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Rhode Was Right (About Character and Fitness)

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RHODE WAS RIGHT (ABOUT CHARACTER AND FITNESS)

Leslie C. Levin*

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INTRODUCTION

Deborah Rhode was a giant in the field of legal ethics. She wanted to make the legal profession better—for lawyers, clients, and the public. Rhode had a seemingly limitless capacity to investigate a topic, declare that the taken-for-granted ways of doing things were nonsense (or self-serving nonsense), demonstrate convincingly why, and then suggest a different approach. She was gifted in her ability to turn a clever phrase. Throughout her life, she wrote about problems with lawyer regulation that worked to disadvantage the public or simply did not make sense. After reading her work, I often thought: “Why didn’t I consider that?” and “Of course she is correct.”

Rhode was concerned with finding ways to improve lawyer conduct and lawyer regulation to better serve the public.¹ While she often chided the

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1. See, e.g., DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* (2015); DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS*

organized bar for acting in a self-interested fashion, she cared deeply about the legal profession. In the mid-1980s, she was a leading proponent of stripping the State Bar of California of control over lawyer discipline and transferring that responsibility to a new state agency to promote “real discipline against errant lawyers.”² At the same time, she skewered burdensome regulatory practices that did not make sense. One of her seminal works, *Moral Character as a Professional Credential*, published in 1985, addressed the character and fitness requirement for bar admission, which she viewed as deeply flawed both in theory and in execution.³ That article has been cited in twenty-eight court decisions and more than 300 scholarly works.⁴ The bar’s moral character inquiry—and moral character in general—were topics that she returned to throughout her career.⁵

As Rhode noted, the purpose of the bar’s moral character requirement is primarily to protect the public and, secondarily, to further the bar’s interest in maintaining a professional community and positive image.⁶ The requirement signals to the outside world that lawyers can be trusted.⁷ Among lawyers, it affirms shared values and helps establish the boundaries of the moral community.⁸ The moral character requirement is also part of the legal profession’s effort to legitimate its regulatory autonomy and near monopoly over the provision of legal services.⁹

In the almost four decades since Rhode’s article appeared, many states have attempted to address some of her criticisms of the character and fitness inquiry. But much remains the same. In this Essay, I discuss her original critique. I will then describe the current state of the inquiry and discuss new evidence about the operation, costs, and usefulness of the character inquiry. I will conclude, as Rhode would, with some suggestions for improvement.

(2005); Deborah L. Rhode & Alice Wooley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 *FORDHAM L. REV.* 2761 (2012); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589 (1985).

2. Philip Carrizosa, *Task Force Urges Stripping State Bar of Discipline Cases*, L.A. *DAILY J.*, Sept. 19, 1985, at 1.

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

4. The citation counts for court decisions and scholarly works are from Lexis and Google Scholar, respectively.

5. See, e.g., DEBORAH L. RHODE, *CHARACTER: WHAT IT MEANS AND WHY IT MATTERS* (2019); Deborah L. Rhode, *Moral Character: The Personal and Political*, 20 *LOY. U. CHI. L. REV.* 1 (1988); Deborah L. Rhode, *Institutionalizing Ethics*, 44 *CASE W. RESV. L. REV.* 665, 691–93 (1994) [hereinafter Rhode, *Institutionalizing Ethics*]; Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 *FORDHAM L. REV.* 333 (2004); Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 *LAW & SOC. INQUIRY* 1027 (2018) [hereinafter Rhode, *Virtue and the Law*].

6. Rhode, *supra* note 3, at 509–10.

7. See, e.g., *In re Lazcano*, 222 P.3d 896, 900 (Ariz. 2010) (“It would ‘ero[de] . . . public confidence in the legal profession and the administration of justice were we to admit an applicant who is still on parole for crimes as serious as those committed by [the applicant].” (alterations in original) (quoting *In re Dortch*, 860 A.2d 346, 348 (D.C. 2004))).

8. Rhode, *supra* note 3, at 509.

9. *Id.* at 510.

I. RHODE'S CRITIQUE OF THE CHARACTER AND FITNESS INQUIRY

Rhode fiercely believed that lawyers should behave ethically. She just did not think that a lawyer's behavior in practice could be predicted based on information gleaned during the character and fitness inquiry. She observed, "[w]e have developed neither a coherent concept of professional character nor effective procedures to predict it."¹⁰ Never one to mince words, she noted that the moral fitness requirement was a "cultural showpiece" that had "excommunicated a diverse and changing community, variously defined to include not only former felons, but women, minorities, adulterers, radicals, and bankrupts."¹¹ She decried the subjectivity of admission standards, their indeterminacy, and the failure by some jurisdictions to specify any criteria at all.¹² She questioned the fairness of a process that provided no means to assess whether existing standards were being consistently applied.¹³

Rhode cataloged other problems with the inquiry. She questioned bar examiners' ability to predict future lawyer misconduct, noting that "[e]ven trained psychiatrists, psychologists, and mental health workers have been notably unsuccessful in projecting future deviance, dishonesty, or other misconduct on the basis of similar prior acts."¹⁴ She was withering in her discussion of questions posed to bar applicants about their "lifestyle" and consensual sexual conduct, which she viewed as highly intrusive and a massive waste of time.¹⁵ Her interviews with bar examiners throughout the United States revealed that most found the feedback they received about applicants from employers "only rarely" or "virtually never" of assistance.¹⁶ She also critiqued as "time consuming" and "ill-designed to generate useful information" the requirement that applicants produce references, which virtually all of them are able to do.¹⁷

Rhode also famously noted that the character and fitness inquiry came "both too early and too late."¹⁸ As she explained, "[s]creening takes place before most applicants have faced situational pressures comparable to those in practice, yet after candidates have made such a significant investment in legal training that denying admission becomes extremely problematic."¹⁹ Perhaps as a result, admission was only rarely denied on character and fitness grounds: At the time of her study, 41 percent of jurisdictions rejected no applicants on character and fitness grounds.²⁰ The overall rejection rate was about 0.2 percent.²¹ But as she noted, "[s]tatistics on denials afford no

10. *Id.* at 494.

11. *Id.* at 493.

12. *See id.* at 530–31.

13. *See id.* at 551–52, 585.

14. *Id.* at 559.

15. *See id.* at 578–81.

16. *Id.* at 514.

17. *Id.* at 564–65.

18. *Id.* at 515.

19. *Id.*

20. *See id.* at 516.

21. *Id.*

indication of the deterrent impact of licensing procedures.”²² She suggested, *inter alia*, putting more resources toward lawyer discipline rather than devoting so much effort to the character inquiry.²³

II. THE CURRENT STATE OF THE CHARACTER AND FITNESS INQUIRY

Today, state boards of bar examiners (or similarly named entities) typically conduct the bar examination and the character inquiry.²⁴ They are usually agencies of state courts or are administered by mandatory state bars.²⁵ Employees are responsible for the day-to-day administrative work, and a group of lawyers who are appointed by the state court or the mandatory state bar assist with the work and the development of rules and policies pertaining to bar admission.²⁶ These lawyers also participate in vetting bar applicants for character and fitness issues.²⁷

The current character inquiry usually begins with a bar applicant’s completion of an application. Many jurisdictions use the National Conference of Bar Examiners’ (NCBE) thirty-six-page character and fitness application.²⁸ It has forty-five questions, plus subparts.²⁹ The NCBE performs preliminary character and fitness investigations for twenty-eight U.S. jurisdictions.³⁰ Other states perform their own investigations. These

22. *Id.* at 517.

23. *Id.* at 590.

24. *See, e.g.*, CONNECTICUT PRACTICE BOOK: SUPERIOR COURT—GENERAL PROVISIONS § 2-5 (2023), <https://www.jud.ct.gov/publications/PracticeBook/PB.pdf> [<https://perma.cc/P7WB-YH4S>]; *State Board of Law Examiners*, MD. CTS., <https://www.mdcourts.gov/ble> [<https://perma.cc/APP4-VJLT>] (last visited Feb. 6, 2023); *About the Board of Law Examiners*, MICH. CTS., <https://www.courts.michigan.gov/administration/committees-boards/board-of-law-examiners/new-ble-page/> [<https://perma.cc/9TSZ-FEXP>] (last visited Feb. 6, 2023). In some states, the “Character and Fitness Committee” is separate from the office of the state bar examiners. *See, e.g.*, *Committee on Character*, N.J. CTS., <https://www.njcourts.gov/attorneys/rules-of-court/committee-character> [<https://perma.cc/T5DH-QLF8>] (last visited Feb. 6, 2023).

25. *See, e.g.*, RULES FOR ADMISSION OF ATT’YS r. 2.05 (OR. STATE BD. OF BAR EXAM’RS 2023); FLA. BD. OF BAR EXAM’RS, <https://www.floridabarexam.org> [<https://perma.cc/53LR-ELP7>] (last visited Feb. 6, 2023); *Contact Admissions*, STATE BAR NEV., <https://nvbar.org/licensing-compliance/admissions/contact-admissions/> [<https://perma.cc/X8U5-ZYKA>] (last visited Feb. 6, 2023).

26. *See, e.g.*, NEV. SUP. CT. R. 49; WASH. SUP. CT. ADMISSION & PRAC. R. 2; *Board Members of Pennsylvania*, PA. BD. L. EXAM’RS, https://www.pabarexam.org/board_information/members.htm [<https://perma.cc/NL8S-T5RL>] (last visited Feb. 6, 2023).

27. The terms “bar examiners” and “character committee” are used interchangeably in this Essay to refer to the state employees and lawyer volunteers who participate in the character and fitness inquiry.

28. *See* Penelope J. Gessler & Kellie R. Early, *NCBE’s Character and Fitness Investigation Services: A Look at the Present—A Vision of the Future*, BAR EXAM’R, Sept. 2017, at 26 (noting that the application has been “adopted in whole by many jurisdictions and adopted in part or liberally copied by the remaining jurisdictions”).

29. *See* NAT’L CONF. BAR EXAM’RS, NCBE CHARACTER AND FITNESS SAMPLE APPLICATION (2021), <https://www.ncbex.org/dmsdocument/134> [<https://perma.cc/2XQL-LMQQ>].

30. NAT’L CONF. BAR EXAM’RS, 2021 YEAR IN REVIEW 15 (2022), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F302> [<https://perma.cc/ZQS6->

typically begin with a preliminary review of the applications. If information revealed in the application raises concerns, this may be followed by further investigation, an interview of the applicant, and occasionally, a formal hearing.³¹

Since Rhode wrote her article, some of the problems she identified with the character inquiry have improved. Character committees no longer seem overly concerned with “lifestyle” issues such as applicant cohabitation or marijuana use.³² Many states have more clearly articulated their character and fitness standards.³³ Almost half of all jurisdictions now offer conditional admission, which enables some applicants who might not otherwise be admitted to be monitored by bar regulators for some period while practicing law.³⁴

Nevertheless, the character and fitness process continues to be time-consuming, intrusive, and stressful for the average applicant, and exponentially so for applicants who must undergo an interview or a hearing. The process can also become costly, embarrassing, and career damaging for applicants who must wait to seek employment or explain to employers why their bar admission is delayed.³⁵ Some applicants with criminal records—including some who have spent time in jail—describe the interview as the worst experience of their lives.³⁶ This all occurs in the absence of evidence that bar examiners are now any better able to predict who will be a problematic lawyer than they were when Rhode wrote her article.

There are other reasons to continue to question the fairness of the inquiry. Eleven states still have no published character and fitness standards.³⁷ The

96MV]. The NCBE provides reports to the jurisdictions, which make their own decisions about applicants. *Id.*; Gessler & Early, *supra* note 28.

31. The procedures differ from jurisdiction to jurisdiction, but many provide for both an interview and the opportunity for a formal hearing. *See, e.g.*, RULES OF THE STATE BAR r. 4.46, 4.47 (STATE BAR OF CAL. 2019); REGULS. OF THE CONN. BAR EXAMINING COMM., arts. VI-1(B), VI-5(E) (2021).

32. I did, however, speak to one applicant who told me that she was asked during her New York character and fitness interview whether her children had the same father. *See* Telephone Interview with anonymous applicant (Aug. 4, 2022) (on file with author).

33. *See, e.g.*, COLO. R. CIV. P. 208.1; MINN. BD. OF L. EXAM’RS, A GUIDE TO THE CHARACTER AND FITNESS STANDARDS AND INVESTIGATION OF APPLICANTS TO THE BAR IN MINNESOTA 12 (2022), <https://www.ble.mn.gov/wp-content/uploads/2016/09/Character-and-Fitness-for-Admission-to-the-Bar.pdf> [<https://perma.cc/8CUK-CJUB>].

34. *See* NAT’L CONF. BAR EXAM’RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (2022) (chart 2 available at <https://reports.ncbex.org/comp-guide/charts/chart-2/> [<https://perma.cc/3CXF-8JG6>]).

35. *See, e.g.*, 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, 114–15, 125 (2001); David A. McGrath, Att’y, Testimony in Support of Proposed Amendments to Rules 2-5 to 2-9 of the Connecticut Superior Court Rules (May 24, 2010) (on file with author).

36. *E.g.*, Hadar Aviram, *Moral Character: Making Sense of the Experiences of Bar Applicants with Criminal Histories*, 43 MANITOBA L.J. 1, 15 (2020).

37. NAT’L CONF. BAR EXAM’RS, *supra* note 34. Some of these same jurisdictions provide applicants with no guidance whatsoever about how to approach the character inquiry. *See, e.g.*, *Bar Admissions*, STATE OF MISS. JUDICIARY, <https://courts.ms.gov/bar/baradmissions/forms.php> [<https://perma.cc/M762-L9HU>] (last visited Feb. 6, 2023);

inquiry into past arrests and juvenile matters may perpetuate racial and class biases, as people of color and the poor are subjected to disparate treatment in the criminal justice system.³⁸ The discussion below highlights some of the continuing problems with the inquiry.

A. *The Problem with the Problem: Information*

A preliminary problem with the character inquiry is that it is nearly impossible to know how these matters are being handled.³⁹ Most character committees do not publish their decisions. Few publish annual reports that provide any numerical information about their work, including basic information such as the number of applicants denied admission on character and fitness grounds.⁴⁰ As Rhode noted, “[t]his reticence may not be entirely inadvertent.”⁴¹ She pointed to a commission report reviewing New York’s character and fitness process in the 1970s that quoted one character committee member who stated that the publication of rejection and deferral statistics would “‘ruin the mystique of the committee’ because they would disclose that character committees rarely reject any applicant.”⁴² The report further noted that character committees appeared to fear that public disclosure would “interfere with the deterrent function which they assume they play in discouraging individuals from going to law school if ‘they have something to worry about.’”⁴³

In recent years, only seven jurisdictions have published any numerical information concerning their handling of character and fitness matters.⁴⁴ Four states revealed numbers suggesting that well under 5 percent of

Frequently Asked Questions, ALA. STATE BAR, <https://admissions.alabar.org/faq> [<https://perma.cc/M2XK-9L2J>] (last visited Feb. 6, 2023).

38. See, e.g., Susan Saab Fortney, *Law School Admissions and Ethics—Rethinking Character and Fitness Inquiries*, 45 S. TEX. L. REV. 983, 991–92 (2004). More than twenty jurisdictions ask about juvenile matters. See JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., BAR ADMISSIONS QUESTIONS PERTAINING TO MENTAL HEALTH, SCHOOL/CRIMINAL HISTORY, AND FINANCIAL ISSUES (2019), <http://www.bazelon.org/wp-content/uploads/2019/05/Bar-Application-Character-and-Fitness-Questions.pdf> [<https://perma.cc/4HF3-MP2N>].

39. See Rhode, *Institutionalizing Ethics*, *supra* note 5, at 684 (using the phrase “the Problem with the Problem”).

40. See, e.g., Email from Sahbra Smook Jacobs, Couns., N.J. Sup. Ct. Comm. on Character, to author (June 3, 2022, 3:09 PM) (on file with author) (stating that committee did not issue annual reports); see also *infra* note 44 and accompanying text.

41. Rhode, *supra* note 3, at 572.

42. The Special Comm. on Prof. Educ. & Admissions of the Ass’n of the Bar of the City of N.Y. & the Comm. on Legal Educ. & Admissions to the Bar of the N.Y. State Bar Ass’n, *Committee Report: The Character and Fitness Committees in New York State*, 33 REC. ASS’N BAR CITY N.Y. 20, 28 (1978) [hereinafter *New York Committee Report*].

43. *Id.*

44. Those jurisdictions are Arizona, Colorado, Illinois, Minnesota, Nevada, Oregon, and Wisconsin. See *infra* notes 45, 47; STATE BAR OF NEV., ANNUAL REPORT 2019 (2020), <https://www.nvbar.org/wp-content/uploads/SBN-2019-Annual-Report-FINAL.pdf> [<https://perma.cc/G9EE-ESFE>]. Nevada and Oregon have not reported this information since 2019.

applicants typically participated in informal proceedings.⁴⁵ A smaller number appeared for formal hearings.⁴⁶ Three of those states indicated that they each conditionally admitted four applicants during the reporting year.⁴⁷ A total of two applicants were denied admission in the three states that reported denials.⁴⁸ In one of those states, two additional applicants withdrew their applications.⁴⁹

To state the obvious: This is a lot of effort and angst given that virtually everyone is ultimately admitted to practice. Of course, the character and fitness inquiry in about half of the jurisdictions also identifies a small number of applicants who will be monitored during conditional admission.⁵⁰ Moreover, as noted, the inquiry has some intangible benefits, such as

45. Only one jurisdiction clearly reported this information. *See* MINN. BD. OF L. EXAM'RS, *supra* note 33, at 12 (stating that roughly 1 percent of applicants are “invited” to meet with the character and fitness committee). In the others, the percentages were roughly calculated by comparing the number of informal hearings to the number of applicants, although in some cases, the hearings may have involved applicants from previous years. *See, e.g.*, OFF. OF ATT'Y REGUL. COUNS., 2021 ANNUAL REPORT 27 (2022), <https://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2021%20Annual%20Report.pdf> [https://perma.cc/KW5E-J3QU] (indicating that less than 1 percent of applicants scheduled to meet with inquiry panel); OR. STATE BAR, 2019 BAR APPLICATIONS BY THE NUMBERS (2020), https://www.osbar.org/_docs/admissions/2019NarrativeofStats.pdf [https://perma.cc/WLC8-REMM] (suggesting that less than 2 percent of Oregon applicants appeared for an interview); ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., ANNUAL REPORT OF THE ATTORNEY REGULATION ADVISORY COMMITTEE TO THE ARIZONA SUPREME COURT 3–4 (2022), <https://www.azcourts.gov/Portals/108/ARC%20Report%202021%20-%20kt%20-%20eah.pdf> [https://perma.cc/QM9Z-Y7WC] (indicating that forty-two—or 4.8 percent of applicants—appeared at informal proceedings).

46. In Arizona, eleven applicants participated in formal hearings in 2021. ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., *supra* note 45, at 3–4. Three Colorado applicants participated in formal hearings. OFF. OF ATT'Y REGUL. COUNS., *supra* note 45, at 27.

47. *See* OR. STATE BAR, *supra* note 45; ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., *supra* note 45, at 4; BD. OF BAR EXAM'RS, 2021 ANNUAL REPORT 10 (2021), <https://www.wicourts.gov/courts/offices/docs/bbe21.pdf> [https://perma.cc/3765-ZF6X]. Minnesota revealed that there were twenty-five conditionally admitted lawyers in that state at the end of 2021 but did not report the number conditionally admitted that year. MINN. BD. OF L. EXAM'RS, 2021 ANNUAL REPORT 16, <https://www.ble.mn.gov/wp-content/uploads/2022/05/BLE-2021-Annual-Report.pdf> [https://perma.cc/DR6X-AUTZ]; *see also* ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF ILL., 2021 ANNUAL REPORT 48 (2022), <https://www.iardc.org/Files/AnnualReports/AnnualReport2021.pdf> [https://perma.cc/7G5Q-PPJ2] (stating that Illinois was monitoring four conditionally admitted lawyers).

48. OFF. OF ATT'Y REGUL. COUNS., *supra* note 45, at 27 (reporting one Colorado applicant denied admission after a formal hearing); ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., *supra* note 45, at 5 (reporting denial of one Arizona applicant); 2019 BAR APPLICATIONS BY THE NUMBERS, *supra* note 45 (stating that the Oregon State Board of Bar Examiners “did not deny admission to any [a]pplicant in 2019”).

49. OFF. OF ATT'Y REGUL. COUNS., *supra* note 45, at 27 (reporting two Colorado applicants withdrew applications after an inquiry panel recommended against admission); ARIZ. SUP. CT. ATT'Y REGUL. ADVISORY COMM., *supra* note 45, at 5 (reporting there were no withdrawals). Oregon did not report whether there were withdrawals.

50. *See supra* notes 34, 47 and accompanying text. A direct inquiry to the Florida Bar, the largest jurisdiction that conditionally admits lawyers, revealed a somewhat higher number of conditional admissions than the jurisdictions that issued reports. *See* Telephone Interview with Elizabeth Tarbert, Dir. of Law. Regul., Florida Bar (Aug. 19, 2022) (on file with author) (reporting that Florida had conditionally admitted sixteen applicants in 2022, eight in 2021, and fourteen in 2020).

signaling to applicants, the profession, and the public expectations about how lawyers should conduct themselves in practice. At a minimum, however, there should be some assurance that the inquiry is being conducted in a fair and sensible manner.

Unfortunately, the confidentiality of character committees' activities and their failure to report on their work make it virtually impossible to determine what is really happening. Are their decisions being made in a consistent, defensible, and nondiscriminatory manner? Are applicants who are asked to appear before character committees being treated appropriately? Is conditional admission being sensibly and fairly employed? Are mental health professionals routinely involved in decision-making when character committees have concerns that an applicant's psychological condition or history of substance abuse may affect the applicant's fitness to practice law?⁵¹ The answers to these questions are critically important from a fairness and due process perspective. They also affect the lessons that applicants learn from going through the inquiry.

Court cases shed relatively little light on these questions. Only about half of jurisdictions publish character and fitness decisions concerning law graduates who are first-time bar applicants.⁵² During the five-year period from 2017 to 2021, only nine states published more than one decision involving such applicants.⁵³ Of course, character committees only rarely deny admission, and there are good reasons why applicants may decline to appeal. Applicants may not want to antagonize the character committee by appealing if they have the right to reapply within a year or two.⁵⁴ It is an uphill battle because applicants bear the burden of proving their good character, and some courts review the committees' decisions using an "abuse of discretion" or even more onerous standard.⁵⁵ But these are just partial explanations. In many jurisdictions, courts simply do not publish or explain their decisions concerning first-time bar applicants. The failure to do so

51. In many jurisdictions, it is not clear to what extent, if at all, mental health professionals participate in character and fitness determinations. *But see, e.g.*, OFF. OF ATT'Y REGUL. COUNS., *supra* note 45, at 18 (indicating that Colorado appears to have four mental health professionals on its character and fitness committee).

52. The Lexis search conducted on July 1, 2022, for the period 2010–2022 ((bar /3 (admit! or admission)) /p (character or fitness)) revealed no such court decisions in twenty-four states and the District of Columbia.

53. The Westlaw search was conducted on August 22, 2022 ((character w/3 fitness) & bar/p admission admit! & DA(aft 1-1-2017 and bef 12-31-2021) %reinstatement).

54. Moreover, it is expensive for applicants to litigate these cases, and many must do so on a pro se basis. *See, e.g.*, *In re Anderson*, 249 A.3d 305 (Vt. 2020) (litigated pro se); *In re Knight*, 211 A.3d 265 (Md. 2019) (same); *In re Coll*, 80 N.E.3d 457 (Ohio 2017) (same).

55. *See, e.g.*, *Ball v. Bd. of Bar Exam'rs*, 950 A.2d 1210, 1212 (Vt. 2008); *In re Roots*, 762 A.2d 1161, 1164 (R.I. 2000); *Scott v. State Bar Examining Comm.*, 601 A.2d 1021, 1025–26 (Conn. 1992); *see also In re Certion*, 826 S.E.2d 52, 55 (Ga. 2019) (stating "[i]f there is any evidence to support the Board's decision, we will uphold it" (quoting *In re C.R.W.*, 481 S.E.2d 511, 512 (Ga. 1997))).

means that many character committees operate with virtually no guidance from their state supreme courts.⁵⁶

B. The Problem with (Some) Character Committees

Most character and fitness committees undoubtedly attempt to operate in a dispassionate and evenhanded manner. Nevertheless, they operate in secret with little or no oversight. It is nearly impossible to achieve consistency when rotating volunteer members receive little or no guidance from state supreme courts and are required to apply ambiguous standards.⁵⁷ Nor is consistency possible when character committees do not write opinions that explain their decisions to admit an applicant following a hearing. Moreover, some members seemingly believe they can act with impunity. Court decisions occasionally reveal when this occurs.⁵⁸

In one recent case, the Wisconsin Supreme Court described what sounded like an unduly difficult and punitive Board of Bar Examiners.⁵⁹ It reversed the Board's denial of admission of applicant Abby Padlock, who had previously been convicted of transporting substantial amounts of marijuana for sale and had insufficiently disclosed the circumstances on her law school application but had not hidden the information once in law school.⁶⁰ The Board denied her application not only because of her failure to disclose more detailed information about her criminal charges in her law school application, but also because of her later revelation to the Board—made in an attempt to demonstrate complete candor—that she had engaged in an earlier drug transaction for which she was not prosecuted.⁶¹ She argued that the Board “interpreted every word she spoke in the most negative light, ignoring some of the evidence favorable to her, and distorting the rest into a portrait of an

56. See, e.g., Telephone Interview with former member of state character and fitness committee (Sept. 16, 2022) (on file with author) (stating that their committee operated “without guidance” because the state supreme court rarely published opinions and sometimes reversed committee decisions without giving any indication as to why it was doing so).

57. See WASH. SUP. CT. TASK FORCE ON BAR LICENSURE, RECOMMENDATIONS FOR REVISIONS TO CHARACTER AND FITNESS PROCESS 13–14 (2022) (PowerPoint presentation on file with author).

58. See, e.g., *Doe v. Sup. Ct. of Ky.*, 482 F. Supp. 3d 571 (W.D. Ky. 2020) (discussing insensitive and unreasonable treatment of applicant).

59. The court pointedly noted that it had, “on several occasions, certified applicants to the bar despite an adverse determination from the Board.” *In re Padlock*, 960 N.W.2d 917, 926 (Wis. 2021).

60. In 2015, Padlock and a friend were arrested while attempting to transport 114 pounds of marijuana by car from Oregon to Wisconsin. *Id.* at 918–19. Police found over \$30,000 in her home. *Id.* at 919. Padlock was charged with two felony counts but was offered a deferred prosecution agreement in which the charges were reduced to one misdemeanor count of marijuana possession. She was sentenced to three days in jail and two years of probation and was required to forfeit the \$30,000. *Id.* When she completed probation, the charge was dismissed. On her law school application, Padlock reported that the charges against her had been dismissed—although she was still on probation—and did not reveal most of these details about the criminal matter. *Id.*

61. She disclosed this information during her hearing in response to a direct question from a board member. *Id.* at 925.

incorrigible liar.”⁶² The majority of the court agreed, noting that “the Board is brutally disparaging of her credibility, employing rhetoric that seems, at times, unnecessarily scathing.”⁶³ The court stated:

While in no way condoning her illegal activity, neither the law school application nor the bar application requires an applicant to disclose behavior that was immoral or even unlawful, but that was never formally investigated or prosecuted. Such an expectation would be entirely subjective, would place the honest and forthright candidate at a disadvantage, and would be impossible to administer.⁶⁴

The court further observed that the Board’s factual conclusion that Padlock had not demonstrated rehabilitation was “clear error” in view of her many volunteer activities.⁶⁵ It also noted that the Board minimized the evidence from character witnesses who knew Ms. Padlock well, observing that “[i]t seems these professors could not overcome the Board’s antipathy for Ms. Padlock.”⁶⁶

Somewhat different concerns arose in connection with the 2017 application of Tara Simmons, who had struggled with addiction and whose adult criminal history included a 2001 assault conviction and 2011 convictions for “retail theft, the unlawful possession of a firearm, and possession of controlled substances.”⁶⁷ She had served over three years in prison, filed twice for bankruptcy, and undergone a foreclosure on her home.⁶⁸ The Washington State Bar Association’s Character and Fitness Board denied her application for admission, but the Washington Supreme Court unanimously reversed, finding that since 2011, Simmons had turned her life around to a “remarkable” degree.⁶⁹ It rejected the Board’s finding that Simmons had minimized her drug activities by failing to disclose one period of addiction and treatment, noting, like the *Padlock* court, that there was no question on the bar application that required her to reveal that information.⁷⁰ It also rejected the Board’s contention that some of the attitudes she expressed signaled “that her acquired fame has nurtured not integrity and honesty, but a sense of entitlement to privileges and recognition beyond the reach of others.”⁷¹ The court then compared Simmons’s case to another recent case with similar facts in which the Board had granted a male applicant bar admission.⁷² The court did not believe that there was a

62. *Id.* at 922.

63. *Id.* at 925.

64. *Id.* at 926.

65. *Id.* at 924.

66. *Id.* at 926.

67. *In re Simmons*, 414 P.3d 1111, 1113 (Wash. 2018).

68. *Id.*

69. *Id.*

70. The court stated: “[T]here was no question on the bar application that required Simmons to disclose her 2005 substance abuse. Indeed, it is doubtful that any question in the initial bar application lawfully *could* require such a disclosure given recent amendments to [the court’s rules and federal law].” *Id.* at 1119.

71. *Id.* at 1116.

72. *Id.* at 1121–22.

“sufficient basis on which to differentiate between [the two applicants’] respective attitudes toward their prior misconduct and the publicity they have received, except for their gender.”⁷³

Court decisions reveal other troubling features of some character inquiries. Character committees play the role of prosecutor, judge, and jury, sometimes bringing evidence that should not be considered into the deliberations. In one case, a committee member who found an applicant’s immature and offensive posts in chatrooms devoted to martial arts videos concluded that those posts were one reason to exclude the applicant, even though those statements were constitutionally protected speech and would not disqualify lawyers from practicing law.⁷⁴ Although the Maryland Supreme Court subsequently claimed that its decision to deny admission was not premised on the electronic postings,⁷⁵ those posts almost undoubtedly affected the court’s decision because the stated basis for the denial of admission was “a rather minor transgression.”⁷⁶

Other cases reveal that applicants may encounter serious problems because they did not understand the highly deferential posture that character committees require of applicants. Character committees seemingly believe that applicants should reveal “everything” and exhibit abject deference to the committees.⁷⁷ Failure to conform to these expectations—which are not always clearly communicated to applicants—can result in denial of admission.⁷⁸

C. The Problems with Prediction

The character and fitness inquiry is an attempt to predict whether an applicant will be a problematic lawyer. As Rhode noted, accurate predictions about human behavior are hard.⁷⁹ Psychological research has shown that

73. *Id.* at 1122. The case the court referenced involved an earlier board, but it illustrates that without written board opinions, it is almost impossible to know how previous boards handled similarly situated cases.

74. *See In re Gjini*, 141 A.3d 16, 23–26 (Md. 2016).

75. *Id.* at 29 n.12.

76. *Id.* at 30 (Adkins, J., dissenting).

77. *See id.* at 28 (majority opinion) (quoting committee member as stating, “if you read our application, it is abundantly clear that we basically want to know everything about you and everything you have ever done and anything and everything that anyone has ever said about you”).

78. In one such case, an applicant was denied admission because he refused to list detailed information about every moving violation not involving alcohol in the past ten years. *See In re Coll*, 80 N.E.3d 457, 458 (Ohio 2017). Instead, he provided his driver’s license number, driving record for the past three years, stated he had “[m]any” violations, and made “provocative statements” about his beliefs about the request on a supplemental form. *See id.* at 458, 459. In another case, the applicant was denied admission for reasons including that he resisted revealing what he considered to be private documents relating to custody and support proceedings involving his son. *See In re A.S.*, 173 A.3d 1280, 1282–83 (R.I. 2017). He had not been required to supply this information when he had simultaneously applied for admission in Massachusetts. *See id.* at 1287. The committee found that he displayed “disdain for and hostility towards the character and fitness process in how he chose to respond to requests for information that is sought from every bar applicant.” *Id.* at 1284.

79. *See supra* note 14 and accompanying text.

personality correlates with certain patterns of conduct and that some of the personality “factors” (e.g., Conscientiousness, Emotional Stability, etc.) are correlated with ethical behavior.⁸⁰ Yet even standardized integrity tests, which are based on personality factors, are of only modest value in predicting counterproductive work behaviors.⁸¹ Moreover, personality alone does not determine who will engage in unethical behavior. Whether individuals make unethical choices at work is determined by individual characteristics, the characteristics of the moral issue, and organizational environments.⁸²

Thus, it is very difficult to predict at the time of bar admission which applicants will become problematic lawyers. When making these predictions, character and fitness committees consider past applicant conduct as evidence that an applicant lacks the requisite character to practice law. This conduct includes unlawful behavior, academic misconduct, dishonesty, and neglect of financial responsibilities.⁸³

Only two published studies have explored whether the information gathered during the character inquiry predicts who will later be disciplined. The first study looked at the information collected from Minnesota bar applicants and the lawyers who subsequently received discipline.⁸⁴ Although the study results suggest that there is a relationship between certain preadmission conduct and subsequent discipline, it was not a rigorously designed study.⁸⁵ A study of Connecticut lawyers indicates that the

80. See Michael J. Cullen & Paul R. Sackett, *Integrity Testing in the Workplace*, in 4 COMPREHENSIVE HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 149, 153 (Jay C. Thomas & Michel Hersen eds., 2004); Tamara L. Giluk & Bennett E. Postlethwaite, *Big Five Personality and Academic Dishonesty: A Meta-Analytic Review*, 72 PERSONALITY & INDIVIDUAL DIFFERENCES 59, 60–61 (2014); Aditya Simha & K. Praveen Parboteeah, *The Big 5 Personality Traits and Willingness to Justify Unethical Behavior—A Cross National Examination*, 167 J. BUS. ETHICS 451, 464–66 (2020).

81. Standardized personality assessments and factors in employer integrity tests have shown modest utility in predicting certain misconduct or counterproductive work behavior. See, e.g., Bernd Marcus, Michael C. Ashton & Kimboem Lee, *A Note on the Incremental Validity of Integrity Tests Beyond Standard Personality Inventories for the Criterion of Counterproductive Behaviour*, 30 CANADIAN J. ADMIN. SCI. 18, 23–24 (2013); Alec T. Twibell, Robert E. McGrath & Matthew Guller, *Prediction of Serious Misconduct in Law Enforcement Officers*, 34 PSYCH. ASSESSMENT 839, 841–42 (2022). But see Connie O’Brien, *Can Pre-Employment Tests Identify White-Collar Criminals and Reduce Fraud Risk in Your Organization?*, 9 J. FORENSIC & INVESTIGATIVE ACCT. 621, 622–23 (2017) (noting that faking honesty and false positives continues to be a problem with integrity tests).

82. See, e.g., Jennifer J. Kish-Gephart, David A. Harrison & Linda Klebe Trevino, *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCH. 1, 17–18 (2010). Studies of lawyers confirm that the workplace strongly influences their beliefs about how they should behave in practice. See, e.g., JEROME CARLIN, *LAWYER’S ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 166, 168 (1966); LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 6 (2001).

83. See, e.g., MINN. BD. OF L. EXAM’RS, *supra* note 33, at 4.

84. Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, BAR EXAM’R, Nov. 1992, at 5, 5.

85. Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C.L. REV. 609, 619 (2001). In contrast to the Minnesota study, informal tracking in Michigan revealed no correlation between “problem” preadmissions history and

information gathered during the character inquiry is of very limited value in predicting who will subsequently be disciplined.⁸⁶ That study examined lawyers who were admitted from 1989 through 1992⁸⁷ by tracking them until 2009 and comparing the 152 lawyers who were disciplined to a sample of 1,198 lawyers who were never disciplined.⁸⁸ Regression analyses revealed that none of the information disclosed on the bar application had a substantial impact on the likelihood of discipline. Being male increased the likelihood of discipline by 2.5 percent.⁸⁹ Delinquent credit card accounts increased the likelihood of discipline by 2.7 percent.⁹⁰ Having a history of mental health problems increased the likelihood of discipline by 2.2 percent, but only for less severe discipline (i.e., suspensions of less than one year and lesser sanctions).⁹¹ Efforts to create a model that would predict who would be disciplined were unsuccessful.⁹²

There are additional reasons to question the accuracy of character committees' predictions about applicants' fitness to practice law. Some jurisdictions require information about juvenile matters,⁹³ and others ask about all criminal conduct occurring after age eighteen.⁹⁴ This means that applicants' fitness to practice may be evaluated based, in part, on conduct that occurred before their brains neurologically matured.⁹⁵ The ages from

subsequent discipline. D. Larkin Chenault, *It Begins with Character . . .*, 77 MICH. BAR J. 138, 138–39 (1998).

86. Leslie C. Levin, Christine Zozula & Peter Siegelman, *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY 51, 65–72 (2013).

87. It was estimated that about 0.14 percent of applicants during those years were denied admission. *Id.* at 54.

88. *Id.* at 57. Ultimately, seven of the disciplined lawyers were excluded because of missing data. *Id.* at 65.

89. *Id.* at 66.

90. *Id.* None of the four lawyers who declared bankruptcy prior to admission was later disciplined. *Id.* at 63.

91. *Id.* at 66.

92. *Id.* at 67–69.

93. *See, e.g.*, N.Y. STATE SUP. CT. APP. DIV., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY AND COUNSELOR-AT-LAW IN THE STATE OF NEW YORK 10, https://www.nybarexam.org/Admission/B-Bar_Admissions-Questionnaire.pdf [<https://perma.cc/67NN-H55R>] (including question about arrests, charges, and convictions as a juvenile); *see also* BAR EXAM APPLICATION—BROWSE FORMS, ALA. STATE BAR, <https://admissions.alabar.org/browseapplication.action?id=1> [<https://perma.cc/EJ63-9VJJ>] (click on “Browse Form” next to “Character & Fitness Questionnaire,” then click “SECTION A - GENERAL INFORMATION” and select “SECTION F - CIVIL / CRIMINAL”) (in question 31, “Have you ever been cited for, charged with, or convicted of any violation of any law (not including traffic violations already disclosed)?”).

94. *See, e.g.*, NCBE CHARACTER AND FITNESS SAMPLE APPLICATION, *supra* note 29 (in question 34, “Have you ever been cited for, arrested for, charged with, or convicted of any violation of any law other than a case that was resolved in juvenile court?”).

95. Brain development is not complete until the early twenties. *See, e.g.*, Ruben C. Gur, *Brain Maturation and Its Relevance to Understanding the Criminal Culpability of Juveniles*, 7 CURRENT PSYCHIATRY REPS. 292 (2005); Bradley C. Taber-Thomas & Koralý Pérez-Edgar, *Emerging Adulthood Brain Development*, in THE OXFORD HANDBOOK OF EMERGING ADULTHOOD 126, 126–33 (Jeffrey Jensen Amett ed., 2016); Ze'ev Hochberg & Melvin Konner, *Emerging Adulthood, A Pre-Adult Life-History Stage*, 10 FRONTIERS ENDOCRINOLOGY 918 (2020).

eighteen to twenty-four—now known as “emerging adulthood”—are marked by prominent neurodevelopment in executive, attention, reward, and social processes.⁹⁶ This is not to suggest that character committees should entirely disregard serious misconduct that occurred during applicants’ late teens or early twenties. But there is scant evidence that committees (or courts) consider that brain development may not be complete by then⁹⁷ or that individuals are less likely to engage in impulsive, risky, and deviant behavior as they mature.⁹⁸

Character committees also fail to consider that their insistence on certain showings by applicants who are called into interviews or hearings can be deeply problematic. For example, committee members expect applicants to display sincere remorse for criminal conduct,⁹⁹ and yet this may be very difficult for applicants who were wrongly charged or pled guilty to a lesser charge for reasons of expediency rather than because of guilt. It is also questionable whether character committees can accurately assess applicant remorse. Professor Hadar Aviram notes that “[t]he importance of not only *feeling* remorse, but *performing* it convincingly, so that it is readable to the committee, cannot be understated.”¹⁰⁰ Yet even judges—who more frequently assess remorse—have difficulty doing so. As one judge candidly noted, “it can be difficult to distinguish between empty statements of regret and true rehabilitation of character.”¹⁰¹ Judges attempting to assess remorse in criminal cases vary widely in their views regarding which cues indicate remorse, with the same cues that signal remorse to some judges signaling a lack of remorse to others.¹⁰² Moreover, “remorse is particularly difficult to evaluate when the fact-finder and the defendant are of different racial or ethnic groups.”¹⁰³

96. Taber-Thomas & Pérez-Edgar, *supra* note 95, at 1–2.

97. For one rare exception, see *In re Stevens*, 519 P.3d 208, 220 (Wash. 2022) (noting that parts of the brain involved in behavioral control continue to develop “well into a person’s 20s” and that the applicant’s brain “was still in development” at age nineteen).

98. See Hochberg & Konner, *supra* note 95, at 9; Gary Sweeton, Alex R. Piquero & Laurence Steinberg, *Age and the Explanation of Crime, Revisited*, 42 J. YOUTH & ADOLESCENCE 921, 935 (2013).

99. REBECCA S. MICK, MAKING THE MARK—CHARACTER AND FITNESS FOR ADMISSION TO THE BAR 10 (2013), <https://www.gabaradmissions.org/making-the-mark> [<https://perma.cc/AC8Y-75Q6>] (“The very important first step is for the applicant to *fully* accept responsibility for his or her conduct and show understanding and remorse.”).

100. Aviram, *supra* note 36, at 18.

101. *In re Haltunnen*, 478 P.3d 488, 500 (Or. 2020).

102. Rocksheng Zhong, Madelon Baranoski, Neal Feigenson, Larry Davidson, Alec Buchanan & Howard V. Zonana, *So You’re Sorry?: The Role of Remorse in Criminal Law*, J. AM. ACAD. PSYCHIATRY L. 39, 43–44 (2014); see also Kate Rossmanith, Steven Tudor & Michael Proeve, *Courtroom Contrition: How Do Judges Know?*, 27 GRIFFITH L. REV. 366, 376 (2019). For a case in which a court and bar examiners came to very different conclusions about whether the applicant had sufficiently displayed remorse, see *In re Stevens*, 519 P.3d at 212, 215, 226.

103. Susan A. Bandes, *Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition*, in THE INTEGRITY OF THE CRIMINAL PROCESS: FROM THEORY TO PRACTICE 309, 311 (Jill Hunter, Paul Roberts, Simon N.M. Young & David Dixon eds., 2016). When judging the same Black capital defendant’s demeanor, white jurors saw deceptive behavior, coldness, and incorrigibility, while Black jurors saw sincerity and remorse. See

Likewise, character committees' insistence that applicants fully narrate in interviews and hearings the details of their misconduct can set applicants up for failure.¹⁰⁴ Applicants may not be forthcoming because they are ruffled and unprepared for an interview.¹⁰⁵ Disclosure of past misconduct during the character inquiry can evoke deep shame and anguish.¹⁰⁶ Psychological processes—sometimes unconscious—can facilitate forgetting when applicants feel ashamed, embarrassed, or traumatized by earlier events.¹⁰⁷ Applicants may also fail to disclose or consistently describe events that occurred years earlier and that they have genuinely forgotten.¹⁰⁸ Yet character committees often conclude that omissions or inconsistencies are intentional lies and treat them as evidence that the applicant lacks the requisite character to practice law.¹⁰⁹

This is not meant to suggest that it is acceptable for applicants to lie to character committees, or that committees should not expect candor or consider evidence of remorse. But Rhode's observation remains correct that “[p]olitically non-accountable decisionmakers [are rendering] intuitive judgments” that are “uninformed by a vast array of research that controverts

William J. Bowers, Benjamin D. Steiner & Maria Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 248–51 (2001).

104. See, e.g., MICK, *supra* note 99, at 5 (“Giving false, evasive and misleading answers to the Board during the application process is a ground for denial of certification in itself.”); see also *infra* note 109.

105. See *In re Certion*, 826 S.E.2d 52, 55 (Ga. 2019). In that case, Certion did not truthfully disclose during an informal interview all of his conduct that had led to criminal charges and an *Alford* plea. See *id.* at 53–54. At his formal hearing, the special master, a lawyer with a master's degree in social work, found that Certion was candid about the criminal matter and demonstrated remorse and rehabilitation. *Id.* at 54. She wrote that Certion's testimony revealed “he had not sought any legal advice before appearing, and that he did not understand that his first appearance before the Board was his opportunity to express remorse.” *Id.* She found that Certion was nervous at the first interview and answered the board's questions “defensively, out of shame, and not in an attempt to deceive anyone,” and that his lack of candor “was not necessarily the result of an innate lack of integrity.” *Id.* Nevertheless, the full board found that Certion had made a “conscious decision to make untruthful statements during the informal conference,” and the court upheld the board's decision to deny admission. *Id.* at 55–56.

106. See Aviram, *supra* note 36, at 14, 16, 25.

107. See, e.g., Michael C. Anderson & Simon Hanslmayr, *Neural Mechanisms of Motivated Forgetting*, 18 TRENDS COGNITIVE SCI. 279, 285, 289 (2014); see also Amy N. Dalton & Li Huang, *Motivated Forgetting in Response to Social Identity Threat*, 40 J. CONSUMER RSCH. 1017, 1018–19 (2014); Benjamin C. Storm & Tara A. Jobe, *Retrieval-Induced Forgetting Predicts Failure to Recall Negative Autobiographical Memories*, 23 PSYCH. SCI. 1356, 1356–57 (2012).

108. For example, one applicant was denied admission, in part because she had failed to reveal a twenty-year-old felony theft charge on her bar application and was inconsistent in her subsequent testimony about that charge. See *In re Brown*, 144 A.3d 1188, 1197 (Md. 2016). She had revealed a false statement charge that arose from the same facts and was not convicted of either charge. *Id.*; see also, e.g., *In re Burke*, 775 S.E.2d 815, 819 (N.C. 2015) (discussing inconsistencies in the explanation of an eleven-year-old shoplifting incident as one reason to deny admission).

109. See, e.g., *In re Burke*, 775 S.E.2d at 819 (noting that testimony that is contradictory or inconsistent is a sufficient basis upon which to deny admission).

the premises on which such adjudication proceeds.”¹¹⁰ Character committees need to understand the ways in which brain maturation, memory, and other cognitive processes work to accurately assess the evidence they are considering.

D. *The Problem with Deterring Applicants*

Two other significant problems with the character inquiry deserve discussion. First, the current inquiry deters some individuals from applying to law school due to fear—or the reality—that their criminal histories will prevent their admission to practice.¹¹¹ For instance, an article on the American Bar Association’s (ABA) website warns that a criminal record poses “a virtually insurmountable hurdle to being admitted to practice law in any American jurisdiction.”¹¹² Black and Latinx people, who are disproportionately arrested and incarcerated,¹¹³ are thus most likely to be deterred from enrolling in law school.

This problem is not theoretical. A survey by the Stanford Center on the Legal Profession (conducted when Rhode was the director) revealed that more than half of the forty-seven individuals with criminal records who were considering applying to law school indicated that one of the top three reasons they had not yet applied was because of concerns about satisfying the character inquiry.¹¹⁴ One respondent wrote, “I thought because I had a felony there was no chance[,] so I never applied.”¹¹⁵ Another individual, on a Reddit thread, discussed the impact of a criminal history on the likelihood of satisfying the character and fitness requirement:

I have wanted to be a lawyer for quite sometime [sic]. In my junior/senior year of undergrad I got serious about it, but then learned that the Character

110. Rhode, *supra* note 3, at 584.

111. Mississippi automatically denies admission to most felons. RULES GOVERNING ADMISSION TO MISS. BAR, r. VIII, § 6 (2019). Oregon precludes admission if the crime would have resulted in a lawyer’s disbarment in that state. RULES FOR ADMISSION OF ATT’YS r. 3.10 (OR. STATE BD. OF BAR EXAM’RS 2023). In Arizona, there is a presumption against admitting a bar applicant “who has been convicted of a misdemeanor involving a serious crime or of any felony” that can only be overcome with clear and convincing evidence that the applicant possesses the requisite character and fitness. ARIZ. SUP. CT. R. 36(b)(2)(A).

112. Jay E. Mitchell, *Character and Fitness: The Underrepresentation of Black Men in Law*, AM. BAR ASS’N (Mar. 17, 2017), <https://www.americanbar.org/groups/litigation/committees/consumer/articles/2017/winter2017-character-and-fitness-the-underrepresentation-of-black-men-in-law/> [https://perma.cc/GL2C-A5SX]. Another article warns that “[b]ecoming licensed will be difficult and often seemingly arbitrary.” Patrick Gleeson, *How to Become an Attorney After a Felony Conviction*, CHRON. (June 29, 2018), <https://work.chron.com/become-attorney-after-felony-conviction-16841.html> [https://perma.cc/NG3C-3RCA].

113. David Marshall, *Dismantling Walls to Encourage Diversity in the Legal Profession*, N.Y. STATE BAR ASS’N (Mar. 2, 2022), <https://nysba.org/dismantling-walls-to-encourage-diversity-in-the-legal-profession/> [https://perma.cc/96R9-AJ83].

114. STANFORD CTR. ON LEGAL PROF. & STANFORD CRIM. JUST. CTR., UNLOCKING THE BAR: EXPANDING ACCESS TO THE LEGAL PROFESSION FOR PEOPLE WITH CRIMINAL RECORDS IN CALIFORNIA 31 (2019), <https://law.stanford.edu/wp-content/uploads/2019/07/Unlocking-the-Bar-July-2019.pdf> [https://perma.cc/C2VX-QSN5].

115. *Id.*

and Moral Fitness test by the State Bar often disqualifies people with a criminal record. I spoke with a Pre-Law counselor, who told me to forget about law school and I pursued another path.¹¹⁶

While prelaw advisors often provide a more nuanced account of the likelihood of admission, some potential law school applicants may never consult them.¹¹⁷ Moreover, prelaw advisors (understandably) cannot predict with confidence whether an applicant will be admitted to practice.¹¹⁸ Only the most optimistic or well-resourced individuals with criminal records are likely to invest the time and money in law school when faced with so much uncertainty.

A second problem with the character inquiry is that many states ask about applicants' mental health conditions,¹¹⁹ deterring some law students from seeking needed mental health treatment. Bar examiners in many states continue to ask these questions even though law students' need for mental health services during law school—and their reluctance to seek them—are well documented.¹²⁰ Moreover, some bar examiners are remarkably insensitive and inept when evaluating this information.¹²¹ The negative impact of these questions and the fact that they violate the Americans with Disabilities Act of 1990¹²² have been well known for decades.¹²³ Their persistence highlights the resistance to changing the character inquiry.

116. *Has Anyone Had Success with C&F Exam with a Criminal Record?*, REDDIT (Jan. 28, 2016), https://www.reddit.com/r/LawSchool/comments/4354n3/has_anyone_had_success_with_the_cf_exam_with_a/ [<https://perma.cc/QS5G-FAF2>].

117. See Sara Weissman, *Narrowing the Gap*, INSIDE HIGHER ED (July 12, 2022), <https://www.insidehighered.com/news/2022/07/12/differences-advising-among-colleges-narrowing-gaps> [<https://perma.cc/8VG8-2Y34>] (noting that “low student engagement” was one of the two “most significant barriers to improving student advising for Black, Latino and Indigenous students”).

118. Marshall, *supra* note 113.

119. See NCBE CHARACTER AND FITNESS SAMPLE APPLICATION, *supra* note 29 (in question 30, “Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?”); see also Cara Bayles, *States Evolve on Mental Health as a Question of “Fitness,”* LAW360 (May 18, 2022, 4:23 PM), <https://www.law360.com/articles/1494448> [<https://perma.cc/W9XT-B4L2>].

120. See, e.g., Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 136–42 (2016); Janet Thompson Jackson, *Legal Education Needs a Wellness Reckoning*, BLOOMBERG L. (Apr. 7, 2021), <https://news.bloomberglaw.com/us-law-week/legal-education-needs-a-wellness-reckoning> [<https://perma.cc/75B6-GFNN>]. Although Rhode did not address this problem in her 1985 article, she turned to the topic later in her career. See Deborah L. Rhode, *Managing Stress, Grief, and Mental Health Challenges in the Legal Profession; Not Your Usual Law Review Article*, 89 FORDHAM L. REV. 2565, 2568 (2021).

121. See, e.g., *Doe v. Sup. Ct. of Ky.*, 482 F. Supp. 3d 571 (W.D. Ky. 2020) (detailing numerous burdens and indignities faced by bar applicant after disclosing history of depression and bipolar disorder).

122. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 29, 42, and 47 U.S.C.).

123. Bauer, *supra* note 35, at 96–98.

III. IMPROVING THE CHARACTER AND FITNESS INQUIRY

A. *The Regulatory Problem*

Why has there been so little progress—over so many years—in addressing the problems with the character inquiry? The answer begins with the fact that courts have delegated their authority to regulate bar admission to bar examiners.¹²⁴ Bar examiners are slow (or reluctant) to rethink assumptions about bar admission requirements and seemingly believe that ferreting out “everything” about an applicant’s life is justified by their mission to protect the public from potentially problematic lawyers.¹²⁵

The NCBE—which produces the Uniform Bar Examination and the Multistate Professional Responsibility Examination—plays a significant supporting role in maintaining the status quo.¹²⁶ The NCBE’s lengthy character application, first developed in 1965,¹²⁷ has become “the standard” in the United States.¹²⁸ The NCBE has been slow to change it. For example, even though the ABA House of Delegates called for changes to the questions regarding mental health in 2015,¹²⁹ and the Conference of Chief Justices adopted a resolution in 2019 urging states to eliminate application questions about mental health “and instead use questions that focus solely on conduct or behavior,”¹³⁰ the NCBE continues to ask about mental health conditions.¹³¹

While the NCBE works to design “reliable” and “valid” bar examinations,¹³² it has not taken a scientific approach to the design of its character and fitness application. Instead, the NCBE’s application seeks a

124. See Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81, 93–94 (2021).

125. *In re Gjini*, 141 A.3d 16, 28 (Md. 2016); see also, e.g., *Mission Statement and Code of Ethics*, VA. BD. BAR EXAM’RS, <https://barexam.virginia.gov/code.html> [<https://perma.cc/H9JM-E7WE>] (last visited Feb. 6, 2023) (stating that “our top priority is to protect the public”). Bar examiners demonstrated their single-minded focus on public protection in 2020 when applicants advocated for admission without a bar examination (through “diploma privilege”) during the early months of the COVID-19 pandemic, before a vaccine was available. Levin, *supra* note 124, at 92. None of the state bar examiners were willing to support applicants’ efforts, with some requiring in-person bar exams. *Id.* at 137.

126. See Penelope J. Gessler, *A Long History of Supporting the Character and Fitness Process in Jurisdictions*, BAR EXAM’R, Winter 2021–2022, at 12.

127. See *New York Committee Report*, *supra* note 42, at 33.

128. See Gessler & Early, *supra* note 28, at 26.

129. See Lorelei Laird, *Bar Licensing Group Urged to Tread Carefully When Asking About Mental Health*, ABA J. (Aug. 3, 2015, 1:46 PM), https://www.abajournal.com/news/article/house_urges_bar_licensing_groups_to_tread_carefully_when_asking_about_mental_health [<https://perma.cc/5TZD-UHA9>].

130. CONF. CHIEF JUSTS., RESOLUTION IN REGARD TO THE DETERMINATION OF FITNESS TO PRACTICE LAW (2019), https://ccj.ncsc.org/_data/assets/pdf_file/0021/23484/02132019-determination-of-fitness-to-practice-law.pdf [<https://perma.cc/V3RE-GLLU>]. The resolution noted, however, that such questions would be appropriate if a mental health condition had been offered as an explanation for conduct or behavior.

131. See NCBE CHARACTER AND FITNESS SAMPLE APPLICATION, *supra* note 29.

132. See, e.g., Ken Kraus, *Test Validity and the Law: An Overview of Case Law Challenging the Validity of Standardized Tests*, BAR EXAM’R, Summer 2022, at 23.

vast range of information, including some of dubious relevance.¹³³ The reason that the NCBE has been slow to revise its application may be, in part, because state bar examiners—the NCBE’s most important customers—have no interest in shortening it.¹³⁴ Nor does the NCBE. Its lengthy application helps to justify the \$395 that the NCBE charges to recent U.S. law graduates for the investigative services it provides in many jurisdictions.¹³⁵ It conducted more than 14,700 character and fitness investigations in 2021,¹³⁶ generating revenue of more than five million dollars.¹³⁷

Many law review commentators have called for changes in the character inquiry, but they have mostly had limited impact.¹³⁸ Only a small number of state or local bar associations have proposed changes.¹³⁹ The group with the greatest interest in changing the current inquiry—bar applicants—are seemingly too transient or too concerned about possible retaliation to engage in sustained advocacy.¹⁴⁰ The absence of vocal advocates for serious

133. See, e.g., NCBE CHARACTER AND FITNESS SAMPLE APPLICATION, *supra* note 29 (in question 9, asking about applicants’ memberships in voluntary bar associations).

134. The NCBE states that its mission is to serve admission authorities, courts, and others. *About NCBE*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/about/> [https://perma.cc/V78K-882L] (last visited Feb. 6, 2023). Nevertheless, the NCBE is heavily reliant on state bar examiners to adopt its tests, and it has nurtured particularly close working relationships with bar examiners. Levin, *supra* note 124, at 137.

135. See, e.g., *Alabama Fee Schedule*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/character-and-fitness/alabama-fee-schedule/> [https://perma.cc/B295-EZAU] (last visited Feb. 6, 2023). The fees charged to applicants who graduated from U.S. law schools more than a year before they applied for admission and to applicants who received their law degrees outside the United States are \$550 and \$925, respectively. *Id.*

136. NAT’L CONF. BAR EXAM’RS, *supra* note 30, at 10.

137. This is a rough calculation. In 2019–2020, the NCBE’s annual revenue from investigations exceeded \$5.4 million. See PROPUBLICA, NATIONAL CONFERENCE OF BAR EXAMINERS FORM 990 FOR PERIOD ENDING JUNE 2020, at 9, https://projects.propublica.org/nonprofits/display_990/362472009/02_2021_prefixes_34-36%2F362472009_202006_990_2021022217736128 [https://perma.cc/9LNY-BGEA].

138. Close to fifty law review articles have criticized aspects of the character inquiry since Rhode wrote her article. One of the few that has had a direct impact is Professor Jon Bauer’s article, *supra* note 35, which has been cited in reports and cases describing the problems with mental health questions. See, e.g., *Brewer v. Wis. Bd. of Bar Exam’rs*, No. 04-C-0694, 2006 U.S. Dist. LEXIS 86765, at *26 (E.D. Wis. Nov. 28, 2008).

139. See, e.g., Letter from N.Y.C. Bar Ass’n to Judge Janet DiFiore, C.J., N.Y. Ct. of Appeals (June 1, 2021), https://s3.amazonaws.com/documents.nycbar.org/files/2020889_AmendingQuestion26oftheNewYorkBarApplication.pdf [https://perma.cc/5F3R-8AYR]; N.Y. STATE BAR ASS’N, REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON QUESTION 26 OF THE NEW YORK BAR APPLICATION 4 (2022), <https://nysba.org/app/uploads/2021/11/H6.-Working-Group-on-Question-26-NYS-Bar-Exam-Admission-App-APPROVED-HOD-1.22.2022.pdf> [https://perma.cc/V2XN-8UFG]; *New York Committee Report*, *supra* note 42, at 42–48; WASH. SUP. CT. TASK FORCE ON BAR LICENSURE, *supra* note 57, at 5; Jon Bauer, Remarks at National Association for Rights Protection and Advocacy Panel: “What’s Mental Health Got to Do With It?: Let’s Discuss Bar Admission Policies” (Sept. 20, 2019) (on file with author).

140. Although some bar applicants advocated for diploma privilege in 2020, see *supra* note 125, others feared that their advocacy would adversely affect them during the character inquiry. This fear was fueled, in part, by media reports that this might occur. See, e.g., Joe Patrice, *NCBE Prez Issues Threat to Tie Up Licenses of Bar Exam Critics*, ABOVE THE L. (Aug. 6, 2020, 11:43 AM), <https://abovethelaw.com/2020/08/ncbe-prez-issues-threat-to-tie-up-licenses-of-bar-exam-critics/> [https://perma.cc/2KJV-M4CU] [hereinafter Patrice, *NCBE*

reexamination of the current inquiry—and the courts’ failure to oversee bar examiners’ activities—help explain why there has been so little change since Rhode wrote her article.

B. Improving the Process

Change may not occur unless courts are persuaded of the need to examine their state’s character and fitness inquiry. In a few states, law school deans were able to convince state supreme courts of the need for emergency changes in admission standards during the COVID-19 pandemic.¹⁴¹ Some of those efforts have resulted in court-initiated task forces that are considering more lasting changes.¹⁴² Ideally, any task force constituted to study the character inquiry would include not only bar examiners, but also judges, other lawyers (including recent applicants), law school representatives, and mental health professionals.

The task force should then critically review all of the questions on the bar application, with research on memory, cognition, and brain maturation in mind. Many of the questions should be time limited to events in the preceding five years.¹⁴³ Task forces should consider how bar examiners can communicate what they are seeking about criminal history so as to avoid needlessly deterring potential applicants. They should also consider about which criminal history bar examiners really need to know. For example, considering the widespread decriminalization of marijuana and the evidence that people of color are disproportionately arrested for possession,¹⁴⁴ there are compelling reasons to exclude those questions. Applications should not ask about mental health conditions or treatment but should instead ask about

Prez Issues Threat to Tie Up Licenses]; Joe Patrice, *Law School Implies Diploma Privilege Advocates Could Get Dinged on Character & Fitness*, ABOVE THE L. (July 6, 2020, 4:16 PM), <https://abovethelaw.com/2020/07/law-school-implies-diploma-privilege-advocates-could-get-dinged-on-character-fitness/> [https://perma.cc/QV72-BNMS].

141. Levin, *supra* note 124, at 119–29.

142. For example, the Washington Supreme Court established the Washington Bar Licensure Task Force a few months after law school deans had successfully advocated for diploma privilege for certain 2020 bar applicants. *See In re Establishment of the Washington Bar Licensure Task Force*, No. 25700-B-649 (Wash. 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/25700-B-649.pdf> [https://perma.cc/X2SN-UMN3]; *see also* Letter from Martha L. Walters, C.J., Or. Sup. Ct., to Troy Wood, Regul. Couns., Or. State Bar (Sept. 14, 2020) (asking Oregon State Bar to establish a task force to study alternatives to bar examination). Thus far, the focus has been primarily on the bar examination requirement. *See* Marilyn Cavicchia, *In Wake of COVID-19, Several Jurisdictions Explore Other Ways to License Lawyers*, BAR LEADER (Nov. 1, 2022), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2022-23/fallissue/in-wake-of-covid-19-several-jurisdictions-explore-other-ways-to-license-new-lawYERS/ [https://perma.cc/K375-VVE7].

143. *See, e.g.*, PA. BD. OF L. EXAM’RS, BAR APPLICATION 2, 16, 27–28 (2017), https://www.pabarexam.org/pdf/204_341/204_sample_application.pdf [https://perma.cc/9UH5-88EA] (limiting inquiries about addresses, employment, alcohol-related offenses, and bankruptcy to past five years).

144. ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 6 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [https://perma.cc/4M75-FCXP].

conduct or behavior.¹⁴⁵ Questions that are very unlikely to yield useful information—such as bankruptcies before law school,¹⁴⁶ periods of volunteer work, memberships in voluntary bar associations, and requests for personal references¹⁴⁷—should also be eliminated.

Task forces should also consider how to reorient the character inquiry from a broad-based search for every detail of an applicant's history to an evaluation of an applicant's fitness in light of scientific and social science literature. Thus far, only the Washington Supreme Court has shown a willingness to carefully consider this literature, recently stating that “[s]uch evidence must play a role in our admissions decisions where relevant.”¹⁴⁸ Task forces should consider how to educate both character committees and the courts about the relevant literature. Task forces should also address how bar examining committees and courts might systematically include mental health professionals in the process to help them interpret testimony and other information they receive, including evidence of remorse and inconsistent narration.¹⁴⁹

Task forces should also consider how to ensure that applicants receive fair notice about the character inquiry. Obviously, all jurisdictions should develop standards and publish them in places where applicants can find them. Bar examiners and courts should publish their decisions in some fashion so that applicants can ascertain how the jurisdiction's standards are actually applied. Likewise, bar examiners should advise applicants up front that their focus is *as much* on the applicants' ability to be truthful in the character inquiry as it is on prior misconduct. Task forces should also consider how to ensure that bar applicants are advised of when it might be prudent for them to consult with a lawyer who can guide them through the character inquiry.

Finally, task forces should address the need for consistency in, and proper oversight of, the character and fitness process. One way to do this would be to require bar examiners to prepare annual reports for the courts with more data about their character and fitness activities. Bar examiners should also be required to disclose the race and gender of applicants who are scheduled for hearings, denied admission, or conditionally admitted. Conditional admission has costs for applicants, and so jurisdictions that conditionally admit lawyers should be required to periodically assess whether conditional

145. See *supra* note 130 and accompanying text.

146. See Levin et al., *supra* note 86, at 63, 67.

147. See, e.g., NCBE CHARACTER AND FITNESS SAMPLE APPLICATION, *supra* note 29 (in question 44, asking for contact information for six character references). As Rhode noted, personal references are “time consuming for all concerned and ill-designed to generate useful information.” Rhode, *supra* note 3, at 564–65.

148. See *In re Stevens*, 519 P.3d 208, 220 (Wash. 2022) (discussing psychological and neurological studies on brain development); see also *In re Simmons*, 414 P.3d 1111, 1117–18 (Wash. 2018) (discussing the scientific literature on drug relapse).

149. The use of mental health professionals already occurs in some jurisdictions. See *In re Halttunen*, 478 P.3d 488, 500 (Or. 2020) (“It is significant to our assessment [of remorse] that Dr. Kolbell—a public member of the board and trained psychologist—had confidence in the genuineness of applicant's remorse.”).

admission is being utilized in a fair and consistent manner.¹⁵⁰ These steps and others would help promote fairness, consistency, and accountability in the character and fitness process.

CONCLUSION

Rhode's critique of the character and fitness inquiry remains remarkably relevant today. As she noted again later in her career, "[m]oral character requirements . . . respond to legitimate concerns but do so in a way that is inconsistent, unjust, and unsupported by psychological research."¹⁵¹ There are significant costs associated with a bloated, intrusive, and sometimes humiliating and abusive process¹⁵² that deters some individuals from seeking mental health treatment or attempting to become lawyers. Courts should insist on character and fitness standards that require reliance on scientific research rather than intuition when assessing an applicant's fitness to practice. Although applicants often fear the character inquiry, there is little evidence that they respect or trust it.¹⁵³ Their experiences can engender cynicism and negatively affect new lawyers' feelings about lawyer regulation.¹⁵⁴ Thus, the signal that the character inquiry sends to these lawyers may not be the one that is intended.

150. Conditionally admitted applicants must pay the costs associated with their conditions (e.g., psychological counseling, drug testing) and must expend the time required to comply with the conditions. There is a risk that conditional admission will be required of lawyers who should be unconditionally admitted to practice. *See, e.g.,* McGrath, *supra* note 35.

151. Rhode, *Virtue and the Law*, *supra* note 5, at 1046.

152. As noted, some applicants refer to their interactions with the character committee as "the worst experience of [their] li[ves]." *See supra* note 36 and accompanying text. One individual who echoed these words told me that she was scrutinized when a committee member inquired about what she had eaten for dinner the night she was arrested over a decade earlier and she could not remember. *See* Telephone Interview with anonymous applicant, *supra* note 32.

153. As one applicant said about the character inquiry:

I live in perpetual fear of [a mistake.] My fear is the parking ticket that I never received, which lead to an arrest warrant, and "Why are you fugitive from justice?" [sic]

Or the "we suspected he was stealing but never confronted him, so when he resigned, we're okay with it."

Something like that. Something I wasn't aware of. It's like Kafka! coffeetnight, REDDIT (June 4, 2020), https://www.reddit.com/r/LawSchool/comments/gwppad/character_and_fitness_horror_story/ [https://perma.cc/F3E7-YVCD].

154. The extent of antipathy that bar applicants felt for bar examiners, and, at times, the organized bar, due to their seeming lack of concern for applicants was palpable in comments on Twitter during the 2020 advocacy for diploma privilege. *See e.g.,* Karen Sloan, "I Understand the Anxiety and Anger," *Says Top Bar Exam Official*, AM. LAW. (Aug. 13, 2020, 3:14 PM), <https://www.law.com/2020/08/13/i-understand-the-anxiety-and-the-anger-says-top-bar-exam-official/> [https://perma.cc/5T9Q-RK8A]; Patrice, *NCBE Prez Issues Threat to Tie Up Licenses*, *supra* note 140.