010) (discussing the debate over the use of social science in *Brown v. Board of Education*, 498 U.S. 483 (1954), and the

United States Supreme Court has relied on various forms of science in reaching decisions over the last several decades.<sup>130</sup> But science is largely not a part of the design of the disciplinary (including reinstatement and readmission) process. Lawyers seeking to mitigate their punishment or seeking to reenter the profession do sometimes offer evidence from psychologists but generally in the limited role to explain recovery and treatment from substance abuse or mental health disorders.<sup>131</sup> With that exception, science is largely absent.

Focusing on lawyers who engage in deceit, we have shown that the various forms of scientific knowledge might offer insights. Tools might be offered to identify lawyers with serious personality and other disorders who plainly should not be reinstated or readmitted because they cannot be trusted at all to adhere to professional norms. More generally, the experts might offer insights into why offending lawyers act dishonestly in given situations, how the thought-process of those lawyers may differ from that of others, how those thought processes would have to change to provide greater confidence that they will act honestly in the future, and how that change might be achieved and identified.

We are not prescribing the use of any particular tools or suggesting that courts should draw on any particular insights or how those insights might change courts' inquiry. The point is simply that scientific knowledge likely has something to offer from which courts have not tried to benefit. One might ask, why not? We offer the following speculation.

There are many reasons why courts might adhere to an approach that predates the development of the social sciences. One is that law

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continuing concerns about the use of social science in the courtroom); *see also* Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Briefs*, 15 LAW & HUM. BEHAV. 1 (1991).

130. *See e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569–74 (2005) (relying in part on scientific and sociological data to support its holding that imposing the death penalty on individuals who committed crimes while juveniles is unconstitutional); *General Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring and noting the increase in “cases presenting significant science-related issues”); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493–95 (1954) (relying on social science evidence that segregation had a negative psychological impact on African American children). The research upon which the Court relied in *Brown* has been widely critiqued. FELDMAN, *supra* note 125, at 149–50.

131. *See* Timothy P. Chinaris, *Even Judges Don't Know Everything: A Call for Presumption of Admissibility for Expert Witness Testimony in Lawyer Disciplinary Proceedings*, 36 ST. MARY'S L.J. 825, 828 n.6 (2005) (collecting cases and noting that a common use of experts is to address health and addiction matters).

practice is innately conservative and slow to change, particularly absent some good reason to do so. Concepts such as *stare decisis* speak to the strength of inertia when it comes to the development of the law and legal institutions. There is a powerful force favoring the preservation of concepts such as “character” that are deeply rooted in the admissions and disciplinary jurisprudence. Courts may be aware, on some level, that a foray into social science literature opens the door to questioning the idea of “character” as a predictor of lawyers’ future behavior. Courts’ indifference to cognitive and social science may simply bespeak resistance to change in this area.<sup>132</sup>

A second possibility is that the traditional common-law approach to post-disciplinary proceedings more easily allows courts to mask political considerations that they believe to be important to their decisions. Courts are sometimes explicit about political considerations that enter into their decision making—e.g., that public confidence in the legal profession sometimes precludes readmission of disbarred lawyers with demonstrable good character because of the nature of their prior wrongs—but they may often prefer to be opaque about their reasoning. An approach predicated on social science literature might give too much weight, or even a dispositive role, to the question of whether the applicant is or is not likely to engage in future wrongdoing, without adequate regard to other considerations that courts would rather hide.

Finally, two other possible explanations bring us back to Julius Henry Cohen and his conception of the central role of professional discipline in preserving law as a “profession.”

First, the idea of “character” is not simply old and venerable. It is also an idea intrinsic to Cohen’s conception of law as a profession. The idea is that people are either honest or dishonest, trustworthy or untrustworthy, law-abiding or lawless; that our character predicts our conduct; and that the admissions and disciplinary processes will, for the most part successfully, weed out the dishonest, untrustworthy, and

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132. Courts’ adherence to long-established practice may also reflect judicial belief that determining rehabilitation is not a terribly complex decision and is one that judges can make based upon common sense. This intuitive style of decision-making seems not to recognize the complexity of the judgments that courts must make in this situation. For more on intuitive judicial decision-making, see Jane Campbell Moriarty, *Will History Be Servitude? The NAS Report and the Role of the Judiciary*, 2010 UTAH L. REV. 299, 317–19 (discussing, inter alia, judges’ intuitive decision-making in deciding certain types of evidentiary issues); and Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

lawless among us. Part of what defines lawyers as professionals is the presumption that, as a result of this process, they possess good character and that clients can trust them with their valuables and courts can take them at their word. Social science literature potentially threatens that core idea in various ways, particularly by exposing the fact that people are not good or bad but mostly a little of both, and by showing that, to the extent distinctions of moral character do exist, we and our institutions are not very good at recognizing them.

What would follow from conceding these possibilities and reconstructing disciplinary processes around them? The lawyer monopoly is predicated in part on the presumption that lawyers, as professionals, are generally more honest, trustworthy and law-abiding than others, and in part on the presumption that lawyers have superior skill, knowledge and expertise relevant to the law. If one assumes that lawyers from a moral perspective are just a cross-section of humanity, half the premise for the lawyer monopoly disappears or weakens.

Second, judicial control over the lawyer regulatory process is predicated on the assumption that lawyers (including judges) are uniquely capable of policing themselves. This is because lawyers have a better understanding of what law practice entails and, presumably, a better ability to discern who has the requisite attributes. As to legal skill and knowledge, that may be true. It is unlikely that judges and lawyers can claim an ability superior to non-lawyers to assess the “character” of applicants to the bar and of lawyers caught up in the disciplinary process or to assess the personal traits for which the concept of “character” may serve as a proxy. If one concedes that social scientists are better than lawyers at fashioning a methodology for determining which would-be lawyers are likely to act honestly in professional dealings, at understanding why lawyers deviate, or at identifying the situations in which lawyers are likely to deviate, the premise of lawyer control over lawyer discipline weakens. If Cohen is right, as discipline goes, so goes the profession.

This is not to suggest that judicial control and social science input are necessarily inconsistent. Judges can draw on social science insights in the disciplinary process without necessarily ceding control, just as they draw on social science expertise in other contexts. However, as we suggested earlier, there are mysteries at the heart of the disciplinary process—the determination of who has been rehabilitated being chief among them. The more these become governed by deliberative processes informed by the social scientists

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and the less by intuitive, somewhat hidden decision making, the less mysterious and more accessible they become, the more obvious the courts' limitations and fallibility become, and the weaker becomes the bar's claim to exclusive authority.<sup>133</sup>

In other words, Cohen was on to something when he stressed the importance of the reciprocal relationship between professional regulation and the preservation of the legal profession. Reinstatement and readmission are just a small part of the regulatory process, which includes admission, rulemaking and—the title of his first chapter<sup>134</sup>—disbarment. But as we have shown, these small parts of the process provide a window into the understanding of lawyer regulation and professionalism. The courts' adherence to the potentially outmoded concept of “character” and methods of discerning it in the contexts of reinstatement and readmission, and perhaps more broadly, their indifference to possible alternative approaches offered by the social sciences, may be rooted, at least in part, in the interest in preserving the idea of law as a profession in the face of perennial challenges posed in the twenty-first century no less than in Cohen's day.

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133. For a challenge to the traditional claim, see Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation and the Idea of a Profession*, 74 *FORDHAM L. REV.* 1079, 1079–82 (2005) (“[W]hatever value self-regulation may have had historically, the legal profession and clients would benefit from abandoning it . . .”).

134. See COHEN, *supra* note 1, at 1.