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Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act

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THE CHARACTER OF THE QUESTIONS AND THE FITNESS OF THE PROCESS: MENTAL HEALTH, BAR ADMISSIONS AND THE AMERICANS WITH DISABILITIES ACT

Jon Bauer^{*}

During the decade since the Americans with Disabilities Act went into effect, mental health inquiries by bar examining committees have engendered intense controversy. Courts have reached no clear consensus as to what, if any, questions about mental illness or substance abuse may be posed by licensing agencies. The trend has been towards a form of "relaxed scrutiny" that authorizes inquiries as long as they are focused on serious conditions that may interfere with practice, and are reasonably tailored in scope and time. In this Article, Professor Jon Bauer examines the implications of allowing disability inquiries in the lawyer licensing process.

The Article begins with a case study of one jurisdiction's mental health screening, and the stories of three bar applicants with mental disabilities who have been affected by it. After analyzing the premises of different judicial approaches in applying Title II of the ADA to mental health inquiries, Professor Bauer examines whether the "narrow" mental health questions that many jurisdictions have adopted, focusing on conditions such as depression, bipolar disorder, schizophrenia, and substance abuse, can be justified. In a discussion that draws on the psychiatric literature concerning mental disorders and treatment, the author concludes that many of the questions currently in use cannot be justified under the ADA, even under the premises of "relaxed scrutiny."

The remainder of the Article addresses the need for changes in the bar admissions process if inquiries into applicants' disabilities are to be allowed. The ADA is concerned not only with outcomes, but also with the processes by which decisions are made. This can be seen most clearly in Title I of the ADA, which regulates employment. Title I allows employers to make certain disability-based inquiries, but only if the selection process is structured in a way that minimizes stigma and the risk of discriminatory treatment. Title II of the ADA is less explicit, but its

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concept of “discrimination” is properly understood to encompass similar process-based protections.

The bar admissions process, as currently structured, is ill-suited to handle disability information. A section of this Article is devoted to a close examination of how the structure, functions and history of bar admissions boards, combined with the particularly stigmatizing nature of the disabilities that have been singled out for scrutiny, create serious dangers of demeaning treatment in the bar admissions process. Even if only “narrow” disability questions are allowed, and nearly all applicants who answer “yes” are ultimately admitted, many applicants with disabilities will experience the process as discriminatory. Professor Bauer argues that the ADA should be construed to prohibit bar examining boards from asking any questions about disability unless the process is restructured in a way that minimizes stigma and the risk of discriminatory treatment. The final section of the Article proposes specific reforms to accomplish this goal.

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INTRODUCTION

In the 1950s, George Anastaplo was denied admission to the Illinois Bar when he refused to answer questions about whether he had ever been affiliated with the Communist Party or other subversive organizations. In his closing remarks to the character and fitness committee, he spoke about why lawyers, and society, should care about the kinds of questions posed to bar applicants:

To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice, that so often lies at the heart of the intelligent and sensitive law student's choice of career.¹

Questions about political affiliation have become a thing of the past, but in the past few decades bar admission authorities have made inquiries into treatment for mental disorders and substance abuse a routine component of the character screening faced by bar applicants. These questions have generated intense controversy since the enactment of the Americans with Disabilities Act (ADA) of 1990.² Although very few applicants are denied

1. *In re Anastaplo*, 366 U.S. 82, 104 (1961) (Black, J., dissenting) (quoting George Anastaplo). The United States Supreme Court, by a five-to-four vote, upheld the decision to deny Anastaplo admission. See *id.* at 96–97. George Anastaplo went on to a distinguished career as a professor of law and political science. For his later reflections on the experience, see George Anastaplo, *Lawyers, First Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. U. L. REV. 353, 355–62 (1999), and George Anastaplo, *What Is Still Wrong with George Anastaplo? A Sequel to 366 U.S. 82 (1961)*, 35 DEPAUL L. REV. 551, 552–56 (1986).

2. 42 U.S.C. §§ 12,101–12,213 (1994). For a partial bibliography of the literature generated by this controversy, see Pam Hollenhorst, *Admission to the Bar: An Annotated Bibliography of Law Review Articles, 1989–1997*, B. EXAMINER, Nov. 1997, at 35, 36–40. See also John Gibeaut,

admission on mental health grounds,³ opponents of mental health questions by bar admission authorities have pointed to real and serious harms that are inflicted by these inquiries: the humiliation felt by applicants who are forced to disclose intensely private matters, delays in admission that often result when investigations or hearings are triggered by an affirmative answer, and the likelihood that the inquiries deter some law students from obtaining counseling for mental, emotional, or substance abuse problems.

Beyond these concerns, the issue has a symbolic dimension that I think accounts for much of the passion and energy with which it has been pursued by advocates of disability rights. The Americans with Disabilities Act was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁴ Like other civil rights statutes, the ADA gives lawyers and courts a leading role in making this promise a reality. If discriminatory attitudes infect the process established by bench and bar to determine who may serve as a lawyer, there is reason to doubt the legal system's fitness to carry out the ADA's mandate, and the character of its commitment to the nondiscrimination ideal.

A first wave of litigation and advocacy has been largely successful in eliminating the broadest mental health inquiries from bar application forms. Questions requiring the applicant to disclose whether he or she had ever been treated or counseled for any mental health condition were common when the ADA went into effect,⁵ but have been discarded by most bar examining committees since the mid-1990s.⁶ These questions were relatively easy targets. They affected large numbers of applicants, most of whom had received counseling for stress, depression, or personal traumas. Every court that has considered a challenge to this type of question since the passage of

Perils of 'Prozac Probes,' A.B.A. J., Feb. 2000, at 20, 20, 22 (discussing continuing controversy over bar disability questions).

3. The imposition of conditional admission, however, is becoming increasingly common. See *infra* Part III.A.3.

4. 42 U.S.C. § 12,101(b)(1) (1994) ("Findings and purposes.").

5. A survey of questions appearing on state bar application forms conducted by the National Conference of Bar Examiners (NCBE) in January 1994 found that approximately 75 percent of the forms included a broad question about outpatient mental health treatment. Nearly all jurisdictions also asked about mental health hospitalizations and substance abuse treatment. Most forms placed no time limitation on the questions. See Nat'l Conference of Bar Examiners, *Analysis of Questions Regarding Addiction and Mental Health* (1994) (unpublished report, on file with author); see also Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331, 332-39 (1995) (reporting similar findings from the author's 1994 survey of forms in forty-eight jurisdictions).

6. See Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 652 (1997) (concluding, on the basis of the author's 1996 survey of application forms, that "inquiries concerning outpatient treatment and inpatient hospitalization are becoming narrower and less widespread").

the ADA has condemned it as unnecessarily broad, of little if any value in assessing fitness to practice law, and undesirable because of its potential to deter treatment.⁷ The American Bar Association, in a 1994 resolution supported by the National Conference of Bar Examiners (NCBE), recommended that inquiries concerning mental health should be narrowly tailored and sensitive to applicants' privacy concerns.⁸ In the wake of that resolution, the NCBE dropped questions about all past mental health counseling or hospitalizations from its own character screening form, which is used as a model by many state jurisdictions.⁹

Bar examiners, however, have been reluctant to abandon mental health inquiries entirely. The NCBE replaced its old broad questions with a "narrowly tailored" inquiry that has been adopted, with some variations, by an increasing number of states: "Within the past five years, have you been

7. The case law will be discussed in Part II.

8. The resolution was the product of a compromise between disability rights advocates and bar examiners, drafted by representatives of the ABA's Commission on Mental and Physical Disability Law, the ABA Section of Legal Education and Admissions to the Bar, the National Conference Bar Examiners, and the Association of American Law Schools (AALS). In its entirety, the resolution reads:

BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should consider the privacy concerns of bar admission applicants, tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.

BE IT FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about an applicant's behavior, conduct or any current impairment of the applicant's ability to practice law.

American Bar Association Bar Admissions Resolution: Narrow Limits Recommended for Questions Related to the Mental Health and Treatment of Bar Applicants, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597, 598 (1994) [hereinafter *ABA Resolution*] (reprinting resolution and accompanying report). The report accompanying the resolution, like the resolution itself, is quite vague about what, if any, questions targeting mental health conditions would be appropriate. See Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by Alternative Means*, 8 GEO. J. LEGAL ETHICS 401, 408-10 (1995) (critiquing *ABA Resolution*). The report, however, does contain some specific guidance on what sorts of questions should not be asked: "In particular, the drafters considered that questions of the type that ask whether an applicant has *ever* been treated or counseled for any mental illness, or whether the applicant has *ever* been institutionalized for treatment of such an illness, intrude too far . . ." *ABA Resolution, supra*, at 598.

9. The NCBE provides a character and fitness screening service that is used by some states. Most jurisdictions prepare their own application forms, but many look to the NCBE questionnaire as a model. In 1995, the NCBE eliminated "have you ever" questions about mental health treatment and hospitalizations that had appeared on its character questionnaire. See Herr, *supra* note 6, at 645-46.

diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"¹⁰ Most states continue to ask about treatment for alcoholism and substance abuse, either in a time-limited or a "have you ever" form. Questions about hospitalizations or commitments for mental illness also continue to appear on some states' application forms.

Disability rights advocates have argued that disability-based questions on bar application forms, even when narrowed to focus only on serious mental illnesses and substance abuse, are impermissible under the ADA. In this view, *any* question that focuses on the existence of a disability impermissibly burdens and stigmatizes individuals based on their disability status, and cannot survive the strict scrutiny mandated by the ADA. Disability-based inquiries are not necessary, the argument runs, because examiners can make an adequate assessment of fitness by scrutinizing the applicant's past record of performance and behavior.

While a few courts have endorsed this strict scrutiny approach, the trend in the decisions has been toward a more relaxed standard. A number of courts have been willing to uphold questions that focus on serious conditions, appear to have some utility in uncovering potential fitness problems, and do not sweep too broadly. Bar examiners look to these decisions as justification for continuing to screen applicants on the basis of disability.

This Article explores the implications of allowing disability inquiries in the lawyer licensing process. Part I tells the story of mental health screening in one jurisdiction, Connecticut, and the stories of three bar applicants who have been affected by it. These narratives shed light on the nature and structure of the institutions that screen prospective lawyers, and the treatment that applicants with disabilities encounter and experience as discriminatory.¹¹ I focus on Connecticut because a wealth of material is available,

10. NAT'L CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT 12 (1997) [hereinafter NCBE CHARACTER REPORT]. The NCBE also added a question about the existence of any condition that "currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner." *Id.* at 12. In place of the former broad question about substance abuse treatment, the NCBE substituted a question asking whether, in the past five years, the applicant has ever raised consumption of drugs or alcohol, or any mental disorder, "as a defense, mitigation or explanation for your actions" in any judicial, administrative or disciplinary proceedings. *Id.* at 12-13.

11. A growing body of scholarship has emphasized the importance of narratives to an understanding of discrimination and the adequacy of legal responses to it. See, e.g., CRITICAL RACE THEORY 41-92 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (reprinting essays by Thomas Ross, Richard Delgado, and Patricia J. Williams); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1012-51 (1991); David M. Engel & Frank W. Munger, *Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 285 (2001) (using narratives to explore the ADA's effects on the careers and consciousness of persons with disabilities).

drawn from litigation, public hearings, and applicants who have been willing to publicly tell their stories. Ideally, a study aimed at gaining an understanding of how bar examiners behave towards applicants with disabilities, and how those applicants perceive the process, would include interviews of applicants, observations of hearings and review of the files in a representative sample of cases in which the applicant disclosed a disability on the application form.¹² The secrecy of bar admissions proceedings makes this impossible. Still, based on my experiences in speaking with dozens of bar applicants who have been required to disclose disabilities, discussions with those who have counseled bar applicants elsewhere, and the published literature, I believe that the stories recounted here are reasonably representative.¹³ Certainly, they are illustrative of the *potential* for stigma and for discriminatory treatment, and this in itself is relevant to determining how the ADA should apply in this setting.

In Part II, my focus shifts to legal doctrine, as I consider how the ADA regulates disability inquiries by licensing boards. Title II of the ADA,¹⁴ which applies to the activities of state and local government, does not expressly restrict questions about disabilities. Challenges to the questions must face a number of threshold issues relating to whether there is discrimination against qualified individuals with disabilities—for that is what Title II prohibits—when a licensing board seeks mental health information. Courts have been unanimous so far in holding that the ADA applies, and that *unnecessary* disability inquiries are unlawful. No federal appeals court has yet ruled on these issues, and they are still open to dispute. My analysis agrees with the case law up to this point: Title II should be interpreted to require licensing agencies to justify the necessity of any disability-based questions they employ.

Because my research included interviews and the use of individually identifiable information of a sensitive and potentially stigmatizing nature, I followed federal guidelines on the use of human subjects in research, 45 C.F.R. pt. 46 (2000), and obtained approval from the University of Connecticut's Institutional Review Board. See generally Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998) (discussing the applicability of human subject research rules and informed consent principles to the use of client stories in legal scholarship).

12. Cf. JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 30–33 (1990) (describing a study of how litigants in small claims court present their cases, and how judges respond to them, conducted through observation of large number of trials and interviews with litigants).

13. I have played a role, as an advocate, in some of the events that I describe. As an objectivity alert, I will note my involvement at appropriate junctures in the story.

14. 42 U.S.C. §§ 12,131–12,165 (1994). Title II remains enforceable, in both federal and state courts, despite the U.S. Supreme Court's recent decision in *Board of Trustees of the University of Alabama v. Garrett*, 53 U.S. 356 (2001), holding that the Eleventh Amendment bars state employees' ADA damage suits in the federal courts. See *infra* note 96.

In applying the necessity test to licensing inquiries, the decisions divide into two camps: a “strict scrutiny” approach that is fatal to nearly all disability-based questions, and a more relaxed approach that is prepared to uphold “narrow” mental health questions. I analyze the basic assumptions (not always fully or clearly articulated in the decisions) that underlie each approach. The relaxed scrutiny model focuses on whether the symptoms of the targeted disorders may result in behaviors that pose risks to clients, and assumes that any net gain in public protection—even if the questions uncover only a few problem cases that otherwise would have escaped notice—is enough to justify the questions. Although I argue that strict scrutiny is truer to the ADA’s purposes, there is good reason to believe that the relaxed scrutiny framework will continue to predominate in the courts.

In Part III of this Article, I question whether the new generation of “narrow” mental health questions on bar application forms can be justified, even under the premises of relaxed scrutiny. I look closely at the particular conditions that examiners have singled out for inquiry—depression, bipolar disorder, schizophrenia, substance abuse, and hospitalizations for mental illness—and draw on the findings of medical and social science research. My conclusion is that a number of widely used questions should not be upheld, either because they sweep too broadly, or because they target conditions that cannot be distinguished in a principled way from physical disabilities (which examiners do not ask about), or because they present particular dangers of deterring treatment that are likely to cancel out any public protection gains.¹⁵ Some disability-based questions may be allowable under relaxed scrutiny, but not to the extent that many bar committees, and some courts, have supposed.

In Part IV, I turn to an important dimension of the problem that courts, examining committees, and commentators have generally ignored. If disability inquiries are to be allowed in the bar admissions process, the structure of the process needs to be changed to minimize the stigma imposed on applicants and the risks of demeaning treatment. As the stories recounted in Part I illustrate, the greatest harms inflicted by bar mental health questions derive from the fact that the information goes to a committee of lawyers—potential employers, colleagues and adversaries of the applicant—whose task is to judge “moral character” at the same time they assess mental fitness. Deep-seated societal prejudices about mental illness and substance abuse inevitably intrude into a process in which bar examiners are charged with making a highly subjective and value-laden determination. The nar-

15. Questions about depression and mental health hospitalizations also have a discriminatory impact on women and certain minority groups. See *infra* text accompanying notes 230, 278.

rowing of mental health inquiries to single out serious mental illnesses and substance abuse—conditions particularly subject to fears, misconceptions, and moral disapprobation—has intensified the stigma felt by applicants.

The employment provisions of the ADA contain a crucial insight that must inform the interpretation of the ADA when it is applied in the comparable setting of occupational licensing. Title I of the ADA¹⁶ acknowledges that inquiries about disabilities are sometimes necessary to assess an applicant's fitness, but also accounts for the dangers of stigma and bias when disability information is allowed to enter a selection process. The statute addresses this problem by requiring the separation of medical information from other aspects of the selection process, evaluation of the information by personnel with appropriate medical expertise, and strict limitations on who else may have access to that information.

Bar examiners' questions about mental illness and substance abuse, even if narrowly tailored, cannot be sustained under the ADA unless comparable safeguards are in place. I examine the institutional nature of bar admissions boards—their structure, history, functions, habits, and incentives—to show that the process, as currently structured, is ill-suited to handle disability information in a nondiscriminatory way. In the final section of Part IV, I outline what a reformed bar admissions process would look like.

I. STORIES OF ONE STATE'S MENTAL HEALTH SCREENING

A. Background: The Shape of the Screening Process and the Origins of Mental Health Questions

In Connecticut, as in most jurisdictions, a committee appointed by the courts and made up of lawyers is responsible for determining the "morals and fitness" of applicants to the bar, as well as for administering an examination and ensuring that applicants have satisfied educational prerequisites.¹⁷ The process by which the Connecticut Bar Examining Committee (CBEC)

16. 42 U.S.C. §§ 12,111–12,117 (1994).

17. Connecticut court rules provide that the judges of the superior court will appoint a twenty-four-member examining committee, with the membership made up of attorneys and at least one judge. See CONN. R. SUPER. CT. § 2-3. The committee has "the duty, power and authority to provide for the examination of candidates for admission to the bar; to determine whether such candidates are qualified as to prelaw education, legal education, morals and fitness; and to recommend to the court for admission to the bar qualified candidates." *Id.* § 2-5.

On the universality of character requirements for bar admission and their administration by committees predominantly made up of lawyers, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 15.3.2 (1986), and Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493, 505 (1985).

conducts its character screening is fairly typical.¹⁸ It starts with a detailed personal history questionnaire that applicants are required to submit when they register for the bar examination, covering such matters as employment, education, criminal history, and credit problems. Reference forms are also gathered from the applicant's past employers, law school dean and personal references.¹⁹ After reviewing this material, the committee or its staff may request additional records or information.²⁰ If the committee finds that there is "information weighing against a determination of good moral character," it must give the applicant notice and an opportunity to respond.²¹ If the CBEC remains unsatisfied after reviewing any additional information submitted by the applicant, it refers the file to a Standing Committee on Recommendations for Admission to the Bar in the appropriate county.²² The county committee may conduct an investigatory hearing, and sends its findings back to the CBEC, which is free either to adopt them or to hold its own, *de novo*, formal hearing on the application.²³ The hearing, conducted before a panel of at least five committee members, ends with the issuance of the CBEC's findings of fact and a recommendation for or against admission that goes to the court.²⁴ Judges will usually defer to the committee's recom-

18. The basic structure of Connecticut's screening—a questionnaire followed by more intensive investigation and hearings when application review reveals problems—is typical of most jurisdictions. See Rhode, *supra* note 17, at 506. The one element of Connecticut procedure that is unusual, the involvement of a second committee in character screening, is discussed *infra*.

19. CONN. BAR EXAMINING COMM., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT BY EXAMINATION (2001) [hereinafter CONN. 2001 APPLICATION].

20. See REGS. CONN. BAR EXAMINING COMM. art. III-2 (2000) [hereinafter CBEC REGS.]. The CBEC has issued regulations, pursuant to authority granted by state court rules. See CONN. R. SUPER. CT. § 2-4. Procedures and substantive standards for the committee's fitness screening appear in Article VI of the regulations, entitled "Guidelines for Assessment of Character and Fitness," which was enacted in 1990, and subsequently amended in minor respects. See CONN. L.J., July 31, 1990, at 2C (notice of publication, including text of Article VI as originally enacted).

21. CBEC REGS., *supra* note 20, art. VI-5(b). In the early 1990s, the committee often conducted this review through an "interview" of the applicant before one member or more of the committee, with the applicant under oath and a court reporter transcribing the proceedings. Now, it is often a "paper" review conducted by one member of the committee, who determines whether the applicant should be approved or the case should proceed to a hearing. The interview procedure is still used in some cases.

22. See *id.*, art. VI-5(e)(i). Each Connecticut county has its own standing committee, made up of three to seven attorneys appointed by the superior court judges. See CONN. R. SUPER. CT. § 2-12. Connecticut is unusual in having two separate entities involved in the character and fitness determination.

23. See CBEC REGS., *supra* note 20, art. VI-5(e)(ii)–(iii). The CBEC is not required to give any weight to the findings of the standing committee. See *Scott v. State Bar Examining Comm.*, 601 A.2d 1021, 1025–26 (Conn. 1992). It frequently disregards a standing committee's recommendation of approval and holds its own formal hearing.

24. See CBEC REGS., *supra* note 20, art. VI-5(e)(iv).

mendation.²⁵ Throughout the process, the applicant bears the burden of proving her character and fitness.²⁶

The Connecticut bar application form did not include any mental health questions until 1984.²⁷ This was consistent with national trends. Although character questionnaires have been a fixture of bar admissions since the 1920s and 1930s,²⁸ it was not until the 1970s and 1980s that bar examiners began to pay attention to mental health as a distinct subject of inquiry.²⁹ In Connecticut, some highly publicized incidents of lawyer misconduct in the early 1980s, particularly a protracted scandal involving thefts by a probate judge, combined with a sharp increase in the volume of bar applications, gave rise to a general sense on the CBEC that more stringent character screening was needed. As part of this general campaign, the committee's staff gathered application forms from jurisdictions that were viewed as conducting intensive background investigations, found questions about mental health and substance abuse treatment on those forms, and incorporated them into Connecticut's questionnaire. Mental illness had not been an issue in the particular lawyer scandals that inspired the committee's actions.³⁰ The committee added the inquiries without discussing their

25. The court's review of a negative recommendation is limited to determining, based on the record of the bar examining committee's proceedings, whether the committee acted arbitrarily or unreasonably, or failed to conduct a fair and impartial investigation. See *Scott*, 601 A.2d at 1025.

26. See CONN. R. SUPER. CT. § 2-8; CBEC REGS., *supra* note 20, art. VI-3.

27. See Conn. Bar Examining Comm., Summary of Substance Abuse/Mental Health Questions: 1984-1993 (June 30, 1993) (unpublished report, on file with author).

28. See Rhode, *supra* note 17, at 499.

29. See Michael J. Place & Susan L. Bloom, *Mental Fitness Requirements for the Practice of Law*, 23 BUFF. L. REV. 579, 582 (1974) (noting that as of 1974, most states' bar application forms did not include any direct questions about the applicant's mental health); John G. Jackson, *Character Requirements for Admission to the Bar*, 21 B. EXAMINER 115, 130-37 (1952) (compiling questions drawn from various states' character and fitness questionnaires that included no inquiries about mental health or substance abuse); *Pennsylvania Questionnaires for Registration of Law Students*, 1 B. EXAMINER 74, 74-77 (1932) (reproducing Pennsylvania questionnaires, which were generally viewed as the model for stringent character screening, and which posed no questions concerning mental health, alcohol or drugs). By the mid-1960s, the National Conference of Bar Examiners was asking about treatment for alcoholism and drug abuse and hospitalizations for mental illness. See NAT'L CONFERENCE OF BAR EXAMINERS, *THE BAR EXAMINERS' HANDBOOK* 69-74 (1st ed. 1968) (reprinting NCBE's 1965 character form). Florida appears to have been the first state to delve into outpatient mental health treatment; by 1971, it was asking, "Have you ever received regular treatment for amnesia or any form of insanity or emotional disturbance or mental disorder?" John Germany, Address at Panel at Recent Developments in the Character and Fitness Qualification for the Practice of Law, in 40 B. EXAMINER 29, 33 (1971). However, as recently as 1982, most jurisdictions restricted their mental health inquiries to substance abuse and adjudications of incompetency, and only 27 percent inquired about mental illness that did not result in commitment. See Rhode, *supra* note 17, at 595-96. By the early 1990s, 75 percent of all jurisdictions asked about outpatient mental health treatment. See *supra* note 5.

30. The factors that led to the CBEC's adoption of mental health and substance abuse questions were explored during depositions taken as part of a later ADA lawsuit. See Deposition of

utility or potential drawbacks, and without expert consultation.³¹ A generalized concern with public protection and the profession's image led the examiners to make sure that Connecticut's screening was as tough as anyone else's.³²

By the start of the 1990s, Connecticut's bar application contained several broad inquiries into mental health issues, closely modeled on the NCBE's questions. Applicants were required to reveal whether they had ever received treatment for any mental, emotional, or nervous disorder; whether they had ever been hospitalized or committed to an institution (voluntarily or involuntarily) for mental illness; whether they had ever been addicted to alcohol or other drugs; and whether they had ever been treated for substance abuse.³³ An affirmative answer to any of these questions set the machinery of character and fitness screening in motion. The CBEC generally asked for all treatment records and a written report from a current treater describing the diagnosis, prognosis, and treatment. Usually, the applicant was required to appear for an "interview" before a panel of committee members, conducted under oath and transcribed by a court reporter, at which the applicant was required to answer questions about the circumstances that led to treatment or counseling, the nature of the condition, whether and how it had affected the applicant's functioning, and so on. Most applicants were approved at this stage, but some (usually in cases involving "serious" mental illnesses or substance abuse) were referred to a county standing committee for a hearing, followed by a formal hearing before the CBEC. Affirmative answers to the mental health questions

Raymond W. Beckwith at 52-60 (June 14, 1994), *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. 1994) [hereinafter Beckwith Deposition]; Deposition of R. David Stamm at 10-15 (June 8, 1994), 56-57 (June 8, 1994), & 7-27 (June 9, 1994), *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. 1994) [hereinafter Stamm Deposition]. Raymond Beckwith has served on the committee since 1970, and became its chairperson in 1990. David Stamm has served as the committee's administrative director since 1978.

31. The committee did have a general sense at the time that substance abuse was a problem among Connecticut attorneys, but had no such concerns about other mental health conditions. See Stamm Deposition, *supra* note 30, at 16-17 (June 9, 1994). Later, around 1991, the committee did consult with a mental health professional about the wording of the mental health question, and was advised that a broad inquiry was appropriate. See *id.* at 37-41 (June 9, 1994).

32. I have not been able to find any documentation of what originally motivated other bar admissions boards. The rise of mental health questions on bar application forms generally corresponds with a period when the public, and the professions, were paying increased attention to mental illness and addiction. Starting in the 1960s, improved treatments, deinstitutionalization, and the rise of community care made people with mental illnesses more visible. This was also the era when the medical model of alcoholism and addiction began to gain general acceptance, and a treatment system for addiction emerged.

33. See Conn. Bar Examining Comm., *supra* note 27; CONN. BAR APPLICATION FORMS (on file with author). The reference forms sent to the applicant's employers, personal references, and law school dean included similar inquiries about the applicant's mental health history.

rarely led to a denial of admission, although this occasionally occurred. Delays were more common: During every administration of the bar examination, some applicants were admitted later than their peers as a result of the committee's investigation of mental health issues.³⁴

In the five-year period from 1989 through 1994, approximately 2.5 percent of Connecticut bar applicants—between thirty and fifty individuals each year—disclosed mental health treatment on their bar application forms.³⁵ The percentage of applicants who actually had received mental health treatment, and should have answered “yes” to the questions, was undoubtedly much higher. In any given year, about 15 percent of the U.S. adult population obtains mental health services.³⁶ Twenty-six percent of first-year law students surveyed at the University of Connecticut School of Law in 1993 indicated that they had been diagnosed or received regular treatment for a mental disorder at some point in their lives.³⁷ It appears that many bar applicants regarded the broad mental health inquiry as an illegitimate intrusion, and resisted it by just saying “no.”³⁸

34. See Stamm Deposition, *supra* note 30, at 68–139 (June 8, 1994).

35. See Defendant's Responses to Plaintiff's First Set of Interrogatories at 14–15, *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. May 10, 1994). These figures do not include responses to the substance abuse question. The percentage varied from year to year; the highest response rate was in 1993, when about 4.4 percent answered affirmatively. See *id.*

36. See U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 408 (1999) [hereinafter SURGEON GENERAL'S REPORT], available at <http://www.surgeongeneral.gov/library/mentalhealth/home.html>; see also Faith Dickerson, *Psychological Counseling for Law Students: One Law School's Experience*, 37 J. LEGAL EDUC. 82, 83–84 (1987) (describing a four-year study of law students at University of Maryland that found that 15 percent of students utilized a campus counseling service; nearly all were diagnosed as having a mental disorder).

37. See Affidavit of Allison Brickley, app. to Plaintiff's Motion for Class Certification, *Roe v. Conn. Bar Examining Comm.*, No. 3:93 CV-1084 (D. Conn. Aug. 5, 1993). In June 1993, eighty-seven first-year students responded to an anonymous survey asking the same questions that appeared on the Connecticut bar application form at the time. Twenty-three of them (26 percent) indicated that they had been diagnosed as having, or had received regular treatment for, a mental disorder or emotional condition. When students were asked whether they had ever received outpatient mental health treatment, the percentage responding affirmatively rose to 31 percent. See *id.*; see also Barbara Hagenbaugh, *Saying No to Mental Health Inquiries*, HUM. RTS., Summer 1995, at 14, 30; Thomas Scheffey, *Local Cases Bolster ADA-Based Challenges to Bar Examiners*, CONN. L. TRIB., Dec. 6, 1993, at 8 (discussing survey results).

38. See also *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 437 (E.D. Va. 1995) (finding Virginia's question about past mental health treatment ineffective because only about 1 percent of applicants answered affirmatively, as compared with an expected response rate of 20 percent based on national statistics). Fear of the consequences of disclosure, as well as a sense that mental health treatment is none of the examiners' business, probably contributed to the low disclosure rates.

B. Challenges, Change, and Resistance

Bar applicants and disability rights advocates began to attack the inquiries as discriminatory soon after the ADA went into effect. The first ADA suit in the nation to challenge bar mental health inquiries was filed in Connecticut in 1992 by an applicant who refused to answer the query about outpatient mental health treatment.³⁹ The plaintiff withdrew his suit after failing the Connecticut bar examination. In 1993, another applicant filed a similar court challenge, but dropped it, and agreed to answer the question, after a federal judge failed to schedule a preliminary injunction hearing early enough to avoid delays in his bar admission.⁴⁰ A third federal lawsuit was filed in 1994 by a recent law graduate named Chrysler Szarlan.⁴¹ Her motion for a preliminary injunction was supported by an affidavit from an expert witness, Dr. Howard Zonana, director of the Law and Psychiatry Division at the Yale medical school, which encapsulated the major themes of the case against mental health inquiries: there is no evidence that such questions have predictive value; the application form's numerous inquiries about applicants' past behavior provide a better basis for predicting future conduct; the questions impose a stigma and treat persons with mental disorders differently than non-disabled applicants and those with physical disabilities; and the questions undermine lawyer fitness by deterring prospective lawyers from seeking treatment.⁴² The United States Department

39. See Verified Complaint, *Doe v. Conn. Bar Examining Comm.*, No. 2:92 CV-634 (D. Conn. July 24, 1992); Thomas Scheffey, *Applicant Claims Bar Query Violates ADA*, CONN. L. TRIB., Aug. 10, 1992, at 1.

40. See Verified Complaint, *Roe v. Conn. Bar Examining Comm.*, No. 3:93 CV-1084 (D. Conn. May 26, 1993); Scheffey, *supra* note 37, at 16.

41. See Verified Complaint, *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. Feb. 1, 1994); Thomas Scheffey, *Are the Bar Examiners' Mental-Health Questions Illegal?*, CONN. L. TRIB., June 6, 1994, at 26.

In *Szarlan* and the *Roe* lawsuit that proceeded it, the plaintiffs were represented by the Civil Rights and Disability Law Clinics of the University of Connecticut School of Law. Tanina Rostain, my colleague on the clinical faculty at the time, and I were the primary attorneys. Ordinarily, clinic cases are litigated by law students, but we decided not to assign these cases to students because we did not want to put our students, the vast majority of whom apply to the Connecticut bar, in the awkward position of suing the examiners who would soon be deciding their admissions.

42. See Affidavit of Howard V. Zonana, M.D., *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. Jan. 28, 1994). Dr. Howard Zonana was coauthor of a proposed ABA resolution and report that urged the elimination of all mental health inquiries from bar application forms. See ABA COMM'N ON MENTAL & PHYSICAL DISABILITY LAW, REPORT ON RESOLUTION CONCERNING INQUIRIES INTO MENTAL HEALTH TREATMENT OF BAR APPLICANTS (1994) [hereinafter ABA COMM'N REP.] (on file with author). This proposal was later withdrawn in favor of a compromise resolution, acceptable to the bar examiners, that was adopted by the ABA House of Delegates in August 1994. See *supra* note 8.

of Justice moved to join the case as *amicus curiae* on the plaintiffs' side.⁴³ The court scheduled a hearing on the plaintiff's preliminary injunction request for August 1994.

Until the eve of the *Szarlan* trial, the CBEC remained firmly committed to its broad mental health inquiry. In statements to the press and memoranda to committee members, the CBEC's chair, Raymond Beckwith, argued that the committee should await guidance from the courts, the NCBE and the ABA before considering any changes.⁴⁴ He suggested that bar applicants did not generally find the questions objectionable, since only a handful out of the many thousands who had filled out the application form over the years had ever complained.⁴⁵

The committee's position changed abruptly in July 1994 after a status conference was held before the federal judge who would preside over the trial. During the conference, the judge asked the bar examiners' lawyer, with a note of incredulity in his voice, "Do you mean to say that if I ever saw a therapist, even if it was for something like marriage difficulties, I'd have to disclose it on this form?"⁴⁶ The judge proposed that the CBEC suspend its use of the mental health treatment question and hold public hearings on the issue of what, if any, questions should appear on the application form concerning applicants' mental health histories. The committee soon accepted this proposal.⁴⁷

43. See United States' Motion for Leave to Participate as Amicus Curiae, *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. July 7, 1994).

44. See Scheffey, *supra* note 37, at 8 (quoting Raymond Beckwith); Memorandum from Raymond W. Beckwith, Chair, Conn. Bar Examining Comm., to all CBEC Members 2 (Sept. 23, 1993) [hereinafter Beckwith Memorandum] (on file with author); see also Scheffey, *supra* note 41, at 26 (noting that after the *Szarlan* suit was filed, CBEC voted down a motion to delete the mental health treatment question by a margin of eleven-to-three).

45. See Beckwith Memorandum, *supra* note 44, at 1. Four years earlier, in a letter to the bar examining committee expressing concern about the scope of the mental health questions, the chief justice of the Connecticut Supreme Court had pointed out the obvious fallacy in reasoning from a lack of complaints: "Applicants to the bar will, of course, not be in a position to contest your regulations, or resist waiving their rights, lest they jeopardize their legal careers from the start." Letter from Chief Justice Ellen A. Peters, Conn. Sup. Ct., to R. David Stamm, Admin. Dir., Conn. Bar Examining Comm. (Jan. 5, 1990) (on file with author).

46. The quote is approximate, based on my recollection of the conference, but I am confident it conveys the substance of the judge's question. It received the candid response that yes, the question did often require such disclosure.

47. See Letter from Ralph Gregory Elliot, Tyler Cooper & Alcorn, to Judge Alan H. Nevas, U.S. Dist. Ct. (July 22, 1994) (on file with author) (confirming terms of interim agreement). The lawsuit was placed on hold pending the results of the public hearings. See *id.*

The bar examiner's decision to settle may have been influenced by the fact that the first three judicial opinions on ADA challenges to licensing inquiries, issued in late 1993 and in the first few months of 1994, had found broadly framed mental health questions inappropriate. See *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670, 1993 U.S. Dist. WL 413016 (D.N.J. Oct. 5, 1993); *In re Applications of Underwood & Plano*, No. BAR-93-21, 1993 WL 649283 (Me. Dec. 7, 1993); *In re Petition of*

Following two public hearings held in the fall of 1994 and the review of written submissions from psychiatrists, mental health organizations, state agencies, bar applicants, admitted attorneys, a law school dean, and the U.S. Department of Justice,⁴⁸ the CBEC voted to eliminate its question about outpatient mental health treatment question and to replace it with the following:

Since you became a law student, have you ever had an emotional disturbance, mental illness or physical illness which has impaired or would impair your ability to practice law or to function as a student of law?⁴⁹

The committee kept its "have you ever" questions about hospitalization for mental illness and treatment for substance abuse, which had not been challenged in the *Szarlan* litigation.⁵⁰ The CBEC's action led to the settle-

Frickey, 515 N.W.2d 741, 741 (Minn. 1994). Opposition to the questions had also been growing on other fronts. In February 1994, the Connecticut Bar Association's Human Rights and Responsibilities Section and Committee on Disability Law issued a report calling for the elimination of mental health inquiries from the bar application form. See REPORT ON PROPOSED CBA RESOLUTION CONCERNING INQUIRIES INTO MENTAL HEALTH TREATMENT OF BAR APPLICANTS (1994) (on file with author, who was also the principal author of this report). The Dean of the University of Connecticut School of Law, Hugh C. Macgill, attacked the mental health questions as "atavistic and discriminatory, primitive and pointless." Scheffey, *supra* note 41, at 26 (quoting Hugh Macgill). Behind the scenes, the chief justice of the Connecticut Supreme Court and the judiciary's chief court administrator urged the CBEC's chair to consult with a psychiatric expert—something that the committee had not done since the ADA went into effect—about the utility of its mental health questions. When this meeting occurred, in the spring of 1994, the psychiatrist suggested that the committee's questions were considerably broader than necessary, and uncovered a great deal of "ancient and/or trivial" information not relevant to determining current fitness. Beckwith Deposition, *supra* note 30, at 151 (June 14, 1994); see *id.* at 131–52.

48. See CONN. BAR EXAMINING COMM., TRANSCRIPTS OF HEARINGS ON MENTAL HEALTH QUESTIONS AND HEARING EXHIBITS (Sept. 21 & 28, 1994) (on file with author). With one exception (the Florida Board of Bar Examiners, which sent a letter urging the continued use of broad mental health inquiries), all of the comments urged the committee to stop asking about mental disorders and mental health treatment. See *id.*

49. Letter from Ralph Gregory Elliot, Tyler Cooper & Alcorn, to Judge Alan H. Nevas, U.S. Dist. Ct. (Dec. 16, 1994) (on file with author) (confirming actions taken by committee after public hearings). The new question was modeled on an inquiry that appeared in guidelines for physician screening endorsed by the American Psychiatric Association. See *id.*; Testimony of James H. Scully, Jr., M.D., Deputy Med. Dir. and Dir. of the Office of Educ., Am. Psychiatric Ass'n, in CONN. BAR EXAMINING COMM., *supra* note 48; see also Herr, *supra* note 6, at 684–85 n.211 (discussing settlement); Aldina Vazao, *Examiners Suspend Mental Health Question*, CONN. L. TRIB., Aug. 15, 1994, at 9.

50. The CBEC retained its question about mental health hospitalizations despite the fact that much of the testimony it received at the public hearings was directed against that question as much as the outpatient treatment inquiry. The ABA's report, issued in August 1994 with the support of the NCBE, had cited questions asking whether applicants had ever been hospitalized for mental illness as an example of inappropriate and overbroad inquiries. See ABA Resolution, *supra* note 8, at 598. Although the CBEC's chair had previously said that Connecticut should look to

ment of the federal lawsuit with a consent decree that permanently enjoined the examiners from asking applicants whether they had ever received outpatient mental health treatment. The examiners were not, however, required to stick with the new question quoted above.⁵¹ In 1996, they replaced it with a question that the NCBE had recently started using: "Within the past five years, have you been diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"⁵²

In the meantime, another ADA lawsuit had led to a significant change in Connecticut's admissions procedures. In 1993, an applicant, proceeding under the pseudonym *Anonymous*, filed suit in federal district court to challenge the CBEC's decision to deny him admission.⁵³ On his 1990 Connecticut bar application, *Anonymous* disclosed that he was receiving treatment for bipolar disorder.⁵⁴ Documentation submitted by *Anonymous*'s physicians stated that his condition was responsive to treatment, he was not experiencing manic episodes that might impair his judgment, and he was fit to practice law. A county standing committee interviewed the applicant and unanimously recommended his admission. The CBEC conducted its own formal hearing and, without obtaining any expert evaluation, found him unfit. *Anonymous*'s lawyers argued that the ADA required a modification

the NCBE and ABA for guidance, see *supra* text accompanying note 44, he would later, in the course of defending the hospitalization question, dismiss the *ABA Resolution* as "without much clout one way or the other." Alex Wood, *Aspiring Lawyers Won't Be Asked About Depression*, J. INQUIRER (Manchester, Conn.), Oct. 21, 2000, at 26 (quoting Mr. Beckwith).

51. See Stipulation and Order of Dismissal, *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. June 26, 1994). The consent decree barred the defendant from reviving the inquiry challenged in the lawsuit ("Have you ever been treated as an outpatient for any mental, emotional or nervous disorders?") or from asking any "substantially similar question on the subject covered by that question." *Id.* at 1-2.

52. CONN. BAR EXAMINING COMM., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT BY EXAMINATION 15 (1996); see also *supra* text accompanying notes 8-10. Ironically, Connecticut's short-lived question about functional impairments since starting law school was being praised as a national model just when the examiners were getting rid of it. See Stuart C. Gauffreau, *The Propriety of Broadly Worded Mental Health Inquiries on Bar Application Forms*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 199, 211 (1996).

53. See Complaint, *Anonymous v. Conn. Bar Examining Comm.*, No. 3:93 CV-1227 (D. Conn. June 21, 1993). My description of the facts is based on the allegations of the complaint, and assumes their truth. See also John D. McKenna, Note, *Is the Mental Health History of an Applicant a Legitimate Concern of State Professional Licensing Boards? The Americans with Disabilities Act vs. State Professional Licensing Boards*, 12 HOFSTRA LAB. L.J. 335, 335-36, 344-46 (1995) (describing facts and arguments in *Anonymous*); Thomas Scheffey, *Mentally Ill Lawyer Fights Barriers to Practice*, LEGAL TIMES, Aug. 9, 1993, at 4.

54. Bipolar disorder, also known as manic-depressive illness, will be discussed in Part III.B.2.

of bar admissions policies to allow for the granting of a conditional license, with continued monitoring after admission, in appropriate cases.⁵⁵

Spurred by the lawsuit, the bar examining committee soon proposed, and the Connecticut judges adopted, a new court rule authorizing the CBEC, "in light of the physical or mental disability of the candidate, [to] recommend an applicant for admission . . . conditional upon the applicant's compliance with conditions prescribed by the committee relevant to the disability and the fitness of the applicant."⁵⁶ Connecticut thus joined about a dozen states that have established conditional licensing programs for attorneys,⁵⁷ and has used the conditional admissions procedure an average of about two times a year.⁵⁸

Mental health inquiries on the Connecticut bar application form have recently become the subject of renewed controversy. On the application form for the July 2000 examination, the CBEC broadened the scope of the questions by adding "clinical depression" to the list of disorders that applicants were required to disclose.⁵⁹ Depression is far more common than other

55. The *Anonymous* litigation has had a tortuous history, and is still going on as of this writing. The original federal court action was dismissed on federal abstention grounds. See Ruling on Defendant's Motion to Dismiss, *Anonymous v. Conn. Bar Examining Comm.*, No. 3:93 CV-1227 (D. Conn. Nov. 5, 1993). The ADA suit was then re-filed in state court. See Complaint, *Anonymous v. Conn. Bar Examining Comm.*, No. CV-94-0534160-S (Conn. Super. Ct. Feb. 8, 1994). While the state litigation was pending, the bar examining committee conducted a new fitness hearing. This time, the committee denied *Anonymous* admission for different reasons, citing his failure to pay child support and a memo that he had sent to Connecticut's chief court administrator, complaining of the bar examiners' discriminatory conduct, as evidence of his lack of good moral character. In the state court lawsuit, *Anonymous* contends that these grounds were pretextual. See Thomas Scheffey, *Applicant Charges Bar with Discrimination*, CONN. L. TRIB., Aug. 14, 2000, at 8. A decision dismissing the suit on procedural grounds is currently on appeal. See Memorandum of Decision Re: Motion to Dismiss and Scope of Review, *Anonymous v. Conn. Bar Examining Comm.*, No. CV-94-0534160-S (Conn. Super. Ct. Sept. 6, 2000).

56. CONN. L.J., July 19, 1994, at 6C-7C (publishing this rule amendment, effective Oct. 1, 1994); see CONN. R. SUPER. CT. § 2-9; see also CONN. R. SUPER. CT. § 2-11 (stating procedures for removal or modification of conditions and monitoring of compliance by counsel to the state-wide grievance committee). The conditional admission rule was enacted independent of any resolution of the *Anonymous* case, but there can be little doubt that it was the lawsuit that triggered action. The examiners had discussed the possibility of a conditional admission program before the *Anonymous* suit was filed, at a February 1991 meeting (shortly after the ADA was enacted), but as the minutes of the meeting state, "no action was proposed or taken." Stamm Deposition, *supra* note 30, at 160-61 (June 9, 1994).

57. Conditional licensing programs, and their relevance to the permissibility of mental health questions under the ADA, will be discussed in Part III.A.3.

58. See Interview with Daniel Horwich, Statewide Bar Counsel, in Hartford, Conn. (Apr. 27, 2000) (stating that since 1995, nine applicants had been conditionally admitted).

59. CONN. BAR EXAMINING COMM., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT BY EXAMINATION 14 (2000) [hereinafter CONN. 2000 APPLICATION]. The committee may have gotten the idea from other states' forms: Colorado, Delaware, Florida, Kentucky, and Virginia had added depression to their lists. See *infra* note 210.

conditions targeted by the application form,⁶⁰ and the CBEC's action struck a chord with the bar and the public. The president pro tempore of the Connecticut State Senate, Kevin Sullivan, sent a strongly worded letter to the examining committee requesting the immediate suspension of all questions dealing with past diagnosis or treatment for mental conditions or substance abuse.⁶¹ The Connecticut Bar Association took a public stand against the questions,⁶² as did several mental health organizations.⁶³ Two recently admitted attorneys, Rose Gower and Kathleen Flaherty, who had been required to disclose mental health hospitalizations and treatment on the application form, filed ADA complaints against the bar examining committee with the U.S. Department of Justice, and decided to publicly discuss their experiences to increase awareness of the harm caused by the questions.⁶⁴ The issue generated a flurry of newspaper articles and editorials, most of it critical of the examiners' practices.⁶⁵

60. The nature of depression, and its prevalence, will be discussed in Part III.B.1.

61. See Letter from Sen. Kevin B. Sullivan, Conn. Senate, to Raymond W. Beckwith, Chair, Conn. Bar Examining Comm. (May 31, 2000) [hereinafter Sullivan Letter] (on file with author). "The inclusion of these intrusive and invidious questions," Senator Sullivan wrote, undermines the "progress [that] is being made to protect privacy, remove the stigma of mental illness and raise awareness that treatment works." *Id.* at 1. He added, "Those charged with setting standards and setting an example for others should know better and do better." *Id.*

62. In a letter to the bar examining committee, the Connecticut Bar Association's president argued that the questions deter applicants from obtaining needed treatment and run counter to the trend of court decisions and the ABA's 1994 resolution calling for "narrow tailoring." Letter from William F. Gallagher, Pres., Conn. Bar Ass'n, to Raymond W. Beckwith, Chair, Conn. Bar Examining Comm. (June 12, 2000) (on file with author). The goals of the questions, he said, could be better served by putting resources into attorney education, rehabilitation, and discipline. *See id.*

63. Starting in 1998, the CBEC had received a number of requests from mental health organizations and advocates (including myself) to eliminate or further narrow the remaining mental health and substance abuse questions. See Letters to Raymond W. Beckwith, Chair, Conn. Bar Examining Comm., from Sheila B. Amdur, Pres., Nat'l Alliance for the Mentally Ill—Conn. (NAMI-CT) (July 5, 2000); Jon Bauer (May 13, 1998 & June 8, 2000); Lawrence W. Berliner, General Counsel, Conn. Office of Prot. and Advocacy for Persons with Disabilities (June 12, 1998); Tracy J. Carroll, Executive Dir., NAMI-CT (Aug. 24, 1998); Janet VanTassel, Executive Dir., Conn. Legal Rights Project, Inc. (Feb. 19, 1999) (on file with author).

64. Applicants who had previously challenged the committee's practices had either proceeded under a pseudonym or, like Chrysler Szarlan, used their real name but did not disclose the nature of their mental health condition or treatment. Rose Gower and Kathleen Flaherty, after careful consideration, decided to speak openly about their experiences and mental health conditions, using their real identities, because they decided that this was the most effective way to fight the stigma of mental illness and bring about change. See *Advice of Counsel: Courage and the Bar Committee*, CONN. L. TRIB., Nov. 6, 2000, at 27 (praising Ms. Flaherty's courage in speaking publicly, and expressing the hope that it would help to end unjust treatment of bar applicants with mental disabilities).

65. See *Advice of Counsel*, *supra* note 64; Associated Press, *Bar Candidates Grilled on Mental Health*, WATERBURY REPUBLICAN-AM., June 10, 2000, at 5A; Associated Press, *Lawyer Sues over Disability Question*, NEW HAVEN REG., June 24, 2000, at A4; Editorial, *Bar Applicants Not on Trial*,

The CBEC beat a tactical retreat. It dropped the reference to clinical depression from the application form for the February 2001 examination, but otherwise left the questions unchanged.⁶⁶ In comments to the press, the committee's chair, Raymond Beckwith, attributed the decision to concern about the question's awkward phrasing, which had implied (incorrectly) that depression is a "psychotic disorder." He said that the examiners would study the matter further and might resume asking about depression in the future.⁶⁷ Otherwise, he strongly defended the committee's mental health inquiries. He noted that few applicants had complained about the questions, and that in any event, character and fitness screening is inherently intrusive, delving into "many areas of people's lives which I'm sure they would not want inquired into."⁶⁸ He argued that such inquiries are needed because "[l]awyers and doctors can have serious consequences on their patients and clients."⁶⁹ The examiners also appeared to view the availability of conditional admissions as proof that the inquiries were appropriate and nondiscriminatory.⁷⁰

So the story stands at present. After eliminating, in response to litigation, the broadest possible question (requiring disclosure of any and all mental health treatment or diagnosis of mental disorder), Connecticut

HARTFORD COURANT, June 15, 2000, at A20; Editorial, *A Depressing Change in the Bar Exam*, CONN. L. TRIB., June 12, 2000, at 26; Editorial, *Drop the Questions*, REC. J. (Meriden, Conn.), June 16, 2000; Editorial, *Ensuring Attorneys' Fitness to Practice*, ADVOCATE (Stamford, Conn.), June 26, 2000, at A12; Editorial, *Prejudice Against Mental Illness*, HARTFORD COURANT, Sept. 14, 2000, at A12; Adam Gorlick, *Bar Association's Questions Under Fire*, REC. J. (Meriden, Conn.), June 10, 2000, at 2; Elizabeth Hamilton, *Question of Fairness*, HARTFORD COURANT, Sept. 10, 2000, at A1; Judson Hand, *Lawyers Must Pass Character Test, Too*, STAR-LEDGER (Newark, N.J.), Nov. 12, 2000, at 2; Norman Pattis, *Nuts to Bar Exam Committee: Could Anyone Pass This Test?*, CONN. L. TRIB., Sept. 25, 2000, at 35; Thomas Scheffey, *Bar Exam Adds Controversial Query About Depression*, CONN. L. TRIB., May 15, 2000, at 1 [hereinafter Scheffey, *Bar Exam*]; Thomas Scheffey, *Just a Crazy Thing to Ask?*, CONN. L. TRIB., July 3, 2000, at 1; Robert Whitman, *Bar Questions Demean*, HARTFORD COURANT, Sept. 19, 2000, at A9.

66. See Editorial, *Kudos to Bar Exam Committee*, CONN. L. TRIB., Oct. 16, 2000, at 28; Elizabeth Hamilton, *Bar Strikes Psychiatric Query*, HARTFORD COURANT, Oct. 26, 2000, at A4; Metro Briefing, *Hartford: Depression Removed from Survey*, N.Y. TIMES, Oct. 25, 2000, at B4; *Mental Health Issue Defused*, ASSOCIATED PRESS ST. & LOC. WIRE, Oct. 23, 2000; Thomas Scheffey, "Clinical Depression" Query Deleted from Bar Exam Form, CONN. L. TRIB., Oct. 16, 2000, at 1; Wood, *supra* note 50, at 25.

67. See Hamilton, *supra* note 66 (citing Mr. Beckwith); Scheffey, *supra* note 66. The unfortunately worded question had referred to "clinical depression or any other psychotic disorder/condition." CONN. 2000 APPLICATION, *supra* note 59, at 14.

68. Hamilton, *supra* note 65 (quoting Mr. Beckwith); see Scheffey, *Bar Exam*, *supra* note 65.

69. Hamilton, *supra* note 65 (quoting Mr. Beckwith).

70. See *id.*; Wood, *supra* note 50. In defending the CBEC's mental health questions, Mr. Beckwith noted that the availability of conditional admission meant that the committee did not have to "choose between the quick and the dead" by either denying admission, on the one hand, or ignoring a mental health problem, on the other. *Id.* at 26.

remains firmly committed to its (fairly broad) version of narrower mental health inquiries. It continues to ask applicants whether they have ever been hospitalized for mental illness, have ever been treated or counseled for substance abuse, or within the past five years have been diagnosed or treated for specified mental disorders.⁷¹ I now turn to the individual stories of three Connecticut bar applicants who have been affected by these inquiries.

C. Three Applicants' Stories

1. James Roe

James Roe (a pseudonym)⁷² was admitted to the Connecticut bar in 1993. His disclosure of a past hospitalization on his bar application form did not result in a denial or any delay in his admission. Yet he perceived the requirement of disclosure itself, and the screening that followed, as humiliating and discriminatory. He described his experience in written testimony that he submitted at the 1994 public hearings held by the bar examining committee. I will let him speak for himself by quoting at length from his testimony:

I am currently a member of the Connecticut Bar and I am writing to you under the pseudonym, James Roe, so as to protect my identity. . . . In May, 1993, I graduated from [law school and then served] as a law clerk in a[n] . . . Appellate court. I am currently employed as an associate in a prestigious law firm

[When I submitted my Connecticut bar application] I was required to inform the Committee whether I had ever been diagnosed as having, received regular treatment for, or been hospitalized for "mental illness or emotional disorder." I had been voluntarily hospitalized for mental illness for approximately one month in 1985 and had received some form of mental health treatment for approximately nine years. Thus, I answered the committee's inquiries in the affirmative. Additionally, as required by the application, I provided a report from my treating psychiatrist setting forth my diagnosis and a report from a psychologist who I had seen for many years for psychotherapeutic treatment. Both of these reports made clear that I

71. See CONN. 2001 APPLICATION, *supra* note 19, at 14. Approximately 3 percent of Connecticut bar applicants, or about forty people a year, answer one of these questions affirmatively. See Gorlick, *supra* note 65 (including an estimate provided by CBEC chair Beckwith).

72. James Roe, together with two other bar applicants, filed a motion to intervene in the *Szarlan* litigation, but the case was resolved before the intervention motion had been ruled on. See Motion to Intervene and Be Joined as Plaintiffs, *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn. May 4, 1994). Tanina Rostain and I were his attorneys. He is not the "Richard Roe" who filed a separate lawsuit against the bar examiners in 1994. See *supra* note 40.

suffered no current impairment that would affect my ability to function as a lawyer. . . .

In the fall of 1993, I received a certified letter that summoned me before a panel of the Committee to be interviewed The letter specifically stated that the interview would concern my mental health history. I was given exactly one week to prepare for this interview and was told that I could be represented by counsel if I desired. I was shocked, and extremely worried by this letter.

I could not understand why, after having provided the Committee with so much information about my current fitness to function as a lawyer, I was required to appear in front of a panel to further explain my mental health history. I was severely embarrassed and humiliated that I would have to retell this deeply personal aspect of my history to a group of strangers.

Of course, I procured counsel and became extremely anxious about the upcoming interview. . . . In addition, I became extremely angry that after having spent so much time receiving help for and overcoming my mental and emotional problems that a group of strangers had the audacity to question my fitness and moral character. I could not understand how there could be any logical link between one's moral character and a mental health problem. . . .

I arrived at the [interview location] a half-hour before my scheduled interview. I was shocked to see a group of other applicants who were also waiting to be interviewed. I felt embarrassed that the receptionist had a list of the interviewees in plain view at her desk and that I knew some of the other people who were waiting to be interviewed. I was further embarrassed because at least one of the interview rooms was a glass office in which from the waiting area, one could see the applicant being interviewed. I expected that these interviews would be conducted in an extremely discreet and confidential manner. I was shocked to see that this would not be the case.

After waiting for over an hour and one-half, I was escorted with my counsel into the glass office to be interviewed by two members of the committee and [its administrative director]. I was asked to relate my entire mental history. I was asked to detail the diagnoses that had been made about me and describe any medications that I had taken. I was subject to detailed questioning about this very intensely personal aspect of my life. Furthermore, I could tell from the questions that were being asked and from the questions that followed from these responses that the two lawyers who were interviewing me had no training, experience or knowledge about mental illness or emotional disorders. I expected that at least one of the members of the

panel who interviewed me would be a psychologist or a psychiatrist, but that did not occur.

The interview lasted over one-half hour. It seemed to me that it had lasted a lifetime. I was extremely anxious and embarrassed. I felt that I had been psychologically raped by strangers who did not have the slightest idea what mental or emotional illness involved, or what it was like to hospitalize myself almost nine years before this date so that I could receive treatment for my disease. At the end of the interview, the panel simply thanked me for my attendance and cooperation, informed me that this was simply an informal interview and stated that they hoped to get back in touch with me in a week.

I left the interview with my counsel who informed me that I had nothing to worry about. However, I felt horribly humiliated and anxious because I knew that my professional fate had been placed in the hands of other attorneys who had no special training, experience or knowledge of mental health. I was also embarrassed because as I left the glass interview office and walked through the reception area to the front door of the . . . office, I could see and feel the eyes of other applicants and other persons upon me. I began to wonder how many of these people had or were going to go through this horrible experience.

I was lucky in that, by the next day, the Committee had sent a letter to my counsel that the "Character and Fitness Panel of the Connecticut Bar Examining Committee voted unanimously to find [James Roe] of good moral character and fitness to practice law in Connecticut." However, I still suffered intense embarrassment, distress and anguish at being required to reveal the highly personal and private details of my mental health history to strangers as a precondition to being admitted to the bar. . . .

I hope that this recounting of my experience with the Committee will convince you of the absurdity of this inquiry into a Connecticut bar applicant's mental health history. I do not understand why those of us who have received mental health treatment are singled out for this type of inquiry. I doubt that people who are diabetic, have heart conditions, cancer or AIDS, epilepsy and other illnesses or problems are treated in a similar manner.⁷³

One aspect of James Roe's experience was unique to the fall of 1993: The CBEC conducted interviews of applicants with all sorts of character and fitness problems (for example, mental health, credit problems, criminal

73. James Roe, Testimony Submitted to Conn. Bar Examining Comm. (Sept. 30, 1994) [hereinafter Roe Testimony] (on file with author). Footnotes appearing in the original document have been omitted. Mr. Roe has authorized the use of his testimony in this Article.

convictions) in a single location, at half-hour intervals, in a setting where the applicants could all see each other. This "cattle call" approach generated intense negative publicity,⁷⁴ and after this, interviews were scheduled in a more discreet manner.⁷⁵ In all other respects, Roe voiced themes that one hears in the accounts given by many applicants affected by bar mental health questions, then and now: distress at being forced to disclose highly personal, stigmatizing information; a perception that the inquiry associates mental illness with a defect in moral character; concern that others in the legal community will have access to the information; dismay that evaluations are conducted by attorneys who lack mental health expertise.

2. Rose Gower⁷⁶

At the age of seventeen, during the summer after her graduation from high school, Rose Gower spent two weeks in the hospital for treatment of major depressive disorder. Over the next seven years, she went to college at Wesleyan University, worked in several jobs, and graduated from the University of Maine School of Law in 1998. There were no blemishes on her record of educational achievement or employment. After law school, she was admitted to the Maine bar (the application form there did not ask about mental health treatment or hospitalizations)⁷⁷ and then moved to Connecticut after being offered a job as a Connecticut Superior Court law clerk. In February 1999, she took the Connecticut bar exam. On the bar application, she was required to respond affirmatively to the question that asked, "Have you ever been voluntarily or involuntarily committed to an

74. See Joseph Calve, *The Peters Principle*, CONN. L. TRIB., Dec. 6, 1993, at 35; Joseph Calve, *Tongue-in-Cheek Awards '93*, CONN. L. TRIB., Jan. 3, 1994, at 22. Joseph Calve described the scene as follows:

[T]he poor round-pees had to mill about together as they awaited the hot lights and oratorical rubber hoses of the examiners. Many of them knew one another, this being a small state. . . . Oh, to be a fly in some of those psyches as they awaited the call. "That guy looks like a mother-murderer." "That one's a drunk." "That one there's definitely a head case."

Id.; see also Scheffey, *supra* note 37, at 8.

75. See Stamm Deposition, *supra* note 30, at 117 (June 8, 1994).

76. The following account is based, with Ms. Gower's consent, on documents contained in her bar admission file and information that she provided in interviews. Citations to particular documents within the bar admissions file, which are not publicly available, are omitted throughout this part. Other sources are noted.

77. In 1993, the Maine Supreme Court had ordered the elimination of questions that asked about past diagnosis or treatment for any mental disorder. See *supra* note 47.

institution for mental, emotional or nervous disorders?”⁷⁸ As required, she described her diagnosis and identified the hospital, and authorized the bar examiners to obtain copies of her medical records.

In April 1999, Ms. Gower received a letter from the CBEC informing her that she had passed the bar examination, but that the committee would be conducting a further inquiry into her application. After hearing nothing for another five months, she wrote to the committee’s staff to ask what was holding up her admission. In September, she received a letter informing her that the committee had reviewed her application back in May and determined that medical records should be requested. The hospital had not yet provided the records. Finally, in November, the records arrived. After reviewing them, the committee e-mailed a follow-up question: “Since your treatment at the [hospital], have you been engaged in any out-patient treatment programs?” Ms. Gower replied that she had received counseling, on-and-off, as needed, but had received no further treatment of a medical nature, nor had she taken any mood-altering medications since the time of her hospitalization. The CBEC asked her to elaborate on the circumstances of her treatment. Ms. Gower wrote back as follows:

Dear Committee Members:

I have received your request for further information concerning my mental health. I will attempt to provide sufficient detail. While I was a patient at [the hospital] following the death of my grandfather, the death of a classmate, and the attempted suicide of [somebody close to me], among other things, I was very briefly placed on an anti-depressant, but I became physically ill and the doctors discontinued administration of the drug. Other than that very brief time (literally a matter of days) I have never taken any drugs related to my mental health.

When I was at college, I sought therapy after I was raped. I also sought therapy once or twice a semester thereafter. I am currently in therapy because I am very strong now, and I want to confront issues I was unable to deal with while I was younger. I believe in health maintenance, both mental and physical, and I pay constant attention to my well-being.

There is no more information I can provide to you. I am, quite honestly, shocked that admission as a patient while I was a minor has provoked such intense scrutiny. I have provided all information that is necessary to a decision on my fitness to practice in this state. If the

78. CONN. BAR EXAMINING COMM., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT BY EXAMINATION 14 (1999).

state of Connecticut wishes to deny admission to one of its own law clerks because I, unlike many, have made efforts to maintain my mental health and have recognized when I required help, so be it.

Consider my application complete, and please issue your decision as soon as possible.

Yours,

Rose M. Gower

The committee did not find this information sufficient. It asked for the names and addresses of Ms. Gower's current therapist and the therapists she saw while in college. Apparently not satisfied by Ms. Gower's assurance that she had not taken any drugs related to her mental health, the committee asked her to list *all* medications that she had been on since the time of her hospital stay. Rather than risk a denial of admission, Ms. Gower complied. On April 3, 2000, she provided the committee with the therapists' names and addresses and wrote, "The only medications I have taken since [my hospitalization] are antibiotics, antihistamines, contraceptive pills, and, rarely, over-the-counter medications such as ibuprofen, Tylenol, Pamprin, and cold medications." On May 25th, the CBEC sent a letter to Ms. Gower's most recent therapist, requesting a "report, narrating the following in detail: diagnosis, motivation for seeking treatment, treatment modality, duration of treatment, frequency of visits and prognosis at the time of discharge," and all records, including progress notes. The therapist sent back a brief report confirming that Ms. Gower had recently completed a five-month course of once-a-week psychotherapy to deal with mild symptoms of depression.⁷⁹

In the meantime, Ms. Gower had retained counsel, who wrote to the CBEC.⁸⁰ The letter pointed out that Ms. Gower's admission had now been delayed for more than a year. During this time, Ms. Gower had been promoted to a supervisory position in the legal research office for Connecticut judges, as a result of her excellent performance as a law clerk. She had been offered, and would soon begin, a clerkship with a justice of the Maine Supreme Court. On June 12, 2000, the CBEC finally recommended her for admission to the Connecticut bar.

79. The report described some personal events that led Ms. Gower to seek treatment, noted that no medication was prescribed and that Ms. Gower's work performance was never impaired, and stated that treatment ended by mutual agreement after symptoms of depression had been dramatically reduced. The therapist ignored the committee's request for copies of treatment records.

80. I appeared as counsel for Ms. Gower at that time, and I continue to represent her in the complaint pending with the U.S. Department of Justice.

Ms. Gower filed an ADA complaint with the U.S. Department of Justice⁸¹ and decided to speak publicly about her experiences. She was upset not only by the delay in her admission, but by the intrusiveness of the repeated demands for records and information, and by the tenor of distrust in the committee's dealings with her. "The whole experience was very insulting and invasive," she told the *Hartford Courant*.⁸² "I was hoping they would understand and see how long ago this was and that it isn't relative to my ability to practice law. . . . I'm proud that I got the treatment I did. I'm not ashamed of it. This is not something I want held against me."⁸³

3. Kathleen Flaherty⁸⁴

Kathleen Flaherty experienced the onset of bipolar disorder in October 1990, while she was a first year student at Harvard Law School. Bipolar disorder is characterized by episodes of mania and depression, often separated by long periods of remission. At law school, Ms. Flaherty showed some of the classic symptoms of a manic episode: racing thoughts and speech, grandiose fantasies. A psychiatrist recommended hospitalization, but Ms. Flaherty, not recognizing that she was ill, refused. After she made a statement to the effect that she would throw herself off the roof of a building if people didn't get off her back, she was involuntarily committed.⁸⁵ She was hospitalized for two months, and placed on medication. After leaving the hospital, she continued to receive medication and outpatient psychotherapy. She resumed her studies at Harvard in 1991.

For Ms. Flaherty, as for many others with this illness, treatment was very effective. She did not experience any further manic episodes. The medication did not prevent her from having occasional episodes of depression, but when these occurred she recognized the symptoms and voluntarily hospitalized herself for brief periods in 1992 and 1994. Her condition did not affect her performance in law school or in her summer jobs. In 1995, after graduating from law school, Ms. Flaherty decided to move to Ireland, and wanted to try living without medication. Her doctor advised against it, but worked

81. See Complaint of Discrimination, *Gower v. Conn. Bar Examining Comm.* (U.S. Dep't of Justice, Civ. Rts. Div., Disability Rts. Sec. June 22, 2000).

82. Hamilton, *supra* note 65 (quoting Rose Gower).

83. *Id.*

84. The following account is based, with Ms. Flaherty's consent, on documents contained in her bar admission file, transcripts of her hearings and conditional admission, and information that she provided to me in an interview. Citations to particular documents within the bar admissions file, which are not publicly available, are omitted throughout this part. Other sources are noted.

85. The commitment was made on the basis of a threat to self; there were no statements or behaviors indicating a threat to others.

with her to taper off her dosage.⁸⁶ Ms. Flaherty soon had another episode of depression; she returned to the United States and once again briefly hospitalized herself. She learned from this experience that she would need to maintain her treatment indefinitely.

Ms. Flaherty took a job in Connecticut as an advocate with a state agency serving people with disabilities, and soon moved on to a position with Legal Services. Although she had already been admitted to the bars of New York and Massachusetts, she hesitated to apply in Connecticut, and passed up one administration of the bar exam, because she was concerned about the mental health questions on the Connecticut form. When she applied, she had to disclose her hospitalizations and treatment for bipolar disorder.⁸⁷ In the fall of 1996, she received a letter from the CBEC informing her that she had passed the examination but was not being recommended for admission at this time. She was referred to a county standing committee for a hearing on her character and fitness.

The first hearing, held in March 1997 before a panel of four lawyers, got off to a bad start. As the hearing was about to begin, Ms. Flaherty overheard one panel member mutter to herself, while reading through the file, "Are you violent?" After a few preliminary background questions, the questioning took on an inquisitorial tone, and the witness flashed resentment in response:

PANEL CHAIR: Do you know why you are before our Committee?

MS. FLAHERTY: I am before this Committee because I had to answer questions disclosing my mental health history.

PANEL CHAIR: Can you tell us something about that?

MS. FLAHERTY: That I have a diagnosis of manic depression, and I have been treated both voluntarily and involuntarily in the hospital. And this Committee makes a decision, unlike the Bar in Massachusetts and New York.

86. The doctor advised her that some people can go off medication and do well, but that the odds were against it.

87. Ms. Flaherty was required to answer yes to three questions, all of which are still on the Connecticut application form: one asking whether the applicant has ever been hospitalized for mental illness; another asking about diagnosis with, or treatment for, bipolar disorder or other specified conditions during the past five years; and a third that asks whether the applicant currently has any condition or impairment "which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?" CONN. 2001 APPLICATION, *supra* note 19. Ms. Flaherty felt obliged to respond affirmatively to the last question because if she stopped receiving treatment (which she had no intention of doing), she might experience manic episodes that could affect her judgment and her competence to practice.

PANEL CHAIR: You're admitted—

MS. FLAHERTY: I am admitted in Massachusetts, and I am admitted in New York.

PANEL CHAIR: That's right.

PANEL MEMBER: Is it your position that you had notified the Bar, that is New York and Massachusetts, as to your condition?

MS. FLAHERTY: They were both notified. I had to answer questions as to whether I have ever been a party in a legal action. Because I was committed, I had to answer yes to that question. But neither of those Bars do any type of interrogation to the extent Connecticut does.

PANEL MEMBER: For better or for worse?

MS. FLAHERTY: But you guys really catch the people who have gotten help, as opposed to missing all the people who haven't gotten help. So it's for better or for worse.

PANEL CHAIR: What are your problems?

MS. FLAHERTY: There has never been a question of anything. I got treated. I am under a doctor's care. I haven't had any problem. I have been in the hospital a number of times, but it has never been—I am taking a medication—

PANEL MEMBER: Is [the medication] mind altering?

Ms. Flaherty went on to describe the mood-stabilizing effect of her medication, and recounted the history of her hospitalizations and treatment. The tone now improved somewhat. One of the panelists expressed sympathy at the difficulty of having to come and talk about these matters, and stressed that the committee's concern was "strictly limited" to determining whether her medical condition "may affect in a material way your ability to practice law." He spoke at length about the stressful nature of law practice, and then asked Ms. Flaherty to "give me some comfort level by discussing and explaining to me in your own words why I need not concern myself with that?" She responded by explaining that ever since the time of her first hospitalization, she had been dealing successfully with stress in school and at work, and had sought help whenever she needed it. The same panelist then pressed her further:

I'm not satisfied that you completely answered my question. You have given me a couple of examples, but can you embellish . . . in terms of future situations. You talked a little bit about the past, but I think you would agree with me that in the future you will be facing various

pressure situations that may be long-term in nature; such as, for example, being on trial for a period of time.

Ms. Flaherty, at a loss as to what more she could say, asked for a break. When the hearing resumed, she responded:

Honestly, I can't predict. . . . I would imagine that something at some point could possibly interfere with my ability to practice law effectively. But I also admit that possibly I could be hit by a bus tomorrow. I don't know. I take my medication, and I am under a doctor's care. There has been nothing in the last couple of years since I have been back on medication steadily that has ever interfered with my ability to do any job that I have ever had.

Several panelists then suggested that an assessment from her most recent treatment providers, and letters from her employers, might be helpful, and proposed that the hearing be adjourned until Ms. Flaherty provided that information. It was also suggested that she come back with counsel when the hearing resumed.

Ms. Flaherty submitted letters from her doctors confirming her treatment, current fitness, and good prognosis, as well as glowing recommendations from her employers. When the hearing resumed, about a month later, she came represented by her uncle, a prominent Connecticut attorney well-known to the committee members. Things went much better. The panel's chairperson started by expressing satisfaction with the doctors' reports, and offered an apologia for the committee's role:

Our problem is we have to look at her present condition and determine whether in our opinion she is capable to practice law in the State of Connecticut because we owe a duty to the public. So that's what we were looking for and didn't mean to embarrass her in any way at our last meeting. We are sorry that other states would let her in without this inquiry.

Another panelist sought, and received, Ms. Flaherty's assurance that if admitted, she would not discontinue her medication against medical advice. Her counsel pointed out that "she has a far greater motivation to take her medicine than simply her admission to the bar, which is for her own good health and her own good functioning." The hearing concluded, and the county committee soon transmitted to the CBEC its recommendation, without reservation, that Kathleen Flaherty be admitted to the Connecticut bar.

The CBEC exercised its prerogative to disregard the county committee's recommendation and conduct its own, *de novo*, fitness hearing. A hearing notice was sent to Ms. Flaherty informing her that the hearing would address her bipolar disorder and "applicant's candor and credibility." (Although

there had been no issue of Ms. Flaherty lying about anything, the CBEC's hearing notices routinely include the latter ground, on the theory that evidence of dishonesty on the application form might emerge during any hearing.)⁸⁸ Ms. Flaherty appeared before a panel of five lawyer-members of the CBEC on August 6, 1997. The panel's chairperson opened the hearing with a reminder that the burden of proof is on the applicant, and invited Ms. Flaherty and her counsel to make a presentation. Ms. Flaherty narrated her history of illness and treatment, and stated that she had learned from her 1995 experience that going off medication against medical advice was "a very big mistake," one she would never repeat. Her counsel wrapped up the presentation by pointing out,

In view of . . . the questions being asked of applicants for the bar, it's interesting to note that there are many, many conditions that are potentially as problematical . . . that don't receive any scrutiny at all, and we submit that the situation here is analogous to someone with diabetes or a significant heart problem, where if you don't take your . . . medication, you can get into serious trouble. It has potentially serious consequences for the clients you would represent. . . . It's kind of an open secret that there are people walking around with all kinds of conditions for which they've never sought any treatment. They're not even asked about those subjects as they come to apply to the bar.

He then invited questions from the panel.

The questioning that followed was polite, but extensive. Two panel members confessed ignorance about the nature of bipolar disorder and asked Ms. Flaherty to explain some of its basic features. This led to an exchange in which the questioner unwittingly employed a derogatory stereotype:

MS. FLAHERTY: [B]ipolar just means you are between two poles, you can get manic or you can get depressed. I have a tendency to lean toward the depression side. So anybody, you know, even just in a general nature of getting depressed, it interferes with your ability to sleep, eat, just go about your day. But at this point, you know, everybody has little highs and lows, and I'm like a normal person now, you know, you have highs and lows.

PANEL MEMBER: The manic would be the more destructive end of it, if that's fair?

88. A third ground was also specified in the hearing notice: that Ms. Flaherty's employment in positions with the job title of "attorney" prior to her admission to the Connecticut bar raised concerns about unauthorized practice of law. This had come up, briefly, at the county committee's hearing, but the panel quickly concluded that Ms. Flaherty had never held herself out as an attorney and the fault, if any, lay with her employers. It was addressed briefly again in the CBEC hearing, to the same effect.

MS. FLAHERTY: I don't think destructive is a fair word. I think it's just more overblown. You have too much of a personality, whereas if you are depressed you might not have any personality at all. Manic, you're just in people's faces. You talk a lot. You talk fast. You don't shut up.

Other topics of questioning included the effects of her medication, whether her disorder had ever caused her to engage in behavior threatening or harmful to others, and whether she was able to recognize the onset of symptoms and get help prior to a crisis occurring. One questioner acknowledged, apologetically, that "the nature of this hearing must feel very invasive. . . . [F]or you this is just torture, I know, so bear with me."

A month after the hearing, the panel issued findings of fact with a recommendation of conditional admission. As conditions, Ms. Flaherty would be required to continue with her current therapies or any successor regime recommended by her treating psychiatrist, and to twice a year submit to the statewide grievance committee, which monitors conditional admissions in Connecticut, an affidavit from herself and her treating psychiatrist confirming that she is in compliance. The panel's decision reasoned that, "Ms. Flaherty is currently fit to practice law in Connecticut but only because of her current therapies." Its findings of fact, however, articulated no basis for believing that she could not be trusted to continue her treatment on her own. The findings expressly noted, and apparently credited, her testimony that she "has learned that she cannot, unilaterally, take herself off her medication and . . . has no intention of doing so."

Ms. Flaherty responded to the recommended decision with a letter to the CBEC, expressing her reluctant willingness to accept conditional admission, but requesting that a definite time period be set for the expiration of conditions. She received a terse response from the committee's assistant administrative director, noting that "it is not the Bar Examining Committee's policy to attach automatic expiration dates to the proposed conditions," and referring her to a court rule that allows a conditionally admitted lawyer to apply to the court to "remove or modify the conditions previously imposed as circumstances warrant."⁸⁹

The formal imposition of admission with conditions took place in October 1997 in a closed-door proceeding before a Connecticut superior court judge. The judge expressed satisfaction that

a number of people have been admitted [conditionally]—and so far with very happy results, because some of these people or maybe all of these applicants would not have been admitted to the bar prior to the change in the Practice Book rule a few years ago and permitting this.

89. CONN. R. SUPER. CT. § 2-11(a).

The judge and the parties then repaired to open court for Ms. Flaherty's swearing in. In his swearing-in speech, the judge bemoaned the public's "exaggerated or false" criticisms of the legal profession.⁹⁰

Three years later, Ms. Flaherty, now a staff attorney with Connecticut Legal Services, filed an ADA complaint with the U.S. Department of Justice⁹¹ and decided to speak publicly about her condition and treatment. She feels an intense stigma from the requirement that she submit an affidavit and doctor's report to the grievance committee every six months: "They treat me like I'm defective because I have a medical condition."⁹² She found the inquiries and multiple hearings that preceded her admission intrusive and degrading. She was disturbed that she bore the burden of proving that her disorder did not render her unfit, and by the fact that "[p]eople who by their own admission did not understand the diagnosis or the illness asked me to explain it to them." She felt that the questioning "delved unnecessarily into very painful personal matters" and inappropriately called her candor into question.⁹³ It also had tangible consequences; during the year-long delay in her admission she had to pass up opportunities to apply for jobs that required being a member of the Connecticut bar.⁹⁴

With these stories as backdrop, I now turn to what the Americans with Disabilities Act, and courts interpreting it, have to say about whether the inquiries faced by Roe, Gower, Flaherty, and many others constitute unlawful discrimination. I will return to these stories in Part IV of this Article, when discussing how the structure of the bar admissions process contributes to discrimination against applicants with disabilities.

II. LICENSING INQUIRIES UNDER TITLE II OF THE ADA

A. Title II, Disability Inquiries, and the Necessity Test

In the near-decade since the ADA went into effect, ten decisions, all from federal district courts and state tribunals, have addressed whether, and

90. Anxiety about the profession's public image is a recurring theme in the discourse of courts and bar examiners relating to the admission of applicants with mental illness or substance abuse disorders. See *infra* Part IV.C.3.

91. See Complaint of Discrimination, *Flaherty v. Conn. Bar Examining Comm.* (U.S. Dep't of Justice, Civ. Rts. Div., Disability Rts. Sec. Aug. 1, 2000).

92. Hamilton, *supra* note 65 (quoting Kathleen Flaherty).

93. Kathleen M. Flaherty, Testimony Submitted to the Presidential Task Force on Employment of People with Psychiatric Disabilities (May 24, 2000) (on file with author).

94. See *id.*

to what extent, the law prohibits bar examiners or other licensing boards from asking mental health questions.⁹⁵ The cases are nearly uniform in finding that Title II of the ADA applies to the activities of state examining boards, and that disability inquiries in the licensing process must be justified by a showing of necessity. To get this far requires the resolution of a number of interpretive issues. Is there any discrimination when a licensing board is merely asking questions? If there is discrimination, is it disability-based, and is it directed against the *qualified* individuals with a disability who are protected under the statute?⁹⁶

95. Only four of these decisions were full rulings on the merits of ADA challenges to bar application questions. See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995); *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A-93-CA-740-SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994); *In re Applications of Underwood & Plano*, No. BAR-93-21, 1993 WL 649283 (Me. Dec. 7, 1993); *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333 (R.I. 1996). Another decision on the merits came in a case involving an ADA challenge to questions on a judicial screening form. See *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534, 1540-45 (S.D. Fla. 1995). One state court ordered the elimination of broad mental health questions without reaching the ADA issues. See *In re Petition of Frickey*, 515 N.W.2d 741, 741 (Minn. 1994). In three other cases, courts expressed opinions about the ADA issues in rulings on motions. See *O'Brien v. Va. Bd. of Bar Exam'rs*, No. 98-0009-A, 1998 U.S. Dist. LEXIS 4344, at *8-*10 (E.D. Va. Jan. 23, 1998); *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489, 1495 (S.D. Fla. 1994); *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016, at *7 (D.N.J. Oct. 5, 1993). One federal court held that disability inquiries posed to a bar applicant's references did not violate the ADA, and addressed the legality of application form inquiries in dicta. See *McCreedy v. Ill. Bd. of Admissions to the Bar*, No. 94-C-3582, 1995 U.S. Dist. LEXIS 791, at *19-*23 (N.D. Ill. Jan. 23, 1995).

96. Federalism issues can also be raised as a defense. Bar examiners, as an arm of the judiciary, are a part of state government. In *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001), the Supreme Court held that Title I of the ADA falls outside the scope of Congress's Fourteenth Amendment enforcement powers, and that Eleventh Amendment doctrine prevents the federal courts from hearing Title I damage suits against states. The court's reasoning would seem to apply to Title II as well. However, private individuals may still sue state officials in federal court in actions seeking injunctive relief. See *id.* at 968 n.9. Thus, federal court lawsuits seeking to enjoin bar examiners from asking disability-based questions are unaffected by *Garrett*. The United States also has the authority to file Title II suits on behalf of aggrieved individuals. See 42 U.S.C. § 12,133 (1994); 28 C.F.R. §§ 35.170-178 (2000). Such actions are not barred by the Eleventh Amendment, even if monetary relief is sought. *Garrett*, 121 S. Ct. at 968 n.9. In the past, the U.S. Department of Justice has taken an active role in enforcing the ADA against bar examiners. See Kate M. Nicholson & Sheila M. Foran, *Using the ADA to Open Gateways to the Professions*, CONSUMER & PERS. RTS. LITIG. NEWSL. (ABA Section of Litigation), May 1995, at 3, 6-10 (discussing the U.S. Department of Justice's role as *amicus* in four federal lawsuits challenging application form questions).

The Eleventh Amendment also does not stand as a barrier to federal court lawsuits against bar examiners brought by individuals under the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1994), which mirrors Title II in substance. See 42 U.S.C. § 2000d-7(a)(1) (1994); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc) (holding that a Rehabilitation Act provision waiving state immunity is valid exercise of congressional Spending Clause powers); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). If a bar examining board is part of a judicial department that receives any form of federal financial assistance, it will be subject to suit under the Rehabilitation Act. See 29 U.S.C. § 794(b) (1994); *Jim C.*, 235 F.3d at 1082.

1. The Starting Point—Title II and Its Regulations

Title II of the ADA applies to state and local governments. Its central substantive provision simply reads,

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from

Abstention principles will prevent some disability discrimination suits against bar examiners from being heard in federal court. Several courts have dismissed cases under the doctrine of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486–87 (1983), on the ground that the federal ADA claims are “inextricably intertwined” with a state court’s judgment (that is, the admissions decision), and must be raised and litigated in the state courts. See, e.g., *Dale v. Moore*, 121 F.3d 624, 626–28 (11th Cir. 1997); *Johnson v. Kansas*, 888 F. Supp. 1073, 1078–85 (D. Kan. 1995). The U.S. Supreme Court’s decision in *Feldman*, however, allows federal courts to exercise jurisdiction over suits that challenge a bar committee’s general rules or practices. See *Feldman*, 460 U.S. at 486. In cases in which the central issue is the legality of standard questions on the application form, rather than discretionary determinations made while processing a particular individual’s application, federal courts have allowed ADA claims to proceed. See *Roe # 2 v. Ogden*, 253 F.3d 1225, 1232–33 (10th Cir. 2001); *Clark v. Va. Bd. of Bar Exam’rs*, 861 F. Supp. 512, 518–19 (E.D. Va. 1994); *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1495 (S.D. Fla. 1994).

Bar applicants’ claims under Title II of the ADA can also be pursued in state courts. An applicant denied admission because of a refusal to answer a disability question can raise the ADA issue in an appeal. Applicants can also sue bar examiners directly in state court, under the ADA or a state’s own antidiscrimination laws, as long as the state’s sovereign immunity doctrine does not bar state courts from hearing a claim of this type. See *Alden v. Maine*, 527 U.S. 706 (1999); *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (holding that a litigant whose federal ADA suit against a state university was dismissed under the Eleventh Amendment may proceed in state court: “Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, . . . Illinois may not exclude claims based on federal law”).

All that I have said above depends on the assumption that Title II, although not supported by the Fourteenth Amendment, remains valid legislation under the Commerce Clause. The U.S. Supreme Court’s recent Commerce Clause decisions can be read to support an argument that all or some of Title II is unconstitutional, period. See James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 148–76 (2000); Ronald D. Rotunda, *The Americans with Disabilities Act, Bar Examinations, and the Constitution: A Balancing Act*, B. EXAMINER, Aug. 1997, at 6, 12–13. Although the ultimate outcome is unclear, there are strong arguments that the ADA’s application to bar examiners is constitutional. The U.S. Supreme Court has invalidated federal legislation that singles out state or local government and “commandeers” it to carry out federal policy, see *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992), but it has also emphasized that Congress may directly regulate state activities that affect interstate commerce, particularly when the statutory scheme imposes similar restrictions on private parties engaged in similar activities. See *Reno v. Condon*, 528 U.S. 141, 148–51 (2000) (upholding statute imposing privacy procedures on state motor vehicle departments). In prohibiting bar examiners from discriminating on the basis of disability, Title II directly regulates a state licensing activity that clearly affects interstate commerce. Bar examiners control access to a profession that is a major player in national and international markets. While Title II itself applies only to public entities, the ADA as a whole imposes similar nondiscrimination requirements on private entities engaged in activities comparable to those of bar examiners, including private testing services that administer professional licensing or certification examinations, see 42 U.S.C. § 12,189 (1994); 28 C.F.R. § 36.309 (2000), and employment agencies or employers that screen job applicants. See 42 U.S.C. §§ 12,111(2), 12,112(a) (1994).

participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.⁹⁷

The statute defines "public entity" to include "any State or local government [and] any department, agency . . . or other instrumentality of a State . . . or local government."⁹⁸ The implementing regulations issued by the attorney general⁹⁹ indicate that coverage extends to activities of the state judicial branch and to state licensing programs.¹⁰⁰ Courts have uniformly held that bar examiners, who act as arms of the state judiciary in licensing attorneys, are covered by Title II.¹⁰¹

The only provision in the Title II regulations that directly addresses licensing prohibits public entities from administering a licensing program "in a manner that subjects qualified individuals with disabilities to discrimination."¹⁰² The regulations also include a section that addresses discrimination in the "eligibility criteria" used for government programs

97. 42 U.S.C. § 12,132 (1994).

98. *Id.* § 12,131(1).

99. The ADA instructs the attorney general to issue regulations implementing Title II's nondiscrimination requirements. *See id.* § 12134(a). The attorney general's regulations, 28 C.F.R. pt. 35 (2000), were issued in July 1991. A number of courts have held that under the principle of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), these regulations are entitled to controlling weight. *See, e.g.,* *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1172-73 (9th Cir. 1999); *Doe*, 906 F. Supp. at 1540; *Petersen v. Univ. of Wis. Bd. of Regents*, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993). The U.S. Supreme Court, without reaching the issue of whether the attorney general's regulations are entitled to *Chevron*-level deference, has held that the U.S. Department of Justice's views "warrant respect" and may properly be looked to for guidance in interpreting Title II. *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999).

100. The regulations prohibit discrimination in the administration of "a licensing or certification program." 28 C.F.R. § 35.130(b)(6) (2000). The Section-by-Section Analysis that the U.S. Department of Justice published as a preamble to the regulations states that "Title II coverage . . . includes activities of the . . . judicial branches of State and local governments." 56 Fed. Reg. 35,696 (July 26, 1991), *reprinted in* 28 C.F.R. pt. 35, app. A, at 476 (2000).

101. *See supra* note 95; *see also In re* *Petition of Rubenstein*, 637 A.2d 1131, 1136 (Del. 1994). As a basis for arguing that Title II does not apply to them, bar examiners have invoked Supreme Court decisions holding that federal legislation should not be construed to reach traditionally sovereign functions of state government unless the statutory language is "unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (construing narrowly the Age Discrimination in Employment Act of 1967 to avoid invalidating state laws on mandatory retirement of judges). Two federal district court decisions have rejected this argument, finding that the language of Title II is sufficiently clear in covering all state activities, including those of the judiciary. *See Doe*, 906 F. Supp. at 1539; *Ellen S.*, 859 F. Supp. at 1494-95. These rulings are bolstered by the Supreme Court's recent statement that the "public entity" definition in Title II "plainly covers state institutions *without* any exception . . ." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (holding that Title II applies to state prisons).

102. 28 C.F.R. § 35.130(b)(6) (2000).

or services. This rule "prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others."¹⁰³

2. Is Asking Discrimination?

Nearly all of the courts that have addressed ADA challenges to licensing questions have reached the conclusion that inquiries about disabilities may constitute discrimination under Title II.¹⁰⁴ This is not self-evident, as neither Title II nor its implementing regulations specifically prohibit disability questions. In contrast, Title I, the employment title of the ADA, defines discrimination to include medical examinations and inquiries, and contains detailed provisions restricting when and how employers may seek disability information.¹⁰⁵ Attorneys for the National Conference of Bar Examiners argued, shortly after the ADA went into effect, that

bar applications are not employment applications and therefore are not covered by Title I of the ADA. Title II, which does apply to bar admissions, contains no comparable provision on pre-decision inquiries. Obviously, Congress knew how to forbid such inquiries and did so in Title I—but just as obviously declined to extend the ban to the public services covered under Title II.¹⁰⁶

The ADA's legislative history, however, indicates that Congress left specific examples out of Title II in order to emphasize its breadth, not to

103. Section-by-Section-Analysis, 28 C.F.R. pt. 35, app. A, at 488 (2000). The regulation itself states:

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered.

Id. § 35.130(b)(8).

104. See *supra* note 95. The closest thing to an exception is the order issued by the Minnesota Supreme Court in *In re Petition of Frickey*, 515 N.W.2d 741, 741 (Minn. 1994), in which the court expressed "doubt as to the application of the Americans with Disabilities Act to the [mental health] questions at issue." *Id.* Nonetheless, the court used its supervisory power over bar admissions to eliminate questions about mental health treatment from the bar application form, finding that the questions were unnecessary to protect the public and deterred law students from seeking counseling. See *id.*

105. See 42 U.S.C. § 12,112(d) (1994).

106. Stephen Fedo & Kenneth H. Brown, *Character and Fitness Review: Is It Legal to Ask About Addiction and Mental Disabilities?*, B. EXAMINER, Aug. 1992, at 40, 41. The authors of this article were special counsel to the National Conference of Bar Examiners.

restrict its scope. Instead of listing prohibited types of discriminatory practices, as it did elsewhere in the ADA,¹⁰⁷ Congress deliberately left Title II's antidiscrimination mandate open-ended to facilitate its application to all the disparate activities of state and local government.¹⁰⁸ For this reason, courts have refused to infer from Title II's silence on the subject that Congress meant to allow public entities to ask whatever they want.¹⁰⁹

The ADA's legislative history also contains a more direct indication that application form questions were among the practices Congress had in mind when it used general language prohibiting discrimination. Title III, the public accommodations title of the ADA, includes a provision that prohibits the use of unnecessary "eligibility criteria" that interfere with the equal enjoyment of services by people with disabilities.¹¹⁰ A nearly identical provision appears in the Title II regulations governing public entities.¹¹¹ Discussing this section, a Senate report states,

It . . . would be a violation for [a public accommodation] to invade . . . privacy by trying to identify unnecessarily the existence of a disability, as, for example, if the credit application of a department store were to inquire whether an individual has epilepsy, has ever . . . been hospitalized for mental illness, or has other disability.¹¹²

Applying Title II to mental health questions on an application form does not stretch the statute beyond what Congress had in mind.¹¹³

107. Titles I and III of the ADA contain specific examples of the types of discrimination that are prohibited in employment and in the sale of goods and services to the public. See 42 U.S.C. §§ 12,112, 12,182 (1994).

108. The report of the House Education and Labor Committee states: "The Committee has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition . . . to all actions of state and local governments." H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

The legislative history in fact goes further, and expresses an affirmative intent to incorporate into Title II a prohibition of the specific types of discriminatory practices that are listed in Titles I and III. The implications of this for Title II's interpretation will be discussed *infra* Part IV.B.

109. See *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489, 1493 (S.D. Fla. 1994); *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016, at *8 (D.N.J. Oct. 5, 1993).

110. 42 U.S.C. § 12,182(b)(2)(A)(i) (1994).

111. See 28 C.F.R. § 35.130(b)(8) (2000); see also *supra* note 103 (quoting regulation).

112. S. REP. NO. 101-116, at 62 (1989). Similar statements appear in the House reports. See H.R. REP. NO. 101-485(II), at 105 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 388; H.R. REP. NO. 101-485(III), at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 481. Oddly, these portions of the legislative history are not discussed in any of the court decisions addressing the ADA's applicability to licensing inquiries.

113. Title II's application to disability questions also finds support in the interpretations that Congress and administrative agencies have given to other statutes that prohibit disability discrimination without specifically mentioning inquiries. The Fair Housing Amendments Act of 1988 prohibits discrimination based on handicap in the sale or rental of housing, while allowing landlords to exclude tenants who would pose a "direct threat" to health or safety or cause substantial property

If the statutory scheme does not preclude the application of Title II to disability inquiries, the question remains whether, and under what circumstances, asking amounts to discrimination. In one sense, application form inquiries treat all applicants alike: Everyone, with or without a disability, is required to answer the same questions. However, as all of the courts to address the issue have found, whenever licensing agencies conduct additional investigation of applicants who answer affirmatively, such as by requiring them to release medical records, provide a therapist's letter, or appear at a fitness hearing, there is discrimination in the straightforward sense that applicants who answer "yes" are subjected to burdens not imposed on those who answer "no."¹¹⁴ Inquiries about mental disorders or substance abuse also discriminate in the sense that they require applicants with these conditions,

damage. 42 U.S.C. § 3604(f)(1), (9) (1994). The legislative history states that this "direct threat" provision was "not intended to give landlords and owners the right to ask prospective tenants and buyers blanket questions about the individuals' disabilities . . . [or] require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history." H.R. REP. NO. 100-711, at 30 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2191. HUD regulations accordingly interpret the Fair Housing Act to prohibit any "inquiry to determine whether an applicant . . . has a handicap or . . . as to the nature or severity of a handicap." 24 C.F.R. § 100.202(c) (2000); *see Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1008-09 (W.D.N.Y. 1990) (holding that the housing authority's inquiries into applicants' mental disabilities violated federal law). Regulations issued to implement the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994), also interpret that statute's general prohibition of discrimination by federal funding recipients to include pre-hiring questions about the existence, nature or extent of a handicap. *See* 45 C.F.R. § 84.14 (2000); *see also Doe v. Syracuse Sch. Dist.*, 508 F. Supp. 333, 336-37 (N.D.N.Y. 1981) (discussing the history of the regulation and affirming it as a reasonable interpretation of the statute).

114. *See Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 442 (E.D. Va. 1995); *Ellen S.*, 859 F. Supp. at 1494; *Jacobs*, 1993 WL 413016, at *7-*8; *In re Applications of Underwood & Plano*, No. BAR-93-21, 1993 WL 649283, at *2 (Me. Dec. 7, 1993); *see also Theriault v. Flynn*, 162 F.3d 46, 49 (1st Cir. 1998) (endorsing *Clark's* conclusion that it is discriminatory for a licensing agency to impose additional eligibility requirements based on the existence of a disability). In *Jacobs*, the first decision to apply the ADA to licensing inquiries, the court held that mental health questions on an application form, standing alone, do not discriminate, and refused to grant a preliminary injunction because the plaintiffs had not established that the medical licensing board would be conducting any further investigation of applicants who answered "yes." *See Jacobs*, 1993 WL 413016, at *8, *11. However, the court indicated that it would find an ADA violation if any additional investigation or screening took place. *See id.* at *5-*7. No other court has had to face this issue, because it is usually quite clear that a licensing board intends to do *something* with the information—otherwise, why would it ask? *Cf. Ellen S.*, 859 F. Supp. at 1494 n.7 (criticizing the *Jacobs* court's distinction between asking and investigating as "flawed").

One federal judge has held that disability questions posed to an applicant's references, rather than to the applicant himself, do not discriminate because they are "noncoercive and [impose] no additional burden on the applicant." *McCready v. Ill. Bd. of Admissions to the Bar*, No. 94-C-3582, 1995 U.S. Dist. LEXIS 791, at *19-*20 (N.D. Ill. Jan. 23, 1995). This distinction makes little sense. The only reason that a bar committee would ask references about an applicant's disabilities would be to subject *the applicant* to additional investigation based on an affirmative answer.

unlike other applicants, to reveal personal and sensitive medical information as a condition of having their applications processed.¹¹⁵

3. Is It Discrimination Based on Disability?

"Disability" is defined in the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual;" or having "a record of such impairment;" or "being regarded as having such an impairment."¹¹⁶ The interpretation of this three-pronged definition has become a Serbonian bog.¹¹⁷ Fortunately, we don't need to wade in too deeply to pull out a few pertinent points.

The Title II regulations make clear that any diagnosable mental disorder or substance abuse condition is a "physical or mental impairment."¹¹⁸ Such conditions will nearly always have some effect on a major life activity, such as caring for one's self, working, learning, thinking, interacting with others, sleeping, or having sexual relations.¹¹⁹ However, courts have turned the statutory requirement that the limitation on major life activities be "substantial" into a major hurdle. Even in cases in which the plaintiff has a serious condition, such as bipolar disorder or alcoholism, and the illness

115. See *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534, 1544 (S.D. Fla. 1995) (stating that "the forced disclosure of information relating to disabilities . . . is a form of discrimination because it . . . impos[es] disproportionate burdens on [the disabled]"); Charles L. Reischel, *The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health*, 61 B. EXAMINER, Aug. 1992, at 10, 19 ("[Mental health and substance abuse inquiries] discriminate in that they invade the privacy only of those with such disabilities, subjecting them to the embarrassment provoked by such invasions."); cf. *Olmstead v. L.C.*, 527 U.S. 581, 598–601 (1999) (explaining that unjustified isolation of the mentally ill in institutions is discriminatory because people without mental disabilities can generally obtain needed medical care in the community, while people with mental disabilities are forced to enter institutions to meet their medical needs; and because such treatment "perpetuates unwarranted assumptions" about people with disabilities and imposes a "stigmatizing injury").

116. 42 U.S.C. § 12,102(2) (1994).

117. Milton described, in hell, "A gulf profound as that Serbonian bog / Betwixt Damiata and Mount Casius old, / Where armies whole have sunk." JOHN MILTON, *PARADISE LOST* BK. II, ll. 592–94 (1667), reprinted in JOHN MILTON, *PARADISE LOST BOOKS I AND II* 659 (A.W. Verity ed., Cambridge Univ. Press 4th ed. 1962).

118. 28 C.F.R. § 35.104 (2000) (defining "physical or mental impairment" to include "[a]ny mental or psychological disorder . . . drug addiction, and alcoholism").

119. Caring for oneself, learning, and working are listed as examples of major life activities in the Title II regulations. *Id.* § 35.104 (defining "major life activities"). The list in the regulations is not exclusive, and any important activity of ordinary life may qualify as "major." See *Bragdon v. Abbott*, 524 U.S. 624, 637–39 (1998) (holding that reproduction is a major life activity). Thinking, interacting with others, sleeping, and sexual relations have been recognized by courts as "major life activities" under the ADA. See, e.g., *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234–35 (9th Cir. 1999); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3d Cir. 1999).

has produced consequences as severe as hospitalization or job loss, decisions go both ways as to whether the “disability” threshold is satisfied.¹²⁰

When a public entity puts questions about mental conditions or substance abuse on an application form, and imposes additional burdens on those who respond affirmatively, its discrimination affects a group that includes people who do not have a “disability,” along with those who do.¹²¹

120. See, e.g., *Taylor*, 184 F.3d at 306–11 (holding that a jury could find that the plaintiff's bipolar disorder was a disability); *Hoeller v. Eaton Corp.*, 149 F.3d 621, 625 (7th Cir. 1998) (holding that a plaintiff's bipolar disorder was not a disability, although it “was undoubtedly a difficult condition to live with”); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1061–62 (7th Cir. 2000) (holding that a plaintiff who was hospitalized and could not return to her former position because of major depression was not disabled); *Pritchard v. S. Co. Serv.*, 92 F.3d 1130, 1132–34 (11th Cir. 1996) (holding that a jury could find that the plaintiff's depression was a disability); *Bilodeau v. Mega Indus.*, 50 F. Supp. 2d 27, 34–38 (D. Me. 1999) (holding that the plaintiff's hospitalization for alcoholism was not enough to establish that she had a record of disability); see also Deborah Landan Spranger, Comment, *Are State Bar Examiners Crazy?: The Legality of Mental Health Questions on Bar Applications Under the Americans with Disabilities Act*, 65 U. CIN. L. REV. 255, 281–84 (1996) (arguing that most of those affected by bar mental health questions do not meet the ADA's definition of disability). See generally Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347 (1999).

The U.S. Supreme Court's recent decisions in *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service Inc.*, 527 U.S. 516 (1999), which hold that the effects of any corrective measures must be considered before determining whether there is a substantial limitation of major life activities, create further difficulties for plaintiffs with mental disorders that are effectively controlled by medication. See *Robb v. Horizon Credit Union*, 66 F. Supp. 2d 913, 918 (C.D. Ill. 1999) (finding that a plaintiff with depression who would not be able to function without medication does not have a “disability,” because when medicated, she can function).

121. One might argue that everyone who responds affirmatively to a mental health inquiry has a “disability” under the “regarded as” prong of the definition: The applicant's impairment, even if it does not actually substantially limit a major life activity, is “treated by a public entity as constituting such a limitation.” 28 C.F.R. § 35.104 (2000). Bar examiners regard everyone with the targeted conditions as being potentially incapable of practicing law. They ask the questions so that they can identify and exclude such persons. Those who are denied admission are substantially limited in the major life activity of working, because they are excluded from a broad range of jobs (the many lawyer jobs that require bar admission). See *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 83–84 (2d Cir. 2000) (holding that the inability to practice law constitutes substantial limitation of the major life activity of working).

The problem with this argument is that bar examiners do not presume that everyone who answers “yes” is unfit to practice; they just believe that further investigation will lead to evidence of unfitness in some cases. Regarding someone as being *potentially* substantially limited in major life activities is not quite the same thing as regarding that person as *having* a disability. See *Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000) (holding that the fact that a police department required a police officer with depression to undergo a medical evaluation and submit to monitoring does not show that it regarded him as disabled); *Clark v. Va. Bd. of Bar Exam'rs*, 861 F. Supp. 512, 517 (E.D. Va. 1994) (“If the defendants regarded [the plaintiff] as disabled and unable to practice law, they would have denied her application. Instead they have merely insisted that she answer their mental health inquiry, so that they can make a decision as to whether she can practice law or not.”), *vacated by* 861 F. Supp. 519 (granting reconsideration after plaintiff submitted further evidence showing that she had a disability).

Title II prohibits only actions taken “by reason of . . . disability.”¹²² Is the discrimination here disability-based? The decisions in the licensing inquiry cases assume, without much discussion, that it is,¹²³ but the problem is conceptually difficult.¹²⁴

The answer lies in distinguishing the issue of motivation (is the discrimination *based on disability*?) from the issue of standing (is the plaintiff a person with a disability who is entitled to sue?).¹²⁵ Bar examiners’ mental health inquiries target disabilities, even if they overshoot their mark. For example, a question about diagnosis or treatment of bipolar disorder requires an affirmative answer from 100 percent of applicants with bipolar disorder who meet the ADA’s “disability” definition, even though it also affects some who fall short of the “disability” threshold. And it is precisely for the purpose of uncovering the more serious cases, the ones that probably do satisfy the ADA’s “disability” definition, that bar examiners ask the question.¹²⁶ Moreover, it would severely undermine the ADA’s purposes if a defendant could avoid liability by arguing that its conduct targets everyone

122. 42 U.S.C. § 12,132 (1994).

123. See *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994) (rejecting, with little discussion, bar examiners’ argument that they could not be discriminating based on disability when they did not know whether or not the plaintiffs were disabled); *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016, at *5 (D.N.J. Oct. 5, 1993) (concluding that the challenged questions inquire into disabilities simply because “each question asks for information regarding physical or mental impairments”).

124. Application of the disparate impact theory might obviate the need to show that the discrimination is disability-based. Under the disparate impact model of proof, a practice that is facially neutral, but disproportionately harms members of a protected group, is unlawful unless justified by business necessity. Mental health questions on application forms clearly have a disparate impact: Persons who have an ADA-protected mental disability are more likely to be required to answer “yes” than those who do not. However, in *Alexander v. Choate*, 469 U.S. 287, 299–301 (1985), the U.S. Supreme Court held that a showing of disparate impact does not suffice to make out a case of disability discrimination under the Rehabilitation Act unless the challenged practice deprives people with disabilities of “meaningful access” to a program or benefit. The ADA has been read to incorporate this approach. See *Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1043–44 (9th Cir. 1998) (holding that a welfare agency practice of imposing additional eligibility requirements on applicants who fail a substance abuse screening test does not violate ADA under disparate impact theory because it does not deprive plaintiffs of meaningful access to welfare benefits); S. REP. NO. 101-116, at 44 (1989) (stating that Title II should be interpreted consistent with *Alexander v. Choate*).

125. Technically, this is not a matter of standing, but of whether one of the substantive requirements of a claim under the ADA—membership in the protected class—is satisfied. See *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1228–29 (10th Cir. 1997). Nonetheless, many courts refer to it as a standing issue, and for convenience, I will do the same.

126. As a leading bar examiner put it, the goal is to “zero in on raging and risky, chronic and serious mental health areas that contraindicate that the applicant meets the minimum qualifications for the practice of law.” Erica Moeser, *Personal Matters—Should Bar Applicants Be Asked About Treatment for Mental Health? Yes: The Public Has the Right to Know About Instability*, A.B.A. J., Oct. 1994, at 36.

with a mental impairment. An action based on generalizations about people with a particular illness discriminates against those within that class who have a "disability," and cannot be meaningfully distinguished from disability discrimination.¹²⁷

Not everyone who is forced to answer "yes" to a disability-based question will have standing to challenge it. Courts in the ADA licensing cases have required plaintiffs to prove (often through evidence submitted under seal) that their impairments were severe enough to meet the "disability" threshold.¹²⁸ This can mean that a question cannot be challenged by those to whom its application is most irrational and offensive—for example, an applicant who is forced to disclose that she receives counseling (but is not otherwise impaired in her day-to-day functioning) as a result of an incident of childhood sexual abuse. However, the statutory language makes it clear that being an "individual with a disability" is an essential element of a Title II claim.¹²⁹ If this sometimes produces absurd results, the fault lies in the "substantially limits" test, which often denies protection to those whose impairments should be least relevant to a decisionmaker.¹³⁰

127. See Equal Employment Opportunity Comm'n, *Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act* 4 (Oct. 10, 1995), reprinted in Fair Empl. Prac. Man. (BNA) 405:7191, :7192 (stating that ADA provisions prohibiting pre-employment inquiries about disabilities extend to "questions that are likely to elicit information about a disability," including questions such as "Have you ever been treated for mental health problems?"); *Downs v. Mass. Bay Transp. Auth.*, 13 F. Supp. 2d 130, 138 (D. Mass. 1998) (approving and following the approach of EEOC Guidance); cf. *Sch. Bd. v. Arline*, 480 U.S. 273, 282–86 (1987) (rejecting, in light of the purposes of disability discrimination statutes, the argument that discrimination based on contagiousness is distinguishable from discrimination based on disability).

128. See *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534, 1538 (S.D. Fla. 1995) (stating that the plaintiff's disability was established by affidavit filed under seal); see also *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 441 (E.D. Va. 1995). But see *Clark*, 861 F. Supp. 512, 516–17 (E.D. Va. 1994) (finding plaintiff's original proffer of evidence insufficient to establish that she is a person with a disability).

129. 42 U.S.C. § 12,132 (1994); see also *supra* text accompanying note 97 (quoting 42 U.S.C. § 12,132 (1994)). In contrast, the provisions in Title I that restrict disability-based inquiries by employers are susceptible to the interpretation that one does not need to be a person with a disability to state a claim, see 42 U.S.C. § 12,112(d)(2)–(4) (1994), and several courts of appeal have held that a showing of disability is not required. See *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969–70 (8th Cir. 1999); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1181–82 (9th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 593–94 (10th Cir. 1998). As the U.S. Court of Appeals for the Tenth Circuit noted in its decision, it makes little sense to require people to "identify themselves as disabled to prevent potential employers from inquiring whether they have a disability." *Id.* at 594.

130. See Cheryl L. Anderson, "Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement, 65 MO. L. REV. 83 (2000); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999); cf. Catherine J. Lancot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327 (1997) (arguing that an

4. Is It Discrimination Against *Qualified* Individuals with Disabilities?

Title II protects only individuals with disabilities who are “qualified,” which the statute defines as the ability to meet “the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity,” with “reasonable modifications to rules, policies, or practices” if required.¹³¹ The essential purpose of a bar licensing program is to protect the public from incompetent or unethical practitioners. Examiners have argued that mental health inquiries do not discriminate against *qualified* individuals with disabilities because they are used to help determine whether the applicant’s condition would pose a risk to the public—in other words, whether the applicant is qualified. The questions themselves, the argument runs, are an “essential eligibility requirement,” and an applicant who refuses to answer is not qualified.

The decisions rightly reject this reasoning as circular. Title II’s protections would be meaningless if a public entity could define essential eligibility requirements in any way it chose; courts must engage in some scrutiny of whether these criteria are necessary to accomplish the program’s purpose.¹³² If a practice that imposes discriminatory burdens on people with disabilities is not really needed to assess whether applicants would pose a risk to the public, it rests on the “generalizations or stereotypes” that the ADA prohibits.¹³³

Whether disability inquiries discriminate against qualified individuals with disabilities thus turns on whether the questions can be shown to be necessary to the licensing agency’s function of determining fitness to practice. This, as previously discussed, is also the approach suggested by the Title

individualized approach produces irrational and inconsistent results, and that courts instead should focus on whether the plaintiff has a condition that, in general, is “substantially limiting”); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 111–37 (2000) (arguing that the “regarded as” prong of the ADA’s disability definition should be construed to reach all discrimination based on stereotypes about impairments, regardless of whether the defendant thinks that the plaintiff is “substantially limited” in major life activities).

131. 42 U.S.C. §§ 12,131(2); 12,132 (1994).

132. See *Clark*, 880 F. Supp. at 442; *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016, at *6 (D.N.J. Oct. 5, 1993).

133. The quotation is from a passage in the U.S. Department of Justice’s commentary on the Title II regulations that addresses what “essential eligibility requirements” means when considerations of safety are involved. “The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment . . .” 28 C.F.R. pt. 35, app. A, at 483 (2000). Several of the bar inquiry decisions rely heavily on this passage when analyzing the “qualified” issue. See *Clark*, 880 F. Supp. at 441–42; *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A-93-CA-740-SS, 1994 WL 923404, at *6 (W.D. Tex. Oct. 11, 1994); *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333, 1335 (R.I. 1996).

II regulations, which prohibit disability-based eligibility criteria “unless such criteria can be shown to be necessary”¹³⁴

Courts in the licensing inquiry cases all agree that necessity is the test, but have markedly different notions of what necessity means. Two basic approaches have emerged in the decisions: a strict approach that effectively dooms nearly all disability-based inquiries, and a more relaxed standard that opens the door to “narrowly tailored” questions.

B. Applying the Necessity Test

Disability rights proponents have argued that there is no need for licensing questions that focus on an applicant’s disabilities because potential fitness problems can be discerned through questions about the applicant’s conduct.¹³⁵ Bar applications probe the applicant’s educational and employment history, criminal record, military service, disciplinary proceedings, defaults on financial obligations and other matters with excruciating thoroughness.¹³⁶ (I will refer to questions of these types as “behavioral” inquiries.) Examiners can also directly ask about any limitations on the applicant’s ability to practice; for example, “Do you currently have any condition that would impair your ability to practice law?” (I will refer to these as “self-assessment” questions.)¹³⁷

134. 28 C.F.R. § 35.130(b)(8) (2000), quoted in full *supra* note 103. The Title II technical assistance manual published by the U.S. Department of Justice also states that public entities are prohibited from making “unnecessary inquiries into the existence of a disability.” U.S. DEP’T OF JUSTICE, TECHNICAL ASSISTANCE MANUAL ON TITLE II OF THE AMERICANS WITH DISABILITIES ACT § II-3.500 (1992 & 1994 Supp.), reprinted in Fair Empl. Prac. Man. (BNA) 405:51, :62–63. As an illustration, the manual states that a medical licensing board would be in violation of Title II if it required applicants to disclose whether they have ever had physical or mental disabilities and conducted more rigorous investigations of applicants who answered affirmatively. See *id.*

135. See, e.g., Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147 (1994).

136. See Rhode, *supra* note 17, at 593–97 (summarizing the results of a survey of questions appearing on bar application forms); Stone, *supra* note 5.

137. A number of jurisdictions include self-assessment questions on their forms, either in place of, or in addition to, questions asking about specific disabilities. For examples, see Clark, 880 F. Supp. at 439–40 n.18, *In re Petition & Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333, 1337 (R.I. 1996), and Herr, *supra* note 6, at 651.

Self-assessment questions are not disability-based to the extent that the requirement of disclosure is triggered by the existence of a current performance impairment, rather than by the existence of a disability *per se*. Cf. 42 U.S.C. § 12,112(d)(2)(B) (1994) (stating that employers may inquire about the ability of job applicants to perform job-related functions). But see Hilary Duke, Note, *The Narrowing of State Bar Examiner Inquiries Into the Mental Health of Bar Applicants: Bar Examiner Objectives Are Met Better Through Attorney Education, Rehabilitation, and Discipline*, 11 GEO. J. LEGAL ETHICS 101, 122 (1997) (arguing against the use of self-assessment questions because, like disability-based questions, they may deter applicants from seeking mental health treatment).

In addition, opponents of mental health questions generally concede that when behavioral inquiries produce evidence of conduct that casts doubt on the applicant's fitness, and there is reason to believe that the conduct was caused by substance abuse or mental illness, examiners may have a legitimate need to investigate the disability issues. For example, if an applicant attributes an incident of academic misconduct during law school to a mental disorder, and says that the problem is now under control, or if an applicant has several drunk driving convictions, it may be appropriate for examiners to ask about diagnosis and treatment, request medical records, or refer the applicant for an evaluation. (I will refer to these kinds of behavior-triggered inquiries as "second-level" questions.)¹³⁸

No one disputes that there are some individuals who are unfit to practice law, or who need monitoring, as a result of mental health or substance abuse problems. But if behavioral, self-assessment, and second-level questions can identify the problem cases, disability-based questions are superfluous.¹³⁹ The case for "necessity," then, is relative. It requires a showing that examiners can do a better job of predicting unfitness with disability-based questions than by relying on the alternatives. The application of this test raises both empirical and normative problems. What kind of evidence is needed to establish predictive value? If a disability inquiry adds any utility, is its use a "necessity," or is a more substantial showing of need required? The decisions fall into two basic camps, which I will call "strict" and "relaxed" scrutiny.¹⁴⁰

A self-assessment question used by the NCBE and by some states, including Connecticut, asks not only about the applicant's current ability to practice law, but also about the existence of any condition which "if untreated could affect" the applicant's ability to practice. NCBE CHARACTER REPORT, *supra* note 10, at 12; CONN. 2001 APPLICATION, *supra* note 19, at 14. This formulation reaches applicants with disabilities who are receiving treatment and fully capable of functioning as lawyers. As such, the question is disability-based, and can be challenged under the ADA.

138. Dr. Howard Zonana, who has testified as an expert for the plaintiffs in several ADA challenges to mental health questions on bar application forms, has acknowledged the need for such second-level questions. See *Clark*, 880 F. Supp. at 436 & n.9 (summarizing Dr. Zonana's testimony on this issue).

139. Many medical licensing boards and hospitals screening doctors for attending privileges have not found it necessary to ask questions about diagnosis or treatment for mental disorders on their application forms. Instead, they rely on the combination of conduct, self-assessment, and second-level questions. See Letter from Howard Zonana, M.D., Dir., Conn. Mental Health Ctr., Law and Psychiatry Div., to Raymond W. Beckwith, Chair, Conn. Bar Examining Comm. (Oct. 24, 1994) (on file with author).

140. The fault lines between the strict and more relaxed approaches to Title II's "necessity" test are similar to the issues that have divided courts in applying the "business necessity" defense to disparate impact claims under Title VII. Should courts insist on empirical proof that a screening practice is predictive of successful job performance, or should they defer to the employer's plausible judgments? If a practice has some utility, is its use a "necessity," or is a stronger showing of need required? See, e.g., *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999).

1. Strict Scrutiny

One court has squarely held, and a couple more have suggested, that virtually all disability-based inquiries on application forms violate Title II.¹⁴¹ One strand in these decisions is an insistence on empirical validation. The subjective judgment of bar examiners that disability questions are helpful is not enough: The case for effectiveness must be made through hard evidence that the questions have predictive value. Also lurking in these decisions is the idea that “necessity” means more than utility. If disability-based questions don’t add much to the ability of examiners to screen out unfit practitioners, they aren’t necessary, even if the questions occasionally provide useful information.

The empirical evidence theme sounds strongly in a 1996 decision of the Rhode Island Supreme Court.¹⁴² Acting on an ACLU challenge to questions that required bar applicants to disclose hospitalizations for mental health reasons, certain mental health outpatient treatment, and drug or alcohol addiction within the past five years, the court appointed a lawyer-physician as a special master to gather information and make recommendations.¹⁴³ The court endorsed the special master’s determination that the challenged questions violated the ADA, and limited the bar examiners to asking about any current condition that, in the applicant’s own assessment, would affect her ability to practice law.¹⁴⁴

141. See *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct. 5, 1993); *In re Applications of Underwood & Plano*, No. BAR-93-21, 1993 WL 649283 (Dec. 7, 1993); *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1333.

142. See *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1333.

143. See *id.*

144. See *id.* at 1335–37. The special master, in her report, considered and rejected the alternative of a question focused on specific serious disorders such as schizophrenia and bipolar disorder, on the grounds that such a question “probably violates the Americans with Disabilities Act because it inquires into diagnosis and status as opposed to behavior and function.” Report of Patricia Ryan Recupero, J.D., M.D., Special Master, at 17 (1996) [hereinafter *R.I. Special Master Report*] (on file with author). The new questions adopted by the Rhode Island Supreme Court read as follows:

Question 26: Are you currently using narcotics, drugs or intoxicating liquors to such an extent that your ability to practice law would be impaired[?]

....

Question 29: Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?

In re Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d at 1337. The court also approved the continued use of a question requiring applicants to disclose any current illegal drug use, on the ground that the ADA specifically excludes current illegal drug use from the definition of “disability.” See *id.*

Disability-based questions, the court held, are illegal under the ADA unless they can be shown to be necessary for the protection of the public. Empirical proof of the questions' predictive value was required:

[T]he burden is on those who propose to ask the questions to show an actual relationship such that (1) applicants with mental-health-and substance-abuse-treatment histories *actually* pose an increased risk to the public, (2) the admission process has effectively protected the public by using [the challenged questions] to identify those persons with mental-health- or substance-abuse-treatment histories who are a danger to the public, or (3) attorneys who have become a danger to the public in their practice of law, when retrospectively reviewed, could have been identified with any degree of reliability by such questions.¹⁴⁵

The court endorsed the special master's findings that "there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action . . .," and that "most disciplinary problems and grievance issues arise after an attorney has been in practice for a number of years, and in nearly all such cases no indicators of future difficulties manifested themselves at the time of original licensure."¹⁴⁶ The court noted that it is difficult even for mental health professionals to make accurate predictions, and the fact that "the initial screening in most bar-examining committees is performed by lay individuals with no mental-health training" exacerbates the questions' lack of predictive value.¹⁴⁷

At the end of its decision, the Rhode Island court suggested that even if the questions had some predictive value, the necessity test would require more. Examiners may have to sacrifice some useful information for the sake of the ADA.¹⁴⁸ A similar theme appears in a 1994 order of the Minnesota Supreme Court striking application form questions about mental health treatment and hospitalizations. Mental health questions are unnecessary, the court reasoned, because "questions relating to conduct can, *for the most part*, elicit the information necessary for the Board of Law Examiners to . . . protect the public from unfit practitioners"¹⁴⁹

145. *In re* Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d at 1336.

146. *Id.*

147. *Id.*

148. The court stated that:

Clearly, it can be argued that the [new self-assessment questions ordered by the court] . . . provide little or no relevant information about behavior that might translate to an inability to practice law. Nevertheless, the committee's investigation must afford to applicants the protections guaranteed under the ADA and preserve the privacy rights of all applicants.

Id. at 1337.

149. *In re* Petition of Frickey, 515 N.W.2d 741 (Minn. 1994) (emphasis added). The court, exercising its supervisory powers, acted on a petition submitted by deans and faculty members of

A strong version of the necessity test also underlies *Medical Society of New Jersey v. Jacobs*, the first of the ADA licensing inquiry decisions, which concluded (albeit in dicta) that only behavior-based inquiries are permissible under Title II.¹⁵⁰ Instead of framing the issue as whether disability-based questions have any marginal utility, the court asked whether screening can be “effective” without them.¹⁵¹ Under this approach, as long as conduct-based questions do a reasonably good job of identifying applicants who are unfit as a result of mental health or substance abuse problems, disability-based questions are not a “necessity,” even if they might uncover a few cases of unfitness that otherwise would go undetected.

The strict scrutiny approach is fatal to mental health questions, because there is simply no empirical evidence that applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney. No prospective validation study, tracking the future careers of bar applicants with and without specified factors in their backgrounds, has ever been attempted.¹⁵² Only one retrospective study has been conducted, and it provides no evidence of any correlation between attorney misconduct and previous mental health treatment.¹⁵³ (The study does, however, suggest that

the three Minnesota law schools. The decision ducked the issue of whether the ADA applies to bar admissions, but reasoned that the questions are unnecessary and inflict harm by deterring law students from seeking counseling. See *id.*

150. See *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016 (D.N.J. Oct. 5, 1993). The case was subsequently resolved by a stipulation that eliminated mental health and substance abuse questions from New Jersey’s medical licensing forms, with the exception of some narrowly focused questions on current illegal drug use and the existence of any condition which, in the applicant’s own assessment, would impair or limit her ability to practice medicine. See *Stipulation & Agreement Between Parties*, *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670, 3 *Am. Disabilities Cas.* (BNA) 1278, 1279–80 (D.N.J. Sept. 20, 1994) (including a settlement agreement appended to the court’s decision awarding attorney’s fees).

151. The court stated that:

[T]hese additional burdens [on applicants with disabilities] are unnecessary. The Court is confident that the Board can formulate a set of effective questions that screen out applicants based only on their behavior and capabilities. For example, the Board is not foreclosed by Title II from screening out applicants based on their employment histories; based on whether applicants can perform certain tasks or deal with certain emotionally or physically demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up to responsibilities. . . . The essential problem with the present questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants’ behavior.

Jacobs, 1993 WL 413016, at *7.

152. See Rhode, *supra* note 17, at 556. See generally Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 *A.B.A. J.* 815 (1972).

153. See Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, *B. EXAMINER*, Nov. 1992, at 5. The Minnesota State Board of Law Examiners conducted a retrospective study of the bar application forms filed by fifty-two attorneys who were later disciplined for professional misconduct. The study’s authors concluded that persons whose application forms revealed past problems (for example, arrests, employment termination, academic

preadmission substance abuse may have some predictive value.)¹⁵⁴ Research on the prediction of violence and criminal behavior, an area that has been intensively studied,¹⁵⁵ provides little basis for placing much confidence in the ability of mental health professionals, let alone bar examiners, to predict the future conduct of persons with mental disorders. The preponderance of recent studies show, at best, "a modest, better-than-chance level of accuracy" in predicting violence in persons with serious mental illnesses.¹⁵⁶ The rates of false positives (the percentage of people predicted to be violent who turn out not to be) are very high, ranging in many studies from 40 to 80 percent.¹⁵⁷

probation, financial problems, substance abuse, mental health treatment) were significantly more likely to be disciplined as attorneys than applicants whose preadmission histories did not include such conduct. See *id.* at 8. In the aggregate, the study provides some support for this conclusion: 50 percent of disciplined attorneys, as compared with 20 percent of all bar applicants, had problematic application forms. See *id.* at 7. However, the small sample size makes it impossible to draw statistically significant conclusions about the relationship between discipline and any particular type of preapplication conduct. See Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Characters*, 68 IND. L.J. 647, 654-55 (1993) (commenting on the findings and limitations of the Minnesota study).

The Minnesota study provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys. Only 3.8 percent of the disciplined attorneys (two out of fifty-two) had received mental health treatment prior to their admission. See Baer & Corneille, *supra*, at 7. This is actually *lower* than the rate of mental health treatment among all bar applicants. Although the Minnesota study's authors do not indicate the overall percentage of bar applicants with mental health treatment histories, based on national statistics and studies from other states, that percentage is likely to be 15 percent or more. See *supra* notes 36-37 and accompanying text.

154. I will discuss these findings in the section on substance abuse inquiries, *infra* Part III.B.5.

155. An extensive review of this complex body of research can be found in John Monahan, *The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 7-2.0 (David L. Faigman et al. eds., 1997 & Supp. 2000).

156. *Id.* § 7-2.2.1[2], at 317; see also *id.* § 7-2.1.1[2], at 308-11; *id.* § 7-2.2.1[2], at 316-17. Even if such predictions can be made with a certain degree of accuracy, this does not mean that information about mental illness contributes to the accuracy of the predictions. A recent analysis of the data from many studies concludes that the accuracy of predictions of crime or violence for persons with mental disorders depends on consideration of the same risk factors that apply in the general population: criminal history, antisocial personality, substance abuse, and family dysfunction. "Clinical or psychopathological variables were either unrelated to recidivism or negatively related." James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 139 (1998). This suggests that, with the possible exception of substance abuse, information about diagnosis and treatment for mental disorders would not enhance the accuracy of bar examiners' predictions of bar applicants' future behavior.

157. See Deidre Klassen & William A. O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 LAW & HUM. BEHAV. 143, 144-45, 152 (1988). The false positive problem stems from the fact that the vast majority of people with serious mental disorders will not engage in violent or criminal acts. See Monahan, *supra* note 155, § 7.2.2.1, at 315 (finding that at least 90 percent of those with current serious mental disorders are not violent). Although data is lacking, it is reasonable to assume that this is also the case in the bar admissions context: most applicants who are required to answer "yes" to bar examiners' mental health questions will not engage in serious acts of professional misconduct after admission. When predicting conduct that has a low

Disability inquiries fail the strict scrutiny test for a second reason as well. As we will see in the next part, bar examiners deem applicants unfit on the basis of information produced by a mental health question only in an extraordinarily small number of cases. The minimal utility that examiners can claim for the questions fails to satisfy the strong version of “necessity” that underlies the strict scrutiny approach.¹⁵⁸

2. Relaxed Scrutiny

In 1994, in *Applicants v. Texas State Board of Law Examiners*,¹⁵⁹ a federal judge rejected an ADA challenge to an application form question requiring disclosure of any diagnosis or treatment for “bipolar disorder, schizophrenia, paranoia or any other psychotic disorder” during the past ten years.¹⁶⁰ The court endorsed the “necessity” test and agreed with prior decisions finding that broad inquiries into all past mental health treatment violate the ADA.¹⁶¹ However, it held that narrowly framed questions focusing on “serious mental illnesses” that may affect a person’s ability to practice law are “necessary to ensure the integrity of the Board’s licensing procedure” in performing its basic function of ensuring that admitted attorneys “are capable of practicing law in a competent and ethical manner.”¹⁶² Federal courts in Virginia, Florida and Illinois have also endorsed disability-based questions that are limited to certain serious disorders with limited time frames.¹⁶³

overall incidence, even a highly accurate prediction instrument will yield high rates of false positives. See Joseph J. Coccozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1089–91 (1976); Dershowitz, *supra* note 152, at 816–18.

The following example illustrates why this is so. Assume that a clinician can predict, with an 80 percent rate of accuracy, whether a bar applicant with a past diagnosis of mental illness will engage in professional misconduct as an attorney. Also assume that 10 percent of such applicants will engage in misconduct after admission. Thus, out of every 1000 people our clinician interviews, 100 will commit an act of misconduct. With her 80 percent accuracy rate, our clinician will correctly identify eighty of the 100 applicants who will commit misconduct. But what about the 900 applicants who will not engage in misconduct? Our clinician will correctly identify 720 of them (80 percent of 900). This means, however, that she will incorrectly label 180 of these individuals as future wrongdoers. The false positive rate can be calculated by dividing the number of erroneous predictions of misconduct (180) by the total number of predictions of misconduct (180 plus eighty, or 260). The false positive rate here is 69 percent. Despite our clinician’s overall 80 percent accuracy rate, when predicting that particular individuals will engage in misconduct, she is wrong 69 percent of the time.

¹⁵⁸. See *supra* text accompanying notes 148–151.

¹⁵⁹. No. A-93-CA-740-SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994).

¹⁶⁰. *Id.* at *6.

¹⁶¹. See *id.* at *6–*7.

¹⁶². *Id.* at *9.

¹⁶³. U.S. District Judge James C. Cacheris has ruled on two ADA challenges to questions on Virginia’s bar application form. In *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995), he struck down, after a full trial, a question that required applicants to disclose all mental

These courts employ approach an approach that I will call "relaxed scrutiny." Instead of requiring evidence that preapplication mental health conditions correlate with future performance problems, they are willing to rely on a commonsense notion that the symptoms of some mental disorders can interfere with a person's ability to practice law. Some disorders are characterized by chronic or recurrent symptoms—for example, hallucinations, delusions, paranoia, abuse of drugs or alcohol—that, if active and uncontrolled, may pose a risk of harm to clients or the public.¹⁶⁴ Anecdotal evidence of disciplinary cases in which mental health problems led to misconduct underscores the connection.¹⁶⁵ Viewed from this perspective, it seems legitimate for examiners to seek some assurance from medical experts that an applicant's condition is currently under control.

Examiners can also try to ascertain whether the applicant is committed to controlling the risks in the future. As the *Texas Applicants* court put it,

Although a past diagnosis of the mental illness will not necessarily predict the applicant's future behavior, the mental health history is

health treatment or counseling in the past five years. Although parts of the decision resonate with the "strict scrutiny" approach and suggest that behavior-based inquiries are sufficient to ensure effective screening, the court also intimated that narrower, diagnosis-based questions might be justified. See *id.* at 435–36, 444, 446. A "relaxed" approach to empirical validation also underlies the *Clark* court's analysis of the mental health question's effectiveness. See *infra* note 167.

Three years later, in *O'Brien v. Virginia Board of Bar Examiners*, No. 98-0009-A, 1998 U.S. Dist. LEXIS 4344 (E.D. Va. Jan. 23, 1998), Judge Cacheris made it clear that he would approve a Texas-style question. After *Clark*, Virginia had narrowed its mental health questions to focus on a list of specified disorders, including substance abuse, schizophrenia, major depression, bipolar disorder, and antisocial personality disorder. See *id.* at *8. In denying a preliminary injunction, Judge Cacheris stated that the new question was narrowly tailored and served the public interest, and that the plaintiff was unlikely to succeed with his ADA claim on the merits. See *id.* at *9.

The Florida decision involved a challenge to a questionnaire that required applicants for state judgeships to disclose all past mental health and substance abuse treatment, and many physical impairments as well. The court granted a preliminary injunction, concluding that the questions violated the ADA because they were overbroad and unnecessary. See *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534 (S.D. Fla. 1995). At the same time, it strongly endorsed *Applicants v. Texas State Board of Law Examiners* and stated that "reasonable, narrowly-drawn" disability questions would satisfy Title II's necessity test. See *id.* at 1541–42.

In the Illinois case, a federal district court judge held that inquiries posed to a bar applicant's references did not violate the ADA. See *McCreedy v. Ill. Bd. of Admissions to the Bar*, No. 94-C-3582, 1995 U.S. Dist. LEXIS 791 (N.D. Ill. Jan. 23, 1995); see also *supra* note 114 (discussing the court's reasoning). In dicta, the court strongly endorsed the *Texas Applicants* court's approach to application form inquiries. See *id.* at *20–*21.

164. See *Clark*, 880 F. Supp. at 436; *Texas Applicants*, 1994 WL 923404, at *2–*3.

165. See *Doe*, 906 F. Supp. at 1545 (finding that the necessity for substance abuse questions was shown by recent history demonstrating "that drug addiction can render a judicial officer vulnerable to corruption and breach of the public trust"); *Clark*, 880 F. Supp. at 436 ("[R]ecent cases of acute mental disability among lawyers which have resulted in license suspensions" support the conclusion that "untreated mental or emotional illness may result in injury to clients" and that some form of mental health inquiry is necessary.).

important to provide the Board with information regarding the applicant's insight into his or her illness and degree of cooperation in controlling it through counseling and medication.¹⁶⁶

A court can feel comfortable deferring to examiners' fitness determinations when their role is defined in this way: Even if they are not mental health experts, making judgments about attitude and responsible behavior is bar examiners' stock-in-trade.

This outlook invites a much less stringent approach to empirical validation. If the decisions of bar examiners can be accorded a presumption of correctness, a question's effectiveness can be measured by how often it produces information that the examiners themselves deem relevant to their fitness decisions. Thus, in *Texas Applicants*, the court found that a study conducted by the Texas Board established the utility of a mental health inquiry.¹⁶⁷ The study showed that, over a seven-year period, nineteen applications were identified by the Board's staff as involving serious mental health concerns, and thirteen of these cases would have gone undetected in the absence of a mental health question on the application form.¹⁶⁸ There

166. *Texas Applicants*, 1994 WL 923404, at *3. The preamble to the NCBE's mental health questions similarly suggests that the crucial issue is the applicant's attitude and behavior in dealing with disability:

The mere fact of treatment for mental health problems or addictions is not, in itself, a basis on which an applicant is ordinarily denied admission in most jurisdictions, and boards of bar examiners routinely certify for admission individuals who have demonstrated personal responsibility and maturity in dealing with mental health and addiction issues.

NCBE CHARACTER REPORT, *supra* note 10, at 12.

167. See *Texas Applicants*, 1994 WL 923404, at *4-*5. In *Clark*, the court employed a similar approach by assessing the effectiveness of Virginia's mental health question by reference to how often it produced information that affected fitness decisions. The question failed even this lax standard. Over a five-year period, forty-seven applicants had responded affirmatively to a question about mental health treatment. In only two of these cases did the Board conclude that the applicant's mental health history raised serious issues about current fitness, and neither case resulted in the denial of a license. See *Clark*, 880 F. Supp. at 434-35, 437.

The District of Columbia Court of Appeals also assessed the need for mental health inquiries by reference to their impact on admissions decisions. In 1992, the court ordered the removal of a broad mental health question from the D.C. application form because, in the admission committee's experience, the question "rarely, if ever, brought to light a serious fitness question that was not highlighted by other information (concerning litigation, employment, encounters with legal authorities, academic or bar discipline, etc.)." Reischel, *supra* note 115, at 10-11. A substance abuse inquiry was retained because the committee found that affirmative answers were "not infrequently associated with conduct raising very serious fitness problems." *Id.* at 11 (describing the basis for the court's unreported action); see also *id.* at 20.

168. See *Texas Applicants*, 1994 WL 923404, at *4-*5. This finding led the court to conclude that behavior-based questions alone are insufficient: "Although relying on past behavior in other areas may reveal behavior relevant to mental fitness, the evidence reflected that in the majority of cases already reviewed by the Board, this was not the case." *Id.* at *7. The court reasoned that behavior- and performance-based questions will fail to detect some cases in which mental illness affects current fitness because of the limited employment history of many law students, the reluctance of

were five cases in which the mental health question yielded information that led to a result other than the unconditional admission of the applicant.¹⁶⁹

Note that this is an extremely small pay-off rate. The mental health question produced outcome-affecting information an average of 0.7 times per year in a state that gets well over two thousand bar applications annually.¹⁷⁰ To courts in the "relaxed scrutiny" camp, however, uncovering even a few cases of unfitness is enough to satisfy the necessity test. A lofty conception of the legal profession informs this approach. In *Texas Applicants*, the court posed a series of rhetorical questions that linked the necessity of mental health questions to the importance of lawyers' responsibilities:

Although a negative light is often cast upon the legal profession in the information that the general public receives and hears, in reality, lawyers serve the important role in our society of assisting people in the management of the most important of their affairs. . . . Lawyers counsel individuals contemplating everything from divorce, bankruptcy, and the disposal of assets to the institutionalization of a loved one. Is it necessary that the Board inquire whether an applicant has been diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or other psychosis before licensing the individual to assume these responsibilities? Before licensing the individual to write wills, manage trusts set up for minors and disabled individuals, or draft contracts affecting

references to provide negative information, and the difficulties of deciding what kinds of past problems should trigger further scrutiny of an applicant's current mental fitness. See *id.* at *8 & n.15. Nor would it be sufficient to ask applicants whether they suffer from any condition that would impair their performance as an attorney; this type of question would be more likely to produce dishonest responses and miss those "who do not recognize or understand the nature and extent of their illness." *Id.* at *7; see also *Doe*, 906 F. Supp. at 1541-42 (endorsing *Texas Applicants*' conclusions on the inadequacy of behavior-based and self-assessment questions).

169. Over the seven-year period, there were a total of eight cases involving mental health issues that ended in an outcome other than unconditional admission. In five of those eight cases, the Board would not have been aware of any problem in the absence of a mental health inquiry. Only one of these applicants was actually denied admission. Two withdrew after a hearing was scheduled, one was granted a conditional license requiring continuing mental health counseling, and one had been given a hearing with the results still pending at the time of the court's decision. See *Texas Applicants*, 1994 WL 923404, at *5.

The number of cases in which substance abuse affected the outcome was much larger. See Jack W. Marshall, *Probationary Licensure in Texas*, B. EXAMINER, May 1997, at 31, 36 (explaining that over a seven-year period, probationary licenses were granted to about fifty applicants based on substance abuse concerns). Substance abuse questions were not challenged in the *Texas Applicants* case, so no statistics are available on how many of these applicants were identified through questions focusing on diagnosis and treatment, as opposed to behavioral questions.

170. See *Admission to Bar by States—1994, 1995, 1996, 1997 and 1998*, B. EXAMINER, May 1999, at 15 (number of applicants admitted by examination in Texas per year ranged from 2487 to 3372). One might, however, argue that even such small gains add significant utility in the context of a screening system that is geared towards excluding a tiny number of applicants. Nationwide, only about one in 500 bar applicants are refused admission on character grounds each year. See Rhode, *supra* note 17, at 516.

parties' rights and finances? Before licensing the individual to represent a parent in a proceeding to determine if the parent will maintain or lose custody of a child? Before licensing the individual to represent a [sic] individual charged with a crime who faces [the] loss of liberty or even life?¹⁷¹

Bar examiners, the court wrote, have an "awesome responsibility" to the public that requires them to make "every effort" to ensure that admitted attorneys will not pose a danger to their clients.¹⁷² Under this necessity test, in contrast with the one envisioned in the "strict scrutiny" cases, the stakes are too high to sacrifice even small amounts of screening effectiveness for the sake of the ADA.

The "relaxed scrutiny" approach gives the ADA its due by insisting that inquiries be narrowly tailored.¹⁷³ Just as the decisions are willing assume a commonsense connection between the symptoms of certain "serious" disorders and law practice as a basis for concluding that inquiries are necessary, they reject questions that sweep in conditions that seem obviously irrelevant to a person's ability to function as a lawyer.¹⁷⁴ Thus, the "relaxed" cases uniformly find that

171. *Texas Applicants*, 1994 WL 923404, at *8.

172. *Id.* The subject of bar admissions has often evoked paeans to the bar's high calling from judges. The rhetoric of Justice Felix Frankfurter's concurring opinion in *Schwabe v. Board of Bar Examiners*, 353 U.S. 232 (1957), is particularly florid but not atypical:

One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character." . . . [T]he profession itself, through appropriate committees, has long had a vital interest, as a sifting agency, in determining the fitness, and above all the moral fitness, of those who are certified to be entrusted with the fate of clients.

Id. at 247-48.

173. See *Doe*, 906 F. Supp. at 1542-44 (holding that while status-based questions about disability are necessary, overinclusive questions that require disclosure of matters irrelevant to current fitness are inconsistent with the ADA's goals of eradicating discrimination and stereotypes); *Texas Applicants*, 1994 WL 923404, at *9 (stating that the Board's "narrowly focused question" burdens persons with disabilities "in the least intrusive, least discriminatory manner possible" and thus strikes the "appropriate balance" between public protection and "the goal of the ADA to integrate those defined as mentally disabled into society").

174. The court in *Doe v. Judicial Nominating Commission* gave these examples of mental health treatment that would be irrelevant to an applicant's fitness: "hospitalization or treatment resulting from personal traumas such as . . . loss of a loved one," or counseling obtained by a person who "as a child, had been psychologically abused by an alcoholic parent and thereafter, as an adult, sought . . . therapy to resolve lingering vestiges from this problem." *Doe*, 906 F. Supp. at 1543-45.

Questions that ask about all diagnosis and treatment for mental disorders do indeed reach an extraordinarily broad range of conditions affecting large numbers of people. Conditions classified as mental disorders by the American Psychiatric Association include insomnia, sexual dysfunctions, phobias such as fear of heights or insects, adjustment disorders (which may be diagnosed whenever

inquiries requiring disclosure of all mental health treatment or counseling are overinclusive and hence fail Title II's necessity test.¹⁷⁵ The decisions also condemn as overbroad inquiries that lack a reasonable time limitation.¹⁷⁶ But if a question zeroes in on "serious" mental health conditions or substance abuse, and does not go too far back in time, a court that accepts the assumptions of the relaxed scrutiny approach may be willing to uphold it.

III. CAN "NARROW" MENTAL HEALTH QUESTIONS BE JUSTIFIED?

A. Relaxed Scrutiny: Some Problems and the Need for Refinement

I will not attempt, in this Article, a detailed analysis of the relative merits of the two basic approaches that have emerged in the case law. My own view is that strict scrutiny is truer to the ADA's purposes.¹⁷⁷ Any gains to public protection that accrue from disability questions on application forms are uncertain but certainly small, while the questions clearly inflict hurt and

a person shows greater-than-usual distress, usually lasting no more than six months, in response to a traumatic experience), and bereavement. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 405-11, 493-538, 553-57, 623-27, 684-85 (4th ed. 1994) [hereinafter DSM-IV]. Large nationwide studies have found that nearly 50 percent of Americans have experienced a diagnosable mental disorder at some point in their lives, and that at any one point in time about 22 percent of the population has a mental disorder, 28 percent if substance abuse disorders are included. See Ronald C. Kessler et al., *Lifetime and 12-Month Prevalence of DSM-III-R Psychiatric Disorders in the United States*, 51 ARCHIVES GEN. PSYCHIATRY 8 (1994); Darrel A. Regier et al., *The de Facto US Mental and Addictive Disorders Service System*, 50 ARCHIVES GEN. PSYCHIATRY 85, 88 (1993).

175. See *O'Brien v. Va. Bd. of Bar Exam'rs*, No. 98-0009-A, 1998 U.S. Dist. LEXIS 4344, at *6-*7 (E.D. Va. Jan. 23, 1998); *Doe*, 906 F. Supp. at 1542-45; *Texas Applicants*, 1994 WL 923404, at *7.

176. See *Doe*, 906 F. Supp. at 1545 (explaining that a question to judicial applicants about past substance abuse "at minimum, . . . must be subject to reasonable time limitations" in order to comply with the ADA); *Texas Applicants*, 1994 WL 923404, at *3, *7, *9 (approving a ten-year time frame for questions because the period between active episodes of symptoms of schizophrenia or bipolar disorder may be as much as ten years); Reischel, *supra* note 115, at 10 (describing a decision of the D.C. Court of Appeals to limit substance abuse and hospitalization questions to a five-year period).

177. The strict scrutiny approach better serves the ADA's stated purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12,101(b)(1) (1994), and accords with the Congressional findings that individuals with disabilities are a "discrete and insular minority" who have faced a history of pervasive discrimination, segregation, and political powerlessness. *Id.* § 12,101(a)(2), (7); see Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 16-17 (1993-1994). Requiring a strong and compelling showing of necessity when the state imposes burdens on the basis of an individual's disability status is also consistent with the approach taken under Title VII to overtly discriminatory classifications that are based on gender, national origin, or religion. See *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 200-01 (1991) (stating that the "bona fide occupational qualification" defense for overtly discriminatory policies must be narrowly and stringently construed).

inconvenience, and reinforce status-based stereotypes. Nonetheless, the relaxed approach has been accepted by an increasing number of courts.¹⁷⁸ In an era of "ADA backlash," this trend is likely to continue.¹⁷⁹ The approach also accords with the traditional deference that courts have shown to bar admission authorities.¹⁸⁰ The necessity of probing serious mental health conditions before unleashing new lawyers on the public will strike many courts as a matter of "common sense."¹⁸¹

For present purposes, however, let us accept the central assumptions of the relaxed scrutiny framework. To recap, these are: (1) The validity of an inquiry can be established by showing that it (a) focuses on disorders which, when active and uncontrolled, are likely to impair a lawyer's performance in ways that potentially endanger clients, and (b) yields information that examiners have deemed relevant to their fitness decisions, and that would not have been discovered in the absence of the disability question. (2) A question that produces any net gain in public protection—even the exclusion of a few unfit applicants—is necessary. (3) Questions must not

178. Since the *Texas Applicants* decision in 1994, only the Rhode Island Supreme Court has opted for the strict approach, while federal courts in Virginia, Florida, and Illinois have embraced the relaxed position. See *supra* notes 141, 163. However, no federal appeals court has yet ruled on the legality of an application form inquiry under Title II of the ADA. It is still possible that a strict scrutiny approach will prevail.

179. See generally Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000). The ABA's Commission on Mental and Physical Disability Law acknowledged which way the wind was blowing when, in 1998, it prepared a proposed resolution and report for the ABA House of Delegates on the subject of mental health inquiries on judicial screening forms. Four years earlier, the Commission had taken a strong stand against all mental health questions on bar application forms. See ABA COMM'N REP., *supra* note 42. This time, it conceded that certain mental health conditions "that no longer are present or have been treated successfully may be so serious and create such a risk of inappropriate judicial behavior or judicial incompetence that they deserve to be further scrutinized." ABA Comm'n on Mental & Physical Disability Law, Section of Individual Rights and Responsibilities, Judicial Division, *Recommendation to the House of Delegates*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 266, 268 (1998).

180. See, e.g., *Tang v. Appellate Div. of N.Y. Sup. Ct.*, 487 F.2d 138, 143 (2d Cir. 1973).

181. See, for example, the rhetorical questions posed by the court in *Texas Applicants*, quoted *supra* text accompanying notes 170–172, and that court's statement that "[i]t is ludicrous . . . to propose" that the ADA prohibits questions on bar application forms about serious mental illnesses. *Texas Applicants*, 1994 WL 923404, at *9; see also *McCreedy v. Ill. Bd. of Admissions to the Bar*, No. 94-C-3582, 1995 U.S. Dist. LEXIS 791, at *22 (N.D. Ill. Jan. 23, 1995) (repeating the *Texas Applicants* court's statements).

This is not an argument for the relaxed approach, just an explanation of its appeal. What seems intuitively obvious often is rooted in prejudice and unfounded assumptions. In the realm of mental health law, particularly, judges have frequently disregarded empirical evidence in favor of myth-perpetuating "ordinary common sense." See Perlin, *supra* note 177, at 29–32. As Judge Guido Calabresi has pointed out, "unthinking reliance on intuition" in dealing with persons with disabilities is "among the barriers that the Rehabilitation Act [and later the ADA] was designed to overcome." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d Cir. 1995).

be overbroad (that is, should not sweep in conditions that fail to satisfy the first criterion), and must be limited to a reasonable time frame.

In the discussion that follows, I will try to show that even under the premises of relaxed scrutiny, many of the “narrow” disability inquiries that frequently appear on bar application forms cannot be justified under the ADA. Before I turn to the specific topics that examiners ask about, I need to touch on three additional issues—deterrence of treatment, the failure to ask about physical disabilities, and the availability of conditional admissions—that must be considered if the relaxed scrutiny approach is to be applied in a principled way.

1. Deterrence of Treatment

The public protection rationale for allowing a disability inquiry makes sense only if the question produces a *net* gain in public protection. The calculus must include public protection costs as well as benefits. Disability questions can discourage prospective applicants from obtaining needed treatment. To avoid the embarrassment of disclosure and the prospect of hearings, delays, and possibly even a denial of admission, a law student experiencing serious mental health difficulties or problems with alcohol or drugs may not seek help for the problem. Even if the student does see a counselor, the knowledge that examiners will seek treatment records may make her unwilling to disclose the full extent of her problems or discuss sensitive personal information, thereby undermining the effectiveness of treatment. The end result is likely to be the admission of some applicants who are less well-prepared to deal with the stresses of law practice, and more likely to pose a danger to clients.¹⁸²

It is impossible to establish with precision how often bar inquiries prevent or interfere with treatment,¹⁸³ but there is strong evidence that the deterrent effect is real. The Surgeon General’s 1999 report on mental health, reviewing studies on the role of confidentiality in mental health treatment,

182. For a detailed discussion of why mental health inquiries are likely to discourage and interfere with the effectiveness of treatment, at significant cost to lawyer fitness, see Stephen T. Maher & Lori Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 IND. L. REV. 821, 830–46 (1990).

The U.S. Supreme Court has recognized that the absence of confidentiality assurances is likely to deter people from obtaining mental health treatment. In holding that a therapist-patient privilege should apply in federal court proceedings, the Court reasoned that effective mental health treatment is undermined by the possibility of disclosures and that the public will suffer if people holding stressful jobs with important public responsibilities (in that case, police officers) are deterred from obtaining counseling. See *Jaffee v. Redmond*, 518 U.S. 1, 10–11 & n.10 (1996).

183. See Maher & Blum, *supra* note 182, at 832 (discussing some of the methodological problems in designing a study of deterrence).

concluded that "[a]vailable research supports [the] assumptions [that] people will be less likely to seek needed help . . . and, once in treatment, less likely to disclose sensitive information about themselves if they believe that the information may be disseminated outside the treatment relationship."¹⁸⁴

A large national survey of law students, sponsored by the Association of American Law Schools (AALS) Special Committee on Problems of Substance Abuse, provides more direct evidence that bar inquiries have an impact on law students' willingness to seek help for alcohol and drug problems:

In the Law Student Survey, students were asked whether they would seek assistance from a law school or university substance abuse program if they believed that they had a substance abuse problem. Only 10 percent answered an unqualified yes. But 41 percent responded that they would seek assistance if they were assured that bar officials would not have access to the information. Another question asked students whether they would refer to counseling or treatment a fellow law student whom they considered to have a problem. Only 19 percent indicated an unreserved yes, but another 47 percent answered yes if assured that bar officials would not have access to the information. These answers, together with considerable anecdotal evidence, indicate that law students' concerns about confidentiality probably reduce significantly not only the number of students willing to self-refer but also the number who would report an impaired colleague.¹⁸⁵

Many law school faculty members, administrators, and counselors have described encounters with law students who decided not to seek help for mental health or substance abuse problems out of fear of what would need to be reported to the bar examiners.¹⁸⁶

184. SURGEON GENERAL'S REPORT, *supra* note 36, at 440-41; see also *id.* at 8. In a 1993 Harris survey, 7 percent of respondents reported that they had actually refrained from seeking medical care for a problem because of concern that information about their treatment might harm their employment or other opportunities. See *id.* at 440-41.

185. *Report of the AALS Special Committee on Problems of Substance Abuse in Law Schools*, 44 J. LEGAL EDUC. 35, 55 (1994) [hereinafter *Report of the AALS Special Committee*]. The survey was distributed in 1991 to all students enrolled at nineteen law schools that were selected to provide a representative sample of the national law school population. Surveys were returned by 3388 students, about 25 percent of those to whom the survey was sent. See *id.* at 40.

186. See Deposition of Dean Paul R. Marcus at 7-10 (May 25, 1994), *Clark v. Va. Board of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995) (No. C.A. 94-211-A) (containing a law school dean's testimony that a "sizeable number" of students have indicated to him, after learning that counseling might need to be disclosed on bar application form, that they were not likely to seek counseling); Michael Distelhorst, *The Problematic Nature of a Confidentiality Differential in Cases of Law Practitioner Versus Law Student Chemical Dependency*, B. EXAMINER, Aug. 1993, at 24 (reporting that one of the first questions asked by law students contemplating seeking help is the extent of confidentiality, and that the author, a law professor who frequently counsels students with chemical dependency problems, is often unable to persuade students to get help because they fear having to disclose it to bar examiners); Hagenbaugh, *supra* note 37, at 14, 30 (quoting a law school professor on

The issue of deterrence has been discussed in some of the ADA bar inquiry decisions, but only in those cases where the court applied the strict scrutiny approach or struck down a broad question that required the disclosure of all mental health counseling.¹⁸⁷ The decisions that endorse inquiries focusing on "serious" mental disorders or substance abuse, under the relaxed scrutiny framework, ignore the issue entirely. This is indefensible. An approach that rests on the overriding importance of protecting the public from unfit lawyers must seriously grapple with the question of whether the gains in public protection achieved by identifying some potentially unfit applicants are offset by the costs to lawyer fitness of discouraging preadmission treatment. As we shall see, for at least two of the conditions that bar examiners frequently target, substance abuse and depressive disorders, there are particularly strong reasons for believing that inquiries will deter a significant number of people from obtaining treatment during their law school years, at considerable cost to fitness. These harms should weigh against a finding of "necessity" when examiners can only point to rare instances in which the question succeeded in uncovering potentially unfit applicants who otherwise would have passed undetected.

an encounter with a student who was deterred from seeking treatment, and a university counseling director who often hears law students express confidentiality concerns); Petition of Professor Philip P. Frickey et al., *In re* Petition for Order of This Court Directing the State Board of Law Examiners to Delete Questions 4.22, 4.23 and 4.24 from the Application for Admission to Bar of Minnesota at 6 (Mar. 10, 1994) (on file with author) (describing the incident of a student who, when a professor expressed concern about her apparent depression, responded that "she will consider counseling *after* she has safely been admitted to the bar," and another incident in which a student disclosed to a professor "that she . . . has for the past year been avoiding seeking professional help because she is afraid of putting herself in the position of having to disclose mental health treatment in her bar application"); Jane Thierfeld Brown & Ellen Rutt, *The Changing Nature of Law School Students with Disabilities: A Growing Challenge*, POSTSECONDARY DISABILITY NETWORK NEWS (A.J. Pappinikou Ctr. on Special Educ. and Rehabilitation, Univ. of Conn.), Spring 1999, at 6 (stating the observations of a law school disability coordinator and dean for student affairs that many students with disabilities go to great lengths to conceal their status out of fear that bar examiners will become aware of their conditions); Letter from Dan Larson, M.D., to Prof. Philip P. Frickey (Nov. 10, 1992) (on file with author) (reporting that the director of a student mental health clinic at the University of Minnesota has seen a significant number of professional students "who have voiced concerns and some of whom have refused treatment such as with antidepressant medications for fear of the impact on future applications"); Letter from Patricia la Plante, Ph.D., to Prof. Philip P. Frickey (Nov. 10, 1992) (on file with author) (reporting that a number of law students declined to use counseling services at Hamline University after learning of the disclosure requirement on the bar application form).

187. See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 437-38 (E.D. Va. 1995); *In re* Petition of Frickey, 515 N.W. 2d 741 (Minn. 1994); *In re* Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996).

2. Underinclusiveness: The Failure to Inquire About Physical Disabilities

Bar examiners, by and large, do not ask applicants about physical disabilities. A provision of the *Code of Recommended Standards for Bar Examiners*,¹⁸⁸ adopted in 1987, expressly places the subject off-limits, stating that “the physical disability of the applicant is not relevant to character and fitness for law practice and should not be considered.”¹⁸⁹ Critics of mental health inquiries have charged that a sole focus on mental disorders is discriminatory:

[T]he fact that bar examiners collect *only* information on treatment or counseling for a mental or emotional disorder rather than all medical conditions is discriminatory on its face. Other medical conditions can have a bearing on fitness to practice law, since physical illnesses or conditions can affect the ability to concentrate, to complete work in a timely manner and adhere to deadlines and otherwise to serve clients. Yet, examiners seek information only about treatment for mental or emotional conditions, a practice that plainly and invidiously discriminates against those having undergone this form of medical intervention.¹⁹⁰

188. Am. Bar Ass'n et al., *Code of Recommended Standards for Bar Examiners*, in NCBE & ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS (2000), available at <http://www.abanet.org/legaled/publications/Compguide2000/cgcode.html>. The *Code of Recommended Standards*, issued jointly by the NCBE, ABA and AALS, was initially adopted in 1959, revised in 1980, and revised again in 1987 with the addition of the current character and fitness standards.

189. *Id.* at standard 15; see also Daniel C. Brennan, *Defining Moral Character and Fitness*, B. EXAMINER, Nov. 1989, at 24, 28 (providing interview guidelines for New York Character and Fitness Committee advising committee members to avoid asking about or commenting on an applicant's physical disability).

Deborah Rhode's 1982–1983 survey of inquiries on bar application forms found that only 10 percent of American jurisdictions asked questions about physical ailments. See Rhode, *supra* note 17, at 595. The number has probably declined further since then, although as of the mid-1990s, physical disability questions appeared on a few states' application forms. See Herr, *supra* note 6, at 648 n.63 & 649 n.69. North Carolina's form asked whether applicants had ever been “impaired” as a result of any “medical, surgical, or psychiatric condition.” *Id.* at 648 n.63. Kentucky's form included, “Are you currently, or have you been, within the last 5 years, (a) diagnosed with or, (b) treated for any physical condition (for example stroke, head injury, dementia, brain tumor, heart disease) that has resulted in significant memory loss, significant loss of consciousness or significant confusion?” *Id.* at 649 n.69.

190. ABA COMM'N REP., *supra* note 42, at 4; see also Coleman & Shellow, *supra* note 135, at 157–58 (arguing that the failure of boards to ask about physical conditions reflects prejudice and a basic misunderstanding of mental illness); Herr, *supra* note 6, at 642 (noting that “state bars do not ask questions about physical conditions that might pose a risk to fitness to practice, such as narcolepsy or chronic fatigue syndrome”); Florence W. Kaslow, *Moral, Emotional and Physical Fitness for the Bar: Pondering (Seeming) Imponderables*, B. EXAMINER, Aug. 1982, at 38, 44–45 (noting the importance of physical health to the “energy, vitality and clarity of thought” needed for effective client representation, and the absence of questions about physical maladies on bar application forms).

The ADA bar inquiry decisions have largely ignored this issue,¹⁹¹ but the argument cannot be easily dismissed. According to courts that adhere to the relaxed scrutiny approach, examiners are justified in asking about illnesses characterized by symptoms that are likely to interfere with law practice. In particular, they need to inquire to assess the applicant's insight into the condition and degree of cooperation in controlling it, in order to gauge whether the applicant is capable of and committed to minimizing the risks to clients.¹⁹² These justifications apply equally well to numerous physical conditions of a chronic, recurrent or progressive nature that are likely to interfere at some point with a lawyer's ability to meet client responsibilities, such as cancer, heart disease, AIDS, multiple sclerosis, or chronic fatigue syndrome.

Both the *Model Rules of Professional Conduct*¹⁹³ and the *Model Code of Professional Responsibility*¹⁹⁴ require that an attorney not undertake or continue a representation when a physical or mental condition would prevent him or her from providing competent representation.¹⁹⁵ In the case of physical disabilities, examiners presume that applicants will live up to their ethical obligations. They do not use the existence of a physical disability as a trigger for probing whether the applicant has behaved responsibly in managing the condition, and can be trusted to take appropriate steps to protect clients if it interferes with performance in the future.¹⁹⁶ Bar application forms that single out mental disorders and substance abuse reflect a presumption that only applicants with these conditions cannot be trusted to abide by their ethical responsibility, and require further scrutiny to assess whether they are capable of, and committed to, doing so. The distinction is invidious and discriminatory, unless the particular conditions that examiners single out for scrutiny have some distinguishing feature that justifies the difference in treatment.

This distinction can be justified only if examiners restrict their inquiries to conditions with symptoms that not only may interfere with a lawyer's ability to practice—in that sense, bipolar disorder is no different than chronic heart

191. The only exception is *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995). The court mentioned, in passing, that in contrast with mental health conditions, the Virginia application "does not . . . inquire into physical disabilities which may impair one's ability to practice law." *Id.* at 432–33. It drew no conclusions from this.

192. See *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A-93-CA-740-SS, 1994 WL 923404, at *3 (W.D. Tex. Oct. 11, 1994).

193. MODEL RULES OF PROF'L CONDUCT (1983).

194. MODEL CODE OF PROF'L RESPONSIBILITY (1981).

195. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2), 1.1 (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101, EC 1-6 (1981).

196. Cf. Sarah O'Neill Sparboe, Comment, *Must Bar Examiners Accommodate the Disabled in the Administration of Bar Exams?*, 30 WAKE FOREST L. REV. 391, 423–24 (1995) (arguing that applicants with learning disabilities should be admitted to the bar because they can be trusted to abide by ethical rules requiring lawyers to handle only matters that they are competent to handle).

disease—but that also are likely to prevent an individual from recognizing and dealing appropriately with an inability to function. The presence of such symptoms might justify a special concern about how the applicant has acted, and is prepared to act, to treat and control the illness. As we will see, some of the conditions targeted in application form inquiries may meet this test (for example, substance abuse, because of the denial that characterizes it; mania in bipolar disorder), while others (depression, hospitalizations) cannot.¹⁹⁷

3. Conditional Admissions

In 1967, the Supreme Court of Nevada dealt with the appeal of Melvin Schaengold, who was denied admission by the Nevada bar examiners because he had been hospitalized three times for depression and suicide attempts, and was found by an evaluating psychiatrist to have a current diagnosis of “psychosis characterized by a loosening of the thinking processes under pressure.”¹⁹⁸ The court said,

We are impelled to rule for Mr. Schaengold mainly because of the uncertainty which inheres in evaluating mental and emotional disturbances. Psychiatry is far from being an exact science. A mental or emotional disturbance requiring treatment is not an uncommon experience for many successful business and professional people. We fear that a grave injustice may result if we were to approve the Board's recommendation. The price of error is too great.¹⁹⁹

The point remains true today. A current or recent diagnosis with a serious mental disorder cannot support a prediction about the applicant's future behavior, as even the court in *Texas Applicants* acknowledged.²⁰⁰ If the

197. Some physical disabilities also meet this test. A number of general medical conditions, including epilepsy, Huntington's disease, and hyperthyroidism, can cause psychotic symptoms such as hallucinations or delusions. See DSM-IV, *supra* note 174, at 139–51, 306–10; see also *Harris v. H & W Contracting Co.*, 102 F.3d 516, 522 (11th Cir. 1996) (noting that Graves' disease can cause mood swings, confusion, and psychosis); SYDNEY WALKER III, *A DOSE OF SANITY: MIND, MEDICINE AND MISDIAGNOSIS* 39–41 & *passim* (1996) (describing cases of psychotic symptoms caused by physical illnesses). Bar examiners can be charged with underinclusiveness for failing to ask about physical disorders that can produce symptoms similar to those associated with the mental disorders that they do ask about. The relative rarity of psychotic symptoms associated with some of these physical disorders might, however, justify a decision not to ask about them.

198. *In re* Petition of Schaengold, 422 P.2d 686, 686–87 (Nev. 1967). The Nevada Board also pointed to incidents of “poor emotional control” that it found corroborative of mental unfitness: two years prior to his application he had assaulted his girlfriend, during the admissions process he presented a book with an “acerbic inscription” to the Board's chairperson, and during the hearing he looked like he was “on the verge of losing self-control.” *Id.* at 687.

199. *Id.* at 688.

200. See *supra* text accompanying notes 152–157, 166.

information cannot support a denial of admission, it is hard to see how examiners can be justified in asking about it.

There is, however, an alternative to denial. Fourteen states have rules authorizing the admission of applicants on a conditional basis.²⁰¹ Typically, these programs establish a probationary period during which the applicant must comply with conditions such as avoiding disciplinary problems, providing periodic reports from a treatment provider confirming compliance with treatment recommendations, or abstaining from alcohol and drug use. The conditions are generally confidential, so that the attorney appears fully licensed in the eyes of clients and colleagues.²⁰²

The justifications for mental health inquiries offered by the relaxed scrutiny approach are more plausible when conditional admissions are available. Although future behavior cannot be predicted with confidence, examiners may be warranted in concluding, in some cases, that there is a high level of current risk and that monitoring can help to alleviate it. The inevitable false positive errors are more tolerable when the consequence of error is monitoring rather than exclusion.

Conditional admission is not without its problems. It places significant burdens on lawyers with disabilities. When conditions are imposed without sufficient basis, or for an unreasonably long time period, conditional admission is degrading and discriminatory.²⁰³ As bar examiners acknowledge, their task

201. Conditional admissions are available in Arizona, Connecticut, Florida, Idaho, Indiana, Kentucky, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oregon, South Dakota, and Texas. See NCBE & ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *supra* note 188, at chart 2. California does not provide for conditional admission, but has an abeyance program that suspends the processing of an application until the applicant has successfully completed a period of treatment. See Jerome Braun, *Dependency and Admission to the Bar: Abeyance as an Alternative to Denial*, B. EXAMINER, Feb. 1995, at 11–12. Texas is unique in that a statute prohibits the bar examiners from denying admission solely based on a chemical dependency problem, and requires them to confer a probationary license in such cases. See TEX. GOV'T CODE ANN. §§ 82.030, 82.038 (Vernon 1995).

202. For descriptions of various conditional admission programs, see Thomas A. Pobjecky, *The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public*, 18 NOVA L. REV. 1313, 1329–30 (1994); Jennifer C. Clarke, *Conditional Admission of Applicants to the Bar: Protecting Public and Private Interests*, B. EXAMINER, May 1995, at 53, 63–66; and Marshall, *supra* note 169, at 31, 34–35, .

203. Kathleen Flaherty's case is a good example. Twice a year, she is required to submit affidavits from her doctor and herself detailing her treatment regimen and establishing that she is complying with it. There is no time limit on the conditions. The bar examiners' rationale for imposing these conditions—that Ms. Flaherty's fitness depends on her treatment—would justify a lifetime conditional admission for virtually every applicant with bipolar disorder. See *supra* Part I.C.3; see also Jerome Braun, *Some Thoughts on Alcoholism and Admission to the Bar*, B. EXAMINER, May 1988, at 7, 11 (arguing that conditional licensure should not be “so long as to be punitive or unreasonably burdensome on the individual”).

is to assess *current* fitness, and not to speculate about the possibility of future changes in the applicant's behavior.²⁰⁴ That is also what the ADA requires.²⁰⁵

If an applicant is currently in stable recovery from substance abuse, or is receiving effective treatment for a mental disorder, and there are no particular reasons to doubt the applicant's willingness and ability to continue on that path, the applicant should be admitted unconditionally. Conditional admission should be reserved for situations in which current fitness is questionable and there is a genuine need for monitoring: for example, an applicant who has recently abused alcohol or drugs and has not yet shown a stable course of recovery, or an applicant with a recent episode of mania or psychosis that resulted from a failure to take medication.

Although the use of conditional admission is not always justified, its availability should be a prerequisite to allowing disability-based questions on bar application forms, even under the relaxed scrutiny approach. The issue has been ignored in the decisions, however, and some courts have upheld mental health inquiries in jurisdictions that fail to provide for conditional admission.²⁰⁶

204. The 1994 ABA *Resolution*, drafted and adopted with the NCBE's participation and support, emphasizes that mental health questions must be "germane to the applicant's current qualifications to practice law." ABA *Resolution*, *supra* note 8, at 598. The NCBE's application form asserts that when examiners deny admission based on mental illness, it is because the applicant's "ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made." NCBE CHARACTER REPORT, *supra* note 10, at 12; see also NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 73:8302 (Stuart Duhl ed., 3d ed. 1991) [hereinafter BAR EXAMINERS' HANDBOOK] (stating that examining boards should not consider themselves responsible for assuring the public that an applicant who, at the time of admission, "is doing what is necessary to maintain his recovery" will not relapse in the future, because "[f]itness . . . relates to the applicant's integrity and character today").

205. See H.R. REP. NO. 101-485(II), at 73-74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356 (explaining that under ADA, decisions to deny employment on medical grounds must reflect a reliable prediction that there is an "imminent" threat of harm); Equal Employment Opportunity Comm'n, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. § 1630.2(m) (2000) (stating that determination of whether an individual with a disability is qualified "should be based on the capabilities of the individual with a disability at the time of the . . . decision, and should not be based on speculation that the employee may become unable in the future"); U.S. DEP'T OF JUSTICE, *supra* note 134, § II-3.500 (explaining that inquiries by a medical licensing board concerning applicants' disabilities would violate Title II unless "limited to conditions that currently impair one's ability to practice medicine"); cf. *Koshinski v. Decatur Foundry Inc.*, 177 F.3d 599, 603 (7th Cir. 1999) ("It would be hard to imagine, for example, that a court would sanction an employer's decision to fire a qualified employee simply because his degenerative heart disease makes a future heart attack inevitable.").

206. See generally *O'Brien v. Va. Bd. of Bar Exam'rs*, No. 98-0009-A, 1998 U.S. Dist. LEXIS 4344 (E.D. Va. Jan. 23, 1998); *McCready v. Ill. Bd. of Admissions to the Bar*, No. 94-C-3582, 1995 U.S. Dist. LEXIS 791 (N.D. Ill. Jan. 23, 1995).

B. Assessing the Inquiries Under the Relaxed Scrutiny Framework

The call for “narrowly tailored” mental health inquiries has led most bar examining boards to abandon questions that required applicants to reveal all past counseling for mental health issues. The National Conference of Bar Examiners and jurisdictions that follow its lead have honed in on bipolar disorder, paranoia, schizophrenia, and psychotic disorders as the specific conditions that warrant inquiry, and a number of states have added clinical depression to this list. The vast majority of jurisdictions continue to ask broad questions about diagnosis or treatment for substance abuse. Questions requiring disclosure of hospitalizations for mental illness also remain on some application forms.²⁰⁷

The relaxed scrutiny cases generally endorse inquiries into “serious” mental illnesses that may affect law practice, but offer little specific analysis of how particular disorders relate to the criteria that may justify inquiries. In this part, I examine whether the premises of relaxed scrutiny can actually support the kinds of questions that examiners are asking. On close analysis, many of the current crop of questions are overbroad, or present particular dangers of deterring treatment that are likely to negate their utility, or underinclusively target conditions that are not significantly different from physical disabilities in the nature of the risk posed. Some of the questions also have a discriminatory impact on women or on racial minorities. Questions focused on psychotic disorders are defensible under the relaxed scrutiny framework, but inquiries about depression and about mental health hospitalizations are not. Bipolar disorder and substance abuse are closer calls; at the very least, inquiries into these conditions need to be considerably narrower than the versions currently extant, if they are to be allowed at all.

Two sources that I draw on extensively in this section warrant specific mention. The *Diagnostic and Statistical Manual of Mental Disorders*,²⁰⁸ published by the American Psychiatric Association, in its fourth edition (DSM-IV), is the standard manual in the United States for the diagnosis of mental disorders.

207. Some states also ask about a laundry list of conditions that Congress exempted from ADA protection: kleptomania, pathological or compulsive gambling, pedophilia, exhibitionism, and voyeurism. See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 439 n.18 (E.D. Va. 1995); Herr, *supra* note 6, at 649–50 n.69 (reprinting questions from Kentucky). At least three states also ask about antisocial personality disorder. See *Roe # 2 v. Ogden*, No. 99-M-967, at 5 (D. Colo. July 7, 2000), *rev'd*, 253 F.3d 1225 (10th Cir. 2001) (Colorado); Herr, *supra* note 6, at 649–50 n.69 (Florida and Kentucky). While not specifically exempted from ADA coverage, this condition is marked by “a pervasive pattern of disregard for and violation of the rights of others.” DSM-IV, *supra* note 174, at 649. One court has expressed doubt that it should be considered a disability, “as opposed to a complex of traits associated with antisocial conduct.” *Stanley v. Litscher*, 213 F.3d 340, 342 (7th Cir. 2000).

208. DSM-IV, *supra* note 174.

I also frequently refer to the Surgeon General's 1999 report on mental health (*Surgeon General's Report*), which provides a detailed, up-to-date summary of scientific research on mental illnesses and treatment.²⁰⁹

1. Depression

While not included in the NCBE's question, a number of states ask applicants about diagnosis or treatment for major depressive disorder, or "clinical depression."²¹⁰ This inquiry has a broad impact. Major depression affects nearly one in five Americans during their lifetimes, and between 5 percent and 10 percent of the population in any given year.²¹¹ Because severe cases of depression often are treated in a hospital setting, questionnaires that ask about mental health hospitalizations also force many applicants to disclose a depression diagnosis.²¹²

Bar examiners have justified asking about clinical depression by pointing out that it is a serious illness that can interfere with an attorney's ability to carry out responsibilities on behalf of clients.²¹³ Those observations are true

209. See SURGEON GENERAL'S REPORT, *supra* note 36.

210. See *supra* text accompanying notes 59–67 (discussing Connecticut's "clinical depression" question); see also *Roe* # 2, No. 99-M-967, at 5 (quoting Colorado question); O'Brien, 1998 U.S. Dist. LEXIS 4344, at *8 (quoting Virginia question); Clark, 880 F. Supp. at 439 n.18 (quoting Florida and Delaware questions); Herr, *supra* note 6, at 649 n.69 (quoting Kentucky question). Some forms refer to "major depressive disorder," and others to "clinical depression." The two terms are essentially synonymous. Major depressive disorder is the official diagnostic category in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), while the term "clinical depression" is frequently used to distinguish major depression from less severe disorders such as "dysthymia," a milder but often more protracted form of depression, or from ordinary feelings of sadness. See SURGEON GENERAL'S REPORT, *supra* note 36, at 245–46; LEWIS WOLPERT, MALIGNANT SADNESS: THE ANATOMY OF DEPRESSION, at x, 17–18 (1999).

211. See SURGEON GENERAL'S REPORT, *supra* note 36, at 228; Kessler et al., *supra* note 174, at 10, 12; Regier et al., *supra* note 174, at 88. Approximately 17 percent of the population has experienced a major depressive episode at some point in their lifetime. See Kessler et al., *supra* note 174, at 10, 12.

212. Connecticut's hospitalization question, for example, is what forced Rose Gower to disclose her depression. See *supra* Part I.C.2. Five to 10 percent of major depressive episodes require hospitalization. See SURGEON GENERAL'S REPORT, *supra* note 36, at 258. Depression was the admission diagnosis for about 20 percent of a large sample of persons hospitalized for mental health reasons examined in one large recent study. See Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 397 tbl. 1 (1998).

213. When asked by a reporter why the Connecticut Bar Examining Committee had recently added clinical depression to the list of disorders it inquires about, the committee's chairperson responded, "We believed there were enough instances of clinical depression that were identifiable to make this relevant. . . . We want to know if the person who was suffering from clinical depression was subsequently able to function." Hamilton, *supra* note 65. The counsel to Florida's Board of Bar Examiners, in an article defending mental health inquiries, cited a disciplinary case in which an attorney failed to prosecute a client's case, and the court found that chronic depression was a substantial cause of the lawyer's inaction. See Thomas A. Pobjecky, *Mental Health Inquiries: To Ask, or Not to Ask—That Is the Question*, B. EXAMINER, Aug. 1992, at 31, 35.

enough, but cannot justify making depression a target for special scrutiny. As discussed below, depression inquiries are difficult to distinguish in a principled way from numerous physical conditions that bar examiners do not ask about. Depression questions also come with particularly high deterrence costs, which negate any utility that can plausibly be claimed for them. Finally, depression inquiries have a disparate impact on women and raise especially sensitive privacy concerns.

A diagnosis of major depressive disorder is given when an individual has experienced at least one major depressive episode.²¹⁴ The primary features of such an episode are depressed mood and/or a loss of interest or pleasure in nearly all the activities of life. At least four other symptoms, drawn from the following list, must also be present:

- a significant decrease or increase in appetite, with weight loss or weight gain;
- insomnia or sleeping too much;
- noticeable agitation or slowing down of bodily movements;
- fatigue or loss of energy;
- feelings of worthlessness or excessive or inappropriate guilt;
- diminished ability to think or concentrate, or indecisiveness;
- recurrent thoughts of death or suicidal ideation, or a suicide attempt or plan.

The symptoms must persist nearly every day, for most of the day, for at least two weeks, and must be severe enough to cause significant distress or impairment in social, occupational, or other types of basic functioning.²¹⁵

214. If an individual has experienced manic or hypomanic episodes, in addition to one or more episodes of major depression, a diagnosis of bipolar disorder, rather than of major depressive disorder, will apply. Major depressive disorder is sometimes called unipolar depression, to distinguish it from bipolar disorder. Bipolar disorder will be discussed in the Part III.B.2.

215. See DSM-IV, *supra* note 174, at 320–23, 327, 339, 344–45. The diagnostic criteria do not adequately convey what severe depression can be like. Kay Redfield Jamison, a leading researcher on mood disorders, gives this account of one of her own depressive episodes:

From the time I woke up in the morning until the time I went to bed at night, I was unbearably miserable and seemingly incapable of any kind of joy or enthusiasm. Everything—every thought, word, movement—was an effort. Everything that once was sparkling was now flat. I seemed to myself to be dull, boring, inadequate, thick brained, unlit, unresponsive, chill skinned, bloodless, and sparrow drab. I doubted, completely, my ability to do anything well. It seemed as though my mind had slowed down and burned out to the point of being virtually useless. . . . The morbidity of my mind was astonishing . . . I saw Death everywhere, and I saw winding sheets and toe tags and body bags in my mind's eye. . . . And, always, everything was an effort. Washing my hair took hours to do, and it drained me for hours afterward; filling the ice-cube tray was beyond my capacity, and I occasionally slept in the same clothes I had worn during the day because I was too exhausted to undress.

KAY REDFIELD JAMISON, *AN UNQUIET MIND* 110–11 (1995); see also WOLPERT, *supra* note 210, at 1, 2–9, 65–67 (providing similar accounts of the experience of depression).

Depressive episodes tend to be self-limiting; even if left untreated, an episode of depression will usually resolve itself within a period of months.²¹⁶

Depression is associated with physical changes in brain functioning, and is the product of complex interactions of genetic predisposition, thought processes, and stressful life events.²¹⁷ It is very responsive to treatment. Studies have consistently shown that antidepressant medication is effective in improving symptoms about 65 percent of the time. Some forms of psychotherapy show similar success rates, and drugs and psychotherapy together can be particularly effective.²¹⁸ With or without treatment, about 50 percent of people who have gone through one major depressive episode will never have another. Individuals who have had two or more prior episodes are much more likely to experience another one in the future, although long-term preventive treatment can reduce the risk of recurrence.²¹⁹

Depression is an occupational hazard for lawyers. Several studies have found rates of depression in the legal profession at least twice as high as those in the general population.²²⁰ A study in Washington state found that

216. The average duration of an untreated episode of major depression is six to nine months. See SURGEON GENERAL'S REPORT, *supra* note 36, at 246; WOLPERT, *supra* note 210, at 22.

217. See SURGEON GENERAL'S REPORT, *supra* note 36, at 251-57; WOLPERT, *supra* note 210, at 41-63, 84-128.

218. See SURGEON GENERAL'S REPORT, *supra* note 36, at 262-66; WOLPERT, *supra* note 210, at 131, 161-62. The success rates for both medication and therapy compare well with the 30 percent of patients who respond favorably to a placebo. See SURGEON GENERAL'S REPORT, *supra* note 36, at 262-66. One recent study found that a combination of medication and cognitive-behavioral psychotherapy produced significant improvement in 85 percent of chronically depressed patients, as compared with about 50 percent who improved in response to either medication or therapy alone. See Martin B. Keller et al., *A Comparison of Nefazodone, the Cognitive Behavioral-Analysis System of Psychotherapy, and Their Combination for the Treatment of Chronic Depression*, 342 NEW ENG. J. MED. 1462 (2000).

219. See INST. OF MED., REDUCING RISKS FOR MENTAL DISORDERS 87, 91 (Patricia J. Mrazek & Robert J. Haggerty eds., 1994); SURGEON GENERAL'S REPORT, *supra* note 36, at 246, 267; WOLPERT, *supra* note 210, at 22-23.

220. The most extensive occupational study estimated that 10 percent of lawyers met the diagnostic criteria for major depressive disorder at a given point in time, as compared with 3 to 5 percent of the general population. After adjusting for other variables, in order to focus solely on the influence of working in a particular occupation, the data indicated that lawyers were 3.6 times more likely than persons employed full-time in other fields to suffer from depression. See William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1081, 1083 (1990). The data for this analysis was drawn from a study that assessed the prevalence of mental disorders through structured, in-person interviews of approximately 20,000 individuals conducted at five sites around the country during the early 1980s. See *id.* at 1079-80; see also Regier et al., *supra* note 174, at 86.

G. Andrew H. Benjamin and his colleagues have used survey instruments to study depression levels among attorneys in Washington state, and among law students and new lawyers in Arizona. Seventeen to 19 percent of their attorney respondents showed significantly elevated depression levels. See Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 18 (1995-1996); G. Andrew H.

approximately 19 percent of lawyers reported significantly elevated depression levels, and a majority of these were experiencing suicidal ideation.²²¹

Depression may prevent a lawyer from getting work accomplished and may interfere with his or her ability to meet responsibilities to clients and courts.²²² This will not necessarily be true; many people, during episodes of major depression, manage to keep up with their work responsibilities, even if it is in a joyless and trudging way.²²³ Still, from the perspective of the relaxed scrutiny approach, what matters is that there is a logical link between the symptoms of a major depressive episode and the risk of certain types of attorney misconduct: missed deadlines, neglected client matters, and failures to keep clients adequately informed.²²⁴

However, any debilitating condition poses similar risks. It is difficult to justify singling out depression for scrutiny when bar examiners do not ask about

Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 234, 236-41 (1990). But see Adam J. Krakowski, *Stress and the Practice of Medicine: Physicians Compared with Lawyers*, 42 PSYCHOTHERAPY & PSYCHOSOMATICS 143, 146 (1984) (finding only a 6 percent rate of depressive illness through interviews of a sample of fifty lawyers practicing in an upstate New York county).

221. See Benjamin et al., *supra* note 220, at 240-41; see also Maura Dolan, *Miserable with the Legal Life*, L.A. TIMES, June 27, 1995, at A1 (reporting that 11 percent of lawyers polled in North Carolina in 1991 admitted that they consider taking their lives at least once a month). Lawyers have one of the higher occupational rates of suicide. In general, about one in ten people who suffer from severe depression will kill themselves. See WOLPERT, *supra* note 210, at 64, 67.

222. Depression is one of the leading causes of occupational disability. See SURGEON GENERAL'S REPORT, *supra* note 36, at 244.

223. For example, Kay Jamison, during the severe, eighteen-month-long depression described *supra* note 215, managed to fulfill her demanding teaching, research, and patient care responsibilities as a medical school faculty member. See JAMISON, *supra* note 215, at 110-25, 210. One notable attorney who suffered from recurrent bouts of major depression, without apparent harm to his ability to serve clients and constituents, was Abraham Lincoln. See DAVID HERBERT DONALD, LINCOLN 27, 57, 87-88, 163-64, 371, 517 (1995).

224. Unlike mania and substance abuse, see *infra* text accompanying notes 246, 286, there is no clear, commonsense link between the symptoms of depression and misappropriation of client funds. Depression has been raised as a defense or mitigating factor in disciplinary cases involving thefts from clients, but courts have been appropriately skeptical of the claim of causation. See *In re Greenberg*, 714 A.2d 243, 254 n.4 (N.J. 1998) (rejecting the claim that an attorney's depression explained stealing, and noting that considering the high rate of depression among attorneys, "[t]he relatively small number of misappropriation cases . . . suggests that very few of the attorneys who suffer from depression manifest their mental illness by acts of theft"); *In re Hunter*, 704 A.2d 1154, 1157 (Vt. 1997) (finding that an attorney's depression and attention deficit disorder may have contributed to his neglect of client matters, but cannot explain his misappropriation of client funds). In cases in which depressed attorneys are involved in acts of dishonesty, the circumstances often suggest causes other than depression. See, e.g., *In re Mann*, 853 P.2d 1115, 1116, 1119 nn.10, 13 (Alaska 1993) (considering a case in which an attorney became acutely depressed and suicidal after stealing client funds to pay his own overdue mortgage; substance abuse was also involved); *State ex rel. Okla. Bar Ass'n v. Colston*, 777 P.2d 920, 921, 923 (Okla. 1989) (noting that the psychiatric evaluation of a depressed attorney involved in acts of fraud and misrepresentation attributed his conduct to a "workaholic" personality and stress, rather than to depression).

numerous physical disabilities that can make it difficult or impossible for an attorney to meet deadlines and get work done. Nor is there anything in the characteristic symptoms of depression that justifies a departure from the usual presumption that an applicant with a disability will respond appropriately if the disability interferes with his or her ability to serve clients in the future.²²⁵ To be sure, some of the symptoms that may be present in depression, such as fatigue and impaired concentration, can make it harder for a depressed attorney to take the steps necessary to address an incapacity, such as requesting an extension of time, finding another attorney to cover, or withdrawing from the representation. But the same will often be true of an attorney who is not meeting client responsibilities because of physical illness, personal crises, or over-commitment. The symptoms of depression do not stand as an obstacle to understanding and addressing the consequences of disability in the same way, or to the same degree, as do the delusions that characterize mania or psychosis, or the denial symptomatic of substance abuse.²²⁶

Deterrence concerns also weigh particularly heavily against depression inquiries. A study of law students at one state law school found that 32 percent displayed significantly elevated depression levels by the end of the first year; by the spring of the third year, the number rose to 40 percent.²²⁷ The knowledge that a diagnosis of depression will have to be disclosed to the bar examiners is likely to prevent a significant number of students from seeing a mental health professional. Most people who are depressed do not obtain treatment, as

225. See *supra* Part III.A.2.

226. See *infra* text accompanying notes 249, 285–287. In extreme cases, depression can have psychotic features, but these usually take the form of delusions that one is to blame for events beyond one's control, or hearing voices emphasizing guilt. See DSM-IV, *supra* note 174, at 327, 377; WOLPERT, *supra* note 210, at 16, 25.

227. See Benjamin et al., *supra* note 220, at 234; see also G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, AM. B. FOUND. RES. J. 225 (1986) (providing a fuller description of the study). The elevated depression level measured by the survey instruments used in this study is “strongly correlated with clinical impairment, and suggests the need for specific treatment,” although it may not correspond to a diagnosis of major depressive disorder. Benjamin et al., *supra* note 220, at 237.

Another study found that out of 161 law students who utilized a counseling service at the University of Maryland over a four-year period, 46 percent were diagnosed with a depressive condition (although most of these did not have full-blown major depression). See Dickerson, *supra* note 36, at 84. At the time, Maryland's bar application form asked about hospitalizations for mental illness, but not about other forms of treatment. Those who used the counseling service were told that treatment would not be reported to professional authorities. See *id.* at 89–90; MD. STATE BAR ASS'N SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, REPORT AND RECOMMENDATIONS ON MENTAL HEALTH INQUIRIES ON THE MARYLAND BAR APPLICATION 19–20 (1995) [hereinafter MD. STATE BAR ASS'N REPORT] (reprinting Maryland question). Law students' willingness to seek help under these circumstances is not inconsistent with the existence of a deterrent effect when treatment for depression must be disclosed to bar examiners.

several studies have shown, and stigma is a major barrier to seeking help.²²⁸ The costs of deterring treatment, both in terms of future lawyers' health and the potential adverse effect on their performance as attorneys, easily wipe out the benefits of any small gains in screening efficacy that might be claimed for depression inquiries.²²⁹

Depression inquiries also raise troubling issues of sex discrimination and privacy. The prevalence of major depressive disorder among women is about twice as high as the rate for men.²³⁰ The burdens of disclosure and delays that arise from depression questions on bar application forms are much more likely to fall on female bar applicants. In addition, major depression is often associated with traumatic events of a personal or humiliating nature, such as physical or sexual abuse, parental neglect or the loss of a loved one, and with situations of chronic adversity such as poverty and marital discord.²³¹ When bar examiners require bar applicants to explain the circumstances of their treatment for depression and release their counseling records, these highly sensitive personal matters become part of the admissions process. Considering the weak claims that can be made for the utility, let alone the necessity, of depression inquiries, these considerations should weigh heavily against their use.

228. See INST. OF MED., *supra* note 219, at 286; SURGEON GENERAL'S REPORT, *supra* note 36, at 257, 454. The suicide of former White House counsel Vincent Foster is a case in point. Four days before his death, he confided in his sister that he was depressed and did not know what to do about it. She tried to set up an appointment with a psychiatrist for him, but he resisted going because he feared that it would endanger his security clearance. See Lloyd Cutler, Editorial, *Psychotherapy: No Sign of a Security Risk*, WASH. POST, July 12, 1994, at A17. There is a great deal of anecdotal evidence that bar application questions have deterred law students from seeking help for depression. See *supra* note 186.

229. Depression inquiries can be expected to uncover, at best, a very small number of cases in which conditional admission or denial might be appropriate. See *supra* notes 167–170 and accompanying text, which discuss the low pay-off rate of inquiries that target mental disorders.

230. See SURGEON GENERAL'S REPORT, *supra* note 36, at 244, 255–56; WOLPERT, *supra* note 210, at 48–51; see also Richard Gater et al., *Sex Differences in the Prevalence and Detection of Depression and Anxiety Disorders in General Health Care Settings*, 55 ARCHIVES GEN. PSYCHIATRY 405 (1998) (finding the gender difference to be consistent across cultural settings). The reasons for the difference are unclear. Biological factors, greater exposure of women to sexual abuse and other traumas, and a greater tendency among women to ruminate about problems instead of seeking distractions, may all play a role. See SURGEON GENERAL'S REPORT, *supra* note 36, at 255–56; WOLPERT, *supra* note 210, at 49–50.

231. See SURGEON GENERAL'S REPORT, *supra* note 36, at 254; WOLPERT, *supra* note 210, at 51–55.

2. Bipolar Disorder

Bipolar disorder, also known as manic-depressive illness, affects fewer applicants than unipolar major depression,²³² but has been a major focus of bar examiners' concern. The NCBE asks about it, as do nearly all of the jurisdictions that list specific mental disorders in their questions.²³³ Applicants with bipolar disorder probably account for a majority of the hearings, conditional admissions, and denials that result from non-substance abuse mental health inquiries.²³⁴ Courts in the relaxed scrutiny camp have had no trouble concluding that examiners' inquiries about bipolar disorder are justified. The decisions, however, pay insufficient attention to the specifics of the disease, and particularly, to the danger of deterring treatment. Whether inquiries about bipolar disorder should be allowed under the relaxed scrutiny framework is a close call. At a minimum, courts should insist that the questions be narrowed to focus only on particular forms of the illness that pose heightened dangers, and should require safeguards designed to minimize deterrence.

Bipolar disorder is a recurrent condition that includes major depressive episodes, like those found in clinical depression, as well as periods of highly elevated mood, known as mania or hypomania. It is a distinct illness from clinical depression, with causes that appear to be predominantly biochemical

232. The one-year prevalence of bipolar disorder in the U.S. population is between 1 and 2 percent, as compared with 5 to 10 percent for major depression. See SURGEON GENERAL'S REPORT, *supra* note 36, at 249; Kessler et al., *supra* note 174, at 12; Regier et al., *supra* note 174, at 88.

233. See NCBE CHARACTER REPORT, *supra* note 10, at 12. States that in recent years have targeted bipolar disorder in their questionnaires include at least Connecticut, Colorado, Delaware, Florida, Kentucky, New Jersey, North Carolina, Texas, and Virginia. See *Roe # 2 v. Ogden*, No. 99-M-967, at 5 (D. Colo. July 7, 2000), *rev'd*, 253 F.3d 1225 (10th Cir. 2001); *O'Brien v. Va. Bd. of Bar Exam'rs*, No. 98-0009-A, 1998 U.S. Dist. LEXIS 4344, at *8 (E.D. Va. 1998); *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 439-40 n.18 (E.D. Va. 1995); CONN. 2001 APPLICATION, *supra* note 19, at 14; STATEWIDE PANEL OF THE [N.J.] SUP. CT.'S COMM. ON CHARACTER, REPORT ON THE IMPLICATIONS OF THE AMERICANS WITH DISABILITIES ACT AND RELATED ISSUES (Jan. 25, 1995), *reprinted in* N.J.L.J., Mar. 6, 1995, at 71 [hereinafter N.J. STATEWIDE PANEL REPORT]; Herr, *supra* note 6, at 648 n.63, 649 n.69.

234. See, e.g., *Johnson v. Kansas*, 888 F. Supp. 1073, 1075-76 (D. Kan. 1995) (alleging denial of admission based on plaintiff's bipolar disorder); *Clark*, 880 F. Supp. at 434 & n.6 (noting that the only cases in which Virginia imposed additional screening requirements on applicants who responded affirmatively to a broad mental health treatment question involved two applicants with bipolar disorder); BAR EXAMINERS' HANDBOOK, *supra* note 204, at 73:6103 (quoting Kentucky bar admission guidelines stating, "[a] person who is manic depressive or subject to psychotic episodes may be unfit to practice law"); Thomas A. Pobjecky, *Everything You Wanted to Know About Bar Admissions and Psychiatric Problems but Were Too Paranoid to Ask*, B. EXAMINER, Feb. 1989, at 14, 20 (describing bipolar disorder controlled by medication as the paradigm case for conditional admission); see also *supra* text accompanying notes 53-55, 84-90 (describing cases of denial and conditional admission based on bipolar disorder in Connecticut).

and genetic, rather than social or psychological in nature.²³⁵ Episodes may last for weeks or months, and will tend to recur every two to four years if the disease is not successfully treated. A large majority of people with bipolar disorder are fully functional between episodes, experiencing no occupational or interpersonal difficulties.²³⁶

There are two distinct forms of manic-depressive illness. Persons who experience mania are diagnosed with bipolar I disorder. Bipolar II disorder is the diagnosis for individuals who have periods of depression and hypomania, but never become manic.²³⁷ The characteristics of manic and hypomanic episodes are described in the *Surgeon General's Report*:

Mania is . . . [a] mood disturbance [that] can range from pure euphoria or elation to irritability to a labile admixture that also includes dysphoria. Thought content is usually grandiose but can also be paranoid. Grandiosity usually takes the form both of overvalued ideas (for example, "My book is the best one ever written") and of frank delusions Auditory and visual hallucinations complicate more severe episodes. Speed of thought increases, and ideas typically race through the manic person's consciousness. Nevertheless, distractibility and poor concentration commonly impair implementation. Judgment also can be severely compromised

By definition, an episode of hypomania is never psychotic nor are hypomanic episodes associated with marked impairments in judgment or performance. In fact, some people with bipolar disorder long for the productive energy and heightened creativity of the hypomanic phase. Hypomania can be a transitional state (that is, early in an episode of mania), although at least 50% of those who have hypomanic episodes never become manic.²³⁸

Long-term maintenance therapy with lithium or other mood-stabilizing drugs effectively eliminates mania in many patients and lessens the effects of depression.²³⁹ However, even among individuals who have received treatment, the recurrence rate for mania can be 40 percent or higher. Noncompliance

235. See SURGEON GENERAL'S REPORT, *supra* note 36, at 246, 249, 251, 256–57; WOLPERT, *supra* note 210, at 26–30, 43, 47; David L. Dunner & G. Andrew H. Benjamin, *Bipolar Affective Disorder (Manic Depressive Illness)*, B. EXAMINER, Nov. 1994, at 25, 25–26.

236. See DSM-IV, *supra* note 174, at 353, 361; SURGEON GENERAL'S REPORT, *supra* note 36, at 249; WOLPERT, *supra* note 210, at 29; Dunner & Benjamin, *supra* note 235, at 26–27.

237. See DSM-IV, *supra* note 174, at 350–63; SURGEON GENERAL'S REPORT, *supra* note 36, at 249; Dunner & Benjamin, *supra* note 235, at 27.

238. SURGEON GENERAL'S REPORT, *supra* note 36, at 249; *see also* DSM-IV, *supra* note 174, at 328–38.

239. See SURGEON GENERAL'S REPORT, *supra* note 36, at 266–68; Dunner & Benjamin, *supra* note 235, at 29. Therapy is a valuable supplement to pharmacological treatment, but there is no evidence that bipolar disorder can be effectively treated by therapy alone. *See id.*

with medication is a major cause of relapse.²⁴⁰ This has a variety of causes: some miss the experience of mania, which can be enormously pleasurable; others may discontinue medication because of unpleasant side effects or concern about fetal health during pregnancy.²⁴¹

When untreated or uncontrolled, bipolar disorder takes a terrible toll. Its manias can be terrifying as well as exhilarating, and its recurrent depressions bleak.²⁴² About one-third of those with manic-depressive illness attempt suicide, and 10 to 15 percent actually kill themselves.²⁴³ But it is also an illness that also confers enormous benefits in energy and creativity. There is strong evidence that manic-depressives make up a disproportionate number of those who excel in the arts, and the same is probably true in business and the professions.²⁴⁴ Attorneys with the illness not only function well between episodes; hypomania often enhances their performance. Drs. David Dunner and Andrew Benjamin, researchers and clinicians who have also treated many bipolar lawyers, write that "most individuals with this condition function quite well in their occupation. . . . Trial lawyers with bipolar disorder are likely to experience hypomanic episodes before and during trials. Their excess energy, decreased need for sleep, over

240. See SURGEON GENERAL'S REPORT, *supra* note 36, at 268; see also JAMISON, *supra* note 215, at 6 ("The major clinical problem in treating manic-depressive illness is not that there are not effective medications—there are—but that patients so often refuse to take them.").

241. In her memoir *An Unquiet Mind*, psychologist Kay Redfield Jamison writes eloquently about her own struggles with the illness, and why for many years she resisted medication. Here is how she describes some of her manias:

When you're high it's tremendous. The ideas and feelings are fast and frequent like shooting stars, and you follow them until you find better and brighter ones. Shyness goes, the right words and gestures are suddenly there, the power to captivate others a felt certainty. . . . Feelings of ease, intensity, power, well-being, financial omnipotence, and euphoria pervade one's marrow.

JAMISON, *supra* note 215, at 67. "Psychological issues," she writes, "ultimately proved far more important than side effects in my prolonged resistance to lithium. . . . I had become addicted to my high moods; I had become dependent upon their intensity, euphoria, assuredness, and their infectious ability to induce high moods and enthusiasms in other people." *Id.* at 98; see also SURGEON GENERAL'S REPORT, *supra* note 36, at 268 (describing risks during pregnancy).

242. Kay Redfield Jamison, once again, provides a compelling description. I quoted her account of the euphoric feeling of a mania above in the previous footnote. Here is how she describes the rest:

But somewhere, this changes. The fast ideas are far too fast, and there are far too many; overwhelming confusion replaces clarity. Memory goes. Humor and absorption on friends' faces are replaced by fear and concern. Everything previously moving with the grain is now against—you are irritable, angry, frightened, uncontrollable, and enmeshed totally in the blackest caves of the mind.

JAMISON, *supra* note 215, at 67.

243. See DSM-IV, *supra* note 174, at 352, 360; Dunner & Benjamin, *supra* note 235, at 27.

244. See WOLPERT, *supra* note 210, at 30, 80–81 (summarizing studies showing high rates of manic-depressive illness in successful writers and artists, past and present). See generally KAY REDFIELD JAMISON, *TOUCHED WITH FIRE: MANIC-DEPRESSIVE ILLNESS AND THE ARTISTIC TEMPERAMENT* (1993).

talkativeness, and increase in ability to interact with others is very adaptive for trial advocacy."²⁴⁵

Still, the justifications for asking bar applicants about manic-depressive illness, from the vantage point of the relaxed scrutiny framework, are relatively strong. Mania can cause serious client-endangering behavior. Impaired judgment, grandiosity, and loss of inhibitions may lead to excessive risk-taking and misuse of client funds. As the *DSM-IV* notes in describing the associated features of mania, "[e]thical concerns may be disregarded even by those who are typically very conscientious (for example, a stockbroker inappropriately buys and sells stock without the clients' knowledge or permission . . .)."²⁴⁶ Reported disciplinary cases include instances of attorneys who misappropriated client funds during manic episodes.²⁴⁷ To be sure, there is no evidence that such cases are common.²⁴⁸ But the point, for the relaxed scrutiny model, is that the symptoms of the disease are reasonably likely to result in some instances of misconduct.

Inquiries focused on mania are not subject to the underinclusiveness objection. The nature and severity of the potential misconduct—stealing from clients—distinguishes mania from physical disabilities. Mania also can interfere with a lawyer's ability to recognize and deal with the effects of the disability. During manic episodes, people frequently fail to understand that they are acting inappropriately, do not recognize that they are ill, and resist obtaining treatment.²⁴⁹

However, asking applicants about all diagnosis or treatment for bipolar disorder is overbroad. The justification for the inquiry rests on the risks posed by mania, but mania appears only in one type of the illness, bipolar I disorder. About one-third of those with manic-depressive illness are bipolar II, and

245. Dunner & Benjamin, *supra* note 235, at 28 (noting also that "such individuals also are likely to experience a let down (depression) following the trial").

246. *DSM-IV*, *supra* note 174, at 330.

247. See *In re Hoover*, 745 P.2d 939 (Ariz. 1987); *In re Larsen*, 589 A.2d 400 (D.C. 1991); *Fla. Bar v. Clement*, 662 So. 2d 690, 693–98 (Fla. 1995); *In re Carmany*, 466 N.E.2d 16, 23 (Ind. 1984); *Cincinnati Bar Ass'n v. Komarek*, 702 N.E.2d 62, 66–68 (Ohio 1998); *Carter v. Gonnella*, 526 A.2d 1279, 1280–82 (R.I. 1987); see also Scott Brede, *F. Mac Buckley Pleads No Contest to Larceny Charges*, CONN. L. TRIB., Sept. 4, 2000, at 1, 3 (noting that a prominent Connecticut attorney's misappropriation of client funds may have been related to bipolar disorder).

248. See Deposition of Howard V. Zonana, M.D., at 46 (June 9, 1994), *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995) (No. 94-221-A) [hereinafter *Zonana Deposition*] ("I have a lot of [patients] who have a history of bipolar disorder that I've seen for fifteen or twenty years who've never had a problem around work functioning, or, whenever a problem comes up, they take a week off and deal with it like any other illness."); Dunner & Benjamin, *supra* note 235, at 31 (reporting their experience that instances of lawyers committing ethical violations during uncontrolled manic episodes are rare).

249. See WOLPERT, *supra* note 210, at 29; Dunner & Benjamin, *supra* note 235, at 27, 29.

experience hypomanic, but not manic episodes.²⁵⁰ Hypomania is not delusional or client-endangering, and, as we have seen, it can be highly adaptive to an attorney's work.²⁵¹ If examiners are to ask about bipolar disorder, the inquiry should be phrased as follows: "Within the past [time frame], have you been diagnosed with or have you been treated for mania or bipolar I disorder?"²⁵²

Even if the questions are appropriately narrowed, it is a close call whether inquiries relating to bipolar disorder should be allowed under the relaxed scrutiny framework. The questions may help identify a few cases in which conditional admission is appropriate,²⁵³ but there is good reason to fear that deterrence will cancel out any public protection gains. Stigma and fear of the consequences of disclosure contribute to the fact that nearly 40 percent of people with bipolar disorders fail to obtain treatment in any given year.²⁵⁴ Examiners' inquiries come at a particularly sensitive time. The average age of onset for bipolar disorders is the early to mid-twenties; thus, many with the illness will experience their first episode during college or law school.²⁵⁵ Clearly, a law student with bipolar illness who has not received treatment out of fear that a diagnosis will imperil her bar admission poses at least as much risk to future clients as one who has been on and off medication in the past.

At a minimum, courts that adhere to the relaxed scrutiny approach should insist, before finding that any inquiries concerning bipolar illness are necessary and justified, that the bar examining authorities communicate to applicants, in word and deed, that disclosing bipolar illness will not endanger their admission or enmesh them in an unduly burdensome process. An appropriate program of conditional admissions must be in place, and the application form should provide assurances that applicants who are receiving treatment have nothing worse than conditional admission to fear, and will generally be admitted unconditionally. These steps would at least mitigate

250. See SURGEON GENERAL'S REPORT, *supra* note 36, at 249.

251. I do not mean to minimize the seriousness of bipolar II disorder. Some individuals with bipolar II are prone to frequent depressive episodes, and the risk of suicide is equally high in both forms of bipolar disorder. See DSM-IV, *supra* note 174, at 352, 360–61. As previously discussed, however, the particular risks associated with depression do not justify singling out a mental disorder for scrutiny.

252. While bipolar I disorder is equally common in men and women, there is evidence that bipolar II, like unipolar major depression, appears more frequently in women than men. See DSM-IV, *supra* note 174, at 360; Dunner & Benjamin, *supra* note 235, at 27. Limiting the questions to bipolar I disorder would have the additional advantage of avoiding a gender-based disparate impact.

253. These would be cases in which the applicant has had problems sticking with a treatment regimen, or where there is reason to doubt whether treatment is effectively controlling manic symptoms. An applicant who is currently receiving effective treatment should not be denied unconditional admission based on the speculative concern that if the applicant discontinues treatment, there could be further manic episodes. See *supra* text accompanying notes 203–206.

254. See JAMISON, *supra* note 215, at 6; SURGEON GENERAL'S REPORT, *supra* note 36, at 257.

255. See WOLPERT, *supra* note 210, at 30, 47; Dunner & Benjamin, *supra* note 235, at 26, 30.

the risk of deterrence, and provide firmer ground for believing (although it will still be impossible to know) that the questions produce relevant information more often than they drive applicants underground.²⁵⁶

3. Schizophrenia and Psychotic Disorders

The NCBE and all of the states that have tailored their mental health questions to specific diagnoses ask about schizophrenia and other psychotic disorders.²⁵⁷ These are the most serious of mental illnesses, and courts that subscribe to the relaxed scrutiny approach have readily assumed that examiners are justified in asking about them. Although exceedingly few bar applicants suffer from these conditions, the case for asking, under the premises of relaxed scrutiny, is defensible.

The term "psychotic disorders" describes a class of conditions in which disturbances of perception and thought processes, such as hallucinations and delusions, are the defining features.²⁵⁸ Schizophrenia, which affects about 1 percent of the U.S. population, is by far the most common of these conditions.²⁵⁹

256. Cf. JAMISON, *supra* note 215, at 204–09. Reflecting on a question about mental illness (of the self-assessment type) that she faced on an application for clinical privileges, Jamison concludes that hospitals have a legitimate need to know about a staff member's bipolar disorder, but that such inquiries need to be handled with great sensitivity, including "guidelines for safeguards and intelligent, nonpaternalistic supervision," so that doctors will not be hesitant to seek treatment. *Id.* at 208.

257. See *supra* note 233, for a list of jurisdictions. The NCBE and several states use the phrase "schizophrenia, paranoia, or any other psychotic disorder." See NCBE CHARACTER REPORT, *supra* note 10, at 12; CONN. 2001 APPLICATION, *supra* note 19, at 14; N.J. STATEWIDE PANEL REPORT, *supra* note 233; see also *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 439–40 n.18 (E.D. Va. 1995) (quoting questions from Texas and Delaware). The insertion of "paranoia" is problematic. Conditions classified as psychotic disorders do not include anything called "paranoia" as such, although there is a paranoid subtype of schizophrenia. See DSM-IV, *supra* note 174, at 286–87. There is also a diagnostic category known as "paranoid personality disorder," but it is not a psychotic disorder. Instead, it describes a pervasive disposition of distrust and suspiciousness of others. See *id.* at 634–38. If the reference to "paranoia" is intended to encompass this condition, the question is overbroad as well as unclear. High levels of paranoid ideation have been found in lawyers and law students; as the authors of one study commented, "[a]lthough these symptoms would be considered significant problems for sufferers in the general population, perhaps these behaviors are adaptive for many lawyers in the adversarial legal system of the United States." Benjamin et al., *supra* note 220, at 244. When hostility and paranoia rise to a level that might make an applicant unfit to practice law, the problem should be easy to detect through behavioral questions: There is likely to be a trail of litigiousness, job and school problems, bad references, and the like. See Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 97–99 (1984) (describing cases of applicants denied bar admission because of a pattern of hostile or paranoid behavior).

258. See DSM-IV, *supra* note 174, at 273–74; SURGEON GENERAL'S REPORT, *supra* note 36, at 40–42.

259. See SURGEON GENERAL'S REPORT, *supra* note 36, at 273. Other, less common, types of psychotic disorders include schizoaffective disorder, delusional disorder and schizophreniform disorder. See DSM-IV, *supra* note 174, at 290–315.

Its symptoms can include disorganized speech and behavior, delusions (most commonly of persecution), hallucinations, flattened affect, and a loss of motivation and initiative that leads to decreased occupational and social functioning.²⁶⁰ The condition generally lasts for a lifetime. Treatment can be effective, and there is great individual variation in the course of the illness, but a complete and permanent remission of symptoms is rare.²⁶¹ Unemployment among people with psychotic disorders is pervasive.²⁶²

Bar examiners encounter very few applicants with schizophrenia or other psychotic disorders, because the illness's severe and chronic nature makes it extraordinarily difficult for a person to make it through law school or pursue legal employment.²⁶³ On occasion, it happens, and with improvements in treatment, such cases are likely to become more frequent. Michael Laudor, who developed schizoaffective disorder in his mid-twenties and spent eight months in a mental hospital, received national attention when he went on to graduate from Yale Law School and was awarded a post-graduate research fellowship there. Nonetheless, he decided that he could not handle the stress and long hours of work in a law firm or a judicial clerkship, and decided to seek academic jobs instead.²⁶⁴

260. See DSM-IV, *supra* note 174, at 274–78; SURGEON GENERAL'S REPORT, *supra* note 36, at 269–71.

261. See INST. OF MED., *supra* note 219, at 102–03; SURGEON GENERAL'S REPORT, *supra* note 36, at 274–75, 279–85.

262. Studies have found that:

[A]bout one third of schizophrenic patients have a relatively unremitting course requiring constant or intermittent institutional care, one third function minimally in the community and require continuous support, and one third function semiautonomously in the community but rarely reach the level of functioning expected before the onset of schizophrenia.

INST. OF MED., *supra* note 219, at 102–03; see also SURGEON GENERAL'S REPORT, *supra* note 36, at 42, 285, 293; Juan R. Bustillo et al., *The Psychosocial Treatment of Schizophrenia: An Update*, 158 AM. J. PSYCHIATRY 163, 168 (2001) (estimating that fewer than 20 percent of persons with schizophrenia hold regular community jobs).

263. See Zonana Deposition, *supra* note 248, at 60 (June 9, 1994) (noting that very few schizophrenics will make it through law school); Dunner & Benjamin, *supra* note 235, at 30 (noting that in contrast to bipolar disorder, the chronicity of schizophrenia “tends to prevent a productive working life”).

264. See Lisa W. Foderaro, *A Voyage into Bedlam and Part Way Back*, N.Y. TIMES, Nov. 9, 1995, at B1. Courts have cited Michael Laudor's story as an example of the unjustified stigma that surrounds mental illness. See *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534, 1542 (S.D. Fla. 1995); R.I. Master Report, *supra* note 144, at 10. Ironically and tragically, he was back in the news several years later when he killed his fiancée, after he stopped responding to medication and became severely delusional. See Joseph Berger & Jane Gross, *From Mental Illness to Yale to Murder Charge*, N.Y. TIMES, June 19, 1998, at B1; Lisa W. Foderaro, *Man Who Killed Fiancee Is Sent to Mental Hospital*, N.Y. TIMES, May 12, 2000, at B6.

His story should not be viewed as evidence that schizophrenics, as a class, are violent, just as his earlier achievements do not constitute proof that schizophrenia is irrelevant to a person's fitness to practice law. See generally Bruce G. Link & Ann Steve, *Commentary: New Evidence on the Violence Risk Posed by People with Mental Illness*, 55 ARCHIVES GEN. PSYCHIATRY 403 (1998) (discussing studies

A lawyer with schizophrenia or related illnesses may be fully capable of practicing when symptoms are in remission.²⁶⁵ However, the likelihood of recurring psychotic episodes, with delusional symptoms that may interfere with the lawyer's ability to provide competent representation and, at the same time, deprive her of the insight needed to recognize and respond to the incapacity, is sufficient to justify inquiries under the relaxed scrutiny approach. A schizophrenic applicant should not be disqualified merely because psychotic episodes may recur, but examiners may have a legitimate interest in gauging whether the applicant is prepared to manage the illness in a way that will minimize the risks, and conditional admission may sometimes be appropriate.²⁶⁶

There is some cause for concern about deterrence. The age of onset for schizophrenia is usually in the early twenties for men and the later twenties for women.²⁶⁷ Studies have shown that it is common for people to wait a year or more after the onset of psychotic symptoms before initiating treatment,²⁶⁸ and the prospect of disclosure on a bar application form might, in some cases, contribute to a delay in seeking treatment. However, someone who experiences the onset of schizophrenia during college or law school and does not get treatment is unlikely to graduate. The risks of deterrence are fairly speculative here, and bar examiners could take steps, like those discussed in the previous section, to minimize them. On balance, the premises of relaxed scrutiny can reasonably support the conclusion that asking about psychotic disorders produces a real, albeit small, net gain in public protection.

showing that a year after release from hospitalization for acute mental illness, patients' violence levels were no different from base levels in the community, although there may be modestly elevated violence risks—no greater than the increased risk associated with factors of gender, age or educational attainment—during acute episodes of certain disorders).

265. Dr. Howard Zonana, in his expert testimony in the *Clark* case, described the case of an attorney diagnosed with schizophrenia who needed some ongoing treatment, but whose ability to function remained quite good throughout his career. See Zonana Deposition, *supra* note 248, at 44 (June 9, 1994).

266. Frederick A. Elliston, an ethicist, put it this way:

If the stress of a courtroom situation . . . [may bring on] a schizophrenic attack, then it may be averted by disqualifying such an applicant. . . . But if the candidate has no intention of becoming a courtroom lawyer, disqualification is unnecessary. If he does have this aspiration, disqualification is extreme: the candidate could be admitted with the stipulation (or recommendation) that he select a less stressful type of practice.

Frederick A. Elliston, *Character and Fitness Tests: An Ethical Perspective*, B. EXAMINER, Aug. 1982, at 8, 11. An applicant who is likely to have psychotic episodes could also be required to provide assurance that he or she will practice in a setting where others will be monitoring his or her work and can take over in case of incapacity.

267. See INST. OF MED., *supra* note 219, at 104; SURGEON GENERAL'S REPORT, *supra* note 36, at 273. The causes of schizophrenia are not yet fully understood, but there is strong evidence that both genetic predisposition and environmental stress in early brain development play major roles. See *id.* at 276–79.

268. See Jeffrey A. Lieberman & Wayne S. Fenton, Editorial, *Delayed Detection of Psychosis: Causes, Consequences, and the Effect on Public Health*, 157 AM. J. PSYCHIATRY 1727, 1727 (2000).

4. Hospitalization

In the wake of the ADA, court challenges, and the ABA's "narrow tailoring" resolution, the NCBE and most states have dropped questions requiring applicants to disclose all hospitalizations or institutionalizations for mental illness.²⁶⁹ However, some jurisdictions continue to ask about hospitalizations, either in "have you ever" form or with a five- or ten-year time limit.²⁷⁰ The justification offered for such inquiries is that if a condition required hospitalization, it must have been particularly serious, and may raise questions about the applicant's ability to function.²⁷¹

Even under the relaxed scrutiny framework, hospitalization questions cannot meet the ADA's requirements of necessity and narrow tailoring. With or without a time limit, the inquiry is distinctly overbroad. Major depression accounts for a significant proportion of mental health hospitalizations.²⁷² Eating disorders, which seem clearly irrelevant to bar admission, are also frequently treated in a hospital setting.²⁷³ A federal court that heartily endorsed the relaxed scrutiny approach of *Texas Applicants* had no trouble concluding that a hospitalization inquiry on a judicial selection form was impermissibly

269. See ABA Resolution, *supra* note 8, at 598 (citing "have you ever" questions about hospitalization for mental illness as examples of inquiries that are overbroad, both in content and time-frame); Herr, *supra* note 6, at 644-46, 652-53 (discussing the NCBE's decision to eliminate hospitalization question in 1995, and the trend in the states to follow suit). Compare *id.* with Stone, *supra* note 5, at 331, 335-36 (stating that a 1994 survey of application forms showed that 96 percent asked about mental health hospitalizations, and most such questions had an unlimited time frame, though some were limited to the past ten or five years).

270. See *Roe # 2 v. Ogden*, No. 99-M-967, at 5 (D. Colo. July 7, 2000), *rev'd*, 253 F.3d 1225 (10th Cir. 2001) (reprinting Colorado question asking about mental health hospitalizations in the past five years); *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 438-39 n.16 (E.D. Va. 1995) (listing eleven jurisdictions that, as of 1995, had dropped questions requiring applicants to disclose all mental health treatment but continued to ask about hospitalizations); CONN. 2001 APPLICATION, *supra* note 19, at 14 ("Have you ever been admitted to an institution or hospital because of a mental, emotional or nervous disorder/condition?"); Herr, *supra* note 6, at 647-49 (discussing hospitalization questions in Kansas and North Carolina).

271. See MD. STATE BAR ASS'N REPORT, *supra* note 227, at 21 (discussing why a stronger argument can be made for the necessity of hospitalization questions than for questions about outpatient counseling or treatment); Reischel, *supra* note 115, at 10, 21 (explaining a decision of the D.C. Court of Appeals to retain a question about mental health hospitalizations within the past five years because "[i]t does not seem unreasonable that a recent institutionalization should trigger close scrutiny . . . to insure that an applicant is capable and reliable").

272. See *supra* note 212.

273. Anorexia, bulimia, and other eating disorders are classified as mental illnesses. See DSM-IV, *supra* note 174, at 539-50. About eight million people, mostly young women, suffer from eating disorders. See Jane E. Brody, *Exposing the Perils of Eating Disorders*, N.Y. TIMES, Dec. 12, 2000, at F8. A survey of female law students at the University of Southern California found that 11 percent had anorexia or bulimia before entering law school. See Julie E. Buchwald, *Confronting a Hazard: Do Eating Disorders Plague Women in the Legal Profession?*, 9 S. CAL. REV. L. & WOMEN'S STUD. 101, 135 (1999). Severe cases often require hospital treatment. See Brody, *supra*.

overbroad; the court noted that the question would reach "hospitalization . . . resulting from personal traumas such as childhood sexual abuse or loss of a loved one."²⁷⁴

Hospitalization is not a particularly good indicator of the severity of a condition, or of the existence of risks that might endanger clients. Whether an individual is hospitalized or treated on an outpatient basis frequently depends on whether alternatives to hospital treatment are available in the particular geographic area,²⁷⁵ and on what insurance will pay for.²⁷⁶ Often, it is the risk of self-harm or suicide, rather than behavior endangering others, that leads to a decision to hospitalize.²⁷⁷ Especially troubling is the role played by race. Blacks and Native Americans are more than twice as likely as whites to be hospitalized for mental illness. The discrepancy exists in both voluntary hospitalizations and involuntary commitments, and persists even after adjustments are made for group differences in the prevalence of mental disorders.²⁷⁸

Questions that focus on specific conditions such as bipolar I disorder and schizophrenia provide a more narrowly focused alternative to hospitalization inquiries.²⁷⁹ Hospitalization questions therefore should be rejected as unnecessary even under the relaxed version of Title II's necessity test.

274. *Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534, 1544–45 (S.D. Fla. 1995).

275. See SURGEON GENERAL'S REPORT, *supra* note 36, at 288 (noting that mobile crisis services and day programs to prevent hospitalization are available in many urban areas, but are not widely available in rural regions).

276. From the 1980s through the mid-1990s, rates of hospitalization for mental health problems among children and adolescents rose dramatically, without any evidence of an increased need for hospital treatment. See *id.* at 171. In part as a response to this phenomenon, insurers now often refuse to pay for hospital treatment, even in situations where it may be warranted. See *id.* at 182; see also MD. STATE BAR ASS'N REPORT, *supra* note 227, at 21–22. These circumstances highlight both the overinclusiveness and underinclusiveness of questions that focus on whether the applicant has been hospitalized.

277. See SURGEON GENERAL'S REPORT, *supra* note 36, at 287–88. For this reason, restricting the question to involuntary commitments only would not solve the overinclusiveness problem.

278. See *id.* at 84–86, 288; Lonnie R. Snowden & Freda K. Cheung, *Use of Inpatient Mental Health Services by Members of Ethnic Minority Groups*, 45 AM. PSYCHOLOGIST 347 (1990). Possible explanations include clinician bias, limited access to outpatient services, or culturally rooted delays in seeking treatment until hospitalization is necessary. See *id.*; see also U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE AND ETHNICITY 63–67 (2001), available at <http://www.surgeongeneral.gov/library/mentalhealth/cre>.

279. Hospitalization might be used as an additional narrowing criterion for a diagnosis-based question, as in the following question adopted by New Jersey: "Have you, within the past twelve months, been admitted to a hospital or other institution for the treatment of bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?" N.J. STATEWIDE PANEL REPORT, *supra* note 233. The report accompanying the revised question argues that the limitation to hospitalization serves as an indicator of severity, and ensures that applicants will not be deterred from seeking counseling or outpatient treatment. See *id.* This approach may help somewhat with respect to deterrence, but it runs the risk of missing some cases in which an applicant's bipolar or psychotic disorder did not result in hospitalization but would nonetheless provide a legitimate basis for imposing conditional admission.

5. Substance Abuse

In the early 1990s, nearly every American jurisdiction required bar applicants to disclose whether they had ever been addicted to or dependent upon alcohol or drugs, or had ever been treated or counseled for substance abuse problems.²⁸⁰ A number of states that have narrowed or eliminated other types of mental health questions continue to ask broad questions about substance abuse, often going back several years or more.²⁸¹ In the courts, challenges to such questions have had mixed results. Two of the strict scrutiny decisions state or strongly imply that all substance abuse questions are off limits except for questions about current illegal use of drugs, which is not a protected disability under the ADA.²⁸² The only decision that has addressed a challenge to substance abuse inquiries under the relaxed scrutiny framework held that questions about past treatment for addiction are permissible, but must include a reasonable time limitation.²⁸³

Alcohol is by far the most commonly abused drug, both in society at large and in the legal profession.²⁸⁴ The following definition of alcoholism, developed by the American Society of Addiction Medicine and the National Council on Alcoholism and Drug Dependence, is consistent with the DSM-IV's diagnostic criteria for substance dependence:

280. See NAT'L CONFERENCE OF BAR EXAMINERS, *supra* note 5; Stone, *supra* note 5, at 338–39.

281. See *Roe # 2 v. Ogden*, No. 99-M-967, at 5 (D. Colo. July 7, 2000), *rev'd*, 253 F.3d 1225 (10th Cir. 2001) (reprinting Colorado question asking about treatment relating to use of drugs or alcohol in past ten years); CONN. 2001 APPLICATION, *supra* note 19, at 14 (“Have you ever been treated for or counseled for substance abuse, including prescription drugs, illegal substances or alcohol?”); Herr, *supra* note 6, at 650–51 & n.75 (listing states that are “sparing in the scope of [mental health] questions asked, focusing primarily on substance abuse”). The NCBE is a notable exception: It has eliminated a broad substance abuse inquiry and now relies on an approach that focuses on whether the applicant has raised substance abuse as a defense to any misconduct charge. See *infra* text accompanying note 296.

282. See *Med. Soc’y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016, at *5–*7 (D.N.J. Oct. 5, 1993); *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333, 1336–37 (R.I. 1996).

283. See *Doe v. Judicial Nominating Comm’n*, 906 F. Supp. 1534, 1545 (S.D. Fla. 1995). The court expressed no view as to what a reasonable time limitation would be. See *id.*

284. According to the two major prevalence studies, alcohol dependence or abuse is present in about 7.5 percent to 10 percent of the U.S. population in a given year, with about 3.5 percent of the population addicted to or abusing other drugs. See Kessler et al., *supra* note 174, at 10, 12; Regier et al., *supra* note 174, at 88. Among lawyers, the rate of alcohol disorders is probably in the range of 15 to 20 percent, see *infra* note 288, but what evidence there is suggests that lawyers do not disproportionately abuse other drugs. See Benjamin et al., *supra* note 220, at 241 (explaining that fewer than 1 percent of lawyers in Washington state were abusing cocaine, as compared to the national average of about 2 percent); see also *Report of the AALS Special Committee*, *supra* note 185, at 41 (explaining that a survey showed widespread use of alcohol by law students, but very few using any other drugs, except for marijuana, and only 2 percent said their use of marijuana was frequent).

Alcoholism is a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial. . . .

"Denial" is used in the definition . . . to include a range of psychological maneuvers that decrease awareness of the fact that alcohol use is the cause of a person's problems rather than the solution to those problems. Denial becomes an integral part of the disease and is nearly always a major obstacle to recovery.²⁸⁵

That these symptoms pose a high potential for lawyer misconduct is fairly obvious. Lawyers with substance disorders may suffer from impaired judgment, neglect client matters, and engage in financial improprieties.²⁸⁶ The denial that characterizes addictive illness also stands as an obstacle to recognizing the problem and avoiding client harm. As the Association of American Law Schools report on substance abuse observes, "Frequently, . . . denial—one of the hallmark symptoms of dependency—prevents the impaired lawyer or judge from obtaining assistance until the progression of the disease leads to a professional mistake or misconduct."²⁸⁷

There is evidence to support the link between substance abuse and lawyer misconduct. Studies suggest that the rate of alcohol abuse and dependence among lawyers is in the range of 15 to 20 percent,²⁸⁸ yet alcohol problems

285. Robert M. Morse & Daniel K. Flavin, *The Definition of Alcoholism*, 268 J. AM. MED. ASS'N 1012, 1013 (1992). The DSM-IV recognizes two categories of substance use disorders, substance dependence and substance abuse. Dependence is characterized by a pattern of compulsive use of a drug despite significant problems caused by it, and is usually accompanied by increasing tolerance and symptoms of withdrawal when use is curtailed. See DSM-IV, *supra* note 174, at 176–81. Substance abuse is "a maladaptive pattern of substance use manifested by recurrent or significant adverse consequences," but without the compulsive drug-taking, tolerance, and withdrawal characteristic of dependence. Very often, although not always, abuse develops into dependence. *Id.* at 182–83, 189.

286. See *In re Kersey*, 520 A.2d 321, 323, 326 (D.C. 1987) (finding alcoholism to be the but-for cause of an attorney's extensive misconduct, including the misappropriation of client funds); Eric Drogin, *Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Intervention*, 15 LAW & PSYCHOL. REV. 117, 146–57 (1991) (describing attorney discipline cases involving alcoholism); George H. Hettrick, *Addiction to Alcohol and Other Drugs: Recognizing the Signs of Lawyer Impairment*, B. EXAMINER, Aug. 1999, at 30, 33–34 (discussing how attorney alcoholism often results in financial irresponsibility and "borrowing" client funds); see also Benjamin et al., *supra* note 220, at 234–35; Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1410 (1988); Richard M. Marrano, *Appropriate Discipline for the Attorney-Addict*, 68 CONN. B.J. 368 (1994).

287. Report of the AALS Special Committee, *supra* note 185, at 50.

288. The study conducted by G. Andrew H. Benjamin and his colleagues found that 18 percent of a representative sample of attorneys in Washington state showed evidence of alcohol abuse or

appear to account for an even higher percentage of disciplinary complaints against attorneys: anywhere from 27 to 75 percent, according to estimates from the ABA and state bars.²⁸⁹ Minnesota's retrospective study of the bar applications of attorneys who were later disciplined suggests that applicants with substance abuse problems are more likely to commit disciplinary violations as attorneys. Twenty-seven percent of the disciplined attorneys (fourteen out of fifty-two) had indications of prior substance abuse—either DWI arrests or treatment—on their application forms.²⁹⁰

What we have seen so far clearly satisfies the relaxed scrutiny approach's criteria for allowing inquiries: a clear link between the symptoms of the disability and potential lawyer misconduct, and a characteristic symptom—denial—that justifies departing from the usual presumption that an attorney will respond appropriately if a disability impairs his or her ability to provide competent representation.²⁹¹ The progressive nature of addictive illness also supports the need for bar examiners to identify applicants with active substance abuse problems: In contrast with an intermittent and self-limiting disorder like depression, an applicant's chemical dependency is likely to continue and worsen if it is not addressed. Conditional admissions can serve a particularly useful role here. For substance abusers who are not getting treatment,

dependency; for those practicing twenty years or more, the rate was 25 percent. See Benjamin et al., *supra* note 220, at 236–41. A study based on structured interviews of fifty lawyers in one upstate New York county found alcohol abuse in 20 percent. See Krakowski, *supra* note 220, at 144, 146. In a nationwide survey of over 3000 lawyers conducted by the ABA in 1990, 13 percent reported having six or more drinks each day, and another 30 percent said that they consumed three to five drinks on a daily basis. See Ted Rohrlich, *Attorneys Report Big Jump in Drinking in ABA Survey*, L.A. TIMES, Dec. 5, 1990, at A5.

289. See ABA COMM'N ON IMPAIRED ATTORNEYS, AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES 1 (1991) (stating that state bars estimate that 40 to 75 percent of all disciplinary complaints stem from lawyer impairment); G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 118 (1992) (noting that ABA's Center for Professional Responsibility has reported that 27 percent of disciplinary cases nationwide involved alcohol abuse, and that surveys in New York and California showed 50 to 70 percent); Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 21 CAP. U. L. REV. 797, 813 (1992) (citing National Bar Council estimates that at least 50 to 60 percent of all client complaints are directly related to alcohol or substance abuse). It should be noted that no information concerning the methodology or scope of these surveys of lawyer discipline cases has ever been published.

290. See Baer & Corneille, *supra* note 153, at 6. Although the study is unclear on this point, this 27 percent figure appears to have been significantly higher than the percentage of all bar applicants who revealed preadmission substance abuse problems. The authors note that 20 percent of all applications disclosed "Category 1 or Category 2 conduct"—classifications that included a wide variety of problems (for example, arrests, academic misconduct, job terminations, loan defaults) in addition to substance abuse. *Id.* at 7.

291. See *supra* Part III.A.2.

the threat of license denial may be needed to overcome denial.²⁹² Monitoring provides incentives to stick with treatment and maintain abstinence for a period of time, which increases the likelihood of a successful recovery.²⁹³

The problem with diagnosis or treatment-based questions about substance abuse is that they are practically useless in identifying applicants with active, untreated substance abuse problems. Ask such a person whether he has, or has been treated for, a substance abuse problem, and denial virtually guarantees a "no" answer.²⁹⁴ Behavioral inquiries, in contrast, have proved quite effective. Without asking a status-based substance abuse question, California finds indications of substance abuse in hundreds of applications each year. The director of its admissions board has reported that nearly 10 percent of California bar applicants are subjected to further investigation on the basis of incidents that come to the committee's attention through the applicant's answers to behavioral questions and information provided by references, and in most such cases, there is information suggesting that substance abuse, usually of alcohol, was involved. Further screening results in some applicants being

292. See DSM-IV, *supra* note 174, at 189 (stating that when individuals with alcohol dependence become permanently abstinent, it is usually following a severe life stress such as "the threat or imposition of social or legal sanctions"); Bloom & Wallinger, *supra* note 286, at 1416-17 (noting that external motivating factors are often "necessary to overcome the alcoholic's denial and ambivalence towards treatment"); Braun, *supra* note 203, at 10 (arguing for conditional or deferred admission of untreated alcoholics, because an outright denial of admission "does nothing to bring the applicant into treatment," while an unconditional admission "encourages the applicant in denial to continue to ignore his disease and to believe that he has no need for treatment").

293. Evaluations of monitoring programs for impaired professionals have shown promising results, both in terms of treatment outcomes and public protection. See Benjamin et al., *supra* note 289, at 118 (according to a study of lawyers in Oregon's lawyer assistance program, while 60 percent had been charged with malpractice and 61 percent with disciplinary violations before entering the program, after one year of participation additional complaints dropped to 2 percent); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 274 (1992) (describing studies showing that 90 percent or more of participants in probation programs for impaired physicians, dentists and airline pilots avoided relapse, as compared with a 40 to 60 percent recovery rate for the general population); Braun, *supra* note 201, at 13 (stating that four out of forty in California's probationary program failed to comply with conditions); Marshall, *supra* note 169, at 36 (noting that twelve out of forty-nine bar applicants in Texas who were granted two-year probationary licenses because of chemical dependency relapsed during their probationary period); N.J. STATEWIDE PANEL REPORT, *supra* note 233 (stating that out of fifty New Jersey bar applicants monitored under conditional admission, none were involved in attorney discipline).

294. The Bar Examiners' Handbook acknowledges as much. See Jerome Braun, *Organization and Funding of a Character and Fitness Investigation*, in BAR EXAMINERS' HANDBOOK, *supra* note 204, at 73:1101, :1105 ("You can certainly ask the applicant if [he is an abuser], but that is rarely productive of a useful answer. . . . One must look to sources other than the applicant to determine whether he or she is an abuser."). See also Marshall, *supra* note 169, at 31, 35, in which the Texas Law Examiners' longtime director of screening advocates using behavioral signs, such as arrests, as a trigger for substance abuse evaluation, and makes no claim for the efficacy of direct questions about substance abuse.

referred for an evaluation by an addiction professional, and, if current dependency is found, the imposition of conditions.²⁹⁵

The approach taken by the National Conference of Bar Examiners is also revealing. Although the NCBE character form asks about past diagnosis or treatment for certain mental illnesses, there is no comparable question about substance abuse. Instead, the NCBE relies on the following question, which focuses on behavior caused by alcohol or drug use:

Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority? If you answered yes, furnish a thorough explanation below . . .²⁹⁶

If substance abuse is the disability that is most clearly relevant to bar admissions, it also is the one most likely to produce behavioral manifestations that can be picked up in other ways.

The applicants who are most likely to be missed by behavioral inquiries, but identified through questions about diagnosis or treatment, are those who have recognized a substance problem and sought help for it. Clearly, these are not the people whom examiners need to be most concerned about. Bar examiners may have a legitimate interest in identifying some applicants who are no longer abusing alcohol or drugs. If the substance abuse ended recently, a period of monitoring may be appropriate, because there is a high risk of relapse during

295. See Braun, *supra* note 201, at 11–12, 14. Sources of information that lead the committee to investigate possible alcoholism include DWI convictions, other crimes or traffic violations in which arrest or accident reports indicate signs of drinking, and employers who report problems that may be substance-related. See *id.* at 12. After the screening process is completed, applicants who are found to have current, unaddressed substance abuse problems may be offered the opportunity to participate in California's abeyance program (deferred admission after a monitored probationary period). During the program's first four years of operation, forty-two applicants were identified for inclusion in the abeyance program. See *id.* at 12–13.

296. NCBE CHARACTER REPORT, *supra* note 10, at 13. This is essentially a conduct-based question, although from the strict scrutiny perspective it can be faulted for asking only about disability-related defenses. Cf. *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670, WL 413016, at *8 (D.N.J. Oct. 5, 1993) (holding that a question that asked only about terminations that stemmed from a disability violated ADA). That problem, of course, could easily be fixed by broadening the question to cover all defenses. In addition to this question, the NCBE uses a self-assessment question asking about any condition, including substance abuse, that currently affects the applicant's ability to practice law. See NCBE CHARACTER REPORT, *supra* note 10, at 12.

the early stages of recovery.²⁹⁷ But it is the utility of uncovering this subset of cases, and not the more crucial task of detecting untreated addiction, that must be placed in the balance against the questions' potential for deterring treatment.

The AALS's national survey of law students, as previously discussed, shows that the prospect of disclosure to bar examiners significantly dampens students' willingness to seek counseling for a substance abuse problem or to refer their friends for help.²⁹⁸ This should be cause for great concern, because patterns of problem drinking that develop in law school contribute to the legal profession's high rate of alcoholism. For example, a study in Arizona found that the percentage of law students who felt concerned about their recent use of alcohol was 8 percent before entering law school, but rose to 15 percent after the first year and to 24 percent by the end of the third year.²⁹⁹ The legal profession's approach to attorneys who develop chemical dependency problems is premised on the idea that public protection is better served by guaranteeing confidentiality than by requiring disclosure. Lawyer Assistance Programs (LAPs), which have been established in every state, offer help to those who self-refer and conduct confidential interventions with attorneys whose impairment is reported to the LAP by a colleague. Their policy of strict confidentiality is backed by a 1991 amendment to the *Model Rules of Professional Conduct*, which exempts lawyers and judges serving on an LAP

297. See Hettrick, *supra* note 286, at 34 (arguing that conditional admission with regular monitoring is warranted for applicants "in early or fragile recovery"). This justification can support only time-limited inquiries, not "have you ever" type questions. See *infra* text accompanying notes 302–305 (discussing appropriate time frame if inquiries are allowed).

298. See *Report of the AALS Special Committee*, *supra* note 185, at 55. Only 3.3 percent of the surveyed law students acknowledged that they personally needed help with a substance abuse problem. See *id.* at 43. However, it is reasonable to infer from the survey results that a significant number of those students are held back from seeking help by confidentiality concerns, and there is a good deal of anecdotal evidence indicating that such deterrence occurs with some frequency. See *id.* at 55; see also Distelhorst, *supra* note 186, at 25; *supra* note 186 and accompanying text. The AALS survey also found that 37 percent of law students knew of classmates whose performance was impaired by substance abuse, and students reported that they are less likely to refer their peers for counseling because of their concerns about bar officials' access to the information. See *Report of the AALS Special Committee*, *supra* note 185, at 43, 55.

299. See Benjamin et al., *supra* note 220, at 238, 240. The AALS's national law student survey also found significantly higher rates of frequent or recent alcohol use in third-year law students, as compared with first- and second-years. Overall, 11.7 percent of law students said that they felt that they had abused alcohol since entering law school, 13.2 percent said that substance abuse had affected their class attendance, and 32.2 percent admitted to driving under the influence of alcohol or drugs in the past year. See *Report of the AALS Special Committee*, *supra* note 185, at 41–43; see also John M. Burman, *Alcohol Abuse and Legal Education*, 47 J. LEGAL EDUC. 39, 42–43 (1997) (discussing how alcohol permeates law school culture, and describing results of a 1995 survey of students at fifteen law schools showing widespread alcohol use and related problems).

from the obligation of reporting professional misconduct.³⁰⁰ It is difficult to justify not offering the same assurances to law students.³⁰¹

Status-based substance abuse questions probably achieve no net gain in public protection. They fail to add in any appreciable way to the ability of bar examiners to detect the untreated problems that pose the greatest risk. Such questions may be helpful in identifying some applicants receiving treatment who could benefit from continued monitoring, but come at the cost of preventing some students with active substance abuse problems from getting treatment in the first place. Even under the relaxed scrutiny version of the ADA's necessity test, the case for the questions is doubtful. The burden should be on the proponents of such questions to show that a *substantial* number of cases of questionable fitness could not have been detected without them, enough so that the benefits plausibly outweigh the costs of deterrence.

If questions about diagnosis or treatment for substance abuse can be justified, the issue of narrow tailoring remains. What is a reasonable time frame? A question going back one year should be sufficient to identify applicants who are in early, unstable recovery. The DSM-IV notes that the risk of relapse is particularly high during the first twelve months after dependence, and applies the designation "sustained full remission" to those who make it through a year without any return to alcohol or drug abuse.³⁰² The ADA's provisions on substance abuse also suggest the appropriateness of a one-year limitation. The statute and regulations distinguish between individuals currently engaging

300. See MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (1983); Benjamin et. al, *supra* note 289, at 118–24; *Report of the AALS Special Committee*, *supra* note 185, at 46–47, 53–54; Hettrick, *supra* note 286, at 34.

The confidentiality premise also underlies national policy on substance abuse treatment. Federal law provides confidentiality protections for alcohol and drug abuse treatment information that are more stringent than most healthcare privacy protections, in order to encourage people to seek treatment. See 42 U.S.C. § 290dd-2 (1994); 42 C.F.R. § 2.3(b)(2) (2000) (stating that regulations are "intended to insure that an alcohol or drug abuse patient . . . is not made more vulnerable by reason of the availability of his or her patient record than an individual who has an alcohol or drug problem and who does not seek treatment"); see also Richard C. Boldt, *A Study in Regulatory Method, Local Political Cultures, and Jurisprudential Voice: The Application of Federal Confidentiality Law to Project Head Start*, 93 MICH. L. REV. 2325, 2330–34 (1995) (discussing the history, purposes and scope of the confidentiality law).

301. See *Report of the AALS Special Committee*, *supra* note 185, at 56; Distelhorst, *supra* note 186, at 24–25; Linda J. Haynes, *Between a Rock and a Hard Place: The Ethical Obligation of a Law School Professor or Dean to Report Substance Abuse Problems of a Student Versus the Need to Help the Student*, B. EXAMINER, May 1994, at 35, 40–41; Ken Myers, *Dilemma of Drugs on Campus*, NAT'L L.J., Mar. 22, 1993, at 1.

302. DSM-IV, *supra* note 174, at 179–80, 189. Relapses are common, even after a period of sustained full remission. See *id.* But bar examiners do not purport to deny admission, or even to impose conditional admission, on applicants who are in stable recovery, simply based on the statistical likelihood of future relapse, nor would it be appropriate to do so. See *supra* notes 204–205 and accompanying text.

in the illegal use of drugs, who are not protected, and those who have been abstaining long enough so that drug use cannot reasonably be viewed as an ongoing problem.³⁰³ Legislative history and court decisions interpreting these provisions indicate that drug use in the prior days, weeks or months can support an inference of current, ongoing use, but never suggest a period longer than one year.³⁰⁴ A one-year time frame would lessen, although not eliminate entirely, the effects of deterrence; students who address a substance abuse problem early enough in their law school careers would not have to disclose. If such questions are to be allowed, it is also essential—for the reasons previously discussed in connection with bipolar disorder—that applicants be informed that a finding of recent substance abuse is likely to result in a conditional admission rather than rejection.³⁰⁵

IV. THE DANGERS OF PROCESS DISCRIMINATION: WHY THE BAR ADMISSION PROCESS NEEDS TO BE REFORMED IF DISABILITY INQUIRIES ARE TO BE ALLOWED

Courts, bar examiners and critics of disability questions have generally treated the ADA's implications for bar application inquiries in either/or terms: Either the ADA allows certain questions on the forms, or it does not. If a ques-

303. See 42 U.S.C. § 12,210 (1994) (defining "individual with a disability" to protect a person who is no longer using drugs and is participating in or has completed a rehabilitation program, or who is otherwise rehabilitated, but the definition does not extend to a person "who is currently engaging in the illegal use of drugs"); 28 C.F.R. § 35.104 (2000) (defining "current illegal use of drugs" as "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem").

304. See H.R. CONF. REP. NO. 101-596, at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 573 (stating that the term "currently engaging" is not intended to be limited to use of drugs "on the day of, or within a matter of days or weeks before, the . . . action in question"); *Zenor v. El Paso Healthcare Sys.*, 176 F.3d 847, 856 (5th Cir. 1999) (stating that current use may be inferred from use in the prior "weeks and months"); *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997) (same); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995) (same); *Quigley v. Austeel Lemont Co.*, 79 F. Supp. 2d 941, 946 (N.D. Ill. 2000) (finding that one month is not sufficient to establish rehabilitation); *Baustian v. Louisiana*, 910 F. Supp. 274, 276-77 (E.D. La. 1996) (finding that seven weeks is not sufficient); *McDaniel v. Miss. Baptist Med. Ctr.*, 877 F. Supp. 321, 327-28 (S.D. Miss. 1995) (finding that two to three weeks is not sufficient). Largely for this reason, New Jersey opted for a one-year time limit when it narrowed its substance abuse inquiry in 1995. See N.J. STATEWIDE PANEL REPORT, *supra* note 233.

305. See *Report of the AALS Special Committee*, *supra* note 185, at 78 (urging examiners to limit inquiries to recent information, and to promulgate and publicize policies of admitting recovering substance abusers, to lessen disincentives to seeking treatment); *Distelhorst*, *supra* note 186, at 26 (noting that putting a three-year time limit on inquiries would not accomplish the goal of encouraging law students to seek treatment, and urging bar examiners to publish clear policies explaining how recovering abusers will be treated).

tion passes the necessity test and is permissible, the ADA is seen as regulating the ultimate outcome—decisions to deny admission or to impose conditions must not be discriminatory—but not the *process* by which bar examiners reach those decisions. In this part, I argue that the ADA in fact has a great deal to say about how the bar admissions process must be structured when disability inquiries are used. The ADA's employment title allows disability inquiries under certain circumstances, but only if the selection process is designed in a way that minimizes stigma and the danger that people with disabilities, regardless of the outcome, will be demeaned by the process.

I start, in Part IV.A, with an analysis of the provisions in Title I of the ADA regulating disability inquiries by employers. The next section explains why Title II should be construed to incorporate Title I's basic safeguards when a public entity conducts a licensing process that is functionally similar to employment screening. (Part IV.B.) Part IV.C examines the dangers of stigma and discriminatory process in bar admissions proceedings, and concludes that these dangers are sufficiently acute, and comparable in nature to the evils addressed by Title I's inquiry provisions, to warrant the application of Title I's process protections. In the final section, I consider how the mechanisms that Title I mandates to minimize the risks of process discrimination in employment can be adapted to the functionally similar, but not identical, setting of bar admissions. I outline what a nondiscriminatory bar admissions process would look like, and address some practical problems in the implementation.

A. Title I and Employment Inquiries

Title I of the ADA, which covers employers, employment agencies, and unions,³⁰⁶ provides that the statute's "prohibition against discrimination . . . shall include medical examinations and inquiries."³⁰⁷ It then goes on to detail what kinds of examinations or inquiries are acceptable or barred. Pre-employment medical examinations and inquiries relating to the existence, nature, or severity of a disability are prohibited.³⁰⁸ However, an employer may require new hires to undergo a medical examination after an offer of employment has been extended, but before the employee starts

306. See 42 U.S.C. § 12,111(2) (1994).

307. *Id.* § 12,112(d)(1).

308. See *id.* § 12,112(d)(2)(A). Prior to an offer of employment, an employer may approach the subject of disability-related limitations only by asking applicants whether they are capable of performing job-related functions, or by requiring them to describe or demonstrate how they would perform tasks required for the job. See *id.* § 12,112(d)(2)(B); 29 C.F.R. § 1630.14(a) (2000).

work.³⁰⁹ The statute does not limit the scope of such examinations,³¹⁰ but provides that the results must be used in a manner that comports with the ADA: The job offer cannot be withdrawn unless the medical examination shows that the applicant is incapable of performing essential job functions.³¹¹

Once an employee has started working, the employer is prohibited from asking any disability-related questions or requiring a medical examination, "unless such examination or inquiry is shown to be job-related and consistent with business necessity."³¹² If an employer observes job performance problems and has reasonable grounds for believing that they are attributable to a medical condition, or has reason to believe that an employee has a condition which will affect her ability to do the job or endanger the safety of others, the employer may request medical documentation or require an examination.³¹³

Title I also regulates the manner in which disability information is gathered, maintained and disseminated. The statute conditions its allowance of some medical examinations and inquiries on the requirement that "information obtained regarding the medical condition or history of the applicant [or employee] is collected and maintained on separate forms and in separate

309. See 42 U.S.C. § 12,112(d)(3) (1994).

310. See 29 C.F.R. § 1630.14(b)(3) (2000) (stating that employment entrance medical examinations "do not have to be job-related and consistent with business necessity"). In contrast, only necessary and job-related inquiries or examinations are allowed for incumbent employees. See *infra* text accompanying note 312. The difference is the product of political compromise. An earlier version of the statute would have required employers to show that any criteria used to identify individuals with disabilities are necessary and substantially related to job performance. The business community was concerned with the expense and difficulty of "job-validating" all medical examinations and inquiries, but ultimately were willing to accept the concept for incumbent employees. See Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 535-37 (1991).

311. See 42 U.S.C. § 12,112(d)(3)(C) (1994); 29 C.F.R. pt. 1630, app. § 1630.14(b) (2000).

312. 42 U.S.C. § 12,112(d)(4)(A) (1994); see also 29 C.F.R. pt. 1630, app. § 1630.14(c) (2000) (stating that disability inquiries and medical examinations are allowed "when there is a need to determine whether an employee is still able to perform the essential functions of his or her job"). As with pre-employment inquiries, employers are also permitted to ask employees questions that focus on "the ability of an employee to perform job-related functions" rather than on the existence, nature or severity of a disability. 42 U.S.C. § 12,112(d)(4)(B) (1994). The statute also authorizes employers to offer voluntary medical examinations as part of an employee health program. See *id.*

313. See Equal Employment Opportunity Comm'n, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA* (July 26, 2000), reprinted in Fair Empl. Prac. Man. (BNA) 405:7701, 7708-11. For example, an employer may: request an employee whose excessive absenteeism has resulted in poor job performance to submit to a medical examination, see *Yin v. California*, 95 F.3d 864, 868 (9th Cir. 1996); require medical documentation of an employee's functional abilities before allowing him to return to work after a back injury, see *Porter v. U.S. Alumoweld Co.*, 125 F.3d 243, 246 (4th Cir. 1997); refer a police officer who displays hostile and paranoid behavior on the job for a psychiatric evaluation, see *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999); or seek confirmation of an employee's medical condition after a coworker has provided reliable information that the employee may have a contagious airborne disease, see Equal Employment Opportunity Comm'n, *supra*, at 405:7710.

medical files and is treated as a confidential medical record . . . ”³¹⁴ The availability of this information to nonmedical personnel is strictly limited. Title I authorizes only three exceptions to the confidentiality rule: “supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;” first aid and safety personnel may be given information about conditions that may require emergency treatment; and information may be provided to government officials investigating ADA compliance.³¹⁵ Thus, when an employer requires an employee to undergo a medical examination, the employer cannot demand access to the employee’s entire medical history; only the physician’s assessment of whether the individual is currently capable of performing job duties, and the medical information directly relevant to that assessment, should make it to the employer’s desk.³¹⁶ Similarly, medical information gathered from job applicants may be disclosed to decisionmakers in the hiring process only on a need-to-know basis.³¹⁷

314. 42 U.S.C. § 12,112(d)(3)(B) (1994); see also *id.* § 12,112(d)(4)(C); 29 C.F.R. § 1630.14(c)(1) (2000) (requiring medical information obtained from employees to be subject to the same record-maintenance and confidentiality requirements that the statute sets forth for applicants).

315. 42 U.S.C. § 12,112(d)(3)(B)(i) (1994); see *Cossette v. Minn. Power & Light*, 188 F.3d 964, 967–70 (8th Cir. 1999) (stating that a supervisor’s disclosure of information obtained through an employee medical examination to the employee’s coworkers and a prospective employer may violate Title I’s confidentiality provisions); *Downs v. Mass. Bay Transp. Auth.*, 13 F. Supp. 2d 130, 141–42 (D. Mass. 1998) (holding that an employer violated ADA’s confidentiality provisions by giving its workers’ compensation claims representative unlimited access to documents in a job applicant’s medical file). Other provisions of the ADA, located outside of Title I but applicable to the entire statute, may be read to authorize certain disclosures for insurance or workers compensation purposes. See 42 U.S.C. § 12,201 (1994); 29 C.F.R. pt. 1630, app. § 1630.14(b) (2000); Equal Employment Opportunity Comm’n, *supra* note 127, at 405:7217–7218.

316. See *Riechmann v. Cutler-Hammer, Inc.*, 95 F. Supp. 1171, 1185–86 (D. Kan. 2000) (holding that although an employer was within its rights when it required an employee who was returning from an extended leave under medical restrictions to undergo a medical examination, it violated the ADA by seeking unnecessary information from the doctor, including what medication the employee was taking and whether she was receiving counseling); Equal Employment Opportunity Comm’n, *supra* note 313, at 405:7701, :7715 (stating that an employer generally “cannot request an employee’s complete medical records because they are likely to contain information unrelated to whether the employee can perform his/her essential functions or work without posing a direct threat”).

317. The section on “Confidentiality” in the EEOC’s *Enforcement Guidance on Pre-Employment Inquiries* provides:

Medical information obtained in the course of a post-offer medical examination or inquiry may be provided to and used by appropriate decision-makers involved in the hiring process in order to make employment decisions consistent with the ADA. . . . The employer may only share the medical information with individuals involved in the hiring process who need to know the information.

Equal Employment Opportunity Comm’n, *supra* note 127, at 405:7216–7217. The statutory requirements that the information be contained in a “confidential medical record,” and that supervisors or managers be informed only of relevant work restrictions or accommodation needs, support the EEOC’s interpretation. See *supra* text accompanying notes 314–315. It is also significant that the

The purposes of these restrictions, and the nature of the discrimination they are designed to combat, are illuminated by the ADA's legislative history and reflected in the statute's structure. Congress was concerned both with *discriminatory outcomes* and *discriminatory processes*. The prohibition of pre-employment inquiries was designed in part as a safeguard against pretextual denials of employment:

Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer—before their ability to perform the job was even evaluated.

In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with a prohibition on pre-offer medical examinations or inquiries.³¹⁸

At the same time, Congress recognized that medical examinations may legitimately serve "the employer's need to discover possible disabilities that do, in fact, limit the person's ability to do the job."³¹⁹ Title I's deferral of disability inquiries until after an offer has been made lessens the risk that conscious or unconscious bias will taint the selection decision. The two-stage process also ensures that an employer will not be able to hide the fact that it is rejecting an applicant for medical reasons.³²⁰

ADA's inquiry provisions authorize only a "medical examination" for new hires. For incumbent employees, the statute allows both examinations and inquiries. See 42 U.S.C. § 12,112(d)(3) & (4) (1994). The statutory requirement that the assessment of applicants be conducted through a "medical examination" suggests that Congress intended that any general medical information gathered through this process remain in the hands of medical personnel who are competent to assess it. See H.R. REP. NO. 101-485(II), at 73-74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355-56 (assuming, in ADA committee report's discussion of employment entrance medical examinations, that any fitness determination will be made by an "examining physician").

318. H.R. REP. NO. 101-485(II), at 72-73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355; *see also* H.R. REP. NO. 101-485(III), at 42-43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465; S. REP. NO. 101-116, at 39 (1989).

319. H.R. REP. NO. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355.

320. The EEOC notes in its *Enforcement Guidance* that applicants have in the past been asked about their medical conditions at the same time they were completing other parts of the application process, such as submission of a written application or resume. If an applicant who disclosed a disability was then rejected, s/he would not necessarily have known whether the rejection was due to the disability, or due to some other criterion (e.g., insufficient skills or experience). Accordingly, Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical conditions.

Equal Employment Opportunity Comm'n, *supra* note 127, at 405:7194; *see also* Feldblum, *supra* note 310, at 531-32.

The stigmatizing effect of disclosure is the second concern that underlies Congress's decision to treat disability inquiries as a form of discrimination. The ADA's committee reports discuss the example of an employer requiring a test for cancer when an employee starts losing his hair: "While the employer might argue that it does not intend to penalize the individual, the individual with cancer might object merely to being identified, independent of the consequences. As was made abundantly clear before the Committee, being identified as disabled often carries both blatant and subtle stigma."³²¹ Unwanted disclosure, whether of the existence of a disability or of the details contained in medical records, can be intrinsically embarrassing; it can also affect the way in which an applicant or employee is treated, even if she is not denied employment. An interviewer may become uncomfortable, or make patronizing or ignorant comments. Coworkers may avoid the individual or treat her condescendingly.³²² When Congress determined that a "prohibition against inquiries regarding disabilities is critical to assure that bias does not enter into the selection process,"³²³ it was as much concerned with discrimination in the process as it was with discriminatory exclusions.

A large part of Title I's restrictions on examinations and inquiries are aimed at process discrimination. The ban on pre-employment inquiries is not only a prophylactic against pretextual decisions to deny employment; it helps to ensure that applicants will not be stigmatized or demeaned during interviews or on job application forms. The provisions authorizing examinations and inquiries were crafted to minimize stigma and embarrassment by placing the process in the hands of medical personnel, with strict limitations on the availability of the information to others in the employer's organization. After hiring, the business necessity requirement safeguards against unwanted disclosures by ensuring that disability will become an issue only if the employee raises it (for example, by seeking an accommodation) or if performance concerns bring fitness into question.

321. H.R. REP. NO. 101-485(II), at 75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 357-58; *see also* S. REP. NO. 101-116, at 39-40 (1989). Several courts have recognized that combating the stigmatic effect of inquiries and examinations was an important part of the Congressional purpose in enacting these provisions. *See Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 812 (6th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998); *EEOC v. Prevo's Family Market, Inc.*, 135 F.3d 1089, 1094 n.8 (6th Cir. 1998).

322. *See, e.g., Cossette v. Minn. Power & Light*, 188 F.3d 964, 967 (8th Cir. 1999) (describing plaintiff's allegations that her coworkers treated her in a patronizing way after her supervisor told them that she had a back impairment that required lifting restrictions and had been tested for dyslexia).

323. H.R. REP. NO. 101-485(II), at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355.

B. The Relevance of the Title I Inquiry Provisions to the Interpretation of Title II

What impact should Title I's detailed regulation of employment inquiries have on the legality of licensing disability questions under Title II? As discussed earlier in this Article, courts have rejected the argument that the absence of a specific prohibition on inquiries from Title II means that the ADA allows licensing boards to ask whatever they want.³²⁴ The statute and its legislative history provide strong support for just the opposite inference: that Title II to some degree incorporates Title I's approach to disability inquiries.³²⁵ The committee reports on the ADA indicate that Congress intended the undefined term "discrimination" in Title II to reach all forms of discrimination that are "identical" or "comparable" to the discriminatory practices listed in other titles.³²⁶ Title

324. See *supra* Part II.A.2.

325. If one were writing on a clean slate, a strong argument could be made that Title I, by its own terms, applies to the screening conducted by bar examiners. Title I applies to any "employer" or "employment agency," 42 U.S.C. § 12,111(2) & (5) (1994), terms imported from Title VII of the Civil Rights Act of 1964. See *id.* § 2000e(b) & (c). Early Title VII cases broadly construed these terms to reach any kind of entity that exercises significant control over access to employment opportunities. See, e.g., *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973) (regarding a hospital that controls patient referrals to a nonemployee nurse); *Puntolillo v. N.H. Racing Comm'n*, 375 F. Supp. 1089, 1091-92 (D.N.H. 1974) (regarding a state board that confers license needed by driver-trainers to race).

Although bar examiners control access to employment as a lawyer, courts, with little analysis, have refused to extend the logic of the *Sibley* line of cases to race discrimination claims brought against bar examining boards. See *Woodard v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975); *Delgado v. McTighe*, 442 F. Supp. 725, 729-30 (E.D. Pa. 1977). It has been suggested that "the real, but usually undisclosed, reason that courts have refused to apply Title VII to state bar examination boards is the fear that Title VII would invariably require the invalidation of all bar examinations." W. Sherman Rogers, *The ADA, Title VII, and the Bar Examination: The Nature and Extent of the ADA's Coverage of Bar Examinations and an Analysis of the Applicability of Title VII to Such Tests*, 36 HOW. L.J. 1, 2 (1993). The decisions are well-entrenched, and have been relied on by federal appeals courts to defeat Title VII claims against a variety of state professional licensing boards. See *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1019-20 (5th Cir. 1990); *George v. N.J. Bd. of Veterinary Med. Exam'rs*, 794 F.2d 462, 463-64 (3d Cir. 1986); *Haddock v. Bd. of Dental Exam'rs of Cal.*, 777 F.2d 462, 463-64 (9th Cir. 1985); see also *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 579-84 (9th Cir. 2000) (en banc) (holding that Title VII applies to state certification exam for teachers, but only because the state exercises substantial control over the operation of local schools as well as controlling licensing). Given these precedents, it is unlikely that any court would find that Title I of the ADA directly applies to bar examining committees.

326. The report of the Senate Labor and Human Resources Committee states: "The forms of discrimination prohibited by [title II] are comparable to those set out in the applicable provisions of titles I and III of this legislation." S. REP. NO. 101-116, at 44 (1989). The House Judiciary Committee's report provides, "Title II should be read to incorporate provisions of titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation

I expressly states that medical examinations and inquiries are a form of "discrimination."³²⁷

In two of the licensing inquiry cases, courts have addressed a version of the incorporation argument raised by the licensing agency defendants.³²⁸ The argument runs like this: If Title II is read to incorporate Title I's requirements, then Title I's allowance of medical examinations of unlimited scope after a conditional job offer has been extended should translate into an entitlement for licensing agencies to ask any disability questions they want—as long as they defer them until after they made an initial decision about the applicant's fitness. Rejecting this argument, the court in *Medical Society of New Jersey v. Jacobs* noted that the legislative history is unclear about the extent of incorporation, and gives a court "little guidance in how to structure its meaning."³²⁹ Because Title I's more detailed provisions are geared specifically to the employment setting, and cannot be mechanically applied to the wide range of government activities covered by Title II, many of which have nothing to do with employment, the court found it better to rest its analysis entirely on Title II and its implementing regulations.³³⁰

Act of 1973" H.R. REP. NO. 101-485(III), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 474. A similar passage appears in the report of the House Education and Labor Committee:

The Committee has not chosen to list all types of actions that are included within the term "discrimination", as was done in titles I and III, because [title II] essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by [title II] be identical to those set out in the applicable provisions of titles I and III of this legislation.

H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

327. The section of Title I with the heading *Discrimination*, begins with a subsection entitled *General rule*, which contains a broad prohibition of "discriminat[ion] against a qualified individual with a disability" in matters relating to employment. 42 U.S.C. § 12,112(a) (1994). Subsection (d), which addresses medical examinations and inquiries, begins as follows:

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

Id. § 12,112(d)(1).

328. See *Med. Soc'y of N.J. v. Jacobs*, No. 93-3670, 1993 WL 413016, at *9-*10 (D.N.J. Oct. 5, 1993); *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489, 1493 n.5 (agreeing with analysis of the *Jacobs* court).

329. *Jacobs*, 1993 WL 413016, at *9-*10.

330. In rejecting the licensing board's argument, the court also pointed to a sentence in the House Education and Labor Committee report that immediately follows its statement about incorporation: "Thus, for example, the construction of 'discrimination' set forth in [42 U.S.C. § 12,112](b) and (c) . . . should be incorporated into the regulations implementing [Title II]." H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The court cited the absence of subsection (d)—Title I's inquiry provision—from this cross-reference as evidence that inquiries may not have been one of the forms of discrimination that Congress had in mind. The court also thought that the language of this sentence suggests that any incorporation of Title I is to be accomplished through the Title II regulations. Neither of these points is particularly convincing. The committee's list of

The *Jacobs* court was right in concluding that not every requirement of Title I can be applied to every Title II situation. It would make little sense, for example, to prohibit disability-based questions on an application form for disability benefits. Moreover, with regard to the particular argument advanced by the licensing board, to allow post-offer medical inquiries of unlimited scope would conflict with the Title II regulations, which "prohibit the imposition of extra burdens on qualified individuals with disabilities when those burdens are unnecessary."³³¹ Title II clearly cannot incorporate any aspect of Title I that is inconsistent with its own requirements.

Title I, however, should not be ignored as an important guide for assessing what discrimination means in a setting that is closely analogous to employment: occupational licensing. As the Rhode Island Supreme Court noted in its decision invalidating disability-based bar application questions, "the procedures required for admission to the bar are the functional equivalent of a hiring process and . . . the committee operates as the equivalent of an employer when it screens applicants."³³² The ADA's legislative history is clear and consistent in stating that the undefined term "discriminate" in Title II is meant to address the basic forms of discrimination identified in other titles, even if the precise contours of incorporation are left unclear.³³³ Title I defines inquiries and examinations relating to disabilities as discriminatory unless they are accompanied by adequate safeguards designed to minimize stigma and discriminatory treatment. The particular safeguards that are needed may vary in different settings, but that is no reason to read one of the central messages of Title I's definition of "discrimination" out of Title II entirely. The determination of whether the use of disability

examples from Title I did not purport to be exclusive. Although the committee did state that the Title II regulations should incorporate provisions from other titles, the main thrust of the statements about incorporation in this committee report, as well as in the reports of two other committees, was that the general term "discrimination" in Title II should be read to encompass the basic forms of discrimination set forth elsewhere in the ADA. See *supra* note 326 (quoting the reports).

331. *Jacobs*, 1993 WL 413016, at *7 (summarizing the requirements of the Title II regulations). In this regard, it is also significant that the absence of any limitation on the scope of post-offer examinations under Title I is the result of political compromise; it can be regarded as an exception to, rather than an application of, Title I's general principles. See *supra* note 310.

332. *In re* Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996). Although the court made this observation after noting Title I's requirements in the employment setting, its decision appeared to rest on the Title II regulations rather than on Title I. To assess the legality of the bar examiners' questions, the court articulated a test to determine whether such inquiries are necessary. See *supra* text accompanying note 145. If the court thought that Title I applied, it could simply have held that disability questions are never permissible at the application stage. But see Diane M. Jeffers, *Professional Responsibility-Questions on Rhode Island Bar Application Violate Americans with Disabilities Act*, 31 SUFFOLK U. L. REV. 779, 786-87 (1998) (noting that the court's decision did not clearly state whether the questions constituted a violation under Title I or under the Title II regulations).

333. See *supra* note 326 (quoting statements from three committee reports).

inquiries in a nonemployment selection process is discriminatory should depend on an assessment of whether the process involves dangers of discrimination similar to those at which Title I's inquiry provisions are aimed. If so, safeguards analogous (although not necessarily identical) to Title I's employment-specific procedures should be required.³³⁴

Some commentators have argued that Title I's policy of prohibiting all pre-employment inquiries about disability supports an interpretation of Title II that would ban all disability-based questions in the licensing application process.³³⁵ The problem with this argument is that Title I *allows* employers to use medical examinations as part of the screening process as long as certain safeguards are in place, and its legislative history acknowledges that employers may have a legitimate need to probe into disabilities.³³⁶ The policy of Title I is not inconsistent with a Title II approach that allows some disability-based inquiries by licensing agencies. But Title I's acceptance of disability-based questions is coupled with a second, crucial insight: The use of disability-based inquiries is discriminatory unless the selection process is structured in a manner that minimizes stigma and the risk of discriminatory treatment. The courts that have allowed disability questions in bar admissions under the relaxed scrutiny approach have ignored what Title I has to say about the meaning of discrimination.

C. Are Title I-Type Procedures Appropriate to Bar Admissions?

Some of the concerns that led Congress to restrict employment inquiries under Title I may be less of a problem when it comes to bar

334. There has been some judicial recognition that Title I's inquiry provisions should inform interpretation of Title II. In a case that arose before Title I's effective date, a federal district court held that Title I's medical examination and inquiry rules were fully applicable to a public employer's hiring by virtue of Title II. (Title II went into effect six months before Title I; both titles apply to the employment activities of public entities.) See *Downs v. Mass. Bay Transp. Auth.*, 13 F. Supp. 2d 130, 134-35 (D. Mass. 1998). A federal magistrate judge refused to dismiss a claim challenging an agency's refusal to provide vocational rehabilitation services to an applicant who refused to take a psychological examination, finding that medical examinations defined as discriminatory under Title I "may well be considered discrimination by entities providing services [under Title II]." *Kent v. Dir., Mo. Dep't of Elementary & Secondary Educ.*, 792 F. Supp. 59, 61 (E.D. Mo. 1992). The *Jacobs* court, while rejecting the particular incorporation argument raised by the defendant in that case, suggested that a reading of Title II that incorporates aspects of Title I's inquiry provisions but adapts them to different settings might be appropriate. "[I]f the inquiry provision is incorporated at all," the court wrote, "it does not function in the same way under Title II as under Title I." *Jacobs*, 1993 WL 413016, at *10.

335. See Coleman & Shellow, *supra* note 135, at 174-76; Carol J. Banta, Note, *The Impact of the Americans with Disabilities Act on State Bar Examiners' Inquiries into the Psychological History of Bar Applicants*, 94 MICH. L. REV. 167, 175-77 (1995).

336. See *supra* text accompanying note 319.

admission.³³⁷ Bar examiners, unlike employers, do not have a history of rejecting large numbers of applicants with disabilities—it is rare for them to deny admission to anyone.³³⁸ On those occasions when admission is denied, or a conditional admission imposed, examiners are less likely to hide the true reasons for their decisions. Unlike employers, bar examiners are required to justify their decisions, and they can't offer easy excuses like "you don't have enough experience" or "another applicant was better qualified." These factors limit the risk of one of the evils that Congress was concerned with—pretextual denials—and may affect what kinds of prophylactic procedures are needed.³³⁹ As we have seen, though, Title I is as much concerned with discriminatory process as with discriminatory outcomes.

The following sections examine the impact on the bar admissions process when bar examiners are allowed to ask questions about mental disabilities. The structure, functions, and history of bar examining boards, combined with the nature of the particular disabilities that have been singled out for scrutiny, pose dangers of stigma and discriminatory treatment that are similar to, and in some respects worse than, the harms that Title I is designed to guard against in the employment setting. Safeguards analogous to Title I's process protections are needed before disability inquiries can be considered nondiscriminatory in the bar admissions setting.

1. Stigma

*Stigmatization of people with mental disorders has persisted throughout history. It is manifested by bias, distrust, stereotyping, fear, embarrassment, anger, and/or avoidance. Stigma leads others to avoid living, socializing or working with, renting to, or employing people with mental disorders, especially severe disorders such as schizophrenia. . . . It reduces patients' access to resources and opportunities (for example, housing, jobs) and leads to low self-esteem, isolation, and hopelessness. It deters the public from seeking, and wanting to pay for, care. In its most overt and egregious form, stigma results in outright discrimination and abuse. More tragically, it deprives people of their dignity and interferes with their full participation in society.*³⁴⁰

337. See Fedo & Brown, *supra* note 106, at 41–42; Reischel, *supra* note 115, at 19 (arguing that differences between employment screening and bar examiners' character and fitness assessments make the policies underlying Title I's ban on inquiries inapplicable to bar admissions).

338. See *supra* note 170.

339. However, in some circumstances there is a significant risk of pretextual treatment in the bar admissions setting. If bar examiners are aware of an applicant's mental disability, they may react more negatively to other problems disclosed on the application form. See *infra* text accompanying notes 405–409.

340. SURGEON GENERAL'S REPORT, *supra* note 36, at 6 (citation omitted).

Recall the words that Kathleen Flaherty heard muttered by a member of her character and fitness panel: "Are you violent?"³⁴¹ Widespread and deeply rooted societal prejudices about mental illness and substance abuse intensify the embarrassment that applicants feel when they are forced to identify themselves, and such prejudices enhance the risk that applicants will encounter discrimination or demeaning treatment as they go through the process. The narrowing of mental health inquiries on bar application forms to hone in on "serious" mental illnesses such as schizophrenia and bipolar disorder has, if anything, increased the stigma for applicants who answer "yes."³⁴²

The idea of mental illness stirs up some of the deepest fears of human beings: the loss of reason and self-control.³⁴³ From the earliest times, mental illness has been associated with violence, divine punishment, and demonic possession.³⁴⁴ By the late nineteenth century, these were joined by notions of degeneracy, defective character, and deviance.³⁴⁵ Surveys tracking public attitudes over the last fifty years have shown some significant increases in public understanding of mental illness, but at the same time reveal a remarkable persistence in misconceptions and social stigma.³⁴⁶ Surveys conducted in the 1990s showed that 70 percent of the public felt that there was a stigma attached to admitting a mental illness.³⁴⁷ The percentage of respondents who

341. See *supra* text following note 87. The comment was off-the-record and is not reflected in the transcript of the hearing. Undoubtedly, the member of the committee would deny having made it, although Ms. Flaherty is sure that she heard it. It is possible, of course, that she misheard. The mere fact that the applicant *thought* that she heard it reflects the reality of stigma: Anyone with a serious mental disorder has good reason to fear that people will view her through the lens of societal prejudices and react with fear, aversion, or discomfort.

342. In striking down a broad question about all mental health treatment during the past five years, the *Clark* court actually suggested that applicants receiving outpatient counseling were being stigmatized by their association, on the application form, with mental hospital patients and addicts! See *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 445 (E.D. Va. 1995) ("Requiring applicants to answer [the counseling question], especially considered in relation to the preceding and succeeding questions regarding drug or alcohol addiction and hospitalization for mental illness, suggests that those answering affirmatively are somehow deficient or inferior applicants.").

343. See Michael L. Perlin, On "Sanism," 46 SMU L. REV. 373, 389 (1992) (quoting SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* 23-24 (1985)).

344. See *id.* at 388-89; John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOLOGIST 511, 512 (1992).

345. See SURGEON GENERAL'S REPORT, *supra* note 36, at 6; see also Perlin, *supra* note 343, at 393-96 (describing stereotypes about mental illness that have become entrenched in social discourse).

346. See SURGEON GENERAL'S REPORT, *supra* note 36, at 7, 289; see also Frank Rich, *The Last Taboo*, N.Y. TIMES, Dec. 27, 1997, at A19 (arguing that Bruce Babbitt's admonition, "[d]on't go near a psychiatrist—it's the kiss of death," remains the rule for politicians).

347. Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders Under the Americans with Disabilities Act*, 42 VILL. L. REV. 723, 723 n.2 (1997) (describing results of a 1993 poll sponsored by *Parade Magazine*). In another survey, only 19 percent of respondents reported being "very comfortable" meeting someone with a mental illness, as compared with 47 percent for someone

associated serious mental illness with violence was much higher in 1996 than in the 1950s.³⁴⁸ Media portrayals of mental illness reinforce prevailing stereotypes and mirror their persistence. The EEOC's *Guidance on Psychiatric Disabilities and the ADA*,³⁴⁹ a generally cautious document,³⁵⁰ nonetheless attracted a firestorm of media criticism and ridicule when it was released in 1997. *Late for Work: Plead Insanity*, read a typical headline.³⁵¹ Television portrayals of ADA plaintiffs routinely depict them as malingerers demanding special treatment,³⁵² and images of homelessness and violence predominate when people with mental illnesses are portrayed in the news and on television dramas.³⁵³

Substance disorders carry their own set of negative associations. The medical model of addiction remains in tension with longstanding views of alcoholism and drug abuse as vices, the product of the addict's own moral failings and lack of willpower. Public attitudes and policy have been marked

who is blind and 59 percent for someone in a wheelchair. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT 35 (1994); see Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 390 n.225 (1997) (describing results of Louis Harris survey); see also SURGEON GENERAL'S REPORT, *supra* note 36, at 7 (describing a 1996 survey in which respondents showed a greater desire for social distance from a person with schizophrenia, less for someone with depression, and still less for someone who was worried and unhappy but not mentally ill).

348. See SURGEON GENERAL'S REPORT, *supra* note 36, at 7. Among those respondents who defined mental illness to include psychosis, the percentage who mentioned violence when describing mental illness rose from 13 percent during the 1950s to 31 percent in 1996. See *id.*

349. Equal Employment Opportunity Comm'n, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997), reprinted in Fair Empl. Prac. Man. (BNA), *supra* note 127, at 405:7461.

350. The EEOC made it clear that employers are not required to tolerate poor performance or misconduct, even if caused by a disability. See *id.* at 405:7476-7478.

351. See Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 9-10 (2000) (quoting the above headline from the *Chicago Sun-Times* and similar ones from other newspapers, and reprinting an editorial cartoon depicting the EEOC coming to an employer's office to explain the new rules—using stock “lunatic” figures to portray the EEOC: a person wielding an axe, another with huge open-mouthed grin and lolling tongue, a figure dressed as an admiral, another totally naked).

352. See *id.* at 10 (describing television accounts of the ADA, including a *King of the Hill* episode in which an addict-employee and his advocate demand the right to come in late and do no work). See generally Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

353. See OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 347, at 32, 34; Monahan, *supra* note 344, at 513; see also James Endrst, “Wonderland” Worries Advocates, HARTFORD COURANT, Mar. 30, 2000, at D1 (including a comment by Laurie Flynn, Executive Director of the National Alliance for the Mentally Ill, criticizing a television network for airing a new series set in a psychiatric hospital for “focusing on ‘the most extreme hopeless cases’ who are depicted as ‘killers, crazies and freaks’”).

by harshly punitive approaches alternating with periods of relative tolerance.³⁵⁴ Stereotypes that link substance use and addiction to African Americans and other ethnic minorities have played a significant role in the periodic crusades against drugs and alcohol.³⁵⁵

The lawyers and judges who serve on bar admissions committees cannot be expected to be immune from the pervasive stereotypes that surround mental illness and substance abuse. As Michael Perlin has documented in his writings on "sanism," myths and prejudices about mental illness, and the deindividualization of persons with mental disabilities, remain deeply entrenched in the legal system and in the practices of courts and lawyers.³⁵⁶ Bar applicants who are forced to disclose mental disabilities to those who will pass on their fitness to practice the profession are acutely aware of the "blatant and subtle stigma" that these conditions carry; to an even greater degree than the employee with cancer discussed in Title I's legislative history, they have good reason to "object merely to being identified, independent of the consequences."³⁵⁷

2. Moral Character

The structure of the bar admissions process compounds the stigma by associating mental disability with issues of moral character. Mental health and substance abuse inquiries on bar application forms appear amidst a sea of questions that are overwhelmingly focused on uncovering evidence of

354. See MICHAEL MASSING, *THE FIX* 85–226 (1998); DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (expanded ed. 1987); Tim Edwards, *Constitutional Limits on an Employer's Right to Dictate the Terms of an Addict's Recovery Under the ADA: Some Sobering Concerns*, 44 WAYNE L. REV. 1679, 1684–90 (1999) (reviewing the history of social and legal attitudes towards addiction).

355. See MUSTO, *supra* note 354, at 5–8, 244–45 & *passim*. As David Musto has written, "The most passionate support for legal prohibition . . . has been associated with fear of a given drug's effect on a specific minority. Certain drugs were dreaded because they seemed to undermine essential social restrictions which kept these groups under control: cocaine was supposed to enable blacks to withstand bullets . . . and to stimulate sexual assault. . . . Alcohol was associated with immigrants crowding into large and corrupt cities."

Id. at 244–45. See generally MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995) (describing policymakers' indifference to the foreseeable disparate impact on African Americans in pursuing failed strategies in the contemporary War on Drugs).

356. See Perlin, *supra* note 343, at 373–75, 393–97, 400–05; see also Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth:" Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did, 10 J. CONTEMP. LEGAL ISSUES 3 (1999); Perlin, *supra* note 177, at 30–34; Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 442–46 (1995).

357. H.R. REP. NO. 101-485(II), at 75 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 358; see *supra* text accompanying notes 321–323 (discussing Title I's legislative history).

dishonesty, irresponsibility, or bad behavior. Connecticut's twenty-four-page, fifty-nine-question bar application form is typical. The questions cover criminal convictions; academic expulsion, probation, or discipline; discharges or forced resignations from employment; evictions; denials or removals of any occupational license; military discharge or discipline; default or arrearage on student loans; judgments entered in favor of creditors; problems relating to surety or fidelity bonds; motor vehicle violations and license suspensions; involvement as plaintiff or defendant in litigation; default or arrearage on any court-ordered obligation, including child support; and grievances filed against attorneys and judges.³⁵⁸ And, in the middle, a few questions about diagnosis or treatment for mental disorders or substance abuse. As State Senate President Kevin Sullivan put it in his letter to Connecticut's bar examiners, "Are these mental health-based questions now the equivalent of other questions asked about criminality, dishonesty, or moral turpitude?"³⁵⁹

Historically, formally, and functionally, certification of "good moral character" has been, and remains, central to the fitness screening performed by bar committees. The requirement of "good moral character" as a precondition to bar admission is universal in American jurisdictions and dates back to the early years of the Republic.³⁶⁰ A wave of bar admissions reforms that unfolded over a period extending from the late nineteenth century through the 1930s produced three central components that continue to be

358. See CONN. 2001 APPLICATION, *supra* note 19; see also NCBE CHARACTER REPORT, *supra* note 10 (covering a similar range of topics). In addition to the questions posed to applicants, questionnaires are sent to prior employers and personal references listed by the applicant, covering (albeit more concisely) the same general ground.

359. See Sullivan Letter, *supra* note 61. Applicants with disabilities certainly experience the questions, and the proceedings triggered by affirmative answers, as a questioning of their moral character. At Connecticut's public hearings on mental health inquiries, an applicant testified, "What I found particularly upsetting about the [mental health treatment] question was its underlying implication that . . . therapy . . . called into question one's moral character." Conn. Bar Examining Comm., *supra* note 48, at 4-5 (Sept. 28, 1994). James Roe similarly described his feelings about being summoned to a hearing after he disclosed his past hospitalization on the application form: "I became extremely angry that . . . a group of strangers had the audacity to question my fitness and moral character. I could not understand how there could be any logical link between one's moral character and mental health problems." Roe Testimony, *supra* note 73, at 2.

360. See 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 102 (1795); Rhode, *supra* note 17, at 493, 496-97. Through most of the nineteenth century, admissions screening in general, and the administration of the moral character requirement, was a casual affair. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 317-18, 652-53 (2d ed. 1985); THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT 186 (Dwight Loomis & J. Gilbert Calhoun eds., 1895). An attorney reminiscing about his examination in Illinois around 1858 recalled that the examiner had asked him a few desultory questions, regaled him stories about practice, and then scribbled out a note which read: "My dear Judge:—The bearer of this is a young man who thinks he can be a lawyer. Examine him if you want to. I have done so and am satisfied. He's a good deal smarter than he looks to be. Yours, Lincoln." Len Young Smith, *Abraham Lincoln as a Bar Examiner*, B. EXAMINER, Aug. 1982, at 35, 37.

the pillars of the system: strict educational prerequisites, written bar examinations administered by centralized state boards, and the active investigation of applicants' moral character through questionnaires and interviews.³⁶¹ In the 1970s and 1980s, when bar examiners began to pay attention to mental health issues, they incorporated these subjects into the existing machinery of moral character screening.³⁶² The same panels that scrutinize the fitness of applicants with mental disabilities simultaneously conduct hearings on moral fitness.³⁶³

That there is an essential difference between the admissions issues raised by disabilities and "moral character" concerns has not gone unnoticed by bar examiners. When the *Code of Recommended Standards for Bar Examiners* was revised in 1987, the drafters were careful to refer to this component of the process as "character and fitness screening."³⁶⁴ A member of Indiana's

361. See RICHARD L. ABEL, *AMERICAN LAWYERS* 46-73 (1989); Rhode, *supra* note 17, at 499. Starting in the late nineteenth century, newly organized bar organizations at both the state and national levels began to promote stricter admissions standards in reaction to threats to the profession's prestige arising from the proliferation of undemanding law schools, the entrance of immigrants into the profession, and corruption scandals. See ABEL, *supra*, at 44-46; THERON G. STRONG, *LANDMARKS OF A LAWYER'S LIFETIME* 159-61 (1914); see also *infra* note 403. Connecticut was at the forefront of this trend. One of the founding purposes of the State Bar Association, organized in 1875 by an elite group of Connecticut attorneys, was to make the admissions process uniform and more stringent. Simeon E. Baldwin, who led the association's efforts on bar admission, was also the principal organizer of the American Bar Association, founded in 1878. See *A History of the First One Hundred Years of the Connecticut Bar Association: 1875-1975*, 49 CONN. B.J. 201, 203-25 (1975). One of the concerns that drove him can be seen from this 1872 entry in his diary: "This constant contact at the Bar on terms of equality with boors and rogues, I hate." CHARLES C. GOETSCH, *ESSAYS ON SIMEON BALDWIN* 16 (1981) (quoting Baldwin's diary).

362. See *supra* note 29 and accompanying text; see also Baude, *supra* note 153, at 655-56.

363. In all areas other than mental health and morals, educational prerequisites and the bar exam are the mechanisms for ensuring that applicants have the ability to perform competently as lawyers.

364. Am. Bar Ass'n et al., *supra* note 188, § III. Earlier versions of the code had referred to the process as "moral character" investigation. See Sheldon D. Elliott, *Report on Standards for Bar Examiners*, 28 B. EXAMINER 59, 61-62 (1959). The distinction between moral and mental fitness found its first official expression in 1969, in the ABA's *Code of Professional Responsibility*: "An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability." MODEL CODE OF PROF'L RESPONSIBILITY EC 1-6 (1981); see Place & Bloom, *supra* note 29, at 580.

The term "fitness" had currency among bar examiners long before the 1980s, but it was not yet associated with issues of mental or emotional fitness that were distinct from moral character. New York, for example, defined the "general fitness" component of its requirement that applicants possess the "character and general fitness requisite for an attorney" as having to do "with a man's general experience in life, his family, his associates, his business or other experience, and his general reputation, and the like." Frederick A. Keck, *Remarks of Frederick A. Keck*, in 20 B. EXAMINER 238, 241-43 (1951).

admissions board, describing the hearing of a candidate with alcohol problems, explains the distinction these two words are supposed to express:

I started to see where this hearing was headed. We weren't talking about character. We were talking about fitness. The two are related but distinctly different. Good moral character generally connotes honesty, trustworthiness, integrity. Fitness to practice law, however, addresses the physical and mental suitability of an applicant to practice law. Does he have the emotional stability to function adequately as a lawyer?³⁶⁵

Nonetheless, the laws, regulations and terminology under which examiners operate continue to label applicants with mental disabilities as deficient in "morals" or "character." The regulations that govern character and fitness screening in Connecticut are a good example.³⁶⁶ All hearings, including those in which the sole concern is the applicant's mental illness or substance abuse, are conducted pursuant to procedural rules that characterize the issue to be decided by the committee as a determination of the applicant's "good moral character."³⁶⁷ Under the heading *Conduct that Creates a Rebuttable Presumption of Lack of Good Moral Character*, "[s]ubstance abuse not under control" is listed alongside of felony convictions and other bad acts.³⁶⁸ Similar regulatory labeling can be found in other states. In some jurisdictions, the committee's very name conveys the message of a moral character judgment: In California, it is the Subcommittee on Moral Character; in New Jersey and Maryland, the Character Committee.³⁶⁹

365. Jerome L. Withered, *Judging Fitness*, B. EXAMINER, Aug. 1991, at 15, 16; see also Baude, *supra* note 153, at 655-56.

366. See CBEC REGS., *supra* note 20, art. VI. These guidelines were drafted in 1990 by a Subcommittee on Character and Fitness, headed by a state court judge, and drew on the practices of other jurisdictions and the CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, *supra* note 189. See Conn. Bar Examining Comm., Report of the Subcommittee on Character and Fitness (1990).

367. CBEC REGS., *supra* note 20, arts. VI-3 & VI-5. The administrative director of the Connecticut Bar Examining Committee acknowledged in a 1994 deposition that the committee's "lack of good moral character" rules apply to applicants who are scrutinized solely on the basis of mental health issues. See Stamm Deposition, *supra* note 30, at 124-31 (June 8, 1994), at 239-40 (June 9, 1994). Seven years later, the same rules remain in place.

368. CBEC REGS., *supra* note 20, art. VI-11.

369. In California, the *Application for Determination of Moral Character* includes questions about mental illness. See COMM. OF BAR EXAM'RS OF THE STATE BAR OF CAL., OFFICE OF ADMISSIONS, APPLICATION FOR DETERMINATION OF MORAL CHARACTER 10 (Sept. 2000); see also *Statement on Moral Character Requirement for Admission to Practice Law in California*, at <http://www.calbar.org/shared/2adm-r1.htm> (last visited Sept. 12, 2001) (including a policy statement treating alcohol and drug dependency as an aspect of the good moral character requirement). Colorado's bar admission rules include a provision that reads as follows: "Applicants must demonstrate that they are mentally stable and morally and ethically qualified for admission. Fingerprints may be required of all applicants." COLO. R. CIV. P. 201.6(1). Georgia's rules and policies treat all

There is more going on here than the inertial persistence of outdated terminology in regulatory language. Fitness hearings are firmly linked with the "good moral character" standard in bar examiners' minds. A recent issue of the *Bar Examiner* leads off with a ringing defense of character and fitness screening from the NCBE's chairperson. "What is good character and fitness?" she asks.³⁷⁰ The answer she gives is devoid of any no-fault concept of fitness; instead, it is all about good moral character, the applicant's "honesty, fairness and respect for the rights of others and for the laws," and "transgressions or misconduct" that may place these in doubt.³⁷¹ Articles written by bar examiners about the character and fitness screening process, even when expressing "enlightened" views about mental illness or addiction, often lapse into referring to such matters as "moral character" problems.³⁷² Moral character is the

fitness issues, including those involving mental illness and substance abuse, as falling under the requirement that applicants possess the "integrity and character" requisite for lawyers. See GA. SUP. CT. R. GOVERNING ADMISSION TO PRACTICE OF LAW §§ 1, 6, 12; *Policy Statement of the Board to Determine Fitness of Bar Applicants Regarding Character and Fitness Reviews*, at <http://www2.state.ga.us/Courts/bar/barpolicy.htm>. In three of New York's four Judicial Departments, the only regulatory authority for Character and Fitness Committees to investigate applicants with fitness issues stemming from mental illness or substance abuse comes from court rules authorizing committee members to require candidates "to furnish such additional proofs of good character as the committee . . . member . . . may consider pertinent." 22 N.Y.C.R.R. §§ 602.1(d), 805.1(d), 1022.34(d). Virginia evaluates fitness issues for applicants with disabilities under a set of rules entitled *Character Requirements*. See *Clark v. Va. Bd. of Bar Exam'ts*, 880 F. Supp. 430, 432 (E.D. Va. 1995); see also N.J. STATEWIDE PANEL REPORT, *supra* note 233 (stating that the Committee on Character is responsible for determining the fitness of candidates who disclose mental health or substance abuse problems); Herr, *supra* note 6, at 695 (reprinting Maryland form authorizing release of information relating to applicant fitness to the court's "Character Committees"). For an example of a court rule that is careful to distinguish mental fitness from moral character, see KY. SUP. CT. R. 2.012.

370. Kathryn E. Ressel, *Letter from the Chair*, B. EXAMINER, May 1998, at 2.

371. *Id.* at 2-3. The *Code of Recommended Standards for Bar Examiners* similarly defines the character and fitness concept solely by reference to conduct and character deficiencies:

Standard of Character and Fitness. A lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission.

Am. Bar Ass'n et al., *supra* note 188, at standard 12. See also CBEC REGS., *supra* note 20, art. VI-2, VI-4 (using similar language to define the "standard of character and fitness" applied by the Committee).

372. See McChrystal, *supra* note 257, at 96 (noting that boards may deny admission "on moral character grounds" based on an applicant's "mental or emotional instability"); C. Graham Carothers, *Character and Fitness: A Need for Increased Perception*, B. EXAMINER, Aug. 1982, at 25 (discussing "good moral character" as the principle underlying all of the Florida board's fitness screening); Lawrence B. Custer, *Georgia's Board to Determine Fitness of Bar Applicants*, B. EXAMINER, Aug. 1982, at 17, 20 (describing Georgia's fitness board's work, including cases involving mental illness or alcoholism, as "applying contemporary community standards of morality and character"); R.J. Gerber, *Moral Character: Inquiries Without Character*, B. EXAMINER, May 1988, at 13 (interchangeably using the terms "moral character," "moral fitness" and "character and fitness" to refer to the matters considered by bar committees, including mental health); Pobjecky, *supra* note 213, at 31, 36-37

paradigm that shapes bar examiners' understanding of their fitness screening function, and the theoretical distinction between pure "fitness" issues and the moral character concerns that dominate their proceedings is easily blurred or forgotten.³⁷³

The moral character paradigm has given rise to certain kinds of behavior and expectations on the part of bar examiners during character and fitness proceedings, which have been noted by observers and participants.³⁷⁴ Applicants are expected to appear before the committee in a posture of deference. As the rules and guidelines that govern these proceedings emphasize, the burden of proof is on the applicant to establish good moral character and fitness.³⁷⁵ Any question posed by a committee member must receive a candid, complete, and respectful response; a candidate can get into serious trouble by coming across as argumentative, evasive, or glib, or by suggesting that certain things are none of the committee's business.³⁷⁶ The applicant is expected to take responsibility for past mistakes and misbehavior, express remorse, and assure the committee that he or she has learned from the experience and can be trusted not behave similarly if admitted to the bar.³⁷⁷

Questioning at these hearings can be harsh.³⁷⁸ This serves in part as a test of whether the applicant displays the expected attitudes (that is, shows

(arguing that mental health inquiries are essential "[i]n determining whether applicants have established good moral character sufficient to demonstrate their fitness").

373. Even when examiners are careful to distinguish fitness from character, their conception of "fitness" may encompass moral outlook as well as mental health. The same bar examiner who so carefully distinguished fitness from moral character in his discussion of the alcoholic applicant, see *supra* text accompanying note 365, in another article attempted to give separate definitions for the terms "good moral character" and "fitness." His "fitness" definition included "respect for the rule of law and our judicial system" and "an absolute willingness to abide by the . . . code of ethics," in addition to "the psychological makeup necessary to function adequately as a lawyer." Jerome L. Withered, *Some Thoughts on Character and Fitness*, B. EXAMINER, Nov. 1986, at 21, 23.

374. Deborah Rhode noted many of these features of character and fitness screening in her 1985 study of the process, which was based on interviews with bar examiners in all fifty states as well as court decisions and secondary materials. See Rhode, *supra* note 17, at 493, 543-45. My description is also informed by discussions that I have had with many bar applicants who have gone through character hearings, my representation of a few, and conversations with attorneys who frequently represent applicants before bar committees.

375. See BAR EXAMINERS' HANDBOOK, *supra* note 204, at 73:3001 (noting that the applicant's burden of proof is well-established); see also, e.g., *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 432 (E.D. Va. 1995) (citing Virginia rule placing the burden on applicant); CBEC REGS., *supra* note 20, art. VI-3 (placing the burden of proof on the applicant).

376. See Richard C. McFarlain, *Character & Fitness Process Before the Florida Board of Bar Examiners*, B. EXAMINER, Nov. 1989, at 4, 7 (advising applicants and their counsel that they are "suplicants" with "no leverage" at investigative hearings, and must not come across as abrasive).

377. See Rhode, *supra* note 17, at 543-45; Gerber, *supra* note 372, at 19.

378. See McFarlain, *supra* note 376, at 7 ("Character and fitness proceedings tend to be personal and highly charged" because "[a]pplicants feel totally exposed to strangers whom they feel are

"good moral character") in responding. By making the proceedings unpleasant, examiners also hope to foster good behavior in the future. The counsel to one state's admissions board observed:

I cannot count the times that a decision has been made by the Board to require an applicant to appear for an investigative hearing, knowing full well that the panel will ultimately recommend his admission. However, applicants whose conduct may not warrant preparation of formal charges ought to be confronted with the unmistakable fact that their conduct is unacceptable. . . . Numerous conversations with applicants over the years have persuaded me that, despite the "trauma" associated with investigative hearings, a positive, therapeutic effect was accomplished³⁷⁹

Another bar examiner's article about character and fitness screening was entitled *A Rite of Passage*,³⁸⁰ and there are elements of a hazing or initiation to these proceedings, an ordeal that purges past sin and makes the applicant worthy of his or her new status as an attorney.³⁸¹

When mental health issues are what brings an applicant before a fitness board, the cluster of examiner behaviors and expectations that I have described above are inappropriate, and justifiably perceived as demeaning and discriminatory. The experiences of bar applicants described in Part I of this Article suggest that the routines of moral character examination inevitably spill over into the treatment of applicants with mental disabilities. Examiners generally act in good faith and show some sensitivity to the mental health/moral character distinction, but habits of distrust and accusation often creep into their questioning. The applicant with a disability distinctly gets the message that she bears the burden of proving her fitness and must deferentially submit to all questions, no matter how ignorant or intrusive, and that her candor and responsibility are always in doubt.³⁸²

not trying to help them but, instead, are intent on dwelling on the most embarrassing moments in their lives.").

379. Carothers, *supra* note 372, at 31; cf. Baude, *supra* note 153, at 657–58 (suggesting that the bar admissions process should focus on the "construction of character"). At a panel discussion for law students concerning bar admissions and legal ethics for law students held in April 2000 at the University of Connecticut School of Law, a lawyer who frequently represents applicants before the state bar examining committee suggested that the committee sometimes gives applicants a hard time, and delays their admission, just to teach them a lesson. A bar examiner on the panel, with the proverbial nod and wink, said that he could not comment on that observation.

380. Philip T. Sciortino, *A Rite of Passage*, B. EXAMINER, Nov. 1989, at 14.

381. See Rhode, *supra* note 17, at 509–10; cf. ABEL, *supra* note 361, at 36 (discussing theories of the professions in structural functionalist sociology that emphasize the idea of profession as community, in which "[m]embership is attained only after a long and painful initiation rite").

382. See *supra* Part I.C.

Ian F. Haney López, in a recent study of the practices of California state judges in nominating grand jurors, draws on the insights of organizational sociology and institutional analysis to explain how judges unintentionally discriminate by selecting their social acquaintances, resulting in the nearly complete exclusion of Mexican Americans.³⁸³ Sociologists such as Harold Garfinkle have shown that people, and especially actors in organized settings, perform many of their functions through widely accepted, standardized routines that are deployed with little conscious thought. These can be thought of as “scripts” that are triggered by “sets of cues used to identify types of situations readily.”³⁸⁴ Thus, judges, as they interacted with other judges and observed how things are done, came to associate grand jury nomination with the “pick your friend”³⁸⁵ script, saw this mode of behavior as routine and natural, and tended to ignore information that might render it problematic.³⁸⁶ I believe that something like this is at work in bar admissions. Certain cues—affirmative answers to an application form question, the scheduling of a “character and fitness” hearing by the staff—set in motion the scripts that bar examiners have internalized for dealing with applicants who present moral character issues. Examiners, even with the best of intentions, may find it difficult to depart from their usual ways of doing things in such hearings when the issue is disability rather than bad behavior.

Employment inquiries concerning disability do not generally carry the same moral character associations that are present in bar admissions. The stigma concerns that underlie Title I’s prophylactic measures exist even more powerfully in the bar admissions context, and support a requirement of similar safeguards.³⁸⁷

3. Professional Image

*Some say that pirates steal, and should be feared and hated.
I say we’re victims of bad press, it’s all exaggerated.
We’d never stab you in the back, we’d never lie or cheat.
We’re just about the nicest guys you’d ever want to meet*

383. See Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

384. *Id.* at 1781–83, 1794.

385. *Id.* at 1795.

386. See *id.* at 1785–1806.

387. One need not accept all that I have said concerning the influence of the “moral character” paradigm on how bar examiners behave towards applicants with disabilities in order to reach this conclusion. As previously discussed, the very placement of the questions on an application form dominated by moral character issues, the persistence of the moral character label in rules and official nomenclature, and the fact that the same panels that pursue moral character issues are responsible for assessing mental fitness, all have a strong stigmatizing effect.

.
 And when you're a professional pirate—
 You'll be honest, brave and free, the soul of decency,
 You'll be loyal and fair and on the square and most importantly:
 When you're a professional pirate—you're always in the best of
 company!³⁸⁸

So sings Long John Silver (played by Tim Curry in a wonderfully over-the-top performance) to young Jim Hawkins in the movie *Muppet Treasure Island*,³⁸⁹ as part of a song-and-dance number welcoming Jim into the “noble brotherhood” of piracy. This anthem to professionalism captures an important aspect of the impulse that lies behind bar admissions proceedings. The officially acknowledged rationale for character and fitness screening is the protection of the public and of the system of justice.³⁹⁰ However, as courts and examiners sometimes admit, upholding the public image of the profession, and the profession's image of itself, are also powerful motivating concerns.³⁹¹ Deborah Rhode discusses some of the reasons for this in her study of character screening, *Moral Character as a Professional Credential*:

In both its instrumental and symbolic dimensions, the certification process provides an opportunity for affirming shared values. As sociologists since Durkheim have argued, the concept of a profession presupposes some sense of common identity. Excluding certain candidates on character grounds serves to designate deviance, thus establishing the boundaries of a moral community. . . . Weeding out the unworthy also helps to legitimate a status in which practitioners have strong psychological as well as economic stakes. An overriding objective of any organized profession is to enhance its members' social standing, and the bar is scarcely an exception. . . . The public's “low regard for the profession,” reflected in recent public opinion polls, is a matter of

388. BARRY MANN & CYNTHIA WEIL, *A Professional Pirate, on MUPPET TREASURE ISLAND* (Angel Records 1996).

389. *MUPPET TREASURE ISLAND* (Walt Disney Pictures 1996).

390. See Am. Bar Ass'n et al., *supra* note 188, at standard 7 (“The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice.”). The commentary to this standard in *The Bar Examiners' Handbook* notes that protecting the public image of the profession is frequently invoked as an additional purpose, but disavows this goal as “too dangerous and uncertain a reason for denying admission to the bar.” *BAR EXAMINERS' HANDBOOK*, *supra* note 204, at 73:3 (quoting Michael K. McChrystal, *Resuscitating Character and Fitness Standards*, B. EXAMINER, Nov. 1986, at 13, 15).

391. See Rhode, *supra* note 17, at 509–11; Deborah L. Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U. CHI. L.J. 1, 3 (1988); M.A. Cunningham, Comment, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 TUL. L. REV. 1015, 1026–28 (1992); Mitchell S. Bierman, *Applying to the Bar: The Broad Inquiry*, B. EXAMINER, Aug. 1991, at 21; Norman Krivosha, *The Matter of Character and Fitness*, B. EXAMINER, May 1986, at 4, 6; Sciortino, *supra* note 380, at 15.

acute concern to practicing lawyers; ABA members have ranked it as the most urgent issue facing the bar, and ABA presidents have repeatedly pledged to make improving lawyers' image one of their highest priorities. How exactly that improvement can be secured is a matter of dispute, but bar examiners frequently present character certification as part of the general campaign.³⁹²

It is telling that even when courts and examiners invoke public protection as the justification for excluding unfit bar applicants, they frequently speak of the need to ensure that clients will *feel confident* when they hire a lawyer.³⁹³ Client and public perceptions may, of course, be affected by much more than the actual fitness of attorneys.

What clients and the public might think has been a significant source of anxiety to bar examiners and to courts when it comes to applicants with mental disabilities. In 1994, the *ABA Journal* ran pro and con opinion pieces on the subject of mental health questions on bar application forms. Erica Moeser, the NCBE's president, began her essay with the following remarkable sentence: "The public, already wary of lawyers, would be incredulous if bar admissions were to take a miserably wrong turn by prohibiting inquiry into subject areas bearing on the current mental fitness of applicants to the bar."³⁹⁴ The judge in the *Texas Applicants* case complained in his decision that "a negative light is often cast upon the legal profession in the information that the general public receives and hears," just before he launched into a string of rhetorical questions asking whether it is necessary for bar examiners to ask about serious mental illnesses before licensing individuals to handle all the vital and sensitive tasks that clients entrust to their

392. Rhode, *supra* note 17, at 509-11 (footnotes and paragraph breaks omitted).

393. Thus, the *Code of Recommended Standards for Bar Examiners*, after setting forth protection of the public and the court system as the justification for character and fitness screening, adds that the public must "be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers." Am. Bar Ass'n et al., *supra* note 188, at standard 7; see also Ressel, *supra* note 371, at 2. Bar admissions decisions by state supreme courts express similar ideas. See *Scott v. State Bar Examining Comm.*, 601 A.2d 1021, 1026 (Conn. 1992) ("It is not enough for an attorney that he be honest. He must be that, and more. He must be believed to be honest." (citation omitted)); *In re Eimers*, 358 So. 2d 7, 9 (Fla. 1978) ("The layman must have confidence that he has employed an attorney who will protect his interests."); *In re Matthews*, 462 A.2d 165, 176 (N.J. 1983) (including a reference to "admission to a profession whose members must stand free from all suspicion"). Such formulations suggest that public perception has an independent significance; as M.A. Cunningham observes, "if a court defines moral fitness in relation to an applicant's ability to act as an ethical attorney, the applicant's potential impact on professional appearances would be irrelevant." Cunningham, *supra* note 391, at 1027.

394. Moeser, *supra* note 126, at 36. Erica Moeser has also served as the chairperson of the ABA's Section of Legal Education and Admissions to the Bar.

lawyers.³⁹⁵ According to an article by a member of Florida's admissions board, bar examiners need to scrutinize "preadmission behaviors such as disrespect for the law, psychological problems, and severe financial irresponsibility" because clients may not want to be represented by these people, and the appearance of fitness is as important as the substance.³⁹⁶ In Connecticut, as discussed in Part I, the bar examiners added mental health questions in response to some highly publicized incidents of lawyer misconduct that had nothing to do with mental health issues; the goal was to reassure the public that something was being done.³⁹⁷

The public relations function of bar admissions screening greatly increases the risk that societal prejudices about mental illness and substance abuse will have an impact on how bar examiners treat applicants with mental disabilities. Examiners will tend to err on the side of intrusiveness, so that the public can be reassured that no stone has been left unturned. Hostility towards the idea of attorneys with highly stigmatized conditions representing clients may color their questioning during hearings. Concern about how it will look if an applicant with past mental health or substance abuse problems later engages in misconduct will exert a pull to resolve close cases in favor of conditional admission, or even denial.

4. Subjectivity

The subjective nature of the character and fitness standard is openly acknowledged by bar examiners and courts.³⁹⁸ Justice Felix Frankfurter, in one

395. Applicants v. Tex. State Bd. of Law Exam'rs, No. A-93-CA-740-SS, 1994 WL 923404, at *28 (W.D. Tex. Oct. 11, 1994).

396. Sciortino, *supra* note 380, at 15.

397. See *supra* text accompanying notes 29–32. After approving Kathleen Flaherty's conditional admission, the judge who presided at her swearing-in ceremony mused on the profession's public image. See *supra* text accompanying note 90. The judge's remarks bear more than a passing resemblance to Long John Silver's song:

Criticisms of our profession—and indeed, it is still a profession, and a noble one—have abounded for centuries. Some have been, and are, justified, but time and again members of our bar have demonstrated, by their acts and activities, that most of these criticisms are exaggerated or false and are based more in resentment than in fact.

Transcript of Swearing-In Ceremony: Kathleen Maura Flaherty (Conn. Super. Ct. Oct. 23, 1997) (on file with author).

398. See BAR EXAMINERS' HANDBOOK, *supra* note 204, at 73:5002 ("No definition of what constitutes grounds for denial of admission on the basis of faulty character exists."); Rhode, *supra* note 17, at 529–31; Krivosha, *supra* note 391, at 6 (likening character and fitness to Justice Potter Stewart's standard for pornography); Withered, *supra* note 373, at 22 ("[T]he inquiry made by the board of law examiners into the character and fitness of a prospective lawyer is predominantly subjective.").

of the several cases to reach the United States Supreme Court as a result of bar examiners' efforts to keep communists out of the profession, put it this way:

No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said . . . that it expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."³⁹⁹

The "fitness" standard used by bar committees—to the extent that it has meant something different than "moral character"—has been equally indeterminate in application. "Of all the standards and prerequisites," the *Bar Examiners' Handbook* notes, "this is perhaps the most nebulous and difficult to define."⁴⁰⁰

The subjectivity of the character and fitness inquiry opens the door to conscious or unconscious bias, and increases the risk that bar examiners' treatment of applicants with mental disabilities will be affected by societal prejudices and concerns about the profession's image. As Justice Hugo Black wrote in another of the U.S. Supreme Court's bar admissions cases, the administration of this "vague qualification" will inevitably "reflect the attitudes, experiences and prejudices of the definer," and can be a "dangerous instrument" for discrimination.⁴⁰¹ The history of character screening provides ample grounds for concern. During the nineteenth century, character standards were used to exclude women.⁴⁰² The legal profession's anxieties about the influx of eastern and southern European immigrants, and particularly Jews, provided much of the impetus for the adoption of formalized character and fitness screening mechanisms during the early decades of the twentieth century, and those groups felt the brunt of the character committees'

399. *Schwartz v. Bd. of Bar Exam.*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring) (quoting *Chicago, Burlington & Quincy Ry. v. Babcock*, 204 U.S. 585, 598 (1907) (Holmes, J.)).

400. *BAR EXAMINERS' HANDBOOK*, *supra* note 204, at 73:5005. One factor that contributes to the elasticity of the fitness concept is the view taken by many bar examiners that the unlimited nature of a law license requires a broad notion of fitness. See *Withered*, *supra* note 373, at 22. This outlook makes it possible to find reasons to question the fitness of virtually any bar applicant. An in-house attorney providing advice and legal analysis for a corporation or government agency might later decide to become a solo practitioner doing trial work. Quite apart from any issues of mental health, few prospective lawyers have the necessary abilities and temperament for *every* kind of law practice.

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

402. See *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (discussing how women's "natural and proper timidity and delicacy" make them unsuited for forensic strife); Rhode, *supra* note 17, at 497.

hostility.⁴⁰³ In later decades, suspected communists faced harassment, delays, and the occasional denial of admission.⁴⁰⁴ The presence or absence of elite social credentials also appears to play a role in determining which applicants will be given a hard time over past indiscretions. A survey of more than fifty judicial opinions reviewing moral character determinations published from 1980 to 1991 found that *none* of the excluded applicants had attended a top-ranked law school.⁴⁰⁵

Vague and subjective standards provide ample scope for bias to operate in hidden ways. These dangers are compounded in a process in which the same entity simultaneously considers mental health information and moral character issues. Bar examiners' knowledge that an applicant has a mental disability may lead them to make harsher judgments about other (and possibly unrelated) problematic information disclosed on the bar application form—for example, a prior credit problem or eviction. Social science research on perception and social judgment indicates that people “tend . . . to assess other individuals on the basis of one salient quality,” and that “once individuals have formed a judgment, they tend to selectively assimilate information that will confirm their original impression.”⁴⁰⁶

403. See ABEL, *supra* note 361, at 46–73; JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 95–129 (1976); Jerold S. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900–1922*, in 5 *PERSPECTIVES IN AMERICAN HISTORY* 551, 584–85 (Donald Fleming & Bernard Bailyn eds., 1971); Rhode, *supra* note 17, at 499–502.

The threat that prospective attorneys of foreign birth or parentage posed to the “finer professional spirit and feeling” of American lawyers was a matter of intense interest to Connecticut’s organized bar in the 1920s and 1930s. See *A History of the First One Hundred Years of the Connecticut Bar Association*, *supra* note 361, at 234 (quoting speaker at the CBA’s 1922 annual dinner). Concerns about a decline in the moral standards of lawyers, attributed in large part to the “very rapidly changing social conditions” in Connecticut’s cities, led to more stringent scrutiny of bar candidates’ moral qualifications by at least some of the county standing committees on admissions. *Proceedings at the Annual Meeting*, 4 CONN. B.J. 151, 189–91 (1930). In 1932, the association approved a resolution urging Connecticut’s bar admissions authorities to use a detailed character questionnaire modeled on Pennsylvania’s. A sponsoring attorney would be required to vouch for the applicant on a form that included questions like: “Are the applicant’s parents native or foreign born? If foreign born, are they naturalized? What is the reputation of the parents in the community in which they reside?” *Id.* at 185–91. When Pennsylvania adopted this screening system in the 1920s, bar leaders there were quite open about their objective of limiting the admission of foreigners and Jews, and it resulted in a 16 percent drop in the proportion of applicants who were Jewish. See ABEL, *supra* note 361, at 69; AUERBACH, *supra*, at 125–28.

404. See Debran Rowland, *The Difficulty of Defining an Effective Requirement of Fitness of Character*, B. EXAMINER, Aug. 1995, at 36, 41–42.

405. See Cunningham, *supra* note 391, at 1037–39.

406. Rhode, *supra* note 17, at 561 (summarizing findings of studies); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1211 (1995) (discussing findings of cognitive psychology concerning how categorization of individuals as belonging to a socially defined group leads to biased judgment and decision making). Social science research on the powerful role that unconscious stereotyping and prejudice plays in evaluating the qualifications of others

Applicants who object to examiners' probing of mental health issues also run the risk that their opposition will be perceived as evidence of a bad attitude, and that it will be held against them.⁴⁰⁷ In Connecticut, for example, "Anonymous," the bar applicant who sued the examiners over the lack of a conditional admission procedure, was initially denied admission in 1991, solely because the bar examining committee concluded that his bipolar disorder rendered him unfit.⁴⁰⁸ He was granted a new hearing several years later; this time, the committee turned him down on moral character grounds, in part because he had sent a memo to Connecticut's Chief Court Administrator complaining that the bar examining committee was engaged in a discriminatory cover-up. The committee reasoned that the memo was "made 'for purposes of intimidating the [committee] into recommending'" the applicant, and thus provided additional evidence of his "lack of good moral character."⁴⁰⁹

5. Confidentiality

The bar admissions process compromises the confidentiality of sensitive mental health information in ways that magnify the stigma involved in disclosure. The boards that conduct character and fitness screening are made up of practicing lawyers and judges from the same jurisdiction in which the applicant will be practicing law.⁴¹⁰ The Connecticut Bar Examining Committee, for example, includes eighteen attorneys and five judges, all of whom have unlimited access to the file of any bar applicant.⁴¹¹ An applicant

has recently been summarized in Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 421-46 (2000).

407. Cf. Rhode, *supra* note 391, at 11 ("Those who refuse to be intimidated [by intrusive inquiries in character proceedings] may be subject to harassment, delay, and occasionally to denial.").

408. See *supra* text accompanying notes 53-55.

409. Scheffey, *supra* note 55, at 8 (quoting from panel's decision). The hearing panel also rested its moral character determination on Anonymous's failure to make child support payments. Whether the committee's assessment of the child support issue would have been any different if it had not been aware of the applicant's bipolar disorder and discrimination suit is, of course, hard to know.

410. Deborah Rhode's national survey of bar admissions procedures found that in all jurisdictions, attorneys make up the bulk of the membership of the boards or committees that conduct character and fitness screening. In about a quarter of the states, a small number of non-lawyers also serve. See Rhode, *supra* note 17, at 505.

411. See CONN. R. SUPER. CT. §§ 2-3, 2-50; CONN. BAR EXAMINING COMM., 2001 INFORMATION BOOKLET 3-5 (revised Sept. 2000) (listing committee members). If a hearing is held, members of a county standing committee on recommendations to the bar (consisting of three to seven attorneys) will also gain access to the information. See CONN. R. SUPER. CT. § 2-12. All of the application forms are available to the chairperson of the applicable county committee. See CBEC REGS., *supra* note 20, art. III-4.

who discloses a mental disability on the application form, even if admitted without incident, still faces the extremely embarrassing prospect of encountering committee members who are aware of her condition as opposing counsel, colleagues in the same law firm, or as the judge presiding over a case.⁴¹²

There is the potential for further disclosures as well. Most states have rules that protect the confidentiality of bar admissions information to some degree, but there are exceptions. Connecticut's rule, for example, gives the statewide grievance committee and any superior court judge access to a bar applicant's records.⁴¹³ Most significantly, applicants are generally required to release all records relating to prior bar applications when they apply for admission in a new jurisdiction.⁴¹⁴ Thus, a bar application disclosing, say, bipolar disorder or past substance abuse treatment, may wind up in the hands of the attorneys who serve on the admissions board in a second state, even if the second state does not inquire about these disabilities on its own application form.

The broad scope of examiners' requests for medical records compounds the problem. The NCBE and many states require all applicants who respond affirmatively to disability questions to execute an authorization consenting to the release of all "records, concerning advice, care or treatment provided

412. The judge in the *Clark* case noted that a Virginia statute prohibiting public disclosure of bar admissions records did not solve applicants' confidentiality concerns: "[A]s the Board is made up of practicing attorneys, applicants may be reluctant to disclose mental or emotional problems to a group who, at some level, comprise the applicants' peers and colleagues." *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 438 n.13 (E.D. Va. 1995).

413. See CONN. R. SUPER. CT. § 2-50. Significant loopholes can be found in the confidentiality rules of other states. See, e.g., WIS. SUP. CT. R. 40.12 (providing the court and bar admissions board with discretion to authorize the release of confidential bar applicant information to "other persons or agencies"). In addition, there is always the possibility of inadvertent disclosures. As Senator Sullivan put it in his letter protesting Connecticut's mental health inquiries, "[p]rivate information is disclosed in writing and becomes a waiting hazard in yet another dubiously secure personal file." Sullivan Letter, *supra* note 61, at 1.

414. The *Code of Recommended Standards for Bar Examiners* states that each jurisdiction should adopt a rule concerning confidentiality that "[m]inimally . . . should provide confidentiality of records and sources for purposes other than cooperation with another bar examining authority." Am. Bar Ass'n et al., *supra* note 188, at standard 11. Bar application forms generally require applicants to submit copies of prior applications and/or authorize other jurisdictions to release their records. See, e.g., CONN. 2001 APPLICATION, *supra* note 19, at 10; NCBE CHARACTER REPORT, *supra* note 10, at 4 & attachment titled *Authorization and Release*. The *Authorization and Release* that bar applicants sign in Connecticut states:

I agree that all information provided by this application and all other information received by the Connecticut Bar Examining Committee may be released by said Committee at any time and without liability to . . . the National Conference of Bar Examiners or other bar admitting authority in connection with any further inquiry relating to my eligibility to engage in the practice of law.

CONN. 2001 APPLICATION, *supra* note 19, at 23.

to me without limitation relating to mental illness, use of drugs or alcohol."⁴¹⁵ Some jurisdictions routinely request the complete records from any hospitalization or outpatient treatment disclosed on the application form. This can cause substantial delays in admission, as in the case of Rose Gower, where it took months to locate and obtain records from a nine-year-old hospitalization.⁴¹⁶ Moreover, such records often contain highly personal information. One attorney who testified at Connecticut's 1994 public hearings on mental health questions described how she felt when she was required, on the bar application form, to authorize the bar examiners to examine all of her treatment records:

I was . . . dismayed to realize that in answering the question [about mental health treatment] truthfully, I would be required to waive all my expectations of privacy in regard to my years in therapy, something which had never occurred to me as a possibility. . . . [F]ew things could be more intensely personal than . . . the details about my family life, my childhood, my parents, my siblings, my marriage and the end of my marriage, all very personal, and even more significant, all completely irrelevant to the question of my fitness to practice law.⁴¹⁷

The inherently stigmatizing disclosure of mental illness or addiction is made more humiliating when the details of personal relationships and traumas are subjected to the gaze of the lawyers and judges of an admissions board (and those beyond) who may get access to the information.⁴¹⁸

415. NCBE CHARACTER REPORT, *supra* note 10, Form 16; see also CONN. 2001 APPLICATION, *supra* note 19, Form 7 (copying the language of the NCBE's medical release authorization).

When bar examiners use these consent forms to request records from substance abuse treatment programs, they are in violation of the federal regulations governing the confidentiality of drug and alcohol abuse patient records. Those regulations specify nine elements that must be present for a consent form to be valid. Two of them—a statement of the patient's right to revoke consent and a time frame in which the consent will expire—are missing from the bar examiners' form. The consent forms that bar examiners use to authorize redisclosure of such information to other jurisdictions, see *supra* note 414, are similarly deficient under federal law. See 42 C.F.R. §§ 2.31, 2.32 (2000). Broad requests for "all records" are also inappropriate under the regulations. Treatment programs are required to limit their disclosures to the minimum information that is necessary to carry out the purpose of the disclosure (for example, in this context, information bearing on the duration and stability of recovery would be appropriate, while releasing counseling notes would be overbroad). See *id.* § 2.13(a).

416. See *supra* Part I.C.2.

417. Conn. Bar Examining Comm., Transcript of Public Hearing on Mental Health 5 (Sept. 28, 1994) (on file with author).

418. Professor Stanley Herr has argued that respect for applicants' privacy rights requires that bar examiners avoid making unlimited requests for records and instead, in consultation with the candidate, frame an appropriately narrow release in cases in which there is a genuine issue about the candidate's current fitness. See Herr, *supra* note 6, at 675–77 & 677 n.184. New Jersey's Character Committee has recognized the legitimacy of criticism that broad demands for medical documentation "is an intrusive invasion of privacy into a very sensitive area." N.J. STATEWIDE PANEL REPORT, *supra* note 233. It has responded by limiting the records it will request in substance abuse cases to "only

The stigmatic harms arising from disclosure that Title I is concerned with are amply present in the bar admissions setting. Title I's mechanisms for addressing these dangers—collecting medical information on separate forms, limiting the scope of information available to nonmedical personnel, strict confidentiality protections—are equally important here.

6. Lack of Expertise

When bar applicants with mental disabilities describe what it is about the process that makes them feel humiliated and discriminated against, they often point to the fact that the people responsible for investigating, questioning and making decisions about them have no training or expertise in mental health issues. As a result, they feel that the questions and demands for information that they encounter are rooted in ignorance, and that the committees are incapable of fairly evaluating the information. This theme was central to James Roe's account of his character and fitness hearing in the testimony he presented at Connecticut's 1994 public hearings:

I was asked [by the hearing panel] to relate my entire mental health history. I was asked to detail the diagnoses that had been made about me and describe any medications I had taken. I was subject to detailed questioning about this very intensely personal aspect of my life. Furthermore, I could tell from the questions that were being asked and from the questions that followed from these responses that the two lawyers who were interviewing me had no training, experience or knowledge about mental illness or emotional disorders. I expected that at least one of the members of the panel who interviewed me would be a psychologist or psychiatrist, but that did not occur.⁴¹⁹

information to confirm that a person is in recovery." *Id.* When an applicant has been hospitalized for mental illness within the prior twelve months, the Committee will request all of the hospital records, but employs other mechanisms to safeguard privacy. "The supporting documentation may be sent to an [sic] medical expert, retained by the Committee, for examination and a report of diagnosis and prognosis findings to the committee. This should eliminate the concern that sensitive information is being placed in the hands of laymen." *Id.* These approaches are similar to the Title I-based mechanisms that I advocate.

419. Roe Testimony, *supra* note 73, at 2. In another submission to the public hearing record, the President of the Mental Health Association of Connecticut listed, as the first of several reasons why her group was opposed to any inquiries by the bar examining concerning the mental health history of applicants, that "the committee has neither the training nor the expertise to draw the proper conclusions from the responses to the inquiries." Letter from Beverly A. Walton, to Conn. Bar Examining Comm. (Oct. 4, 1994) (on file with author).

Six years later, Kathleen Flaherty focused on the same issue when she described her experience with the bar examiners in public testimony to a federal task force:

I had to have two meetings with a local committee and one with a statewide committee. I had to answer questions that I believe delved unnecessarily into very painful personal matters. . . People who by their own admission did not understand the diagnosis or the illness asked me to explain it to them. These committees are made up of lawyers who very generously donate their time; there are no psychiatrists or psychologists or anyone with medical training on the committees.⁴²⁰

Mental health professionals voice similar concerns. Several times, I have spoken with therapists who received letters from the bar examining committee requesting a report on a past or current patient and "all medical records such as intake/admission report, progress notes and discharge papers."⁴²¹ The therapists have been extremely reluctant to turn over the complete patient file; they fear that the committee lacks the expertise to properly interpret medical records, and is likely to misunderstand or take out of context information about diagnoses, medication, treatment, and the details of counseling sessions.⁴²²

Application of the Title I framework to bar admissions would do much to address these problems. It would place the primary responsibility for reviewing applicants' answers to mental health questions, making follow-up inquiries, and evaluating medical fitness in the hands of medical personnel, and would limit the information that would reach the lawyers and judges on the committee. Applicants are likely to feel more comfortable disclosing mental health information to a trained professional. Although expertise is no panacea, by and large one can expect that a psychologist or psychiatrist will handle the questioning of an applicant with some sensitivity, and will be better suited than an untrained examiner to tailor information requests to seek only relevant information.⁴²³ A medical expert will not be invested to the same degree as lawyers and judges in upholding the legal profession's image, and is less likely to be influenced by misconceptions or prejudice about mental illness and addiction.

420: Testimony of Kathleen M. Flaherty Submitted to the Presidential Task Force on Employment of People with Psychiatric Disabilities 2 (May 24, 2000) (on file with author).

421. Letters from Conn. Bar Examining Comm., to therapists (on file with author, with names and identifying information redacted).

422. Additionally, they are concerned that the scope of the requested disclosures unnecessarily invades their patients' privacy, and may have a disruptive effect on the therapist-patient relationship.

423. Professor Stanley Herr, in his article about disability inquiries in bar admissions, urges for similar reasons that if inquiries into an applicant's mental health or substance abuse history are to be allowed at all, they should be handled by an individual with an understanding of disability and treatment issues, "perhaps with credentials in law and medicine." Herr, *supra* note 6, at 677.

D. Reforming the Process

What would a nondiscriminatory bar admissions process for applicants with disabilities, one that incorporates protections equivalent to Title I's requirements for employment screening, look like? For purposes of this discussion, let us assume that the following disability-based inquiries would be upheld by courts as necessary and narrowly tailored under a "relaxed scrutiny" approach to Title II:

1. Have you within the past twelve months engaged in, or been treated for, the abuse of drugs or intoxicating substances, including alcohol?
2. Have you within the past [time frame] been diagnosed with or treated for schizophrenia or any psychotic disorder?
3. Have you within the past [time frame] been diagnosed with or treated for bipolar I disorder or mania, or experienced any manic episode?
4. Do you currently have any disorder or condition that impairs your judgment or would otherwise adversely affect your ability to practice law?
5. If your answer to any of these questions is yes, describe the condition or problem and any treatment that you received, and provide the dates of treatment, the name and address of your physician or other treatment provider, and the name and address of any hospital, program or institution at which you received treatment.⁴²⁴

The disability-based questions would not appear on the regular bar application form that applicants submit to the bar examining committee.⁴²⁵ Instead, the questions would be contained in a separate medical questionnaire. The committee would be required to set up a separate medical office, staffed by a psychiatrist or other mental health professional. Applicants would send the medical questionnaire directly to that office.⁴²⁶ The records of the medical office would be confidential and separate from those of the bar examining

424. As discussed in Part III, *supra*, the above questions approach the outer limit of what can reasonably be justified under the relaxed scrutiny approach. Nonetheless, the questions that many jurisdictions currently ask, and some courts have been willing to uphold, are broader. To the extent that broader disability-based inquiries are allowed under Title II, the application of Title I-type protections becomes even more important.

425. I will use the terms "bar examining committee" or "committee" to refer to the entity responsible for making character and fitness determinations. In some states, that role will be played by the statewide bar examining committee; in others, it may be a character committee that is a sub-entity or a separate entity from the overall bar admissions board.

426. Applicants would also provide the medical office with a copy of the regular bar application form. As part of its screening, the medical office may need to investigate in some cases whether behaviors reported on the bar application form are related to a disability.

committee.⁴²⁷ Members of the bar examining committee and the committee's regular staff would not have access to applicants' medical information, except under circumstances that I will later describe.

After receiving an applicant's medical questionnaire, the medical office would first determine whether additional information is needed to assess whether the applicant's disability affects her current fitness to practice law. If so, the medical officer⁴²⁸ can pose follow-up questions to the applicant, consult with treatment providers, review treatment records,⁴²⁹ and, if necessary, arrange a full-scale psychiatric or substance abuse evaluation. The medical officer then would determine either (a) that the applicant is medically fit, or (b) that there is a serious issue concerning the applicant's current fitness to function as a lawyer.

While this medical screening process is taking place, the bar examining committee can conduct a character and fitness review based on the conduct- and performance-based questions on the bar application form, and on the information provided by references. The committee will not know, at this juncture, whether the applicant has disclosed a disability on the medical questionnaire.⁴³⁰ At the conclusion of the committee's screening—for example, after the committee clears the applicant based on a paper review or decides after a hearing that some past misconduct should not be disqualifying—the committee can ask the medical office for its determination.⁴³¹ If the medical

427. The medical file should not be available to others who may have access to the bar examining committee's files, such as judges, grievance committees, and admitting authorities in other jurisdictions.

428. I will use the term "medical officer" to refer to the psychiatrist or other mental health professional in charge of the medical office.

429. The applicant would need to authorize treatment providers to release information to the medical office. Applicants could be required to sign an information release form as part of the medical questionnaire, authorizing the medical office to request any medical information that it deems relevant to the fitness determination. The consent form should be drafted to comply with federal confidentiality laws. See *supra* note 415.

430. Allowing medical inquiries and nonmedical screening to proceed on simultaneous tracks is a departure from Title I, which requires employers to defer medical inquiries until all other aspects of screening have been completed. See *supra* text accompanying notes 307–312. For bar applicants with disabilities, delay in admission has been one of the most common and serious forms of discriminatory burden. Deferring medical screening until the end of the process would contribute to this problem. The purpose of Title I's two-stage process—to keep disability information out of the hands of decisionmakers while they are considering the nonmedical aspects of eligibility—can be served by a strict separation of the medical office from the rest of the bar examining committee's operation.

431. The timing of the bar examiners' request for information from the medical office raises some logistical problems. If the bar examining committee asks for the results of medical screening too soon—before the medical office has had time to investigate and reach conclusions in most cases—the result will be an implicit disclosure to the committee of the identities of applicants (many of whom ultimately will receive a medical clearance) who have disclosed disabilities on their medical questionnaires. This is because the medical office would have to respond "determination

office has cleared the applicant, it will simply report that fact. The committee will not know whether the applicant has a disability but was medically cleared, or has no disability at all. If, on the other hand, the applicant has not been medically cleared, the medical office will provide the committee with an evaluation or report that includes all of the relevant medical information. A hearing would then be held before the committee to determine whether admission should be denied, granted, or granted with conditions.

Consider how the process would work in the case of *B*, a hypothetical bar applicant. *B* was diagnosed with bipolar disorder five years ago and continues to receive treatment for the illness. He does not have any other adverse information to report on his bar application form: no criminal offenses, defaults of responsibility, or allegations of academic or employment misconduct. *B* provides information about his disability and treatment on the medical questionnaire and submits it to the medical office. He simultaneously submits his regular bar application form to the bar examining committee.

The medical officer interviews *B*, and with *B*'s consent, also speaks with *B*'s treating psychiatrist and requests certain medical records. The medical officer learns that *B* experienced several episodes of depression starting in high school. During his junior year in college, he had his first manic episode. It was characterized by racing and confused thoughts, nonstop talking, overly ambitious academic projects, and lack of sleep. Frightened by the episode, *B* went to see a psychiatrist, who gave a diagnosis of bipolar I disorder and prescribed lithium. Since that time, *B* has remained on medication and has seen a therapist on a regular basis. He continues to experience mood swings, but no uncontrolled manias or disabling depressions. Based on this information, the medical officer concludes that *B*'s bipolar disorder is currently under control, and that there is no serious issue regarding his current fitness to function as a lawyer.

In the meantime, the bar examining committee, which does not know about *B*'s bipolar disorder, is reviewing his regular bar application. The application form answers and the information provided by references contain nothing problematic, so the committee informs *B* that his character and fitness have been approved, pending the outcome of medical screening. When the

pending" for applicants who disclosed disabilities, while it could report "medically cleared" for those who did not. Therefore, the bar examining committee should allow enough time for the medical office to complete the bulk of its medical screening before it sends the medical office a list of applicants who have been found otherwise eligible for admission and asks for their medical results. (Of course, it cannot wait so long that the result would be a delay in bar admission for everyone.)

An early start to the medical screening process would help to avoid this problem. Many jurisdictions wait to see who has passed the bar examination before scheduling any character hearings. The medical office could start its screening process well before then.

committee obtains the results from the medical office, *B*'s name appears on the list of those who were medically cleared. He is admitted.⁴³²

Let's vary the hypothetical slightly. Suppose that *B*, instead of presenting a spotless record on his bar application form, has a misdemeanor conviction for disorderly conduct that dates from his junior year in college. He is summoned to a character interview, where he explains to members of the bar examining committee that he was arrested at a demonstration against the reopening of a nuclear power plant. The protesters were trespassing on private property and many were arrested. *B* expresses appropriate regret for the unlawful aspects of his behavior, and the committee certifies his good character. When the bar examiners check with the medical office, they are informed that *B* is among the applicants who have been medically cleared, and he is admitted.

The above examples represent the situations where Title I-type procedures most clearly and cleanly serve their purposes. The use of a separate medical questionnaire and medical screening procedure disassociates disability from the issues of moral character that dominate the regular application form and process. Although *B* has been forced to reveal sensitive information about his disorder, disclosing it to a trained medical professional probably has been less embarrassing and demeaning to him than revealing the same information to a group of attorneys. The information will remain in a confidential medical file, separate from the bar examining committee's records. The attorneys and judges on the bar examining committee, whom *B* may encounter later on in his practice, do not know that he has bipolar disorder. If *B* later applies for admission in another state, information about his disability will not follow him around. When the bar examiners conducted an inquiry into a character problem unrelated to *B*'s disability, their attitude towards him was not contaminated by the knowledge that *B* has a serious mental illness.

432. A substance abuse case could follow the same process, with identical results. Consider, for example, applicant *C*, who must respond affirmatively to the substance abuse question on the medical questionnaire because she spent six weeks in an inpatient facility for alcoholism treatment the summer after her first year of law school, and then continued with an outpatient program for another year. Her treatment ended eight months before she applied to the bar. The medical officer speaks with *C*'s counselor at the substance abuse treatment program, who reports that *C* showed no signs of substance abuse after the first few months of treatment and "graduated" from the program with every indication that she is in stable recovery. The medical officer requests a copy of the discharge summary, which confirms the counselor's assessment. Applicant *C* herself tells the medical officer that she is regularly attending Alcoholics Anonymous meetings and is not drinking. Based on all this information, the medical officer concludes that *C* is in stable recovery and that there is no serious question of her current fitness to function as a lawyer. The bar examining committee, in the meantime, has found no problems based on its review of the regular bar application form. *C* is admitted, and the bar examining committee never learns of her alcoholism.

Let's vary the hypothetical again. Suppose that the information that the medical officer obtains from B's treating psychiatrist indicates that B has discontinued his medication several times, against medical advice. Without lithium maintenance, the risk of manic episodes is high. Although B is currently taking his medication, the medical officer, after talking with B, is concerned that he rationalizes his nonadherence to treatment and does not fully recognize the importance of staying on medication. Under these circumstances, the medical officer might well conclude that there is a serious issue regarding his current fitness to practice law.

Under this scenario, as with the prior examples, the bar examining committee would conduct its nonmedical processing of the application without knowledge of B's disability. After an initial review of the application, or after holding an interview or hearing on the conviction issue, the bar examiners will certify him as meeting the character standards for admission. Only at this point do the bar examiners learn that there is a serious issue of medical fitness. The medical office provides the committee with an evaluation and report, and a hearing is scheduled before the committee.⁴³³ At this hearing, B might contest the accuracy of the information that he has failed to comply with treatment recommendations, or might explain his discontinuance of medication and argue that it is unlikely to recur. The examiners may find B's ability or willingness to stick with a treatment regimen to be sufficiently in doubt that conditional admission is warranted; or, if they find B's version convincing, they may admit him unconditionally.

In this situation, information about the applicant's disability does ultimately wind up in the hands of the bar examiners.⁴³⁴ Still, the application of Title I-type procedures has served to lessen the stigma of the process. The

433. One could imagine a system in which the medical office would have the final say, and could reject or impose conditions on the applicant, rather than referring such issues to the bar examining committee. Due process, however, requires giving the applicant a hearing to contest any adverse determination. See *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103–06 (1963). Putting the medical office in charge of a hearing process would make applicants' dealings with that office more formal and potentially more stigmatizing. A system that lets the medical officer focus on gathering information and making a nonadversarial assessment of fitness makes the best use of his or her medical expertise. The lawyers who serve on bar examining committees are relatively well-suited to an adjudicatory role. To be sure, they are not experts, but input from the medical office, along with any expert testimony that the applicant may present, can help to make their decisions reasonably well-informed. Having some people with mental health expertise serve on bar examining committees might also help.

434. Once disability information has reached the committee, it will be subject to possible further disclosures in situations when the release of committee records is authorized; for example, if the applicant applies to another jurisdiction. See *supra* text accompanying notes 413–414. There should be a procedure for “sealing” the medical information, so that it would not be subject to further disclosures, at least in those cases in which the committee ultimately finds that the applicant's disability does not impair fitness, and grants unconditional admission.

initial inquiry and investigation of *B*'s disability was not entangled with issues of moral character. The threshold determination made by the medical office adds legitimacy to the process by helping to ensure that disability information reaches the decisionmakers only when necessary. The risk of pretextual treatment also has been reduced. The manner in which the examiners handled the conviction issue was unaffected by knowledge that *B* has a disability. During the hearing on medical fitness, the examiners, having already found the conviction non-disqualifying, are less likely to give him a hard time about it.⁴³⁵

The separation between medical and nonmedical issues cannot always be maintained quite so neatly. In two situations, bar examiners should be permitted to request disability information before completing the character screening process. These exceptions are justified by necessity—they are situations in which prohibiting a committee-initiated inquiry would undermine the basic goals of fitness screening or result in pointless proceedings.⁴³⁶

The first situation can be illustrated by the facts of *Campbell v. Greisberger*.⁴³⁷ Campbell, the applicant, revealed on his New York bar application form that he had been arrested twice within the past several years, once for assault and once for causing a disturbance, and had defaulted on a student loan. He explained this conduct as having resulted from “schizophrenia bipolar disorder,” from which he had subsequently recovered.⁴³⁸ The character and fitness committee scheduled a hearing, and Campbell sought a preliminary injunction to bar the fitness committee from inquiring further into his mental illness.⁴³⁹ In response, the New York committee took the position that it did not intend to initiate discussion of Campbell's mental illness during the hearing, although Campbell was free to raise it “by way of mitigation or

435. There is one potential disadvantage to deferring the examiners' consideration of medical information in cases in which there is an independent character issue. Suppose that *B*'s criminal conviction leads to protracted admissions proceedings: an informal hearing, followed by a formal hearing, stretching out over weeks or months. If the committee does not learn of the medical fitness issue until after the conviction issue has been resolved, and then has to schedule another hearing, *B* may face a significant delay in admission. He might prefer to have the committee receive the medical report sooner, and address all issues in a single hearing. The applicant should have that option.

436. Under Title II, “necessity” can justify imposing discriminatory burdens on applicants with disabilities. See *supra* text accompanying notes 133–134. As I have argued, requiring applicants for a license to disclose disability information, in the absence of Title I-type safeguards to minimize stigma and related harms, is a form of discrimination. Just as Title II allows the asking of disability questions to the extent necessary, it should allow necessity-based exceptions to restrictions concerning the manner in which such questions must be asked and how the information must be handled. The exceptions that I will describe are also analogous to the circumstances in which Title I authorizes employers to initiate inquiries into an employee's medical condition that are “job-related and consistent with business necessity.” See *supra* notes 312–313 and accompanying text.

437. 865 F. Supp. 115 (W.D.N.Y. 1994), *aff'd*, 80 F.3d 703 (2d Cir. 1996).

438. *Id.* at 117.

439. See *id.* at 116–19.

explanation.”⁴⁴⁰ The court refused to grant the injunction, reasoning, “[S]hould Campbell raise the issue of his mental illness to explain some of his conduct, then, inquiry by the Committee into his mental illness as it is relevant to that conduct (that is, his arrests and his default on his student loan), is appropriate.”⁴⁴¹

In a situation like this, when an applicant discloses past behavior that raises genuine fitness concerns and attributes it to a mental disability that is now under control, the committee cannot assess the validity of that explanation, and whether the conduct is likely to recur, unless it has access to medical information. It would be pointless to go through a hearing with disability questions off-limits. On the other hand, the committee should not have carte blanche to conduct an inquisition into the applicant’s medical history and examine all medical records. The most appropriate way to handle this situation, in a bar admissions system that conforms to Title I principles, is to have the committee suspend its processing of the character issue, and refer the applicant to the medical office for an evaluation.⁴⁴² After receiving the medical office’s report,⁴⁴³ the committee can proceed with a hearing that addresses both the conduct and the medical fitness issues. Having the medical office first investigate the disability issue, and provide the examiners with a report that distills the relevant medical information, helps to minimize the risk of uninformed or insensitive questioning by the bar examiners, and prevents them from having unnecessarily broad access to medical records.

Bar examiners should not be allowed to seize upon this exception as a backdoor way of making broad disability inquiries. Bar applications typically require the applicant to list all prior employment and the reasons for leaving each job, and to account for periods of unemployment. In response to this question, an applicant might have to disclose that she left a job and remained out of work for a period of time because she was ill and needed to be hospitalized. Bar examiners should not be allowed to refer the applicant for a medical evaluation, demand details about the nature of the disability, or request copies of medical records on the basis of such a response, any more than they should be allowed to ask, “Have you ever been hospitalized for mental

440. *Id.* at 119.

441. *Id.* at 121.

442. If the disability is one that the applicant was required to disclose on the medical questionnaire, the medical office’s evaluation may already have been completed, or may be underway.

443. The medical office’s report would address whether the past behavior is actually attributable to a disability, whether the condition is currently under control, and the present likelihood of behavior similar to the past incidents. In this situation, unlike the previous scenarios, the medical office would need to furnish the results of its evaluation to the bar examiners, even if its conclusion is favorable to the applicant.

illness?⁴⁴⁴ The necessity and legitimacy of inquiries triggered by the applicant's explanations of past conduct depends on the conduct being of a sort that would raise character concerns for any applicant (for example, criminal behavior, discharge or discipline for misconduct, defaults of responsibility), independent of any connection to a disability.

The second situation in which bar examiners should be allowed to initiate an inquiry into an applicant's disability can be illustrated by these cases:

John Doe's application form shows that he has been arrested twice in the past two years, once for drunk driving and once for assault. The police report from the latter arrest indicates that he had been drinking before getting into a fight. At a character and fitness hearing, Doe tells the bar examiners that he does not drink frequently and has no problem with alcohol. The two incidents resulted from errors in judgment, for which he is very sorry.

On an employment reference form, a partner at the law firm Sally Poe worked at last summer tells the bar examiners that Poe sent him a rambling, incoherent, and somewhat threatening letter after she was not offered a job at the firm. Poe's bar application form indicates that she was brought up on academic discipline charges for disruptive behavior during an examination. At a character and fitness hearing scheduled to deal with these issues, Poe addresses the panel in an agitated, disorganized manner, and claims that her law school and former law firm are involved in a conspiracy against her. She does not attribute any of her problems to illness.

In both cases, bar examiners would have reasonable grounds for believing that a disability that is not acknowledged by the applicant may be the underlying cause of problematic behavior that raises legitimate character and fitness questions. It would be appropriate to refer the applicant to the medical office for an evaluation before proceeding further.⁴⁴⁵ This is not without its problems;

444. *Edwards v. Illinois Board of Admissions to the Bar*, No. 99-C-6792, 2000 U.S. Dist. LEXIS 5869 (N.D. Ill. Mar. 29, 2000), provides another good example. Suzanne Edwards was forced to disclose her treatment for major depressive disorder in response to the bar examiners' question as to why she had left a prior job as an air traffic controller. She responded that she had to leave the job because her antidepressant medication made her ineligible for an Federal Aviation Administration medical certificate. The bar examiners then requested all her medical records, and Edwards sought a federal court injunction under the ADA. See *id.* at *2-*5. The court dismissed on federal abstention grounds without reaching the merits. See *id.* at *5-*11. Illinois did not ask about treatment for depression on the bar application form, nor can such a question be justified under the ADA. See *supra* Part III.B.1. To launch a full-scale investigation of an applicant's medical history based on her disclosure of treatment for depression, in the absence of any evidence of behavior or performance problems, is the functional equivalent of asking a depression question on the application form. See Gibeaut, *supra* note 2, at 24 (discussing *Edwards* case).

445. This is consistent with the current practices of bar committees, which often refer candidates for dependency evaluations based on alcohol-related convictions or other possible signs of addiction.

examiners may make inappropriate referrals and some applicants may be unfairly stigmatized by the suggestion of mental illness or substance abuse.⁴⁴⁶ Still, it is hard to quarrel with the necessity of allowing bar examiners to require a medical evaluation when there are reasonable grounds to believe that serious conduct problems are disability-related.⁴⁴⁷ Without the ability to do this, the kinds of conditions that are most likely to impair a lawyer's performance—substance abuse or mental illness that is active, untreated and perhaps not even recognized by the applicant—cannot be addressed.⁴⁴⁸

Two general objections might be raised to this framework for adapting Title I's procedural mechanisms to bar admissions. One relates to the allocation of decision-making authority. Under my proposal, if the medical officer concludes that there is no serious issue regarding the fitness of an applicant who answers "yes" to a disability question, the examiners will be told only that the applicant has been medically certified; they will not learn that the applicant disclosed a disability, and will not receive any information about it. Why should the medical office have the final say in such cases? To evaluate an applicant's fitness requires a detailed understanding of what lawyers do in addition to medical expertise. The capabilities required of a lawyer are not like the stamina or lifting abilities needed for, say, a dock-worker's job, which can easily be translated into a set of determinate medical standards. A medical expert may be able to describe a bar applicant's condition, treatment and prognosis, but is less well suited to say what the impact on law practice will be.⁴⁴⁹ Arguably, it should be the bar examiners who always have the final word on fitness, taking into account the medical officer's assessment and the information on which it is based.

See Braun, *supra* note 201 (describing practices in California); Marshall, *supra* note 169 (describing practices in Texas).

446. Limiting such referrals to situations in which the behavior problems have been serious, and providing examiners with appropriate training, can help to control the risks inherent in discretion. See Braun, *supra* note 201, at 12 (noting that members of the California character committee, although not qualified to make a diagnosis, have been trained to recognize signs of dependency that warrant a referral for a professional evaluation).

447. In the employment context, decisions interpreting Title I recognize the necessity of allowing employers to require a medical examination when the employer observes a performance problem and has reasonable grounds for believing that it may be disability-related. See *supra* note 313 and accompanying text.

448. Such cases usually will not be uncovered through the medical screening process; the applicant would answer "no" to questions about diagnosis or treatment. The applicant, too, may benefit from being referred for an evaluation. The result may be treatment and conditional admission in a case in which admission might be denied if the bar examiners were forced to make a decision solely on the basis of the behavior.

449. When Georgia's bar admissions board asked a psychiatrist about the fitness of a bar applicant with schizophrenia, it received the following response: "[The applicant] is acutely schizophrenic; however, I do not know how schizophrenic one must be before he should be disqualified from practicing law." Custer, *supra* note 372, at 20.

My response to this critique is that medical evaluators, working together with the bar examiners, can develop workable and reasonably concrete and consistent standards for deciding which cases raise serious fitness issues that warrant the bar examiners' attention. The basic capabilities that are required of an attorney should not be a professional mystery; they can be defined in terms that will be meaningful to a mental health expert.⁴⁵⁰ Principles that bar examiners have already developed to flesh out the meaning of "fitness" in the disability context can be used as the basis for medical office guidelines for determining when there is a serious fitness question.⁴⁵¹ The risk that a medical office would clear applicants in any significant number of cases in which the examiners could reasonably reach a contrary conclusion would be small. On the other hand, if a medical report went to the examiners in every case in which the applicant answered a disability question affirmatively, the purposes that underlie Title I's procedural protections would be severely undermined. The examiners would frequently gain access to highly confidential medical information in cases in which the disability has no bearing on the applicant's fitness.

A second objection is the expense. Bar committees have limited resources and must screen large numbers of applicants. Charles Reischel, a member of the Washington, D.C. bar admissions committee, argued against

450. An example can be found on Rhode Island's bar application form, which contains the following definition in connection with a question that asks about the existence of any conditions that would impair the applicant's ability to practice law:

"Ability to practice law" is to be construed to include the following:

- (a) The cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation, organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and resolving ethical dilemmas, for example[;]
- (b) The ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and
- (c) The capability to perform legal tasks in a timely manner.

In re Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1337 (R.I. 1996).

451. Bar examiners generally agree that *current* fitness is the issue when it comes to disabilities. In substance abuse cases, applicants in stable recovery are considered fit, even though there is always a high statistical probability of future relapse. Similarly, with serious mental disorders, the key issues tend to be the stability of the applicant's participation in treatment, and whether treatment is effectively controlling symptoms. See *supra* notes 204–205 and accompanying text.

Medical evaluation criteria based on these general principles might provide that there is a serious fitness issue when an applicant shows signs of continuing substance abuse or less than a year of stable recovery from a substance abuse problem; when an applicant's treatment for mental illness is not effectively controlling serious manic or psychotic episodes; or when an applicant has not been cooperative or consistent in complying with a necessary treatment regimen.

the applicability of Title I on these grounds in an article analyzing the ADA's implications for mental health questions:

An employer has both greater means and a greater incentive to test each applicant post-offer than a licensing body has concerning applicants for licensure. An employer will establish a continuing relationship with those it hires, and will derive benefits or suffer detriments from the employee's performance. A licensing body deals with many applicants, always on a strictly limited basis, and is not directly affected, if at all, by their post-license performance.⁴⁵²

The flaw in this analysis is that licensing boards, unlike employers, are not independent, freestanding entities. Bar admissions authorities are an arm of the judiciary, a branch of state government. If disability-based inquiries are necessary for the sake of public protection, as bar examiners contend, the state has ample incentive, as well as the means, to pay the cost of ensuring that the inquiry is handled in a nondiscriminatory way.⁴⁵³

To not apply Title I's safeguards to a licensing screening process also has its costs. It imposes the burdens of a discriminatory process on applicants with disabilities. There is no good reason why the state, unlike employers, should be exempt from the law's requirement that disability-based screening must be conducted in a manner that avoids discrimination against applicants with disabilities.

452. Reischel, *supra* note 115, at 19.

453. The expense should not be great. If the inquiries on medical questionnaires comply with Title II's requirements of necessity and narrow tailoring, only a very small percentage of bar applicants will respond affirmatively. Conducting the medical screening would be a part-time job for a mental health professional. Cf. Herr, *supra* note 6, at 677–78 (arguing that, given the small number of applicants who respond affirmatively to mental health questions, it would not be unduly burdensome for bar committees to utilize an interviewer with medical qualifications).

To shift this expense to applicants with disabilities, by charging an additional fee for the medical questionnaire or making the applicant pay the costs of an evaluation, should not be permissible. The U.S. Department of Justice's Title II regulations prohibit a public entity from placing a surcharge on any individual with a disability to cover the costs of measures required to provide nondiscriminatory treatment. See 28 C.F.R. § 35.130(f) (2000). Some courts have questioned the validity of this regulation when it is applied to prohibit states from charging a fee for special services provided to individuals with disabilities, such as handicapped parking permits. See *Neinast v. Texas*, 217 F.3d 275, 280–82 (5th Cir. 2000); *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 703–08 (4th Cir. 1999) (dismissing suits on Eleventh Amendment grounds, but with reasoning suggesting that these courts might find the regulation to be an arbitrary and irrational interpretation of statute). But see *Dare v. California*, 191 F.3d 1167, 1176 (9th Cir. 1999) (upholding regulation). However, requiring a person with a disability to pay for a burden that is imposed by the state, solely because of the applicant's disability, in order to determine eligibility for a general professional license, should stand on a different footing than requiring payment for a service or benefit that is available only to persons with disabilities and is designed to assist them. The former is a straightforward form of discrimination—treating people differently on the basis of their disability status—that should be prohibited under Title II's statutory prohibition of discrimination, regardless of the validity of the U.S. Department of Justice regulation.
