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THE ETHICS OF MORAL CHARACTER DETERMINATION: AN INDETERMINATE ETHICAL REFLECTION UPON BAR ADMISSIONS

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INTRODUCTION

> There must be no seeming, for if he seem to be just he will be honoured and rewarded, and then we shall not know whether he is just for the sake of justice or for the sake of honours and rewards;[1]

In Book II of the *Republic*, Socrates discusses with his friend Glaucon the nature of moral character. Glaucon contends that we act morally only because we risk punishment if we act immorally. Heteronomous ethical restraints on our autonomy are sanctioned so as to avoid sanction. To illustrate his contention, Glaucon narrates an old Greek story, "The Ring of Gyges":

> According to the tradition, Gyges was a shepherd in the service of the king of Lydia; there was a great storm, and an earthquake made an opening in the earth at the place where he was feeding his flock. Amazed at the sight, he descended into the opening, where, among other marvels, he beheld a hollow brazen horse, having doors, at which he stooping and looking in saw a dead body of stature, as appeared to him, more than human, and having nothing on but a gold ring; this he took from the finger of the dead and reascended.

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1. PLATO, THE REPUBLIC 361b-c (Benjamin Jowett trans., 1945) (360 BCE).

> Now the shepherds met together, according to custom, that they might send their monthly report about the flocks to the king; into their assembly he came having the ring on his finger, and as he was sitting among them he chanced to turn the collet of the ring inside his hand, when instantly he became invisible to the rest of the company and they began to speak of him as if he were no longer present. He was astonished at this, and again touching the ring he turned the collet outwards and reappeared; he made several trials of the ring, and always with the same result-when he turned the collet inwards he became invisible, when outwards he reappeared. Whereupon he contrived to be chosen one of the messengers who were sent to the court; where as soon as he arrived he seduced the queen, and with her help conspired against the king and slew him, and took the kingdom.[2]

To the extent that the gygian ring gives its wearer the ability to act immorally with impunity, Glaucon argues that anyone who possesses such a ring would indeed act without ethical restraint.[3] For Glaucon, therefore, "the highest reach of injustice is to be deemed just when you are not."[4] In effect, Glaucon advocates an ethics of "seeming, rather than being, moral."[5]

Contemporary ethics seems governed as well by a kind of Glauconian strategy of prudence over principle. Reminiscent of Platonic distress over the shadowed absence of the Good, philosophers attribute this modern moral malaise to a recently emergent (post-Enlightenment) ethical indetermination.[6] Ethical indetermination devolves from a moral scepticism aligned with a cultural diversification, from which scepticism and diversification evolves the autonomy of the individual as no longer ethically restrained by the heteronomy of moral traditions except by choice.[7] A moral calculus of self-interest eclipses any sense of moral obligation to yield an insipid ethics of "[i]ntractable plurivocity and heteromorphic proliferation."[8] Not unlike the Ring of Gyges, the pragmatics of contemporary ethical conduct dictates seeming, rather than being, moral in order to achieve desired social ends. Immoral conduct is merely unseemly.

In light of the current academic eschewal of any ethically determinate notion of morality, it is perhaps startling that modern professional culture typically requires its licensees to have demonstrated, in addition to professional competence, "good moral character" in order to gain membership.[9]

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2. PLATO, *supra* note 1, at 359d-360b.

3. *Id.* at 360c ("No man can be imagined to be of such an iron nature that he would stand fast in justice. No man would keep his hands off what was not his own when he could safely take what he liked out of the market, or go into houses and lie with any one at his pleasure, or kill or release from prison whom he would, and in all respects be like a God among men.").

4. *Id.* at 361a.

5. *See* JONATHON GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY 20 (2000).

6. *See generally* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHOSE RATIONALITY? (1988).

7. *See* Charles Taylor, *Democracy, Inclusive and Exclusive, in* MEANING AND MODERNITY 181, 189 (Richard Madsen et al. eds., 2002).

8. JOHN D. CAPUTO, AGAINST ETHICS 222 (1993).

9. "Typical examples of occupations regulated are: ambulance drivers, billiard room em-

Since colonial times in America, good moral character has been singularly requisite for lawyers to gain membership in a bar association.[10] Each of the fifty one bar associations in the United States requires that applicants demonstrate good moral character as a pre-condition to the practice of law in its jurisdiction.[11] This is perhaps due to the fact that, as Alexis de Tocqueville noted after his visit to America in 1830, "attorneys may comprise 'the American aristocracy' and its 'political upper class.'"[12] The U.S. Supreme Court has attributed it to the unique cultural role occupied by lawyers as the guardians of our fundamental liberties:

> All the interests of man that are comprised under the constitutional guarantees given to "life, liberty, and property" are in the professional keeping of lawyers. From a profession charged with such responsibility there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."[13]

Apparently attendant, however, to the ethical obscurity of what good moral character means, the Court has also expressed a certain uneasiness with good moral character requirements for admission to the bar: "It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial. . . ."[14] The deeper ethical concern with a good moral character requirement, however, is not whether the operative criteria of good moral character may be arbitrary and/or vague, but whether the criteriology of good moral character does not eclipse the very morality it seeks to illumine by obligating applicants to the practice of law to wear a gygian ring of moral seemliness.

This discussion will critically reflect upon Good Moral Character as a

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ployees, attorneys, physicians, pharmacists, nurses, barbers, embalmers, septic tank cleaners, real estate professionals, accountants, contractors, and sellers of alcoholic beverages. . . . Occupational licensing laws typically contain two components, a 'competency component' and a 'character component.'" Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 190-91 (1995). "In the exercise of its police power to protect the health, morals, and welfare of the public, the state inquires into the moral character of the applicant." *Id.* at 191 n.35.

10. "Within the American bar, moral character requirements have been a fixed star in an otherwise unsettled regulatory universe. Educational standards came and went, but, at least after the colonial period, virtue remained a constant prerequisite, in form if not in fact." Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496 (1985).

11. Brendalyn Burrell-Jones, *Bar Applicants: Are Their Lives Open Books?*, 21 J. LEGAL PROF. 153, 154 (1996).

12. Rhode, *supra* note 10, at 510 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 268 (G. Lawarence trans., J. Mayer ed. 1969) (1864)).

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

14. Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957) (Black, J.).

professional licensing condition imposed by bar associations upon prospective lawyers. This article will first delineate the heritage of good moral character as currently requisite for legal advocacy. It will then set out the jurisprudence of good moral character requirements as articulated largely by the U.S. Supreme Court. This article will then explain the general procedure of good moral character determination as an administrative function of state bar associations. It will then illustrate how good moral character determinations have been reviewed in exemplary cases at the Supreme Court level of both the federal and state (California) judiciary. It will subsequently proffer a critique of the "post-modern" ethics of moral indetermination within which good moral character is determined. This article will then bring this critique to bear upon the administrative adjudication of moral character. It will offer finally a concluding un-ethical postscript on good moral character determination.

I. HISTORY OF GOOD MORAL CHARACTER DETERMINATION

> So you, too, outwardly appear righteous to men, but inwardly you are full of hypocrisy and lawlessness.[15]

The contemporary requirement that men (and very recently, women as well) who dictate matters of law demonstrate good moral character has historical roots that reach into the ancient subsoil of our culture. When Moses set about forming the government of Israel, God commanded that he choose men who, by virtue of their God-fearing and virtuous nature, would properly enact and enforce the divine will through the rule of law:

> You shall represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do. Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times. . . . [16]

Aristotle as well advised that public orators—both lawyers and politicians—be men of good character so as to be effective in convincing their audience of the rightness of their arguments:

> But since rhetoric exists to affect the giving of decisions—the hearers decide between one political speaker and another, and a legal verdict *is* a decision—the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character

15. *Matthew* 23:28.
16. *Exodus* 18:19-22.

> look right. . . . Particularly in political oratory, but also in lawsuits, it adds much to an orator's influence that his own character should look right and that he should be thought to entertain the right feelings towards his hearers. . . . There are three things which inspire confidence in the orator's own character—the three, namely, that induce us to believe a thing apart from any proof of it: good sense, good moral character, and goodwill.[17]

In the fifth century C.E., the Roman Theodesian Code required that "advocates be of 'suitable character' with past lives that were praiseworthy."[18] The earliest licensing regulations were perhaps developed in thirteenth-century France, where a university chancellor issued teaching licences (*licentia docendi*) in the fields of Law, Theology, and Medicine only to those candidates examined and recommended by the majority of the masters of the respective faculties, and new members were to observe the customs and statutes of the guild.[19] In the early seventeenth century, statutory law in England required that lawyers be "skillful" and "honest."[20] In 1874, Parliament statutorily required of lawyers an apprenticeship as well as a judicial examination for fitness.[21] The requirement that professionals in general, and lawyers in particular, be possessed of good moral character thus has a long lineage that may readily be traced through our Anglican, European, and Roman ancestry into Hebraic and Hellenic foundations of American culture.

The enduring societal concern over the morality of lawyers suggests, of course, a perennial societal anxiety that absent regulation, rule over matters of law might readily be acquired by persons who would abuse their power over the life and liberty of the citizenry. Whether devolving from a Jewish concern for righteousness or a Grecian concern for rightness, the requirement that lawyers be possessed of good moral character is animated by a longstanding cultural suspicion that persons entrusted with the rule of law may not otherwise be trustworthy.

Early America provides a high and clear instance of this cultural suspi-

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17. ARISTOTLE, RHETORIC Bk. II, 1378a (W. Rhys Roberts trans., 1954).

18. Michael D. White, Comment, *Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?*, 48 U. CIN. L. REV. 876, 876 (1979).

19. *See* G. POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE 1100-1322 (1964).

20. Roger Roots, *When Lawyers were Serial Killers: Nineteenth Century Visions of Good Moral Character*, 22 N. ILL. U. L. REV. 19, 19 (2001) (quoting S.H. BAILEY & M.J. GUNN, SMITH & BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 115 (3d ed. 1996) (referring to a 1605 statute)).

21. *See* Rhode, *supra* note 10, at 495. Scholars generally contend, however, that such fitness requirements had to do more with class than character. *See* Root, *supra* note 19, at 20 ("This screening process, although facially egalitarian, evolved by 1860 to differentiate lawyers from the lowest English rabble.") (quoting BRIAN ABEL-SMITH & ROBERT STEVENS, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965, 67 n.6 (1967) ("In 1860, Parliament enacted the Solicitors Act, requiring a preliminary examination for all men seeking admission to the bar. The Solicitors' Journal remarked in August 1863 that the clear purpose of the examination was "to exclude from the profession all who are not gentlemen by birth and education.")).

cion. Although lawyers were generally well regarded in pre-Revolutionary America,[22] several of the colonies sought to banish them altogether.[23] Perhaps due to the fact that many members of the bar had remained loyal to the British crown and left the colonies during the war, the relatively incompetent and unscrupulous continued to practice law in the post-Revolutionary period;[24] their professional "blood-suck[ing]"[25] existence as "cursed hungry caterpillars [whose fees] will eat out the very Bowels of our Commonwealth"[26] was tolerated only because of the imposition by the various state bar associations of character requirements,[27] as well as apprenticeships and/or competency examinations.[28] A nineteenth-century essay on professional ethics stated the matter pointedly: because lawyers control our "fortunes, reputations, domestic peace . . . nay, our liberty and life itself . . . [t]heir character must be not only without a stain, but without suspicion."[29] Despite such manifest cultural anxiety over the relative societal value of lawyers, the ability to practice law in the ante-bellum nineteenth century became virtually unregulated.[30]

From 1820 through the Civil War, bar admission requirements became increasingly less stringent—due to the perceived elitism of extant admission practices as contrary to democratic ideals.[31] The apprenticeship requirements historically imposed by most jurisdictions had tended to confine applicants to the well heeled and well connected.[32] In 1851, the Constitution of Indiana stipulated simply that "every person of good moral character, being a voter,

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22. HISTORY OF THE COLUMBUS BAR ASSOCIATION, *available at* http://cbalaw.org/main.asp?nav=10,8,0&content=aboutContent%2Fhistory%2Easp (Nov. 1, 2002).

23. Rhode, *supra* note 10, at 496.

24. HISTORY OF THE COLUMBUS BAR ASSOCIATION, *supra* note 22.

25. ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 17 (1965) (quoting I J. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES: FROM THE REVOLUTION TO THE CIVIL WAR 302 (1927)), *quoted by* Rhode, *supra* note 10, at 496.

26. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 83 (1973) (quoting H. LEFLER, NORTH CAROLINA HISTORY AS TOLD BY CONTEMPORARIES 87 (1956)), *quoted by* Rhode, *supra* note 10, at 496.

27. Rhode, *supra* note 10, at 496-97 ("during the eighteenth century, Massachusetts demanded references from three ministers; Virginia mandated certification from a local judge; and New York and South Carolina provided for examination by the court to determine whether the candidate was 'virtuous and of good fame' or manifested 'probity, honesty and good demeanor.'"). *See also* Roots, *supra* note 20, at 21.

28. Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1194 (1995) ("The standards typically included a period of law study under a practitioner or judge, and varied greatly in length—generally ranging from one to five years. In some states, the applicant also had to pass some kind of written or oral exam to gain admission.") (citing CHROUST, *supra* note 25, at 164-65).

29. G. SHARWOOD, AN ESSAY ON PROFESSIONAL ETHICS 172 (3d ed. 1869) (1854), *quoted by* Rhode, *supra* note 10, at 496.

30. Benjamin Hoorn Barton, *Why do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 429 (2001).

31. CHROUST, *supra* note 25, at 165-66 (1965), *cited by* Hansen, *supra* note 28, at 1195.

32. *Id.*

shall be entitled to admission to practice law in all courts of justice."[33] Ohio only required applicants to certify that they had "regularly and attentively studied law."[34] Prior to the Civil War, New Hampshire law simply "provided that any citizen over twenty-one was entitled to be admitted to practice." [35] By 1860, of the thirty-nine states, only nine had any specific requirements for admission to their bar.[36] In 1866, the Supreme Court stipulated that "[i]t shall be requisite to the admission of attorneys and counsellors to practise in this court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, *and that their private and professional character shall appear to be fair.*"[37] Attorneys were then obliged to swear an oath: "I, A. B., do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States."[38] The court clarified that attorneys were subject to no further qualification.[39] Although good moral character remained requisite for admission to the practice of law in many states, bar membership was effectively open at the end of the Civil War to any and all male citizens who could produce a personal reference.[40] As a result, the practice of law in the nineteenth century had become a good deal more raucous than genteel; beatings, canings, stabbings, and pistol duels among lawyers were neither uncommon nor grounds for disbarment.[41]

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33. THE NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 15 (Stuart Duhl ed., 2d ed. 1980) (reprinting Indiana's 1851 constitutional requirement), *quoted by* Roots, *supra* note 20, at 19.

34. Hansen, *supra* note 28, at 1195 (quoting CHROUST, *supra* note 25, at 168 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 229 (1953))).

35. *Id.* at 1196 (quoting ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S, at 9 (1983)).

36. HISTORY OF THE COLUMBUS BAR ASSOCIATION, *supra* note 22.

37. *Ex Parte* Garland, 71 U.S. 333, 336 (1866) (emphasis in original).

38. *Id.*

39. *Id.* Immediately after the Civil War, Congress had amended the federal bar admission statute to require attorneys to swear an oath that they had not given aid or held office under "any authority or pretended authority in hostility to the United States," which served to prevent lawyers who had practiced law in a Confederate state from membership in the federal bar. *Id.* at 335 (citing Act of Jan. 24, 1865, ch. 20, 13 Stat. 424 (1865)). The court declared this further oath requirement to be unconstitutional. *Id.* at 381.

40. Rhode, *supra* note 10, at 497-98 ("Reported cases reveal almost no instances of denial of admission on character-related grounds. . . ."). *See also* Roots, *supra* note 20, at 34 ("Although the lives of such men as [John Wesley] Hardin, [Andrew] Jackson, and [Judge Roy] Bean generated an immense historical literature, the record seems bare of any attempts at barring or disbarring such individuals from the practice of law for their activities outside the courtroom. Denial of admission and disbarment were generally reserved for courtroom-related conduct or for serious crimes committed in the course of practicing law.")

41. Roots, *supra* note 20, at 33 ("The practice of law in the nineteenth century, especially in frontier jurisdictions, was dangerous work, and attorneys contributed to the danger. . . . Thus wild brawls and bloody feuds were played out in the countryside wherever and whenever frontier courts were in session, becoming part of the 'unofficial court docket.'") (citing DICK STEWARD, DUELS AND THE ROOTS OF VIOLENCE IN MISSOURI 137 (2000)).

The radical democratization of bar admissions prompted widespread calls for its reform in the later nineteenth century. On the one hand, there was increased concern over character certification.[42] On the other hand, a burgeoning post-war industrialization increased concern over the competency of lawyers to deal with the exacerbated legalization of the social economy.[43] The American Bar Association, founded in 1878, fronted the professional movement toward establishing more stringent and uniform standards for both competence and character.[44] The dissenting opinion in a 1906 North Carolina attorney licensure case articulated an oft-quoted jurisprudential concern for good moral character requirements at the beginning of the twentieth century:

> The public policy of our state has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public and to the proper administration of justice, than legal learning. Legal learning may be acquired in after years, but, if the applicant passes the threshold of the bar with a bad moral character, the chances are 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. . . . The profession of the law is one of the noblest and most important of all professions. The relation between attorney and client is very confidential, and often involves matters of the greatest delicacy, and it is of the highest possible importance to the welfare of the people of the state that those who are intrusted with their most important and private matters should be men of upright character.[45]

A remark cribbed from an unrelated case written by Justice Holmes in 1907, however, provided the competing concern that such good moral character requirements express "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions

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42. Rhode, *supra* note 10, at 498-99. *See also* Hanson, *supra* note 28, at 1197-98 ("Around 1870, professional articles lamented the state of legal training, asking why the legal profession 'should be so utterly regardless of its own fair name, and careless of the honors which ought to be connected with the practice of so noble a profession as to admit so readily horde upon horde . . . within its precincts, with scarcely a voucher for the ability or worth, morally or intellectually, of such applicants as choose to present themselves.'") (quoting STEVENS, *supra* note 35, at 24 (quoting an article printed in both the *Albany Law Journal* and the *Western Jurist* in 1870)).

43. STEVENS, *supra* note 35, at 9-10 ("Apparently there was a demand in this country (after the Civil War)—either from above or below, or perhaps both directions—for a trained legal profession to operate an increasingly legalistic society. . . . [T]he pendulum began to swing back (toward standards of formal training), with the refounding of law schools and increased interest in the more organized side of bar life. Law was beginning once more to be seen as a learned profession."), *quoted by* Hanson, *supra* note 28, at 1197.

44. At the time of its inception the ABA's historical self-portrayal laments that: "[l]awyers were generally sole practitioners who trained under a system of apprenticeship. There was no national code of ethics; there was no national organization to serve as a forum for discussion of the increasingly intricate issues involved in legal practice." ABA HISTORY, *at* http://www.abanet.org/media/overview/phistory.html (Nov. 1, 2002).

45. *In re* Applicants for License, 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

which may lie beneath conciousness without losing their worth."[46] Navigating its way between these two concerns, the regulation of bar admissions in general, and of good moral character requirements in particular, has dramatically accelerated over the course of the twentieth century.[47]

II. JURISPRUDENCE OF GOOD MORAL CHARACTER DETERMINATION

> The profession of the law is one of the noblest and most important of all professions. . . . [I]t is of the highest possible importance to the welfare of the people of the state that those who are intrusted with their most important and private matters should be men of upright character.[48]

The governing purpose of the good moral character requirement as imposed by states for admission to a bar association is twofold: protection of both the public and the legal system.[49] A state's justification for protection of

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46. Chicago, B. & Q.R. Co. v. Babcock, 204 U.S. 585, 598 (1907). Many scholars are anxious to note that the operative criteriology of good moral character has historically been the function more of ethnic rather than of ethical concerns. *See* Banks McDowell, *The Usefulness of "Good Moral Character,"* 33 WASHBURN L.J. 323, 325 (1994) ("In the past, the character a professional should display was often defined by the class characteristics of the more successful leaders and went beyond the ethical virtues to notions of civility, demeanor, political attitudes, and behavioral style.") (citing JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976)). Due to the post Civil War wave of European immigration, "Roman Catholicism, and, to a lesser extent, Judaism, were widely viewed as threats to America, which was self-consciously a Protestant country." Stephan L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1197 (1997) (citation omitted). The advent of programmatic moral character scrutiny in the late nineteenth century was perhaps more informed by ethnic rather than ethical interests. "At the close of the nineteenth century, the recently-founded American Bar Association, joined by various state and local organizations as well as law schools, began spearheading a campaign for higher professional standards. While the quest was 'aimed in principle against incompetence, crass commercialism, and unethical behavior,' the ostensibly 'ill-prepared' and 'morally weak' candidates were often in fact 'of foreign parentage, and, most pointedly, Jews.'" Rhode, *supra* note 10, at 499 (quoting M. LARSON, THE RISE OF PROFESSIONALISM 173 (1977)).

47. Barton, *supra* note 30, at 431.

48. *In re* Applicants for License, 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

49. "The primary purposes of character and fitness screening before admission to the Florida Bar are to assure the protection of the public and safeguard the justice system." Ippolito v. Florida., 824 F. Supp. 1562, 1566 (M.D.Fla. 1993). *See also* Rhode, *supra* note 10, at 507 ("Those involved in the character certification process have almost uniformly identified its central justification as protecting the public."); Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 67 & n.4 (1984) ("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.") (citing Hallinan v. Comm. of Bar Exam'rs, 421 P.2d 76, 87 (Cal. 1966)); Maureen M. Carr, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards*, 8 GEO. J. LEGAL ETHICS 367 (1995) ("The overriding justification for character screening prior to admission to a state bar is the protection of the public."); Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National*

the public derives from its constitutionally permissible police power to promote the health, safety and welfare of the citizenry.[50] A state's justification for protection of the legal system, which serves the twofold purpose of promoting the public image of the law and respect for the law,[51] is relatively obscure, but has been judicially permitted out of deference to states' regulatory self-interest in the orderly administration of justice.[52]

Competing with a state's concern to protect both the public and the legal system is a bar applicant's concern to pursue a chosen vocation. Vocational concern has been recognized as both a liberty and property right constitutionally protected under the due process and equal protection guarantees of the Fifth Amendment[53] and Fourteenth Amendment.[54] "The practice of law is not a matter of grace, but of right for one who is qualified by his learning

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Standard, 36 TULSA L.J. 487, 490 (2000) ("There are two main theories which have been advanced as to the purpose the good character requirement serves in today's legal society. The first and perhaps of the most concern to the states is the protection of the public. The second and less-frequently cited rationale for the good character requirement is the protection of the legal system.").

50. "It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses 'the character and general fitness requisite for an attorney and counselor-at-law.'" Application of Griffiths, 413 U.S. 717, 722-23 (1973) (quoting Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159 (1971)). "In their protection of the public health and safety, states 'have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" Johnson v. State of Kan., 888 F. Supp. 1073, 1080 (D.Kan. 1995) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)). *See also* May, *supra* note 9, at 190 ("A state's power to issue regulatory type licenses flows from the state's police powers with regard to the protection of the health, morals, and welfare of the public.") (citing Rabino v. Commonwealth, 450 A.2d 773, 775 (Pa. Commw. Ct. 1982) ("determining that a state may impose reasonable conditions on licenses to protect the public"); Alexander v. Dir., Dept. of Agric., 444 N.E.2d 811 (Ill. App. Ct. 1983) (finding that the primary purpose of the licensing trades is the prevention of injury to the public)).

51. *See* McChrystal, *supra* note 49, at 88 (identifying the twin "concerns for the public image of the profession and for respect for law" as operative in the determination of moral fitness to practice law, although having no viable relationship to such a determination). *See also* Carr, *supra* note 49, at 379 ("In addition to its strong desire to protect the community, the bar conducts character screening out of its own interest in upholding its professional and public image.").

52. A state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law." Application of Griffiths, 413 U.S. 717, 725 (1973). Federal courts have been "particularly chary of intrusion into the relationship between the state and those who seek license to practice in its courts." Tang v. Appellate Div. of the New York Supreme Court, First Dept., 487 F.2d 138, 143 (2d Cir. 1973), *cert. denied* 416 U.S. 906 (1974).

53. "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." Green v. McElroy, 360 U.S. 474, 492 (1959).

54. "[T]he requirements of procedural due process must be met before a State can exclude a person from practicing law. 'A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.'" Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963) (quoting Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 238-39 (1957).

and his moral character."[55] The pursuit of any particular vocation, however, does not constitute a constitutionally fundamental right.[56] Courts therefore apply a "rational basis" test to state licensing statutes.[57] The rational basis test dictates that a state's statutory requirements of competency and character for bar admission must bear a rational relationship to the legitimate state interest in protecting its public and legal system from those unfit to practice law.[58] An applicant to the bar may therefore be denied admission to the bar only if that applicant is demonstrably a threat to the good of the public and/or the practice of law.[59]

The criteriology for intellectual fitness to practice law varies little among the states, which typically require completing at least three quarters of a baccalaureate degree at an accredited college or university, graduating from an approved law school, and passing a bar examination.[60] The criteriology for moral fitness to practice law, however, has remained notably indeterminate.[61]

> 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

55. Baird v. State Bar of Ariz., 401 U.S. 1, 8 (1971).

56. "Pursuit of a particular occupation is not a 'fundamental right' for purposes of equal protection strict scrutiny." Thomas v. Bd. of Exam'rs, Chicago Pub. Sch., 651 F. Supp. 664, 671 (N.D. Ill. 1986) (citing Miller v. Carter, 547 F.2d 1314, 1320 (7th Cir. 1977) (Campbell, J., concurring), *aff'd* 434 U.S. 356 (1978); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976)).

57. "[The rational basis] standard . . . has consistently been applied to state legislation restricting the availability of employment opportunities." Dandridge v. Williams, 397 U.S. 471, 485 (1970) (citations omitted).

58. "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957).

59. "[A] person cannot be prevented from practicing except for valid reasons." *Id.* at 239 n.5 (1957). *See Ex Parte* Garland, 71 U.S. 333, 379 (1866) ("The attorney and counsellor being . . . clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon . . . is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.").

60. Hansen, *supra* note 28, at 1202-03. Whether these educational and testing requirements bear a sufficiently rational relationship to any demonstrable fitness to practice law has itself been a matter of rather acrimonious scholarly debate. *See, e.g., id.*; *see also* Barton, *supra* note 30, at 441 ("By guaranteeing that all licensed practitioners are minimally competent, the regulations arguably address both the information asymmetry-presumably all practitioners are minimally competent-and the problem of grave harms-minimally competent lawyers will be less likely to cause such harms. Nevertheless, a comparison between the current entry regulations and the supposed justification establishes that the regulations are ill-fitted to the actual problem.").

61. "The Bar Examiners' Handbook candidly admits that 'no definition of what constitutes grounds for denial of admission on the basis of faulty character exist[s].'" Ratcliff, *supra* note 49, at 512 (quoting THE BAR EXAMINERS' HANDBOOK 123 (Stuart Duhl, 2d ed. 1980) (1968)).

> many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."[62]

The indetermination of the good moral character requirement has prompted constitutional anxiety over its use to exclude bar applicants from the practice of law:

> The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.[63]

To alleviate the ethical indetermination of the good moral character requirement, some states have employed the negative standard of moral turpitude.[64] Conduct that violates generally accepted moral norms evidences moral turpitude.[65] The Model Code of Professional Conduct, for instance, defines good moral character ("qualities of truth, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility") in apposition to moral turpitude ("baseness, vileness or depravity in the duties which one person owes to another or to society in general").[66] Construal of good moral character as goodness versus moral turpitude as badness, however, scarcely alleviates its ethical indetermination.[67] The more recent Model Rules of Professional Conduct, which suggests that unfitness for the practice of law may be determined by the commission of offenses involving "violence, dishonesty, breach of trust, or serious interference with administration of justice," fares no better.[68] Given their ethical indetermination, reasonable persons would invariably differ over whether any of these standards is met in any particular case, as demonstrated by the fact that over 40% of administrative adverse moral character determinations have been judicially reversed or remanded.[69]

Despite the ethical indetermination of good moral character determina-

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62. *Schware*, 353 U.S. at 248 (Frankfurter, J., concurring) (quoting Chicago, B. & Q. R. Co. v. Babcock, 204 U.S. 585, 598 (1907) (Holmes, J.)).

63. Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957) (Black, J.).

64. McChrystal, *supra* note 49, at 86.

65. May, *supra* note 9, at 199.

66. *Id.* at 87 (quoting the official American Bar Association version of the MODEL CODE OF PROF'L RESPONSIBILITY (2001)).

67. May, *supra* note 9, at 87.

68. MODEL CODE OF PROF'L RESPONSIBILITY R. 8.4 cmt. (2001).

69. Rhode, *supra* note 10, at 534 ("[C]ourts reversed or remanded bar determinations in 43% of all cases, a percentage that has remained relatively constant over the half-century studied. Criminal convictions, the most common form of misconduct at issue during the last decade, provoked reversals or remands in 46% of the thirty-nine appeals.").

tion, courts have categorically refused to find good moral character requirements unconstitutionally vague.[70] States are permitted broad discretion in regulating admission to the practice of law.[71] Notwithstanding clear constitutional concerns, the federal courts in particular are wary of undue intrusion into state licensing procedures.[72]

III. PROCEDURE OF GOOD MORAL CHARACTER DETERMINATION

> [A]n intuition of experience which outruns analysis and sums up many unnamed and tangled impressions;[73]

Although subject to judicial review, the determination of the good moral character requisite for the practice of law is an administrative adjudication of state bar associations.[74] In addition to completing educational and/or examination requirements,[75] applicants to a state bar association must submit their character to moral scrutiny.[76] The stated purpose of such moral scrutiny is protection of both the public and the legal system.[77] "The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably

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70. "Long usage . . . has given well-defined contours to this requirement. . . ." Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 159 (1971).

71. States "have broad power to establish standards for licensing practitioners and regulating the practice of professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). A state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law." Application of Griffiths, 413 U.S. 717, 725 (1973).

72. Federal courts have been "particularly chary of intrusion into the relationship between the state and those who seek license to practice in its courts." Tang v. Appellate Div. of the New York Supreme Court, First Dept., 487 F.2d 138, 143 (2d Cir. 1973), *cert. denied* 416 U.S. 906 (1974).

73. Chicago, B. & Q. R. Co. v. Babcock, 204 U.S. 585, 598 (1907) (Holmes, J.).

74. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS vii (ABA 2002), http://www.abanet.org/legaled/publications/compguide/code.pdf (Nov. 1, 2002) [hereinafter ABA COMPREHENSIVE GUIDE] ("A body appointed by and responsible to the judicial branch of government . . . should administer character and fitness screening."). *See also* Rhode, *supra* note 10, at 496.

75. *See, e.g.*, Staley v. State Bar of Cal., 109 P.2d 667, 668 (Cal. 1941) ("[G]eneral qualifications of an applicant should not be substituted for requisite knowledge of law which one must possess in order to be admitted into the legal profession.").

76. ABA COMPREHENSIVE GUIDE, *supra* note 74, at vii ("The lawyer licensing process is incomplete if only testing for minimal competence is undertaken.").

77. *Id.* ("The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. . . . The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law."). *See also* Ippolito v. State of Fla., 824 F. Supp. 1562, 1566 (M.D.Fla. 1993) ("The primary purposes of character and fitness screening before admission to the Florida Bar are to assure the protection of the public and safeguard the justice system."), *and* Johnson v. Kansas, 888 F. Supp. 1073, 1080 (D. Kan. 1995) (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) ("In their protection of the public health and safety, states "have broad power to establish standards for licensing practitioners and regulating the practice of professions.")).

place in their lawyers."[78] The operative assumption is that subjecting bar applicants to moral scrutiny will help to exclude the unscrupulous from practicing law, thus protecting the public from bad lawyering as well as maintaining the good public image of lawyering.[79] Generally, desirable character traits include: "honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, fiscal responsibility, physical ability to practice law, knowledge of the law, mental and emotional stability, and a commitment to the judicial process."[80] Because responsibility for a state's legal system lies with the individual states, however, moral character requirements vary from state to state, both substantively and procedurally.[81]

Character scrutiny may be initiated by a state bar association while the applicant is in law school, prior to sitting for the bar examination, or subsequent to successful completion of the bar examination.[82] An applicant must first file an extensive moral character application.[83] In most states, the bar association processes the application; in fourteen states, however, a separate agency performs this administrative task.[84] If the applicant's moral character application is problematic in any way, it typically triggers a heightened scrutiny by an administrative ethics committee.[85] Most states have published

78. ABA COMPREHENSIVE GUIDE, *supra* note 74, at vii; *accord* Vaughan v. State Bar of Cal., 284 P. 909, 911 (Cal. 1930) ("[T]hose seeking admission to practice law must be possessed of unquestioned good character and be above suspicion in dealings with public, particularly those with whom they will come in the closer relationship of attorney and client.").

79. Richard R. Arnold, Jr., *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 67 (1997) ("In addition to protecting the public, the bar also desires to protect its own image and that of the legal profession generally.").

80. Ratcliff, *supra* note 49, at 495 (citing Daniel C. Brennan, *Defining Moral Character and Fitness*, 58 BAR EXAM'R 4, 24, 25-26 (1989)). *See, e.g., In re* Gossage, 5 P.3d 186, 196 (Cal. 2000) ("Attorneys must possess good moral character. Good moral character includes traits of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation, and respect for the rights of others and for the judicial process.") (citing CALIFORNIA RULES OF ADMISSION, RULE X, § 1). *But see* ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II (2002) (indicating that eighteen states do not publish a detail of what constitutes good moral character).

81. *See* ABA COMPREHENSIVE GUIDE, *supra* note 74, at vii-viii ("Some variation in rules and interpretations among the bar examining authorities may be appropriate, as character and fitness screening is the responsibility of each individual bar examining authority. Standards should be applied in a consistent manner and interpretive material should be developed in furtherance of this objective."). *See also* Ratcliff, *supra* note 49, at 495 ("While [published standards] are stated as being relevant in the assessment of character in many jurisdictions, how each individual jurisdiction follows these considerations differs substantially." (citing R. J. Gerber, *Moral Character: Inquiries Without Character*, 57 BAR EXAMINER 2, 18 (1988)).

82. Ratcliff, *supra* note 49, at 493 (citing THE BAR EXAMINERS' HANDBOOK 125 (Stuart Duhl, 2d ed. 1980) (1968)).

83. *See, e.g.*, CALIFORNIA RULES OF ADMISSION, R. X, *available at* http://webserver.firstecc.com/californiabars/html/2admrule.htm#x (Nov. 1, 2002).

84. ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II.

85. *See, e.g.*, CALIFORNIA RULES OF ADMISSION, R. X.

standards of character and fitness so as to alert applicants to the possibility of heightened scrutiny; twenty-three states, however, do not publish their standards.[86] Moreover, because states do not publish the rationale of an administrative moral character determination except when it has been subsequently appealed and judicially reviewed, how standards are actually employed in regard to particular kinds of problematic conduct remains relatively obscure.[87] In the course of its investigation, an ethics committee may invite an applicant to an administrative hearing—purportedly informational in character; procedural due process demands such an invitation in the event of an adverse moral character determination by an ethics committee.[88] The ethics committee may then either recommend the applicant to the state supreme court for certification to the practice of law, or not recommend by virtue of the applicant's lack of good moral character.[89] The time required to make a moral character determination, however, is not bound by due process constraints, and therefore remains disturbingly indeterminate.[90] Upon an adverse moral character determination, the applicant possesses a procedural due process right of appeal. Initial appeals may be adjudicated by a state bar court;[91] appeals may then proceed to the state supreme court;[92] final appeals

86. *Id.* "There is no consensus among jurisdictions as to what type of conduct bar examiners may find relevant in assessing an applicant's character." Ratcliff, *supra* note 49, at 495 (citing R. J. Gerber, *Moral Character: Inquiries Without Character*, 57 BAR EXAM'R 2, 18 (1988)).

87. McChrystal, *supra* note 49, at 69-70 ("[U]nless bar admission authorities seek to block an applicant's admission on moral character grounds, the result of the moral character assessment is generally not reported. Thus, a host of cases in which bar admission was granted notwithstanding blemishes relating to moral character evade evaluation.").

88. *See, e.g.*, Martin v. Comm. of Bar Exam'rs., 661 P.2d 160, 162 (Cal. 1983). *But cf.* Engel v. McClosky, 155 Cal. Rptr. 284, 290-91 (Cal. Ct. App. 1979) (holding that the due process rights of an applicant were not violated by his not being adequately informed of charges reflecting on his moral character, or given copies of the evidence available to the ethics committee, or given the right to confront the person who had given information to the committee alleging the misconduct).

89. Although most states do not provide for conditional admission (vis-à-vis substance abuse, mental disability, debt, criminal history, etc), sixteen do. ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II. California does not. *Id.* Eleven states allow for a deferred admission. *Id.*

90. *See, e.g.*, CALIFORNIA RULES OF ADMISSION, R. X (indicating a minimum of six months for a moral character determination, but specifying no maximum); *accord* Engel v. McClosky, 155 Cal. Rptr. 284, 288-89 (Cal. Ct. App. 1979) (holding that the good moral character certification process is not bound by any mandatory time constraints). Moral character determinations may therefore range from a few months to several years.

91. *See, e.g.*, CALIFORNIA RULES OF ADMISSION, R. X. California has two levels of bar courts, the first serving as a trial review and the second as an appellate review of the moral character recommendation made by the ethics committee.

92. *See, e.g.*, CAL. BUS. & PROF. CODE § 6066. Administrative moral character determinations exercise substantial influence on review, but are not binding on the state supreme court. *See, e.g., In re* Gossage, 5 P.3d 186, 197 (Cal. 2000) ("[T]he moral character determinations of the [Ethics] Committee and the State Bar Court play an integral role in the admissions decision, and both bear substantial weight within their respective spheres. However, neither determination is binding on [the Supreme Court]. We independently examine and weigh

may be made to the U.S. Supreme Court.[93]

The burden of establishing requisitely good moral character initially lies with the applicant to the bar.[94] This is generally accomplished through providing extensive biographical information,[95] personal references,[96] and disclosure of all past indiscretions.[97] The burden then shifts to the bar to rebut

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the evidence, and pass on its sufficiency.").

93. *See* Craig v. State Bar of Cal., 141 F.3d 1353, 1354 (9th Cir. 1998) ("Orders of a State Court relating to the admission of an individual to the state bar may be reviewed only by the United States Supreme Court on writ of certiorari to the state court, and not by means of an original action in a lower federal court.").

94. Donald M. Zupanec, Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 88 A.L.R. 3d 192, 195 (1978 & Supp. 2000) ("It is well established under general law, constitutional provisions, statutes, or rules of court, that good moral character is a prerequisite for admission to the bar. It is also generally accepted that the burden of establishing good moral character rests upon the applicant for admission to the bar."); *accord, e.g., In re* Gossage, 5 P.3d 186, 196 (Cal. 2000) ("[B]urden rests upon the candidate for admission [to the bar] to prove his own moral fitness."); *In re* Stepsay, 98 P.2d 489, 491 (1940).

95. Moral Character Applications typically require a thorough and detailed account of the applicant's life between the age of majority and the time of application, with particular focus upon academic, residential, employment, financial, military (if any), and medical history, with heightened inquiry into any problematic history involving extraordinary academic, administrative, civil, criminal, financial, or medical measures, with particular concern for any untoward chemical dependency. Given the indetermination of what constitutes good moral character, the determination of good moral character generally allows for inquiry into any and every aspect of life. *See* Rhode, *supra* note 10, at 583 ("Under prevailing certification standards, elusive notions of virtue make for expansive state interrogation. As long as the applicant's entire 'life history' is thought relevant in admissions, the scope of bar inquiry is not readily cabined. Given the vagueness of prevailing standards, applicants are understandably wary of failing to answer any questions, no matter how tenuously related to practice."). Consequently, "[m]ost certification processes operate without any formal boundaries on their scope of inquiry." *Id.* at 575.

96. Good moral character may be evidenced by the testimony of personal references, most pertinently Professors of Law, Attorneys at Law, professional associates, and other reputable personal acquaintances. *See, e.g.*, Pacheco v. The State Bar of Cal., 741 P.2d 1138, 1143-44 (Cal. 1987) ("Traditionally, we have accorded great weight to testimonials submitted by attorneys and judges regarding an applicant's moral fitness . . . premised on the notion that such persons possess a keen sense of responsibility for the integrity of the legal system.").

97. Under ABA guidelines, prior acts that prompt accelerated inquiry are:

- unlawful conduct;
- making false statements, including omissions;
- misconduct in employment;
- acts involving dishonesty, fraud, deceit or misrepresentation;
- abuse of legal process; neglect of financial responsibilities;
- neglect of professional obligations;
- violation of an order of a court;
- evidence of mental or emotional instability;
- evidence of drug or alcohol dependency;
- denial of admission to the bar in another jurisdiction on character and fitness grounds; and
- disciplinary action by a lawyer disciplinary agency, or other professional disciplinary agency of any jurisdiction.

an applicant's good moral character with evidence of bad moral character.[98] Evidence of bad moral character typically involves past instances of unlawful conduct, dishonesty (particularly in the bar application process),[99] untrustworthiness, financial malfeasance, emotional and/or mental instability, or objectionable political belief and/or conduct.[100] Some states construe any conduct involving moral turpitude sufficient for an adverse moral character determination.[101] In any event, denial of bar admission may not be punitive;[102] rather, the state must show that the prior misconduct renders the applicant currently unfit for the practice of law.[103] The burden then shifts back

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ABA COMPREHENSIVE GUIDE, *supra* note 74, at viii.

98. *See, e.g.*,CALIFORNIA RULES OF ADMISSION, R. X; *accord* Greene v. Comm. of Bar Exam'rs, 480 P. 2d 976, 978 (Cal. 1971) ("The burden of proving good moral character is upon [the applicant for admission to bar], who must initially furnish sufficient evidence of good moral character to establish a prima facie case . . . [and the] committee then has an opportunity to rebut such showing with evidence of bad moral character.").

99. Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331, 363 (1995) ("The importance of truth and honesty in the bar application procedure cannot be overstated."). *Compare, e.g.*, Bernstein v. Comm. of Bar Exam'rs of State Bar, 443 P. 2d 570, 580 (Cal. 1968) ("[R]ecord as a whole demonstrates a lack of truthfulness and candor on the part of [applicant] and that he has not shown himself to be of good moral character."), *and In re* Wells, 163 P. 657, 661 (Cal. 1917) (holding that where an applicant attorney concealed and/or distorted various matters of import on application for admission and committed a fraud upon the court, he did not possess the necessary good moral character), *with In re* Gossage, 5 P.3d 186, 196 (Cal. 2000) ("Whether it is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, [] omission of [criminal history] is itself strong evidence that the applicant lacks the integrity and/or intellectual discernment required to be an attorney. By the same token, no adverse effect on admission generally occurs where the applicant omits less crucial information, where the omission is the product of an innocent mistake, or where the application is otherwise complete."), *and* Konigsberg v. State Bar of Cal., 353 U.S. 252, 270 (1957) ([I]t is our judgment that the inferences of bad moral character which the Committee attempted to draw from [applicant's] refusal to answer questions [on application for admission] about his political affiliations and opinions are unwarranted.").

100. *See* Arnold, *supra* note 79, at 67-68, *and* McChrystal, *supra* note 49, at 73.

101. McChrystal, *supra* note 51, at 86 ("Illegal conduct involving moral turpitude, on the other hand, can be, and frequently is, the basis for denying bar admission."). *See, e.g.*, *Gossage*, 5 P.3d at 196 ("Persons of good moral character, which must be possessed by attorneys, do not commit acts or crimes involving moral turpitude—a concept that embraces a wide range of deceitful and depraved behavior."), *and* Seide v. Comm. of Bar Exam'rs, 782 P.2d 602, 604 (Cal. 1989) ("The fundamental question [is] whether petitioner is a fit and proper person to be permitted to practice, and that question usually turns upon whether he committed or is likely to continue to commit acts of moral turpitude.") (quoting Hightower v. State Bar, 666 P.2d 10 (Cal. 1983)).

102. *Cf. Ex Parte* Garland, 71 U.S. 333, 380 (1866) ("The question, in the case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution."); *accord* Hallinan v. Comm. of Bar Exam'rs, State Bar of Cal., 421 P.2d 76, 87 (Cal. 1966) ("The purposes of investigation by the bar as to moral character of applicant for admission to the bar should be limited to assurance that, if admitted, he will not obstruct administration of justice or otherwise act unscrupulously as officer of the court.").

103. "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v.

to the applicant to demonstrate that the adverse moral character determination is either insufficiently evidenced or erroneous.[104] All reasonable doubts, however, are to be resolved in the applicant's favor.[105] Alternatively, the applicant is obliged to demonstrate "rehabilitation"[106]—especially so if the prior misconduct involved unlawful acts.[107] For purposes of demonstrating rehabilitation, behavior generally expected of any citizen is not sufficient; rather, the applicant must exhibit exemplary behavior affirmatively demonstrative of sincere remorse and rehabilitation over a prolonged period of time.[108] The requisite amount of such evidence of rehabilitation, however, varies according to the relative seriousness of the misconduct at issue.[109] In the final analysis, the evidence of rehabilitation must show that the cause of applicant's misconduct has been eliminated, that such misconduct will therefore not recur, and that the applicant is therefore currently fit to practice law.

Although the operative criteria for determining good moral character are expansively indeterminate, the actual number of applicants denied admission to the bar on the basis of an adverse moral determination remains quite small.[110] Applicants most vulnerable to an adverse moral character determi-

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Bd. of Exam'rs, 353 U.S. 232, 239 (1957) (citations omitted). *See also In re* Stolar, 401 U.S. 23, 30 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 170 (1971); Willner v. Comm. on Character and Fitness, 373 U.S. 96, 98-99 (1963).

104. *See, e.g.*, March v. Comm. of Bar Exam'rs, 433 P.2d 191, 192 (Cal. 1967) ("[T]he burden of showing that findings [of the bar admissions committee that applicant did not possess the requisite good moral character] are not supported by evidence or that the committee's action is erroneous or unlawful is on the [applicant].").

105. *See, e.g.*, Seide v. Comm. of Bar Exam'rs, 782 P.2d 602, 604 (Cal. 1989).

106. *See, e.g.*, Pacheco v. The State Bar of Cal., 741 P.2d 1138, 1147 (Cal. 1987) ("'Rehabilitation . . . is a 'state of mind' and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved 'reformation and regeneration.'") (citing *In re* Petition of Gaffney, 171 P.2d 873 (Cal. 1946)).

107. Carr, *supra* note 49, at 384, 386. *See, e.g., Gossage*, 5 P.3d at 196 ("[W]here applicant [for bar admission] presents a prima facie case of good character and the Committee of Bar Examiners rebuts with evidence of bad character, the burden falls squarely upon the applicant to demonstrate his rehabilitation."), *and In re* Menna, 905 P.2d 944, 948 (Cal. 1995) ("In moral character proceeding, applicant for admission to bar must first establish prima facie case he or she possesses good moral character; the State Bar may then rebut that showing with evidence of bad moral character. If it does so, burden then shifts back to applicant to demonstrate his or her rehabilitation.").

108. *See, e.g., Gossage*, 5 P.3d at 197 ("Cases authorizing admission on the basis of rehabilitation commonly involve a substantial period of exemplary conduct following the applicant's misdeeds.") (citations omitted); Seide v. Comm. of Bar Exam'rs, 782 P.2d 602, 603 (1989) (referencing the "exemplary behavior required of one who has committed serious crimes and seeks admission to the bar" and the requisite "remorse for [] previous criminal conduct and [acceptance of] responsibility" to demonstrate "rehabilitation"). *See also* Rhode, *supra* note 10, at 545 (regarding the "high premium on remorse").

109. *See* Carr, *supra* note 49, at 387; *accord* Stone, *supra* 86, at 364 ("Although a record of a felony conviction does not automatically preclude one's bar admission, the more serious the misconduct, the greater the showing of rehabilitation required."). *See, e.g., Gossage*, 5 P.3d at 196 ("[T]he more serious the prior misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be.").

110. Rhode, *supra* note 10, at 516 ("[T]he maximum number of individuals excluded in

nation are those who have some history of unlawful conduct.[111] Historically, a felony conviction pre-empted admission into any of the regulated professions; preaching, teaching, or stealing were the only professions routinely open to ex-felons.[112] Currently, however, a felony conviction operates as an absolute bar to admission in only three states,[113] and as a temporary bar in three others.[114] The current trend among most states is that a felony conviction presumptively disqualifies an applicant for admission to the practice of law, but the applicant may rebut the presumption by demonstrating rehabilitation.[115] This demonstration is subjected, moreover, to a heightened standard of review in most states, with the applicant bearing a relatively heavy burden to prove current fitness to practice law.[116] A heightened standard of

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any jurisdiction was estimated at twelve to fifteen (California).") (citing Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 497 (1953)) ("[E]stimates from New York, Illinois, and California indicating that less than .5% of applicants rejected on character grounds"), *and* Shafroth, *Character Investigation—An Essential Element of the Bar Admission Process*, 18 BAR EXAM'R 194, 198 (1949) ("California data suggest that about .5% of applicants were denied admission and .5% abandoned their applications for moral character reasons."). More recently, the number of applicants denied admission to the California Bar Association due to an adverse moral character determination ranged from thirteen to sixteen per year from 1996 through 2000. Telephone Interview with the Office of the President of the Cal. Bar Ass'n (Fall, 2001). "Although the number of applicants formally denied admission has always been quite small, the number deterred, delayed, or harassed has been more substantial." Rhode, *supra* note 10, at 493-94.

111. Arnold, *supra* note 79, at 67; *see also* Zupanec, *supra* note 94, at 195 ("It is generally recognized, at least implicitly, in every case in this annotation that the criminal record of an applicant for admission to the bar may adversely affect the applicant's moral character and may preclude admission of the applicant to the bar.").

112. *See* May, *supra* note 9, at 13-14 n.30, 193 (commenting that the only unregulated professions available to persons with a felony record were the clergy, university professorships, and burglary) (citing Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10, 13 (1976)).

113. ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II (Indiana: a felony is prima facie evidence of bad moral character; Mississippi: all felonies except manslaughter and IRS violations render an applicant ineligible; Oregon: commission of a crime that would have led to disbarment renders an applicant ineligible). In 1984, a felony conviction barred admission to the practice of law in ten states; in 1994, it barred admission in six. Carr, *supra* note 49, at 368 (citing COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (ABA 1984, and 1993)).

114. ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II (Missouri: felons may only apply for admission five years after completion of sentence or probation; Montana: felons may apply for admission only upon completion of sentence or probation; Texas: felons may only apply for admission five years after completion of sentence or probation).

115. *See* Carr, *supra* note 49, at 383-84; Arnold, *supra* note 79, at 63; Ratcliff, *supra* note 49, at 496-97. *But see* Zupanec, *supra* note 82, at 12 ("However, it has also been held, expressly or by implication, that evidence of rehabilitation and good conduct was insufficient to establish the good moral character of a bar applicant with a criminal record.").

116. The standard of review under which an applicant must demonstrate rehabilitation varies from state to state, but is generally heightened in each. *See* ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II. California employs a "preponderance of the evidence" standard as opposed to the more stringent "clear and convincing evidence" standard required of re-admittees (persons seeking re-admission to a bar after having been disbarred). *See, e.g., In re* Menna, 905 P.2d 944, 950 (Cal. 1995), *and In re* Murphy, No. 96-V-01909, 1997 WL

review allows for an accordingly accelerated level of inquiry by the state into the both the circumstances of the felonious conduct as well as the subsequent conduct allegedly demonstrating rehabilitation.[117] A threshold requirement for demonstrating rehabilitation in most states is a prolonged period of good conduct since the time of misconduct.[118] An affirmative demonstration of a rectified moral attitude toward prior felonious misconduct is commonly required as well, evidenced typically by acceptance of full personal responsibility and genuine remorse for the criminal activity.[119] Lack of candor about prior misconduct is generally grounds for an adverse moral character determination,[120] regardless of whether the conviction has been ex-

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18845, *12 (Cal. Bar Ct. Jan. 10, 1997). *See also* Carr, *supra* note 49, at 369.

117. See Carr, *supra* note 49, at 384 ("With a heavy burden resting on the applicant to prove present moral fitness, this approach allows states to conduct an extensive review of mitigating and aggravating factors in an effort to make a just determination of an individual's present moral capacity to practice law."). The ABA has promulgated guidelines for such state inquiry:

- the applicant's age at the time of the conduct;
- the recency of the conduct;
- the reliability of the information concerning the conduct;
- the seriousness of the conduct;
- the factors underlying the conduct;
- the cumulative effect of the conduct or information;
- the evidence of rehabilitation;
- positive social contributions since the conduct;
- the applicant's candor in the admissions process;
- the materiality of any omissions or misrepresentations.

ABA COMPREHENSIVE GUIDE, *supra* note 74, at viii-ix (stating further that "[t]he investigation . . . should be thorough in every aspect . . . ."). California considers the following factors:

> (1) the nature of the activity; (2) aggravating and mitigating circumstances; (3) any restitution that has been made; (4) the age and education of the applicant at the time of the criminal activity and at present; (5) informed opinions of others regarding the applicant's present moral character; and (6) the nature and extent of any voluntary rehabilitative activities undertaken by the applicant.

Carr, supra note 49, at 388-89 (quoting STATEMENT ON MORAL CHARACTER REQUIREMENT FOR ADMISSION TO PRACTICE LAW IN CALIFORNIA 3, Office of Admissions, Supreme Court of California (June 1992)).

118. Five years of good behavior subsequent to the completion of sentence or probation seems to be the current trend. *See* ABA COMPREHENSIVE GUIDE, *supra* note 74, chart II. *See also* McChrystal, *supra* note 49, at 91 ("[T]he most convincing evidence of rehabilitation is often the simple passage of time without transgressions.").

119. *See* Rhode, *supra* note 10, at 543-45 ("Arrogance, 'argumentativeness,' 'rudeness,' 'excessive immatur[ity],' 'lackadaisical' responses, or intimations that a candidate is 'not interested in correcting himself' can significantly color character assessments. . . . Other courts and committees place a high premium on remorse.") (alterations in original) (citations omitted).

120. *See* Carr, *supra* note 49, at 386 ("In addition to rehabilitation, honesty, and forthrightness in the application process are weighed heavily by several admissions committees."), Rhode, *supra* note 10, at 544 ("The ultimate sin in many jurisdictions is a failure to seem 'up front' with the committee. Nondisclosure, even about relatively trivial matters, may evidence the wrong 'mental attitude,' and 'glib, equivocal responses,' even if technically accurate, may

punged.[121] Atonement for past unlawful deeds may also be of paramount concern, evidenced either by restitution to the victims of the criminal activity (if possible) or by subsequent socially redeeming conduct (such as charitable acts).[122] On the other hand, some criminal acts are deemed to reflect such a deep stain on the character of the applicant that admission to the bar will not

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prove more damning than the conduct at issue."), *and* Stone, *supra* note 99, at 363 ("The importance of truth and honesty in the bar application procedure cannot be overstated.").

121. Bar associations routinely exempt themselves from the right of non-disclosure pursuant to expungement and sealing statutes, even in regard to juvenile offenses. *See* Rhode, *supra* note 10, at 577. The stated purpose of such statutes is generally to "erase" the stigma of the conviction so that it will no longer operate as a hindrance to the personal, social, or professional life of the convict by allowing the convict to construe the arrest and conviction as if it had never occurred. *See* U.S. v. Fryer, 402 F. Supp. 831, 834 (N.D. Ohio 1975) ("Expungement is a legislative provision, as opposed to executive, for the eradication of a record of conviction or adjudication upon the fulfillment of prescribed conditions. . . . It is not simply the lifting of disability attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect. It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication and thereby restoring to the regenerative offender his status quo ante."). *See, e.g.*, CAL. PENAL CODE § 1203.45(a) (West 2002) (sealing a misdemeanor: "In any case in which a person was under the age of 18 years at the time of commission of a misdemeanor . . . may petition the court for an order sealing the record of conviction. . . . *Thereafter the conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.*"); CAL. PENAL CODE § 1203.4(a) (West 2002) (felony expungement: "[A] defendant shall . . . be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter *be released from all penalties and disabilities resulting from the offense* of which he or she has been convicted. . . . The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for *licensure by any state or local agency,* or for contracting with the California State Lottery."); CAL. PENAL CODE § 1203.4a (a) (misdemeanor expungement: "Every defendant convicted of a misdemeanor shall . . . be permitted by the court to withdraw his or her plea of guilty or nolo contendere and enter a plea of not guilty; or if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusatory pleading against such defendant, who shall thereafter *be released from all penalties and disabilities resulting from the offense* of which he or she has been convicted. . . .") (emphasis added). Section 1203.4a contains no disclosure exceptions as does § 1203.4 for state licensing agencies. The California Bar Ethics Committee does not exempt itself from the non-disclosure allowance of the juvenile sealing and misdemeanor expungement; because the Bar Association is a licensing agency, however, the California Bar Ethics Committee explicitly exempts itself from non-disclosure of felony expungement. *See* California Bar Association Moral Character and Fitness Application Form.

122. *See, e.g., In re* Menna, 905 P.2d 944, 952 (Cal. 1995) ("While restitution 'is not necessarily determinative of whether rehabilitation has been proven,' it is a legitimate and substantial factor to be considered 'in the overall factual showing made by the individual seeking reinstatement.'") (quoting Hippard v. State Bar, 782 P.2d 1140 (Cal. 1989)); Seide v. Comm. of Bar Exam'rs, 782 P.2d 602, 607 (Cal. 1989) ("[P]articipating in community volunteer programs to help other substance abusers might well demonstrate a recognition of the deleterious effects illicit drug sales have upon individuals and the community as a whole."). *See also* Rhode, *supra* note 10, at 544.

be tolerated, regardless of subsequent redemptive efforts.[123]

Given both the substantive indeterminancy of good moral character and the variance of its procedural determination, the judicial review of administrative inquiry into moral character reveals an unsurprising, albeit disturbing ethical heterogeneity.

IV. GOOD (AND NOT SO GOOD) MORAL CHARACTER DETERMINATIONS

> The power [to determine requisite qualifications for the practice of law], however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility.[124]

> [W]hen a State seeks to deny an applicant admission . . . it must proceed according to the most exacting demands of due process of law.[125]

A. Federal Supreme Court Decisions Regarding Moral Character Determination

U.S. Supreme Court decisions involving adverse moral character determinations for admission to the practice of law have to date concerned applicants denied certification because of their political posture. In its first significant decision on the matter in 1866, the Court refused to permit congressional exclusion of lawyers from the practice of law due to former association with the Confederacy.[126] Just after the Civil War, the U.S. Congress enacted legislation requiring attorneys who sought entrance to the federal bar to swear an oath that they had not given aid or held office under "any authority or pretended authority in hostility to the United States," which served in effect to prevent lawyers who had practiced law in any Confederate state from acquiring membership in the federal bar.[127] The Court held that although Congress may permissibly impose qualifying standards upon entrance to the federal bar, such qualifications may not be punitive.[128] "It rests exclusively with the court to determine who is qualified to become

123. *Cf.* Rhode, *supra* note 10, at 537 ("[C]ertain illegal acts—regardless of the likelihood of their repetition in a lawyer-client relationship—evidence attitudes toward law that cannot be countenanced among its practitioners; to hold otherwise would demean the profession's reputation and reduce the character requirement to a meaningless pretense.").

124. *Ex Parte* Garland, 71 U.S. 333, 347 (1866).

125. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 174 (1971) (Black, J. dissenting).

126. *Ex Parte* Garland, 71 U.S. at 336.

127. *Id.* at 335 (quoting Act of Jan. 24, 1865, ch. 20, 13 Stat. 424 (1865)).

128. *Id.* at 380 ("The question, in the case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution.").

one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. *The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility;* but it is the duty of the court to exercise and regulate it by sound and just judicial discretion . . . ."[129] A century later, however, sound and just judicial discretion was confronted with the histrionic moralism of the Cold War.

In 1957, the Court decided two cases, which together stood for the proposition that a state may not deny applicants admission to the bar because of their political associations.[130] In *Schware*, the court held that an applicant was improperly denied admission to the New Mexico Bar because of previous association with the Communist Party, the related use of several aliases, and multiple political activity related arrests some thirteen years prior to his application.[131] The Court found that the applicant had engaged in no misconduct for the past fifteen years, and that his previous allegedly subversive misconduct was insufficient to justify a present determination of unfitness to practice law because it had happened many years prior and he had never been convicted of any criminal activity.[132] In holding that the applicant had demonstrated good moral character, the court stated:

> Schware's professors, his fellow students, his business associates and the rabbi of the synagogue of which he and his family are members, all gave testimony that he is a good man, a man who is imbued with a sense of deep responsibility for his family, who is trustworthy, who respects the

129. *Id.* at 347 (emphasis added).

130. Schware v. Bd. of Exam'rs, 353 U.S. 232 (1957) (Black, J.); Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957) (Black, J.).

131. During the Great Depression in 1932, Schware had joined the Young Communist League; he was eighteen. In 1933 he began work in a glove factory; because the workers were principally Italian, Schware assumed the name Rudolph Di Caprio which helped him secure and retain his job, diminish the anti-Jewish prejudice against him, and help organize his fellow employees. In 1934 he moved to California to work on the docks; he continued to use an alias because of anti-Semitism. He remained politically active. While on strike in California he was arrested for "suspicion of criminal syndicalism," but was never formally charged. In 1937 Schware left the Communist Party but later rejoined. In 1940 he was arrested and indicted for violating the Neutrality Act of 1917; charges were later dismissed. In 1940 he quit the Communist party. Schware joined the U.S. military in 1944. He was dishonorably discharged in 1950, finished college, and enrolled at the University of New Mexico Law School. He informed the law school about his past activities and associations with the Communist party; the dean told him to not worry about such matters because they happened years before. In 1953 Schware submitted his application to the New Mexico Bar. He answered all questions and disclosed that he had used certain aliases between 1933 and 1937 and that he had been arrested several occasions prior to 1940. He was refused entrance to bar examination. He later requested a formal hearing on the denial of his application. At the hearing he called his wife, a rabbi, a local attorney, and the secretary to the dean of the school to testify to his good moral character. He presented letters from almost every student in his graduating class and all his law professors that were available. The ethics committee determined that Schware lacked the good moral character requisite for the practice of law. The New Mexico Supreme Court affirmed this decision. *Schware*, 353 U.S. at 236-39.

132. *Id.* at 243.

> rights and beliefs of others. From the record it appears he is a man of religious conviction and is training his children in the beliefs and practices of his faith. A solicitude for others is demonstrated by the fact that he regularly read the Bible to an illiterate soldier while in the Army and law to a blind student while at the University of New Mexico law school. His industry is depicted by the fact that he supported his wife and two children and paid for a costly professional education by operating a business separately while studying law. He demonstrated candor by informing the Board of his personal history and by going to the dean of the law school and disclosing his past. The undisputed evidence in the record shows Schware to be a man of high ideals with a deep sense of social justice. Not a single witness testified that he was not a man of good character.[133]

In *Konigsberg*, the Court remanded, holding that an applicant was not properly denied admission to the California Bar because of his reputed association with the Communist Party and his refusal to answer questions regarding his political associations.[134] The Court ruled that the evidence of bad moral character was insufficient and that the applicant's refusal to answer questions did not warrant an inference of bad moral character.[135] The court further stated that:

> Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.[136]

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133. *Id.* at 240.

134. *Konigsberg*, 353 U.S. at 271. The ethics committee questioned Konigsberg about his political beliefs and associations. He repeatedly objected to these questions, asserting that such inquiries infringed on the rights guaranteed him by the First and Fourteenth Amendments. He had worked in various social agencies after receiving his Masters in Social Administration, volunteered for the Army and was promoted to Captain. He was honorably discharged and thereafter resumed his career in social work. Suspicion that Konigsberg was or had been a communist was based on testimony from an ex-communist who stated Konigsberg had attended meetings of the Communist Party in 1941. In 1950, Konigsberg had written a series of editorials for a local newspaper criticizing the U.S. participation in the Korean War, the actions and policies of the leaders of the major political parties, the influence of "big business" in American life, racial discrimination, and a U.S. Supreme court decision. The ethics committee presented no other evidence of any misconduct. At his hearing before the ethics committee, Konigsberg called forty-two persons who had known him at different periods during the previous twenty years. These included a Priest, a Rabbi, lawyers, doctors, professors, businessmen and social workers, all of which recommended him to the practice of law. The ethics committee refused to certify him to practice law on the grounds he had failed to prove that he was of good moral character and that he did not advocate overthrow of the Government of the United States or California by unconstitutional means; the California Supreme Court declined to hear the appeal. *Id.* at 260-68.

135. *Id.* at 273.

136. *Id.* at 273-74.

In 1961, however, the Court established in two companion decisions that a state may deny admission to applicants who refuse to answer questions concerning their political associations as an undue obstruction to moral character determination by the state.[137] In revisiting the *Konigsberg* decision on its subsequent appeal, the Court held that the applicant's continued refusal to answer questions regarding his political association with the Communist Party did demonstrate a lack of good moral character by obstructing proper moral character inquiry by the bar.[138] The Court stated that with respect to membership in the Communist Party, "the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented."[139] In *Anastaplo*, the Court similarly held that an applicant was not denied proper due process of law when the Illinois Bar refused to certify him to the practice of law for refusing to answer questions regarding his reputed association with the Communist Party because he was duly notified that such refusal would exclude him.[140] "[T]he State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment."[141]

In 1971, the Court issued three decisions, holding that although questions concerning political loyalty to the United States do not chill the exer-

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137. Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) (Black, J, dissenting); *In re* Anastaplo, 366 U.S. 82 (1961) (Black, J. dissenting).

138. *Konigsberg*, 366 U.S. at 55.

139. *Id.* at 52.

140. *Anastaplo*, 366 U.S. at 94-95. At a sub-committee ethics hearing, Anastaplo was asked several questions over the course of six days regarding both his religious beliefs and political beliefs regarding overthrow of the government. He refused to answer these questions because he considered them outside the purview of what the committee was constitutionally permitted to investigate. This prompted an escalating animosity between Anastaplo and his examining committee. The committee declined to certify him to the practice of law, despite offering no other evidence regarding his lack of good moral character. The Illinois Supreme Court affirmed *Id.* at 85 nn.4-6. "[Anastaplo's] position throughout has been that the First Amendment gave him a right not to disclose his political associations or his religious beliefs to the Committee. But his decision to refuse to disclose these associations and beliefs went much deeper than a bare reliance upon what he considered to be his legal rights. The record shows that his refusal to answer the Committee's question stemmed primarily from his belief that he had a duty, both to society and to the legal profession, not to submit to the demands of the Committee because he believed that the questions had been asked solely for the purpose of harassing him because he had expressed agreement with the assertion of the right of revolution against an evil government set out in the Declaration of Independence." *Id.* at 103-04 (Black, J., dissenting).

141. *Id.* at 89-90 (citing *Konigsberg II* and stating that "it is of no constitutional significance whether the State's interrogation of an applicant on matters relevant to these qualifications—in this case Communist Party membership—is prompted by information which it already has about him from other sources, or arises merely from a good faith belief in the need for exploratory or testing questioning of the applicant.").

cise of free expression and association rights, admission may not be denied for refusal to answer questions concerning political associations.[142] In both *Baird* and *Stolar*, the Court held that applicants were improperly denied admission to the Arizona and Ohio Bars respectively because of their refusal to answer questions regarding political associations with the Communist Party or any other subversive organization.[143] The *Baird* Court ruled that although the state has a legitimate interest in determining the moral character of applicants to the bar, that interest does not outweigh "[t]he First Amendment's protection of association [which] prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs."[144] The Court thus construed questions concerning political association as primarily designed to provide a foundation for exclusion; "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."[145] Under the same rationale, the *Stolar* Court stated that in light of no contravening evidence of bad moral character, "we can see no legitimate state interest which is served by a question which sweeps so broadly into areas of belief and association protected against government invasion."[146] In *Wadmond*, however, the Court held in declaratory judgment that requiring applicants to the New York Bar to affirm loyalty to the government of the United States did not impermissibly infringe upon their rights of free expression and association.[147] The Court

142. Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (Black, J.); *In re* Stolar, 401 U.S. 23, 30 (1971) (Black, J.); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159 (1971) (Stewart, J.) (Black, J. dissenting).

143. After passing the Arizona bar examination, Baird listed all the organizations she belonged to since age sixteen on the moral character application; however, she refused to answer the question of whether she was ever a member of the Communist Party or any other organization which "advocates the overthrow of the U.S. Government by force or violence." Despite no other evidence of bad moral character, the committee refused to process her application or recommend her to the bar. The Arizona Supreme Court denied her petition to order the committee to show good cause for her exclusion. *Baird*, 401 U.S. at 4-5, 9. Stolar had been admitted to the New York bar a year prior to applying for admission to the Ohio State Bar. Although he stated on oral interrogation that he was not and never had been a member of the Communist Party, he failed to answer questions on the moral character application whether he advocated the overthrow of the government by use of force or violence, and also failed to list all organizations in which he was a member, on the grounds that these questions violated the First and Fifth Amendments. The ethics committee recommended that Stolar be denied permission to sit for the Ohio bar examination. The Ohio Supreme Court affirmed the committee's recommendation without opinion. *Stolar*, 401 U.S. at 27.

144. *Baird*, 401 U.S. at 6.

145. *Id.* at 7.

146. *Stolar*, 401 U.S. at 30.

147. *Wadmond*, 401 U.S. at 164. An organization of law students and law graduates brought an action for declaratory and injunctive relief against two committees for character and fitness for admission to the New York Bar. The organization contended that questions concerning loyalty to the government to the United States were vague, overbroad, intrusive, and chilled the free exercise of the speech and association rights by students who must anticipate having to answer them. No person involved in the case was refused admission. *Id.* at 158.

found that merely requiring belief in the United States' form of government and loyalty to that government did not evidence an intent to penalize political beliefs.[148]

Despite the obvious waffling, the Supreme Court has consistently held that advocation of unpopular, offensive, or even subversive political beliefs does not alone justify a determination of bad moral character so as to render an applicant unfit to practice law.[149] The more dissentious issue is whether questions regarding political association and/or belief are constitutionally impermissible as an undue state invasion, especially if employed as an exclusionary measure to the practice of law. Justice Black, author of the lead opinions in each of the cases that restrained the rights of state bar associations in querying applicants' political posture (*Schware, Konigsberg I, Baird, Stolar*), and author of the lead dissenting opinions in each of the cases that upheld that state right (*Konigsberg II, Anastaplo, Wadmond*) asserted that:

> [T]he right of a lawyer or Bar applicant to practice his profession is often more valuable to him than his home, however expensive that home may be. Therefore I think that when a State seeks to deny an applicant admission . . . it must proceed according to the most exacting demands of due process of law.[150]

Given such constitutionally stringent due process demands, an accordant stringency of administrative process in the determination of good moral character for certification to the practice of law might be expected. This expectation is frustrated, however, as illustrated in California by even a cursory review of state court decisions in bar admissions matters.

B. State Supreme Court Decisions Regarding Moral Character Determination—California

In the eight major decisions rendered by the State Supreme Court of California from 1966 to 2000 on matters regarding moral character certification to the State Bar of California, each remarkably involved a reversal by the reviewing court of the administrative determination made by the bar.

In 1966, the California Supreme Court in *Hallinan* reversed the ethics committee's refusal to certify an applicant for admission to the practice of law due to applicant's alleged inclination toward violence, disregard for the

148. *Id.* at 164. *But see id.* at 176 (Black, J. dissenting) ("The First Amendment was intended to make speech free from government control, even speech which is dangerous and unpopular. And included within the protection of the First Amendment is the right of association; the right to join organizations which themselves advocate ideas. It therefore follows for me that governments should not be able to ask questions designed to identify persons who have belonged to certain political organizations and then exclude them from the practice of law.").

149. *See* Ratcliff, *supra* note 49, at 509.

150. *Wadmond*, 401 U.S. at 174 (Black, J. dissenting).

rights of others, disrespect for the law, and lack of candor—all in regard to applicant's political activism and promotion of civil disobedience.[151] The court not only declined to construe the applicant's record of civil disobedience as demonstrative of moral turpitude, but found it to be "conspicuously absent" of moral turpitude and demonstrative rather of the "highest moral courage."[152] The court further suggested that the ethics committee's adverse moral character determination was ostensibly governed by invidious discrimination against the applicant's political posture as opposed to a viable inquiry into his fitness to practice law.[153]

In 1973, the court in *Siegal* reversed an applicant's adverse moral character determination who was denied certification by the ethics committee because of his lack of candor in sub-committee hearings regarding his alleged advocation of unlawful violence in three political speeches he gave during student demonstrations while in law school.[154] Although noting the possible constitutional concerns of obliging an applicant to account for the content of political speech as effecting a possible chill of First Amendment rights, the court based its reversal rather on finding a reasonable basis in the

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151. Hallinan v. Comm. of Bar Exam'rs, 421 P.2d 76 (Cal. 1966). Hallinan had been politically active in the civil rights movement and was arrested and convicted numerous times in connection with his involvement in non-violent demonstrations and other various civil rights related activities. Hallinan did not deny his acts of civil disobedience, but protested their justification before the ethics committee on moral and philosophical grounds. *Id.* at 82-84. Hallinan had also been involved in several personal altercations, apparently devolving from his "pugnacious attitude" as a youth. The majority of these fights occurred many years prior to his application for admission to the bar, and evidenced nothing more than a quarrelsome disposition upon provocation. *Id.* at 89-94. Since Hallinan's involvement in the civil rights movement, which was the sole basis for the ethics committee's adverse moral determination, he had repudiated the use of violence and he had resorted to no violent activity in any of his acts of civil disobedience. *Id.* at 94.

152. *Id.* at 87. The court further explained that violations of laws that contravene the demands of morality are accordingly not crimes of moral turpitude and therefore do not provide an independent basis for exclusion from the practice of law. *Id.* at 85.

153. *Id.* at 86-87.

154. Siegel v. Comm. of Bar Exam'rs, 514 P.2d 967 (Cal. 1973). For much of his life, but particularly during law school at Berkeley where he was elected president of the Associated Students of the University of California, Siegel had been a political activist. In three separate political speeches, Siegel allegedly advocated the use of unlawful violence against authorities in furtherance of his political causes. The first concerned a dispute with the university over use of a park for recreational purposes, which eventually escalated Siegel's urging a rally of sympathetic students to "take the park," which led to a violent encounter with police. Siegel was acquitted of the charge of inciting a riot, but the university placed him on disciplinary probation for one year. The second concerned a speech in which Siegel addressed at length, but in philosophical abstraction, the need for violence to effect radical social change; no acts of violence followed this speech. The third concerned Siegel's speech at a rally denouncing U.S. involvement in Indochina, where he urged the audience to "smash R.O.T.C.," which led to a violent confrontation with university police. Siegel was acquitted of the charge of inciting a riot; the university pursued no action. At the ethics sub-committee hearings, Siegel denied having advocated violence. The ethics committee based its adverse moral character determination not on Siegel's alleged political posture, but solely on the fact of his refusal to admit to that alleged political posture. *Id.* at 973-79.

text of the speeches for concluding that the applicant had not in fact advocated unlawful violence, as evidenced further by the applicant's acquittal of all charges of having incited riotous conduct.[155] Given the sub-committee's extensive questioning of the applicant regarding the specifics of his political beliefs, moreover, the court suggested that the ethics committee had tread on rather thin constitutional ice in effectively questioning not merely his candor regarding his political beliefs, but the political beliefs themselves: "We must observe in closing that our decision has not emerged from a process wholly free of troublesome aspects."[156]

In 1979, the court in *Hall* reversed the adverse moral character determination of an applicant whom the ethics committee had refused to certify because of alleged professional misconduct six years prior and the applicant's lack of remorse and candor regarding the misconduct.[157] The court held that the allegations of misconduct involved relatively unserious matters and that the ethics committee's insistence that the applicant admit to the alleged misconduct and show remorse in order to demonstrate good moral character was ethically incongruous:

> [The applicant's] consistent refusal to retract his claims of innocence and make a showing of repentance appears to reinforce rather than undercut his showing of good character. Precisely because the Committee made clear that [the applicant's] chances for admission would be improved if he demonstrated remorse, we find his refusal to do so indicative of good character rather than the contrary: [the applicant] refused, in effect, to become the fraudulent penitent for his own advantage.[158]

The court therefore concluded that the ethics committee's findings simply did not justify its adverse moral character determination.[159]

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155. *Id.* at 982-93.

156. *Id.* at 984.

157. Hall v. Comm. of Bar Exam'rs, 602 P.2d 768 (Cal. 1979). Prior to matriculation at law school, Hall had managed an employment agency. He received a disciplinary twenty day suspension of his agency license from the Bureau of Employment Agencies (despite its own reservations about the charges) because he had allegedly used undue pressure in collecting fees owed him from a client (having called the client's employer ten times), failed to refund a referral fee owed a client, improperly solicited a fee from a client, and used deceptive techniques in obtaining fees owed him from a client. Hall had contested each of these charges at the time, and maintained his innocence before the ethics committee. He otherwise presented uncontroverted evidence of good moral character as having a distinguished Air Force record, honorable discharge, steady employment, residence, and marriage, having raised five children, and two testimonials. *Id.* at 770-75.

158. *Id.* at 777 (stating further that "[a]n individual's courageous adherence to his beliefs, in the face of a judicial or quasi-judicial decision attacking their soundness, may prove his fitness to practice law rather than the contrary. We therefore question the wisdom of denying an applicant admission to the bar if that denial rests on the applicant's choosing to assert his innocence regarding prior charges rather than to acquiesce in a pragmatic confession of guilt, and conclude that Hall should not be denied the opportunity to practice law because he is unwilling to perform an artificial act of contrition.").

159. *Id.* at 778.

In 1983, the court in *Martin B.* reversed and remanded for further proceedings the adverse moral character determination of an applicant, which the ethics committee had based upon his acquittal of two rape charges and filing a false claim in court ten years prior to his application for admission to the bar.[160] In the course of the ethics committee's moral character investigation, the state bar court conducted several hearings and re-tried the rape charges (despite the unavailability of vital records and the ten-year staleness of the evidence, but at which the complaining witnesses testified) and found the applicant guilty.[161] On appeal by the applicant, the court held that the ethics committee proceedings were fundamentally unfair.[162]

In 1987, the court in *Pacheco* again overturned the refusal of the ethics committee to certify an applicant for admission to the bar due to an adverse moral character determination based upon allegations of professional misconduct over ten years prior to his re-application to the bar.[163] The court held that the alleged misconduct was relatively insignificant (if not trivial), of diminished probative value (having occurred so many years prior), and that the applicant's rehabilitation was sufficiently demonstrated by personal references and the passage of a lengthy amount of time since his previous alleged misconduct.[164]

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160. Martin B. v. Comm. of Bar Exam'rs, 661 P.2d 160 (1983). While in the Marine Corps, Martin B. was charged with the rape of two women. He was acquitted for the one (successfully showing consent) and the other was dismissed (jury deadlocked eleven to one in favor of acquittal). He subsequently filed a claim against the United States Government to recover allegedly stolen property (worth $1,346) and was court marshaled. He continued his service, was later awarded three medals, and received an honorable discharge. *Id.* at 161.

161. *Id.* The ethics committee concluded that Martin B. lacked good moral character not only because he committed the rapes, but also because he had therefore lied to the state bar court in advocating his innocence, thus demonstrating lack of candor. The ethics committee also found his false claim to indicate his bad moral character despite Martin B.'s admission of guilt, service of punishment, expressed remorse, and the fact that it had occurred ten years prior. *Id.*

162. *Id.* at 166. In regard to the ethics committee's effort to bootstrap its adverse moral character determination, the court noted that "[a]n individual's courageous adherence to his beliefs, in the face of a judicial or quasi-judicial decision attacking their soundness, may prove his fitness to practice law rather than the contrary." *Id.* at 165 (citations omitted).

163. Pacheco v. The State Bar of Cal., 741 P.2d 1138 (Cal. 1987). Prior to his matriculation at law school while employed as a Highway Patrol officer and then as a private investigator, Pacheco was allegedly involved in various incidents of improper handling of evidence, inaccurate record-keeping, suspect loan practices, and one instance of advising a murder suspect how to avoid a subpoena, all of which Pacheco challenged, but in regard to which the ethics committee therefore found him to be neither candid nor truthful and determined him to lack good moral character. Two years later, Pacheco re-applied and the ethics committee again declined to certify him to the bar, finding that he had failed in the meantime to demonstrate adequate rehabilitation due to his allegedly having used undue force in assisting an attorney and his client legally to re-obtain custody over the client's child (Pacheco was accused of restraining the ex-wife's arm), was insufficiently diligent in de-listing himself from an attorney directory (in which he did not place himself and which was made without his knowledge), and remained unwilling to recant his former challenges to the previous adverse moral character determination. *Id.* at 1140-42.

164. *Id.* at 1142-46. Pacheco offered twenty testimonials, nineteen of which were made

In 1989, the court in *Seide* declined to certify an applicant for admission to the bar due to the seriousness of the applicant's drug trafficking conviction five years prior to his seeking admission to the bar and the recency of his release from probation.[165] Although an initial hearing department had found that the applicant possessed good moral character, the review department reversed.[166] On appeal by the applicant, the Supreme Court found the applicant's drug-related activity particularly egregious because he was a former law enforcement officer and law school graduate, and the applicant's primary motivation for his drug-related activity was pecuniary, which led the court to discount the mitigating circumstances of applicant's personal difficulties at the time of his arrest.[167] The applicant's evidence of rehabilitation, moreover, consisted only of the testimony of character witnesses who had not been fully apprised of the extent of the applicant's former criminal activity. The applicant also failed to show proper remorse for his actions and declined to assume full responsibility for them.[168] Lastly, the applicant was still on probation at the time of the State Bar hearings and had only just recently been released at the time of its judicial review, which obviated the applicant's ability independently to demonstrate the exemplary conduct requisite to overcome the substantial evidence of his bad moral character.[169]

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by attorneys. The ethics committee had questioned their credibility because Pacheco had not disclosed his previous misconduct. The court chastised the ethics committee for seeking to bootstrap its own adverse moral character determination: "We . . . question the wisdom of denying an applicant admission to the bar if that denial rests on the applicant's choosing to assert his innocence regarding prior charges rather than to acquiesce in a pragmatic confession of guilt, and conclude that [he] should not be denied the opportunity to practice law because he is unwilling to perform an artificial act of contrition.'" *Id.* at 146 (citations omitted).

165. Seide v. Comm. of Bar Exam'rs, 782 P.2d 602 (Cal. 1989). Seide had previously been arrested five times over the course of seven years for drug-related offenses. He had conducted an extensive cocaine trafficking enterprise for almost a year, involving five transactions of more than a pound of cocaine. He was finally arrested for selling federal agents six pounds of cocaine (worth approximately $500,000) and convicted of the distribution of 2.845 kilograms of cocaine. He received a three-year suspended sentence with six months actual sentence, and five years probation. All but the first arrest occurred after he entered law school. His most extensive drug-related activity took place while studying for the California Bar exam. Prior to entering law school, applicant had been a deputy sheriff. *Id.* at 603-04.

166. *Id.* at 603. Two of the three members of the hearing panel observed that Seide cooperated with the investigatory proceedings, expressed remorse for past illegal misconduct, and had successfully rehabilitated himself, subsequently having earned a reputation for honesty, reliability, fairness, and trustworthiness. *Id.*

167. *Id.* at 604. Seide was gathering funds to invest in a lingerie business. *Id.* at 604 n.1.

168. *Id.* at 605-07. Seide claimed that such drug-related activity was socially acceptable at the time and continued to insist that despite his drug use he had never suffered a substance abuse problem; he consequently eschewed therapy, which in the court's view would have evidenced rehabilitative efforts toward recognition of the deleterious social and personal effects of illegal drugs, and refrained as well from any voluntary participation in community substance abuse programs. *Id.*

169. *Id.* at 607 (stating that the conduct required to show rehabilitation must exceed what would otherwise be expected of an ordinary citizen and further suggesting that supervised behavior does not accrue to the credit of a person on parole or probation because exemplary conduct is required to avoid violation of the terms of the probation or parole). Seide's evi-

In 1992, however, the California State Bar Court held that an applicant convicted of illegal drug trafficking had sufficiently demonstrated his rehabilitation through character witnesses, the shame he felt over his former cocaine involvement (having developed "great maturity of insight and hindsight about his earlier life"), and his cooperation with the prosecution in the matter.[170]

In 1995, the court in *In re Menna* declined to certify an applicant convicted of drug-related activities, fraud, theft, and IRS violations, because of the seriousness and protracted course of his criminal misconduct and the fact that his five and one-half years of post-probation behavior was an insufficient period of time to demonstrate genuine rehabilitation.[171] Subsequent to his disbarment from the New Jersey Bar, the applicant applied to the California Bar. The ethics committee recommended against his admission to the bar for lack of good moral character after its preliminary investigation, but following an evidentiary hearing the applicant was determined to have good moral character by the hearing department, which determination was affirmed by the review department, but reversed by the Supreme Court on appeal by the ethics committee.[172] The court held that given the enormity of his previous misconduct, the applicant failed to make a requisitely clear and convincing demonstration of his rehabilitation by character testimony, apparent recovery from his gambling addiction through extensive involvement with Gamblers' Anonymous, efforts at making restitution, and his "extreme sorrow" for his past misconduct.[173] The court further explained that the ap-

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dence of rehabilitation was that he had subsequently married, had a child, and held steady employment. *Id.* at 605.

170. *In re* Passenheim, 2 Cal. State Bar Ct. Rptr. 62, 67 (1992). Passenheim passed the bar examination on his sixth try and was admitted to the California Bar eleven years after his drug-related misconduct. He subsequently that same year pled guilty to having trafficked in cocaine and received a two-year sentence with four years probation. He was convicted of distributing for profit approximately one hundred and ten pounds of cocaine over a two-year period. At the time of the judicial review of his admission, Passenheim's misconduct was thirteen years prior. *Id.* at 66-67.

171. *In re* Menna, 905 P.2d 944 (Cal. 1995). Menna had been a member of the New Jersey Bar Association who had engaged in a continuous course of criminal and professional misconduct over a period of five years, during which he misappropriated approximately $250,000 from the trust funds of nineteen separate clients and fraudulently obtained a large loan from another to pay off gambling debts, devised a scheme to manufacture methamphetamine to offset his increasing indebtedness, and wilfully failed to file his state income tax return. He pleaded guilty to four felony counts, was sentenced to four years in prison, and was permanently disbarred by the New Jersey Bar Association. At the time of the court review of his application to the California State Bar Association, Menna still owed $25,000 to his former law firm, $95,000 to the defrauded client, over $120,000 to the bank that reimbursed the New Jersey Client Security Fund, and more than $535,000 to the Internal Revenue Service in tax liabilities and penalties. *Id.* at 945-46.

172. *Id.* at 946.

173. *Id.* at 946-47. The court ruled that because the applicant had been previously disbarred in another state, he was required to demonstrate rehabilitation under the much more rigorous standard than that imposed upon a first time applicant—namely, by clear and convincing evidence—and was not entitled to have all reasonable doubts resolved in his favor. *Id.*

plicant's five and one-half years of unsupervised good conduct (i.e., remaining out of trouble) since his parole from prison was neither a sufficient period of time to demonstrate his sincere regret and rehabilitation nor constitutive of exemplary (as opposed to merely unblemished) conduct.[174]

In 2000, the court in *In re Gossage* declined to certify an applicant convicted of voluntary manslaughter (under circumstances evidencing moral turpitude) and several other various crimes (evidencing general lack of respect for the law as well as both drug and alcohol addiction), and who failed to disclose all convictions on his moral character application to the bar.[175] After its preliminary investigation, the ethics committee recommended that the applicant not be certified for lack of good moral character, but the hearing department reversed, finding the applicant had demonstrated his rehabilitation by clear and convincing evidence of remorse, his recovery from substance abuse, subsequent academic achievement, and community involvement, and that he now possessed the good moral character requisite to the practice of law; the review department affirmed.[176] On appeal by the ethics committee, the Supreme Court reversed and held the applicant was not presently fit to practice law.[177] The court explained that the applicant's fourteen years of rehabilitative efforts were insufficiently compelling to overcome the demonstrative moral turpitude of his criminal conduct, continuing dishonesty, and disregard for the law.[178]

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at 950.

174. *Id.* at 952-53. The court declined to credit applicant with his good conduct while incarcerated or on probation. *Id.* at 952.

175. *In re* Gossage, 5 P.3d 186 (Cal. 2000). Twenty five years prior to his seeking admission to the bar at the age of twenty one, Gossage killed his sister during an argument. After beating her to death with a hammer, he stabbed her with scissors, then fled the scene and concealed the evidence of his crime. He was on probation for forgery at the time and frequently binged on both alcohol and heroin. After two and a half years in prison for voluntary manslaughter, Gossage reassumed his dissipated lifestyle and was arrested and/or convicted of various crimes, including driving while intoxicated, theft, possession of heroin, public intoxication, forgery, failure to appear in court, and parole violations; he eventually was reimprisoned for six months. After his release, Gossage obtained a college degree and then a law degree. During this time, however, he incurred multiple traffic violations and attendant misdemeanor convictions for failure to appear in court and non-payment of fines. Of his seventeen criminal convictions, Gossage disclosed only four on his moral character application. *Id.* at 180-94.

176. *Id.* at 188, 195. Evidence of rehabilitation over the course of the fourteen years after his second imprisonment, Gossage obtained a college and law degree, abstained from illegal drug use, assisted various non-profit groups dedicated to urban development, volunteered in various political action groups and a substance abuse program, cooperated with the investigation of the ethics committee, and expressed remorse for his past misconduct. Twenty witnesses also testified in his support, including prominent political officials, professors, attorneys, and mental health experts. *Id.* at 194-95.

177. *Id.* at 202.

178. *Id.* at 198-202. Given the gravity of his misconduct, Gossage bore an equally heavy burden to demonstrate rehabilitation—especially in regard to the moral turpitude evidenced in the killing of his sister. The court considered the more recent traffic infractions and Gossage's mishandling of them as reminiscent of his previous more criminal misconduct, and was equally disturbed by his lack of candor in the bar admissions process. *Id.*

Regardless of the character of misconduct over which the ethics committee of the California State Bar Association has managed historically to distress itself—whether devolving from the undesirability of an applicant's political posture, impropriety of an applicant's lack of remorse and/or candor in regard to alleged professional and/or criminal activity, or insufficiency of an applicant's demonstrated rehabilitation from felonious behavior (generally attendant to the morally onerous use of illegal drugs)—the record of its moral character determinations scarcely evidences "the most exacting demands of due process of law" in avoidance of "passion, prejudice, or personal hostility." On the contrary, when subjected to judicial review, the record has evidenced moral character inquiries to be constitutionally "troublesome," "fundamentally unfair," and "ethically incongruous." In some cases, the California Bar has refused to certify applicants on the basis of matters judicially reviewed as morally insignificant—"trivial," "unserious," or even "conspicuously absent of moral turpitude;" in other cases, it has recommended certification to applicants despite prior misconduct judicially reviewed as morally debilitating—"particularly egregious," "protracted" and "enormous," or even "clearly demonstrative" of moral turpitude as exacerbated by "continuing disrespect for the law." The ethics of moral character determination seems distressingly indeterminate and scarcely in accord with the most exacting demands of due process. Albeit distressing, it is not surprising given the ethos of our time.

V. ETHICS OF GOOD MORAL CHARACTER

> "I do not know what the Good is. Were I of a more apocalyptic frame of mind, I would say that the time of the Good is over."[179]

In its classical form, ethics establishes the moral law for living in accord with the Good.[180] Historically, the moral law for living in accord with the Good was a matter of divine dictate; ethics was consequently a theological discipline: living in accord with the Good was achieved through living by the Word of God.[181] "Thou shalt—says the Law."[182] In the later years of the eighteenth century, however, evincing ethical distress over the numerous religious traditions laying claim to moral truth, Enlightenment thinkers sought to abstract universal moral principles from their religious ensconcement and

179. CAPUTO, *supra* note 8, at 30.

180. *Id.* at 4 ("Ethics lays the foundations for principles that force people to be good; it clarifies concepts, secures judgments, provides firm guardrails along the slippery slopes of factical life. It provides principles and criteria and adjudicates hard cases. Ethics is altogether wholesome, constructive work, which is why it enjoys a good name.").

181. *See generally* Matthew A. Ritter, *Universal Rights Talk/Plurality of Voices: A Philosophical-Theological Hearing, in* RELIGION IN INTERNATIONAL LAW 417-82 (Mark Janis & Carolyn Evans eds. 1999).

182. CAPUTO, *supra* note 8, at 13.

therefore provide them a properly rational foundation.[183] Ethics thus became a matter of autonomous moral reasoning rather than heteronomous faith. "I can—says Kant."[184] Remaining in awe of the "moral law within,"[185] the ethics of the Enlightenment sought to determine the universal norms of behavior through appeal to the common principles of practical reason, thus freeing moral agency from the dictates of particular religious traditions.[186] Enlightenment ethics was thus a function of a presumptively rational moral autonomy by virtue of which individuals inherit their intrinsic moral dignity as human.[187]

Unable to achieve consensus on either its rational means or its moral ends, however, enlightened skepticism toward its religious traditions landed ethical reflection not on the solid ground of universal moral normativity but on the shifting sands of moral relativism.[188] In the latter part of the nineteenth century, Friedrich Nietzsche remarked: "Naivete: as if morality could survive when the *God* who sanctions it is missing! The 'beyond' absolutely necessary if faith in morality is to be maintained."[189] Nietzsche proclaimed the futility of basing moral claims on anything other than the will to do so. Absent God, moral claims are a function of will, not reason. For Nietzsche,

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183. MACINTYRE, *supra* note 6, at 6 ("It was a central aspiration of the Enlightenment, an aspiration the formulation of which was itself a great achievement, to provide for debate in the public realm standards and methods of rational justification by which alternative courses of action in every sphere of life could be adjudged just or unjust, rational or irrational, enlightened or unenlightened. So, it was hoped, reason would displace authority and tradition. Rational justification was to appeal to principles undeniable by any rational person and therefore independent of all those social and cultural particularities which the Enlightenment thinkers took to be the mere accidental clothing of reason in particular times and places.").

184. CAPUTO, *supra* note 8, at 13.

185. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 166 (Lewis White Beck trans., Bobb-Merrill Co. 1956) (1788).

186. MACINTYRE, *supra* note 6, at 335.

187. *Id.* ("[T]he project of founding a form of social order in which individuals could emancipate themselves from the contingency and particularity of tradition by appealing to genuinely universal, tradition-independent norms was and is not only, and not principally, a project of philosophers. It was and is the project of the modern liberal, individualist society . . . ."). The ethics of the modern liberal society is rooted in the moral autonomy of the individual as the primal moral reality. *See* Douglas J. Den Uyl, *Liberalism and Virtue, in* PUBLIC MORALITY, CIVIC VIRTUE, AND THE PROBLEM OF MODERN LIBERALISM 55, 86 (T. William Boxx & Gary M. Quinliven eds., 2000).

188. MACINTYRE, *supra* note 6, at 335 ("[T]he most cogent reasons we have for believing that the hope of a tradition-independent rational universality is an illusion derive from the history of that project. For in the course of that history liberalism, which began as an appeal to alleged principles of shared rationality against what was felt to be the tyranny of tradition, has itself been transformed into a tradition whose continuities are partly defined by the interminability of the debate over such principles."). In short, the Enlightenment developed unanimity neither in the principles of moral reason nor consequently in the principles of morality whereby a universal ethics of rational autonomy could be established. *Id.* at 6 ("Yet both the thinkers of the Enlightenment and their successors proved unable to agree as to what precisely those principles were which would be found undeniable by all rational persons.").

189. FREIDRICH NIETZSCHE, THE WILL TO POWER 147 (Walter Kaufman ed., Walter Kaufman & R.J. Hollingdale trans., 1967) (1901).

to rationally justify moral ideas, in particular the idea of the Good, is to avoid taking responsibility for them. The principle of a moral law accessible through the moral reason of the individual as constitutive of its moral autonomy is not an idea that corresponds to any kind of moral reality. There simply is no reality that morality is therefore obliged to recognize. In essence, there is no truth to which morality must rationally conform.

> Presupposition of this hypothesis: that there is no truth, that there is no absolute nature of things nor a "thing-in-itself." This, too, is merely nihilism—even the most extreme nihilism. It places the value of things precisely in the lack of any reality corresponding to these values and in their being merely a symptom of strength on the part of the value-positers, a simplification for the sake of life.[190]

The truth of reality is precisely false: a fiction imposed upon existence for purposes other than truthful:

> This is the greatest error that has ever been committed, the essential fatality of error on earth: one believed one possessed a criterion of reality in the forms of reason—while in fact one possessed them in order to become master of reality, in order to misunderstand reality in a shrewd manner.[191]

> "Truth" is therefore not something there, that might be found or discovered—but something that must be created and that gives a name to a process, or rather to a will to overcome that has in itself no end—introducing truth, as a *processus in infinitum*, an active determining—not a becoming-conscious of something that is in itself firm and determined. It is a word for the "will to power."[192]

Without God, morality cannot viably be based on any kind of moral truth provided by rationality. Morality is simply not a function of reason. To believe so is profoundly to misconstrue what morality is. Absent its divine sanction, moral principles are a function, and a function only, of human sanction. And human sanction is grounded upon nothing other than its political power.

> [T]here is discontent verging on despair whenever some theorist tries to develop a system in which "found" ethical or legal propositions are to be treated as binding, but for which there is no supernatural grounding. God's will is binding because it is His will that it be. Under what other circumstances can the unexamined will of anyone else withstand the cosmic "says who" and come out similarly dispositive? *There are no such circumstances.* We are never going to get anywhere (assuming for the moment that there is somewhere to get) in ethical or legal theory unless we finally face the fact that, in the Psalmist's words, there is no one like unto the

190. *Id.* at 14.
191. *Id.* at 315.
192. *Id.* at 298.

Lord.[193]

Rational justification does not, and can not supplant God. Not only is this philosophically the case; it is historically the case as well—as evidenced by the progressive moral scepticism of the post-Enlightenment.[194] "The result of that realization is what might be called an exhilarated vertigo, a simultaneous combination of an exultant 'We're free of God' and a despairing 'Oh God, we're free.'"[195] The ethical project of the Enlightenment to rationally establish a universal morality abstracted from religious particularity has therefore engendered an "[i]ntractable plurivocity and heteromorphic proliferation"[196] characterized by relativistic ethical scepticism rather than moral conviction.[197]

Contemporary ethics is consequently morally indeterminate.[198] Practitioners of ethical reflection are wont to diagnose this ethical condition as "the crisis of liberal democracy,"[199] which is increasingly afflicted by a "declining sense of moral obligation,"[200] and therefore prognosticate that "the American experiment . . . is in deep trouble,"[201] due to the fact that "[t]he prospects of reviving belief in the moral law are dim."[202] Absent cultural consensus on the dictates of moral law, contemporary ethics is typified by a

193. Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1232 (1979).

194. "In the absence of some empirical truth about human nature or some transcendental realm of moral reality, there is no indubitable source for securing our most cherished moral values from a disabling skepticism." Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE J.L. & HUMAN. 233, 236 (1994).

195. Leff, *supra* note 193, at 1233.

196. CAPUTO, *supra* note 8, at 222.

197. MACINTYRE, *supra* note 6, at 6 ("[T]he legacy of the Enlightenment has been the provision of an ideal of rational justification which it has proved impossible to obtain. And hence in key part derives the inability within our culture to unite conviction and rational justification."). *See also* Winter, *supra* note 194, at 236 ("[T]he genesis of modernity lies in the conflict between reason and religion. On this familiar account, religious belief is seen as a prejudice to be overcome because it is an obstacle to true and accurate knowledge about the world. Accordingly, modern science begins with a healthy distrust of received dogma and an insistence on reason and empirical proof. Applied to the domain of values, however, the skepticism introduced by modern science and the attendant processes of secularization proves corrosive.").

198. "One feature of our time is the fading of the moral law. The idea of a moral law external to us may never have had secure foundations, but, partly because of the decline of religion in the Western world, awareness of this is now widespread." GLOVER, *supra* note 5, at 405.

199. Daniel J. Mahoney, *The Moral Foundations of Liberal Democracy, in* PUBLIC MORALITY, CIVIC VIRTUE, AND THE PROBLEM OF MODERN LIBERALISM 24, 38 (T. William Boxx & Gary M. Quinlivan eds., 2000).

200. Jeffrey C. Alexander & Steven J. Sherwood, *Mythic Gestures, in* MEANING AND MODERNITY 1, 11 (Richard Madsen et al. eds., 2002) (quoting ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL xii (1984)).

201. Stanley Hauerwas, *On Being a Christian and an American, in* MEANING AND MODERNITY 224, 225 (Richard Madsen et al. eds., 2002).

202. GLOVER, *supra* note 5, at 41.

radical diversity of competing moral preferences based not upon rational moral inquiry but upon moralistic posturing.[203] Such an ethical climate is controlled not by substantive moral demands; it is controlled rather by the merely procedural moral demand of egalitarian regard for such competing moral preferences.[204] The moral autonomy of the individual reigns supreme in a heteronomous ethical world.

The requisitely secular liberalism of such a heteronomous ethical world, however, in its continuing effort to disestablish itself from any substantive moral foundations, consequently establishes itself upon a procedural moral foundation of ethical indetermination.[205] Liberal commitment to moral indeterminancy, which devolved from the failure of the Enlightenment project to achieve rational consensus on ethical matters in abstraction from moral traditions, has itself come to comprise a moral tradition ethically determined to preserve the liberal social order of accommodating competing moral preferences, but which liberal social order is therefore morally intolerant of any moral preference that would dis-accommodate competing moral preferences.[206] The heteronomous ethical world of secular liberalism, therefore, is distinguished not by a robust diversity of competing moral convictions, but rather by a non-evaluative insipidity of competing individual preferences.[207] "And so finally modern liberalism, born of antagonism to all tradition, has transformed itself gradually into what is now clearly recognizable even by

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203. MACINTYRE, *supra* note 6, at 343 ("[R]ival appeals to accounts of the human good or of justice necessarily assume a rhetorical form such that it is as assertion and counterassertion, rather than as argument and counterargument, that rival standpoints confront one another."). *See also* Winter, *supra* note 194, at 236 ("With nothing else to secure moral justification, diverse or conflicting social practices seem to stand beyond rational approval or condemnation."); *accord* Hauerwas, *supra* note 201, at 232 ("[O]ur political culture has made us quite literally speechless (though of course we go on talking, but such talking represents no more than the clash of opinion).").

204. Taylor, *supra* note 7, at 190. Charles Taylor thus characterizes contemporary liberal democracy as a "procedural republic." *Id.* ("Respect me, and accord me my rights, simply in virtue of my being a citizen, not in virtue of my character, outlook, or the ends I espouse, not to speak of my gender, race, sexual orientation, and so on.").

205. MACINTYRE, *supra* note 6, at 335-36 ("Every individual is to be equally free to propose and to live by whatever conception of the good he or she pleases, derived from whatever theory or tradition he or she may adhere to, unless that conception of the good involves reshaping the life of the rest of the community in accordance with it. . . . And this qualification of course entails not only that the liberal individualism does indeed have its own broad conception of the good, which it is engaged in imposing politically, legally, socially, and culturally wherever it has the power to do so, but also that in so doing its toleration of rival conceptions of the good in the public arena is severely limited.").

206. *Id.* at 349 ("[L]iberalism, beginning as a repudiation of tradition in the name of abstract, universal principles of reason, turned itself into a politically embodied power, whose inability to bring its debates on the nature and context of those universal principles to a conclusion has had the unintended effect of transforming liberalism into a tradition.").

207. *See* Mark Blitz, *Liberal Freedom and Responsibility, in* PUBLIC MORALITY, CIVIC VIRTUE, AND THE PROBLEM OF MODERN LIBERALISM 107, 111-12 (T. William Boxx & Gary M. Quinliven eds. 2000) (arguing that liberal moral freedom has engendered an ethics of social acquisition characterized at best as an indeterminate voluntariness, and at worst as a bovine self-absorption).

some of its adherents as one more tradition."[208]

The tradition of modern liberalism as a procedural republic of heteronomous moral indeterminancy is scarcely explicable, however, as the mere historical consequence of a cultural diversification of competing religio-moral traditions devolving into a proliferation of competing individual preferences. Rather, the ethics of modern liberalism is explicable as itself a moral tradition by virtue of its having devolved from a distinctly Judeo-Christian religious heritage, which continues to provide for the central moral conviction of our civic society despite its secularization.

The primordially controlling religious concept for the Judeo-Christian understanding of human being is its creation in the image of God: "So God created man in his own image, in the image of God he created him; male and female he created them."[209] By virtue of reflecting the divine image, absolute worth is accorded human being.[210] Judaism ascribes this absolute value of humanity to every person.[211] Within Judaism, however, the absolute value of human being is not intrinsic to the being of human being, but is divinely granted. Such divine regard may be withheld or withdrawn depending upon fulfillment of God's will through obedience to the revealed Law of God (Torah).[212] Although absolute, Jewish moral regard for human beings is not universal.[213] Within its Christian heritage, however, divine regard for human being is fulfilled by the Son of God in the person of Jesus Christ. Through Christ, humanity is freed from sin, redeemed before God, and exists in a state of grace.[214] Divine regard is therefore realized not through obedience

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208. MACINTYRE, *supra* note 6, at 10.

209. *Genesis*, 1:27.

210. Michael Fishbane, *The Image of the Human and the Rights of the Individual in Jewish Tradition, in* HUMAN RIGHTS AND THE WORLD'S RELIGIONS 17, 18 (Leroy S. Rouner ed., 1988) ("For at the core of the biblical system is the perception that the person is of absolute and inviolate worth: created in the divine image."). Fishbane notes that the biblical attribution of absolute worth to human being distinguished early Judaism from other Near Eastern religions. Among the Babylonians, Assyrians, and Hittites, human life could be measured economically in terms of the value of property or possessions: "[L]ife and property are commensurable values, used interchangeably in the legal system, there being presupposed an exchange rate between persons and things." *Id.* The Bible allows no such economic valuation of human being, and therefore permits no legal substitution of property for human life: "Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." *Genesis* 9:6.

211. Fishbane, *supra* note 210, at 17 ("The fundamental presupposition of the rights of the person in Judaism is a belief in the absolute and compromisable worth of human life. This belief is grounded in the unique value of the individual in the divine scheme of creation and is variously articulated in both biblical literature and rabbinic tradition.").

212. Judaism has generally confined its absolute regard for human life to those of the Jewish faith who, moreover, properly fulfill their religious duties as such. *Id.* at 25.

213. Not only has Jewish regard for the absolute value of human life been historically confined to those of the Jewish faith who fulfill their religious duties as such, but certain categories of persons were not historically accorded full human status to begin with (e.g., idiots, minors, women, androgenes, etc.). *Id.* at 26.

214. As the incarnation of divinity in humanity, the person of Jesus Christ rectified the relationship between God and humankind—a rectification achieved not by human fulfillment

(to the law), but through faith (in Christ): "If you continue in my word, you are truly my disciples, and you will know the truth, and the truth will make you free."[215] Christian freedom from Jewish law is therefore "granted by God and received in faith."[216] The Christian is free from the burden of the law by virtue of living in Grace. "For the law was given through Moses; grace and truth came through Jesus Christ."[217] A leading theologian of the twentieth century, Karl Barth, construes the Christian faith accordingly:

> To believe means to believe in Jesus Christ. But this means to keep wholly and utterly to the fact that our temporal existence receives and has and again receives its truth, not from itself, but exclusively from its relationship to what Jesus Christ is and does as our Advocate and Mediator in God himself. . . . [I]n faith we abandon whatever we might otherwise regard as our standing, namely, our standing upon ourselves . . . for the real standing in which we no longer stand on ourselves . . . but . . . on the ground of the truth of God and therefore on the ground of the reconciliation which has taken place in Jesus Christ and is confirmed by him to all eternity.[218]

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of the law, but by the Grace of God. *Romans* 8:3-4 ("For the law of the Spirit of life in Christ Jesus has set me free from the law of sin and death. For God has done what the law, weakened by the flesh, could not do: sending his own Son in the likeness of sinful flesh and for sin, he condemned sin in the flesh, in order that the just requirement of the law might be fulfilled in us, who walk not according to the flesh but according to the Spirit."). Rectification between God and humankind is thus entirely God's doing. Through Christ, therefore, humankind is freed from the logic (or word) of law, and lives in the logic (or word) of Spirit whereby divine Grace may be enjoyed fully and eternally: "For the wages of sin is death, but the free gift of God is eternal life in Christ Jesus our Lord." *Romans* 6:23. In essence, the law of God is fulfilled in the person of Jesus Christ, which fulfillment is accorded by the Grace of God to all of humankind.

215. *John* 8:31-32. The freedom referred to here is freedom from the burden of having to fulfill the divine will through obedience to God's law: "For freedom, Christ has set us free; stand fast therefore, and do not submit again to the yoke of slavery." *Galations* 5:1.

216. Trutz Rendtorff, *Christian Concepts of the Responsible Self, in* HUMAN RIGHTS AND THE WORLD'S RELIGIONS 33, 39 (Leroy S. Rouner ed., 1988).

217. *John* 1:17.

218. 2 KARL BARTH, CHURCH DOGMATICS, THE DOCTRINE OF GOD 159 (T. H. L. Parker et al. trans., G. W. Bromiley & T. F. Torrance eds., 1957). The truth of Jesus Christ is the truth of the reconciliation between the divine and the human. For the Christian faith, Jesus Christ reveals this truth by virtue of embodying this reconciliation. The truth that we humans are constitutionally unable to realize is realized in the constitution of Jesus Christ. MATTHEW A. RITTER, GOD AND TRUTH: A CONCEPTUAL ANALYSIS OF RELIGIOUS COMMITMENT; SUBVERSION OF THE S/SUBJECT 158 (Unpublished Dissertation, Yale University, 1989) (discussing the metaphysics, philosophical and theological, of the Christian faith) (on file with author). "Jesus Christ is the atonement. But that means that He is the maintaining and accomplishing and fulfilling of the divine covenant as executed by God Himself." 4 KARL BARTH, CHURCH DOGMATICS, THE DOCTRINE OF GOD 34-35 (G. W. Bromiley trans., G. W. Bromiley & T. F. Torrance eds., 1956). The person of Jesus Christ thus renders/reveals full accord between divinity and humanity, and accordingly between God and all persons. Although this accord is realized by Christ alone, it is revealed to humanity, the only proper response to which is faith: "Believers 'are' the elect . . . so far as they bear witness to the truth, that is, to the elect man, Jesus Christ, and manifest and reproduce and reflect the life of this one Elect." 2 KARL BARTH, *supra*, at 346. Constitutionally unable to realize the truth of the divine-human accord itself, truth is realized for humanity by Jesus Christ. Humanity thus receives truth vi-

The Christian understanding of being human is entirely a function of the extraordinary value divinely granted to human being through the person of Jesus Christ. This value is not only absolute; it is *fait accompli*. Through Christ, all persons exist in the state of Grace by virtue of being human. Christ rectified divine regard for human being. All humans participate in this rectification. Divine regard for the individual is thus utterly independent of anything the individual is or does. Grace is prevenient, it is achieved not by human, but by divine effort in the person of Christ. The absolute value of a person therefore pre-exists any social differentia, and is consequently universal. All persons are accordingly equal by virtue of no-thing—not by virtue of anything a person is or does. Pre-established through Christ, divine regard for humanity is absolute, universal, and egalitarian.

Universal egalitarian regard for the absolute value of the individual devolves from this radical freedom from the law provided by Grace in the person of Jesus Christ. The Christian community of faith proclaims this freedom:

> But now the righteousness of God has been manifested apart from the law, although the law and the prophets bear witness to it, the righteousness of God through faith in Jesus Christ for all who believe. For there is no distinction; since all have sinned and fall short of the glory of God, they are justified by his grace as a gift, through the redemption which is in Jesus Christ, whom God put forward as an expiation by his blood, to be received in faith.[219]

The Christian community of faith is itself the communal incarnation of Christ as proclaiming redemption through Christ.[220] As the communal incarnation of Christ, Christian ethics is accordingly governed by the single moral dictate of Christ as the Word of God: "I give you a new commandment: love one another; just as I have loved you, you must also love one another."[221] The law—whereby the human is reconciled with the divine—becomes through Christ the singular commandment to be toward all others as Christ was: to love—unconditionally, without regard to anything a person is or does.[222] Christian love is granted through divine grace—a function not of

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cariously. Only through faith in its revelation may this truth be acknowledged and received. "[T]he truth of man's being . . . can consist in nothing other than in man's response with a corresponding faithfulness to the way and work of God [in Jesus Christ], to God's faithfulness." *Id.* at 207. Reconciliation between divinity and humanity is therefore accomplished by God, through the person of Jesus Christ, but for the salvific benefit of all human kind.

219. *Romans* 3:21-25.

220. "For where two or three are gathered in my name, there I am in the midst of them." *Matthew* 18:20.

221. *John* 13:34.

222. *Matthew* 22:35-40 ("And one of [the Pharisees], a lawyer, asked [Jesus] a question, to test him [on Jewish law]. 'Teacher, which is the greatest commandment in the law?' And he said to him, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, You shall love your neighbor as yourself. On these two commandments depend all the law and the

human achievement; Christian love is received in gratitude—as profoundly undeserved.

Christian freedom from the law, however, does not mean unlawfulness. On the contrary, Christian ethics merely deprives the law of its soteriological significance—i.e., one may not acquire redemption before God through acting lawfully. Religious freedom from the law permits moral freedom for the law. Obedience to the law serves not religiously to rectify oneself with God, but morally to manifest one's rectitude with God. Having been rectified with God through Christ, one is free to act accordingly. Acting lawfully thus remains a primordially religious activity;[223] it is performed, however, not out of religiously self-interested motives to right oneself with God, but out of moral interest to act rightly in accordance with the divine will as revealed through the law.[224] Hence the biblical remonstration against religious hypocrisy: "Woe to you . . . hypocrites! For you tithe the mint and dill and cumin, and have neglected the weightier matters of the law, justice and mercy and faith . . . ."[225]

The religious heritage of the Judeo-Christian tradition thus accords absolute, universal, and egalitarian value to all individuals—simply and only by virtue of their being human. The Judeo-Christian tradition accordingly provides for the inherent dignity of every individual human being simply by virtue of being human and not by virtue of any other defining social characteristic whatsoever. Following the philosophical lead of Enlightenment thinkers—most notably Immanuel Kant,[226] and continuing through theological efforts in the twentieth century—most notably by Paul Tillich,[227] however, secularism has persistently sought to abstract this ethic from its religious ensconcement and therefore provide it a properly rational basis, hence non-contingent upon adherence to any particular sectarian dogma. The ethics

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prophets.'"). When asked to clarify who one's neighbor is, Jesus responds with the Good Samaritan parable, making it clear that neighbor encompasses all others, no matter how detestable. *Luke* 10:29-37.

223. "'Did not your father eat and drink and do justice and righteousness? Then it was well with him. He judged the cause of the poor and needy; then it was well. Is not this to know me?' says the Lord." *Jeremiah* 22:15-16.

224. "'Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me. . . .' 'Truly I say to you, as you did it not to one of the least of these, you did it not to me.'" *Matthew* 25:40, 45.

225. *Matthew* 23:23. The Jewish prophetic books are also replete with the same disaffection for self-serving religious ceremony over moral rectitude with the divine will. *Isaiah* 1:10-17 ("Hear the word of the Lord, . . . 'What to me is the multitude of your sacrifices?' says the Lord; . . . 'Wash yourselves; make yourselves clean; remove the evil of your doings from before my eyes; cease to do evil, learn to do good; seek justice, correct oppression; defend the fatherless, plead for the widow.'"); *Amos* 5:21-24 ("I hate, I despise your feasts, and I take no delight in your solemn assemblies. . . . Take away from me the noise of your songs; to the melody of your harps I will not listen. But let justice roll down like waters, and righteousness like an ever-flowing stream.").

226. *See generally* IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (1793).

227. *See generally* PAUL TILLICH, SYSTEMATIC THEOLOGY (1951).

of modern liberalism accordingly proclaims as its fundamental moral principle an absolute, universal, and egalitarian regard for the value of each human being, but which regard refrains from reliance upon religious belief. In its enthusiasm to elide religion from morality, secular esteem for the inherent value of human being turns not on divine regard for the human, but on human self-regard. Such human self-regard consequently truncates the value of human being into its autonomy: rational, independent, self-sufficient, unencumbered and unconnected to others except by choice. For secularism, the value of being human thus becomes intrinsic to its humanity—therefore not a function of its endowment by divinity.

Absent its religious foundation, this secular egalitarian regard for all persons profoundly re-construes the worth of the individual, yielding an ethics that inverts the Judeo-Christian regard for others into a regard for self. The Judeo-Christian tradition construes the absolute worth of the individual as a function of divine regard. The truncation of this divine regard into human self-regard consequently transforms an ethics driven by unconditional love of others into an ethics driven by unconditional self-interest. When worth is granted, it is received graciously; when owned, it is demanded indignantly. In its secular anxiety to abstract the human worth of the individual from all differentia, particularly religious, liberal ethics collapses a uniquely Judeo-Christian understanding of the absolute, universal and equal value of all persons into the being of the individual. Secular morality is thus a truncated inversion of religious morality.[228]

The ethics of modern secular liberalism as a procedural republic of heteronomous moral indeterminancy thus has a religious etiology that provides for its historical force as a tradition. As a truncated inversion of religious morality, secular morality trades upon an egalitarian regard for the dignity of each individual, but which dignity it locates not in divine regard for the individual to which the individual is morally obliged to respond, but in the self-regarding moral autonomy of each individual. Moral "freedom [has come] to mean freedom to pursue self-interest."[229] The primal movement of secular ethics is active, not responsive. Secular ethics accordingly places the burden of moral autonomy entirely upon the abstracted agency of the individual in its perennial pursuit of self-interested preferences.[230]

Self-interested preferences are largely a function, however, not of moral

228. *See* HANS KUNG, ON BEING A CHRISTIAN 27 (Edward Quinn trans., Doubleday & Co., 1976) ("The different spheres of life were seen less and less from the standpoint of a higher world. They came to be understood in themselves and explained in terms of their own immanent laws. Man's decisions and plans came to be based more and more on these intrinsic laws and not on the supposed will of supramundane powers.").

229. ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL xii (1984), *quoted by* Jeffrey C. Alexander & Steven J. Sherwood, *Mythic Gestures, in* MEANING AND MODERNITY 1, 11 (Richard Madsen et al. eds., 2002).

230. MACINTYRE, *supra* note 6, at 337-39 (arguing that the central virtue of modern liberalism is the ability effectively to bargain and therefore implement one's preferences as a matter of prudential practical reasoning).

agency but of social circumstance.[231] Although the secular ethics of modern liberalism presumes each individual to possess an essential moral agency in abstraction from the existential preferences toward which it freely acts, the exercise of moral autonomy betrays a converse human reality. Moral agency is primarily responsive to the social circumstances in which it acts.[232] The moral identity of the modern secular individual is accordingly engendered not principally by moral inspiration but by pragmatic aspiration.[233] Few indeed are the individuals who would otherwise possess the strength of character to bear the burden of their own moral autonomy.[234] Competing moral preferences within the heteronomous ethical world of secular liberalism amount to little more than the avid expression of individuated feelings dictated typically by social ambition of one sort or another as informed by a myriad of rivaling personal, familial, cultural, racial, national, moral, religious, and economic concerns.[235] This comports with a liberal market econ-

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231. As quintessentially expressed in the writings of and subsequent philosophical traditions founded by both Martin Heidegger and Ludwig Wittgenstein, humans are irreducibly situated in the factical historicity (Heideggerian) of their life forms (Witttgensteinian) as evidenced by the metaphysical primacy of language in the construction of reality. *See* MATTHEW A. RITTER, GOD AND TRUTH: A CONCEPTUAL ANALYSIS OF RELIGIOUS COMMITMENT; SUBVERSION OF THE S/SUBJECT pt. II, ch. 1 (Unpublished Dissertation, Yale University, 1989) (on file with author). *See, e.g.*, Winter, *supra* note 194, at 244 ("We are contingent beings in the literal sense of the original Latin contingentem—'touching on all sides.' We are enmeshed in contingency; we are inextricable from it.").

232. Winter, *supra* note 194, at 244 ("We are embodied in a field of social interaction that is both our formative context and our own ongoing production. For us, there can be no transcendence of the contingent social contexts that are, simultaneously, both constitutive of the self and the field of action in which the self is always already implicated as a responsible actor.").

233.

> There is a painful contradiction between what modernity promises and what it delivers. It promises—indeed demands—intellectual, moral, and political emancipation. Yet it delivers an iron cage. Modern persons aspire to express themselves as autonomous individuals, even as their choices are channeled into paths laid down by the modern market economy and bureaucratic state.

Richard Madsen et al., *Introduction, in* MEANING AND MODERNITY ix, ix (Richard Madsen et al. eds., 2002).

234. *Cf.* Den Uyl, *supra* note 187, at 88 ("If liberalism requires the widest possible latitude for individual responsibility, then the issue we are left with is not whether liberalism is connected with virtue or destructive of it, but rather whether the demands of liberalism for virtue are too great for creatures prone to ignorance, prejudice, and weakness of will.").

235. *See* MACINTYRE, *supra* note 6, at 343 ("[Moral] [s]tandpoints are construed as the expression of attitude and feeling and often enough come to be no more than that."). MacIntyre further contends that the source of such moral attitudes and feelings remain largely unexamined and incoherent:

> [Post-Enlightenment liberals] tend to live betwixt and between, accepting usually unquestioningly the assumptions of the dominant liberal individualist forms of public life, but drawing in different areas of their life upon a variety of tradition-generated resources of thought and action, transmitted from a variety of familial, religious, educational, and other social and cultural sources. This type of self which has too many half-convictions and too few settled coherent convictions, too

omy that valorizes a facile diversity in a programmatic effort to eradicate fundamental difference so as to render all workers the same—effectively interchangeable.[236] Although reigning supreme in the heteronomous ethical world of secular liberalism, the moral autonomy of the modern individual is principally governed social prudence.[237]

VI. PROBLEMATIC ETHICS OF GOOD MORAL CHARACTER DETERMINATION

> In a context designed to assess character, the bar encourages prudence rather than principle.[238]

Bureaucratic ethical inquiry into moral character thus inherits a heteronomous ethical world of moral indetermination, but within which world it purports to pass determinate judgment on the moral autonomy of applicants aspiring to the practice of law. The administrative determination of good moral character is ethically problematic because it employs the moral principles of secular modernity in a post-modern world of indeterminate moral prudence. It therefore trades on a profound ethical incongruity that undermines the very moral integrity it seeks to identify. By virtue of this ethical incongruity, moreover, the administrative determination of good moral character dis-serves a state's constitutionally permissible interest in protecting both the public and the legal system from harm, and services rather a constitutionally suspect intrusion into the privacy rights of applicants to the bar.

The ethics of secular modernity demands a procedurally egalitarian regard for the dignity of each individual, which dignity it therefore locates in the self-regarding moral autonomy of each individual: rational, independent, self-sufficient, unencumbered and unconnected to others except by choice.

> many partly formulated alternatives and too few opportunities to evaluate them systematically, brings to its encounters with the claims of rival traditions a fundamental incoherence which is too disturbing to be admitted to self-conscious awareness except on the rarest of occasions.

Id. at 397.

236. Harvey Cox, *Mammon and the Culture of the Market, in* MEANING AND MODERNITY 124, 134 (Richard Madsen et al. eds., 2002). ("The Market God prefers individualism and mobility. It needs to be able to move people wherever production requires. It is only hampered when individuals have deep ties to families, local traditions, particular places. Therefore, it wishes to dissolve these ties. In the Market's eyes, all places—and indeed all persons—are interchangeable. The market prefers a uniform, homogenized world culture with as few inconvenient particularities as possible."). The market economy of secular liberalism thus engenders "a benign neglect of privatized differences." Richard Madsen et al., *Introduction, in* MEANING AND MODERNITY ix, ix (Richard Madsen et al. eds., 2002).

237. *See* Ann Swindler, *Saving the Self, in* MEANING AND MODERNITY 41, 53-54 (Richard Madsen et al. eds., 2002) ("[B]oth the institutional depletion and economic dynamism of our era create pressure to strengthen the self, make it more autonomous, more independent. The irony is that it is hard to develop stronger, more integrated, more genuinely autonomous selves in an institutionally depleted social world.").

238. Rhode, *supra* note 10, at 584.

Secular ethics consequently attributes an abstracted moral agency to the exercise of this autonomy. The administrative determination of good moral character evaluates the character of this moral agency on the basis of previous misconduct—conduct subject to criminal, civil, administrative, political, or medical sanction of one sort or another. It therefore presumes an intrinsic autonomous moral agency that is either morally good or bad based upon the extrinsic evidence of sanctionable conduct.[239] Sanctionable conduct is presumptive evidence of badness; the absence of sanctionable conduct is presumptive evidence of goodness.[240] That this scarcely comports with the conceptual grammar of what is generally meant by good moral character betrays the ethical incongruity of an administrative moral character determination. Relying upon a strong notion of autonomy to attribute a determinate character to the intrinsic moral agency of an applicant, the administrative determination of moral character valorizes extrinsic conformity to ethically indeterminate heteronomous social standards. This reliance is not only ethically problematic in both the attribution of a determinate moral character and the attendant prediction of fitness to practice law; it naively misconstrues the character of moral conduct.

The determination of good moral character as the absence of sanctionable conduct dictates conformity to heteronomous social standards within a culture of secular liberalism that procedurally eschews substantive moral standards on the one hand, but moralistically imposes them on the other, albeit in an inevitably incoherent and historically histrionic manner. Hence the curious legacy of good moral character determinations, which despite "the most exacting demands of due process of law,"[241] evidences a remarkably unexacting imposition of vague and arbitrary moral standards when judicially reviewed.[242] The fact that very few administrative adverse moral character determinations ever reach judicial review—due largely to the inordinate cost of appealing administrative determinations, both emotionally and financially—obscures the true extent to which bar associations have imperiously prevented entry into its membership.[243] The administrative determina-

239. McDowell, *supra* note 46, at 328 ("We go to great lengths in professional education and testing to ensure minimum adequate levels of expertise as a prerequisite to licensing. We do little to ensure or develop the requisite moral character. We seem to feel it is either there or not, and our certification through licensing is an attempt to attest to its presence.").

240. *Id.* at 329 ("'Good moral character' in this sense is primarily negative, signifying that nothing drastically unethical is known about the candidate, or more minimally that the applicant has never been convicted of a crime. In effect, we use a weak concept of moral character and a strong presumption in favor of its presence.").

241. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 174 (1971) (Black, J. dissenting).

242. Ratcliff, *supra* note 49, at 488 ("Ambiguous notions of good character coupled with vague tests for judging an applicant's character, have resulted in inconsistent results in bar admission cases.").

243. Rhode, *supra* note 10, at 493-94 ("Although the number of applicants formally denied admission has always been quite small, the number deterred, delayed, or harassed has been more substantial. In the absence of meaningful standards or professional consensus, the

tion of good moral character trades not on careful inquiry into the exercise of an applicant's moral autonomy, but on moralistic "passion, prejudice, or personal hostility"[244] in regard to conduct nonconforming to ethically indeterminate social standards.[245]

More profoundly troublesome, however, is that the moralistically "capricious and prejudicial"[246] imposition of ethically indeterminate social standards induces conformity to such standards. Good moral character becomes principally a matter of prudence in the pursuit of a specific social preference to practice law.[247] Because the administrative determination of bad moral character is a function of an applicant's misconduct, the good moral character of an applicant is more readily a matter of cleverness than ethics.[248] This is problematic both pragmatically and ideologically. Pragmatically, in a profession devoted—at least in its more honorable moments—to championing the rights of the unpopular, such an ethics of conformity does not well serve the interests of the bar.[249] Ideologically, what matters within an ethics of conformity to indeterminate moral standards is "seeming, rather than being moral."[250] The administrative determination of good moral character reduces

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filtering process has proved inconsistent, idiosyncratic, and needlessly intrusive."). Given the heightened level of inquiry for those who have engaged in misconduct in some way or another, whether legally, administratively, politically, economically, or medically, every aspect of an applicant's existence becomes grist for the mill of moral scrutiny. The emotional burden of such inquiry is excessive. Moreover, the financial burden of challenging an adverse moral character determination is extreme. In California, licensure attorneys typically charge a $5,000 fee for representation at the administrative hearing and a further $20,000 retainer for representation at the State Bar Court. Such costs are generally well beyond the financial means of recent law school graduates.

244. *Ex Parte* Garland, 71 U.S. 333, 347 (1866).

245. *See* McDowell, *supra* note 46, at 325 ("[Another] difficulty is caused by the application of the concept of 'good moral character' to a series of problematic moral issues over which there is currently ideological or political disagreement. Examples are questions of normality in sexual conduct, the degree to which drug use is immoral, the permissible extent of dissembling in relations with others, the acceptable range of eccentric personal conduct or opinions, etc. Good moral character has become a weapon in those conflicts. For example, one person may argue that a strict code of personal conduct as defined by religious or moral beliefs signifies good moral character, while another, not sharing that value position, might argue that a tolerance of human differences is a greater hallmark of good moral character.").

246. Rhode, *supra* note 10, at 575.

247. Rhode, *supra* note 10, at 584 ("In a context designed to assess character, the bar encourages prudence rather than principle. Such spectacles devalue the concept of morality they purport to maintain.").

248. *See* GLOVER, *supra* note 5, at 20 (arguing that in any bureaucratic ethical regime, which "rig[s] the social rewards and penalties so that co-operation becomes a winning strategy." A person wishing to avoid exclusion will engage in "a sophisticated calculation of self-interest," such that "what matters is reputation and image, rather than what you are really like.").

249. *Cf.* Rhode, *supra* note 10, at 512 ("And it is difficult to construe the bar's parochial concerns as the kind of legitimate state interest normally required to restrain vocational choice.").

250. GLOVER, *supra* note 5, at 20.

morality to the appearance of morality.[251] Hence the profound ethical incongruity of an administrative moral character determination: it confuses conformity to a morally indeterminate heteronomy with the exercise of moral autonomy.

The administrative determination of good moral character exacerbates this ethical incongruity by presuming, moreover, that its diagnosis of moral character provides a prognosis of moral conduct. Given the constitutionally permissible justification for the administrative determination of good moral character, it serves ultimately a predictive rather than descriptive function toward certifying that an applicant to the bar will not harm the public or compromise the public image of the bar as a licensed attorney.[252] Because the administrative determination of good moral character evaluates moral character on the basis of previous conduct, it requisitely presumes that past conduct is viably predictive of future conduct.[253] The ethical fallacy of this presumption is betrayed by its lack of empirical verification.[254] Should it be disposed to ignore the judgment of those having professional expertise in such matters, who have been uniformly unsuccessful in providing any empirical justification for the claim that prior misconduct is a reliable predictor of future misconduct,[255] bureaucratic ethical inquiry would be well served to note the long-standing legal proscription against allowing prior misconduct as evidence of character.[256] The administrative determination of bad moral character on the basis of prior misconduct further presumes that instances of misconduct within one ambit of life augurs misconduct in others—to wit, in the future practice of law. No evidence supports this presumption.[257] More-

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251. McDowell, *supra* note 46, at 333 ("One questionable if not totally unacceptable use of 'good moral character' is as a control mechanism, pushing professionals toward conformist and safe behavior.").

252. *Id.* at 327 ("[T]the concept [of 'good moral character']is not used descriptively, but as a basis for prediction.").

253. McChrystal, *supra* note 49, at 67 ("[T]he prevailing view of bar admission authorities is that past conduct predicts future conduct."). *See also* Rhode, *supra* note 10, at 545-46 ("[B]ar decisionmakers are all operating on one shared empirical premise. Their common assumption is taht [sic] certain attitudes and actions are sufficiently predictive of subsequent misconduct to justify the costs of certification procedures.").

254. McChrystal, *supra* note 49, at 68 ("Although this is a rational and attractive premise, it has not been proven empirically in the context of bar admission.") (referring to a study commissioned by the American Bar Association in the early 1970's, which attempted to establish some psychometrically viable standards whereby to predict attorney misconduct, but which was subsequently shown to be entirely unfeasible). *See also* Rhode, *supra* note 10, at 546.

255. Rhode, *supra* note 10, at 559 ("Even trained psychiatrists, psychologists, and mental health workers have been notably unsuccessful in projecting future deviance, dishonesty, or other misconduct on the basis of similar prior acts.") (citing J. MONOHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981) (U.S. Dep't of Health and Human Services Monograph); C. NETTER, RESPONDING TO CRIME 88-92 (1982); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978)).

256. *See, e.g.*, FED. R. EVID. 404(b).

257. Rhode, *supra* note 10, at 560 ("Not only do examiners and judges generally lack

over, the administrative determination of good moral character on the basis of regret of previous bad conduct and subsequent good conduct lacks empirical support as well.[258] Perhaps most significantly, the pervasiveness and interminability of attorney misconduct empirically obviates the viability of such an administrative certification of good moral character for admission to the bar.[259]

The governing rationale that ineluctably leads bureaucratic ethical inquiry to determine moral character on the basis of prior misconduct, despite the wisdom of legal tradition and professionally propounded empirical evidence to the contrary, is that it posits—in accord with its modern liberalist heritage—an abstracted moral agency to be the object of its characterization as either good or bad. Prior misconduct is consequently surmised as evidence of a faulty moral agency in the exercise of its autonomy, which faulty moral agency is therefore augured, absent rehabilitation, to misconduct itself in the future. Rehabilitation is accordingly imagined as the moral repair of a faulty moral agency, evidenced by regret of previous bad conduct and subsequent good conduct. This liberalist conception of autonomous moral agency devolves, of course, from an archetypically religious notion of the soul—in its commission of sin, the soul becomes stained; purification is effectuated through penitent confession and righteous action toward redemption.[260]

Aside from its suspect conceptual dependence upon an archaic metaphysics of moral agency, both philosophical and theological, such preconceptions about the character of moral agency as evidenced by conduct and regard for conduct inevitably occasion unbounded bureaucratic inquiry into an applicant's life in regard to matters that may bear no reasonable relationship to fitness for the practice of law.[261] Because the purported object of

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clinical expertise, they are dealing with highly circumscribed data. Decisionmakers are frequently drawing inferences about how individuals will cope with the pressures and temptations of uncertain future practice contexts based on one or two prior acts committed under vastly different circumstances. [A] half century of behavioral research underscores the variability and contextual nature of moral behavior: A single incident or small number of acts committed in dissimilar social settings affords no basis for reliable generalization.").

258. *Id.* ("It is equally problematic to assume, as do most courts and commentators, that individuals willing to acknowledge the error of prior misconduct are less likely to stray from the path of righteousness in the future. Despite our historic faith in the confessional, current research reflects that individuals' resistance to temptation and remorse for past transgressions are 'completely independent or at best minimally interrelated.'") (citing W. MISCHEL, PERSONALITY AND ASSESSMENT 26 (1968)).

259. McDowell, *supra* note 46, at 336 ("The claim that all licensed members of a profession have good moral character loses credibility if it is regularly falsified by examples of egregiously unprofessional conduct.").

260. *See* PAUL RICOEUR, THE SYMBOLISM OF EVIL 37-41 (Emerson Buchanan trans., 1967).

261. *See* Rhode, *supra* note 10, at 575, 577 (arguing that the scope of ethical inquiry is unjustifiably expansive both spatially ("a vast amount of the biographical data demanded bears no meaningful relationship to the legitimate objectives of bar certification. And the undisciplined scope of inquiry opens opportunities not only for unwarranted intrusions, but also

moral scrutiny is the intrinsic character of the applicant's moral agency, all extrinsic aspects of an applicant's life—literally everything an applicant has ever done, said, or even thought—becomes relevant evidence of that character. This allows for undue governmental intrusion into matters otherwise constitutionally protected as private,[262] or legislatively protected as expunged, sealed, or pardoned.[263] Such intrusion is dramatically exacerbated by the ethically indeterminate standards of such moral scrutiny.[264]

Ironically, the expansive moral scrutiny directed at bar applicants toward certification is not generally directed at bar members in disciplinary proceedings.[265] Such a disparity between attorney certification and attorney discipline is both constitutionally and ethically problematic. The administrative determination of moral character is justified only with regard to fitness for the practice of law in order to protect the public and the legal system from harm. Diagnostic inquiry into attorney misconduct should therefore comport with prognostic inquiry into attorney misconduct.[266] The disparity betrays a bar's operative interest in maintaining "a licensing ritual that too often debases the ideals it seeks to sustain."[267] Under its constitutionally permitted principles of ethical inquiry, a bar should be a good deal more concerned about dictating attorney fitness than predicting applicant unfit-

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for capricious and prejudicial inferences from irrelevant information.") and temporally ("[s]ince relatively few questions include any time constraints, their scope includes conduct that may be so remote at the time of application as to bear no rational relationship to current fitness to practice.")).

262. *Id.* at 584 ("To enlist applicants, their counselors, and references in disclosure of highly personal information compromises fundamental notions of dignity and autonomy.").

263. *Id.* at 577 ("Requiring revelation of all arrests, or of juvenile or expunged offenses, is particularly troubling in light of the statutory provisions in most states generally shielding such information from compelled disclosure. The public policies underlying such legislation—that adverse inferences should not be drawn from conduct of marginal probative value—are as applicable to bar certification decisions as to other licensing and employment determinations."); *accord* May, *supra* note 9, at 208 ("Pardons, clemency, or convictions that have been annulled or expunged should operate to completely eliminate the effect of a prior conviction for purposes of occupational licensing laws.").

264. Rhode, *supra* note 10, at 493 ("In the absence of meaningful standards or professional consensus, [moral character inquiry] has proved inconsistent, idiosyncratic, and needlessly intrusive. We have developed neither a coherent concept of professional character nor effective procedures to predict it.").

265. *See* McChrystal, *supra* note 49, at 71 ("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.").

266. Rhode, *supra* note 10, at 549 ("Insofar as the profession is truly committed to public—rather than self-protection, the incongruity between disciplinary and certification procedures is untenable.").

267. *Id.* at 494; *accord* Barton, *supra* note 30, at 449 ("Current entry regulations . . . largely benefit existing lawyers. The entire onus of guaranteeing quality falls upon entrants to the market, with the helpful side effect of limiting competition for existing practitioners. Likewise, regulation of current lawyers is as unobtrusive as possible, leaving little ongoing control for quality or competence.").

ness.[268] To deny applicant certification on the basis of a conceptually incoherent and empirically unjustified prediction of unfitness, and yet to retain attorney certification under less stringent standards of fitness, is constitutionally suspect, ethically incongruous, and renders meaningless the administrative certification of good moral character.

The administrative determination of moral character trades on an ethical incongruity that conflates the exercise of moral autonomy with conformity to heteronomous social standards. It consequently purports to determine moral character by virtue of ethically indeterminate and therefore idiosyncratically moralistic criteria, which inevitably occasions an unduly intrusive scrutiny conducted on the basis of a conceptually incoherent and empirically unjustified prediction of fitness to practice law. A bar's bureaucratic ethical inquiry toward the determination of moral character consequently tends to subvert the very principles it endeavors constitutionally to serve—protection of both the public and the legal system.[269] By valorizing the appearance of morality over morality, the administrative determination of moral character conduces, rather, to the promotion of prudence over principle, which undermines the very moral integrity it seeks to identify. Neither the public nor the public image of the bar is well served by a bureaucratic ethical regime that inevitably and invariably contributes to the moral malaise of its membership.

CONCLUDING UN-ETHICAL POSTSCRIPT

> The lawyers, not the philosophers, are the clergy of liberalism.[270]

In an ethically indeterminate world, a bureaucratic moral scrutiny is singularly unsuited to the determination of moral character. By virtue of certifying applicants to the bar through a process of moral inquiry that is conceptually incoherent, empirically unjustified, ethically insipid, and constitutionally suspect, the administrative determination of moral character conduces, rather, to a moral calculus of self-interest that obviates the interest of the bar in protecting the public and the legal system from the immoral. The membership of a bureaucratic ethical regime wears a gygian ring of moral seemliness. Moral seemliness scarcely comports with the otherwise noble profession of lawyering, to which is entrusted our very life and liberty.

Given its constitutional mandate to protect both the public and the legal system from harm, the administrative resources currently devoted to predict-

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268. McDowell, *supra* note 46, at 335 ("The formal professional structure must vigorously weed out those who have acted unprofessionally and thereby damaged clients or others. That consequence, however, should be based on objective criteria and actual acts of wrongdoing, not subjective judgments and predictions.").

269. *Cf.* Rhode, *supra* note 10, at 563 ("Taken as a whole, the current certification process is an extraordinarily expensive means of providing a dubious level of public protection.").

270. MACINTYRE, *supra* note 6, at 344.

ing attorney misconduct on the basis of a determination of good moral character would be more productively spent upon dictating the good conduct of attorneys on the basis of a determination of attorney misconduct.[271] In the ethically indeterminate world of post-modern liberalism, moral character is simply not subject to determination by virtue of heteronomous constraints on conduct. The bar should accordingly divest itself of the good moral character business; as a bureaucratic regime, it is ethically inept.

271. *Cf.* McDowell, *supra* note 46, at 334-35 ("'Good moral character' is not something the profession can warrant in any particular professional. This is not a judgment that "good moral character" is unimportant, because it is a vital aspect of the status of professional, i.e., a person who is concerned with the welfare of the client and who is loyal and trustworthy towards that client. The problem is the reliability of predictions based on such limited information. Abandoning the formal certification recognizes this reality by not making such a warranty. It surrenders the pretense that clients need not take some responsibility for determining the level of competence and the trustworthiness of the professional to whom they entrust their affairs. Any sophisticated consumer of legal services already understands that licensing is not an effective guarantee of either of these qualifications and that inquiries must be made. Should we mislead less sophisticated members of the public about their personal responsibility in selecting adequate professional help?); *accord* Barton, *supra* note 30, at 441, 449 ("[A] comparison between the current entry regulations and the supposed justification establishes that the regulations are ill-fitted to the actual problem. . . . Current entry regulations largely benefit existing lawyers. The entire onus of guaranteeing quality falls upon entrants to the market, with the helpful side effect of limiting competition for existing practitioners. Likewise, regulation of current lawyers is as unobtrusive as possible, leaving little ongoing control for quality or competence.").