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RULES VERSUS STANDARDS: A MORAL INQUIRY INTO WASHINGTON'S CHARACTER & FITNESS HEARING PROCESS

Jennifer Aronson*

Abstract: Historically, moral character inquiries within the state bar admission process have led to the exclusion of diverse and important voices from the legal profession, both consequentially and at times by design. Washington does not keep statistics on the race, ethnicity, gender, or economic class of bar applicants who are referred to character and fitness hearings, nor on the outcomes of those hearings. Examining how implicit bias and disparate outcomes interact in other areas of discretionary adjudicative decision-making illustrates the potential impact that the character and fitness process has on underrepresented communities in the legal profession.

In a criminal justice reform context, well-intended shifts from discretionary standards to bright-line rules have increased disparate outcomes. Yet a recent Washington State Supreme Court case, *In re Bar Application of Simmons*,¹ shed light on the opaque, discretionary nature of the character and fitness hearing process and led many to call for such clarity through rulemaking. Taking a lesson from twentieth-century criminal justice reform movements, Washington should refrain from developing any immediate, bright-line rules. Instead, reforms should first focus on the collection and review of comprehensive data regarding which applicants get referred for hearings and what outcomes result. Data-driven reforms to discretionary processes have a better chance at avoiding unintended outcomes. In another recent Washington State Supreme Court case, *State v. Gregory*,² the court relied on a study quantifying the “statistical significance of the racial patterns”³ to overturn the death penalty. The *Gregory* opinion highlights why citable data is often essential to successful advocacy. More data is necessary to illuminate how the system currently operates. However, there is enough scholarship to support making certain reforms to the process immediately, including consideration of financial and behavioral health records.

This Comment is in conversation with current research regarding implicit bias in adjudicative processes. It opposes scholarship promoting further exclusion of bar applicants with prior convictions, or bright-line rules for admission absent supporting data.

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1. 190 Wash. 2d 374, 414 P.3d 1111 (2018).
2. 192 Wash. 2d 1, 35, 427 P.3d 621, 642 (2018).
3. *State v. Davis*, 175 Wash. 2d 287, 401, 290 P.3d 43, 98 (2012) (Wiggins, J., dissenting), *abrogated by Gregory*, 192 Wash. 2d at 1, 427 P.3d at 621.

INTRODUCTION

Because of my past experiences, I see beyond the current case. I see how it affects their family, children, the collateral consequences. A lot of my work is on reentry and I bring a fuller sense of understanding to that work. I understand what prison life is like emotionally and logistically, I know how the bureaucratic barriers before and after incarceration affect their lives, like whether they can volunteer in their child's school. It's a fuller and deeper understanding than an advocate can possess with good intentions alone.

— Tarra Simmons, attorney and reintegration advocate⁴

Before enrolling at Seattle University School of Law, Tarra Simmons met with professor John Strait⁵ to ask a question he had grown accustomed to answering: given her personal history, would she even be allowed to sit for the bar exam?⁶ Professor Strait indicated that she would certainly be referred for a character and fitness hearing, but that it was survivable.⁷ Simmons's criminal record was tied to addiction—a medical condition—and she felt that her desire to serve the public and her unique experiences would be positive contributions to a profession that remains predominantly comprised of white men⁸—a demographic which, due to

4. Telephone Interview with Tarra Simmons, Dir., Civil Survival Project (Oct. 29, 2018) [hereinafter Simmons Interview] (on file with author). As this Comment argues in favor of the importance of diverse legal voices often weeded out through the character and fitness hearing process, interviews were conducted with individuals with applicable personal experiences. Tarra Simmons is a noted advocate in the fields of reintegration and criminal justice reform. *Id.* After winning her appeal to the Washington State Supreme Court to be admitted to the bar, Simmons went on to work as a Skadden Fellow for the Public Defender Association of Seattle. *Tarra Simmons*, PUB. DEF. ASS'N, <http://www.defender.org/content/tarra-simmons> [<https://perma.cc/SZ58-2Z6X>]. Simmons is currently the Executive Director of Civil Survival. *Our Team*, CIV. SURVIVAL, <https://civilsurvival.org/our-team/> [<https://perma.cc/XY4J-BWMX>]. She was appointed to Governor Inslee's Public Defense Advisory Board and co-chairs the Statewide Reentry Council. *Id.*

5. John Strait also provided interviews for this Comment. John Strait is an Emeritus Professor of Law, Distinguished Practitioner in Residence, and Professional Ethics Counsel at Seattle University School of Law. *John Strait*, SEATTLE U. SCH. L., <https://law.seattleu.edu/faculty/profiles/emeriti/john-strait> [<https://perma.cc/AXH4-G9TC>]. He is noted for his work in the fields of legal ethics and has represented bar applicants such as Tarra Simmons in character and fitness hearings and appeals. Telephone Interview with John Strait, Emeritus Professor of Law, Seattle Univ. Sch. of Law (Nov. 1, 2018) [hereinafter Strait Interview] (on file with author) He has also served on several committees with the Washington State Bar Association, including the Rules of Professional Conduct Committee, the Criminal Law Section, and Office of Legal Discipline. *John Strait, supra*.

6. Simmons Interview, *supra* note 4; Strait Interview, *supra* note 5.

7. Simmons Interview, *supra* note 4.

8. Only 36.4% of lawyers are female, while 86.6% are white. *Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/NV42-SCRL>]. According to the Washington State Bar Association's most recent membership demographics, around 85% of respondents selected

biases at all stages of the justice process, has less experience with what justice involvement⁹ feels like for their clients.¹⁰

The decision to go to law school is a weighty one—in most cases, involving three years of intensive study and significant financial investment.¹¹ The average cost of tuition for the 2017–2018 academic year at a private law school (like the one Simmons attended) was \$47,112.¹² The decision becomes excruciatingly fraught for students whose backgrounds may trigger a moral character inquiry, such as those with criminal convictions, past addiction issues, or mental health-related diagnoses.¹³

“White / European Descent” as their ethnicity. *WSBA Member Licensing Count*, WASH. ST. B. ASS’N, https://www.wsba.org/docs/default-source/licensing/membership-info-data/countdemo_20190801.pdf?sfvrsn=ae6c3ef1_86 [<https://perma.cc/JH8H-6VEZ>].

9. This paper uses the terms “justice involvement” or “justice-involved” to describe individuals who have been touched by the criminal justice system, resulting in their own arrest or conviction. This is in accordance with person-centered language movements to avoid dehumanizing people by defining them by the crimes for which they were convicted, such as *drug dealer*, *convict*, or *offender*. Nguyen Toan Tran et al., *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, 18 BMC INT’L HEALTH & HUM. RTS. 41, 41–42 (2018); Cameron Okeke & Nancy G. La Vigne, *Restoring Humanity: Changing the Way We Talk About People Touched by the Criminal Justice System*, URB. INST. (Nov. 29, 2018), <https://www.urban.org/urban-wire/restoring-humanity-changing-way-we-talk-about-people-touched-criminal-justice-system> [<https://perma.cc/4C5F-HMFG>]. This language was largely adopted by the Department of Justice under the Obama Administration. See, e.g., Press Release, Dep’t of Justice, The Departments of Justice and Housing and Urban Development to Award \$1.75 Million to Help Justice-Involved Youth Find Jobs and Housing (Apr. 25, 2016), <https://www.justice.gov/opa/pr/departments-justice-and-housing-and-urban-development-award-175-million-help-justice-involved> [<https://perma.cc/XM38-UMEP>] (using the language “justice-involved youth” to describe children who have been arrested or convicted).

10. See ELIZABETH HINTON ET AL., VERA INST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/FE6X-U967>]; DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM xvi–xvii (2010) (highlighting that the prison population is “overwhelmingly poor and disproportionately black”). Studies have found that white men living in conditions of poverty and unemployment are more likely to commit violent crimes than Black men of similar backgrounds. Danielle C. Kuhl, Lauren J. Krivo & Ruth D. Peterson, *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOC. 1765, 1765–802 (2009); Robert J. Sampson & William J. Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in CRIME & INEQUALITY 37 (John Hagan & Ruth D. Peterson eds., 1995). However, in 2016, 22% of Black people, compared to 9% of white people, dealt with “the realities of poverty.” HINTON ET AL., *supra*, at 10.

11. *Find the Law Program for You*, L. SCH. ADMISSION COUNCIL, <https://www.lsac.org/applying-law-school/types-law-degrees> [<https://perma.cc/X5XB-LM89>].

12. Ilana Kowalski, *See the Price, Payoff of Law School Before Enrolling*, U.S. NEWS & WORLD REP. (Mar. 21, 2018, 8:00 AM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-03-21/understand-the-cost-payoff-of-law-school-before-getting-a-jd> [<https://perma.cc/4SK3-RTFJ>]. For the 2020–2021 school year, Seattle University itself cost \$47,565, with an estimated total cost of attendance of \$65,970 for students living on-campus. *Tuition and Fees*, SEATTLE U., <https://www.seattleu.edu/undergraduate-admissions/finances/tuition/> [<https://perma.cc/68Q5-QB5M>].

13. See *infra* Parts I and IV.

Each state bar association's application process involves a moral character inquiry.¹⁴ In Washington State, the character and fitness hearing process occurs before law students take the bar exam.¹⁵ Students referred for a hearing must be found to possess a "good moral character" before they are allowed to sit for the bar exam.¹⁶ The Washington State Bar Association (WSBA)'s character and fitness hearing process is highly discretionary.¹⁷ Law students with prior justice involvement, like Simmons, are afforded little notice about whether they will be referred for a hearing and what the outcome of that hearing might be.¹⁸

Knowing her criminal background could present challenges, Tarra Simmons took a leap of faith and set out to achieve at the highest possible levels while in law school.¹⁹ During her time at Seattle University School of Law, Simmons earned top academic honors while committing herself to a variety of public interest organizations and legal reform movements.²⁰ Simmons graduated magna cum laude with several honors, including the Dean's Medal.²¹ Upon graduating, she was named "National Law Student of the Year" by the National Jurist.²² Professor Strait noted that, by the time she graduated, Simmons had already "accomplished more for law reform than most lawyers would do in their lifetime," all while commuting by ferry from a neighboring county and balancing the demands of being a single parent.²³

But in 2017,²⁴ when Simmons was referred to the character and fitness hearing she knew would potentially await her, the Character and Fitness Board ("the Board") viewed the evidence of how her law school accolades differently than she had anticipated.²⁵ Rather than proof of her

14. NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *Comprehensive Guide To Bar Admission Requirements* (2018) [hereinafter ABA, *Comprehensive Guide to Bar Admission Requirements*], <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html> [<http://perma.cc/9K7W-RU5A>].

15. Austin Jenkins, *From Drugs to Prison to Law School, Woman Faces One Extra Hurdle to Become a Lawyer*, NW NEWS NETWORK (May 11, 2017), <https://www.nwnewsnetwork.org/post/drugs-prison-law-school-woman-faces-one-extra-hurdle-become-lawyer> [<https://perma.cc/K6MX-VUXD>].

16. WASH. CT. A.P.R. 24.1(c).

17. See discussion *infra* Part I.

18. See discussion *infra* Part I.

19. Simmons Interview, *supra* note 4.

20. Grace Li, *Interview with Tarra Simmons: Forging the Way for Formerly Incarcerated Lawyers*, 43 HARBINGER 1, 1 (2018).

21. *Id.*

22. Li, *supra* note 20, at 1.

23. Strait Interview, *supra* note 5.

24. Jenkins, *supra* note 15.

25. Simmons Interview, *supra* note 4.

rehabilitation and likely success as a legal professional, the Board felt her proffered record of achievement demonstrated “entitlement.”²⁶ Ultimately, the Board recommended against allowing Simmons to sit for the bar exam.²⁷ Both the tone and outcome of the hearing shocked Simmons.²⁸

Simmons requested Washington State Supreme Court review of the Board’s recommendation, and oral arguments were heard by the Washington State Supreme Court.²⁹ WSBA again argued that Simmons’s rehabilitative evidence, necessary to prove her likelihood of positive contribution to the legal community, was boastful.³⁰ Prior to the hearing, Simmons received a prestigious Skadden fellowship,³¹ which funded two years of work providing civil legal services to underserved communities.³² During oral arguments, WSBA bar counsel highlighted the more than thirty times that Simmons’s Skadden Fellowship was mentioned in the character and fitness hearing transcripts as evidence of her entitlement.³³ However, bar counsel failed to note that twenty-five of those were mentions by members of the Board themselves, or Simmons’s responses to their direct questions about her fellowship.³⁴ WSBA counsel juxtaposed these mentions of her fellowship to a single mention of the word “sorry,” as though Simmons’s omission of further repentant utterances were itself an act of moral turpitude.³⁵ But the Washington State Supreme Court disagreed. As Justice Mary Yu noted in her opinion, the Court “summarily reject[s] the premise that this word count is an appropriate basis on which to evaluate Simmons’ moral character.”³⁶ But what is an appropriate basis? And what limitations exist on what the Board can consider?

Historically, moral character inquiries have led to the exclusion of diverse and important voices from the legal profession, both

26. Simmons Interview, *supra* note 4; see also *In re Bar Application of Simmons*, 190 Wash. 2d 374, 391, 414 P.3d 1111, 1119 (2018) (noting “the Board was concerned that Simmons did not sufficiently understand the concerns raised by her prior misconduct and that her success has engendered in her an inappropriate sense of entitlement”).

27. See generally *In re Simmons*, 190 Wash. 2d at 374, 414 P.3d. at 1111.

28. Simmons Interview, *supra* note 4.

29. See generally *In re Simmons*, 190 Wash. 2d at 374, 414 P.3d at 1111.

30. Simmons Interview, *supra* note 4.

31. Elizabeth Olson, *Are Felons Fit to Be Lawyers? Increasingly, the Answer Is Yes*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/business/are-felons-fit-to-be-lawyers.html> [<https://perma.cc/GPF4-6UJU>].

32. *Id.*

33. Oral Argument at 27:26, *In re Simmons*, 190 Wash. 2d at 374, 414 P.3d. at 1111 (No. 201,671-5), <https://www.tvw.org/watch/?eventID=2017111036> (last visited May 20, 2020).

34. *In re Simmons*, 190 Wash. 2d at 377, 414 P.3d. at 1112.

35. *Id.* at 393, 414 P.3d at 1119.

36. *Id.*

consequentially and at times, by design.³⁷ Tarra Simmons certainly felt that her gender and socioeconomic background played a role in how her history was perceived by the Board.³⁸ Meanwhile, little data is available regarding the race, ethnicity, gender, or economic class of applicants referred to hearings or the outcomes of those hearings.³⁹ However, by examining the ways in which implicit bias and disparate outcomes interact in other areas of discretionary decision-making in the criminal justice system, one can surmise how they may operate in the context of character and fitness hearings.⁴⁰ Only comprehensive data collection can confirm or deny these assumptions, and illuminate the specific mechanisms by which they operate in the character and fitness hearing process.

In the interest of furthering equity, Washington must start collecting comprehensive data on disparate impacts and rates of recidivism within its character and fitness process. Washington should refrain from developing any immediate, bright-line rules. Instead, proponents of character and fitness process reforms should first focus on the collection and review of comprehensive data regarding which applicants get referred for hearings and what outcomes result. It is essential to the success of such reforms that citable data is available to highlight and quantify particular problems with the current system.⁴¹

Further, changes to how past convictions are considered within the character and fitness hearing process must be responsive to insights from collected data. Character and fitness hearings are quasi-judicial, and weigh individuals' morality based, in part, on prior criminal history.⁴² As such, they are saturated with the same tension between bright-line rules and discretionary standards that plague criminal justice advocacy.⁴³ Past examples of criminal justice reform, such as mandatory sentencing, caution against the adoption of bright-line rules to combat disparate impacts absent a complete picture of where discretion undermines equity.⁴⁴

This Comment proceeds in four parts. Part I discusses the character and fitness hearing process in Washington and compares it to the standards of other state bar associations. Part II reviews the tension between rules versus standards—and as such, discretion versus predictability—in legal settings, using sentencing reform and criminal record accessibility as a

37. See discussion *infra* Part I.

38. Simmons Interview, *supra* note 4.

39. Strait Interview, *supra* note 5.

40. See *infra* Part III.

41. See *infra* Part III.

42. See *infra* Part I.

43. See discussion *infra* Part II.

44. See discussion *infra* section II.A.

framework. Part III provides a framework for how implicit bias operates in criminal justice settings and in employment, and how it may be operating in the character and fitness hearing process in Washington. Finally, Part IV provides suggestions for normative policies, such as comprehensive data collection, arguing in favor of the need for inclusion of rehabilitated applicants with prior convictions in the legal profession. This Comment advocates for the Washington State Bar Association to collect desperately needed comprehensive data to assess the barriers that applicants face during character and fitness hearings. It also proposes solutions that are immediately actionable given current available data and scholarship, such as pre-enrollment advisory decisions, mandatory maximums regarding how long convictions may be considered, the exclusion of past convictions and treatment related to behavioral health, and the exclusion of evidence regarding past financial issues.

I. OVERVIEW OF THE CHARACTER AND FITNESS HEARING PROCESS

There's a technical procedural 'glitch' to the way Washington does [Character and Fitness Hearings] that always extends the application process and swearing-in by at least nine months and typically a year.

— John Strait, emeritus professor of law at Seattle University, attorney in *In re Simmons*⁴⁵

Moral character inquiries for admission to the legal profession have existed in some iteration for centuries.⁴⁶ In the English tradition, admission to the upper branch of the legal profession was limited to society's upper caste, with required dinners at the Inns of the Courts largely serving as the only screening of potential clerks' obvious social deviations.⁴⁷

In the eighteenth century, United States colonial legislatures began formalizing character examinations.⁴⁸ In particular, some legislatures barred admission for those previously convicted of felonies, treason, and other specified crimes.⁴⁹ However, such morality requirements were

45. Strait Interview, *supra* note 5. The WSBA used to allow students to sit for the bar prior to issuing character and fitness hearing decisions—now getting referred causes serious delays in licensure. *Id.*

46. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491, 496 (1985) [hereinafter Rhode, *Moral Character*].

47. *Id.* at 495.

48. *Id.* at 496.

49. 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 17 (1965).

largely unenforced due to the lack of centralized information.⁵⁰ One of the only morality bar truly enforced was the exclusion of women.⁵¹ In the seminal case *Bradwell v. Illinois*,⁵² the United States Supreme Court held that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it” to enter the legal profession.⁵³

As occupational licensing increased across most trades, these standards solidified.⁵⁴ By the 1930s, two-thirds of American jurisdictions mandated moral character inquiries through formal processes such as interviews.⁵⁵ In one such character interview program, within the first eight years, admission of Jewish candidates dropped by 16%, with almost no admissions of Black applicants.⁵⁶

Currently, every state bar admission process involves an inquiry into moral character.⁵⁷ Rules of admission are generally promulgated by the state supreme court, with a few states enacting some rules through their legislatures.⁵⁸ While these inquiries have shifted from overt exclusion of certain demographics, little has been done to quantify who these inquiries exclude in effect—and whether that exclusion affects demographic groups of bar applicants equitably.

A. *Washington State: The Character and Fitness Review Process*

As is the case with many state bar associations, the Washington State Bar Association (WSBA) controls the admission and licensing of lawyers.⁵⁹ This process is governed by the Admission and Practice Rules (APRs) adopted by the Washington State Supreme Court.⁶⁰ The WSBA

50. *Id.*

51. Rhode, *Moral Character*, *supra* note 46, at 497.

52. 83 U.S. 130 (1872).

53. *Id.* at 141.

54. Rhode, *Moral Character*, *supra* note 46, at 499.

55. *Id.*

56. *Id.* at 501; *see also* J. AUERBACH, UNEQUAL JUSTICE 127–28 (1976) (describing Pennsylvania’s precept system). This Comment uses the term “Black” as opposed to African American. For discussion on this usage, *see*, for example, NABJ Style Guide A, <https://www.nabj.org/page/styleguideA> [<https://perma.cc/946N-YWQS>]. For discussion on the capitalization of the term “Black,” *see*, for example, David Lanham & Amy Liu, *Not Just a Typographical Change: Why Brookings is Capitalizing Black*, BROOKINGS (Sept. 23, 2019), <https://www.brookings.edu/research/brookingscapitalizesblack/> [<https://perma.cc/3M7S-J5N2>].

57. *In re* Bar Application of Simmons, 190 Wash. 2d 374, 377, 414 P.3d 1111, 1112 (2018). *See generally* ABA, *Comprehensive Guide to Bar Admission Requirements*, *supra* note 14.

58. ABA, *Comprehensive Guide to Bar Admission Requirements*, *supra* note 14, at 1.

59. *Admission by Lawyer Bar Examination*, WASH. ST. BAR ASS’N (June 6, 2019), <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/lawyers/rules-and-regulations> [<https://perma.cc/3BJ3-DYDU>] [hereinafter ABA, *Admission by Lawyer Bar Examination*].

60. *Id.*

Board of Governors promulgates admission policies consistent with these rules.⁶¹ In Washington, a bar applicant's character and fitness review begins before they even sit for the bar exam, and permission to do so may be withheld pending a Board hearing.⁶² Those referred for a hearing bear the burden of proving that they are "of good moral character" and "fit to practice law."⁶³ *Good moral character* is defined as "a record of conduct manifesting the qualities of honesty, fairness, candor trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process."⁶⁴ Applicants must prove their character and fitness by a "clear and convincing evidence" standard.⁶⁵

Character and fitness review is very different from disbarment proceedings, where an attorney has actually committed unethical conduct related to their practice.⁶⁶ In disbarment proceedings and disciplinary hearings, which are quasi-criminal, it is *the Board* that bears the burden of proving the unethical or illegal conduct occurred by clear and convincing evidence.⁶⁷

B. *Washington State: Hearing Referral Process*

Who gets referred for a hearing with the Board is a discretionary decision made by WSBA counsel.⁶⁸ An applicant may be referred for a hearing if counsel finds "there is a substantial question" about the applicant's character and fitness.⁶⁹ In determining whether a substantial question exists, WSBA counsel considers an unweighted list of factors, including unlawful conduct, acts involving dishonesty, neglect of financial responsibilities, and "any other conduct that reflects adversely on moral character or fitness of the applicant to practice law."⁷⁰ In 2016,

61. *Id.*

62. *Admission Policies of the Washington State Bar Association*, WASH. ST. BAR ASS'N (July 28, 2017), https://www.wsba.org/docs/default-source/licensing/admissions/wsba-admission-policies---10-4-17---sep-1-2017.pdf?sfvrsn=b4ed38f1_22 [<https://perma.cc/Y98X-AFLB>] [hereinafter *ABA, Admission Policies of the Washington State Bar Association*] (some amendments made following *In re Simmons*, 190 Wash. 2d at 374, 414 P.3d at 1111).

63. *Id.*

64. WASH. CT. A.P.R. 20(c).

65. WASH. CT. A.P.R. 24.1(c) ("An applicant must establish by clear and convincing evidence that he or she is of good moral character and possesses the requisite fitness to practice law.").

66. WASH. REV. CODE § 2.48.220 (2019).

67. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wash. 2d 516, 528, 29 P.3d 689, 694 (2001) (stating that professional licensure disciplinary hearings are quasi-criminal).

68. *In re Bar Application of Simmons*, 190 Wash. 2d 374, 377, 414 P.3d 1111, 1115 (2018).

69. WASH. CT. A.P.R. 22.1(d).

70. *Id.* r. 21(a)(14).

after pushback from advocates, and scrutiny of such practices from United States Attorney General Eric Holder, the Washington State Supreme Court adopted amendments to APRs 20 through 25.6 which removed explicit questions about mental health from the bar application.⁷¹ This development recognizes wide-sweeping issues with mental health concerns in the legal community. A 2016 study in partnership with the American Bar Association (ABA) found that a staggering 28% of attorneys struggle with depression, and that 19% suffer from symptoms of anxiety.⁷² Moreover, attorneys within their “first 10 years of practice exhibit the highest incidence of these problems.”⁷³

In an industry rife with depression, anxiety, and other mental health concerns, encouraging law students and professionals to seek treatment free from the fear of repercussions should be paramount. The law renders plenty of evidence inadmissible or subject to privilege for this very reason.⁷⁴ Character and fitness proceedings should be no different. Further, studies have shown that police respond differently to people of color in mental distress, likely resulting in disparate outcomes for justice-involvement related to such encounters.⁷⁵

Although Washington’s bar application no longer includes explicit questions about mental health, bar counsel may still inquire into mental health diagnoses and drug or alcohol dependence if “it appears” the applicant engaged in conduct demonstrative of a lack of ability to fulfill their professional duties, and if that conduct is explained in part by such medical information.⁷⁶ The decision to refer an individual for a hearing is

71. *Suggested Amendments, Admission and Practice Rules (APR) Rules 20–25.6*, WASH. CTS., http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=487 [<https://perma.cc/AU47-JY2G>]; *WSBA Can No Longer Discriminate Against Applicants with Mental Health Disabilities After Rule Change*, DISABILITY RTS. WASH. (Sept. 1, 2016), <https://www.disabilityrightswa.org/2016/09/01/questions-of-discrimination/> [<https://perma.cc/53EJ-TU6J>]; The United States’ Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89).

72. *ABA, Hazelden Betty Ford Foundation Release First National Study on Attorney Substance Use, Mental Health Concerns*, HAZELDEN BETTY FORD FOUND. (Feb. 3, 2016), <https://www.hazeldenbettyford.org/about-us/news-media/press-release/2016-aba-hazelden-release-first-study-attorney-substance-use> [<https://perma.cc/L5F7-3G4J>].

73. *Id.*

74. This is aligned with many policy-based rationales for encouraging desired behaviors, such as FED. R. EVID. 407, rendering evidence of subsequent remedial measures inadmissible. *Id.* Examples of this in the context of admissibility of mental health treatment include psychotherapist-patient privilege and rules regarding witness impeachment on the grounds of sensory perception. *See* FED. R. EVID. 501, Notes of Comm. on the Judiciary, H.R. Rep. No. 93-650; *United States v. Pryce*, No. 89-0016-02, 1995 WL 17204217, at *7 (D.C. Cir. Aug. 9, 1995).

75. *See* Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 *FORDHAM URB. L.J.* 615, 622 (2016).

76. WASH. CT. A.P.R. 22.1(c).

a nonreviewable decision.⁷⁷ The vague language of Washington’s APRs regarding the hearing referral process provides little guidance to applicants on their likelihood of being referred for a hearing based on this type of information.

C. *Washington State: Character and Fitness Hearing Process*

A referral by bar counsel triggers a hearing in front of the Board,⁷⁸ which is comprised of volunteer members—one attorney from each congressional district and three community members not licensed to practice law.⁷⁹ Character and fitness hearings are *sui generis*, meaning they are neither civil nor criminal.⁸⁰ Once again, the unweighted factors listed in Washington APR 21(a) are considered.⁸¹ In Tarra Simmons’s initial hearing, the Board considered her previous issues with substance abuse, criminal history, and two bankruptcies resulting from the financial strain of her incarceration.⁸² It also considered sealed juvenile records.⁸³

The Board penalized Simmons for failing to initially disclose sealed juvenile records on her law school application, concluding this demonstrated a “lack of candor.”⁸⁴ This is significant: under Washington State law, sealed juvenile records are treated as if the underlying crimes never occurred, and individuals whose juvenile records have been sealed may legally answer questions about the events or records on forms or applications as though the events never occurred.⁸⁵ Though the hearings are neither civil nor criminal, the quasi-judicial setting fosters an intimidating and adversarial feel to the proceedings.⁸⁶ Applicants are often represented by counsel, and bear the burden of proving their good moral character “by clear and convincing evidence.”⁸⁷ Board members may subpoena witnesses, question applicants’ witnesses, use their own

77. Strait Interview, *supra* note 5. *See generally* WASH. CT. A.P.R. 21–25. Practically, this means that applicants have no right to appeal the decision to be referred for a character and fitness hearing itself, only to appeal its outcome.

78. WASH. CT. A.P.R. 22.1(d).

79. *Id.* r. 23.

80. *Id.* r. 24.1(d).

81. *Id.*

82. *In re* Bar Application of Simmons, 190 Wash. 2d 374, 377, 414 P.3d 1111, 1113 (2018).

83. Strait Interview, *supra* note 5.

84. *Id.* Simmons was under the impression she was not required to disclose these records, but she did so her second year of law school upon realizing this might be an issue. *Id.*

85. WASH. REV. CODE. § 13.50.260 (2019).

86. Strait Interview, *supra* note 5.

87. WASH. CT. A.P.R. 24.1(c).

specialized knowledge, and request medical records or independent medical examinations.⁸⁸

While board members are afforded many tools to seek reasons why an applicant should not be admitted, applicants are somewhat more limited in their control over their own “case.”⁸⁹ As demonstrated in Simmons’s hearing,⁹⁰ unlike adversarial proceedings, full candor is expected from the applicant, and anything deemed as less can itself be a reason to reject an applicant.⁹¹

Beyond candor about their history, it would seem from Simmons’s case that WSBA counsel and members of the Board are—on some level—also looking for signs of remorse.⁹² Compounding the burden of candor placed upon applicants, there are few attorneys who represent applicants in character and fitness hearings.⁹³ Some such attorneys have anecdotally reported an increase in what they call “sandbagging.”⁹⁴ The Board is not required to notify applicants of witnesses they are subpoenaing, or what applicants’ supporting witnesses say about them, before reporting those findings to bar counsel.⁹⁵ John Strait explains that the Board does not share the reports with applicants; “the only time you’ll see them is in a pre-hearing brief ten days before the hearing, so you won’t know what the witnesses they’ve spoken to are saying until a week or two prior to the scheduled hearing.”⁹⁶

88. *Id.* r. 24.1(e)–(f).

89. As these proceedings are not criminal nor does the applicant currently have a property interest in their membership as would a practicing attorney facing disbarment, their legal protections are limited, especially regarding substantive due process and rules of admissible evidence. Carolyn R. Cody, *Professional Licenses and Substantive Due Process: Can States Compel Physicians to Provide Their Services*, WM. & MARY BILL RTS. J. 941, 942–50 (2014) (discussing professional licenses as a property right); FED. R. EVID. 1101 (outlining the courts and proceedings to which the Federal Rules of Evidence apply); *see also* WASH. R. EVID. 1101 (indicating that barring some exceptions, the state’s rules of evidence “apply to all actions and proceedings in the courts of the state of Washington”).

90. Despite the Board’s comments on Simmons’s lack of candor about matters such as sealed juvenile records, the Washington State Supreme Court noted that Simmons’s “complete candor” helped to “persuade the court that she is highly likely to remain on her current path when she becomes a practicing attorney.” *In re* Bar Application of Simmons, 190 Wash. 2d 374, 387, 414 P.3d 1111, 1116–17 (2018). The court further noted that at least in its majority opinion, the Board acknowledged Simmons’s “complete candor” as well. *Id.* at 395, 414 P.3d at 1120.

91. WASH. CT. A.P.R. 21(b)(7) (stating that “candor in the admissions process and before the Character and Fitness Board” is “considered in mitigation or aggravation when determining an Applicant’s good moral character or fitness to practice law”).

92. *See supra* Introduction.

93. John Strait describes “sandbagging” as the dearth of information provided to applicants or their counsel about whom they are speaking with, what those individuals have said, and what information they are seeking. Strait Interview, *supra* note 5.

94. *Id.*

95. *Id.*

96. *Id.*

The process—often incredibly frustrating and dehumanizing for applicants—can be surprisingly emotional for Board members as well. Judge David Keenan served as a member of the Washington State Character and Fitness Board.⁹⁷ He volunteered for the three-year term in part because of his own interactions with the law as a teenager.⁹⁸ When asked what he found most surprising about the experience, he quickly replied,

[t]hey are gut-wrenching. There was not a single hearing where the applicant did not cry. It was not uncommon for board members to cry as we debated this. I didn't agree with [the Board's] decision regarding Tarra [Simmons], but I know they took their work very seriously. There were long, long debates about this stuff.⁹⁹

Members of the Board are provided with little training to equip them to make these harrowing decisions.¹⁰⁰ As a board member, Judge Keenan does not recall receiving much training beyond the Washington Admission and Practice Rules.¹⁰¹ This is especially surprising given board members' mixed familiarity with adjudicative processes.¹⁰²

1. *Washington State Supreme Court Review*

If the Character and Fitness Board recommends denial, an applicant may appeal the decision to the Washington State Supreme Court.¹⁰³ The Washington State Supreme Court makes final determinations in appeals to the outcomes of character and fitness hearings.¹⁰⁴ It is up to applicants to cover the cost of taking their case up for review if they wish to pursue an appeal.¹⁰⁵ The standard of review is *de novo*¹⁰⁶—meaning the court

97. Interview with Hon. David Keenan, Judge, King Cty. Super. Ct. (Oct. 30, 2018) [hereinafter Keenan Interview] (on file with author).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *1-31-2020 Character & Fitness Board Volunteer Position Description*, WASH. STATE BAR ASS'N, https://www.wsba.org/docs/default-source/connect-serve/volunteer-position-descriptions/character-fitness-board-position-description-2019.pdf?sfvrsn=a3e805f1_9 [<https://perma.cc/V9DN-XKGN>].

103. WASH. CT. A.P.R. 24.2, 24.3.

104. ABA, *Comprehensive Guide to Bar Admission Requirements*, *supra* note 14, at 6.

105. WASH. CT. A.P.R. 24.2(b)(2).

106. *In re Bar Application of Simmons*, 190 Wash. 2d 374, 382, 414 P.3d 1111, 1114 (2018); Brief for ACLU of Washington et al. as Amici Curiae Supporting Petitioner at 3, *In re Simmons*, 190 Wash. 2d at 374, 414 P.3d at 1111 (No. 201,671-5), <https://defense.net.org/wp-content/uploads/2017/12/ACLU-Simmons-Brief-FINAL.pdf> [<https://perma.cc/RMY5-N3BR>].

reviews the matter anew, and the Board's recommendation is considered "advisory only."¹⁰⁷

Applicants may waive their right to confidentiality, though the WSBA seems to oppose public availability of information regarding applicants' hearings. For example, in *In re Simmons*, the WSBA opposed Simmons's requests to use her name in court filings, hold the oral argument in open court, and publish the full case opinion.¹⁰⁸

2. *Washington State Bar Exam Administration*

The unique way that scheduled bar exams factor into Washington's character and fitness timeline provides additional barriers to bar applicants referred for hearings. The Washington State Bar Exam is administered twice each year: once in July and once in February.¹⁰⁹ Application filing dates are typically four months before the exam date.¹¹⁰ Because they cannot file to sit for the bar until the satisfactory conclusion of such proceedings, applicants referred for character and fitness hearings typically miss the deadline for the first, or even second, exam offered. Even applicants who are ultimately recommended for admission may suffer consequences collateral to the hearing process. For example, such applicants will be forced to disclose to any employers that they are unable to sit for the bar and likely the reason why.

Federal Direct Stafford student loans only have a six-month grace period before the first repayment installation is due, while payments on graduate PLUS loans must begin within sixty days of graduation.¹¹¹ Thus, applicants referred for hearings often must begin paying back law school loans before they are eligible to sit for the bar. If denial is recommended, they will have to wait through the Washington State Supreme Court appeal, which they are also responsible for financing.

D. *Character and Fitness Processes in Other States*

While using character and fitness as a prerequisite to sit for the bar exam is unique, Washington's ad-hoc approach to character and fitness decisions is not unconventional. Most states publish codified character and fitness standards, though they vary greatly in detail and in discretion

107. *In re Belsher*, 102 Wash. 2d 844, 689 P.2d 1078, 1084 (1984).

108. *In re Simmons*, 190 Wash. 2d at 381 n.3, 414 P.3d at 1114 n.3 (2018).

109. ABA, *Admission by Lawyer Bar Examination*, *supra* note 59.

110. ABA, *Admission Policies of the Washington State Bar Association*, *supra* note 62.

111. *Grace Periods*, NAT'L CONSUMER L. CTR. (2018), <https://www.studentloanborrowerassistance.org/repayment/postponing-repayment/grace-periods/> [<https://perma.cc/7QMH-98KS>].

given to the evaluating entity.¹¹² Most states have declined to set automatic barriers to bar admission based upon criminal convictions.¹¹³ Only four states—Texas, Mississippi, Missouri, and Kansas—have bright-line rules barring applicants with felony convictions from admission.¹¹⁴ Kansas, Missouri, and Texas have a five-year bar from the completion of an applicant’s sentence or probation.¹¹⁵ Mississippi has a lifelong ban for all but a few felonies.¹¹⁶ Florida and Georgia require either a pardon or restoration of rights before an applicant may apply for admission.¹¹⁷ Oregon bans the readmission of Oregon lawyers previously disbarred for their criminal convictions.¹¹⁸ In contrast, Washington does not consider applications for readmission until a minimum of five years after disbarment.¹¹⁹

The discretionary nature of Washington’s character and fitness process provides little insight for would-be bar applicants with issues like prior justice-involvement. Every step of the process presents unknowable odds foreclosing licensure—application to law school, application to the bar, referral to a hearing, ability to sit for the bar exam, and possible appeal of unfavorable decisions. The dearth of historical data compounds bar applicants’ uncertainties and makes it impossible for the legal community to know where we may be losing needed voices in the profession along the way.

II. GENERAL RULES VERSUS STANDARDS

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.

— Justice Black, *Konigsberg v. State Bar of California*¹²⁰

112. ABA, *Comprehensive Guide to Bar Admission Requirements*, *supra* note 14, at 4–5.

113. *Id.*

114. *Id.* at 5–6.

115. *Id.*

116. *Id.* at 5.

117. *Id.*

118. *Id.* at 6.

119. WASH. CT. A.P.R. 25.1(b).

120. 353 U.S. 252, 262–63 (1957) (footnote omitted).

A. *Rules Versus Standards: A Classic Legal Debate*

The judicial suitability of bright-line rules versus discretionary, ad-hoc standards has long been fodder for legal scholarship.¹²¹ The rules-versus-standards debate came to a head in the 1970s—reaping dismal results from lawmakers’ grand experiment to overcorrect the disparate outcomes attributed to ad-hoc judicial decision-making in the criminal justice system.¹²² Highly discretionary decision-making has also proven problematic in the context of character and fitness determinations, where bar applicants often wander blindly into a years-long maze of intensive doctrinal work and debt accrual to earn a juris doctorate degree, with no guarantee for successful entry into the profession. The outcomes resulting from the many judicial applications of ideas raised in rules-versus-standards scholarship provide guidance on normative policies for the character and fitness hearing process.

The tensions that exist between rules and standards concern balancing the need for knowable laws which put citizens on notice, and decisionmakers’ discretion to consider relevant circumstances in individual cases.¹²³ The rules versus standards debate considers legal directives on a continuum, rather than a simple dichotomy.¹²⁴ In a property rights context, such as with licensure, the normative point is often considered the point at which that directive “becomes sufficiently rule-like along the continuum between rules and standards to satisfy due process.”¹²⁵ Generally, “it is asserted that rules tend to be over- and/or underinclusive relative to standards.”¹²⁶ On the other hand, standards are often understood as failing to provide predictability and consistency at the same rate as rules.¹²⁷

Given prevailing wisdom regarding rules, it is easy to see why criminal justice reformers of the twentieth century would be tempted to combat

121. See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); David Olson & Stefania Fusco, *Rules Versus Standards: Competing Notions of Inconsistency Robustness in Patent Law*, 64 ALA. L. REV. 647, 695 (2013); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

122. See generally NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES*, ch. 4 (2015).

123. William C. Powers, Jr., *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 30–31 (1976).

124. Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L.L. REV. 65, 70 n.16 (2002).

125. *Id.*

126. Kaplow, *supra* note 121, at 589.

127. Olson & Fusco, *supra* note 121, at 678.

disparate impacts with the comfort of uniform, mandatory rules. Disparate impacts were thought to result from biases of decision-makers, and:

The difference between the two approaches . . . [is] the difference between ex ante and ex post decision making: When a law is drafted as a rule, it is known in advance whether particular transactions or acts fall within or without the law. Laws setting out only broad standards create less certainty. It is up to some decision maker—usually, a court or administrative body—to determine whether a transaction or act satisfies the standard.¹²⁸

However, the result proved to be a cautionary tale against tipping the scales so thoroughly in favor of bright-line rules in a criminal justice reform context.

B. Twentieth Century Sentencing Reforms Demonstrate How Hasty Shifts from Discretionary Regulations to Mandatory Rules Often Exacerbate Disparate Impacts.

Patterns of vacillation between rules and standards are common among adjudicative processes. For instance, the debate between knowable, bright-line rules and discretionary, ad-hoc standards greatly shaped the chronological arch of criminal sentencing reforms in the twentieth century. In the 1970s, incarceration rates fell, leading to a focus on individualized sentencing.¹²⁹ Judges and parole boards enjoyed broad discretion in sentencing and granting of parole.¹³⁰ But liberals' criticism began to grow regarding risks of racial bias and presumed sentencing disparities, dovetailing with criticisms that “nothing works.”¹³¹ Between the mid-1970s and late-1990s, legislatures enacted mechanisms to address such disparities, including determinate sentencing.¹³² As the decade wore on, discretionary power shifted from judges to prosecutors.¹³³ Prosecutors then held most discretion in terms of who to charge, with judges and parole boards bound by severe truth-in-sentencing laws,¹³⁴ three-strikes

128. Laura Cunningham, *Use and Abuse of Section 704(c)*, 3 FLA. TAX REV. 93, 124 (1996) (footnotes omitted).

129. NAT'L RESEARCH COUNCIL, *supra* note 122, at 71.

130. *Id.* at 72.

131. Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 326–34 (2013) (referencing Robert Martinson's famous 1974 study, *What Works?*).

132. NAT'L RESEARCH COUNCIL, *supra* note 122, at 76.

133. *Id.* at 83.

134. Truth-in-sentencing laws “require[] offenders to serve a substantial portion of their sentence and reduce[] the discrepancy between the sentence imposed and actual time served in prison.” Paula M. Ditton & Doris J. Wilson, *Truth In Sentencing In State Prisons*, BUREAU OF JUST. STATISTICS 1 (1999), <http://www.bjs.gov/content/pub/pdf/tssp.pdf> [<https://perma.cc/4VJP-Q58R>]. These laws were enacted in response to concern about early release, or at least in order to qualify for federal

laws,¹³⁵ and mandatory life without parole.¹³⁶ The shift in discretion from judges to prosecutors, coupled with the new, rigid sentencing requirements meant there were still huge racial disparities between which defendants were charged, and those sentenced ultimately served much more time under the longer sentences these legislative reforms mandated.¹³⁷

This same ineffective pendulum between discretion and bright-line rules can be seen in other criminal justice settings. The last century provides a cautionary tale for character and fitness proceeding reforms: when it comes to the interaction between bias and discretion, intentions are not always predictive of impacts.

III. IMPLICIT BIAS IN LEGAL SETTINGS

Gender bias is real Women who've been convicted, society sees us as more antisocial or broken. The Board asked me if I was "manipulative," and those gendered terms definitely hurt. All people who have conviction history are oppressed, marginalized, but I was told I have a "sense of entitlement," I was not allowed to be proud. I've been through so much trauma, it's taken a lot of work on my inside to have self-worth. To know that I was seen as having a "sense of entitlement" for being proud of myself—even a law student without trauma history should be proud of an award like a Skadden fellowship. No one in my family even graduated high school. I came from poverty; I just want to help people, and I was proud of getting money to help people. The Board was beyond insulting. In [Shon Hopwood]'s hearing,¹³⁸ all those

incentive grants. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1976, §§ 20102, 20103 (1994). These laws often limit the availability of parole and early release, usually requiring individuals convicted of crimes to serve 85% of their imposed sentences. Katherine J. Rosich & Kamala M. Kane, *Truth in Sentencing and State Sentencing Practices*, U.S. DEP'T JUST., (July 1, 2005), <https://nij.ojp.gov/topics/articles/truth-sentencing-and-state-sentencing-practices> [https://perma.cc/Y828-YFQ9]. In practice, truth-in-sentencing laws "greatly increased the lengths of prison terms . . ." Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 147 (2013).

135. Three-strikes laws create long, mandatory sentences for individuals convicted of three felonies, usually from an enumerated list of specific felonies. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 75 (1999). Washington State was the first to pass a three strikes law in 1993. *Id.* at 76.

136. NAT'L RESEARCH COUNCIL, *supra* note 122, at 89.

137. *Id.* at 101–02.

138. Shon Hopwood is an Associate Professor of Law the Georgetown University Law Center and a renowned criminal justice reform advocate. After graduating from the University of Washington School of Law, the Washington State Supreme Court issued an order approving the Board's unanimous recommendation that he be allowed to sit for the bar. Order, *In re Shon Hopwood*, No.

things were seen as reflecting positive change in a nice white man from Nebraska.

—Tarra Simmons¹³⁹

A. *The Relationship Between Implicit Bias and Discretion*

While criminal justice reform advocates have argued for centuries about the existence of biases within the system, the conversation around implicit bias gained strength in 1998 when Anthony Greenwald, Debbie McGhee, and Jordan Schwartz released a study detailing their Implicit Association Test (IAT).¹⁴⁰ The test sought to measure how the brain's pattern recognition creates a "tendency for stereotype-confirming thoughts to pass spontaneously through our minds,"¹⁴¹ creating biases individuals may not even be aware they hold.

Though the IAT's reliability has been debated,¹⁴² the study and resulting scholarship has been incredibly influential: the team's initial article has been cited over 12,000 times,¹⁴³ and the associated website has had over 5 million visits.¹⁴⁴

The many discretionary functions within the criminal justice system, coupled with unexplained differences in outcomes by race, made it ripe for

201,345-7 (Wash. Sep. 4, 2014) (order approving recommendation for admission); *Shon Hopwood*, GEO. L., <https://www.law.georgetown.edu/faculty/shon-hopwood/> [<https://perma.cc/XY3Y-NNFW>]. This decision came in spite of Hopwood's conviction for five armed bank robberies and twelve years spent in federal prison. Susan Svrluga, *He Robbed Banks and Went to Prison. His Time There*

Put Him on Track for a New Job: Georgetown Law Professor, WASH. POST (Apr. 21, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/04/21/bank-robber-turned-georgetown-law-professor-is-just-getting-started-on-his-goals/> [<https://perma.cc/C3V5-ZXUB>]. As counsel for Simmons in her appeal, Hopwood acknowledged his case also lacked Simmons's "mitigation history of childhood trauma or reliance on addiction to self-medicate." Notice of Appeal, *In re Bar Application of Simmons*, 190 Wash. 2d 374, 414 P.3d 1111 (2018) (No. 201,6715), <https://www.acluwa.org/file/101929/download?token=uzK0qzAa> [<https://perma.cc/G2TG-BSHS>].

139. Simmons Interview, *supra* note 4.

140. Anthony G. Greenwald et. al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

141. Keith Payne et. al., *How to Think About "Implicit Bias,"* SCI. AM. (Mar. 27, 2018).

142. Beth Azar, *IAT: Fad or Fabulous?*, 39 AM. PSYCHOL. ASS'N 44 (2008); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139 (2010); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 193 (2018) (debating whether implicit bias is, in fact, implicit, or just merely explicit bias).

143. GOOGLE SCHOLAR, https://scholar.google.com/scholar?q=Measuring+Individual+Differences+in+Implicit+Cognition:+The+Implicit+Association+Test,&hl=en&as_sdt=0&as_vis=1&oi=scholar [<https://perma.cc/2A8B-6EGR>].

144. Azar, *supra* note 140, at 44.

the application of implicit bias research. Individuals' implicit biases can pack a large wallop in contexts involving individualized decision-making.¹⁴⁵

Federal courts in Washington have been particularly active in applying implicit bias theory to court processes: the U.S. District Court for the Western District of Washington created a video to inform jurors of "unconscious biases" and their potential impact on decision-making.¹⁴⁶ In 2018, Washington also became the first state to adopt a court rule specifically aimed at eliminating both explicit and implicit racial bias in the jury selection process.¹⁴⁷ Generally, Rule 37 allows either party to object to peremptory challenges not just on the basis of intentional racial discrimination, but based on "implicit, institutional and unconscious" racial bias if an "objective observer" would find it was a factor.¹⁴⁸ Thus, Washington courts already lead the nation on recognition of and incorporation of safeguards against implicit bias in their court rules.

B. How Implicit Bias May Be Operating in Character and Fitness Procedures.

Simmons never raised the issue of bias in her case,¹⁴⁹ so the Washington State Supreme Court "therefore [did] not explore potential indicators of bias."¹⁵⁰ However, Simmons and her attorneys are clear that they believe implicit bias played a role in her case.¹⁵¹

Former board member Judge David Keenan never witnessed explicit instances of racial or gender bias during his time on the committee,¹⁵² but wonders how one explains the discrepancy between the decisions in Shon Hopwood's case and Tarra Simmons's case, where Mr. Hopwood was

145. William J. Bowers et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 226–230 (2001) (discussing the import of jurors' individual decision-making and the potential for racially-based decisions).

146. Marella Gayla, *A Federal Court Asks Jurors to Confront Their Hidden Biases*, THE MARSHALL PROJECT (2017), <https://www.themarshallproject.org/2017/06/21/a-federal-court-asks-jurors-to-confront-their-hidden-biases> [<https://perma.cc/W55X-B476>].

147. Sydney Brownstone, *Washington Courts Now Have the Country's First Rule for Tackling Implicit Bias in Jury Selection*, THE STRANGER (Apr. 10, 2018), <https://www.thestranger.com/slog/2018/04/10/26024644/washington-courts-now-have-the-countrys-first-rule-for-tackling-implicit-bias-in-jury-selection> [<https://perma.cc/2D7S-ZDWJ>]; *Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. WASH., <https://www.wawd.uscourts.gov/jury/unconscious-bias> [<https://perma.cc/ZR4E-8Q3W>].

148. WASH. CT. G.R. 37(a)–(f).

149. *In re* Bar Application of Simmons, 190 Wash. 2d 374, 398 n.13, 414 P.3d 1111, 1122 n.13 (2018).

150. *Id.*

151. Simmons Interview, *supra* note 4.

152. Keenan Interview, *supra* note 97.

admitted to practice as a convicted bank robber.¹⁵³ Given Hopwood's record, it is hard to explain the discrepancy absent implicit bias.¹⁵⁴

Simmons also points to class as an intersectional factor that likely affects character and fitness hearings and determinations.¹⁵⁵ Considering the way financial insolvency and credit issues factor into such determinations, this becomes even more likely.

Since the *In re Simmons* case, the Washington State Bar now provides its board with the same implicit bias training video that Washington State Courts provide to jurors.¹⁵⁶

C. *Dinged Twice: Bias Resulting from Disparate Outcomes Often Results in Higher Chances of Initial Justice-Involvement.*

Implicit bias is especially troubling in the context of character and fitness hearings because female applicants and applicants of color are likely impacted by such biases twice: once during their initial interaction with the justice system, and once during their interaction with the Character and Fitness Board. People of color applying to the bar are far more likely to have been pulled over,¹⁵⁷ arrested,¹⁵⁸ incarcerated,¹⁵⁹ and harshly sentenced¹⁶⁰ than white applicants. Because of implicit bias and the discretionary nature of the proceeding, it is likely their resulting criminal record will then be viewed less forgivingly compared with white applicants who possess the same record.

Collateral consequences in other contexts illustrate the unfair reality that people of color are often punished twice (or more) for their crimes. Studies have shown the synergistic effect of the system's racial disparities

153. *Id.*

154. Simmons Interview, *supra* note 4.

155. *Id.*

156. Strait Interview, *supra* note 5.

157. John Sides, *What Data on 20 Million Traffic Stops Can Tell Us About 'Driving While Black,'* WASH. POST (July 17, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/what-data-on-20-million-traffic-stops-can-tell-us-about-driving-while-black/> [https://perma.cc/9LJ7-ZEY5].

158. Radley Balko, *There's Overwhelming Evidence That the Criminal-Justice System is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/> [https://perma.cc/B4DC-WT6P].

159. *Black Children Five Times More Likely Than White Youth to Be Incarcerated*, EQUAL JUST. INITIATIVE (Sept. 14, 2017), <https://eji.org/news/black-children-five-times-more-likely-than-whites-to-be-incarcerated/> [https://perma.cc/R3KA-DABF].

160. German Lopez, *Report: Black Men Get Longer Sentences for the Same Federal Crime as White Men*, VOX (Nov. 17, 2017), <https://www.vox.com/identities/2017/11/17/16668770/us-sentencing-commission-race-booker> [https://perma.cc/P9KL-BCZE].

and racial bias towards people with criminal records on the job market.¹⁶¹ Men with felony drug convictions are 50% less likely than men without any record to receive a callback.¹⁶² Further, Black men with a record were *twice* as likely as white men with a record to be penalized by potential employers for having a criminal record.¹⁶³ While more data is needed, there is no reason to doubt bar applicants of color with criminal records receive the same heightened professional penalty as job applicants in other contexts.

Access to data has been crucial in highlighting problems and effecting change related to disparate impacts in criminal justice settings. For years, death penalty abolitionists advocated for a ban on the practice based upon sentencing disparities between races. But when University of Washington Sociology Professor Katherine Beckett and then-graduate student Heather Evan's 2014 study found that Black defendants in capital-murder cases were four times as likely to be sentenced to death as defendants of other races, the drumbeat grew shrill.¹⁶⁴

In 1981, Washington State enacted a mandatory proportionality review for death penalty sentence review,¹⁶⁵ though the Washington State Supreme Court had never vacated a death penalty sentence on those grounds.¹⁶⁶

In a 2012 death penalty case, *State v. Davis*,¹⁶⁷ Washington State Supreme Court Justice Charles Wiggins noted that “[a] review of the reports of prosecutions for aggravated first degree murder quickly discloses that African-American defendants are more likely to receive the death penalty than Caucasian defendants.”¹⁶⁸ Justice Wiggins stated that he “would either reverse the death penalty . . . or remand to superior court to take evidence on the statistical significance of the disproportionate

161. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 331 (2015).

162. *Id.*

163. *Id.*

164. KATHERINE BECKETT & HEATHER EVANS, *THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981–2012*, at 14 (2014).

165. WASH. REV. CODE. § 10.95.130(2)(b) (2010) (“Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, “similar cases” means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court.”).

166. Neil M. Fox, *The Struggle Against the Death Penalty Moves Forward in Washington State: Reflections on State v. Gregory*, 75 NAT'L LAW. GUILD REV. 172, 181–82 (2018).

167. 175 Wash. 2d 287, 290 P.3d 43 (2012).

168. *State v. Davis*, 175 Wash. 2d 287, 389, 290 P.3d 43, 92 (2012) (Wiggins, J., dissenting).

number of African-Americans sentenced to death.”¹⁶⁹ Davis’s defense counsel set out to prove the statistical significance of race in these cases, retaining Beckett and Evans to analyze thirty-three years of aggravated murder cases.¹⁷⁰

Then, in the fall of 2018, the Washington State Supreme Court heard *Gregory*.¹⁷¹ In a unanimous decision, the *Gregory* Court struck down the death penalty, citing racial bias.¹⁷² Then-Chief Justice Fairhurst’s opinion heavily cited Beckett and Evans’s updated report—*The Role of Race in Washington State Capital Sentencing, 1981–2014*¹⁷³—with the four-year legal battle surrounding the case largely centering on the reliability of Beckett and Evans’s study.¹⁷⁴

Comprehensive data collection, by scholars tirelessly sifting through the results for meaningful relationships, has been crucial to discovering disparate impacts—impacts hard to explain absent existing implicit systemic bias. These biases can be much harder to pin down and quantify. In *In re Simmons*, Justice Yu noted that Simmons did not raise the issue of bias in her case, and thus the court “[did] not explore potential indicators of bias and note that it is extremely important for the WSBA . . . to ensure that they are sufficiently informed to make subjective judgments about applicants with histories of substance abuse, criminal convictions, and financial problems.”¹⁷⁵ In the same manner that attorneys heeded Justice Wiggins’s call to study the statistical significance of race in death penalty cases, it is the Washington legal community’s responsibility to study potential bias in the consideration of evidence during the character and fitness hearing process.

169. *Id.*

170. Neil M. Fox, *The Struggle Against the Death Penalty Moves Forward in Washington State: Reflections on State v. Gregory*, 75 NAT’L LAW. GUILD REV. 172, 182–83 (2018).

171. 192 Wash. 2d 1, 427 P.3d 621 (2018). For further discussion of the need for data on racial disparities in a death penalty context, see *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (“My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to die, it is the constitutionally impermissible basis of race But racial discrimination has not been proved, and I put it to one side.”).

172. *Id.* at 627.

173. *Id.* at 633–36.

174. Danny Westneat, *Meet the UW professor who just killed the death penalty*, SEATTLE TIMES (Oct. 12, 2018), <https://www.seattletimes.com/seattle-news/crime/meet-the-uw-professor-who-just-killed-the-death-penalty/> (last visited Apr. 17, 2020).

175. *In re Bar Application of Simmons*, 190 Wash. 2d 374, 398 n.13, 414 P.3d 1111, 1114 n.13 (2018).

IV. PROBLEMS IN THE CHARACTER AND FITNESS HEARING PROCESS AND PROPOSED SOLUTIONS

“I don’t think I’d support a bright-line rule, with a particular number of years. Then again, I’m a judge, of course I think ‘well, the Board needs discretion.’”

— The Honorable David Keenan¹⁷⁶

“Based on rates of recidivism, we argued, and I would argue, for a five-year presumption of admissibility.”

— John Strait¹⁷⁷

“A clear standard can be difficult in some ways, at the time [of my case] we argued five years as a bright-line rule, but what about minor offense two or three years ago? So, I go back and forth on that. . . In retrospect, better to get rid of character & fitness altogether.”

— Tarra Simmons¹⁷⁸

Critics of character and fitness hearing process reform may point to the value of the process, the need to protect clients, and the need to instill trust in the profession. While the *In re Simmons* Court refused to set a number-based rule, and wrote somewhat critically of biases possibly at play in the process, it still pointed to the need for morality inquiries based upon “a legitimate interest in protecting the public and preserving a degree of professionalism.”¹⁷⁹ However, given the incongruity between historical attempts to mitigate injustice in adjudicative processes by installing limiting principles, and the outcomes of those attempts, this Comment calls, as a first step, for comprehensive data collection regarding hearing outcomes. This aligns with advocacy calling for racial impact statements to guide sentencing reforms.¹⁸⁰ This section will address reforms that should be made immediately, including data collection, and reforms that should be made after data is made available, which can be used to refine and support such reforms.

176. Keenan Interview, *supra* note 97.

177. Strait Interview, *supra* note 5.

178. Simmons Interview, *supra* note 4.

179. *In re Simmons*, 190 Wash. 2d at 378, 414 P.3d at 1112.

180. Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 46 (2007).

A. *Until Data is Collected Clarifying Specific Problem Areas for Reform, the Board Should Issue Nonbinding, Pre-Enrollment Advisory Decisions to Mitigate the Lack of Notice to Applicants.*

One major procedural problem with Washington's current character and fitness hearing procedure is the lack of notice to students and applicants regarding the likelihood their personal history will survive scrutiny by the Board.¹⁸¹ At applicants' requests, the Board should issue nonbinding pre-enrollment advisory decisions. Individuals whose histories will certainly subject them to a hearing should be notified directly within a reasonable time period, and steps should be provided for how to demonstrate rehabilitation over the next three years. Law school applicants are routinely asked to disclose similar information on their school application to the information they must disclose on their bar application. In an effort to raise awareness and provide notice, these schools should provide information on the availability of pre-enrollment advisory decisions to students whose backgrounds indicate they may be referred for a character and fitness hearing.

While nonbinding, successfully meeting the Board's suggestions should weigh heavily in favor of admittance. Provided that the applicant exhibits no subsequent troubling actions, this would provide some front-end guidance to applicants before investing time and money into the pursuit of licensure.

B. *There Should Be a Mandatory Maximum Excluding "Stale" Convictions from the WSBA Character and Fitness Board's Consideration, but Mandatory Minimums Should Be Avoided Until Further Data is Available*

The WSBA should adopt a mandatory maximum excluding the consideration and required disclosure of "stale" convictions five years or older. Further, applicants should not be required to disclose sealed juvenile records.¹⁸² Substantively, this would help mitigate the lack of notice for law students with prior convictions and is supported by available research on the waning risk of recidivism over time post-conviction.¹⁸³

Remaining mindful of historic results regarding mandatory minimums as a fix for disparate outcomes of discretion,¹⁸⁴ setting a mandatory

181. *See supra* Part I.

182. *See In re Simmons*, 190 Wash. 2d at 379, 414 P.3d at 1113 (providing Simmons's juvenile adjudications as background); Strait Interview, *supra* note 5 (noting Simmons was unaware she was required to disclose sealed juvenile records in her character and fitness hearing).

183. *In re Simmons*, 190 Wash. 2d at 389, 414 P.3d at 1117–18.

184. *See supra* Part II.

minimum number of years before an applicant can be reconsidered is not advisable. The WSBA should avoid these types of bright line rules until more data is available on referrals and hearing outcomes.

Professor Strait may be correct about the clarity provided by a bright-line rule,¹⁸⁵ but Simmons may also be proven correct¹⁸⁶ if there appears to be no valuable connections between data points involving prior history, equity, and recidivism. Character and fitness hearing outcome data collection will shed light on the breadth and particularities of the issue—what to overhaul, and to what degree. Particularly with regards to any new, number-based rules, reforms should be based upon comprehensive data to avoid past issues with number-based mandatory sentencing.

C. *The WSBA Should Implement Comprehensive Data Collection Practices to Check for Disparate Outcomes and Rates of Recidivism*

Comprehensive data collection is essential to effectuate change and create normative policy solutions. It is impossible to address problems without quantifying their extent or pinpointing their sources. Further, providing good-faith transparency measures would increase WSBA's institutional legitimacy. Such measures are standard in other discretionary areas of criminal justice policy where the potential for disparate outcomes is high.¹⁸⁷ One can surmise from the application of vague standards in other criminal justice settings how disparate outcomes may be operating in character and fitness hearings. But the Washington legal community knows shockingly little about the actual impact of the current Admission and Practice Rules on applicants from underrepresented groups.

Quantifiable measures regarding a process's disparate impacts are far more compelling than theoretical applications of historical trends in criminal justice policy. As was the case with *Gregory*,¹⁸⁸ it will be near-impossible for advocates to affect change without hard data to back up their anecdotal and common-sense claims regarding the disparate impacts of the character and fitness hearing process on applicants from underrepresented groups.

Due to the Family Educational Rights and Privacy Act of 1974 (FERPA) and student privacy law issues, it may also be much easier to legally collect this data at a professional licensure level than through the initial screening provided by law schools of applicants for juris doctorate

185. See *supra* text accompanying note 177 (from interview with John Strait).

186. See *supra* text accompanying note 178 (from interview with Tarra Simmons).

187. See *supra* section II.B.

188. See *supra* section III.C (discussing *State v. Gregory*, 192 Wash. 2d 1, 427 P.3d 621 (2018)).

programs.¹⁸⁹ The WSBA has publicly stated its commitment to “diversity and inclusion within the legal profession,” as well as its “dedicat[ion] to understanding and responding to the conditions which exist for all lawyers in Washington.”¹⁹⁰ To give these commitments teeth, the WSBA must ensure its own policies for admission to practice are not unfairly prejudicial to diverse candidates. The best way to achieve this is through a statistical analysis of character and fitness referrals and character and fitness hearing recommendations, comparing the outcomes of applicants with similar histories by race, gender, and socioeconomic class. In addition, data should also be collected regarding how many attorneys disbarred by the WSBA were initially referred for character and fitness hearings, compared against the percentage of attorneys who are referred for such hearings overall.

Results of this comprehensive data should then be used by the WSBA to evaluate the factors used in the character and fitness process. If the risk of disparate outcomes related to the consideration of certain crimes or factors so outweighs its value to evaluating an applicant’s character, then those factors should no longer be considered. Given the current lack of diversity in Washington’s law schools, this data should be aggregated over a period of time adequate to protect diverse individuals’ privacy. The WSBA could enlist a third party to analyze this data, such as researchers from the University of Washington.

It is important to acknowledge that comprehensive data collection would require a significant investment by the WSBA: coding protocol, data entry, and decisions about what data to collect all incur costs. The first step to this process should involve organizing a group of stakeholders to come together and think methodically about how to turn existing records into data, how to train people on consistent data entry, and what types of demographics and outcomes to collect (for example, race, gender, age, prior convictions, etc.). Researchers would also have to evaluate at what point the number of referred applicants recorded became large enough to be able to infer statistically meaningful trends. Data collection should be as robust as possible. As data of this kind has never been

189. Family Educational and Privacy Rights, 20 U.S.C. § 1232(g); 34 C.F.R. pt. 99 (2013); *see also* U.S. Dep’t. of Educ., *Family Educational Rights and Privacy Act (FERPA)* (last modified Mar. 1, 2013), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> [<https://perma.cc/2DJN-3K4A>] (explaining that FERPA is a “[f]ederal law that protects the privacy of student education records,” dictating parties to which schools may disclose student records without consent). Many other states have enacted their own student privacy laws governing records, such as applications for admission. Sunny Deye, *Protecting Student Privacy in a Networked World*, NAT’L COUNCIL ST. LEGISLATURES (2015), http://www.ncsl.org/Portals/1/Documents/educ/DataPrivacy_2015.pdf [<https://perma.cc/4HW6-USGU>].

190. *Diversity and Inclusion*, WASH. ST. B. ASS’N (2019), <https://www.wsba.org/about-wsba/equity-and-inclusion> [<https://perma.cc/GL3S-U68T>].

comprehensively collected and studied in Washington, it is not apparent what might be significant.

The purpose of the *good moral character* requirement's gatekeeping function should be to protect the public from individuals unworthy of the trust imbued by professional licensure in the legal field. That gatekeeping function represents the profession's *own* moral failing when it keeps underserved populations out of the field—preventing clients from receiving representational and culturally-competent legal services. The legal profession is long overdue for an examination of what purpose the *good moral character* requirement serves in practice. Only comprehensive data collection will reveal whether the character and fitness hearing process is producing desirable effects.

D. Given Currently-Available Data, Treatment and Convictions Related to Mental Health and/or Drugs and Alcohol Should Not Be Deemed Relevant to Evaluating Applicants' Good Moral Character and Fitness.

The logic underlying the last century of advancements in the fields of criminal justice and psychology should also inform the legal profession's understanding of what is relevant to a discussion of "good moral character." Struggling with and seeking help for mental illness is not evidence of a lack of moral character. While it may appear more relevant to evaluating fitness to practice, the hearing process reveals little about one applicant's mental health compared to another's. Applicants are not asked to submit to a psychological screening with a therapist. Rather, the board may subpoena any medical records they deem relevant.¹⁹¹ This process will only capture applicants who have either already faced consequences related to their untreated or under-treated condition, or those who have proactively sought treatment to address these concerns. These individuals are much more likely to be fit to practice than they would be while suffering in silence. But current policy encourages just that, stoking fear that seeking treatment may expose an applicant to evidentiary risk in a character and fitness hearing.

Similarly, past instances of drug and alcohol addictions, which follow the same rationale encouraging treatment, should not be deemed relevant to the character and fitness hearing process. Our understanding of addiction has evolved to recognize addiction as a disease.¹⁹²

191. WASH. CT. A.P.R. 23.1(a)(2)–(3), 24.1(e)(8).

192. See generally Nora D. Volkow et. al., *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 N. ENGL. J. MED. 363 (2016).

As with the mental health context, consideration of drug and alcohol addiction only evaluates those who have been professionally treated and those who have had justice involvement related to their addictions. Applicants are not tested for drug use, despite common knowledge in the profession that incidences of drug use and problematic drinking are high.¹⁹³ More than one in three attorneys can be classified as “problem drinkers,”¹⁹⁴ compared with one in eight adults nationally.¹⁹⁵ If we are not seriously inquiring into each individual’s current drug and alcohol usage, do we really only care about criminality? This is incredibly problematic in the drug crimes context, where there is voluminous data indicating disparate rates of arrest between Black and white Americans despite the same or lower rates of criminality by Black Americans.¹⁹⁶ Besides concern with discouragement of treatment-seeking behavior, criminal history of drug and alcohol use simply is not an accurate indicator of an applicant’s current rate of usage compared to their peers, and is highly susceptible to the system’s racial impacts.

This is further reinforced by studies related to addiction relapse.¹⁹⁷ While the *In re Simmons* Court declined to adopt a time-based rule, it did specifically note that “86 percent of addicts who maintain their sobriety for at least 5 years will never relapse.”¹⁹⁸

Clearly, there is enough available data about the disparate impacts of certain crimes and the incidence of behavioral health concerns in the legal profession to support a bright-line rule in this context. Here, the uncertainty of a discretionary standard stokes law students’ fear of creating a paper trail by seeking help. Nearly half of law students surveyed in a 2014 study were dissuaded from seeking mental health services out of fear such documentation might be used against them in a character and

193. See Lisa F. Smith, *The Most Terrifying Part of My Drug Addiction? That My Law Firm Would Find Out.*, WASH. POST (Mar. 24, 2016), https://www.washingtonpost.com/posteverything/wp/2016/03/24/the-most-terrifying-part-of-my-drug-addiction-that-my-law-firm-would-find-out/?utm_term=.37e4371c2306; Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html?mtrref=www.google.com&gwh=5887DB00F86B4776DA366964B69E3903&gwt=pay> [<https://perma.cc/74Q5-ETFR>].

194. See Smith, *supra* note 193.

195. Bridget F. Grant et. al., *Prevalence of 12-Month Alcohol Use, High-Risk Drinking, and DSM-IV Alcohol Use Disorder in the United States, 2001–2002 to 2012–2013*, JAMA PSYCHIATRY (2017), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2647079> [perma.cc/N8S4-TKHJ].

196. Mirko Bagaric et. al., *Bringing Sentencing into the 21st Century: Closing the Gap between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 HOFSTRA L. REV. 785, 824 (2017).

197. See *In re Bar Application of Simmons*, 190 Wash. 2d 374, 389, 414 P.3d 1111, 1117–18 (2018).

198. *Id.*

fitness determination.¹⁹⁹ The legal profession cannot afford to discourage students from seeking help, and the only cure to this fear is the assurance that past records will not be subpoenaed. Likewise, consideration of prior charges for possession have a high potential to disproportionately exclude applicants of color. This risk is too high to merit a discretionary consideration. For these reasons, prior drug and alcohol convictions and treatment over five years old should not be considered when evaluating applicants' good moral character and fitness. Any indication of these within APR 21(a)'s non-exhaustive list of factors for consideration or candor requirements placed upon applicants should be removed. The Character and Fitness Board and bar counsel's ability to subpoena prior criminal and medical records related to these issues should also be removed.

E. Financial History Should Not Be Deemed Relevant to Evaluating Applicants' Good Moral Character and Fitness.

Consideration of past financial troubles by the Character and Fitness Board risks increasing already-stark racial equity issues in the legal profession. Financial troubles should not be viewed as a basis for moral character, but as an indicator of socioeconomic impacts. Individuals in poverty do not have a safety net for emergency situations.²⁰⁰ Those who have experienced both poverty and prior justice involvement are again dinged twice, given the likelihood they will experience collateral financial consequences resulting from their convictions.²⁰¹ In Simmons's case, the Washington State Supreme Court described the collateral financial consequences Simmons faced as "sufficient punishment."²⁰² The court clearly indicated her two bankruptcies and a foreclosure on her home were not due to dishonesty or a lack of morality, but came about "[a]s a result of her criminal convictions."²⁰³ However, the court also referred to those financial troubles, as did the Board, as part of her "challenging social history."²⁰⁴ The mere fact that someone has experienced poverty does not make it more likely that they will commit grave ethical infractions. Again,

199. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).

200. Sarah Minton & Linda Giannarelli, *Five Things You May Not Know about the US Social Safety Net*, THE URB. INST. (Feb. 2019), https://www.urban.org/sites/default/files/publication/99674/five_things_you_may_not_know_about_the_us_social_safety_net_1.pdf [<https://perma.cc/7D3T-RDXF>].

201. See *supra* section III.C.

202. *In re Simmons*, 190 Wash. 2d at 388 n.6, 414 P.3d at 1117 n.6.

203. *Id.* at 379, 414 P.3d at 1113.

204. *Id.* at 378, 414 P.3d at 1112.

there is already available data on the financial effects of arrest across socioeconomic classes.²⁰⁵ Requiring disclosure of debts incident to arrest or incarceration is too likely to have disparate impacts on applicants with prior justice involvement from socioeconomically-disadvantaged groups. Equitable acceptance of applicants to the bar is impossibly hindered by financial history's inclusion amongst the list of criteria in the Washington Admission and Practice Rules. Prior history of financial troubles, absent current issues involving dishonesty, should not be considered relevant.

F. Shifting or Lowering the Burden of Proof on Applicants Would Make Up for Some of the Clarity Missing from the Current Discretionary Standards Governing the Character and Fitness Process.

It is unnecessary to force applicants to bear the burden of proving their own good moral character and fitness by a clear and convincing standard. First, *clear and convincing* is a standard nearly as amorphous as *good moral character*.²⁰⁶ Throw in the discretionary nature of the proceedings, and applicants are left with little guidance about what they must prove to the Board. “Clear and convincing” is also higher than the standard set for most lawsuits.²⁰⁷ Proceedings are merely adjudicative—rather than quasi-criminal—which allows the WSBA to demand an absurd level of candor and invasiveness from applicants, while offering them none of the protections afforded to licensed professionals accused of actual misconduct. Like licensed professionals, applicants to the bar have already invested a great deal into their legal career. Most have also been screened by ABA-accredited universities upon admission. Those with academic disciplinary records were determined fit by their universities to continue their legal education. The level of individual investment towards licensure and the dearth of notice or clarity provided by the WSBA's character and fitness standards justify lowering the burden of proof to a preponderance of evidence. That, or the burden should be shifted to bar counsel to prove why an applicant does not possess good moral character and fitness.

205. See generally Patrick Liu et al., *The Economics of Bail and Pretrial Detention*, THE HAMILTON PROJECT (Dec. 2018), https://www.brookings.edu/wpcontent/uploads/2018/12/BailFineReform_EA_121818_6PM.pdf [<https://perma.cc/4PAW-QMMR>].

206. See Bryant M. Bennett, Comment, *Evidence: Clear and Convincing Proof: Appellate Review*, 32 CALIF. L. REV. 74, 75–76 (1944).

207. Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 469 (2009).

CONCLUSION

Before I built a wall I'd ask to know
What I was walling in or walling out . . .
— Robert Frost, *Mending Wall*²⁰⁸

Bar admission standards dictate what we value as a profession and who belongs to our “community of profession.”²⁰⁹ Each year, will we seek to admit a class of new attorneys diverse in backgrounds, challenges and experiences? Or will we seek to merely mend the wall—to uphold a barrier separating the profession’s membership from those affected by its reach, those who embody the rehabilitative principles we purport to promote?

If the Washington legal profession values equity and diversity among practitioners, substantive and procedural changes must be made to the character and fitness hearing process. Reforms must be based upon comprehensive data collected regarding rates of recidivism and disparate hearing outcomes. Data-informed changes avoid common pitfalls at the intersection of rules versus regulations, implicit bias, and adjudicative processes. Besides the obvious hindrance to equity posed by consideration of criminal records and racism within the criminal justice system, applicants with criminal backgrounds provide a needed diversity of lived experiences.

Practitioners with justice involvement understand the impacts on their clients’ lives in a way that cannot be taught. These attorneys provide a needed insight and voice to the legal community, and their exclusion represents an unquantifiable loss to the community they wish to serve.

This year, amidst widespread financial, psychological, and physically debilitating effects of the coronavirus pandemic, bar applicants are in a particularly vacillating situation. Throughout the country, graduating students do not know whether, and under what conditions, state bar admissions committees will consider and determine the bar exam requirement.²¹⁰ The inability to safely administer the bar exam has

208. ROBERT FROST, *COLLECTED POEMS, PROSE, & PLAYS* 39 (1995).

209. William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194, 194 (1957).

210. Megan Tribe et. al., *The Pandemic is Putting Law Students’ Futures on Hold*, BLOOMBERG BUSINESSWEEK (Apr. 14, 2020), https://www.bloomberg.com/news/articles/2020-04-14/coronavirus-pandemic-is-putting-law-students-futures-on-hold?utm_source=Sailthru&utm_medium=email&utm_campaign=Issue:%202020-04-15%20Higher%20Ed%20Education%20Dive%20Newsletter%20%5Bissue:26747%5D&utm_term=Education%20Dive:%20Higher%20Ed [perma.cc/TX5Q-DH8N].

resulted in varying ad hoc determinations and substantial uncertainty.²¹¹ For the first time, a majority of bar applicants are experiencing pains and anxieties that Washington applicants referred for character and fitness hearings know all too well. To some, it feels cruel and unacceptable that after three years of rigorous study, students should wait with bated breath to find out whether they can sit for the bar exam. Yet this is precisely what the legal community regularly demands of students with past financial insecurities or prior convictions. After the dust settles, and bar applicants become licensed members of the legal community, let us remember not to shut the gate behind us.

211. See, e.g., Kelsey J. Griffin, *HLS Dean Advocates for Allowing Out-of-State Law Students to Take the New York Bar Exam Amid Restrictions*, CRIMSON (May 4, 2020), <https://www.thecrimson.com/article/2020/5/4/harvard-coronavirus-law-school-dean-bar-exam-new-york/> [perma.cc/AN3M-UWT6] (detailing New York's decision to give priority to students who attended law schools in New York State); Xochitl Underwood, *Nevada State Bar Exam to be Online, Open Book, in Filed Petition*, 8 NEWSNOW LAS VEGAS (May 8, 2020), <https://www.8newsnow.com/news/local/nevada-state-bar-exam-to-be-online-open-book-in-filed-petition/> [perma.cc/A3QR-YP57]; Stephanie Francis Ward, *If States Want July Bar Exam, NCBE Will Have Testing Materials*, A.B.A. J. (May 5, 2020), <https://www.abajournal.com/news/article/if-states-want-july-bar-exam-ncbe-will-have-testing-materials> [perma.cc/9HVA-UND3] (listing Arizona, Florida, Indiana, Kansas, Minnesota, Washington and Wyoming as states tentatively moving ahead with an in-person July exam); Stephanie Francis Ward, *California Bar Exam Will be Postponed and Administered Online*, A.B.A. J. (Apr. 27, 2020), <https://www.abajournal.com/news/article/california-looks-to-online-testing-for-state-bar-exam> [perma.cc/WTD5-E4AE] (outlining California's decision to hold an online bar exam in September).