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Law Student Admissions and Ethics - Rethinking Character and Fitness Inquiries

Susan Saab Fortney

Maurice A. Deane School of Law at Hofstra University

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LAW STUDENT ADMISSIONS AND ETHICS— RETHINKING CHARACTER AND FITNESS INQUIRIES

SUSAN SAAB FORTNEY*

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I. INTRODUCTION

Scandalous is the term we often use to describe and condemn the most reprehensible conduct. It is also a word that James J. Alfini, President and Dean of the South Texas College of Law, used to depict the legal academy's collective neglect in failing to address the ethics of our law students. In his welcoming remarks at the Tenth Annual Ethics Symposium on the ethics of law students, Dean Alfini cogently stated that the little attention given to our principal clients, our students and their conduct, borders on being scandalous.¹ The organizers and participants at the symposium sought to fill the void by devoting a day to exploring ethics of law students and the role of law schools as gatekeepers of the legal profession.

Various ethics issues first arise in connection with admission of law students. In fact, the majority of situations involving law student dishonesty most likely stem from applicants' failures to reveal past conduct required to be disclosed on applications for admission to law

* Associate Dean for Student Affairs and George H. Mahon Professor of Law, Texas Tech University School of Law. Views expressed in this article reflect only the views of the author, not those of other faculty members or administrators.

1. James J. Alfini, Address at the South Texas Law Review Tenth Annual Symposium on the Ethics of Law Students (October 10, 2003).

school. Two symposium contributors, Linda McGuire, Dean of Students at the University of Iowa, and John S. Dzienkowski, John Redditt Professor of State & Local Government at the University of Texas School of Law, focused on issues related to nondisclosure of information on law school applications. Dean McGuire's article provides interesting insights related to law school applicants' failure or refusal to disclose information clearly covered by application questions ("non-disclosure"). Professor Dzienkowski examines the range of character and fitness questions, suggesting steps to improve the handling of fitness inquiries. Taken together these articles illuminate the problems and possible solutions. I, too, will reflect on these issues because as an Associate Dean for Student Affairs and as a professional responsibility professor, I have devoted a great deal of time struggling with these issues.

II. THE PURPOSE OF CRIMINAL BACKGROUND QUESTIONS ON LAW SCHOOL ADMISSION APPLICATIONS

You will probably get a variety of responses if you ask law professors and bar regulators why law school applications include criminal background questions. The most common response is that lawyers should possess good moral character.² This reflects the view that law schools should screen applicants' fitness to practice law. Such a screening role suggests a partnership between law schools and admission authorities who seek to limit bar admission to applicants possessing the moral character appropriate for a lawyer.³

Dean McGuire's symposium article recognizes this partnership

2. Every state requires that bar applicants possess the necessary "character and fitness" to practice law. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 33 (8th ed. 2003). As explained in the Restatement of Law Governing Lawyers, the central inquiry concerns the present ability and disposition of the applicant to practice law competently and honestly. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2, cmt. d (2000) (noting that character screening dates back to the first bars in medieval England). In pointing to the special position of attorneys, the Restatement justifies the fitness and character requirement as follows: "A license to practice law confers great power on lawyers to do good or wrong. Lawyers practice an occupation that is complex and often, particularly to nonlawyers, mysterious. Clients and others are vulnerable to wrongdoing by corrupt lawyers." *Id.*

3. The ABA's Standards for Approval of Law Schools reflect the accrediting body's expectation that law schools assist the bar in screening prospective attorneys. AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, STANDARD 501(b), <http://www.abanet.org/legaled/standards/chapter5.html> (last visited Apr. 19, 2004). Standard 501 (b) states that "A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." *Id.*

and the public protection justification for admissions inquiries into past criminal conduct.⁴ In addition, she identifies various law school interests served by character screening. These institutional interests include identifying students who might disrupt a safe and healthy learning environment⁵ as well as those whose admission and graduation might adversely affect the law school's reputation.⁶

The admission of James Hamm to Arizona State University School of Law illustrates the reputation risks that schools take when they admit students with serious criminal convictions. Despite the fact that legal ethics experts could view Mr. Hamm as a "poster child" for rehabilitation, his admission to law school outraged members of the public and legislature in Arizona because Mr. Hamm was convicted of murder in 1974.⁷

Interestingly, law students who participated in focus groups organized by Dean McGuire concurred that law schools' "reputational integrity" justified law school inquiry about an applicant's past.⁸ Focus group students also opined that law school admissions authorities should be "clear about how their criminal histories affected admissions decisions, both in terms of knowing how to factor such records, as well as communicating this important information to them."⁹ Evidently, the focus group students believe that school admissions personnel make admissions decisions based on a defined policy or position for evaluating criminal histories of applicants.

Finally, character and fitness inquiries on law school applications serve consumer interests by identifying potential admissions problems

4. Following the assertion that legal educators are partners with state bar authorities in selecting and preparing future lawyers to meet high character and fitness qualifications, Dean McGuire summarizes the debate on whether law school schools should function as "trade schools" that largely limit their enrollment to persons who can ultimately qualify to practice law or whether they should operate as "graduate programs" that provide educational opportunities. Linda McGuire, *Lawyering or Lying? When Law School Applicants Hide Criminal History and Other Misconduct*, 45 S. TEX. L. REV. 709, 728-32 (2004).

5. *Id.* at 727-28. For example, a student with violent propensities might endanger others if the stressful environment of law school contributes to the person threatening others.

6. *Id.* at 727.

7. Paul Davenport, *Paroled Murderer Passes Bar Exam*, THE LEGAL INTELLIGENCER, Oct. 15, 1999, at 4 (noting that Arizona lawyers as well as state officials criticized Hamm's admission to law school). For example, former Arizona Attorney General Grant Woods stated that admission of Hamm would mean that "we no longer have standards." *Id.*

8. McGuire, *supra* note 4, at 732-33.

9. *Id.*

before the student invests time and money in obtaining a legal education.¹⁰ Such questions reveal the hurdles applicants will encounter in obtaining admission to law practice.¹¹

III. THE EFFECT OF APPLICATION MISREPRESENTATIONS

Professor Dzienkowski's comprehensive survey of application questions reveals a wide variety of questions on past criminal conduct.¹² Similarly, law school handling of application misrepresentations varies a great deal. A particular school's institutional structure and perspective on application nondisclosure will largely influence the approach the school uses. If law school administrators and faculty members share a lenient view, they may treat nondisclosures as an administrative matter that can be simply cured by allowing students to amend their applications to include the information previously not disclosed. At the other end of the continuum, a law school may treat inaccurate answers as application misrepresentations that could result in revocation of admission or discipline. Between the two ends of the continuum is the modified amnesty approach recommended by Dean McGuire.¹³ Even the language suggests a particular perspective. Using the term "nondisclosure" does not communicate the same message as using the term "misrepresentation." Arguably, a "nondisclosure" could result from an applicant misunderstanding a particular question or recklessness, whereas "misrepresentation" communicates more of an intent to deceive.

Dean McGuire persuasively describes the advantages of the modified amnesty program as an opportunity for teaching professional values of honesty, forthrightness, and accountability.¹⁴ At the same time she acknowledges, "even a partial amnesty approach is

10. For example, when application answers reveal potential problems, the University of Colorado School of Law advises applicants they may have future bar admission problems. See Elizabeth Gepford McCulley, *School of Sharks? Bar Fitness Requirements of Good Moral Character and the Role of Law Schools*, 14 GEO. J. LEGAL ETHICS 839, 855 (2001) (citing an email from an Associate Dean at the law school).

11. John Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 935 (2004) (noting that the warning to applicants is particularly important for students paying tuition for private law schools).

12. *Id.* at app. (outlining the application questions for all Texas law schools as well as the top twenty law schools on the 2003 U.S. NEWS & WORLD REPORT ranking of law schools).

13. For an overview of the modified amnesty procedure used at University of Iowa School of Law see McGuire, *supra* note 4, at 711-15.

14. *Id.* at 741.

problematic” if it amounts to “unwarranted absolution and prematurely removes a potential barrier to bar admission.”¹⁵ Furthermore, a law school may actually reinforce unethical behavior by imposing no sanction or a mere “hand slap.” As noted by the law students who participated in the Iowa focus groups, a major reason that applicants misrepresented their records was because “they could get away with it.”¹⁶ As a professional responsibility professor and volunteer in the attorney disciplinary system, I am very troubled by the message sent when law schools simply allow students to amend their applications with no sanction or meaningful intervention.

Depending on the circumstances, counseling may suffice. During the counseling session, students can learn the purpose of character and fitness inquiries. In counseling students, I explain the fiduciary role of attorneys and the importance of truth telling and candor. At the end of the session, students should fully appreciate how the lack of candor bears on current fitness to practice law. I typically read to students the bar application warning on full disclosure to underscore the fact that lack of candor during the admissions process reflects adversely on their fitness to practice.¹⁷

This counseling and teaching opportunity may arise during the first few weeks of law school in states requiring first year students to declare their intention to study law.¹⁸ For example, representatives of

15. *Id.* at 745.

16. *Id.* at 718. “Focus group participants stated they believed their classmates felt compelled to lie to get admitted, given the highly competitive market—operating on a misperception that there was an automatic bar to law school admission for persons with criminal histories.” *Id.*

17. The Texas Declaration of Intention to Study Law includes the following paragraph:

Full disclosure: it is **imperative** that you honestly and fully answer all questions, regardless of whether you believe the information requested is relevant. Your responses on your Declaration are evaluated as evidence of your candor and honest. An honest “yes” answer to a question on your Declaration is not definitive as to the Board’s assessment of your present moral character and fitness, but a dishonest “no” answer is evidence of lack of candor and honesty, which may be definitive on the character and fitness issue.

TEX. BD. OF LAW EXAM’RS, DECLARATION OF INTENTION TO STUDY LAW, at ii, para. 16 (2003), available at http://www.ble.state.tx.us/apps_2003/pdf_2003/ble-1.pdf (last visited April 21, 2004) [hereinafter TX INTENT TO STUDY LAW].

18. McGuire, *supra* note 4, at 712 n.4 (listing jurisdictions that require first year law students to register with bar admissions authorities) In Texas, the Supreme Court of Texas Rules for Admission of attorneys require that first year students file a Declaration of Intention to Study Law. The Texas Board of Law Examiners requires that the Declaration be filed by “all persons who have begun their law study at ABA-approved schools in Texas who intend to apply for licensure in Texas.” TX INTENT TO STUDY LAW, *supra* note 17, at i.

the Texas Board of Law Examiners (the Board) visit law schools during the first few weeks of class. The Board representatives speak to first year students, explaining to them the criminal background check that the Board will conduct. The Board representatives also emphasize the importance of candor and the need to amend law school applications if students did not provide accurate information on their law school applications. Following these presentations, numerous students amend, triggering the particular school's procedure for handling application nondisclosure.

Over the last ten years, our law school has revised the procedure for handling application amendments. In the past, the Dean's delegate referred nondisclosure matters for Honor Council review when the delegate determined that there was sufficient cause to believe that the applicant may have violated the Honor Code by failing to make truthful and complete disclosure. Although the range of sanctions under the Honor Code included suspension and expulsion, the Honor Council could not determine the threshold admissions decision of whether the applicant would have been admitted had the student provided complete and truthful answers.¹⁹

Focusing on this admissions concern, our faculty adopted new procedures requiring that admissions personnel first evaluate the nondisclosure matter. Specifically, a panel of Admissions Committee members now evaluates all cases involving accepted applicants and students to determine if the accepted applicant or student would have been admitted had the offense(s) been disclosed.²⁰ If the admissions panel determines that the student/applicant would not have been admitted, the panel revokes the admission.²¹ When admission has been revoked, the student/applicant can request a hearing.²² Following the hearing, admission is only reinstated if the admissions panel concludes that the explanation for nondisclosure is sufficient to allow the person to continue as a student.²³

Given that admission is not revoked in the vast majority of cases, critics might question the relative value of a procedure that causes a great deal of stress for students and additional work for admissions

19. TEX. TECH UNIV. SCH. OF LAW, STUDENT HANDBOOK, HONOR CODE 11 (2003), available at <http://www.law.ttu.edu/assets/pdf/files/lawHB.pdf>. The Texas Tech Honor Council is composed of student and faculty members. *Id.* at 10. If the panel does not reinstate the admission, the applicant/student may appeal the matter to the Dean of the law school. *Id.* at 12.

20. *Id.* at 12.

21. *Id.*

22. *Id.*

23. *Id.*

personnel and administrators. The response to this concern is that revocation must be an available sanction to counter the “moral hazard” created when students suffer no real consequences from intentionally lying on their applications.²⁴ Without the risk of revocation, students who do not truthfully answer questions benefit while applicants who answered truthfully may be denied admission if admissions decisions are influenced by criminal background. Students facing revocation learn quickly the importance of truth telling and candor.

When admission is not revoked, students are also held accountable because application nondisclosures may constitute misrepresentations that violate a school’s honor code. Honor code proceedings, like the revocation proceeding, provide a valuable opportunity for teaching professional values. The question is whether the benefits of the bifurcated procedure (first admissions review and then honor code review) outweigh the disadvantages of the approach. From the student’s perspective, the clear disadvantage is that the revocation risk elevates student stress and anxiety beyond the level typically experienced by first year law students. Notwithstanding this concern, those professors and administrators who want to factor criminal background into the admissions decisions may insist that revocation be an available tool.

This brings us back to the threshold question of whether criminal background information should affect law school admission. As discussed above, the most common justification for doing so is that law schools should preliminarily screen students as future applicants for admission to the bar. Even persons who advance this justification should remember that the standard for admission to practice law is “current fitness.”²⁵ If criminal background information does not relate

24. The definition of moral hazard:

Moral hazard may be defined as actions of economic agents in maximizing their own utility to the detriment of others in situations where they do not bear the full consequences, or equivalently, do not enjoy the full benefits of their actions due to uncertainty and incomplete or restricted contracts which prevent the assignment of full damages (benefits) to the agent responsible.

Marianne M. Jennings, *Moral Disengagement and Lawyers: Codes, Ethics, Conscience, and Some Great Movies*, 37 DUQ. L. REV. 573, 594 n.84 (1999) (citing JOHN EATWELL ET AL., *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* (1987)).

25. As explained in the ABA Code of Recommended Standards for Bar Examiners, “The bar examining authority should determine whether the *present character and fitness* of an applicant qualifies the applicant for admission.” AM. BAR ASS’N, CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, para. 15 (2003) (emphasis added), available at <http://www.abanet.org/legaled/publications/compguide2003/code.pdf>. The Court of Appeals for Maryland described the test to be used for evaluating current fitness.

to fitness at the time of the application for admission, should it be a factor in law school admissions? In answering this question, faculty members should recognize possible class bias in using criminal background information that does not relate to current fitness to practice law.

IV. POSSIBLE CLASS BIAS REFLECTED IN BROAD CRIMINAL BACKGROUND QUESTIONS

Some law schools, such as Yale Law School and the University of Chicago Law School limit their criminal background inquiries to asking about criminal convictions.²⁶ Other law schools, including Cornell, ask broader questions covering criminal charges.²⁷ Various schools ask the identical questions posed by bar admission authorities. For example, a question on the application for St. Mary's School of Law tracks the following question asked by Texas bar authorities: "Have you within the last [ten] years been arrested, cited, or ticketed for, or charged with any violation of the law?"²⁸ Professor Dzienkowski explains that variations in questions are "significant because there is such a difference of weight to a conviction rather than a charge or an arrest that has not been pursued."²⁹

Bar authorities may justify inquiries about arrests and charges by explaining that the standard of review for convictions is beyond a reasonable doubt. Given this high standard, bar regulators may inquire about the circumstances of the arrest in an effort to evaluate fitness and character.³⁰ If an application for bar admission reveals an

See *In re App. of Allan S.*, 387 A.2d 271, 275 (Md. 1978). According to the court:

The ultimate test of present moral character, applicable to original admissions to the Bar, is whether, viewing the applicant's character in the period subsequent to his misconduct, he has so convincingly rehabilitated himself that it is proper that he become a member of a profession which must stand free from all suspicion.

Id.

26. The Yale application asks, "Have you been convicted of a crime." Dzienkowski, *supra* note 11, at 966. The University of Chicago question reads, "Have you ever been convicted of a criminal offense . . . ?" *Id.* at 969. For a comparison of other school questions, see *id.* at app.

27. "Have you ever been charged with or convicted of a crime, including expunged offenses, other than a minor traffic violation, or are charges pending?" *Id.* at app.

28. *Id.* at app. Baylor Law School also asks about tickets, excluding minor traffic offenses. *Id.* at 957. According to a survey of 170 law schools, 14% used application forms that asked about arrests. See Deborah Rhode, *Moral Character as Professional Credential*, 94 YALE L.J. 491, 521 tbl. 1 (1985).

29. Dzienkowski, *supra* note 11, at 927. A law school may elect not to ask about arrests if school authorities believe that that arrest information has limited probative value.

30. See McCulley, *supra* note 10, at 846 (using a disorderly conduct case to illustrate

arrest or charges, the bar authorities should investigate the matter to determine if the arrest adversely reflects on current fitness. Law school admissions personnel most likely do not conduct similar investigations beyond considering the disclosure included in the application.³¹ Without additional information or access to official records, Professor Dzienkowski cautions that information on arrests and charges does not provide sufficient information to make a judgment about the conduct leading to the arrest.³²

Law school personnel who calculate arrest information into admissions decisions may not appreciate possible class bias reflected in such assessments. Empirical studies indicate that persons from lower socioeconomic areas are more likely to be arrested than persons living in higher income areas.³³ Studies also note racial differences in arrest rates for adults³⁴ as well juveniles.³⁵

Assuming that applicants from lower socioeconomic neighborhoods encounter more arrest exposure than their counterparts, should law schools consider arrests when making admission decisions? To treat a single arrest as a strike against an otherwise qualified applicant disproportionately impacts persons from lower socioeconomic communities that are already under-served by lawyers. Therefore, law schools interested in improving access to legal education and services should not use arrest information alone to deny admission to an otherwise qualified applicant. Moreover, broad questions on arrests may actually deter or dissuade persons from

how bar examiners consider "suspected criminal behavior, or other questionable conduct," even if charges are dropped).

31. "Law schools generally lack the resources or inclination to conduct serious independent investigation." Rhode, *supra* note 28, at 522.

32. Dzienkowski *supra* note 11, at 943 (noting that many institutions do not have the resources or staff to investigate beyond information provided by the applicant).

33. See, e.g., John R. Hepburn, *Race and the Decision to Arrest: An Analysis of Warrants Issues*, 15 J. RES. CRIME & DELIQ. 54 (1978) (noting that data appear consistent with "the assertion that powerless persons are more likely than powerful persons to be arrested on less sufficient evidence").

34. According to the Bureau of Justice Statistics, U.S. Department of Justice, the arrest rate for adult blacks was 28.1% and the arrest rate for black juveniles was 26.4%, although blacks only comprised 12.7% of the total population. See BUREAU OF JUSTICE STATISTICS, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS § 4, tbl. 4.10 (30th ed. 2002), available at http://albany.edu/sourcebook/1995/tost_4.htm.

35. "Studies consistently confirm that black and Latino children risk arrest at rates grossly disproportionate to their white peers who commit the same offense." Wendy Anton Fitzgerald, *Stories of Child Outlaws: On Child Heroism and Adult Power in Juvenile Justice*, 1996 WIS. L. REV. 495, 515 n.122 (citing the PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN & THEIR FAMILIES, AM. BAR ASS'N, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 61 (1993)).

applying to law school if such questions signal to applicants that they will not be admitted to law school or the bar.³⁶

Board questions on convictions can also reflect a class bias if you accept the proposition that wealthy defendants fare better in the criminal justice system.³⁷ As stated by Nkecha Taifa, director of the Public Services Program at Howard University School of Law and co-chair of the Criminal Justice Section of the National Conference of Black Lawyers, "Invariably, people of color and the poor are subjected to disparate treatment at every state of the criminal justice system from arrest, prosecution and pretrial, to conviction, sentencing and parole decisions."³⁸

Over the years, various law students have advised me that they entered no contest pleas to criminal charges because they could not afford to hire an attorney. Students who can obtain competent legal representation should be in a better position to challenge charges as compared to persons who must proceed pro se.³⁹ Admissions officials and faculty members who share the view that wealth results in differential treatment in the criminal justice system should rethink their own willingness to factor convictions into admissions decisions if convictions have no bearing on current fitness to practice law.

36. After referring to law student's reports that they did not apply to schools that asked a particular type of question, Professor Dzienkowski warns, "To the extent that applicants decline to apply to an institution, it would, over the years, lead to a potential decline in the applicant pool resulting from an inquiry that was not a factor in admissions." Dzienkowski, *supra* note 11, at 932.

37. Beginning in the 1960s, activist lawyers attacked the "class based and racist character of social relationships and the court structures which maintain these relationships." Robert Lefcourt, *Law Against the People*, in *LAW AGAINST THE PEOPLE, ESSAYS TO DEMYSTIFY LAW & ORDER AND THE COURTS* 22 (1971). As portrayed by another essayist, the "system of justice, and most especially the legal profession, is a whorehouse serving those best able to afford the luxuries of justice offered to preferred customers." Florence Kennedy, *The Whorehouse Theory of Law*, in *LAW AGAINST THE PEOPLE, ESSAYS TO DEMYSTIFY LAW & ORDER AND THE COURTS* 81 (1971).

38. Tukufu Kalonji, *Opinion, Law and Disorder*, SAN DIEGO UNION-TRIBUNE, Dec. 10, 2003, at B7. According to a study report released by the Leadership Conference of Civil Rights, "blacks and Hispanics are disproportionately targeted by police, unfairly victimized by 'racially skewed' charging and pleas bargaining decisions by prosecutors, given harsher sentences by judges and deeply impacted by 'get tough' crime policies enacted by lawmakers." Michael A. Fletcher, *Criminal Justice Disparities Cited, Group: Blacks, Hispanics Treated More Harshly at Every State*, WASH. POST, May 4, 2000, at A02.

39. In order to provide competent representation, an attorney should be familiar with criminal practice in a particular area. For example, a former prosecutor who handled a variety of juvenile cases, such as Minor in Possession of Alcohol cases, reports that non-criminal attorneys hurt their clients by insisting on trying cases that experienced criminal counsel would settle. Interview with Larry Cunningham, Director of the Criminal Prosecution Clinic at Texas Tech University School of Law (January 16, 2004).

When law school admissions decisions turn on criminal history, applicants can escape scrutiny if they obtain expungement.⁴⁰ Although expungement varies by jurisdiction, typically expungement is a technical procedure.⁴¹ Practically speaking, pro se defendants face a daunting task in pursuing expungement. A law school applicant who obtains expungement may not need to disclose the existence of the expunged matter.⁴² This benefits applicants with resources to hire attorneys to obtain expungement.

Finally, certain criminal convictions may also relate to an inability to pay fines. Consider the offense related to failure to pay traffic tickets. Persons who do not have the funds to pay tickets can be cited and convicted for failure to appear in court. Bar authorities may take the position that such a failure to appear indicates that the applicant does not respect the law. If the failure to appear conviction occurred many years before the applicant seeks admission to law school, my concern is that failure to pay and appear may indicate inability to pay coupled with immaturity. Unless failure to pay traffic tickets reflects on current fitness to practice, such violations should not disqualify an otherwise qualified applicant.

V. BENEFICIAL EFFECT OF ACCESS TO COUNSEL

As discussed above, using criminal background information in law school admissions decisions may reflect class bias. A related concern is that applicants who obtain legal assistance may fare better than those who do not obtain such assistance. During the admission process, a competent lawyer can help an applicant in maneuvering through the application process.⁴³ For example, a lawyer could counsel

40. "Criminal defense attorneys may view expungement proceedings as separate civil actions, requiring either a separate fee agreement or even a different attorney. Additionally, the arrestee may not even be aware that steps can be taken to expunge criminal records, even in jurisdictions that have expungement laws." Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 63 (2000).

41. See, e.g., TEX. CRIM. PROC. CODE ANN. § 55.02 (Vernon 2002) (setting forth a complicated procedure for expungement).

42. In Texas, a person who obtains an expungement may deny the occurrence of the arrest and the existence of the expungement order, except when questioned under oath in a criminal proceeding. TEX. CRIM. PROC. CODE ANN. § 55.03 (Vernon 2002). The Texas Board of Law Examiners takes the position that an expunged criminal matter is not a proper subject of inquiry; however, a criminal matter involving deferred adjudication or community supervision is properly the subject of inquiry. Letter from Julia Vaughan, Executive Director of the Texas Board of Law Examiners, to W. Frank Newton, Dean, Texas Tech University School of Law (Oct. 5, 2001).

43. In order to be competent, an attorney should determine precisely what information is covered by the admissions questions. Too many applicants have been hurt

an applicant on the importance of full disclosure and the serious consequences of nondisclosure. Lawyers can also assist applicants in understanding specifically what criminal information the applications seek. Again this is illustrated by the example of a conviction for failure to appear. Lawyers should understand that the failure to appear offense arising out of the failure to pay traffic tickets must be disclosed even though the application question specifically excludes minor traffic violations. Without the guidance of an attorney, or clear application instructions, an applicant might mistakenly believe that the failure to appear offense need not be disclosed because the application question on criminal offenses excluded minor traffic tickets.

Lawyers can also advise applicants on the content of the disclosure. Specifically, attorneys can assist applicants in explaining the criminal matter so that admission authorities are not concerned about the applicant's current fitness to practice law. A lawyer may also assist an applicant in dealing with the consequences of nondisclosure.

VI. RECOMMENDATIONS ON EQUALIZING ACCESS AND TREATMENT OF LAW SCHOOL APPLICANTS

If law school administrators and faculty members recognize the potential for disparate impact of criminal background questions on applicants from lower socio-economic groups, they can take specific steps to address the problem. As a starting point, they can clarify questions and revise broad questions that ask about a wide array of criminal matters such as arrests.⁴⁴ In reconsidering questions, law school and bar applicants should consider limiting the period of time for disclosing prior criminal incidents that occurred when an applicant was a minor. If particular questions do not seek information relevant to current fitness, those questions should be eliminated.

by off-handed advice that matters such as deferred adjudications need not be disclosed. To address this possibility, some applications include supplemental instructions cautioning students about relying on such advice. *See, e.g.*, Univ. of Houston Law Ctr., Character and Fitness Frequently Asked Questions, <http://www.law.uh.edu/admissions> (last visited April 19, 2004). In considering reliance on counsel, the Kentucky Supreme Court concluded that a bar applicant had acted in good faith in consulting counsel in an attempt to ascertain whether disclosure was necessary. *Ky. Bar Ass'n v. Guidugli*, 967 S.W.2d 587, 589 (Ky. 1998).

44. In recommending elimination of questions on arrests, Professor Dzienkowski proposes that schools use the following question on past criminal behavior: "Have you ever been convicted of, and/or entered a plea of guilty or no contest to a violation of the criminal law?" Dzienkowski, *supra* note 11, at 945.

Law schools should attempt to equalize the application process so that applicants without access to legal assistance are in the same position as those applicants with such access. For example, law school representatives could work closely with pre-law programs, including minority pre-law groups. By developing such a working relationship, law school representatives can counsel pre-law students and advisers on application disclosure issues.

Admissions officials should improve admission applications and supplemental material to clearly explain what information the application seeks.⁴⁵ The application should emphasize the importance of candor and the fact that nondisclosure reflects adversely on current fitness. The material should clearly warn applicants to confirm the disposition of a criminal matter, rather than relying on passing comments by judges and attorney who assure applicants that matters need not be disclosed. The application should urge applicants to call the law school if the applicant has any doubts or questions about disclosure.

Within law schools, faculties should determine how admissions committees and officials are evaluating past criminal conduct.⁴⁶ Faculty members and administrators should openly discuss whether a criminal matter should affect the evaluation of competing applicants when the matter does not reflect on current fitness to practice law. We should strive to make the evaluation process more transparent. Without clarification of how reviewers should evaluate criminal information, reviewers will use their own judgment and discretion, resulting in unequal treatment of applicants.⁴⁷ The articles in this symposium provide a good springboard for faculties and administrators to reexamine their school's approach to handling criminal background inquiries.⁴⁸

45. "An unambiguous statement clearly requiring disclosure of certain specifically defined offenses on a law school application will enable bar authorities to determine, with greater clarity, if a lack of disclosure evidence a lack of candor." McCulley, *supra* note 10, at 854.

46. For different approaches to handling information, see Dzienkowski, *supra* note 11, at 926–27.

47. *Id.* at 932 (urging that a school only collect information that the school plans to use because reviewing agents may still consider information "despite institutional policies on how such information should be used").

48. As a starting point, faculties could discuss the following questions posed by Professor Dzienkowski:

- (1) Is the information likely to prevent the person from becoming a member of the bar in most jurisdictions?
- (2) Does the information indicate that the applicant's character may be flawed?
- (3) Should the information be considered only if the applicant is in a

Persons concerned about lawyer regulation and ethics owe thanks to the members of the South Texas Law Review for their insight and efforts in organizing the symposium on the ethics of law students. Law schools, the legal profession, and consumers of legal services will all benefit if the symposium sparks additional discussion and scholarship on related topics.⁴⁹

discretionary admission pool with other applicants?

(4) Should the information be completely ignored because it involved conduct that is relatively minor or common among applicants?

Id. at 938.

49. Taking inspiration from the symposium, three symposium participants organized a meeting with representatives from the Texas Board of Law Examiners and all Texas law schools. The purpose of the meeting was to discuss the handling of nondisclosure issues.