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A Structural Analysis of the Good Moral Character Requirement for Bar Admission

Michael K. McChystal*

American jurisdictions universally require good moral character for admission to the bar.1 The good moral character requirement has eluded useful definition and has been described as possessing "shadowy rather than precise bounds."2 The United States Supreme Court has held that the requirement is constitutionally permissible as long as pre-admission conduct which is the basis for denying bar admission has a "rational connection with the applicant's fitness or capacity to practice law."3

Because the requirement of good moral character for bar admission is designed principally to protect the public from unethical lawyers,4 the assertion of any such rational connection requires the belief that an applicant's conduct during the bar admission process serves as a useful predictor of how he will behave if admitted to practice law. Thus, the prevailing view of bar admission authorities is that past conduct predicts future conduct.5

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1 See generally WEST PUBLISHING CO., RULES FOR ADMISSION TO THE BAR IN THE UNITED STATES AND TERRITORIES (1982); VII MARTINDALE-HUBBELL LAW DIRECTORY (1984). For example, SUP. CT. R. 5.1 provides in part: "It shall be requisite to the admission to practice in this Court . . . that the applicant appears to the Court to be of good moral and professional character."


3 Id. at 239.

4 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-2 (1982); see also Florida Bd. of Bar Examiners re G.W.L., 364 So. 2d 454, 458 (Fla. 1978); In re Taylor, 647 P.2d 462, 467 (Or. 1982); Pushinsky v. West Virginia Bd. of Law Examiners, 266 S.E.2d 444, 450 (W. Va. 1980).

An additional rationale for the good moral character requirement is to protect the orderly administration of justice. Although this goal has more frequent relevance in lawyer discipline cases, it is also mentioned as a concern in bar admission cases. E.g., Ex Parte Wall, 107 U.S. 265, 274 (1883) (disbarment); Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 462, 421 P.2d 76, 87, 55 Cal. Rptr. 228, 239 (1966) (bar admission).

5 Although expressed in a dissenting opinion, the prevailing view is stated well in In re Applicants for License, 143 N.C. 1, 21, 55 S.E. 635, 642 (1906) (Brown, J., dissenting):

[I]f the applicant passes the threshold of the bar with a bad moral character, the
Although this is a rational and attractive premise, it has not been proven empirically in the context of bar admission. Bar admission authorities are unlikely to employ, in the foreseeable future, any psychometrically-sound device to assist in determining whether applicants satisfy the good moral character requirement. In the absence of such a device, it is not likely that his character will remain bad, and that he will become a disgrace, instead of an ornament, to his great calling, a curse, instead of a benefit, to his community, a Quirk, a Gammon, or a Snap, instead of a Davis, a Smith, or a Ruffin.

It is interesting to compare the treatment of past conduct in bar admission cases with its treatment under the rules of evidence. Generally, evidence of past wrongs is not admissible to prove the character of a person in order to show the commission of subsequent acts. See Fed. R. Evid. 404(b); cf. Fed. R. Evid. 405(a). While evidence tending to prove an actor's propensity to commit acts of a given sort generally may be excluded in other settings, proof of such propensities is at the heart of moral character assessments in bar admission cases. See also Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies, 31 UCLA L. Rev. 1003 (1984).

6 In the early 1970's, an American Bar Association committee proposed research studies to identify character traits which, when present in a lawyer, make it highly likely that the lawyer would engage in unethical conduct. The goal was to test whether bar admission applicants possessed the offending traits and to deny admission to those who did. See Jaworski, President's Page, 58 A.B.A. J. 667 (1972); Information Report of the Section of Legal Education and Admission to the Bar, 97 Reports of A.B.A. 984 (1972).

An excerpt from the committee report appears in Dershowitz, Preventive Disbarment: The Numbers Are Against It, 58 A.B.A. J. 815 (1972). The report proposed:

A. An interdisciplinary inquiry into what is now being done or projected in other professions or businesses:

1. To identify those significant elements of character that may predictably give rise to misconduct in violation of professional responsibilities.

2. To estimate the capacity of those inimical elements to persist despite the maturing process of the individual and the impact of the stabilizing influence of legal education.

B. A “hindsight” study of selected cases of proved dereliction of lawyers to ascertain whether any discoverable predictive information could have been obtained at the law student level by feasible questionnaires or investigations; and if so, what type of inquiry would have been fruitful.

Id.

Alan Dershowitz argued convincingly against the empirical feasibility of using such methods to screen out future violators of professional standards. See generally Dershowitz, supra. Dershowitz contended that any such screening device would likely ensnare more persons who would establish clean records as lawyers than future violators. Id.


Sophisticated moral reasoning, however, does not ensure moral conduct. Moral conduct requires the identification of the moral problem at issue so that moral reasoning may be invoked to resolve the problem. In addition, moral conduct requires action in accord with the results of the moral reasoning: an actor may morally reason on a sophisticated level and then act contrary to the conclusions he reaches. Moreover, even if a person identifies the moral
sence of any effective testing device, an applicant's moral character is ordinarily assessed through information gathered from applications and questionnaires, letters of recommendation, follow-up investigations, interviews, and hearings. Bar admission authorities decide whether an applicant meets the good moral character requirement by assessing all of the relevant facts before them. Justice Frankfurter described this decision-making process:

No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment . . . that . . . expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."9

Decisions which rely on "unnamed and tangled impressions . . . which may lie beneath consciousness" run serious risks, especially when they may be devastating to a bar admission applicant's future livelihood and reputation. Bar admission decisions will be more consistent, rational, and just if the reasons supporting them are consciously recognized, clearly stated, and explicitly related to the applicant's fitness or capacity to practice law. Visceral reactions are an inadequate basis for denying an applicant a license to practice law. Bar admission authorities should be expected to articulate the rational connection between the grounds for their moral character objections to an applicant's admission and the applicant's fitness or capacity to practice law.

This article is an effort to raise consciousness, principally by identifying significant threads that make up the fabric of the good moral character requirement.10 This purpose is moderately frustrated by two dynamics. First, unless bar admission authorities seek to block an applicant's admission on moral character grounds, the

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8 For an expanded discussion, see BAR EXAMINER'S HANDBOOK 137-87 (S. Duhl ed. 1980).
10 Although relevant to the good moral character requirement for bar admission, this article does not address good moral character standards in other professions or in immigration and naturalization cases, nor does it assess due process considerations in applying the standard in bar admission cases.
result of the moral character assessment is generally not reported. Thus, a host of cases in which bar admission was granted notwithstanding blemishes relating to moral character evade evaluation. This may conceal some of the greatest inconsistencies among bar admission cases. Second, courts are often cursory in describing the underlying facts and in offering the rationales for their decisions in moral character cases.\textsuperscript{11}

In most states, the disciplinary rules of the Code of Professional Responsibility constitute the ethical duties imposed upon lawyers and form the only bases for a finding of unfitness to practice law.\textsuperscript{12} Not all violations of the disciplinary rules prove unfitness to practice. Certainly, violations of disciplinary rules which do not result in the offending lawyer losing his license for any period of time cannot support a finding of unfitness to practice, since a lawyer could not be permitted to retain his licensure without interruption if he were deemed unfit to practice.\textsuperscript{13} Conversely, the imposition of the severe sanctions of long-term suspension from practice or disbarment must surely reflect a determination that the offending lawyer is unfit to practice law.

The fact that the disciplinary rules embody the full statement of bases for determining that a lawyer is unfit to practice for reasons of misconduct\textsuperscript{14} has significant implications in assessing the appropriate

\begin{enumerate}
\item Extremely vague denials of admission to the bar may violate due process requirements. See \textit{In Re Berkan}, 648 F.2d 1386, 1388 (1st Cir. 1981) (applicant was informed of her denial in a one-sentence letter providing no reasons).
\item Conduct not proscribed in a specific disciplinary rule may be grounds for disbarment, but only if it is “conduct which all responsible lawyers would recognize as improper for a member of the profession.” \textit{In Re Ruffalo}, 390 U.S. 544, 555 (1968) (White, J., concurring). This exception becomes superfluous under the Model Code of Professional Responsibility, which contains a catch-all rule prohibiting “any other conduct that adversely reflects on [the lawyer’s] fitness to practice law.” \textbf{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 1-102(A)(6) (1982). This provision also makes clear the Code’s position that all lawyer misconduct under the Code adversely reflects on the lawyer’s fitness to practice law. See also \textit{id. Canon} 1 n.14.
\item A determination of unfitness to practice logically accompanies the sanctions of suspension (for more than a nominal duration) and disbarment in the same jurisdiction in which the determination is made. The situation differs when the issue concerns the effect of disciplinary action taken by one jurisdiction on licensure in another jurisdiction. Generally, one jurisdiction is not bound by disciplinary action in another jurisdiction, even though bar admission in that jurisdiction is derived from admission in the other jurisdiction. See \textit{In Re Ruffalo}, 390 U.S. 544, 547 (1968) (effects of a state’s disciplinary action on lawyer’s admission to practice in federal court). See \textit{generally Annot.}, 173 A.L.R. 298 (1948) (effect of one state’s disciplinary action on lawyer’s admission to practice in another state).
\item Even the catch-all provision of DR 1-102(A)(6) rarely supplies a sole basis for disciplinary action. A LEXIS search for attorney discipline cases in which DR 1-102(A)(6) is cited disclosed 676 cases in state courts, only two of which did not also invoke some other discipli-
scope of the good moral character requirement. Bar admission can be denied on moral character grounds only upon a finding of unfitness to practice law, which is defined by the ethical duties imposed upon lawyers, usually under some variant of the Model Code of Professional Responsibility. It follows, then, that only that pre-admission conduct which indicates that the applicant would violate disciplinary rules if admitted to practice may justify a finding of lack of good moral character.

Notwithstanding the logic of this approach, some jurisdictions distinguish between moral character standards for applicants to the bar and for admitted lawyers. These jurisdictions usually hold that the standards of behavior for bar admission applicants are less defined and more expansive than the ethical duties to which lawyers are bound. This produces the anomalous result that persons must demonstrate a better moral character to be granted a license to practice law than to keep it.

Reported decisions involving questions of good moral character offer no compelling justification for this unequal treatment. The usual justification is evidentiary in nature: bar admission applicants generally have the burden of establishing good moral character.

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15 Although bar admission may be denied on moral character grounds whenever the applicant's conduct adversely reflects on his or her fitness or capacity to practice law, the word "capacity" adds little in such cases. It is difficult to conceive of a moral character case in which the applicant is adjudged fit for law practice and otherwise qualified for admission, yet is determined to lack capacity for law practice. While it is possible to ascribe a narrow meaning to "fitness" so that "capacity" becomes an important consideration, courts do not appear to have done so. No cases have been discovered where the court, in the context of a moral character assessment, focuses primarily on an applicant's "capacity" to practice law.

16 See In re Wells, 174 Cal. 467, 474-75, 163 P. 657, 660 (1917); In re Florida Bd. of Bar Examiners, 373 So. 2d 890, 891 (Fla. 1979); see also In re Stepsay, 15 Cal. 2d 71, 75, 98 P.2d 489, 491 (1940) ("[T]he court may properly refuse to admit an applicant to practice law upon proof which would not justify an order of disbarment.").

17 Early cases sometimes distinguished an admitted lawyer's property right in continued licensure from an applicant's mere expectancy of licensure. See In re O'Brien, 79 Conn. 46, 55, 63 A. 777, 780 (1906), overruled on due process grounds, In re Dinan, 157 Conn. 67, 72, 244 A.2d 608, 610 (1968). This distinction is rarely made in modern cases. See Reese v. Board of Comm'r's, 379 So. 2d 564, 569 (Ala. 1980).


Generally, the applicant has the burden of establishing a prima facie showing of good
while the burden of proving a lawyer's unethical conduct generally falls on the discipline board. Courts have used these differing burdens of proof to justify a more expansive scope of relevancy in bar admission cases. Some courts avoid the evidentiary clutter resulting from an expansive scope of relevancy by summarily holding that the applicant has failed to meet his burden of proving good moral character, without clearly specifying the weight given to negative evidence or identifying the connection between the negative evidence and fitness to practice law.

Some jurisdictions may apply a more stringent standard to bar applicants than to admitted lawyers on the theory that lawyers are subject to greater temptations to engage in misconduct. Succumbing to lesser temptations is, arguably, more telling morally than succumbing to greater temptations. Moreover, one who succumbs to lesser temptations prior to bar admission may be especially likely to misbehave when confronted by the greater temptations present in law practice. While this reasoning is appealing at first blush, it is a highly speculative basis for depriving an otherwise-qualified individual of the opportunity to practice his chosen profession. In particular, it ignores the serious temptations to which bar applicants are often subject by virtue of their social and economic circumstances. In some respects, the social and economic circumstances in which lawyers live and work may be less conducive to serious temptation than applicants' pre-admission circumstances.

It is a premise of this article that bar applicants and admitted lawyers should be treated similarly; thus, bar admission authorities should deny admission only if past misconduct portends that the applicant, if admitted, would engage in conduct unacceptable for a licensed lawyer. Unacceptable conduct for a licensed lawyer is conduct prohibited by the Code of Professional Responsibility, or whatever ethical standards the jurisdiction imposes upon its licensed lawyers. This requirement serves the important goal of protecting

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moral character, which the bar admission authority may introduce evidence to rebut. See In re Rogers, 297 N.C. 48, 57, 253 S.E.2d 912, 918 (1979).

19 See, e.g., Dodd v. Board of Comm'mrs, 365 So. 2d 975, 977 (Ala. 1979); State ex rel. Nebraska State Bar Ass'n v. Erickson, 204 Neb. 692, 700, 285 N.W.2d 105, 109 (1979); see also In re Burrows, 291 Or. 135, 629 P.2d 820 (1981).

20 Several forces work in combination to lessen the temptation to which lawyers are subject. Lawyers typically enjoy greater financial security than the public at large. Peer pressure within the profession discourages misconduct, and lawyers often work in groups in which supervision by peers increases the likelihood that wrongful conduct will be detected. The adversary process itself may discourage lawyer misconduct, and the threat of disbarment provides an additional deterrent.
the public equally from new unfit lawyers and from experienced unfit lawyers. When addressing the question of whether to admit an applicant who has engaged in misconduct, bar admission authorities and courts should be substantially guided by the treatment afforded admitted lawyers who engage in similar misconduct. In all events, bar admission authorities and courts should look to an applicant's more recent conduct to determine whether rehabilitation has corrected a past unfitness.\(^\text{21}\)

With few exceptions,\(^\text{22}\) bar admission cases involving the good moral character requirement fall within the following categories: political belief and conduct; misconduct in the bar admission process; past illegal conduct; financial malfeasance; and emotional or mental instability. Each of these categories of misconduct will be discussed in turn, with a focus upon the nature of the conduct and its relation to ethical standards imposed upon lawyers.

I. Political Belief and Conduct

Bar admission cases in which the applicant's moral character is at issue because of the applicant's political belief or conduct fall within three general categories: cases in which the applicant's political beliefs and actions have been disclosed and the bar admission authority must decide whether to deny admission based on the applicant's politics per se; cases in which the applicant has engaged in politically-motivated illegal conduct;\(^\text{23}\) and cases in which the applicant declines to answer questions of a political nature in the bar admission process, thereby giving rise to charges of misconduct in that process.\(^\text{24}\)

Thought, speech, association, and conduct in the bar admission process enjoy constitutional protection. In \textit{Schware v. Board of Bar Examiners},\(^\text{25}\) the California court prohibited an applicant to the bar from taking the bar examination because he had not shown good

\(^{21}\) In order to satisfy the requirement, the applicant must be of good moral character at the time of admission. \textit{See In re Estes}, 580 P.2d 977 (Okla. 1978); \textit{In re Taylor}, 293 Or. 285, 647 P.2d 462 (1982). \textit{See generally Annot. 88 A.L.R.3d 192 (1978)}.


\(^{23}\) \textit{See generally text accompanying notes 84-113 infra.}

\(^{24}\) \textit{See text accompanying notes 50-66 infra.}

\(^{25}\) 353 U.S. 232 (1957). The Supreme Court held that previous membership in the Communist party, use of aliases, and arrests without formal charges, did not under the circumstances establish grounds for refusal of admission to the bar.
moral character. Schware had been a member of the Communist Party for eight years, but had not been a member for the thirteen years before he applied to take the examination. In reversing, the Supreme Court held that in order for political expression to form the basis for denial of admission to the bar on moral character grounds, the expression must bear some "rational connection with the applicant's fitness or capacity to practice law."\textsuperscript{26}

The law clearly answers the question of when bar admission may be denied on the basis of an applicant's politics per se. "[K]nowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable"\textsuperscript{27} and presumably may be the basis for denial of admission to the bar on moral character grounds. The rule has been clearly formulated, although not easily applied. In any event, few courts have denied admission explicitly on such grounds.\textsuperscript{28}

Politically-motivated criminal activity has generated an interesting line of moral character cases. Disciplinary rules prohibit a lawyer from knowingly counseling or assisting a client in engaging in illegal conduct\textsuperscript{29} and, from engaging in illegal conduct in the lawyer's own right in the course of representing a client.\textsuperscript{30} In addition, the disciplinary rules prohibit a lawyer from engaging in illegal conduct involving moral turpitude and from engaging in acts which are prejudicial to the administration of justice.\textsuperscript{31} These standards, which help define fitness to practice law, may be rationally connected to an applicant's

\textsuperscript{26} Id. at 239; see also Konigsberg v. State Bar of Cal., 366 U.S. 36, 44-46 (1961).

\textsuperscript{27} Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165 (1971); see also Dennis v. United States, 341 U.S. 494 (1951) (upholding the constitutionality of the Smith Act, 18 U.S.C. § 2385 (1982), which makes it a crime, under some circumstances, to advocate the overthrow of the government by force or violence).

\textsuperscript{28} See, e.g., Siegel v. Committee of Bar Examiners, 10 Cal. 3d 156, 514 P.2d 967, 110 Cal. Rptr. 15 (1973), in which the bar admissions committee refused to certify the applicant's good moral character because he had falsely testified before the committee in saying he had not advocated violent political action, rather than because he had publicly advocated violent political action. But see In re Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202 (1944), aff'd on rehearing, 270 A.D. 1046, 63 N.Y.S.2d 840 (1946), aff'd per curiam, 296 N.Y. 926, 73 N.E.2d 41 (1947).


politically-inspired illegal conduct or advocacy of violent overthrow of the government. If they are, then the applicant may properly be denied admission to the bar.

On the other hand, it is wise to consider the effect of a wholesale exclusion of applicants whose political beliefs and action are of this nature. In his stirring dissent in *In re Anastaplo,* Justice Black extolled the heroic courage of lawyers who "dared to speak in defense of causes and clients without regard to personal danger to themselves." Regarding the need for these dissident voices in the bar, Justice Black wrote:

> The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.
>
> . . . [T]he Government is being permitted to strike out at those who are fearless enough to think as they please and say what they think.

The Supreme Court of Washington ignored these considerations in *In re Brooks,* in which the court denied permission to take the bar examination to a conscientious objector who had, more than a decade before, violated criminal law by refusing to report to a civilian labor camp. The divided court denied Brooks' application because he had defied the law by refusing to honor his duty to his country and its "great heritage of liberty."

The duty to obey the law (the corollary of impermissible defiance of law) is generally not applied with strict exactitude in bar

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33 Id. at 115 (Black, J., dissenting). On a list of lawyers possessing "the uncommon virtue of courage to stand by [their] principles at any cost," Justice Black included Malsherbes, who defended Louis XVI against the revolutionary government of France at the cost of his life; Chief Justice Hughes, who as a lawyer defended socialist members of the New York legislature who were suspended from that body because of their political views; Clarence Darrow; and others. Id. at 114-15.
34 Id. at 115-16.
36 Id. at 69, 355 P.2d at 842; see also *In re Summers,* 325 U.S. 561 (1945), in which the Court affirmed the decision of the Illinois Supreme Court denying the petitioner's application for admission to the Illinois bar. The petitioner's religious beliefs made him a conscientious objector to military service, who eschewed the use of force regardless of circumstances. Although the petitioner had not violated any law, the justices of the Supreme Court of Illinois denied the petitioner's application because they determined that he could not swear, in good conscience, to uphold the Illinois constitution, which contained a provision requiring men in petitioner's age group to serve in the state militia in time of war. The Supreme Court held that the denial did not violate the first amendment as applied to the states by the fourteenth amendment.
admission cases. Cases abound in which applicants were admitted to the bar notwithstanding prior criminal convictions,\textsuperscript{37} even recent ones.\textsuperscript{38} The disciplinary rules do not suggest that lawyers be disciplined for all forms of criminal conduct.\textsuperscript{39} Rather, when lawyers engage in criminal conduct, courts consider the nature of the conduct and the circumstances surrounding it. These considerations are especially relevant where the applicant’s criminal conduct involves political expression.

With these considerations in mind, the Supreme Court of California, in \textit{Hallinan v. Committee of Bar Examiners},\textsuperscript{40} admitted an applicant to the bar notwithstanding his convictions for unlawful assembly, remaining present at a place of unlawful assembly, disturbing the peace, and trespass upon land for the purpose of obstructing lawful business, all in connection with a civil rights sit-in. The court emphasized the non-violent nature of these acts and the widespread view that non-violent civil disobedience can be a morally-legitimate form of political expression. The court cited the works of several legal scholars on the legitimacy of civil disobedience, as well as works by Thoreau, Laski, Gandhi, Plato and Aristotle.\textsuperscript{41}

\textit{Brooks} and \textit{Hallinan} are inconsistent, at least in their treatment of non-violent civil disobedience, since the \textit{Brooks} court ignored the applicant’s motivation in refusing to report for alternative service. The opinion identified no rational connection between the applicant’s dated illegal conduct and his present fitness to practice law, except to say:

\begin{quote}
We are not inclined to adopt a transitory theory as to the applicant’s character. Age alone has not reduced his potential for war resistance to zero. . . . An old lawyer can impede his country’s war effort in many ways as well as a young one.\textsuperscript{42}
\end{quote}

This, of course, avoids the crucial issue, which is the relationship of draft resistance to fitness to practice law, or, more specifically, whether a former draft resistor is likely to breach ethical duties. The

\begin{itemize}
\item \textsuperscript{37} See Annot., 88 A.L.R.3d 192 (1978).
\item \textsuperscript{38} See, e.g., \textit{In re Florida Bd. of Bar Examiners}, 183 So. 2d 688, 690 (Fla. 1966) ("[A] conviction of petty larceny would not deprive an individual of his or her right to be admitted to The Florida Bar if otherwise qualified.").
\item \textsuperscript{39} \textit{Model Code of Professional Responsibility DR 1-102(A)(3)} (1982); \textit{Model Rules of Professional Conduct} Rule 8.4(b) (1983). \textit{See generally text accompanying notes 84-113 infra.}
\item \textsuperscript{40} 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).
\item \textsuperscript{41} \textit{Id.} at 461, 421 P.2d at 87, 55 Cal. Rptr. at 239.
\item \textsuperscript{42} \textit{In re Brooks}, 57 Wash. 2d at 68, 355 P.2d at 841.
\end{itemize}
court denied admission on moral character grounds without identifying the rational connection required by *Schware*.

The commission of minor crimes in the furtherance of morally-legitimate political objectives can be of substantial service to society. This is a nation which once permitted slavery, denied women the right to vote, reneged on treaties with Indian nations, and interned life-long citizens solely because of their Japanese ancestry. Who knows which of our current national policies and laws will be rejected as morally repugnant in future years? Moral leaders who call attention to an immoral status quo may be required to engage in minor acts of civil disobedience to do so.

Political advocacy which is criminal per se poses unique problems in the context of the good moral character requirement. Where an applicant has committed a non-political crime motivated by political belief, it is unlikely that his licensure as a lawyer poses risks any greater than those ordinarily associated with the admission of a person who has committed that crime. Therefore, criminal conduct motivated by political belief should certainly carry no greater weight in the bar admission process than criminal conduct not so motivated. In fact, the political motivation may be an ameliorating factor because of the moral legitimacy of some forms of civil disobedience. In no event should the political motivation be seen as an aggravating factor.

Consistent with the disciplinary rules, political belief and conduct ought to be invoked to deny bar admission only when a political crime has been committed. This does not require that the applicant have been convicted of a political crime; the "conviction" may

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43 A state may deny admission to the bar on moral character grounds if the applicant cannot, in good conscience, swear to the attorney's oath required in most jurisdictions. *In re* Summers, 325 U.S. 561 (1945). Attorney's oaths typically require an attorney to swear to support the constitutions of the United States and the state where the attorney seeks admission to the bar. *See*, e.g., *IND. CODE ANN.* § 34-1-60-4 (West 1983). The illegal advocacy of overthrow of the government by force or violence poses moral character difficulties for this and other reasons.

44 Consider three hypothetical cases in which an applicant has been convicted of malicious destruction of government property: (1) the act has no political overtones and is committed only for the "thrill" of it; (2) the act is done to protest the war in Vietnam; and (3) the act is done to show opposition to court-ordered busing to cure past illegal school segregation. Assuming that questions of rehabilitation are not at issue, neither the second nor third case should be treated more harshly in the bar admission process than the first case. An argument could be made for treating the second case less harshly than the other cases.

45 Although it is not easy to define "political" crimes, certain crimes seem to qualify, including treason, sabotage, sedition, and flag desecration. *See*, e.g., *WIS. STAT.* §§ 946.01-06 (1982). Even absent rehabilitation, it is not clear that all such criminal acts should be an impediment to bar admission on moral character grounds. The test remains whether the act
be reached in the bar admission process itself. Convictions for some political crimes may adversely reflect on the applicant’s fitness to practice law, particularly where the criminal conduct reflects such distrust of the legal process that the applicant, absent a change of heart, would likely violate ethical duties imposed upon lawyers. The rational connection required by Schweare might be present in those cases.

II. Misconduct in the Bar Admission Process

If the good moral character requirement is to be effective, an applicant’s failure to truthfully disclose material information solicited by bar admission authorities must be an impediment to admission. Misconduct in the bar admission process is one of the most frequently cited bases for denial of admission on moral character grounds.

Applicants are expected to answer all questions truthfully and completely. Failure to disclose material, solicited information adversely reflects on the applicant’s fitness to practice law. See text accompanying notes 14-23 supra.

Bar admission authorities may independently assess evidence of prior misconduct notwithstanding an acquittal or dismissal of criminal charges relating to that misconduct. See In re Leff, 127 Ariz. 62, 618 P.2d 232 (1980) (no criminal charges filed for impeding an IRS undercover investigation); Florida Bd. of Bar Examiners re L.K.D., 397 So. 2d 673 (Fla. 1981) (acquittal of shoplifting charge); Nall v. Board of Bar Examiners, 98 N.M. 172, 646 P.2d 1236 (1982) (charges of conspiracy to sell heroin dropped).

But see Martin B. v. Committee of Bar Examiners, 33 Cal. 3d 717, 661 P.2d 160, 190 Cal. Rptr. 610 (1983), where the court reiterated the general principle that bar admission authorities may assess evidence of misconduct even if criminal charges based on the misconduct were terminated in favor of an applicant. However, the court held that the committee erred in conducting a “retrial” of ten-year-old rape charges, where original transcripts and some key witnesses were unavailable and the presiding judge at the criminal trial was deceased.

See also In re Cassidy, 268 A.D. 282, 51 N.Y.S. 202 (1944), aff’d on rehearing, 270 A.D. 1046, 63 N.Y.S. 840 (1946), aff’d per curiam, 296 N.Y. 926, 73 N.E.2d 41 (1947), where evidence of the applicant’s advocacy of unlawfully forming armed units for use against what he considered to be subversive elements was the basis for denial of admission, notwithstanding the applicant’s acquittal of a criminal conspiracy charge based on the same conduct.

Whether a given political crime adversely reflects on the applicant’s fitness to practice law would depend at least on the gravity of the crime and the motivation of the applicant in committing the crime. For example, publicly desecrating a flag may be motivated by opposition to a single government policy, such as the war in Vietnam, and might not be treated as adversely reflecting on the perpetrator’s fitness to practice law.

Cf. Model Code of Professional Responsibility DR 1-101(A) (1982); Model Rules of Professional Conduct Rule 8.1 (1983). Because good moral character is an unpredictable standard, the applicant who has engaged in (or been accused of engaging in) conduct which may raise questions of moral character has a serious tactical problem in deciding how to disclose that information. Bare disclosure without comment may provoke charges of lack of candor, while disclosure with explanation or defense may also provoke charges of
serves raises questions about the applicant's fitness for law practice and may be the basis for denial of admission to the bar.\footnote{49} Fraud on courts and tribunals is an extremely grave offense under the disciplinary rules,\footnote{50} and the Code of Professional Responsibility explicitly prohibits lawyers from making materially false statements or failing to disclose material, solicited facts in the bar admission process.\footnote{51} No aspect of the good moral character requirement more directly implicates ethical standards imposed upon lawyers than the prohibition against misconduct in the bar admission process.

The Supreme Court has affirmed the propriety of denying bar admission to applicants who refuse to answer questions relevant to moral character.\footnote{52} A particularly striking decision by the Court in this area is \textit{In re Anastaplo},\footnote{53} in which an applicant was denied admission to the Illinois bar notwithstanding "a mountain of evidence so favorable to Anastaplo that the word 'overwhelming' seems inadequate to describe it."\footnote{54} Anastaplo had refused, on first amendment grounds, to answer questions concerning membership in the Communist Party or any other organization on the Attorney General's list of subversive organizations. No evidence suggested that the applicant advocated violent overthrow of the government or engaged in conduct which could, if proven, lead to denial of his application for admission to the bar. His failure to cooperate fully in the character investigation\footnote{55} was sufficient to support denial of admission.


\footnote{53} 366 U.S. 82 (1961).

\footnote{54} \textit{Id.} at 107 (Black, J., dissenting).

\footnote{55} The applicant was forthright in responding to all questions, including those related to his political beliefs, except that he refused to answer questions concerning his religious views and affiliations, whether he was ever a member of the Communist Party, and whether he ever belonged to any organization on the Attorney General's list of subversive organizations. The questions were triggered by Anastaplo's support of the right of revolution against an oppressive government, a right asserted in the Declaration of Independence. This support was ex-
Anastaplo may be criticized for permitting bar admission authorities to pursue highly intrusive fishing expeditions as part of the moral character inquiry. Its greater weakness, however, is that it denied admission to an applicant on moral character grounds without any evidence of deceit or other wrongdoing. The applicant in Anastaplo was forthright in refusing to answer questions, his refusal was narrow and principled, and no evidence was adduced to show that he concealed damaging facts.

Konigsberg v. State Bar of California, decided at the same time as Anastaplo, presents a closer case, since the questions which the applicant in Konigsberg refused to answer were prompted by damaging information provided to the bar admission authorities. A witness in the applicant's character investigation stated that the applicant had attended meetings of members of the Communist Party. When questioned about his association with the Communist Party, the applicant refused to answer on first amendment grounds. The Supreme Court affirmed the California decision denying bar admission. The political questions posed to the applicant in Konigsberg were "substantially relevant to his qualifications" because of the existence of damaging information. Since there was no such damaging evidence in Anastaplo, it is questionable whether extended inquiry into the applicant's political beliefs had "substantial relevance to his qualifications."

Subsequent to Konigsberg and Anastaplo, the Supreme Court has held that an applicant's views and beliefs are immune from questions "designed to lay a foundation for barring an applicant from the practice of law." Also, an applicant may not be denied admission to the bar "solely because he is a member of a particular political organiza-

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56 Anastaplo was asked whether he was associated with scores of organizations, including the Ku Klux Klan, the Silver Shirts (an allegedly Fascist organization), every organization on the so-called Attorney General's list, the Democratic Party, the Republican Party, and the Communist Party. At one point in the proceedings, at least two of the members of the Committee insisted that he tell the Committee whether he believes in a Supreme Being. . . .


58 The Court held that "the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualification." Id. at 44.

tion or because he holds certain beliefs."\textsuperscript{60} Nor may an applicant be required "to state whether he has been or is a ‘member of any organization which advocates the overthrow of the government of the United States by force.’ "\textsuperscript{61} Bar admission authorities, however, apparently may ask whether an applicant is or has been a member of the Communist Party or of any organization which the applicant \textit{knows} to advocate the forcible overthrow of the government and which the applicant \textit{specifically supports} in its illegal goals. The Court regards these questions as substantially relevant to an applicant’s qualifications.

The result of \textit{Konigsberg} is that bar admission may be denied on moral character grounds solely for refusing to answer questions which are substantially relevant to the applicant’s qualifications. Critics of the rule present this attack:

The automatic rule means than an applicant, regardless of the strength of the rest of his record, can be denied simply because he refuses to answer on principle a question he deems improper. If, however, we take the conscientious objector stance seriously—and there is much in American history to suggest that we should—the rule can only operate to prefer applicants who are willing to answer over those who on principle are not. But among those who will answer must be some insensitive to the possible impropriety of the question and many sensitive to it but persuaded to swallow their indignation in order to be admitted; whereas on the other side, assuming good faith, we have those who have this much courage in their convictions. The argument, therefore, is that the automatic rule is arbitrary in that it prefers the servile and insensitive to the courageous—and all under the rubric of a proceeding to determine good moral character.\textsuperscript{62}

If the bar admission applicant refuses to cooperate in the character investigation, bar admission authorities have three choices: they can deny admission, they can admit the applicant on the chance that he is concealing no significant information, or they can conduct their own further investigation and rely on its results. In cases involving first amendment rights, the latter course is appealing and comports with the protections usually afforded admitted lawyers in disciplinary proceedings.\textsuperscript{63}

\textsuperscript{60} \textit{Id.} at 6 (emphasis added).

\textsuperscript{61} \textit{In re Stolar}, 401 U.S. 23, 30 (1971); \textit{see also} Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971).


\textsuperscript{63} The burden of proving misconduct in attorney discipline proceedings is generally
Not all applicants who refuse to answer permissible questions will be denied admission to the bar, even though the Supreme Court has said that they may be. *In re Jolles* involved an applicant who admitted prior membership in the Communist Party but asserted that he resigned from the party some four years prior to seeking admission to the bar. The bar admission authority asked the applicant to divulge the names of some of his former colleagues in the Communist Party in order to substantiate his claim that he had resigned. The applicant attempted to obtain permission from such people to divulge their names and to arrange for the Board of Bar Examiners to interview them anonymously. When neither of these efforts to protect his former colleagues was successful, the applicant refused to disclose any names. The Oregon court was impressed by the applicant's sincerity and his efforts to comply with the Board's demands. The court also believed that the further investigation sought by the Board was unlikely to yield significant results. In light of these considerations and favorable evidence presented by the applicant, the court determined that the applicant satisfied the good moral character requirement.

When a court is faced with a bar admission case in which an applicant to the bar has refused to answer questions concerning political beliefs and conduct, the most equitable approach is to make a balanced assessment, as the court did in *Jolles*. The court should consider the full record, including the likely probative value of the unanswered questions. The *Anastaplo* approach, under which an applicant placed on the party seeking to have discipline imposed. See, e.g., *In re Marcus*, 107 Wis. 2d 560, 576, 320 N.W.2d 806, 815 (1982); see also note 21 supra.

In addition, an attorney may not be disbarred for refusing to answer, on fifth amendment grounds, questions put to him in disciplinary proceedings. Spevack v. Klein, 385 U.S. 511 (1967). Justice Harlan, in his dissent, noted the logical extension of this rule to bar admission cases:

> [The holding of the majority] exposes this Court itself to the possible indignity that it may one day have to admit to its own bar [a lawyer who asserts his fifth amendment right against self-incrimination] unless it can somehow get at the truth of suspicions, the investigation of which the applicant has previously succeeded in blocking. For I can perceive no distinction between "admission" and "disbarment" in the rationale of what is now held.

_Id._ at 521 (Harlan, J., dissenting).

If a fifth amendment refusal to answer questions cannot be grounds for disbarment or denial of admission, should not a good faith refusal on first amendment grounds be treated similarly, even though courts may not be required to do so?

It should be noted, however, that the scope of the fifth amendment protection in lawyer discipline cases remains unsettled. For a useful analysis and compilation of cases, see ABA/BNA Lawyer's Manual on Professional Conduct 101: 2401-03 (1984).
may be denied admission upon refusal to answer relevant questions even in the absence of any damaging information, seems more punitive than sensible. The *Jolles* approach does entail a risk that a truthful, but violent revolutionary with a fairly clean record may refuse to answer political questions and be admitted to the bar. This possibility, however, is obviously remote and is by far outweighed by the interest in treating bar admission applicants fairly.

One final case involving an applicant’s misconduct in the bar admission process relating to his political belief and conduct warrants attention. The applicant in *Siegel v. Committee of Bar Examiners* was a radical activist in Berkeley around 1970. During the character investigation, the California Committee of Bar Examiners reviewed recordings of three speeches which the applicant had delivered to Berkeley residents. The committee interpreted these speeches, which expounded a radical political theory and called for concerted action, as advocating unlawful violence. The applicant denied that his speeches carried that meaning or intent. Concluding that the applicant’s denials were lies and that he therefore lacked good moral character, the committee recommended against admission. It specifically stated that it found a lack of good moral character on the basis of the applicant’s lies, not on the basis of his advocacy of unlawful violence. Thus, the determinative issue was what the applicant claimed he had said, not the freedom to speak the words in the first place.

In discussing this issue, the Supreme Court of California held:

> If a prospective speaker knows that at some time in the future he may be called upon to interpret his remarks before a body concerned with his admission to professional status, and that such admission may depend upon his making an assessment of those remarks which agrees with that made by the official body itself, he may well feel constrained to confine his public utterances to statements wholly free of ambiguous and provocative aspects. The inevitable result would be a dampening of the vigor of spoken expression.

The court ordered that the applicant be admitted because it could not conclude “*beyond any reasonable doubt* that the applicant’s version [of his original words’ meaning] not only [was] objectively false but [had] been advanced by him with an intent to deceive the

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65 10 Cal. 3d 156, 514 P.2d 967, 110 Cal. Rptr. 15 (1973).
66 *Id.* at 165, 514 P.2d at 973-74, 110 Cal. Rptr. at 21-22.
67 *Id.* at 175-76, 514 P.2d at 981, 110 Cal. Rptr. at 29.
Committee.\textsuperscript{68}

In the cases in which the applicant's misconduct in the bar admission process involves political belief and conduct, the misconduct usually is a refusal to answer questions. In non-politics cases, however, the applicant's misconduct usually consists of concealing damaging information or giving misleading or false answers to questions. This misconduct often concerns prior illegal conduct.\textsuperscript{69} It is often difficult to tell whether those cases in which the applicant was denied admission are based principally on the applicant's cover-up in the character investigation or on other forms of misconduct, including the conduct which was concealed. In virtually all the cases resulting in denial, misconduct outside of the character investigation would have justified denial of admission.\textsuperscript{70} Thus, it is possible that misconduct in the bar admission process, although often cited as a basis for denying admission, is largely a make-weight or pretextual rationale.

Reese v. Board of Commissioners,\textsuperscript{71} a recent Alabama case, is an interesting study in the weight accorded candor in the bar admission process. In his first year of law school, the applicant in Reese filed an application for registration as a law student. The application required disclosure of any instances in which the applicant was charged with violating federal or state law or city ordinances, other than minor traffic violations. In response to this question, the applicant disclosed convictions for driving while intoxicated or under the influence of drugs and for disorderly conduct. Subsequently, the Alabama State Bar Committee on Character and Fitness learned that the applicant failed to disclose thirteen additional brushes with the law. The undisclosed information included additional convictions for driving while intoxicated, disorderly conduct, and possession of an open can of beer in a moving vehicle, as well as arrests not resulting in convictions for possession of marijuana, possession of narcotics,

\textsuperscript{68} Id. at 178-79, 514 P.2d at 983, 110 Cal. Rptr. at 31.

\textsuperscript{69} See, e.g., In re Mitan, 75 Ill. 2d 118, 387 N.E.2d 278 (1979) (failure to disclose name change in an attempt to conceal felony conviction), cert. denied, 444 U.S. 916 (1979); In re Bowen, 84 Nev. 681, 447 P.2d 658 (1969) (false statements concerning prior arrests and convictions); In re Davis, 38 Ohio St. 2d 273, 313 N.E.2d 363 (1974) (evasive answers respecting felony conviction).

\textsuperscript{70} See, e.g., Spears v. State Bar of Cal., 211 Cal. 183, 294 P. 697 (1930) (failure to disclose charges filed in other states involving forgery, misappropriation of guardianship funds, and receiving stolen goods, because charges had been dismissed or conviction reversed on appeal); In re Ascher, 81 Ill. 2d 485, 411 N.E.2d 1 (1980) (failure to disclose pending lawsuit charging applicant with "gross misconduct including fraud and forgery"); In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981) (failure to disclose assault conviction, although murder conviction was disclosed).

\textsuperscript{71} 379 So. 2d 564 (Ala. 1980).
and disturbing the peace. Some of these additional charges were later disclosed by the applicant in hearings; others were revealed by outside sources. The applicant was also less than candid in hearings held to further investigate his character. Moreover, the committee received two derogatory letters and one derogatory affidavit concerning the applicant’s character, although the committee apparently did not rely on these character assessments in its decision not to certify the applicant.

The Alabama Supreme Court held that the applicant established his good moral character through several favorable letters of recommendation from judges and lawyers. The court held that the record as a whole created no substantial doubt about the applicant’s good moral character, even though the omissions, both in number and seriousness, suggested an intent to conceal the facts. The court made no attempt to justify or explain the applicant’s lack of candor. Presumably, because the concealed facts did not themselves justify an adverse character ruling, neither did the misconduct in the bar admission process. An opposite result might well be reached under Schware, Konigsberg and the Code of Professional Responsibility.

These facts present an interesting dilemma. In the context of bar admission, should a lie about inconsequential matters carry the same significance as a lie about possibly-dispositive matters? If not, then dishonesty in the bar admission process is itself inconsequential.

If Reese were an anomaly, the court’s magnanimous treatment of the applicant’s misconduct in the bar admission process would not be especially disturbing. Other decisions, however, reflect the same attitude. In In re Klahr, the Supreme Court of Arizona determined, without any specific explanation, that an applicant was of good moral character notwithstanding a finding by the Committee on Examinations and Admission that he was “less than truthful” in his

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72 At the second hearing before the Committee on Character and Fitness, in response to a direct question, Reese stated that he had made full disclosure. However, when confronted with information concerning additional offenses, he admitted them. At the third hearing, Reese disclosed still other offenses. Id. at 566.

73 Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (permits denial of bar admission on moral character grounds if the conduct in question has a rational connection with the applicant’s fitness or capacity to practice law).

74 Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) (permits denial of bar admission if the applicant is not candid in the character investigation).

75 DR 1-101(A) prohibits a lawyer from making false statements in the bar admission process. See also Model Rules of Professional Conduct Rule 8.1 (1983).

76 102 Ariz. 529, 433 P.2d 977 (1967).
testimony before the committee.\textsuperscript{77} In In re Waters,\textsuperscript{78} the Nevada court admitted an applicant who, in response to a specific question, did not disclose his expulsion from a law school for cheating on the Law School Admission Test. The court concluded that the concealment of the expulsion was not deliberate.

These cases seem to undervalue the significance of misconduct in the bar admission process.\textsuperscript{79} Bar admission authorities should recognize that the ultimate effect of treating lies about inconsequential matters as inconsequential is to treat all lies in the bar admission process as inconsequential. Requiring truthfulness of lawyers should be more than a rhetorical exercise.

III. Prior Illegal Conduct

The Code of Professional Responsibility prohibits lawyers from engaging in illegal conduct in the course of representing clients\textsuperscript{80} and from engaging in illegal conduct involving moral turpitude.\textsuperscript{81} Because most applicants to the bar have never practiced law, the prohibition against illegal conduct in the course of representing clients rarely affects moral character determinations in bar admission cases. Illegal conduct involving moral turpitude, on the other hand, can be, and frequently is, the basis for denying bar admission. This standard naturally raises questions about what constitutes “illegal” conduct and what conduct involves “moral turpitude.” The choice of the word “illegal,” rather than “criminal,” may be telling. Non-criminal

\textsuperscript{77} Id. at 530, 433 P.2d at 978.
\textsuperscript{78} 84 Nev. 712, 447 P.2d 661 (1968).
\textsuperscript{79} The most flagrant undervaluation of dishonesty in the bar admission process may be contained in State Bar v. Turner, 31 Cal. 2d 842, 192 P.2d 897 (1948), in which the California court came precariously close to saying that dishonesty in the bar admission process is not an appropriate basis for denying admission. In the context of a proceeding to revoke an attorney’s license based on dishonesty in the bar admission process, the court distinguished two similar cases in which revocation was not ordered “because in neither of those proceedings was it shown that the facts concealed would have justified the committee in refusing to recommend admission.” Id. at 844, 192 P.2d at 897-98.

However, it is wise to remember that at least two factors complicate such decisions. First, predictions regarding an applicant’s future transgressions if admitted to practice are highly inexact. See text accompanying notes 6-9 \textit{supra}. Second, notwithstanding serious character-related blemishes on an applicant’s record, favorable evidence of good moral character may outweigh the negative evidence. See, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

\textsuperscript{80} \textsc{model code of professional responsibility} DR 7-102(A)(7)-(8) (1982).
\textsuperscript{81} \textsc{model code of professional responsibility} DR 1-102(3) (1982); \textit{cf} \textsc{model rules of professional conduct} Rule 8.4(b) (1983) (professional misconduct includes criminal acts which reflect “adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).
activity may be illegal in at least two senses: the conduct may not have resulted in a criminal conviction, or the conduct may carry only civil consequences. In bar admission cases, courts have held that acquittal or dismissal of criminal charges does not preclude consideration of the conduct underlying those charges in the character assessment.\footnote{See note 46 supra.} Moreover, applicants with records of shady dealings have been denied admission even though never charged with a crime nor apparently guilty of any criminal conduct.\footnote{See, e.g., In re Kadans, 93 Nev. 216, 562 P.2d 490 (1977) (denial based on apparent misrepresentations outside of the character investigation concerning applicant's authorship of books, possession of academic degrees, professional appointments, and nature of a correspondence school operated by applicant), appeal dismissed, 434 U.S. 805 (1977); In re Alpert, 269 Or. 508, 525 P.2d 1042 (1974) (denial based on applicant's involvement in dubious, though possibly legal, stock transactions); see also text accompanying notes 125-27 infra.}

Moral turpitude is a virtually useless standard for establishing lack of moral character. Footnotes to the official American Bar Association version of the Code of Professional Responsibility define "good moral character" as "qualities of truth, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility."\footnote{Model Code of Professional Responsibility Canon 1 n.14 (1982) (quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring)).} "Moral turpitude" is defined as "baseness, vileness or depravity in the duties which one person owes to another or to society in general."\footnote{Model Code of Professional Responsibility Canon 1 n.13 (1982) (quoting Committee on Legal Ethics v. Scheer, 149 W. Va. 721, 726-27, 143 S.E.2d 141, 145 (1965)).} In short, good moral character is goodness and moral turpitude is badness, neither possessing fixed boundaries.

At common law, attorneys were automatically disbarred upon conviction of any felony or upon conviction of a misdemeanor involving fraud or dishonesty.\footnote{See Ex parte Wall, 107 U.S. 265 (1883). At common law, disbarment could also be based on gross malpractice, dishonesty, or conduct gravely affecting the lawyer's professional character. \textit{Id.} at 273.} In the bar admission process, most courts now take a more expansive view. These courts will consider the nature, number of instances, and recency of the illegal conduct, as well as other evidence tending to show present moral character and evidence of rehabilitation.\footnote{Some jurisdictions continue to maintain an absolutist treatment of lawyers convicted of felonies who have not received a full pardon for the conviction. \textit{See, e.g.,} In re Florida Bd. of Examiners, 350 So. 2d 1072 (Fla. 1977); In re Kastenbaum, 341 So. 2d 503 (Fla. 1976); In re Florida Bd. of Bar Examiners, 183 So. 2d 688 (Fla. 1966).}
catalogued elsewhere.88 More pertinent to the purpose of this article is the identification of the relationship between past illegal conduct and the ethical standards imposed upon lawyers. The Code of Professional Responsibility offers mixed guidance. An ethical consideration states: "Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law."89 This admonition differs substantially from the mandatory precepts of the disciplinary rules, where the focus is on illegal conduct involving moral turpitude and illegal conduct in the course of representing a client.90

The ethical consideration identifies two concerns which are not reflected in the disciplinary rules—concerns for the public image of the profession and for respect for law. Because these concerns are not reflected in the disciplinary rules, they do not supply a rational connection between past illegal conduct and fitness to practice law.91 Any such rational connection must be grounded in the disciplinary rules.

The disciplinary rule prohibiting illegal conduct in the course of representing a client reflects a concern for legitimate limits in furthering a client’s interests,92 while the disciplinary rule prohibiting illegal conduct involving moral turpitude suggests a concern for morality as distinct from legality.93 One major difficulty is that the disciplinary rules do not provide a workable standard for identifying “moral turpitude.” The mental state of the actor should generally be considered relevant: one who engages in unintentional illegal conduct is less morally culpable than one who engages in intentional

89 Model Code of Professional Responsibility EC 1-5 (1982); see also id., EC 9-6.
90 See notes 31-33 supra and accompanying text.
91 Courts sometimes discipline lawyers for the sole stated reason that a failure to discipline the lawyer would likely harm the public image of the legal profession. See notes 108-13 infra and accompanying text. To permit a concern for the public image of the profession to stand as an independent basis for denying bar admission on moral character grounds substantially departs from the requirement that denial be based on conduct rationally connected with the applicant’s fitness or capacity to practice law. Adverse public reaction to an applicant’s bar admission cannot be tantamount to unfitness to practice law, if unfitness to practice law is to be defined in a principled (i.e. rational) way.

Respect for law also fails to provide a useful standard. It cannot be (and is not) rigorously applied to deny admission to every applicant who ever committed an illegal act. See, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). "Minor violations of law" are treated, ordinarily, as not dispositive of moral character issues.
92 This issue applies almost exclusively to bar admission cases in which the applicant was previously admitted to practice law in another jurisdiction.
93 In this context, “illegality” constitutes a larger universe than “immorality.”
illegal conduct. Additionally, a person whose illegal act is malum prohibitum is considered less morally culpable than one whose illegal act is malum in se, while conduct in violation of civil law is generally considered less morally repugnant than conduct in violation of criminal law.

Theoretically, these distinctions could be the basis for formulation of an objective rule, such as limiting the scope of "illegal conduct involving moral turpitude" to intentional acts in violation of criminal laws which prohibit conduct which is malum in se. Hard and fast rules, however, are inappropriate in this area, particularly since evidence of rehabilitation plays an important role in good moral character cases involving past illegal conduct. Certain illegal conduct such as criminal abuse of the legal process, fraud, and embezzlement, is clearly incompatible with ethical standards imposed upon lawyers and may therefore justify denial of admission to the bar. Just as clearly, isolated and dated instances of shoplifting, possession of beer as a minor, and intoxication ought not, by themselves, justify denial of admission. Between these extremes lies an extraordinary diversity of cases which yields little concrete guidance as to when past illegal conduct will block admission and when proof of rehabilitation offsets the negative impact of such conduct.

These cases have sometimes resulted in perplexing inconsistencies. For example, the Supreme Court of Maryland recently decided two cases involving past illegal conduct. In 1981, the court denied bar admission to an applicant who had been convicted of stealing sleeping pills and leaving the scene of an accident, notwithstanding a psychologist's report that the applicant had resolved the problems leading to his earlier behavior. In 1982, the court ordered that the convicted driver of a getaway car in a bank robbery who failed to fully disclose the circumstances of the conviction on his bar application be admitted on evidence of rehabilitation and present good

94 Cf. In re Rappaport, 558 F.2d 87 (2d Cir. 1977) (pro hac vice admission denied based on plea of guilty to two counts of criminal contempt for delaying and giving evasive testimony before a federal grand jury); Lark v. West, 289 F.2d 898 (D.C. Cir. 1961) (admission to the bar denied because of mail fraud conviction), cert. denied, 368 U.S. 865 (1961); People ex rel. Deneen v. Gilmore, 214 Ill. 569, 73 N.E. 737 (1905) (disbarment for failure to disclose embezzlement conviction in another state in application for admission).

95 See, e.g., In re David H., 294 Md. 546, 451 A.2d 657 (1982) (applicant conditionally admitted despite pleas of nolo contendere to shoplifting charges); In re Schaeffer, 273 Or. 490, 541 P.2d 1400 (1975) (applicant admitted despite conviction for possession of beer as a minor); In re Monaghan, 126 Vt. 53, 222 A.2d 665 (1966) (applicant permitted to take bar examination, despite denial five years earlier, where only recent offense was for intoxication).

moral character.97

The Model Rules of Professional Conduct, recently adopted by the American Bar Association, abandon the standard of "illegal conduct involving moral turpitude" and prohibit instead any "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."98 This standard is amplified by the following comment to the Rules:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.99

Thus, the Model Rules establish a criminal misconduct provision that operates very much like the good moral character requirement for bar admission: the focus is upon fitness to practice law. The standard permits broad discretion, but requires a rational connection between the criminal act and fitness to practice law before a lawyer may be disciplined. The effect is to bring the disciplinary rules for attorneys and the good moral character requirement for bar applicants into virtual conformity.

Some courts have recognized the logical necessity of treating bar admission applicants and admitted lawyers alike. The Supreme Court of California, for example, has held:


In North Carolina, an applicant was denied admission on moral character grounds because of convictions for trespassing, driving while intoxicated, and driving in violation of a limited driving license. In re Willis, 286 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed sub nom. Willis v. North Carolina State Bd. of Bar Examiners, 423 U.S. 976 (1975). In Alabama, an applicant established his good moral character notwithstanding two convictions for driving while intoxicated, three convictions for disorderly conduct, and several additional arrests, some of which resulted in additional convictions. Reese v. Board of Comm'rs, 279 So. 2d 564 ( Ala. 1980).


99 Id., Rule 8.4 comment.
Fundamentally, the question involved in both situations is the same—is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude.\textsuperscript{100}

Other jurisdictions, however, treat admitted lawyers and bar applicants very differently in fitness determinations relating to illegal conduct. For example, an applicant in Florida was denied bar admission on moral character grounds because he failed to file income tax returns,\textsuperscript{101} even though Florida lawyers recently subject to discipline actions for failing to file income tax returns had not been disbarred, but had merely been reprimanded.\textsuperscript{102} The Florida court justified the different standards for admission and disbarment on the theory that denial of admission is less severe than disbarment since an applicant denied admission may reapply after two years.\textsuperscript{103}

This justification is suspect. A court which imposes a public reprimand as the sole sanction for an admitted lawyer who has engaged in illegal conduct has obviously not determined that the lawyer is unfit to practice law. If the failure to file an income tax return does not establish unfitness for an admitted lawyer, how can the same act establish unfitness for a bar applicant?

Even if admitted lawyers and bar admission applicants are treated alike, difficult questions remain. Determining what illegal conduct is rationally connected with fitness to practice law can be perplexing. Standards for establishing rehabilitation are also elusive, in part because the most convincing evidence of rehabilitation is often the simple passage of time without transgressions.

The treatment of lawyers who have failed to file income tax returns illustrates the difficulty of assessing the rational connection between specific illegal acts performed in a lawyer’s non-professional life and the lawyer’s fitness to practice law. The Model Rules of Professional Conduct states that the wilful failure to file income tax re-
turns is rationally connected to fitness to practice law,\textsuperscript{104} but offers no rationale for that conclusion. Many lawyer discipline cases involving the failure to file income tax returns are reported,\textsuperscript{105} with results ranging from findings of no cognizable misconduct\textsuperscript{106} to long-term suspensions.\textsuperscript{107} Those courts favoring serious discipline are concerned primarily with preserving public confidence in the legal profession,\textsuperscript{108} while those courts opposing discipline believe that serious discipline is warranted only where the lawyer is likely to breach his professional duties to clients or tribunals.\textsuperscript{109}

Courts and bar admission authorities must decide how broadly the net should be cast to protect the public. If the goal is to rout out all lawyers who might cause members of the public to distrust the legal profession generally, the net must be cast very broadly. If, on the other hand, the courts are seeking only to protect the public from lawyers who would victimize them or victimize the legal process itself, the net does not need to be cast as broadly. A choice between these alternative goals is essential if the meaning of "fitness to practice law" is to be clear. Otherwise, the goal of consistent and rational decision-making about unprofessional misconduct will remain elusive.\textsuperscript{110}

IV. Financial Malfeasance

A disciplinary rule of the Model Code of Professional Responsibility states that a lawyer may not "[e]ngage in any . . . conduct that adversely reflects on his fitness to practice law."\textsuperscript{111} Under this catch-

\textsuperscript{104} \textit{Model Rules of Professional Conduct} Rule 8.4(b) comment (1983).
\textsuperscript{105} See Annot., 63 A.L.R.3d 476 (1975); Annot., 63 A.L.R.3d 512 (1975).
\textsuperscript{107} See \textit{In re Lambert}, 47 Ill. 2d 223, 265 N.E.2d 101 (1970) (five year suspension for failing to file returns for 17 years).
\textsuperscript{108} See, e.g., \textit{In re O'Hallaren}, 64 Ill. 2d 426, 434, 356 N.E.2d 520, 523-24 (1976) ("An attorney's failure to file returns and his subsequent conviction of that offense diminish public confidence in the legal profession and tend to bring it into disrepute."); see also note 91 \textit{supra}.
\textsuperscript{109} See, e.g., \textit{In re Gillis}, 402 Mich. 286, 293, 262 N.W.2d 646, 649 (1978) (Kavanaugh, J., dissenting) ("The rules should . . . provide that only misconduct in the course of professional activities or conduct outside of professional activities indicating that a lawyer can no longer be trusted to represent clients or appear in court warrants discipline."); see note 94 \textit{supra}.
\textsuperscript{110} If the broader standard—harm to the public image of the legal profession—is adopted, consistent and rational decision-making about unprofessional misconduct may remain an impossible goal. Such factors as media coverage and speculations as to public opinion clearly affect the projected harm to the profession's image that a given instance of misconduct is likely to cause. These factors are unprincipled and do not lead to consistent and rational decision-making.
\textsuperscript{111} \textit{Model Code of Professional Responsibility} DR 1-102(A)(6) (1982). But see note 14 \textit{supra}. 
all rule and *Schware*, an applicant whose conduct, even if wholly legal, has a rational connection with unfitness to practice law could be denied admission. Applicants have been denied admission to the bar on moral character grounds because of financial malfeasance, even though no illegal conduct was involved. The most striking examples are a recent group of cases in which applicants avoided student loan obligations through bankruptcy proceedings.112

Student loans are a peculiar species of debt, especially in the context of bankruptcy proceedings. Students, unlike most borrowers, generally have no tangible assets to pledge as security for the fulfillment of their student loan obligations. In congressional debate on the Bankruptcy Act of 1978, Congressman Erlenborn of Illinois stated:

The student . . . , not having assets to pledge, is pledging his future earning power. Having pledged that future earning power, if, shortly after graduation and before having an opportunity to get assets to repay the debt, he seeks to discharge that obligation, I say that is tantamount to fraud.113

Although some courts may share these sentiments, the supremacy clause of the Constitution restricts their ability to determine that a bar admission applicant lacks good moral character based on his legal invocation of bankruptcy proceedings to discharge student loan obligations. Under the supremacy clause, state laws may not frustrate the full effectiveness of federal laws.114 A primary purpose of federal bankruptcy law is “to give debtors a new opportunity in life and a clear field for future effort.”115 Denying bar admission because an applicant legally avoided student loan obligations frustrates the full effectiveness of federal bankruptcy law and the cleansing waters which it provides.116

In *In re Gahan*,117 the Minnesota Supreme Court denied bar admission to an applicant who discharged $14,000 in federally-guaranteed student loan obligations through bankruptcy proceedings, while discharging all other dischargeable debts.118 The court concluded that

112 *In re G.W.L.*, 364 So. 2d 454 (Fla. 1978); *In re Gahan*, 279 N.W.2d 826 (Minn. 1979); *In re Taylor*, 293 Or. 285, 647 P.2d 462 (1982).
113 124 CONG. REC. 1793 (1978).
115 Id. at 648.
117 279 N.W.2d 826 (Minn. 1979).
118 At the time that Gahan invoked the federal Bankruptcy Act, it permitted the full
the applicant was financially able to meet his student loan obligations at all relevant times. In denying admission, the court held:

A flagrant disregard of this repayment responsibility by the loan recipient indicates to us a lack of moral commitment to the rights of other students and particularly to the rights of creditors. Such flagrant financial irresponsibility reflects adversely on an applicant's ability to manage financial matters and reflects adversely on his commitment to the rights of others, thereby reflecting adversely on his fitness for the practice of law. It is appropriate to prevent problems from such irresponsibility by denying admission, rather than seek to remedy the problem after it occurs and victimizes a client.\(^{119}\)

The rational connection between the applicant's bankruptcy and his fitness to practice law is hazy at best.\(^{120}\) The federal policy, now altered, which allowed students to fully discharge their student loans like any other debt\(^{121}\) might well be criticized; abuses were substantial, as the facts in \textit{Gahan} illustrate. Nevertheless, the legal pursuit of federal rights, even if improvidently granted, does not portend the victimization of clients. The links which the court found between the applicant's discharge of his student loans and unfitness to practice law—inability to manage financial matters and lack of commitment to the rights of others—are rather weak. Respecting the ability to manage financial matters, the facts in \textit{Gahan} suggest that this may have been a particular strength of the applicant. He maximized the value of his exempt assets in contemplation of bankruptcy and took full advantage of the cleansing waters that federal bankruptcy law provides. In doing so, he was careful to preserve his creditworthiness by affirming all debts other than student loans. Nothing in the applicant's bankruptcy suggested any legally-cognizable fraud, deceit, or moral turpitude.\(^{122}\)

The court held that the applicant's discharge of his student loans in bankruptcy adversely affected the rights of creditors and other students. Bankruptcy law, however, places a clear limit on creditors' rights by establishing a set of debtors' rights. The applicant's bankruptcy infringed upon no creditors' rights; it was merely

\(^{119}\) Id. at 831.

\(^{120}\) It is possible that the \textit{Gahan} court was voicing its dissent to the provisions of the Bankruptcy Act, now altered, which permitted the full discharge of student loans like any other debt.

\(^{121}\) See note 118 supra.

\(^{122}\) 279 N.W.2d at 828.
an exercise of the applicant's rights as a debtor. Under federal law at the time, the discharge of student loan obligations in bankruptcy was simply one vehicle through which Congress implemented its belief that sound public policy favored the discharge of debts in bankruptcy; Congress viewed the debtor's right to a fresh start as more compelling than the creditor's right to repayment. The applicant in Gahan did no more than effectively secure his legal rights against creditors.

The applicant's bankruptcy affected the rights of other students in only the most amorphous sense. If permitting the discharge of student loans through bankruptcy was an unwise policy, it was for Congress to change the policy; the applicant was under no obligation to refrain from exercising a right created by federal law. Allowing a business expense deduction for the "three-martini lunch" may be an unwise federal policy; yet, few would conclude that lawyers who deduct such expenses, thereby endangering the continued availability of more legitimate deductions for business lunches and also increasing the tax burden on others, are therefore unfit to practice law.

Bar admission authorities and courts ought not to label applicants as lacking good moral character and therefore refuse them the opportunity to engage in a profession for which they are otherwise qualified on the basis of their assertion of clearly-recognized legal rights. This is especially true where, as in Gahan, it is difficult to see what forms of unethical conduct the applicant would engage in if admitted to the bar.

Financial malfeasance unrelated to student loan obligations has proven an impediment to bar admission in a few additional cases; however, most such cases involve conduct which appears to be illegal. One exception is In re Alpert, in which an applicant was denied admission because of his involvement in "dubious," although apparently legal, stock transactions while in law school. The applicant had purchased stocks on credit, expecting to pay for the stocks out of interim increases in their value. The stocks decreased in value after the applicant's purchase and before the deadline for payment,

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123 Moreover, a lack of commitment to the rights of creditors is arguably unrelated to victimizing clients, since an attorney's relationship to his client is of a fiduciary nature, whereas a debtor's relationship to his creditor is not.

124 See, e.g., In re Appell, 116 N.H. 400, 359 A.2d 634 (1976) (violation of various statutes and regulations in operation of construction business); In re Cheek, 246 Or. 433, 425 P.2d 763 (1967) (signing employer's name on checks without authority to do so; issuing personal checks without sufficient funds).

with the majority of the losses falling on the seller. The Oregon court denied the applicant admission to the bar, despite a favorable recommendation from the trial committee of the Board of Bar Examiners. The court held that the legality of the transactions was "beside the point" and that "doubts of consequence" about an applicant's moral character were to be construed against the applicant and in favor of the public's protection.127

In other words, the applicant in Alpert was denied admission because of "doubts" created by financially disastrous, but apparently legal, stock transactions. It seems likely that, if the applicant's stock transactions had yielded a profit instead of a loss, the court would not have denied admission. The court expressed concern that the applicant was willing to take financial chances, knowing that he would be unable to make up the losses in the event that the enterprise failed. The court failed to consider that such risks are common to many business ventures—so common that investors usually consider them carefully before making any financial commitment.

A court which determines that legal conduct in financial affairs has a rational connection with fitness for law practice is making a business judgment with respect to that financial conduct. Such a court is, in effect, substituting its own business judgment for that of the applicant and his investors and labeling it "moral" judgment. Courts and bar admission authorities alike ought to be extremely wary of denying admission on this basis, and in no event should invocation of a clear, federally-provided right trigger denial of admission to the bar.

V. Mental or Emotional Instability

The most nebulous basis for denying admission on moral character grounds is that the applicant's personality is unfit for the practice of law due to mental or emotional instability.128 While no

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126 Id. at 514, 525 P.2d at 1045.
127 Id. at 518, 525 P.2d at 1046.
128 Surprisingly few moral character cases involve actual mental illness. Perhaps some cases in which the court focused on illegal conduct involve applicants suffering from mental illness where the illegal conduct is symptomatic of the illness, although in no case has the court identified this relationship. A number of illegal conduct cases involve alcohol or drug abuse. See In re A.T., 286 Md. 507, 408 A.2d 1023 (1979) (drug addiction); In re Gimbel, 271 Or. 671, 533 P.2d 810 (1975) (alcoholism); In re Monaghan, 126 Vt. 53, 222 A.2d 665 (1966) (alcoholism).

Although it bears little on contemporary bar admission issues, it is interesting to note the primordial impediment to bar admission relating to unfitness of an applicant's personality. At common law, women were ineligible for admission to the bar. See In re Bradwell, 55 Ill.
disciplinary rules of the Code of Professional Responsibility directly address the problem of mental or emotional instability, an ethical consideration does:

An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice.129

Reported bar admission decisions in this area generally involve persons who exhibit abnormal behavior, whether or not victims of mental illness. The form of abnormal behavior which appears to give bar admission authorities the greatest pause is a combative personality, often coupled with a tendency to make enemies (or perceive others as enemies) and to hurl invectives at those real or perceived enemies.

The applicant in In re Latimer30 filed a “scurrilous” petition with the Illinois Supreme Court attacking members of the Committee on Character and Fitness, circulated pamphlets disparaging members of that committee and members of the Illinois court, and submitted an affidavit accusing character witnesses before the committee of being Communists. The court held that these tactics in the character investigation process for bar admission thwarted, and demonstrated contempt for, the orderly administration of the investigation and re-

535, 538-40 (1869), affd sub nom. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872). The rationale for this exclusion was expressed in an 1875 Wisconsin decision:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it . . .

The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.

In re Goodell, 39 Wis. 232, 245, 20 A.R. 42, 46-47 (1875). In this instance, the lawyer’s occupation, rather than the bar applicant, was found wanting of “good moral character.” The profession of law “has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene, in human life.” Id. at 245, 20 A.R. at 47. Following the enactment in 1878 of a legislative provision expressly prohibiting denial of bar admission in Wisconsin based on sex, Ms. Goodell was admitted to practice. In re Goodell, 48 Wis. 693, 81 N.W. 551 (1879).

129 Model Code of Professional Responsibility EC 1-6 (1982).
130 11 Ill. 2d 327, 143 N.E.2d 20 (1957), appeal dismissed and cert. denied, 355 U.S. 82 (1957).
lected negatively on the applicant’s moral fitness for law practice. For these and other reasons, the applicant was denied admission.

_In re Feingold_ 131 concerned an applicant whose prior history allegedly indicated “a propensity to engage in unwarranted character assassination.” 132 In unrelated events, the applicant had: been indicted (but not tried) for criminal libel; struck opposing counsel during an administrative hearing; by his own admission, called the Attorney General “every name in the book”; 133 and made a derogatory remark in the presence of others to a judge before whom he had a case. The moral character issue concerning this applicant was not resolved due to procedural infirmities; however, the court indicated that “[t]urbulent, intemperate or irresponsible behavior is a proper basis for denial of admission to the bar.” 134

In _In re Martin-Trigona,_ 135 the court denied admission to an applicant with a “propensity to unreasonably react against anyone whom he believes opposes him.” 136 The applicant had accused a judge who ruled against him of a “pathological antipathy” against him which rendered the judge “temporarily mentally insane.” 137 In addition, the applicant had referred to an attorney who served a notice of forfeiture upon him and who suffered from a mild case of cerebral palsy as a “palsied lunatic” and described him as “shaking and tottering and drooling like an idiot . . . a physically and mentally sick man.” 138 In denying admission, the court determined that the applicant lacked “the qualities of responsibility, candor, fairness, self-restraint, objectivity and respect for the judicial system which are necessary adjuncts to the orderly administration of justice.” 139

_Latimer, Feingold, and Martin-Trigona_ share a central element: the bar admission applicant became malicious in response to legal setbacks. Ethical considerations encourage lawyers to be “temperate and dignified” 140 and disciplinary rules prohibit a lawyer from taking action “merely to harass or maliciously injure another.” 141 Thus,

131 296 A.2d 492 (Me. 1972).
132 Id. at 498.
133 Id. at 499.
134 Id. at 500.
136 Id. at 308, 302 N.E.2d at 72.
137 Id.
138 Id. at 310, 302 N.E.2d at 73.
139 Id. at 312, 302 N.E.2d at 74.
the applicants’ misconduct in *Latimer*, *Feingold*, and *Martin-Trigona* may be rationally connected to fitness to practice law, as defined by the Code of Professional Responsibility.

Other bar admission cases suggest that such malicious conduct may indicate a lack of good moral character even if it arises apart from proceedings before a court or tribunal. For example, the applicant in *In re Ronwin* appeared “mentally unable to reasonably deal with the type of social interaction involved in dealing with clients, other members of the Bar and the public.” Expert testimony indicated that the applicant had a “‘paranoid personality’ which is characterized by hypersensitivity, rigidity, unwarranted suspicion, excessive self-importance and a tendency to blame others and ascribe evil motives to them.” The applicant had made critical comments and strong charges against administrators and faculty members at the law school which he attended and threatened physical violence toward others when he became angered during discussions of academic matters. The court determined that the applicant was unfit for law practice because he would probably “bring and prosecute groundless claims and subject clients, parties, the Court and adversary counsel to groundless charges of misconduct and impropriety.”

Psychiatric or psychological evaluations play a role in some of the cases involving an applicant’s mental or emotional instability, while others use no expert guidance in evaluating the applicant’s fitness for practice. The area is a particularly sensitive one, especially since not all forms and degrees of emotional instability are rationally connected with fitness or capacity for law practice. Certainly, bar admission authorities should deny admission to applicants whose mental or emotional instability render them unfit for the practice of law. The Supreme Court of Vermont recognized the difficulty

143 Id. at 359, 555 P.2d at 317.
144 Id.
145 Id. at 358, 555 P.2d at 316. The applicant in Ronwin subsequently brought suit against the Arizona State Bar and members of Arizona’s Committee on Examinations and Admissions for antitrust violations in the grading of the Arizona bar examination. The United States Supreme Court held that the action of the Committee was an action of the Arizona Supreme Court, and thus the Committee’s conduct came within the state action exemption from the antitrust laws. Hoover v. Ronwin, 104 S. Ct. 1989 (1984).
of such cases in *In re Monaghan*, in which it permitted an application for bar admission from a reformed alcoholic whose admission had been denied five years earlier:

The power of the court to reject the application on the grounds of moral delinquency is one of great delicacy, and should be exercised with extreme caution, and with a scrupulous regard for the character and rights of the applicant.\(^{149}\)

These decisions are made more delicate by the imprecision of standards by which mental or emotional stability is measured. Bar admission authorities may feel more comfortable in assessing moral character by focusing on the symptoms of mental or emotional instability rather than on the degree of instability itself.\(^{150}\)

**Conclusion**

Virtually everyone would agree that some applicants ought to be denied admission to the bar for reasons unrelated to their technical legal skills. To use an extreme case, nearly all would agree that a lawyer who was disbarred yesterday for a recent theft of clients' funds should not be admitted today to practice law in a neighboring jurisdiction. The requirement of "good moral character" is the rule upon which the denial would be based.

Given the desirability of such a requirement, the problem is to devise a rule which recognizes the fine line between applicants whose past conduct portends future misconduct as a lawyer and those who have erred in the past but deserve the opportunity to practice law because their error was unrelated to the requirements of law practice or because their error is not symptomatic of their present character and behavior. The line which has been drawn—the requirement that applicants prove their good moral character to be admitted to the bar—is, standing alone, extremely imprecise. It "is easily adapted to fit personal views and predilections [and] can be a dan-

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\(^{149}\) Id. at 64, 222 A.2d at 674.


For a recent decision expressly holding that mental and emotional fitness is required for admission to practice law, see Florida Bd. of Bar Examiners re Applicant, 443 So. 2d 72 (Fla. 1983). The Florida court also held that the burden of demonstrating this fitness is on the applicant and that bar admission authorities may inquire about an applicant's mental and emotional fitness without violating the applicant's privacy and due process rights. *Id.*
gerous instrument for arbitrary and discriminatory denial of the right to practice law.\textsuperscript{151}

These dangers are lessened somewhat by requiring that a bar applicant's past misconduct may block admission only if it is a rationally connected to his fitness to practice law.\textsuperscript{152} But the necessity of interpreting “fitness to practice law” may revive all of the dangers of a bare “good moral character” standard unless fitness to practice is tied to the standards imposed upon persons who actually practice law. These standards are embodied in the rules which form the basis for disciplining lawyers, usually some variant of the disciplinary rules of the Code of Professional Responsibility.

This article has examined some of the usual patterns of conduct resulting in moral character questions. Some of this conduct is closely related to disciplinary rules imposed upon lawyers while some bears little relation to those rules. Fairness to bar applicants and a uniform concern for the protection of the public dictate the need for a closer alignment of the fitness assessments made of bar applicants through the good moral character requirement and fitness assessments of admitted lawyers through disciplinary proceedings. While perfect consistency in these assessments may not be attainable, it is certainly a worthy goal, especially when the stakes are the protection of the public from unethical lawyers, access to the privileges and powers which only lawyers enjoy, and the composition of the legal profession in the decades to come.

\textsuperscript{151} Konigsberg v. State Bar, 353 U.S. 252, 263 (1957).