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## Law Student Debt + Public Interest Career = Character and Fitness Fail

Annie Legomsky\*

In 2011, the Supreme Court of Ohio upheld the state bar’s decision to deny Hassan Jonathan Griffin admission to the bar on character and fitness grounds.<sup>1</sup> Mr. Griffin had graduated from law school in May 2008.<sup>2</sup> Since graduating, he had successfully registered for admission to the Ohio bar three times, but had failed the bar examination on each occasion.<sup>3</sup> Meanwhile, he had accrued \$170,000 in student loan debt and \$16,500 in consumer debt, and had not made any payments on his loans since graduation.<sup>4</sup> The Court reasoned that Mr. Griffin’s plan to continue working part-time in the public defender’s office, in the hope that it would lead to a full-time position upon passage of the bar exam, was not a feasible debt repayment plan.<sup>5</sup> The Court implicitly suggested that Mr. Griffin should instead have sought more lucrative work, such as returning to his former profession as a stockbroker, and perhaps declaring bankruptcy to discharge his consumer debt.<sup>6</sup> The Court found that Mr. Griffin had “neglected his personal financial obligations”<sup>7</sup> and had “no plan or

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\* J.D., M.S.W. (2014), Washington University School of Law and George Warren Brown School of Social Work; B.A. (2007), University of San Francisco. I would like to thank three professors who helped me formulate and refine my arguments in this Note: Prof. Brian Tamanaha, whose teaching inspired me as a 1L and whose advocacy around issues of contemporary legal education provided an essential jumping-off point for this Note; Dean Michael Piel, who so generously reviewed my drafts and provided invaluable edits, feedback, and policy suggestions; and lastly, my dad, Prof. Stephen Legomsky, for being my sounding-board and chief advisor throughout the writing process, as well as in life.

1. *In re Application of Griffin*, 128 Ohio St. 3d 300 (Ohio 2011).

2. *Id.* at 301.

3. *Id.*

4. *Id.* at 301–02.

5. *Id.* at 303.

6. *Id.* at 301–03.

7. *Id.* at 303.

ability to pay these debts.”<sup>8</sup> Ultimately, the Court denied Mr. Griffin’s application to take the bar at that time.<sup>9</sup>

The *Griffin* case reveals an increasingly common problem in today’s legal environment. How should a court balance the importance of assuring the financial reliability and responsibility of future attorneys against the realities of high tuition levels, rising student debt, the shortage of legal jobs, and the need for public interest lawyers?

Part I of this Note provides a background of the standards that Ohio and other states apply in determining whether an applicant has the requisite character and fitness to gain admission to the bar, and the laws and policies that govern those standards. It will also examine the current state of law student debt and the legal job market. Part II analyzes the Supreme Court of Ohio’s decision to deny Mr. Griffin admission to the bar. It contends that, while it did not arbitrarily deny Mr. Griffin admission to the bar on character and fitness grounds, the result was nonetheless unjust because current character and fitness standards are not consistent with the realities of current legal employment opportunities and public policies supporting public interest employment. This Note proposes that the standards governing the character and fitness review process should be modified to (1) provide for more uniformity across jurisdictions; (2) explicitly require consideration of an applicant’s debt and repayment plan in the context of the current economic and legal employment climates; (3) reflect avowed policy interests in promoting public interest legal employment; and (4) diversify the membership of decision-makers to provide for review based on more culturally, professionally, and experientially diverse perspectives.

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8. *Id.* at 302.

9. The Court left open the possibility of Mr. Griffin reapplying at an unspecified later date. *Id.*

## I. BACKGROUND

A. *History of the Griffin Case*

When Hassan Jonathan Griffin applied for admission to the bar to take the February 2010 bar exam, the Columbus Bar Association Admissions Committee reviewed his application and interviewed him.<sup>10</sup> Thereafter, in December 2009, the Columbus Bar Association Admissions Committee reported to the State Board of Commissioners on Character and Fitness (“the Board”) that Mr. Griffin possessed the requisite character and fitness to practice law in Ohio, and recommended he be approved for admission to the bar.<sup>11</sup>

The Board, however, had concerns about Mr. Griffin’s debt and initiated a *sua sponte* investigation.<sup>12</sup> Three members of the Board conducted a panel hearing in May 2010.<sup>13</sup> The panel found that Mr. Griffin had worked as a stockbroker for several years before attending law school, “earning enough money to meet his expenses.”<sup>14</sup> The panel also found that “[s]ince completing his first year of law school, however, [he] has worked part-time, 24 to 32 hours a week, at the Franklin County Public Defender’s Office, earning \$12 per hour.”<sup>15</sup> The panel noted that Mr. Griffin was living with his nine-year-old daughter and her mother in the mother’s home, and he was making minimal financial contributions to household expenses.<sup>16</sup> During this time, Mr. Griffin had not been able to make any payments on his student loans, which had become due in July 2009,<sup>17</sup> nor had he been able to make payments on his credit cards

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10. *Id.* As is standard procedure, Mr. Griffin was also interviewed by the admissions committee at this time. *Id.*; OH SUP. CT. GOV. BAR R. 1, § 11(C)(3).

11. *Griffin*, 128 Ohio St. 3d at 301. In Ohio, the local admissions committee performs the first line of character screening, followed by a review by the Board. The Supreme Court of Ohio has the final decision-making power upon appeal by an applicant. OH SUP. CT. GOV. BAR R. 1, §§ 10(B), 12(B). *See also infra* Part II.B.3.a.

12. *Id.* The investigation was conducted pursuant to *Griffin*, 128 Ohio St. 3d at 301. *See infra* notes 32, 33 and accompanying text for a discussion of the concerns about board composition.

13. *Griffin*, 128 Ohio St. 3d at 301.

14. *Id.* at 301–02.

15. *Id.* at 302.

16. *Id.*

17. *Id.*

since December 2008.<sup>18</sup> Additionally, one creditor secured a default judgment against him.<sup>19</sup>

The panel recommended to the full Board that Mr. Griffin be denied admission to the bar, “[n]oting that the applicant has no plan or ability to pay these debts.”<sup>20</sup> The Board agreed with the panel and also recommended that Mr. Griffin be disapproved, with permission to reapply for a later examination date.<sup>21</sup>

Mr. Griffin appealed the Board’s recommendation to the Supreme Court of Ohio.<sup>22</sup> The Court agreed with the Board’s recommendation. In a cursory opinion, the court simply summarized the Board’s findings and conclusions, noting that:

[Mr. Griffin had] neglected his personal financial obligations by electing to maintain his part-time employment with the Public Defender’s Office in hope that it will lead to a full-time position upon passage of the bar exam, rather than seeking full-time employment, which he acknowledges would give him a better opportunity to repay his obligations and possibly qualify him for an additional deferment of his student-loan obligation.<sup>23</sup>

### *B. Overview of the Character and Fitness Requirement*

#### 1. Premises and Justifications for Screening for Character

The general requirement of moral character for a professional lawyer can be traced back to Roman Theodesian Code.<sup>24</sup> Informal and inconsistent requirements of “virtue,” often demonstrated by personal references, were maintained in the American legal system from the colonial period through the 19th century.<sup>25</sup> Character

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 300.

23. *Id.* at 303.

24. Deborah L. Rhode, *Moral Character As A Professional Credential*, 94 YALE L.J. 491, 493 (1985).

25. *Id.* at 496–98.

screening became more formalized in the late nineteenth century, and many states instituted character interviews with committee oversight.<sup>26</sup> During this time, the American Bar Association (ABA) and other organizations led the campaign for higher professional standards.<sup>27</sup> The effort was “aimed in principle against incompetence, crass commercialism, and unethical behavior.”<sup>28</sup>

By the 1930s, character certification had become more systematic, although “gross inadequacies in the structure, resources, and jurisdiction of oversight remained.”<sup>29</sup> Legal ethics scholar Deborah L. Rhode undertook a comprehensive review of the character screening process in her 1985 article *Moral Character as a Professional Credential*.<sup>30</sup> In addition to questioning the effectiveness of character screening,<sup>31</sup> Professor Rhode highlighted concerns about the compositions of screening boards.<sup>32</sup> At the time of her review, government and public interest lawyers were underrepresented on screening boards, as were attorneys under age 35.<sup>33</sup> Today, character screening for lawyers is an established part of the bar licensing process, but many of the problems identified in historical criticisms remain.

There are two chief justifications for character certification in the legal profession: to protect the public and to preserve the profession.<sup>34</sup>

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26. *Id.* at 498–99. Many other professions also experienced an increase in character screening and professionally licensing during this time. *Id.*

27. *Id.* at 499.

28. *Id.* (quoting MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 173 (1977)). Historically, the discretionary nature of the process made it subject to abuses, and it was often used to validate discrimination. Candidates who were found to be lacking in moral character were more likely to be denied based on their foreign nationality or Jewish roots than any legitimate characteristic. *Id.* at 499.

29. *Id.* at 502.

30. *Id.*

31. *Id.* at 555–64.

32. *Id.* at 505–06.

33. *Id.* Professor Rhode found that there was little representation of lawyers employed in academic, public interest, and government practice, and that “[screening] committees may also be skewed toward established, mainstream practitioners.” *Id.* at 505–06. In regard to the age of reviewing members, while 40 percent of the bar was under age 35, that age group was only represented in 16 percent of review positions. *Id.* at 505–06.

34. *Id.* at 507–09.

Courts and scholars often agree that the public needs protection from unscrupulous attorneys who would abuse their clients' trust, such as through misappropriation of funds or breaking client confidences.<sup>35</sup> Another concern is that attorneys will "subvert" justice by promoting perjury or misrepresentation.<sup>36</sup>

Character and fitness requirements are also frequently justified on grounds that they are necessary to preserve the professionalism of the legal community.<sup>37</sup> Negative stereotypes about lawyers are widespread.<sup>38</sup> For the profession to survive, its members and their conduct must be regulated. Character and fitness standards are one aspect of the bar's ability to regulate would-be attorneys.<sup>39</sup>

Whether or not the character and fitness process is actually effective in screening for future attorney misconduct, it is possible that the mere existence of these procedures helps improve public confidence in attorneys. In other words, one of the purposes of the character and fitness process is to preserve the *appearance* of professionalism in the legal industry.<sup>40</sup> This justification may be one of the more salient rationalizations for the character and fitness

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35. *Id.* at 508.

36. *Id.* at 509.

37. Many scholars have criticized the common assumptions that the character and fitness process actually works as designed to keep the most risky law graduates out of the guild and thereby enhance the professionalism of the bar. *See, e.g., id.* at 555–63. Indeed, as late as the mid-1980s, no controlled research had been conducted to test the effectiveness of the character and fitness process, and this author has not discovered any such research since. *Id.* at 556. Nor had any state bar even performed a review of its disciplinary records to identify any predictive factors of poor character. *Id.*

38. Public opinion polls, as well as common themes in literature and humor reflect these stereotypes of the lawyer as greedy, arrogant, and willing to do anything to win. *Id.* at 510–11.

39. Another mechanism of the profession's self-regulation is found in the ABA's Model Rules of Professional Conduct ("MPRC"), but these primarily operate apply to attorneys post-certification. MODEL RULES OF PROF'L CONDUCT (2012). Several of the MPRC rules are related to one's character for handling finances. Rule 1.1 prescribes that an attorney be competent. *Id.* at R. 1.1. Two relevant elements of the competence requirement are those of thoroughness and preparation. *Id.* Rule 1.5 provides direction on how and when attorneys may handle fees. *Id.* at R. 1.5. Rule 1.8 prohibits an attorney from taking advantage of a client in a financial or business relationship. *Id.* at R. 1.8. Rule 1.15 states that an attorney shall not mingle clients' funds and outlines proper handling of client property. *Id.* at R. 1.15. In addition to outlining certain actions prohibited by membership in the Bar, the MRPC also defines general attributes that constitute misconduct. This includes engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation" or "that is prejudicial to the administration of justice". *Id.* at R. 8.4(c)-(d).

40. Rhode, *supra* note 24, at 510–11.

certification process. A more critical explanation for the character and fitness procedures also exists: the appearance of moral oversight legitimates the profession's ability to self-regulate.<sup>41</sup>

Despite the aforementioned justifications for having character and fitness screening, the scheme is not without its fair share of criticism. The scope of the character and fitness rules has been criticized as being both over-inclusive and under-inclusive. One concern is that certain character and fitness standards are so broad that they are arbitrarily applied.<sup>42</sup> Mr. Griffin's case may serve as an illustration of this view. Others argue that any character failings of attorneys who have passed the character test demonstrate that the current standards are not stringent enough.

## 2. State Variation

While all states require bar applicants to demonstrate that they possess good character and moral fitness, the requirements are not standardized. This has led to significant variation among the states as to what constitutes the requisite character to practice law.<sup>43</sup> Evidence of the variation between states can be found in the different rates and types of denial of bar applications.<sup>44</sup> An applicant may be denied on

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41. This, too, is an assumption that has been questioned. *Id.* at 511. Whether the bar's desire to improve its public appearance is motivated by the more noble purpose of assuring attorney credibility and the subsequent functioning of the justice system, is up for debate. There are certainly selfish motivations behind the effort—to preserve the bar's autonomy, as well as to maintain the economic monopoly the bar has on the practice of law. *Id.* at 511.

42. *See generally id.* at 511.

43. For example, in some states, such as Texas and Mississippi, a felony conviction will disqualify an applicant for admission, while in other states it is merely a factor in the decision. NAT'L CONFERENCE OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2013 CHARACTER AND FITNESS DETERMINATIONS 5 (Erica Moser & Claire Huismann eds., 2012) [hereinafter GUIDE]. Another example is that some states provide for conditional or qualified admissions, while others do not. *Id.* Ohio, for example, does not permit conditional admission, while several other states, including Arizona, Indiana, and New Jersey, do permit conditional admission. *Id.* at 4–5. These states permit conditional admission where there are concerns about an applicant's debt, substance abuse, mental disability, or criminal history. *Id.*

44. *See* ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, A MODEL FOR DIALOGUE: A MEETING MANUAL ON CHARACTER AND FITNESS ISSUES FOR BAR EXAM'RS AND LAW SCHOOLS, 28, 41–43 (rev. Aug. 2002), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/model\\_dialogue.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/model_dialogue.authcheckdam.pdf). *See also*, Rhode, *supra* note 24, at 532–37.



character and fitness grounds in one state and then successfully pass the test in another.<sup>45</sup>

The United States Supreme Court has recognized the ambiguity of the term “moral character,” describing it as having “shadowy rather than precise bounds.”<sup>46</sup> Justice Black dissected the dangers of using such a vague term:

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.<sup>47</sup>

Recognizing the need for some uniformity in the bar admissions context, in 2012 The National Conference of Bar Examiners and the ABA Section of Legal Education and Admissions to the Bar joined forces to publish the *Comprehensive Guide to Bar Admission Requirements*.<sup>48</sup> This guide includes the *Code of Recommended Standards for Bar Examiners* (“The Code”), which was made for the purpose of providing “guidance and assistance [in the hope that] they will lead toward uniformity of objectives and practices in bar admissions throughout the United States.”<sup>49</sup>

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45. Indeed, after Ohio denied Mr. Griffin admission to the bar, he moved to Arizona, where he passed the bar (and has since retained his license). Telephone Interview with Eric Brehm, Esq., Licensed Practicing Attorney, Brehm & Associates, LPA (Oct. 15, 2012).

46. *Schwartz v. Bd. of Bar Examiners of New Mexico*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring). See also Tyler R. Martinez, *The Effects of Student Loan Debt on Bar Admission—Recalibrating the “Good Moral Character” Requirement*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 37, 39 (2011) [hereinafter Martinez].

47. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262–63 (1957).

48. GUIDE, *supra* note 43.

49. CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS (2012) (see GUIDE, *supra* note 43).

The Code provides three notable procedural suggestions.<sup>50</sup> First, that character and fitness standards should be “articulated and published.”<sup>51</sup> Second, “[s]tandards should be applied in a consistent manner and interpretive material should be developed in furtherance of this objective.”<sup>52</sup> And finally, that bar examiners should rotate sufficiently often “to bring new views to the authority.”<sup>53</sup>

### 3. The Ohio Admissions Process

#### a. Decision Makers

In Ohio, local bar admissions committees, who are appointed by the local bar association president, make the first recommendations about whether applicants should be approved as having the requisite character and fitness.<sup>54</sup> These committees report their findings along with their recommendations to the State Board of Commissioners on Character and Fitness (“the Board”).<sup>55</sup> The Board is comprised of twelve attorneys, each of whom is appointed by the Ohio Supreme Court.<sup>56</sup> The Board’s responsibilities include supervising and directing the local admissions committees in investigating applicants’ character and fitness.<sup>57</sup> To accomplish this task, the Board has various powers, including the power to establish rules of procedure, “promulgate . . . standards of conduct”, and instigate *sua sponte* character and fitness investigations.<sup>58</sup>

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50. There are also substantive guidelines in the Code. Among these is a list of thirteen factors to be considered in making a character and fitness determination, similar to the fifteen-factor list in Ohio’s Rules. CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS III, 13 (2012); OH SUP. CT. GOV. BAR R. 1, § 11(D)(3). See also *infra* notes 68–71 and accompanying text.

51. CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS § III, 9 (2012). Many states do not currently publish their character and fitness standards and therefore they are not easily available, if at all, to the public. GUIDE, *supra* note 43, at 5.

52. CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS § III, 9 (2012).

53. CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS § I, 2 (2012).

54. OH SUP. CT. GOV. BAR R. 1, §§ 11(A), (B).

55. *Id.* § 11(B).

56. *Id.* § 10(A)(1).

57. *Id.* § 10(B)(2).

58. *Id.* The Board may also refer matters to regional or local admissions committees and direct them to investigate applicants further and report back to the Board. *Id.*

Ultimately, while the local admissions committees conduct the investigations and make recommendations about whether applicants should be approved as having the requisite character and fitness, the Board decides whether or not to actually recommend an applicant for admission to the bar.<sup>59</sup> In cases where the Board recommends that an applicant not be approved, it is required to make a report about the proceedings, including any appeals hearings and its findings of fact, to the Supreme Court.<sup>60</sup> The final decision is made by the Supreme Court, which will enter an order on the matter.<sup>61</sup>

#### b. The Rules

The Supreme Court of Ohio based its decision to deny Mr. Griffin admission to the bar on Rule I of the Ohio Supreme Court Rules for the Government of the Bar (“the Rules”).<sup>62</sup> The Rules require that applicants to the bar be approved as possessing “the requisite character, fitness, and moral qualifications for admission to the practice of law.”<sup>63</sup> Section 11 outlines the substantive and procedural requirements on which admissions committees base their determinations.<sup>64</sup>

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59. *Id.* § 10(B)(4).

60. *Id.* § 12(E). Once the report and record are filed with the Supreme Court, applicants are afforded the opportunity to object to the Board’s findings or recommendations. *Id.* § 12(F).

61. *Id.* § 12(G). It is a rare case where the Supreme Court of Ohio reverses the Board’s recommendation to deny an applicant admission to the bar. In fact, between 1993 and 2005, the Supreme Court of Ohio only reversed a Board recommendation for denial once (out of the forty-eight reviews it conducted). Supreme Court of Ohio, [supremecourt.ohio.gov Character and Fitness Determinations, Statistics](http://www.supremecourt.ohio.gov/Character%20and%20Fitness%20Determinations/Statistics), <http://www.supremecourt.ohio.gov/AttySvcs/admissions/cfstats/default.asp> (last visited Nov. 4, 2012). The lone case where the applicant was approved by the Court despite the Board’s recommendation that she be denied involved an applicant who, despite having engaged in the unauthorized practice of law, was approved anyway because the extent of applicant’s unauthorized practice of law was through inadvertent title representations in her letterhead, she did not intentionally mislead anyone, and applicant had ceased using the inappropriate title. *In re Application of Stage*, 81 Ohio St. 3d 554, 556, 559 (1998).

62. OH SUP. CT. GOV. BAR R. 1.

63. *Id.* § 1(D). Applicants must meet the character and fitness requirements before they will be allowed to take the bar exam. *Id.*

64. OH SUP. CT. GOV. BAR R. 1. § 11. The burden of proof in establishing the requisite character and fitness lies with the applicant. *Id.* § 11(D)(1). The standard is proof in Ohio is “by clear and convincing evidence.” *Id.* “Clear and convincing evidence is an intermediate standard of proof that is more than the ‘preponderance of the evidence’ standard used in most civil cases and less than the ‘beyond a reasonable doubt’ standard used in criminal cases.” 32A C.J.S.

Admissions committees may recommend an applicant for approval if “the applicant’s record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them and demonstrates that the applicant satisfies the essential eligibility requirements for the practice of law as defined by the Board [of commissioners on character and fitness].”<sup>65</sup> In the reverse, the Rules state that an applicant may be denied if his/her record reflects “a significant deficiency in the honesty, trustworthiness, diligence, or reliability of the applicant.”<sup>66</sup> The Rules specify that admissions committees should “carefully” consider fifteen potentially disqualifying factors before making a recommendation about an applicant’s character and fitness.<sup>67</sup> Whether the applicant has demonstrated a “neglect of financial responsibilities,” the issue Mr. Griffin was rebuked for, is among these potentially disqualifying factors.<sup>68</sup>

Some of the other fifteen factors are more representative of what might come to mind when imagining the character traits that would prevent one from pursuing a career in law. These include whether the applicant has committed or been convicted of a crime,<sup>69</sup> whether the applicant has an existing or untreated chemical dependency,<sup>70</sup> or whether there is evidence that the applicant has engaged in “[a] pattern of disregard of the laws.”<sup>71</sup>

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Evidence § 1624 (2008). Evidence is found to be clear and convincing evidence if the factfinder believes the truth of the assertions to be “highly probable or reasonably certain.” *Id.* A consequence of the burden of proof lying with the applicant is that an applicant may be denied simply by a “failure to provide requested information . . . or otherwise cooperate in proceedings”. OH SUP. CT. GOV. BAR R. 1 § 11(D)(1).

65. *Id.* § 11(D)(3).

66. *Id.*

67. *Id.*

68. *Id.* § 11(D)(3)(k). Other factors include whether the applicant violated the honor code or engaged in academic misconduct at his or her school; practicing law when “unauthorized”; having a mental or psychological disorder that affects the applicant’s ability to competently practice law; failing to provide “complete and accurate” information about one’s past; making false statements; “acts involving dishonesty, fraud, deceit, or misrepresentation”; abusing the legal process; neglecting professional obligations; violating a court order; being denied admission to another state’s bar on character and fitness grounds; and being subjected to disciplinary action by a legal or professional agency. *Id.* § 11(D)(3).

69. *Id.* § 11(D)(3)(a).

70. *Id.* § 11(D)(3)(b).

71. *Id.* § 11(D)(3)(f).

The mere presence of any of the fifteen factors is not a sufficient basis for the panel to deny the applicant admission to the bar. Instead, such a finding triggers a more in-depth analysis of the “weight and significance to the applicant’s prior conduct.”<sup>72</sup> This analysis is undertaken in order to provide a determination about whether the applicant’s *present* character and fitness qualify him or her for admission to the bar.<sup>73</sup> This analysis also calls for a factor-based inquiry.<sup>74</sup> The admissions committee considers factors including the recentness of the conduct, the seriousness of the conduct, factors underlying the conduct, evidence of rehabilitation, positive social contributions of the applicant since the conduct, and the applicant’s candor in the admissions process.<sup>75</sup>

In addition to following the requirements under the Rules for character investigations, admissions committees must also make their decisions in accordance with the decisions of the Supreme Court of the United States and the Supreme Court of Ohio.<sup>76</sup>

#### 4. Limits on the Rules: Due Process and Equal Protection

State supreme court rules on character and fitness for admission to the bar are subject to federal constitutional requirements.<sup>77</sup> The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution are a source of guidance on the state regulation of professional memberships.<sup>78</sup> Together, the clauses provide that no state shall “deprive any person of life, liberty, or property, without due process of the law; nor deny to any person . . .

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72. *Id.* § 11(D)(4).

73. *Id.*

74. *Id.*

75. *Id.* § 11(D)(4)(b)-(e),(g)-(i). The other factors are the age of the applicant at the time of the conduct, the cumulative effect of the conduct, and the materiality of any omissions or misrepresentations. *Id.* § 11(D)(4)(a),(f),(j).

76. OH SUP. CT. GOV. BAR R.1, § 11(D)(2).

77. *Id.* § 11(D)(2).

78. *See* U.S. CONST. amend. XIV, § 1. *See* *Schwartz v. Bd. of Bar Exam'rs. of New Mexico*, 353 U.S. 232, 238–39 (1957) (“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.”).

the equal protection of the laws.”<sup>79</sup> Included among those rights is the right to pursue employment.<sup>80</sup>

Arbitrary or capricious regulation of admission to certain professional bodies may violate rights under the Due Process and Equal Protection Clauses.<sup>81</sup> The Supreme Court of the United States considered the limits of state regulation of admission to the bar in the landmark case *Schware v. Board of Bar Examiners of New Mexico*.<sup>82</sup> The *Schware* Court explained that states may set high standards for qualification to practice law, including having “good moral character.”<sup>83</sup> These requirements, however, must “have a rational connection with the applicant’s fitness or capacity to practice law.”<sup>84</sup>

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79. U.S. CONST. amend. XIV, § 1.

80. *Dent v. West Virginia*, 129 U.S. 114, 121–22 (1889). In *Dent*, the Court discussed the applicability of the Due Process Clause to state regulation of licensing medical professionals, as well as vocations in general as a “source of livelihood”:

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose . . . This right may in many respects be considered as a distinguishing feature of our republican institutions . . . All [vocations] may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The . . . right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society . . . The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession . . . no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession . . . that they can operate to deprive one of his right to pursue a lawful vocation.

*Id.*

81. See *Schware*, 353 U.S. 232; see also *Dent*, 129 U.S. at 121–22. The Court in *Schware* refrained from examining whether pursuit of the practice of law is a right or a privilege within the requirements for a due process claim. It found that question to be unnecessary because the more pertinent issue presented was the *validity* of the reasons the State relied upon in reaching their decision to deny the applicant admission to the bar. *Schware*, 353 U.S. at 251 n.5.

82. 353 U.S. at 239. The issue was whether New Mexico’s denial of an applicant for bar licensure based on his prior membership in the Communist Party, as well as his prior use of aliases and a record of arrests, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* The Court held that the applicant’s denial was a violation of his due process rights. *Id.* at 247.

83. *Id.* at 239.

84. *Id.* (citing *Douglas v. Noble*, 261 U.S. 165 (1923); *Cummings v. State of Missouri*, 4 Wall. 277, 319–20 (1866)). For example, “an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church.” *Id.*

Additionally, even when a standard might be rationally related to the practice of law, state officers cannot apply those standards to exclude an applicant from the practice of law when there is no basis for a finding that the applicant does not possess the necessary qualities, or when such exclusion is discriminatory.<sup>85</sup>

In his concurring opinion in *Schwartz*, Justice Frankfurter explored how certain moral characteristics are rationally related to the practice of law:

One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that 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. It is a fair characterization of the lawyer’s responsibility in our society that he stands ‘as a shield,’ to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities 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.’<sup>86</sup>

##### 5. Financial Irresponsibility

Applicants may be denied admission to the bar for neglecting their financial responsibilities, since one’s intention to pay one’s debts reflects respect for the law and for personal obligations. Additionally, because attorneys must often hold their clients’ funds in trust, how they handle their own finances may be relevant in determining whether they will be diligent or trustworthy in holding their clients’ funds responsibly.<sup>87</sup> An attorney in dire financial straits may be tempted to “either to short-shrift [his] clients or . . . convert money from [his] clients to take care of those debts.”<sup>88</sup>

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85. *Id.*

86. *Id.* at 247 (Frankfurter, J., concurring).

87. Martinez, *supra* note 46, at 39, 46.

88. Terri C. Harris, *Student Loan Default Could Result in License Revocation*, 46 TENN. B.J. 14, 16 (2010) (citing *Santulli v. Tex. Bd. Of Law Exam’rs*, No. 03-06-00392-CV, 2009

Inquiries into bar applicants' financial responsibility are therefore appropriate. They do, however, present multiple concerns. Chief among those concerns is the effectiveness of these inquiries in predicting poor moral character. Student loan debt, for example, has not been shown to be predictive of poor future conduct, but is still invoked as a reason to deny applicants admission to the bar.<sup>89</sup>

A second concern is the subjectivity of the bar admission decision-making process. The resulting judicial inconsistency impairs the notice that prospective and current students need to avoid problematic behavior, particularly with respect to law school debt.<sup>90</sup> This is particularly troublesome because decisions to attend law school and incur high debt loads are made years before the character and fitness review. Law schools and law school rankings publications, such as *U.S. News and World Report*, have been criticized for providing less than transparent data on job placement, debt, and salary figures for recent graduates.<sup>91</sup> Indeed, numerous scholars, the legal academy, Senator Barbara Boxer, and the ABA have highlighted these problems.<sup>92</sup>

Courts have used a variety of approaches to analyze bar applicants' financial responsibility. Some courts have stressed the student's efforts to repay the debt, rather than the amount of the debt, in assessing financial responsibility. The Louisiana Supreme Court found an applicant was eligible for admission to the bar despite

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WL 961568, at \*1 (Tex. App. Apr. 10, 2009)).

89. Stanford University professor Deborah L. Rhode has commented, "[t]he key thing that the character process is designed to do, which my research says it doesn't do very well, is predict based on past conduct what future conduct will be . . . Just the fact that you've taken out large amounts of loans at a time that you have no income, is not predictive [of poor future conduct]." Jonathan D. Glater, *Again, Debt Disqualifies Applicant from the Bar*, N.Y. TIMES (Nov. 27, 2009), [http://www.nytimes.com/2009/11/27/business/27lawyer.html?\\_r=0](http://www.nytimes.com/2009/11/27/business/27lawyer.html?_r=0) [hereinafter Glater, *Again*].

90. *Id.*

91. See, e.g., REPORT OF THE SPECIAL COMMITTEE ON THE U.S. NEWS AND WORLD REPORT RANKINGS, SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR (July 15, 2010), <http://ms-jd.org/files/f.usnewsfinal-report.pdf>; see also *Core Issues*, LAW SCHOOL TRANSPARENCY, [http://www.lawschooltransparency.com/reform/issues/#Employment\\_Outcomes](http://www.lawschooltransparency.com/reform/issues/#Employment_Outcomes) (last visited Aug. 9, 2014).

92. See, e.g., Debra Cassens-Weiss, *Sen. Barbara Boxer Accuses ABA of Taking 'Half Measures' to Collect Better Job Stats*, A.B.A.J., Oct. 6, 2011, available at [http://www.abajournal.com/news/article/sen.\\_barbara\\_boxer\\_accuses\\_aba\\_of\\_taking\\_half\\_measures\\_to\\_collect\\_better\\_jo/](http://www.abajournal.com/news/article/sen._barbara_boxer_accuses_aba_of_taking_half_measures_to_collect_better_jo/).



defaulting on his student loans, on the condition that he enter into a loan rehabilitation agreement to repay his debt.<sup>93</sup> For similar reasons, the Ohio Supreme Court denied an applicant who had only \$3,500 in debt because, it reasoned, the applicant had no justification for failing to resolve his debts and had a “pattern of leaving jobs without having any meaningful job prospects in place.”<sup>94</sup>

In contrast, other courts place greater weight on the sheer size of the applicant’s debt. Robert Bowman’s case was highly publicized when he was denied admission to the New York bar for having \$480,000 in student debt.<sup>95</sup> Despite his enormous debt load, the admissions committee had recommended his admission after finding that he had “exceptional character,” based on his history of overcoming personal obstacles.<sup>96</sup> Additionally, Bowman had presented evidence that he was a victim of fraudulent servicing of his private loans, and that he had contacted other creditors to work out a repayment plan.<sup>97</sup> Still, a reviewing court denied him admission to the bar on the basis of neglect of personal finances.<sup>98</sup>

Still other decisions seem to be more concerned with the applicant’s ability to quickly repay his or her debt, rather than the

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93. *In re Thomas*, 761 So. 2d 531 (La. 2000).

94. *In re Kline*, 116 Ohio St. 3d 185, 185–86 (2007).

95. *In re Anonymous*, 67 A.D.3d 1248 (2009); see also, e.g., Debra Cassens Weiss, *Unpaid Student Loans Derail Law Grad’s Quest for NY Bar Admission*, A.B.A.J., July 2, 2009, available at [http://www.abajournal.com/news/article/unpaid\\_student\\_loans\\_derail\\_law\\_grads\\_quest\\_for\\_ny\\_bar\\_admission](http://www.abajournal.com/news/article/unpaid_student_loans_derail_law_grads_quest_for_ny_bar_admission); Jonathan D. Glater, *Finding Debt a Bigger Hurdle than the Bar Exam*, N.Y. TIMES (July 1, 2009), <http://www.nytimes.com/2009/07/02/business/02lawyer.html> [hereinafter Glater, *Finding*]; Glater, *Again*, *supra* note 89.

96. Letter from Beth Davies Carpinello, Esq., James M. Conboy, Esq. & Cynthia Feathers, Esq., Subcommittee Members, to Committee on Character and Fitness (Jan. 23, 2009), available at <http://graphics8.nytimes.com/packages/images/nytint/docs/report-on-robert-a-bowman-s-application-for-admission-to-the-new-york-state-bar/original.pdf>; Jack Marshall, *Robert Bowman: Aspiring Lawyer, Ethics Martyr*, ETHICS ALARMS BLOG (Nov. 27, 2009, 2:50pm), <http://ethicsalarms.com/2009/11/27/robert-bowman-aspiring-lawyer-ethics-martyr/>. Mr. Bowman moved through the foster care system as a child and struggled through community college, four-year university, and then graduate school and law school. Along the way, he almost lost his leg in an accident. It took him six years of rehabilitation to learn to walk again. Upon graduation from law school, Mr. Bowman repeatedly took the New York bar exam, persisting through multiple failures. He finally passed the New York bar on his fourth try, when he was met with his ultimate barrier to admission on character and fitness grounds. Glater, *Finding*, *supra* note 95.

97. Glater, *Finding*, *supra* note 95.

98. *In re Anonymous*, 67 A.D.3d 1248 (2009).

reason for or the amount of that debt. In one such case, much like Mr. Griffin's case, the decision to deny admission to the bar involved a graduate who was working part-time in a public service legal job and had plans to repay his debt.<sup>99</sup> Another example is found in *In re Holbrook*, in which the Ohio Supreme Court denied Melinda Holbrook admission to the bar based on her family's pending bankruptcy.<sup>100</sup> The Court found that Holbrook's husband's gambling losses, which he had concealed from Holbrook, "significantly contributed to the family's financial downfall."<sup>101</sup> Despite recognizing that Holbrook was not fully aware of her family's financial troubles before starting law school, nor was she personally culpable for her family's debt, the court denied her admission to the bar.<sup>102</sup>

Notably, some denials that were formally grounded on financial irresponsibility might actually have reflected findings of other shortcomings. Many of these decisions, for example, turn on the applicant's candor during the character and fitness process.<sup>103</sup> Similarly, applicants have also been censured for financial irresponsibility in connection with the character trait of trustworthiness.<sup>104</sup>

Apart from concerns over effectiveness and consistency, a third problem with financial irresponsibility review is the weight courts assign to certain financial indicators in comparison to other, seemingly more compelling, character criteria. "[C]ourts have overlooked misconduct like lawyers' solicitation of minors for sex, [and] efforts to deceive judges and possession of cocaine," while public interest-minded applicants like Mr. Griffin are denied for

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99. See, e.g., *In re Ford*, 110 Ohio St. 3d 503 (2006).

100. *In re Holbrook*, 116 Ohio St. 3d 248 (2007).

101. *Id.* at 251.

102. *Id.* This is not to say that the court erred in making this decision. It's arguable that the court legitimately applied the rules as a device to protect the public. If being in serious debt may relate to one's trustworthiness for handling client funds, then culpability may be beside the point.

103. See, e.g., *In re Application of Bland*, 93 Ohio St. 3d 414 (2001) (finding applicant's failure to provide information about his defaulted student loans and plans to repay them upon the Bar Committee's request warranted his denial).

104. See *Kosseff v. Bd. of Bar Exam'rs*, 475 A.2d 349 (Del. 1984) (denying applicant on character and fitness grounds because, even though he had repaid his debt in full, the procurement of the loan was itself fraudulent).

having high, but not unheard of, levels of debt.<sup>105</sup> Additionally, character and fitness review, which is designed to predict and thereby prevent future misconduct, may result in harsher consequences for the applicants than do actual instances of financial misconduct, such as diversion of funds, committed by already licensed attorneys.<sup>106</sup>

### *C. Current Trends in Legal Employment and Student Debt*

Judgments about good moral character require comparison to other similarly situated people, as well as consideration of one's environment. This is especially important when questions about one's character are examined during a time of extreme change, such as during a recession. As Professor Brian Tamanaha points out in his recent critique of the legal education model, *Failing Law Schools*, the early 2000s have seen extreme changes in the cost of legal education, student debt levels, and legal employment prospects.<sup>107</sup>

The cost of a legal education has skyrocketed over the last few decades. From 2005 to 2011, for example, the cost of tuition at Mr. Griffin's *alma mater*, The Ohio State University Moritz College of Law, rose 69 percent for residents and 44 percent for non-residents.<sup>108</sup> That is a 46 percent or 25 percent increase over the rate of inflation, respectively.<sup>109</sup> Increasing tuition costs are common across the states. Public law school tuition has increased by approximately 10 percent each year since the late 1980s, while inflation rose by only 3 percent each year.<sup>110</sup> At the same time, living expenses now range from approximately \$15,000 to \$27,000 annually.<sup>111</sup>

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105. Glater, *Finding*, *supra* note 95.

106. Harris, *supra* note 88, at 16. "Meaning in a ludicrous sense, attorneys may be better off stealing the money to pay back their student loans rather than defaulting on them." *Id.*

107. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (John M. Conley & Lynn Mather eds., 2012).

108. Matt Leichter, *The Law School Tuition Bubble Data: Tuition Increases Law School-by-Law School from 2005 to 2011*, LAW SCHOOL TUITION BUBBLE BLOG (Jan. 22, 2011), <http://lawschooltuitionbubble.wordpress.com/2011/01/22/the-law-school-tuition-bubble-data-tuition-increases-law-school-by-law-school-from-2005-to-2011/#OH>.

109. *Id.*

110. TAMANAHA, *supra* note 107, at 108. Tuition has also risen at private schools, though not quite as dramatically as at public schools. *Id.* From 1985 to 2009, the average public law schools' tuition rose 820%, from \$2,006 to \$18,472. *Id.*

111. Paul Campos, *The Cost of Living*, INSIDE THE LAW SCHOOL SCAM BLOG (June 19,

Tuition alone fails to paint a full picture of how a legal education is financed today. The key indicator is how much debt a student can expect to have upon graduation. In 2010, the average law student debt was \$98,500 for 85 percent of graduates from ABA-accredited law schools.<sup>112</sup> Resident graduates of Ohio State who pay full tuition and do not have other financial support, such as savings, will graduate with an average debt of \$179,233.<sup>113</sup> Ohio State students without in-state discounts will average a debt level of \$236,087 at graduation.<sup>114</sup> On the national level, approximately 50 percent of U.S. law students paid “full sticker price” for law school in recent years.<sup>115</sup> Like tuition, debt levels alone paint an incomplete picture of a recent law graduate’s financial future. Debt levels can be fully appreciated only when viewed in light of a graduate’s ability to repay his or her debts—whether through employment or loan repayment assistance programs.

Employment rates for law graduates have been in serious decline since the early 2000s.<sup>116</sup> As recently as 2007, nearly 77 percent of law graduates were employed in legal jobs.<sup>117</sup> In 2011, however, the National Association of Legal Professionals (NALP) reported that just 65 percent of law graduates were employed in full-time, long-term jobs that require a J.D.<sup>118</sup> *Law School Transparency* reported

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2012), <http://insidethelawchoolscam.blogspot.com/2012/06/cost-of-living.html>.

112. William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, 98 A.B.A.J. 30, 30–31 (2012), available at [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/) [hereinafter Henderson & Zahorsky, *Bubble*]. This figure is probably much lower than actual debt figures because it was based on what schools report to *U.S. News and World Report*. Those figures typically do not include the loan-based interest fees often added to tuition charges. See *Non-Discounted Cost of Attending Law School*, LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com/reform/projects/Non-Discounted-Cost/> [hereinafter Law School Transparency, *Non-Discounted*].

113. *School Profiles, Ohio State University Profile*, LAW SCHOOL TRANSPARENCY, <http://www.lstscorereports.com/schools/osu/costs/2014/> (last visited Jan. 30, 2013) [hereinafter Law School Transparency, *School*]. Adjustments for inflation would put this figure at approximately \$171,554.97 when Mr. Griffin graduated from Ohio State in 2008. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).

114. Law School Transparency, *School*, *supra* note 113.

115. Law School Transparency, *Non-Discounted*, *supra* note 112.

116. TAMANAHA, *supra* note 107, at 117.

117. *Id.* at 73.

118. NALP, CLASS OF 2011 NATIONAL SUMMARY REPORT, THE ASSOCIATION FOR LEGAL CAREER PROFESSIONALS, (July 2012) [http://www.nalp.org/uploads/NatlSummChart\\_Classof](http://www.nalp.org/uploads/NatlSummChart_Classof)

that only 58 percent of 2011 graduates from Ohio State reported full-time employment in a job requiring a J.D.<sup>119</sup> Tamanaha expects this trend to continue for some time.<sup>120</sup> The Bureau of Labor Statistics predicts that there will be only about 25,000 legal job openings each year through 2018, while the number of graduates has recently averaged approximately 45,000 per year.<sup>121</sup>

Those who secure employment still face lower salaries than their counterparts did in prior years. According to the ABA, only 8 percent of 2011 graduates found full-time positions that required a law degree at firms with over 250 lawyers, where the highest salaries can be found.<sup>122</sup> In contrast, approximately one-half of the 2010 law graduates earned between \$40,000 and \$65,000.<sup>123</sup> The median starting salary for a 2010 law graduate was just \$63,000, a decrease of approximately 13 percent from the median starting salary in 2009.<sup>124</sup>

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2011.pdf. Another 12.5% were reported to be in “JD Advantage” jobs. *Id.* Overall, NALP reported 12.1% of graduates were unemployed. *Id.* Of those who reported which sector they were employed in, 67.6% were employed in the private sector; 31.7% were employed in the public sector. *Id.* Even these figures are likely overstatements, both because law schools report misleading information about their graduates’ employment outcomes, and because the regulating bodies compile the information differently. TAMANAHA, *supra* note 107, at 144. Additionally, schools have been engaging in the practice of hiring some of their own graduates into short-term positions (“bridge positions”), which enables the schools to count more graduates as “employed” at the time they report their figures nine months post-graduation. Bernie Burk, *Employment Outcomes IV: What the ABA Employment Outcomes Data Tell Us About the Prevalence and Distribution of School-funded “Bridge” Positions*, THE FACULTY LOUNGE BLOG (Apr. 18, 2012), available at <http://www.thefacultyounge.org/2012/04/employment-outcomes-iv-what-the-aba-employment-outcomes-data-tell-us-about-the-prevalence-and-distri.html>.

119. Law School Transparency, *School*, *supra* note 113. The percentage of 2009 graduates from Ohio State with full-time, long-term legal jobs was slightly higher in 2009, reported at 66.5%. *Id.*

120. TAMANAHA, *supra* note 107, at 139.

121. *Id.* (citing Employment by Occupation, 2008–2018, Employment Projections (Washington, DC: US Bureau of Labor Statistics, 2010), table 1.2), [http://www.bls.gov/emp/ep\\_table\\_102.pdf](http://www.bls.gov/emp/ep_table_102.pdf)).

122. Rachel M. Zahorsky, *When the Data Differs, Whose Job Stats Should Would-be Law Students Trust?*, A.B.A.J., Sept. 20, 2012, available at [http://www.abajournal.com/lawscribbler/article/when\\_the\\_data\\_differs\\_whose\\_jobs\\_stats\\_should\\_would-be\\_law\\_students\\_trust/](http://www.abajournal.com/lawscribbler/article/when_the_data_differs_whose_jobs_stats_should_would-be_law_students_trust/).

123. TAMANAHA, *supra* note 107, at 112.

124. Henderson & Zahorsky, *Bubble*, *supra* note 112; Debra Cassens-Weiss, *Average Starting Pay for Law Grads Is on Downward Shift; Drop Is Largest for Law Firm Jobs*,

Some new lawyers will be able to take advantage of loan repayment programs. Federal student aid programs that assist law graduates with lower starting salaries include the Income-Based Repayment Program (IBR) and Public Service Loan Forgiveness (PSLF). IBR generally benefits those students with high debt and modest income.<sup>125</sup> IBR allows students who qualify to make payments in the amount of 15 percent of the difference between their adjusted gross income and 150 percent of the poverty level.<sup>126</sup> After twenty-five years of payments, the remaining federal debt will be forgiven.<sup>127</sup> Under the PSLF program, graduates using IBR who work in public service may have their remaining loans forgiven in ten years.<sup>128</sup> Unlike IBR, which is provided for the purpose of making debt “manageable,” PSLF was created to encourage public service.<sup>129</sup>

In addition to federal repayment programs, some law schools and some states offer Loan Repayment Assistance Programs (LRAPs). School-based LRAPs are typically funded by private individuals to encourage graduates to pursue public service employment.<sup>130</sup> Students are required to work in a qualifying position and for a certain period of time, at the completion of which the school may forgive all or part of the student’s LRAP loan.<sup>131</sup> About half of the

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A.B.A.J., July 6, 2011, available at [http://www.abajournal.com/news/article/average\\_starting\\_pay\\_for\\_law\\_grads\\_is\\_on\\_downward\\_shift\\_drop\\_is\\_largest\\_for/](http://www.abajournal.com/news/article/average_starting_pay_for_law_grads_is_on_downward_shift_drop_is_largest_for/).

125. *Income-Based Repayment Plan for the Direct Loan and FFEL Programs*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/sites/default/files/income-based-repayment.pdf> (last updated Mar. 2012) [hereinafter Federal Student Aid, *Income-Based*].

126. TAMANAHA, *supra* note 107, at 119; Federal Student Aid, *Income-Based*, *supra* note 125.

127. Federal Student Aid, *Income-Based*, *supra* note 125. Note that IBR and other federal forgiveness programs do not cover private debt.

128. Federal Student Aid, *Income-Based*, *supra* note 125; *Public Service Loan Forgiveness*, FED. STUD. AID, <http://www.studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service> (last visited Jan. 30, 2013) [hereinafter Federal Student Aid, *Public*].

129. Federal Student Aid, *Public*, *supra* note 128. In 2003, the ABA Commission on Loan Repayment and Forgiveness published *Lifting the Burden: Law Student Debt as a Barrier to Public Service*. The Commission recognized the importance of federal, state, and private loan repayment and forgiveness programs and recommended expansions of those programs. ABA COMMISSION ON LOAN REPAYMENT AND FORGIVENESS, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE* 7, 11–13 (2003).

130. Rev. Rul. 2008-34, 2008-28 I.R.B. 76.

131. *Id.*

states also provide LRAPs.<sup>132</sup> State programs vary considerably as to which jobs qualify, how much assistance is provided, and who administers and funds the program.<sup>133</sup> Of the twenty-four current state LRAPs, only ten consider work as a public defender, as was Mr. Griffin's case, to meet eligibility requirements.<sup>134</sup>

## II. ANALYSIS AND PROPOSAL

### *A. Did Ohio err in Denying Mr. Griffin Admission to the Bar?*

Questions as to character and fitness necessarily entail broad discretion, and I do not argue here that the Ohio Supreme Court abused that discretion in denying Mr. Griffin admission to the bar. The Court's rationale is consistent with the factors defined in the Rules, *i.e.*, that Mr. Griffin neglected his financial responsibility by incurring \$170,000 in debt and defaulting on his payments post-graduation. Arguably, Mr. Griffin's decision to continue working part-time at the public defender office rather than pursuing other, full-time employment, supported the Court's doubt of his diligence and reliability.

That is not to say that the Court should not have approved Mr. Griffin's application to the Ohio bar. Much of the inquiry into Mr. Griffin's character and fitness was speculative and predictive. The Court could have found that it was most wise for Mr. Griffin to remain in his part-time job at the office where he expected to work full-time upon passing the bar examination. Employment prospects in many industries were down, and Mr. Griffin had spent the last several years cultivating his legal resume. Without a bar license, he would have had an especially difficult time finding another legal job. Moreover, although he had previously worked as a stockbroker, in

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132. *State Loan Repayment Assistance Programs*, AMERICAN BAR ASS'N, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/loan\\_repayment\\_assistance\\_programs/state\\_loan\\_repayment\\_assistance\\_programs.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/loan_repayment_assistance_programs/state_loan_repayment_assistance_programs.html) last updated Sept. 21, 2012 [hereinafter ABA, *State*].

133. *Id.* Some LRAPs are administered by the state bar association, while others are administered by non-profit organizations. *Id.* Funding also differs across states. Some state legislatures appropriate funds for their LRAP; Others rely on Interest on Lawyer Trust Account (IOLTA) funds. *Id.*

134. *Id.*

2008 those positions were neither as lucrative nor as readily available as in years prior.

Furthermore, even if the Court felt that a decision to pursue other employment would have been more prudent, courts should not dictate career decisions for people based on their financial circumstances. Career choices are highly personal and reflect more than economics. Indeed, this precept is so fundamental that the courts have found the pursuit of one's chosen profession to be protected by the Due Process Clause.<sup>135</sup> While it is fair to require a debtor to make reasonable efforts to repay his or her debt, especially those who are delinquent, the Court's decision here goes far beyond deciding whether Mr. Griffin made reasonable efforts at repayment and infringes upon Mr. Griffin's right to autonomy in making decisions about his career and lifestyle.

The *Griffin* decision is also hard to reconcile with other courts' treatment of more serious character flaws. Here, the Court prevented Mr. Griffin from practicing law because his financial situation made him a risk for future misconduct. Yet courts have admitted applicants with criminal convictions and have allowed attorneys to keep their licenses despite actually engaging in fraudulent conduct.<sup>136</sup>

The Court should also have viewed Mr. Griffin's debt and his employment prospects in the context of the current legal job market and average law student debt levels. Mr. Griffin's situation is not exceptional when considering the economic climate at the time. While some might argue that the depressed legal job market is so poor that most people who pursue a legal career today are making risky, irresponsible decisions, this argument is too sweeping to justify exclusion from the profession on character and fitness grounds. At any rate this argument would not apply to Mr. Griffin, who entered law school in 2005, before most people were aware of the associated risks of pursuing legal education. Furthermore, it's not clear that anyone who applied to law school in this depressed legal job market can be faulted for their decision. Substantial systemic barriers, such as less than transparent rankings reports and job-placement data

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135. See *Dent*, 129 U.S. 114.

136. See *supra* notes 105–06.



released by law schools, prevent potential students from being fully informed about whether a law degree is a wise investment.<sup>137</sup>

Additionally, the Court should have given more consideration to Mr. Griffin's pursuit of a public service career. Public policy supports encouraging law graduates to go into public service work, as evidenced by federal public interest loan forgiveness programs.<sup>138</sup> In fact, Mr. Griffin's pursuit of public interest employment should actually be seen as evidence of his *good* moral character. In addition, the fact that Mr. Griffin would be able to qualify for those assistance programs should have been considered, as it would enable him to repay his debts much more easily and quickly. The failure to recognize these sources of assistance subverts the government's purpose in creating loan forgiveness programs. The message to students is that they should not plan to pursue public interest work upon graduation unless they are among the lucky few who have little to no debt. Apart from discouraging students from sacrificing for the public good, this message would reserve such jobs for the independently wealthy.

Ironically, the Court's decision served only to exacerbate Mr. Griffin's debt problems. Without admission to the bar, Mr. Griffin's ability to gain legal employment and repay his debt is severely limited. To be sure, courts are not obligated to help applicants become financially sound. But when looking at the totality of the circumstances, the Court's concern that Mr. Griffin would not be able to repay his debt would be better addressed if the Court granted Mr. Griffin admission to the bar. Had he been able to take the bar exam again, and, assuming he were to pass, he was practically guaranteed a full-time public defender position.<sup>139</sup> With a public defender salary

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137. See *supra* notes 91–92 and accompanying text.

138. See *supra* note 129 and accompanying text.

139. Telephone Interview with Eric Brehm, Esq., Licensed Practicing Attorney, Brehm & Assocs., LPA (Oct. 15, 2012). While the record of Mr. Griffin's hearing in front of the panel of the Ohio Board has been sealed, an interview with his attorney at the time revealed representations from Mr. Griffin's employers at the public defender office that he would be hired full-time upon his passing the bar. Mr. Brehm stated that this information had been shared with the panel members. *Id.*

and access to IBR and PSLF programs, Mr. Griffin's plan to repay his debt was both a reasonable and fairly common one.<sup>140</sup>

### *B. Character and Fitness Rules Need Revision*

#### 1. Uniformity of Character and Fitness Standards

The history of the character and fitness rules and the unjust outcomes they produce, illustrated by Mr. Griffin's case, suggest that the standards need to be revised. There are two major problems with the current rules. First, it is unclear whether the rules effectuate the purposes for which they were created—to protect the public and preserve the public image of the guild. Second, the definition of “good moral character” is vague, leading to inconsistent application within and between states. These vagueness issues deny applicants notice of which behaviors will obstruct admission to the bar.

Moving toward a more uniform set of standards would help minimize inconsistent and unpredictable outcomes, like the outcome in Mr. Griffin's case.<sup>141</sup> While professional licensing is not in the federal domain, the legal community should make efforts to improve upon the Code of Recommended Standards for Bar Examiners and produce more detailed model rules, with extensive examples, as is done in other areas of the law, such as with the Model Penal Code or in restatements.<sup>142</sup> One specific feature that should become uniform is that all states should allow conditional, or qualified, acceptance procedures.<sup>143</sup> This will help to reduce arbitrary outcomes because examiners will be able to decide difficult cases within this

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140. The options available to Mr. Griffin were through federal IBR and PSLF programs; although Ohio offers a state LRAP, public defenders are not eligible. *See* ABA, *State*, *supra* note 132.

141. Many scholars and organizations have advocated for a more uniform national standard. *See, e.g.*, Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 488, 512 (2000); (*see* GUIDE, *supra* note 43, at vii). *But cf.* Rhode, *supra* note 24, at 588–89 (discussing undertaking more bright-line regulation of moral character and the potential for problems of both over-inclusiveness and under-inclusiveness).

142. *See* Ratcliff, *supra* note 141, at 512.

143. *See supra* note 43 and accompanying text.

framework. This procedure will also help to continue to address the bar's concern for protecting the public from unfit attorneys.

## 2. Addressing Student Loan Debt

To better address notice and fairness concerns in character and fitness cases like Mr. Griffin's, this Note offers four specific recommendations. First, states should explicitly require reviewing committees to consider the applicant in the context of the current legal employment market and student debt levels when they base character and fitness determinations on student debt. To that end, committee members should be required to stay informed about current trends, just as practicing lawyers are generally required to stay current through Continuing Legal Education (CLE) credits. This continuing instruction should include remaining current on the costs of legal education, average and local student debt levels, the legal job market, and federal loan repayment programs.

Second, as the National Conference of Bar Examiners and the ABA Section of Legal Education and Admissions to the Bar have suggested, members of bar examining authorities should be appointed for staggered terms to enhance diversity of views.<sup>144</sup> At least one member should be from a class that graduated in the preceding three years. In addition to these temporal requirements, there should also be diversity in members' professional backgrounds, where at least some members have professional experience in public interest work.

Another option is the formation of peer review boards. These boards would be comprised of recent graduates with more familiarity with the market for entry-level jobs and the current state of student debt levels. Applicants who have received adverse decisions could elect to receive *de novo* review by a peer review board, which may be better able to judge the effects of the current job market, and whether a board's decision has failed to consider relevant circumstances.

Third, whenever student debt and/or a graduate's ability to repay his or her debt is at issue because of the person's pursuit of public interest employment, the reviewer should consciously consider the

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144. See *supra*, notes 48 and 49.

graduate's public interest repayment options.<sup>145</sup> State rules should explicitly identify public policies related to legal employment, such as those encouraging graduates to pursue public interest careers, and include these objectives among the factors relevant to a character and fitness determination.

Fourth, states should set a debt level that is presumptively reasonable. This may be an exact figure, such as the current average level of debt in the area. A national debt average, for example, would suggest a level around \$98,500.<sup>146</sup> Or, states could provide a formula for bar examiners to apply, which could involve calculations based on the applicant's student debt, any other debt, their financial obligations, and their employment or other income prospects. As a presumption, courts would retain discretion to disapprove an applicant if they found other factors affected the character determination. This approach would provide prospective students with clear notice of both their likelihood of getting a return on their investment and how much they can safely borrow.

#### CONCLUSION

When the Ohio State Supreme Court upheld the state bar's decision to deny Hassan Jonathan Griffin admission to the bar on character and fitness grounds for having an insufficient plan to repay his student debt, it prompted a timely question: how should courts balance the importance of assuring the financial reliability and responsibility of future attorneys against the realities of high tuition levels, rising student debt, serious shortages of legal jobs, and the need for public interest lawyers?

This Note proposes that state bars should move towards a more uniform set of character and fitness standards to prevent inconsistent and unjust decisions, like the Ohio State Supreme Court's decision to deny Mr. Griffin admission to the bar due to financial hardship.

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145. Because much of the record of the Board's review of Mr. Griffin's case has been sealed, it is unclear to what extent, if any, the Board considered his public interest repayment options. One of Mr. Griffin's attorneys, however, stated that this matter had been discussed with the panel. Yet the Court makes no mention of it upon its review of the Board's recommendation. *See* Telephone Interview with Eric Brehm, Esq., *supra* note 45.

146. *See supra* note 112.

Among these uniform standards should be explicit rules about how to properly consider student loan debt when assessing applicants' character and fitness requirements.

Examiners must consider applicants within the context of the current legal employment market and debt levels, with specific formulas in place that provide presumptions of reasonable borrowing. Furthermore, examiners must base their decisions on factors that reflect avowed policy interests in public service work. An applicant's decision to pursue a public interest career should not be treated as evidence of irresponsible borrowing. Rather, one's pursuit of public interest employment should be seen as evidence of good moral character. Examiners should also consider how federal loan forgiveness programs impact—and often improve—an applicant's financial stability. Finally, examiners should be drawn from a more diverse group of lawyers from a variety of professional backgrounds. Reforming the character and fitness process in these ways will enable states to address concerns about professionalism in the law while providing for fair and predictable outcomes for law graduates.