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Moral Character: The Personal and the Political

Deborah L. Rhode*

I.

For most of this nation's history, legal ethics was a field of relative neglect, both in scholarly thought and public discourse. That pattern has recently begun to change, in part because of the support and interest that this endowed lecture series on ethics reflects. I am pleased to be part of this series, although I should perhaps confess a few qualms about the particular subject for discussion. When I initially received the suggestion to talk about moral character, my immediate reaction was reluctance. Although recent events make it a timely subject, it is also one that I have previously pursued at unseemly length.¹ Academics justifiably may feel uneasy about returning to the published scenes of their youthful indiscretions. In many cases, they will find themselves in remarkable agreement with what they have already said, which leaves them in an unbecoming position of offering unoriginal variations on earlier themes. Alternatively, they may find themselves in the equally awkward position of having to recant, which may leave their audience wondering why authors should be believed the second time when they couldn't get it right the first.

Yet even as I counseled myself to leave this topic, current events conspired to tempt my return. Over this past year, moral character as a professional credential has been a topic of increasing interest. More and more private indiscretions have become public knowledge in political campaigns, judicial confirmation hearings, and even state bar admission procedures. Under these circumstances, to decline comment seemed almost imprudent. How often do academics receive invitations to talk about drugs and sex and call it scholarship?

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1. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

What particularly intrigued me about the subject was that recent discussions about the character of political candidates often echoed the debate about character among applicants to the bar. Having already taken the position that much of the inquiry in bar admission procedures is inappropriate, I began wondering whether the same arguments were applicable to selection processes for other individuals involved in shaping the law. What implications might this recent political debate about character have for our professional regulatory structures?

With these questions in view, let me suggest that most responses fall into three general categories. One approach, traditionally applicable to members of the bar and now increasingly extended to political candidates, advocates a broad inquiry into character. Any conduct that violates the law or compromises widely shared moral principles is relevant to individual fitness and is appropriate for public scrutiny. A second approach denies that much of the information we have unearthed about personal conduct is sufficiently predictive of future performance to be worth the cost of exposure. A final, more contextual approach, views such conduct as relevant in some circumstances for some positions, but emphasizes the need for better ways of identifying when and how much.

It is, of course, possible to be critical of all the above positions, and I admit to leaning in that direction. However, I also recognize that it is somewhat unseemly to initiate a discussion of important ethical issues, propose three possible resolutions, pronounce all of them deeply flawed, and call it a day. So, if forced to choose, I'll place myself reluctantly in the contextual camp.

This contextual framework acknowledges that certain forms of personal behavior are insufficiently predictive of professional conduct to justify the costs of public scrutiny. Only where a crucial part of a crucial job involves moral leadership will extended moral oversight be appropriate. As a general matter, individuals holding positions of judicial and governmental leadership should expect more exacting scrutiny than those engaged in more routine legal practice. What sorts of personal conduct are relevant to a given position involves contextual judgments that the following discussion will explore in some detail. But underlying this discussion is a more general point. However one resolves particular cases, it is critical that the process of decision making become more reflective than traditionally has been the case. Those directly involved in character evaluation — including journalists, judges, and bar officials — need to subject their own evaluative standards to more

rigorous moral scrutiny. That process, in turn, should suggest the need for fundamental changes in both our legal and journalistic ethics.

II.

Those who support broad inquiries into moral character for all political and legal positions generally make two claims. The first is that lawyers, judges, and politicians occupy positions of public trust. To safeguard the interests of society in general and those of clients, litigants, and constituents in particular, it is critical to screen out candidates who are likely to abuse their positions. Given the difficulties of ousting incumbents or of rectifying the injury they cause, some preliminary inquiry into honesty, integrity, and moral judgment seems advisable to prevent harm before it occurs. Character cannot always be compartmentalized and the qualities that individuals display in their personal lives may spill over to professional relationships.²

A second rationale for character inquiry involves issues of image. Those charged with making, administering, or upholding the law should not have defiled it. In order to maintain respect for legal and governmental processes, individuals holding positions of public responsibility should behave responsibly in their personal as well as professional lives.³

Of course, as subsequent discussion will suggest, there are important differences in our expectations for different offices and in our processes for moral inquiry. The degree of probity we demand in Supreme Court nominees is not what we accept in county commissioners, and the degree of self-regulation we permit for the organized bar is not what we allow for other vocational groups. Nevertheless, our rationales for character inquiry in all of these contexts are quite similar and they are vulnerable on several grounds.

A threshold difficulty involves the marginal relevance of much of the information that emerges from inquiries by bar character committees and political journalists. Underlying these inquiries is the assumption that character reflects consistent personality traits, and that individuals who exhibit dishonesty or disrespect for law in

2. See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957); G. SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 173 (3d ed. Philadelphia 1869).

3. See *In re Wolff*, 490 A.2d 1118 (D.C. App. 1985); E. DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (1957); Farley, *Character Investigation of Applicants for Admission*, 24 B. EXAMINER 147, 158 (1955); Rhode, *supra* note 1, at 509-11 nn.82-93.

one context will do so in another. Yet a vast array of social science research suggests that this assumption is, to a large extent, a "figment of our aspirations."⁴ Contextual factors play a critical role in shaping moral behavior and little correlation is apparent between seemingly similar character traits, such as lying and cheating. Even slight changes in situational variables can substantially affect tendencies toward deceit. For example, studies of students indicate that it is impossible to predict cheaters in French from cheaters in math.⁵

If we cannot reliably make those sorts of predictions, it is hard to defend the far more attenuated inferences that underlie character assessments in bar admission proceedings and political campaigns. It is doubtful that any systematic study would confirm a frequent reaction to the Gary Hart affair, which was that anyone who would lie to his wife would find it easier to lie to voters with "whom he has a less intimate relationship."⁶ Whatever else one may say about infidelity in marriage, history does not disclose it to be a particularly accurate predictor of infidelity to constituents. Compare, for example, Richard Nixon and Franklin Delano Roosevelt. It is equally implausible to expect a close connection between performance in office and much of the other character information that emerged during recent judicial and political investigations. Such information included Bruce Babbitt's use of marijuana in college; Pat Robertson's efforts to disguise the illegitimacy of his son's birth decades ago; Dan Quayle's fraternity antics; Robert Bork's choices in home video rentals; Douglas Ginsburg's operation of a dating service while in college; and Ginsburg's wife's performance of abortions during her medical training.⁷

The costs of this form of "character" inquiry are not born by

4. Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 926 (1975).

5. H. HARTSHORN & M. MAY, STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT, BOOK 1 377-90, 407-12; H. HARTSHORN & M. MAY, STUDIES IN THE NATURE OF CHARACTER, BOOK 2 211-21. See also W. MISCHEL, PERSONALITY AND ASSESSMENT 25-26 (1968); Bem & Allen, *On Predicting Some of the People Some of the Time, The Search for Cross-Situational Consistencies in Behavior*, 81 PSYCHOLOGICAL REV. 506, 506-07 (1974); Rhode, *supra* note 1, at 556-62 nn.292-326.

6. Wyse, *The Way We Are*, GOOD HOUSEKEEPING, Sept. 1987, at 286. See also Gersh, *Miami Herald v. Gary Hart*, EDITOR AND PUBLISHER, May 9, 1987, at 15; Kinsley, *TRB: On the Zipper Beat*, THE NEW REPUBLIC, May 25, 1987, at 4 ("[t]he same juices that drive politicians to run for office drive many to horse around and may drive some to express themselves in other ways, like starting wars").

7. *Ginsburg Withdraws as Court Nominee Citing Clamor on Drugs*, N.Y. Times, November 8, 1987, at 18, col. 3 [hereinafter *Ginsburg Withdraws*]; Hevst, *Gore and Babbitt Admit Marijuana Use in Past*, N.Y. Times, Nov. 8, 1987, at 18, col. 1.

candidates and their families alone. Society also suffers when its choices for leadership narrow to those willing to put their entire life histories on public display. Under the watchful eye of reporters scrambling for a scoop, most biographies will reveal something that is frayed around the ethical edges. Our nation has a limited supply of saints, and it is unclear how many will be willing and able to withstand our lengthening journalistic gauntlets.

Even more troubling is the risk that this kind of character scrutiny will deflect attention from more serious issues. As it is, the public's attention span is limited, and stories about sex are inevitably more sexy than those about farm price supports. Even after San Antonio's highly regarded mayor, Henry Cisneros, had withdrawn his candidacy for elective office, new revelations of his adultery eclipsed discussion of his administration's performance.⁸ Front page coverage focused on whether Dan Quayle whispered sweet nothings in the ear of then lobbyist and later *Playboy* model, Paula Parkinson. Of far less interest was Quayle's undistinguished Senate performance, his questionable Congressional campaign tactics, and his subordination of political responsibilities to personal interests.⁹ Similarly, a number of facts about Douglas Ginsburg's professional conduct raised serious ethical questions, including his affidavits concerning prior trial experience and his insensitivity to potential conflicts of interest while an official in the Justice Department.¹⁰ But it was marijuana use that captured public attention and prompted a series of true confessions by political candidates about their student smoking behavior. At the same time media leaders were dismissing such revelations as gratuitous, a national opinion poll reported that over a quarter of surveyed Americans would refuse to vote for a presidential candidate who had used ma-

8. Applebone, *Disclosure of San Antonio Mayor's Infidelity Brings Pain and Questions About Process*, N.Y. Times, Oct. 16, 1978, at A11, col. 3.

9. See Cato, *The View From the Hill*, NATIONAL REVIEW, Sept. 16, 1988, at 24 (noting Quayle's undistinguished political performance and sponsorship of special tax breaks for professional golfers); Hosenball, *Fore*, NEW REPUBLIC, Sept. 12-15, 1988, at 18 (describing Quayle's inadequate record and concessions to his golf schedule); Sheehy, *Just Danny*, VANITY FAIR, Nov. 1988, at 152; *A Media 'Feeding Frenzy'?*, NEWSWEEK, Aug. 29, 1988, at 20, 25 (noting that Quayle had labeled himself a Vietnam-era veteran in his brutal Senate campaign); *The Quayle Quagmire*, TIME, Aug. 21, 1988, at 18, 22, 25 (discussing Senate campaign tactics, record, and Parkinson allegations).

10. *Inquiry on Ginsberg Advances*, N.Y. Times, Dec. 26, 1987, at A11, col. 1; *Ginsberg's Role in Cable TV Case is Investigated*, N.Y. Times, Nov. 14, 1987, at A9, col. 1; *Behind the Ginsburg Smoke*, N.Y. Times, Nov. 10, 1987, at A34, col. 1; *Ginsberg Had Two Roles in a Pension Case, Documents Show*, N.Y. Times, Nov. 8, 1987, at A36, col. 1; *Cabinet Official Bids Ginsberg End High Court Quest*, N.Y. Times, Nov. 7, 1987, at A1, col. 1; *Ginsberg Faces Queries Over Cable TV*, N.Y. Times, Nov. 4, 1987, at D30, col. 1.

rijuana in college.¹¹

Judging from recent allocations of media attention, not enough observers shared the view of one irate television talk show listener who informed Gary Hart that she was "sick of hearing about [his] sleeping habits." What bothered her was *not* hearing about his 1.4 million dollars in unpaid campaign debts.¹² Yet that issue, as well as much of the other "character" evidence available from a fifteen year career in public service, received a tiny fraction of the attention devoted to Hart's marital infidelity. His "Monkey Business" in Bimini made page one; his tax proposals made page twenty-two.

While defenders of the press stakeouts of Hart's boudoir generally maintained that the issue was judgment, many readers were clearly more interested in sex. In one national opinion poll, over a third of those surveyed indicated that they would refuse to vote for a candidate who was unfaithful to his wife, even if they agreed with him on most issues.¹³ Because the possibility of a woman candidate apparently escaped pollster's notice, it is unclear whether a double standard for politicians survives. In any case, it is not encouraging that such a substantial constituency would attach overriding importance to adultery, irrespective of surrounding circumstances. Nor is it comforting that the amount of press coverage concerning sex and drugs among candidates and their families has dwarfed coverage of professional misconduct among many existing government officials.¹⁴

Once we license a general inquiry into candidates' personal lives, the risk is that a Gresham's law of journalism will prevail. All it takes is one reporter with a peephole perspective. As soon as a scandal breaks in any major media outlet, it becomes difficult for other members of the press to remain above the fray. The kind of "let the public decide" philosophy that currently guides character investigation encourages the media to pander to our worst instincts.¹⁵ To make national press conferences into open forums on adultery demeans not only candidates but ourselves. It encourages

11. See *Ginsberg Withdraws*, *supra* note 7.

12. *Hart's 1984 Debts Make the 1988 Campaigns Nervous*, N.Y. Times, Jan. 10, 1988, § 8, at 4, col. 1.

13. *Poll Finds Infidelity A Lesser Evil Than Others in Picking Candidates*, N.Y. Times, May 8, 1987, at A1, col. 4.

14. For a list of 110 Reagan Administration officials accused of unethical conduct, see Washington Post, April 27, 1986, at A12, col. 1. Most of the abuses (which ranged from substantial financial conflicts of interest to reliance on government chauffeurs for picking up laundry) received comparatively little attention outside of Washington.

15. Kinsley, *supra* note 6, at 41; Judd, *The Hart Affair*, COLUM. JOURNALISM REV., July-Aug. 1987, at 25.

a climate in which leading journalists believe that the exposure of "human folly is valuable for its own sake, and that if politicians are going to run our lives, the least we can expect in return is . . . some entertainment value."¹⁶

The effects of that ethos are not readily contained. As Anthony Lewis has noted, "each vulgarity makes the next easier."¹⁷ More and more political figures are becoming targets of the kind of scrutiny once reserved for Hollywood celebrities, complete with round-the-clock surveillance tactics. In the aftermath of the Hart stakeout, the *New York Times* proposed a more genteel but equally invasive means of obtaining extensive personal information: just ask candidates voluntarily to supply it. Among other things, the *New York Times* requested copies of high school transcripts, marriage licenses, medical records, and blanket permission to discuss medical histories with physicians.¹⁸ Even some of the most ardent first amendment defenders were a bit uncomfortable with this demand. As a former *Washington Post* managing editor suggested, "better they should ask about adultery."¹⁹

To assess the price of such character inquiries, some historical perspective is useful. For example, would society in general, and the civil rights movement in particular, be better off if the national media had trumpeted the "truth" about the sexual activities of Martin Luther King, minister of the cloth? As Warren and Brandeis' celebrated article on privacy noted, gossip "both belittles and perverts . . . [b]y inverting the relative importance of things [I]t usurps the place of interest in brains capable of other things."²⁰

Similar points are applicable to character inquiries for lawyers. In both admission and disciplinary contexts, the process has been inconsistent, idiosyncratic, and unnecessarily intrusive. Although only a tiny percentage of bar applicants have been formally denied admission, a significant number have been deterred, delayed, and harassed. So too, while the number of lawyers disbarred for non-

16. Kinsley, *supra* note 6, at 4.

17. Lewis, *After the Fall*, N.Y. Times, May 1, 1987, at 25, col. 1. See Bain, *Private Sex and Public Exposure*, MACLEANS, May 25, 1987, at 48; Hertzberg, *Sluicagate*, NEW REPUBLIC, June 1, 1987, at 11.

18. Goodman, *Request Goes Too Far*, B. Globe, June 4, 1987, at 9, col. 1; *Dole Berates Press - 'Gossip, Nit-Picking'*, S.F. Chronicle, April 27, 1988, at A12, col. 5.

19. Goodman, *supra* note 18 (quoting Howard Simons).

20. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See A. WESTIN, *PRIVACY AND FREEDOM* (1970); Gavison, *Privacy and the Limits of the Law*, 89 YALE L. J. 421 (1980); Gererty, *Redefining Privacy*, 12 HARVARD C.R.-C.L. L. REV. 233 (1977).

professional misconduct has been equally small, the arbitrariness of standards has been equally troubling.

Here a historical footnote is instructive, although not particularly inspiring. Prior to this century, the process for screening applicants was, for the most part, ritualistic. In the nineteenth century, the only substantial groups excluded were females and convicted felons.²¹ The first major Supreme Court case on point gives a sense of the problems to follow. The case involved Myra Bradwell, a publisher of a prominent Chicago legal periodical, whose character deficiencies were fundamental and irredeemable. She was female and the "Law of the Creator" decreed that women's destiny was domesticity. Many nineteenth-century jurists apparently shared Alexander Pope's conclusion that women either had "no character at all" or had one of the wrong types.²² Within the legal profession, the general consensus was that the "peculiar qualities of womanhood," its "gentle graces, quick sensibility . . . and tender susceptibility," were not qualifications for "forensic strife."²³

Although by the early twentieth century the Creator's will had apparently reversed itself regarding women, the standards for character scrutiny remained no less problematic. Those disbarred or denied entrance formed a motley collection, including convicted felons, suspected subversives, indiscreet adulterers, and overly-blatant self-promoters.²⁴ Class, racial, and ethnic biases were sometimes pronounced. In the late 1920s, for example, Pennsylvania's rigorous pre-law and post-law school screening system was particularly effective in filtering out the most *lumpen* of the *proletariat*. In 1929, one county board excluded individuals whom it variously characterized as "dull," "colorless," "subnormal," "unprepossessing," "shifty," "smooth," "keen," "shrewd," "arrogant," "conceited," "surly," and "slovenly."²⁵ During the first eight years the system was in place, the proportion of Jewish candidates who passed moral muster dropped by sixteen percent and almost no blacks gained entry.²⁶

21. Rhode, *supra* note 1, at 496-98.

22. A. POPE, MORAL ESSAYS: IN FOUR EPISTLES TO SEVERAL PERSONS (1781).

23. *In re Goodell*, 39 Wis. 232, 245 (1875). See also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring); Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

24. See Rhode, *supra* note 1, at 500-01.

25. Douglas, *The Pennsylvania System Governing Admission to the Bar*, 54 REP. A.B.A. 701, 703-05 (1929).

26. J. AUERBACH, UNEQUAL JUSTICE 112-14 (1976).

The Cold War era marked another period of rigorous scrutiny, as character committees searched diligently for evidence of "pinkish" sympathies.²⁷ George Anastaplo, now a distinguished faculty member at Chicago's Loyola University, was a case in point; his bar application essay defending the right of revolution as set forth in the Declaration of Independence was sufficient to prompt questions of unfitness.²⁸

Character inquiry in disciplinary proceedings has raised similar concerns. Once admitted to the bar, practitioners generally can be excommunicated only for conduct involving "moral turpitude," a standard open to indeterminate and idiosyncratic interpretation. Even within the same jurisdictions, different committees have expressed different views of conduct ranging from anarchism to personal income tax violations.²⁹

To take only the most colorful examples, the bar's early pronouncements regarding promiscuity generated a collection of somewhat murky moral mandates. To a 1929 Missouri court, seduction by an unfulfilled promise to marry constituted an act of "baseness and depravity" warranting disbarment.³⁰ By contrast, to a New Jersey court around the same period, statutory rape of a fifteen year old was forgivable in light of the attorney's previously "upright" record and the girl's more tainted reputation.³¹ Again, class biases have been apparent. Seducing one's secretary has been thought discreditable but not disabling; seducing a prominent society matron and wife of a war hero has been grounds for disbarment.³²

Although both admission and disciplinary systems have improved over time, certain problems remain. The first is the possibility for arbitrary and intrusive decision making. Existing definitions of character are circular, conclusory, or both. In most cases, courts simply announce that the applicant is or is not fit, sometimes without even disclosing the factual basis for their judg-

27. Brown & Fasset, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 494 (1953).

28. See *infra* note 38 and accompanying text. *In re Anastaplo*, 366 U.S. 82, 98-102 (1961) (Black, J., dissenting). See Anastaplo, *What is Still Wrong with George Anastaplo? A Sequel to 366 U.S. 82 (1961)*, 35 DE PAUL L. REV. 551 (1986); Papke, *The Watergate Lawyers All Passed the Character and Fitness Committee*, 2 COLUM. U.F. 15, 17-18 (1973).

29. See Rhode, *supra* note 1, at 552-53.

30. *In re Wallace*, 323 Mo. 203, 206, 19 S.W.2d 625, 629 (1929).

31. *In re Isserman*, 6 N.J. Misc. 146, 148, 140 A. 253, 253 (1928).

32. Compare *Grievance Comm. v. Broder*, 112 Conn. 263, 274-78, 152 A. 292, 294-95 (1930) with *State v. Byrkett*, 3 Ohio N.P. 28 (1896).

ments. Rarely are the premises guiding the decision acknowledged, let alone defended.³³

The indeterminacy of standards has both reflected and reinforced a screening process of equally unguided scope. Applicants for admission must provide a broad array of information that in some jurisdictions extends to parking violations and high school extracurricular activities. My prior empirical survey of character committees revealed that in eighty percent of the states, candidates might run into difficulties for membership in leftist political organizations or for misdemeanor convictions resulting from civil disobedience.³⁴ Forty percent of surveyed jurisdictions would or might investigate cohabitation or homosexual conduct. Although contemporary studies suggest that some three-quarters of all college undergraduates have either cohabited or have expressed a willingness to do so if the opportunity arose, some bar committees have recently denied, deferred, or humiliated candidates on that basis.³⁵ Over a third of all states demand the records of divorce proceedings, and a substantial percentage of states make inquiries about voluntary mental health treatment.³⁶ In most cases, even trained mental health clinicians cannot accurately predict future psychological incapacities on the basis of past treatment; yet untrained bar examiners have routinely attempted such predictions.³⁷

The refusal to provide such information or even an inadvertent failure to disclose remote activities can of itself constitute grounds for exclusion. George Anastaplo was denied admission because of his refusal to answer questions about political affiliations that would not of themselves have been a constitutionally legitimate basis for rejection.³⁸ In the more recent and celebrated case of Edward Loss, a rehabilitated drug offender with an exemplary law school record, a majority of the Illinois Supreme Court denied certification but declined to "lengthen [its] opinion" by identifying the

33. Rhode, *supra* note 1, at 529-31. For a recent illustration, see *In re Loss*, 119 Ill. 2d 186, 518 N.E.2d 981 (1987).

34. Rhode, *supra* note 1, at 568-69.

35. For a discussion of cohabitation rates, see Macklin, *Non-Marital Heterosexual Cohabitation*, 1 MARRIAGE AND FAM. REV., 1, 2 (1978); Spanier, *Married and Unmarried Cohabitation in the United States*, 45 J. MARRIAGE AND FAM. REV. 277 (1983). For discussions of committee decisions, see Rhode, *supra* note 1, at 532-37, 581-83.

36. See Rhode, *supra* note 1, at 571-88.

37. For problems of predicting psychological difficulties, see sources cited in Kaslaw, *Moral, Emotional and Physical Fitness for the Bar: Pondering (Seeming) Imponderables*, B. EXAMINER, 38, 41 (Aug. 1980); Note, *Selective Incapacities: Reducing Crime Through Prediction of Recidivism*, 96 HARV. L. REV. 511 (1982).

38. Anastaplo, *supra* note 28, at 567-69.

factual basis for its conclusion.³⁹

As even this brief overview suggests, the costs of such a system are substantial. Part of the price is consistently inconsistent judgments. Many of the same offenses, such as bankruptcy, bounced checks, marijuana use, and participation in student protests, are treated differently within and across jurisdictions.⁴⁰ Even when applied to dissimilar conduct, prevailing criteria yield peculiar results. For example, during the early 1980s, one local Michigan character committee refused to certify an applicant who had violated a fishing license statute a decade earlier. In the same state around the same time, examiners on the bar's central committee admitted applicants convicted of child molesting and conspiracy to bomb a public building.⁴¹ Such decision making is a mockery of due process — of standards for consistency, regularity, and fair notice that the bar has so valiantly fought to establish in other contexts.

Moreover, the intrusiveness of current character proceedings has other costs. The risk of problems with the bar may chill protected political activity or discourage those with psychological difficulties from seeking treatment. Those who refuse to be intimidated may be subject to harassment, delay, and occasionally to denial. By extending scrutiny to relatively unimportant matters, the bar risks trivializing the entire character inquiry. Worse still, the judgments of unfitness that have too often emerged from this process — involving political activists, conscientious objectors, acknowledged homosexuals, and rehabilitated offenders — subvert principles that the profession seeks to sustain.⁴²

Analogous points are applicable to bar disciplinary systems. Indeed, a comparison of the two processes suggests considerable selectivity in the bar's commitment to moral oversight. At the admission stage, character committees deny, delay, or deter applicants with minor misconduct on the theory that they might commit serious professional abuses. At the disciplinary stage, however, the vast majority of those who have committed such abuses escape significant sanctions.⁴³

39. *In re Loss*, 119 Ill. 2d 186, 197, 518 N.E.2d 981, 985 (1987).

40. Rhode, *supra* note 1, at 542-46.

41. *Id.* at 538.

42. *Id.* at 569-70. See also *In re Summers*, 325 U.S. 561 (1945); Brown & Fasset, *supra* note 27.

43. For a summary of almost two decades of studies beginning with the ABA Clark Report in 1970, see G. HAZARD & D. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* (2d ed. 1988).

The problems in existing disciplinary processes have been canvassed elsewhere and need not be rehearsed here. It is sufficient to note that major studies consistently have found these procedures inadequate in responding to professional misconduct.⁴⁴ It is also ironic that the bar is willing to penalize applicants who have shown disrespect for law in a wide range of contexts, including cohabitation or non-payment of parking fines and child support awards. Yet after admission, the same conduct never triggers scrutiny among practitioners. Those who have already sworn to uphold the law receive the greatest latitude when they violate it.⁴⁵

This double standard in admission and discipline has not always escaped attention among the public it theoretically serves to protect. In commenting on the *Loss* case, columnist Mike Royko reviewed the recent list of Illinois attorneys who had committed major felonies and serious professional misconduct but were reinstated to practice. As Royko noted, those imprisoned for crimes committed as attorneys were able to retain their licenses, even though a "man who apparently pulled himself out of trouble [was] denied a chance."⁴⁶

This is not to imply that the bar has been unfailingly tolerant of collegial misconduct. Rather, as prior discussions of moral turpitude suggested, character inquiries in disciplinary as well as admission proceedings have reflected inconsistent, intrusive, and idiosyncratic judgments. Cases concerning non-professional conduct, such as those involving sex, drugs, or assault, have produced widely differing results and little reasoned analysis.⁴⁷ Often, the

44. *Id.*; Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986).

45. See Rhode, *supra* note 1, at 546-55 nn.241-85.

46. Royko, *Lets Get to Bottom of Ed Loss Affair*, Chicago Tribune, Aug. 20, 1987, § 1, at 3, col. 1; see also Royko, *High Court Misses the Point of Law*, Chicago Tribune, Aug. 18, 1988, § 1, at 3, col. 1.

47. For example, courts sometimes view illegal sexual conduct as evidence of a disorder unrelated to practice and allow attorneys to retain their licenses. See, e.g., *In re Kimmel*, 322 N.W.2d 224 (Minn. 1982) (homosexual assault of minor viewed as dysfunction similar to alcoholism; practice restricted to title searches for four years); *In re Adonizio*, 95 N.J. 121, 469 A.2d 492. (1984) (three month suspension for undisclosed "aberrational" sex offense); *In re Martin*, 112 Wis. 2d 661, 334 N.W.2d 107 (1983) (six-month suspension for contributing to the delinquency of a minor). In other instances, courts view such conduct as moral turpitude justifying disbarment. See *People v. Grenemyer*, 745 P.2d 1027 (Colo. 1985) (consensual sex with boy under 15); *In re Wolff*, 490 A.2d 1118 (D.C. App. 1988) (distribution of child pornography); *In re Levinson*, 444 N.E.2d 1175 (Ind. 1983) (exhibitionism). See also *Committee on Prof. Ethics v. Tompkins*, 415 N.W.2d 620 (Iowa 1987) (two-year suspension and treatment for attorney convicted of trespass while searching for female undergarments); *Committee on Prof. Ethics v. Fray*, 334 N.W.2d 739 (Iowa 1983) (18-month suspension for obscene phone calls).

For varying views on assaults, compare *Carter v Cianci*, 482 A.2d 1201 (R.I. 1984)

relative priorities in bar enforcement seem more related to public image than protection. Two 1983 cases from Indiana are illustrative. One involved an attorney convicted of growing marijuana. The other involved a lawyer who had repeatedly neglected and deceived clients and improperly withheld their funds. The former was disbarred; his colleague received a forty-five day suspension.⁴⁸ If this is protecting the public, we need to rethink our definition of protection.

III.

Such considerations have led some commentators to an alternative approach toward character issues, one which seeks to distinguish between the personal and the political, the private and the professional. In effect, this position is that those interested in public office or legal practice should not be subject to scrutiny for conduct that is not directly related to professional performance. Although the proper scope for character investigation may blur at the boundaries, matters such as marital fidelity or marijuana use at private gatherings should remain off limits. This position has much to commend it when lawyers are regulating lawyers. However, problems arise when certain highly visible political and judicial offices are at issue, and certain ostensibly "private" conduct has public consequences. Where the position entails moral leadership, we may wish to tolerate broader moral scrutiny.

One example involves "womanizing," the charge leveled at Gary Hart. Underlying that allegation were two sets of objections: one went to the substance of his sexual activities, the other to the manner in which he conducted them. Although it is not clear that the

(public reprimand for attorney convicted of attacking friend who was having an affair with the attorney's ex-wife) and *In re Kuvira*, 97 Wash. 2d 743, 649 P.2d 834 (1982) (no discipline imposed for "isolated instance" of barroom struggle that had been redressed through civil and criminal law) with *In re McGrath*, 98 Wash. 2d 337, 655 P.2d 232 (1982) (disbarment for shooting that arose from barroom quarrel).

For drug use, compare *People v. Young*, 732 P.2d 1208 (Colo. 1987) (disbarment following conviction for cocaine use and distribution) and *In re Thomas*, 472 N.E.2d 609 (Ind. 1985) (three-year suspension following conviction for possession of marijuana and another controlled substance) and *Office of Disciplinary Counsel v. Simon*, 510 Pa. 312, 507 A.2d 1215 (1986) (disbarment based on conviction of not-for-profit cocaine transactions involving acquaintance) with *Florida Bar v. Levine*, 498 So. 2d 941 (Fla. 1986) (public reprimand for conviction for cocaine use) and *In re McLaughlin*, 105 N.J. 457, 522 A.2d 999 (1987) (public reprimand following conviction for cocaine purchase) and *In re Kinnear* 105 N.J. 391, 522 A.2d 414 (1987) (one-year suspension following conviction for distribution of cocaine). See generally G. HAZARD & D. RHODE, *supra* note 43.

48. Compare *In re Moore*, 453 N.E.2d 971 (Ind. 1983) with *In re Holloway*, 452 N.E.2d 934 (Ind. 1983).

two issues can be ultimately separated, both call into question the public/private boundary that some commentators have sought to establish.

Leaving aside, for the moment, the issue of the media's own conduct in investigating Hart's activities, the information that emerged was relevant to his candidacy in two respects. The first has to do with qualities of honesty and judgment that became apparent in the way Hart publicly responded to personal inquiries. Rather than refusing to discuss charges of extra-marital relationships, Hart flatly denied them and indeed challenged reporters to verify his claim. Yet once having painted a picture of marital rectitude, Hart found it difficult to sustain for even a few months, a fact that inevitably raised doubts about his judgment and self-control.⁴⁹ Moreover, in the face of mounting evidence about his frequent contacts with model Donna Rice, Hart's denial that they had any "personal relationship" seemed inadequate to the occasion. As a *New York Times* editorial wryly inquired, "would 'political' or 'business' relationship better describe it?"⁵⁰ However, we as individuals judge Hart's underlying conduct, his inability to predict how the public in general would assess that conduct suggests a troubling degree of moral myopia.

The lack of discretion with which Hart conducted his personal life at a critical juncture in his career raises broader concerns. In some respects, the point is reminiscent of a perhaps apocryphal but nonetheless telling anecdote about a former president of U.S. Steel. When forced to resign after his liaison with actress Lillian Russell became public, the president objected to his board of directors that he was being penalized for doing publicly what many of them did behind closed doors. To which the response was, "that's what doors are for."

But to take a harder case, suppose that Hart had been more discrete and utterly candid about his personal life and insisted that it had no bearing on his fitness for public office. In a recent interview, Yale Law School Dean Guido Calabresi maintained that while he could not approve of the conduct culminating in the Rice affair, his advice to Hart would have been to say:

I have a problem. I have a weakness for beautiful women. It's not something I'm proud of. It's not something that's good. It's a weakness. It's made strains on my marriage. If I were to tell you I would never do that kind of thing again, that would be

49. Kinsley, *supra* note 6, at 41.

50. N.Y. Times, May 5, 1987, at A34, col. 1.

foolish. You never know. If that is so much of a problem for you that you cannot vote for me on it, so be it. That is what I am.⁵¹

Yet to present Hart's conduct in those terms risks trivializing its significance. A habitual weakness for casual affairs is not like a weakness for chocolate. Womanizing degrades and "objectifies" women in general and can be hurtful and humiliating to one woman in particular. It signifies a lack of respect for an individual with whom one has an intimate relationship and ongoing responsibility. In an age in which divorce is publicly acceptable, an individual's choice to remain married, while repeatedly violating the commitments it is thought to entail, raises questions of his or her character. For positions involving moral leadership, those questions are relevant.

That is not to imply that such concerns should be conclusive. How a candidate treats another person in private life is not, of course, more critical than how he or she treats their concerns in a political capacity. What makes for personal goodness is not always synonymous with what makes for the common good. For the reasons indicated earlier, it would be a mistake to assume that private conduct will accurately predict public performance. Rather, my point is that when an important aspect of an important job involves expressing moral values, it makes sense to consider whether a particular individual can credibly speak for the standards we seek most to maintain.

Thus, as my introductory remarks suggested, judicial and governmental leaders should attract fuller scrutiny than those engaged in legal practice. In general, we expect individuals who play prominent roles in shaping or administering the law to abide by its mandates. Whatever our tolerance for hypocrisy in other contexts, we would prefer that our leaders not — as the proverb has it — preach water and drink wine.

Again, this does not suggest that any legal violation is conclusive. Context matters. Contrary to some recent judicial censure cases, it is not self-evident that any allegation of extra-marital sexual activity that arouses "gossip" warrants investigation.⁵² Public respect for the administration of justice is not necessarily enhanced by selective application of adultery or sodomy prohibitions. But

51. Liptak, *Taking it Personally*, YALE ALUMNI MAG., March 1988, at 29.

52. See, e.g., *In re Agerter*, 353 N.W.2d 908 (Minn. 1984) (suggesting that inquiry into extra-marital liaison would be appropriate if conducted in a public manner raising community concern); *In re Snyder*, 336 N.W.2d 533 (Minn. 1983) (continued adultery and possible paternity of illegitimate child that became a subject of public gossip was ground for censure).

neither do we want Supreme Court Justices who are use illegal drugs or prominent SEC officials who batter their wives.⁵³ The reason has nothing to do with attenuated inferences about professional competence. Some individuals with a weakness for marijuana might also have a flair for constitutional jurisprudence. Most of the country, however, would prefer that they exercise that talent in positions carrying less symbolic freight.

Practicing law is one possibility. Whatever the public may have thought about Douglas Ginsburg's suitability for judicial office, there was no groundswell of opinion calling for his disbarment. Much as our profession may wish to cling to de Tocqueville's view of lawyers as the "American aristocracy," wishing does not always make it so.⁵⁴ Opinion polls suggest that a more modest understanding is in order. Compared with other professions, lawyers rank poorly on the public's scale of virtue.⁵⁵ Yet the best way to combat that perception is not the kind of idiosyncratic moralism that has too often passed for moral oversight in character proceedings. A more effective approach will require a fundamental rethinking of the profession's regulatory premises and priorities.

In undertaking this reassessment, we should be sensitive to one other fact that makes character inquiry for lawyers unique and subject to special concern. Unlike politicians or other professionals, members of the bar are accountable to no other group in selecting their membership. It is not self-evident that society is well served by granting lawyers this degree of regulatory autonomy. The earlier overview of moral character procedures suggests some of the problems with such a structure, this and a review of regulatory processes in other contexts raises similar concerns.⁵⁶ But for

53. For a description of John Fedders' resignation as director of enforcement for the Securities and Exchange Commission after public disclosure of his repeated spousal assaults, see S. KLAIDMAN & J. BEAUCHAMP, *THE VIRTUOUS JOURNALIST* (1987).

54. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (G. Lawrence trans., J. Mayer ed. 1969) (1st ed. n.p. 1864).

55. For public opinion poll data and bar concerns, see AMERICAN BAR COMMISSION ON PROFESSIONALISM, *IN THE SPIRIT OF PUBLIC SERVICE; A BLUEPRINT FOR THE REKINDLING OF LAWYERS' PROFESSIONALISM* (1986). For example, Gallup polls between the mid-1970's and 1980's consistently indicated that over one-quarter of surveyed Americans rated lawyers "low" or "very low" in ethical standards, while only four to six percent rated them very high. See G. HAZARD & D. RHODE, *supra* note 43, at 27 (citing Oliver, *Lawyers Losing the Verdict in the Court of Public Opinion*, L.A. Times, Oct. 19, 1983, at 3, col. 3; Stiebman, *Bar Study Finds Public Sees Lawyers as Greedy, Unethical*, S.F.B. Daily J., Dec. 24, 1987, at 1).

56. See FELLMETH, *THE DISCIPLINARY SYSTEM: AN INITIAL REPORT* (1987); HAZARD & RHODE, *supra* note 43; *The Professions and Public Policy* (P. Slayton & M. Trebilock ed. 1978); Martyn, *Lawyer Competence and Lawyer Discipline; Beyond the Bar?*

present purposes, it is sufficient to note that as long as the bar has so little external accountability in its character determinations, some special self-restraints and procedural safeguards seem advisable.

IV.

This is not the occasion for a detailed analysis of alternative character procedures. I have reviewed specific structural proposals for the bar elsewhere and suggested ways of limiting investigation, confining discretion, and redirecting regulatory resources.⁵⁷ What bears emphasis here is one final, more general observation about the recent focus on professional character. If there is any single lesson that emerges from the debate about moral standards for politicians, judges, and lawyers, it is that we need more of precisely that kind of debate.

Any self-regulating profession runs the risk of tunnel vision and neither journalists nor lawyers appear to be an exception. The pace of life, stress of deadlines, and diffusion of responsibility work against sustained scrutiny of ethical premises. In contexts lacking external structures of accountability, professionals can lose perspective on their own frailties. These problems can become especially acute when issues of personal privacy are implicated. The law provides extraordinarily little protection for bar applicants or public officials who are subject to unnecessarily intrusive inquiry.⁵⁸ What little recourse is available requires the victim to be victimized twice — once by the initial exposure and again by any remedial action that further publicizes the material that was intended to be private. Such considerations impose a special responsibility on professions that profess to serve the public interest.

At a minimum, that responsibility entails a greater commitment to self-reflection and self-restraint than has often been apparent.

69 GEO. L.J. 705 (1981). See also Rhode, *supra* note 44; E. FREIDSON, *SOCIOLOGY OF THE PROFESSIONS* (1972); G. GEISEN, *PROFESSIONAL IDEOLOGIES IN AMERICA* (1983).

57. Rhode, *supra* note 1, at 584-92; Rhode, *supra* note 44.

58. Bar candidates who refuse to supply information risk denial of certification. See *supra* note 38 and accompanying text. For discussion of the highly limited privacy rights accorded to public figures, see generally *New York Times v. Sullivan*, 376 U.S. 254 (1964). In theory, most state laws provide a remedy for public disclosure of embarrassing private facts if the "matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *RESTATEMENT (SECOND) OF TORTS* § 652D (1959). In practice, however, the few plaintiffs who are willing to sue on those grounds almost never win. See M. France, *How Far is too Far?* *Journalistic Ethics and the Invasion of Privacy* (unpublished manuscript, Stanford, Cal. 1988).

Politics always has been partly about perceptions and journalists' own perceptions can often redirect our national debate. In a society increasingly dominated by "image politics," the press bears a heavy responsibility for constructing the images it purports to describe.⁵⁹ For all its concerns about exposing the petty foibles and moral frailties of others, the press has been notably uninterested in subjecting its own processes to public criticism. The politics of character have been newsworthy; the character of news gathering has not. There has been comparatively little effort to explore journalistic ethics in any systematic fashion. What voluntary ethical standards currently exist leave most of the hard questions unacknowledged and unaddressed.⁶⁰ One brief effort to establish a National News Council that would review conduct of cooperating members sparked little interest outside the profession and little support within it.⁶¹ Recent events, however, suggest more encouraging trends. A number of incidents in the last few years sparked new interest in journalistic ethics and the reporting on Gary Hart and Dan Quayle has heightened those concerns.⁶²

For the legal profession, occasions like this lecture series may

59. J. Lichtenberg, *The Politics of Character and the Character of Journalism* (unpublished manuscript, Center for Philosophy and Public Affairs, Maryland 1988).

60. KLAIDMAN & BEAUCHAMP, *supra* note 53; R. MEYER, *ETHICAL JOURNALISM: A GUIDE FOR STUDENTS, PRACTITIONERS AND CONSUMERS* (1987); Garment, *Can the Media Be Reformed?*, COMMENTARY, Aug. 1987, at 37. The American Society of Newspaper Editors Statement of Principles (adopted 1975) provides simply that: "Journalists should respect the rights of people involved in the news, observe the common standards of decency, and stand accountable to the public for the fairness and accuracy of their news reports." The Associated Press Managing Editors Association Code of Ethics (adopted 1975) rests with the assertion that a good newspaper is "fair, accurate, honest, responsible, independent and decent." In relevant part, the *Washington Post* Standards and Ethics (issued 1977) maintains "the paper shall observe the decencies that are obligatory upon a private gentleman." See M. France, *supra* note 58.

The most complete discussion of privacy-related concerns occurs in the Society of Professional Journalists (Sigma Delta Chi) which includes, under the general definition of "Fair Play":

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.
2. The news media must guard against invading a person's right to privacy.
3. The media should not pander to morbid curiosity about details of vice and crime.

SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, *JOURNALISM ETHICS REPORT 1* (1988-89).

61. KLAIDMAN & BEAUCHAMP, *supra* note 53, at 225; Garment, *supra* note 60.

62. See KLAIDMAN & BEAUCHAMP, *supra* note 53, at 225; Garment, *supra* note 60. See also, R. CLURMAN, *BEYOND MALICE* (1988); Rosenthal, *Special to the Miami Herald*, N.Y. Times, May 7, 1987, at 35, col. 1; Berke, *Coverage of Quayle is Unfair, 55% of Voters Say in Survey*, N.Y. Times, at 17, col. 1 (55% of surveyed voters felt coverage of Quayle was unfair and 69% felt it was excessive).

help to play a similar role. It is somewhat awkward to end on that note; when a commentator invites further commentary, the invitation has an uncomfortably self-validating tone. But in this instance forgiveness may be in order precisely because there are so few opportunities for such a dialogue. Too many debates in this area have too little public visibility or accountability. Given the ill-defined and in some instances ill-conceived standards of character we have invoked, the time has come to explore our understanding more openly and systematically. Oscar Wilde once reminded us that to be good according to conventional definitions was not necessarily demanding. All it required was a certain reflexive timidity and "lack of imaginative thought."⁶³ To have character may be something else again, and we would do well to consider the difference.

63. O. WILDE, *THE CRITIC AS ARTIST* (1890).

