BARRED FROM THE BAR: THE PROCESS, POLITICS, AND POLICY IMPLICATIONS OF DISCIPLINE FOR ATTORNEY FELONY OFFENDERS

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> "The bar has . . . been entrusted with anxious responsibilities. . . . It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'
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> . . . [W]hile we have nothing comparable to the Inns of Court, with us too the 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

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> entrusted with the fate of clients. With us too the requisite 'moral character' has been the historic unquestioned prerequisite of fitness."[2]
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> "A lawyer should be like Caesar's wife."[3]
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> "Even in the largest associations, where there is presumably less intimacy, lawyers have proven utterly incapable of disciplining each other. . . . The general impulse is to protect a brother at the bar—even a knavish one—rather than protect the public."[4]

INTRODUCTION

Following twenty or so years of "get tough" and "just deserts" approaches to crime and punishment,[5] the past few years have brought about a reconsideration of the nation's punitive practices and processes. In particular, and on account of the "prison boom" of the 1990s, issues regarding and implications of ex-offender societal reintegration have received greater attention from scholars, advocates, the legal community, and government officials.[6] With over 630,000 ex-offenders, being released from federal and state jails and prisons in 2002 (as opposed to 150,000 per year three decades ago), the dilemmas of prisoner reentry have begun to receive more attention from scholars and the general public. Specifically, the lack of education, job skills, and means with which to start anew on the "outside,"[7] has forced a comprehensive re-evaluation of not simply the consequences of punishment, but more

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[2] Schware v. N.M. Bd. of Bar Exam'rs, 353 U.S. 232, 247-48 (1957) (Frankfurter, J., concurring).

[3] Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 510 (1985) (quoting a former Executive Secretary of Manhattan's Character Committee).

[4] Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, *in* VERDICTS ON LAWYERS 47, 50 (Ralph Nader & Mark Green eds., 1976).

[5] *See, e.g.*, TED GEST, CRIME AND POLITICS 41-62 (Oxford University Press 2004).

[6] *See generally* JOAN PETERSILIA, WHEN PRISONERS COME HOME (Oxford University Press 2003), JEREMY TRAVIS, BUT THEY ALL COME BACK (The Urban Institute Press 2005), Milton Heumann et al., *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41(1) CRIM. L. BULL. 24 (2005).

[7] TRAVIS, *supra* note 5, at xvii.

> neglectful when it comes to the subject of corrections . . . When the prisoner is taken way [sic], our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it . . . . We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away.[16]

In the same vein, the American Bar Association itself recently issued a compelling call for reform of the collateral punishment schemes in effect in the American justice system. As a remedy to observed systemic problems, the House of Delegates of the American Bar Association has recently issued a Black Letter calling for, among other things, greater transparency in the domain of punishments that attach to felony convictions:

> One goal of the proposed Standards on Collateral Sanctions is to encourage awareness of the full legal consequences of a criminal conviction, particularly those that are mandatory upon conviction. There is no justification for the legal system to operate in ignorance of the effects of its actions. Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients, and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making.[17]

Finally, elected officials have also begun to address the problems posed by such extra-legal punishments. Of particular note, the recent political energy directed at "common sense" reforms has been of a bi-partisan nature and has portrayed a philosophy of what is previously referred to as "utilitarian rehabilitation," or a

> willingness . . . to expend public money and resources not so much because rehabilitation programs are good for *individual offenders*, but rather because the reform of these individuals would ultimately benefit *society* in the

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[16] *Justice Kennedy's Challenge*, *in* A.B.A. JUSTICE KENNEDY COMMISSION 1-2 (2004).

[17] *Black Letter*, *in* A.B.A. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS BL-1, R-7-8 (3d ed. 2003b).

> long run . . . . [And thus there is] *utility* to be derived from addressing the "revolving door" problem in our criminal justice system.[18]

That is, while Democrats typically have been associated with policies emphasizing rehabilitation, it seems to be the pragmatic—and economic—motivations that have drawn Republicans into a leading role in the discussion of prisoner reentry, at least at the federal level.

Recall, for example, that as a means of easing the transition back into society, President George W. Bush in his 2004 State of the Union Address proposed a four-year, $300 million "Prisoner Re-Entry Initiative" intended to "expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups."[19] Moreover, Senators Rick Santorum (R-PA) and Sam Brownback (R-KS)—both with consistently conservative voting records on issues of crime and punishment—have recently proposed the "Second Chance Act of 2004: Community Safety Through Recidivism Prevention," which seeks to "reduce recidivism, increase public safety, and help states and communities to better address the growing population of ex-offenders returning to communities . . . [by focusing] on four areas: jobs, housing, mental health and substance abuse treatment, and strengthening families."[20]

It is a more specific form of "second chance" to which our attention is directed in this article. Drawing upon the authors' interest in collateral consequences generally, our focus in this research is on the process and politics of professional licensing, with special attention paid to disciplinary actions taken against attorneys convicted of—or, in some cases, charged with—indictable (i.e., felony) offenses in the state of New Jersey.[21] Because so little is known about the nature and parameters of

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[18] Heumann et al., *supra* note 5, at 32-33 (emphasis added).

[19] President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html.

[20] Human Rights Watch, Summary of H.R. 4676, the Second Chance Act of 2004, http://www.hrw.org/english/docs/2004/06/24/usdom8947.htm.

[21] The state of New Jersey classifies criminal offenses into two classes—indictable and non-indictable crimes, a binary distinction that for all practical purposes translates into felony and misdemeanor offenses. Thus, for the

such proceedings, we rely on the case study method as a means of conducting this exploratory research. Specifically, our study included interviews of officials involved in attorney disciplinary proceedings in New Jersey as well as an examination of the records and results of official actions taken by disciplinary authorities. A more detailed discussion of our interests and conclusions can be found below, but in essence we conclude that attorneys who commit felonies of one variety—the misappropriation of a client's funds—do so at the risk of mandatory and permanent revocation of their professional licenses, while those offenders convicted of various other felonies confront a much more uncertain fate and form of punishment at the hands of a board with considerable discretionary authority.

In Section I below we review the key concepts of collateral punishment and prisoner reentry generally, as well as the democratic dilemmas presented by such punitive actions beyond the sentence. Following this, in Section II, we discuss the history of and rationale for occupational licensing in the United States and then move to a more specific discussion, in Section III, of the practices of attorney licensing in the Anglo-American tradition. After this, in Section IV, we proceed to the case study of disciplinary actions taken against attorneys convicted of or charged with felony offenses in New Jersey and present original data on the process and politics of this method of the administration of justice. We then conclude the paper in Section V with some final questions and concerns inspired by our research into this long-too-neglected area of study.

II. CONCEPTS & DILEMMAS

As John Jay College President and former Urban Institute Director Jeremy Travis puts the issue simply in the title of his book, "[t]hey all come back."[22] That is, with the obvious exception of offenders sentenced to death or life without the possibility of parole, those incarcerated will—at some point—return to society. And thus while bodies can temporarily be locked away, the issues of reentry and reintegration cannot, no matter how much a society may desire to avoid such problems. The implications of the increasing criminalization of society and the attendant consequences are staggering. As of mid-year

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purposes of this research, we will be treating indictable offenses as the functional equivalent of felonies.

[22] TRAVIS, *supra* note 5.

2004 there were 2,131,180 individuals in American prisons and jails.[23] Moreover, approximately 4.5 million are either on parole or probation and approximately 9.5 million Americans in the general population have a felony conviction on their record.[24] Logic would suggest, therefore, that as the number of offenders and ex-offenders increases every year, so too will the number of individuals constrained by collateral consequences in our society. With this as an overview of the basic problem, this section addresses the key concepts and dilemmas that frame the discussion, providing the context for the more extended review of professional licensing and disciplinary proceedings against attorney felony offenders later in the article.

A. Concepts

At the outset, it is worth recalling that the large majority of the consequences triggered by criminal activities flow from felony, as opposed to misdemeanor, convictions. Certain disabilities or punishments may be tethered to misdemeanor offenses (e.g., the loss of eligibility for student loans), but most apply only to the more "serious" crimes that are generally classified as felonies. It is also essential at the outset to recall that in a federal system such as that of the United States, the nature of a felony is largely a state issue.[25] Offenses such as murder

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[23] PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2004 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf.

[24] Uggen & Manza, *supra* note 12, at 781.

[25] The word felon originated in European feudalism—

> At that time, feudal disloyalty was a threat to the entire social structure and therefore merited the sanctions of forfeiture of all properties and usually capital or corporeal punishment. Breaches of feudal obligations thus punished were labeled felonies. The English common law adopted this terminology to impose forfeiture for such serious breaches of the King's peace as homicide, arson, rape and robbery. The penalty of forfeiture was thought to be justified by the baseness of the deed, without reference to broken oaths and disloyalty. As a result, the word "felony" came to signify the character of the crime rather than the form of punishment.

Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 406-407 (1967).

In *Federalist* No. 42, James Madison notes that

are felonies in every state, but criminal codes are devised by state legislatures and thus certain non-violent offenses could theoretically differ in their classification according to different states. Given these limitations, a relatively stable definition for analytical purposes would suggest that a felony is a crime for which a prison sentence of a year or more is an option; while a misdemeanor is something falling short of this mark.

However they are determined statutorily, felonies may carry with them various collateral sanctions which are, according to the American Bar Association, "legal penalties, disabilities or disadvantages that are imposed on a person *automatically* upon that person's conviction for a felony, misdemeanor, or other offense, even if not included in the sentence."[26] Examples of such sanctions include the loss of firearms privileges, per se disqualification from certain forms of employment or public benefits, and required criminal registration procedures (e.g., versions of Megan's Law in the fifty states). Discretionary disqualifications, by contrast, "are penalties, disabilities, or disadvantages that a civil court, administrative agency, or official is *authorized* to impose on a person convicted of an offense on grounds related to the conviction."[27] Such disqualifications might come in the form of restrictions on public housing options (because conduct is sometimes more relevant than an actual conviction in such determinations), deportation, and restrictions on or suspensions/revocations of professional licenses.

As they are contemplated by commentators and in other contexts, however, the consequences of felony convictions may be defined in different ways. In the criminal justice literature, for example, collateral consequences are meant to imply the broad range of political, legal, and societal impediments to effective reentry, including punishments in the

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> [f]elony is a term of loose signification, even in the common law of England. . . . The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws.

THE FEDERALIST NO. 42, at 266 (James Madison) (Penguin Books, Inc. 1961).

[26] *Black Letter*, *supra* note 16 (emphasis added).

[27] *Id.* (emphasis added).

form of "collateral sanctions" or "discretionary disqualifications" imposed by courts or other legal agents or bodies, but also including potential future disabilities (e.g., a felony conviction can serve as grounds for divorce or can bar one from entering a particular profession) and the more general societal implications of sentencing such as the effect on particular neighborhoods and communities when large percentages of their residents are incarcerated.[28]

Meanwhile, courts have distinguished between "direct" and "collateral" consequences with respect to the amount of information that a defendant has a right to be apprised of in the course of plea negotiations. "Direct" consequences are generally those where notice is required that a conviction will *automatically* lead to certain additional penalties (e.g., the loss of a driver's license, criminal registration, or ineligibility for future welfare benefits due to a drug conviction), regardless of whether the penalty is a function of the court-imposed sentence or rendered by a self-executing statutory mandate.[29] By default then, in the context of plea negotiations, consequences are deemed to be "collateral" when a penalty is "contingent upon action taken by an

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[28] *See generally* INVISIBLE PUNISHMENTS: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind, eds., The New Press 2002); PETERSILIA, *supra* note 5; Kathleen Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (1996).

[29] For a recent assessment of the issue of direct consequences, consider the case New Jersey v. Kaa'Wone Johnson, 182 N.J. 232 (2005), where the New Jersey State Supreme Court examined the situation of an individual who was not informed specifically of the three-year period of parole supervision that attached to each count of aggravated assault. Justice LaVecchia, for the Court, explained:

> A guilty plea may be accepted as part of a plea bargain when the court is assured that the defendant enters into the plea knowingly, intelligently and voluntarily. For a plea to be knowing, intelligent and voluntary, the defendant must understand the nature of the charge and the consequences of the plea. Although a court is not responsible for informing a defendant of all consequences flowing from a guilty plea, at a minimum the court must ensure that the defendant is made fully aware of those consequences that are "direct" or "penal."

Id. at 236 (citations omitted).

individual or individuals *other than* the sentencing court"[30] and when the defendant need *not* be given notice of the potential disadvantages or disabilities (e.g., the potential for a future conviction as a repeat offender or possible deportation, although more and more states are requiring this information by statute).[31]

B. Dilemmas

Apart from the problems presented by the imprecise nature and evolving definitions of collateral consequences in their various social and legal forms are the dilemmas inherent to a scheme of sanctions that shadows offenders even after they have "paid their debt" to society. In this section we raise some of the questions that must be addressed in any review of state punitive mechanisms that not only subject offenders to the "time" for their crime, but that also—arguably—places offenders in a position worse than when they entered the criminal justice system.[32]

1. The Nature of the Offender

One of the themes animating the discussion of prisoner reentry is the uncertain social, political, and legal status enjoyed by ex-offenders. Significantly, the concept of a collateral legal disability is a remnant of the ancient Greek notion of "infamy," or the penalty of "outlawry" among the Germanic tribes—punishable by "civil death"[33] and representing permanent exclusion of an offender from the community.[34] It is to be expected then that, as many scholars have observed, ex-offenders exist in an in-between[35] realm in which they are formally free (on paper), but in effect are still bound by a range of restrictions, prejudices, and complications that frustrate their transition back into society. In a technical sense, this might pertain to the considerable

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[30] United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000).

[31] *See generally* Jamie Ostroff, Comment, *Are Immigration Consequences of a Criminal Conviction Still Collateral? How the California Supreme Court's Decision* In Re Resendiz *Leaves This Question Unanswered*, 32 SW. U. L. REV. 359 (2003).

[32] Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023 (1986).

[33] Alec Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, WIS. L. REV. 1045 (2002).

[34] Mirjan Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. L., CRIMINOLOGY, & POL. SCI. 347 (1968).

[35] *See* PETERSILIA, *supra* note 5, at 105; *see also* CLEAR & COLE, *supra* note 7, at 377.

difficulties presented by the convoluted and circuitous process of actually having one's rights and privileges restored (i.e., navigating the bureaucratic morass in order to get back on the voting rolls[36]); or, such tensions might be manifest in the more subtle social reluctance to conceive of those with criminal records as capable of the requirements of good citizenship.

In earlier research on issues of prisoner reentry, we produced the first ever public opinion data on the debate surrounding felony disenfranchisement[37]—finding that over eighty percent of those surveyed supported the return of the franchise at some point. This figure allowed us to conclude that Americans by and large do not endorse "civil death" as a punitive approach; though in light of the various responses, the public still seems to remain ambivalent as to the moral and/or political fitness or propriety of offenders reentering society.[38] Specifically, as we noted in our earlier piece, the data suggest that Americans impose a "public sentence" on ex-offenders, thus "situating them in a kind of intermediate socio-political space, somewhere between political banishment or 'civil death' . . . and genuine inclusion."[39]

Moreover, we argued, this public sentence "suggests that felons are 'in'—in the contractarian sense that they have been reseated at the table—but it also underscores a deeper tension within civic republicanism—in that their tablemates remain suspicious and are unsure exactly how to address them."[40] The dilemma then pertains to the status of ex-offenders in the civil society from which they were removed, and to which they have been reinstated with the post-sentence imprimatur of

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[36] *See, e.g.*, MARC MAUER & TUSHAR KANSAL, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES (The Sentencing Project 2005); *see also* Jennifer Gonnerman, *The Ripple Effect: Confusion Over Felon Voting Bans Keeps Even the Eligible from the Polls*, THE VILLAGE VOICE, Oct. 12, 2004, *available at* http://www.villagevoice.com/news/0441/gonnerman,57500,1.html (last visited May 15, 2005).

[37] Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519 (2003).

[38] See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford University Press 2005), and Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the U.S.*, 68 PUB. OPINION Q. 276 (2004), for subsequent survey data yielding similar results.

[39] Pinaire et al., *supra* note 37, at 1548.

[40] *Id.*

the state. Are they "in"? Are they "out"? Are they "in-between"? Finally, to what extent is the ambivalence and suspicion associated with these individuals a function of—or constituted by—their experience in the system itself?[41]

2. The Nature of the Punishment

Capturing the essence of collateral consequences in a powerful metaphor, Jeremy Travis has referred to such sanctions as "invisible punishments" because they "operate largely beyond public view, yet have very serious adverse consequences for the individuals affected."[42] Additionally, they "typically take effect outside the traditional sentencing framework . . . [that is,] they are imposed by operation of law rather than by decisions of the sentencing judge."[43] Furthermore, they are "rarely visible in the legislative debates on sentencing policy" and are "not typically enacted by the same legislative committees that determine a state's sentencing statutes" but rather are "added as riders to other major pieces of legislation" and thus slide under the public radar.[44] Other scholars refer to the "secret sentence" of collateral consequences[45]—a secret that is perhaps most alarming because many legal actors do not even seem to be fully aware of the range of consequences buried in state and federal statutes that confront those with

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[41] Powerful imagery pervades the discussion of the state-conditioned status of ex-offenders. As alluded to above, Demleitner, *supra* note 8, speaks to the "internal exile" experienced by those released from state supervision, while others liken this labeling to the "mark of Cain" or pariah status. *See* JAMES JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 30 (Cornell University Press 1983); Webster Hubbell, *The Mark of Cain*, SAN FRANCISCO CHRON., June 10, 2001. Consider, as well, the words of one commentator who suggests that civil disability statutes

> run counter to the philosophy of rehabilitation and fit more appropriately with the discarded idea that an offender should be eliminated or banished from society. Actually, these laws may operate to frustrate the rehabilitative ideal by *increasing* the likelihood of recidivism.

Note, *Civil Disabilities of Felons*, *supra* note 24, at 422-23 (emphasis added).

[42] INVISIBLE PUNISHMENTS: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 27, at 19.

[43] TRAVIS, *supra* note 5, at 64.

[44] *Id.*

[45] *See, e.g.*, Chin & Holmes, *supra* note 14, at 700.

felony convictions. And, absent some sort of consolidation, perhaps that awareness never will be achieved.

But beyond the invisibility of the consequences—which take the form of a collateral sanction or a discretionary disqualification—there exists the problem of the unrealized or unanticipated effects of the punishments. Consider, for example, what we have in our previous work referred to as "second-level" consequences, or "those social and economic consequences that are the *consequence* of state-imposed consequences."[46] Such consequences might involve a doctor convicted of a felony offense who is now prohibited from working in any medical-related profession; a felon released from prison who cannot accept employment as a security guard due to state and federal prohibitions on firearms possession by ex-felons; an individual unable to procure the bonding that is a requirement of many industries; or even, at a more basic level, the difficulties of pursuing employment without a driver's license—due to a 1992 federal law that requires states to revoke or suspend, for at least six months, the driver's licenses of people convicted of drug felonies or lose ten percent of their federal highway funds. A state can avoid the imposition of this provision without penalty only if the legislature and governor jointly express their opposition to the law.[47] It is easy to imagine how, in this more security-conscious age such as ours, locating employment without the proper identification would be quite a challenge and this is simply one additional example of the sort of complications that scatter the road to successful reentry.

II. PROFESSIONAL LICENSING RESTRICTIONS IN THE UNITED STATES

To provide some context for the discussion of our findings and their implications, we review the history, scope, and justification of the laws and policies governing professional licensing. In terms of lineage, trade and/or occupational licensing has a long history in this country, going back to the colonial era when auctioneers and peddlers were required to procure licenses. As the legal historian Lawrence Friedman has explained, the sort of occupational licensing that we are familiar with blossomed in the late nineteenth century and hit its peak in the period

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[46] Heumann et al., *supra* note 5, at 35.

[47] Nora Demleitner, *Collateral Damage: No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1037 (2002).

between 1890 and 1910.[48] Licensed occupations not only included those conceived of as professions or sub-professions, but also included trades such as plumbers, barbers, and horseshoers.[49]

Recent numbers indicate that nearly 6,000 occupations are currently licensed in one or more states in the United States.[50] One study conducted in the early 1970s found upon a search of the legislative codes of the fifty states that there were 1,948 separate statutory provisions that affect the licensing of persons with an arrest or conviction record.[51] Some states had considerably more of these statutory provisions than others, but the average number for each state was thirty-nine, an amount with the potential to seriously impede an ex-offender's pursuit of employment.[52] Moreover, recent research specifically focusing on barriers confronted by felony offenders concluded that federal or state laws bar or restrict employment of ex-offenders in approximately 350 occupations, employing approximately ten million persons.[53] Note, too, that in many states the largest employer—the government—is virtually off limits to those with felony convictions.[54] Indeed, the web of state restrictions means, in practice, that "[i]n some states virtually the only 'profession' open to an ex-felon is that of burglar."[55]

As we contemplate the proffered justification for such policies and practices, however—and with special reference to the case of attorney felony offenders discussed in Section V—it is worth recalling that a trade or occupational license is a

> *privilege* granted by a governmental jurisdiction, such as a city or state, permitting an applicant for a license to

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[48] LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 454-57 (2d ed., Simon & Schuster 1985).
[49] *Id.* at 455.
[50] PETERSILIA, *supra* note 5, at 114.
[51] JAMES HUNT ET AL., LAWS, LICENSES, AND THE OFFENDER'S RIGHT TO WORK: A STUDY OF STATE LAWS RESTRICTING THE OCCUPATIONAL LICENSING OF FORMER OFFENDERS 8 (Nat'l Clearinghouse on Offender Employment Restrictions 1974).
[52] *Id.*
[53] BILL HEBENTON & TERRY THOMAS, CRIMINAL RECORDS: STATE, CITIZEN, AND THE POLITICS OF PROTECTION 111 (1993).
[54] PETERSILIA, *supra* note 5, at 115.
[55] Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 193 (1995).

> engage in an activity that he would not be entitled to conduct without a license. . . . [And] [t]he agencies or boards that administer a state's licensing laws have two main functions: The first is to control entrance into the occupation; the second is to support and enforce the standards of practice required of the licensed practitioners by the state legislature.[56]

Typically, the state's rationale for such restrictions is that employees or licensees must possess "good moral character"[57]—or must have no record of moral turpitude—and thus, as a function of its police powers, the state may set certain reasonable and generally applicable conditions on licensure and employment.

But, while ostensibly passed for the protection of the public or the raising of revenue, some licensing legislation was, in the words of one legal historian, "harsh and discriminatory a 'defense mechanism of local merchants against outsiders.'"[58] That is, according to Lawrence Friedman, the real motivation for these laws was economic. Specifically:

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[56] HUNT ET AL., *supra* note 52, at 4 (emphasis added).

[57] The concept of "good moral character" is an especially slippery standard with which to regulate the professions—particularly in light of the plasticity of the language and the politics of interpretation. The ambiguousness of such a concept is, as one scholar has explained, troubling for several reasons:

> First, a good moral character requirement is common to many licensing statutes. Second, without a reasonably clear legislative or judicial definition of good moral character, licensing boards and agencies can easily rely on the generally accepted definition. Third, equating a criminal conviction with the lack of good moral character essentially converts the good moral character statute into the previously discussed criminal conviction statute which automatically bars an ex-felon from obtaining a license.
> Further, without adequate guidelines, different licensing agencies can apply varying interpretations of good character which can lead to inconsistent application of the same licensing statutes.

May, *supra* note 55, at 197; *see also* Donald T. Weckstein, *Maintaining the Integrity and Competency of the Legal Profession*, 48 TEX. L. REV. 267, 274-80 (1970) (making a similar argument).

[58] FRIEDMAN, *supra* note 48, at 454.

> Trade groups were anxious to control competition. Typically, these were occupations with strong unions or strong trade associations; but they did not face large and powerful economic institutions as employers or consumers. . . .
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> The Virginia embalmers' law was typical. In occupational licensing laws, the state "board," which had power to decide who was fit to be a doctor, barber, nurse, or plumber, was effectively a private group, a clique of insiders. Its aim was to drive out marginal competition, to raise the prestige of the trade, and to move toward the status of a self-perpetuating guild, made up of respectable professionals. By and large, the courts accepted these aims as readily as legislatures did. Few licensing statutes were challenged in court; fewer still were overturned.[59]

Indeed, in its first comprehensive consideration of these questions, the Supreme Court found compelling the police powers argument and found constitutional a range of state occupational restrictions.

In *Dent v. West Virginia*, the Court explained that "it is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition."[60] In this country, Justice Field continued for the Court:

> [A]ll vocations are open to every one on like conditions . . . . The interest, or, as it is sometimes termed, the "estate," acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.[61]

However, Field continued:

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[59] *Id.* at 456-57.
[60] 129 U.S. 114 (1889).
[61] *Id.* at 121-22.

> [T]here is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.[62]

And so, licensing restrictions are per se within the ambit of the state's authority and unless the conditions are arbitrary, they do not run afoul of the Constitution.

But what is the reach of the state's police powers in this domain, especially with respect to individuals who violate the criminal law? As we have seen, the government may impose conditions on those who are allowed into a profession; but may it also work to escort convicted professionals out as a function of their debt to society? That is, may the state impose the additional "sentence" of licensing restrictions, suspensions, or revocations on top of the formal sentence for the crime? Addressing this dilemma in *Hawker v. New York*, a case involving a

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[62] *Id.*

doctor convicted of a felony and then relieved of his medical license, the Court explained:

> On the one hand it is said that defendant was tried, convicted and sentenced for a criminal offence. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practise medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and after the defendant has once fully atoned for his offence a statute imposing this additional penalty is one simply increasing the punishment for the offence, and is ex post facto.
>
> On the other, it is insisted that within the acknowledged reach of the police power, a State may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practice medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character . . . .
>
> We are of the opinion that this argument is the more applicable and must control the answer to this question. No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power . . . . It is fitting not merely that [the physician] should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal

> propriety prescribe what evidence of good character shall be furnished.[63]

According to the Court, the government may impose additional sanctions on previously licensed individuals convicted of felony offenses if the profession falls under the purview of the state and if the nature of the work is such that not only must members exhibit a certain facility in terms of training, continuing education, and capacity, but they must also demonstrate the character and moral grounding that are both explicitly expressed in statutory form and implicit in the very concept of a profession.[64] In the next Section we turn to the specific case of attorney licensing in the Anglo-American tradition and set the stage for our discussion of the politics and processes of disciplinary actions for attorneys in New Jersey.

III. KEEPING THE GATE: ATTORNEY LICENSING IN THE ANGLO-AMERICAN TRADITION

Writing for the majority in *Schware v. N.M. Board of Bar Examiners*, Justice Hugo Black noted that, while relevant and rational standards of entry and retention could certainly be justified, "the practice of law is not a matter of the State's grace."[65] In this particular case, the petitioner had been denied admission to the state bar on account of his allegedly radical political associations and past activities. While the bar's terms for entry were deemed unconstitutionally onerous under these circumstances, this case does well to portray the tensions generally presented when *private* professions—that serve professedly *public* purposes in our society—seek to set and enforce the conditions of membership in ways that conflict with larger societal and political values.[66] This Section of the paper addresses this tension, with special attention paid to the standards and expectations for admission to the bar and, more importantly, the procedures and politics of discipline for those already members of the legal fraternity.

A. ASPIRATIONS

In the words of George Sharswood, the author of a seminal nineteenth century essay on professional ethics: "Since our 'fortunes,

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[63] Hawker v. New York, 170 U.S. 189, 191-94 (1898).
[64] *Id.*
[65] 353 U.S. 232, 239 (1957).
[66] *See* Rhode, *supra* note 2, at 496.

reputations, domestic peace . . . nay, our liberty and life itself" rest in the hands of legal advocates, '[t]heir character must be not only without stain, but without suspicion.'"[67] Moreover, "[b]ar rhetoric traditionally has cast lawyers as 'sentinels' and 'high priests' at the portals of justice."[68] While one might dismiss such hyperbolic assessments of attorneys in an era of lawyer jokes, Grisham novels, and "tort tales,"[69] it is important to note the historic aspirations of the profession.

The moral character requirement as a professional credential dates back to the Roman Theodesian Code, with its Anglo-American roots reaching back to thirteenth century England.[70] Indeed, so strict were the standards that, a few centuries ago, an English lawyer who had misbehaved was subject to censure in the form of a public ceremony wherein "the wayward barrister would be physically thrown over the wooden railing—'the bar,' and hence the term 'disbarment'—that separated the judges' and lawyers' half of the courtroom from the spectators."[71] In the sub-Sections below and in the Sections to follow, we will see what constitutes grounds for being "barred from the bar," but more importantly *who* makes the decisions and *how* the assessments are made.

B. THE ORGANIZED BAR: GATEKEEPERS

Before the time of the American Revolution, attorneys had begun to organize into associations that were self-regulating—private groups that maintained standards for admission and practice. But from the early nineteenth century through the era of Jacksonian democracy, American society was increasingly wary of—and hostile to—"secret" societies of all stripes (e.g., Freemasons and Know-Nothings) and thus in this period organized bar associations generally faded away. Following this transition, legislatures in the states lowered the standards for admission to the bar in an effort to render the profession less exclusive and elitist. After the Civil War, however, bar organizations emerged once again in response to rampant corruption and flimsy standards. Indeed, such calls for reform were essential to the eventual establishment of the American

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[67] *Id.* at 507-08 (quoting G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, 172 (3d ed. 1869)).
[68] *Id.* at 510.
[69] WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 5-6 (University of Chicago Press 2004).
[70] Rhode, *supra* note 2, at 493.
[71] Garbus & Seligman, *supra* note 3, at 49.

Bar Association in 1878.[72] According to Lawrence Friedman, those involved in the early years of the American Bar Association "longed for the honor and security of the barrister[]" and "dreamt of a close-knit, guild-like bar."[73] Though, as other commentators have noted, the founders of the Bar were among the most prominent attorneys of the era, "representing accordingly the most powerful economic interests" of the time.[74]

1. Admission

Drawing upon her study of the good moral character requirements invoked by bar associations in the fifty states, Deborah Rhode explained that "[b]ar spokesmen have advocated 'eliminating the diseased dogs before they inflict their first bite[]'[75] . . . [because,] [a]s a practical matter, it is thought 'easier to refuse admittance to an immoral applicant than it is to disbar him after he is admitted.'"[76] While the exact standards for entry to the bar vary from state to state, Professor Rhode's study indicates that the review process is comprehensive and inclusive of factors that range well beyond merely professional concerns and often includes consideration of traffic offenses, sexual practices, and various other qualities that might be found under the umbrella of moral character.

More importantly, as with any standard, it awaits the interpretation and implementation of those vested with the responsibility to define and apply the measures to the facts at hand. In this regard, consider Rhode's observation that "[t]he definition of 'unworthy' was quite elastic. Those rejected by one county board in 1929 included individuals deemed 'dull,' 'colorless,' 'subnormal,' 'unprepossessing,' 'shifty,' 'smooth,' 'keen,' 'shrewd,' 'arrogant,' 'conceited,' 'surly,' and 'slovenly.'"[77] Moreover, while the call for higher standards was putatively aimed at shoring up professional expectations, in effect it often meant that those "of foreign parentage, and, most pointedly Jews" were deemed morally

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[72] *Id.*

[73] FRIEDMAN, *supra* note 48, at 635

[74] Ostroff, *supra* note 31, at 306.

[75] Rhode, *supra* note 2, at 509 (quoting Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident*, 40 B. EXAMINER 17, 23 (1971)).

[76] *Id.* (quoting James E. Alderman, *Screening for Character and Fitness*, 51 B. Examiner 23, 24 (1982)).

[77] *Id.* at 501.

weak and of unsound character.[78] The issues and implications surrounding admission to bar are vast and deserving of study, but our concern in this paper pertains to the processes and politics of disciplinary actions, to which we now turn.

2. Discipline

In 1970, a panel headed up by former Supreme Court Justice Tom Clark studied attorney disciplinary programs and processes in the United States for eighteen months and determined that it was, in sum, "scandalous."[79] According to the Clark panel, "[w]ith few exceptions the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically non-existent in many jurisdictions."[80] Moreover, the Clark panel found that:

> [I]n some instances disbarred attorneys are able to continue practice in another location; that even after disbarment lawyers are reinstated as a matter of course; that lawyers fail to report ethical violations by their brethren; that in many communities disciplinary agencies will not proceed against prominent lawyers or law firms and that, even when they do, no disciplinary action is taken; and that disciplinary agencies are undermanned and underfinanced, many having no staff whatever for the investigation or prosecution of complaints.[81]

The traditional rationale for disciplinary proceedings is the protection of the public (in the exposure and excommunication of those unfit to manage the legal affairs of others) and the preservation of the confidence, integrity, and stature of the professional bar. To wit, disciplinary actions are typically instituted in response to professional or public failings, but personal activities that might subject the profession to public derision and distrust are appropriate grounds for disciplinary intervention. And yet, "[e]very major analysis of the disciplinary structures has found them grossly insensitive both to serious professional

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[78] *Id.* at 500.
[79] PHILIP STERN, LAWYERS ON TRIAL 83 (Times Books 1980).
[80] *Id.* at 83.
[81] GARBUS & SELIGMAN, *supra* note 3, at 48-49.

misconduct and to garden variety problems of delay, neglect, incompetence and overcharging."[82]

Of equal importance, however, is the discrepancy between the standards for admission and retention. In other words, the expectations for "getting in" differ from those for "getting (kicked) out." As Professor Rhode has framed the problem:

> Offenses for which applicants are delayed or denied admission—traffic violations, bankruptcy, nonpayment of debts, failure to answer questions regarding radical political involvement, personality disorders, consensual sexual activity, and petty drug violations—almost never have comparable repercussions for practitioners. The disparity between entry and exclusionary standards raises a number of awkward questions about the current scope of certification procedures. If certain nonprofessional conduct is sufficiently probative to withhold a license, why is it not also grounds for license revocation? . . . Insofar as the profession is truly committed to public—rather than self—protection, the incongruity between disciplinary and certification procedures is untenable.[83]

One assessment of the situation, in the words of two critics writing in an era of heightened ethical scrutiny following the Watergate scandal, is to note that "if the purpose of court and state bar association disciplinary proceedings is to assure the public high standards of diligence and propriety, self-regulation is a nearly complete failure—an embarrassment for a profession which brags that the integrity of its practitioners 'is the very breath of justice.'"[84]

IV. BARRED FROM THE BAR: DISCIPLINING ATTORNEY FELONY OFFENDERS IN NEW JERSEY

Given that we were entering a complex and not frequently examined area, we felt that an exploratory, in depth analysis was the preferable mode with which to begin this larger research project. Eventually our

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[82] Rhode, *supra* note 2, at 547 (citations omitted).
[83] *Id.* at 549.
[84] GARBUS & SELIGMAN, *supra* note 3, at 49.

study will analyze the consequences of felony convictions for a range of professions in multiple states. The scope of this article, however, is limited to attorneys in New Jersey. This narrower focus has enabled us to learn in detail about issues and difficulties that likely are common to other professions as well.

To facilitate this case study, we conducted seven lengthy interviews (the average interview lasted approximately two hours) with attorneys involved in one way or another with licensing matters as well as with several health care monitoring professionals with similar responsibilities. The ambiguity of these affiliations is intentional—to preserve anonymity in this rather compact universe it is necessary to be a bit unspecific about identifiers. In addition, we examined the dispositions of 188 cases over four years by the New Jersey attorney disciplinary authorities (the Disciplinary Review Board and the New Jersey Supreme Court).[85] We were able to examine the range of sanctions employed by the New Jersey disciplinary authorities for ten specific offenses. These data—together with the interview data—are the material that we draw on in this section, and which allows us to proffer, albeit rather tentatively, conclusions about the process of studying the relationship between the licensing of attorneys and felony convictions by courts as well as findings of felony offenses by disciplinary authorities. We will also use these data to discuss the process of studying the disciplinary process *itself*—that is, the research issues and complications (e.g., various access pitfalls and difficulties of interpretation) that confront a study of systems of punishment. Our findings and reflections on the need for additional analysis of these data and compilation of related data in other professions follow, but first we provide some context for the discussion of disciplinary actions taken against felony offenders by providing an overview of the characteristics—some universal and some unique—of collateral employment consequences in New Jersey.

A. General Collateral Employment Consequences

There are twenty-two categories of jobs for which certain criminal convictions serve as an absolute bar in New Jersey (most are a product of state law, but a few are a result of federal law). Moreover, the state prohibits public employment for those convicted of an offense involving

[85] In this four year period, there were a total of 730 cases where final disciplinary sanctions were imposed, but we are only discussing the 188 cases involving felony offenses here.

dishonesty or a crime of the third degree or above.[86] Many more jobs, while not out of reach, do require *disclosure* of criminal convictions, though some also require the consideration of proof of rehabilitation.[87] With respect to our more specific focus in this research, more than fifty professions in the state are subject to state licensing requirements under the general licensing statute that allows any state licensing board to refuse to admit a person to an examination or to deny issuance, suspend, or revoke a certificate, registration, or license upon proof that an individual has been convicted of or engaged in acts constituting a crime of moral turpitude, or relating adversely to the regulated activity.[88]

Importantly, however, the Rehabilitated Convicted Offender's Act ("RCOA") was adopted to override the general licensing bar and provides that no licensing authority may discriminate or disqualify an applicant on the basis of a conviction of a crime or disorderly person offense, except in cases involving law enforcement agents, public employees (and offenses related to their offices) or licensed individuals for whom the offense relates in an adverse way to the occupation for which the license is sought.[89] In essence, the RCOA supersedes statutes that *allow* for license denials for crimes of moral turpitude, but it does not apply in cases of statutory *requirements* for disqualification from

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[86] N.J. STAT. ANN. § 2C:51-2 (2005).

[87] Nancy Fishman, *Briefing Paper: Legal Barriers to Prisoner Reentry in New Jersey*, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, 2 (2003), *available at* http://www.njisj.org/reports/barriers_report.html.

[88] N.J. STAT. ANN. § 45:1-21(f).

[89] The stated legislative intentions for the Act are as follows:

> The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record. Therefore, the Legislature finds and declares that notwithstanding the contrary provisions of any law or rule or regulation issued pursuant to law, a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless N.J.S. 2C:51-2 is applicable or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought.

Id. § 2A:168A-1.

certain jobs based on convictions of moral turpitude. Moreover, the statute provides that "certificates of rehabilitation" should serve to preclude licensing authorities from disqualifying an individual. To be exact, the statute reads:

> The presentation to a licensing authority of evidence of a pardon or of the expungement of a criminal conviction, pursuant to N.J.S. 2A: 164-28, or of a certificate of the Federal or State Parole Board, or of the Chief Probation Officer of a United States District Court or a county who has supervised the applicant's probation, that the applicant has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society shall preclude a licensing authority from disqualifying or discriminating against the applicant.[90]

These certificates are legal documents that formally recognize that an offender has been rehabilitated, thereby restoring his or her rights and lifting the restrictions on licensing and public benefits. In addition to New Jersey, Arizona, California, Nevada, New York, and Illinois currently offer such certificates.[91] Thus, an individual with a felony record who had obtained such a certificate and who was interested in selling real estate could not be denied a license simply due to a conviction for a generic crime of "moral turpitude" (i.e., a crime not involving fraud, embezzlement, or larceny or anything else with a particular association with sales), though a sex offender could still be statutorily barred from working in the child care industry.

B. The Structure and Process for Disciplinary Actions

The New Jersey disciplinary system is governed by Court Rule 1:20 and consists of three levels: the Office of Attorney Ethics ("OAE") and seventeen district ethics committees, the Disciplinary Review Board

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[90] *Id.* § 2A:168A-3.

[91] *Coming Home for Good: Meeting the Challenge of Prisoner Reentry in New Jersey, Final Report of the New Jersey Reentry Roundtable*, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, at 20 (2003), *available at* http://www.njisj.org/reports/cominghome_report.html.

("DRB"), and the New Jersey Supreme Court.[92] The OAE oversees the district ethics committees in investigating and prosecuting grievances and complaints and acts as the investigative and prosecutorial arm of the New Jersey Supreme Court, representing the public interest in all cases before the court. The DRB is an intermediate appellate body in disciplinary matters appointed by the state supreme court and made up of at least nine members, at least five of whom must be attorneys and at least three of whom cannot be attorneys. In all matters other than disbarment its decisions regarding discipline become final on the entry of a confirmatory order by the court. The New Jersey Supreme Court has exclusive authority to admit and discipline attorneys and it alone can disbar attorneys.

The Director of the OAE has exclusive jurisdiction over the investigation and prosecution of cases in disciplinary proceedings where an attorney has first been charged in criminal court. If the attorney has been found guilty, the state supreme court immediately suspends that attorney from practice. Oral arguments are subsequently held in front of the DRB with the OAE acting as prosecutor; the DRB then renders its decision and makes its recommendation for final discipline to the court.

Both a pre-hearing conference and a hearing may occur at the district level in cases where an attorney has committed an indictable offense but has not undergone a criminal proceeding prior to discipline. Hearings are held only in cases where there are disputes of material fact, where the respondent requests an opportunity to be heard in mitigation, or where the ethics counsel requests to be heard in aggravation. In all other cases, the pleadings and a statement of procedural history are filed directly with the DRB for its consideration in determining the appropriate sanction. In those cases where a hearing is held, if the hearing panel or special ethics master (appointed by the Director of the OAE at his or her discretion, often for the purpose of hearing longer cases) find that a reprimand, suspension, or disbarment should be imposed, they must submit their recommendation and the record of all proceedings to the DRB. The DRB then decides upon the final action to be taken, subject to review by the state supreme court. We turn now to the description and discussion of our findings regarding the politics and processes of disciplinary actions against attorney felony offenders—why and how, in other words, such individuals come to be "barred from the bar" in New Jersey.

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[92] *See* THE RULE FOR DISCIPLINE OF MEMBERS OF THE BAR, *available at* http://www.judiciary.state.nj.us/rules/r1-20.htm, for a more detailed discussion of the attorney disciplinary structure.

C. FINDINGS AND REFLECTIONS

1. Disbarment

New Jersey is one of the few states where disbarment is truly permanent. Eleven states have some form of "permanent" disbarment, but it is genuinely permanent in only six states: New Jersey, Ohio, Oregon, Kentucky, Iowa, and Indiana.[93] In other states, consistent with the new math of sentencing, what you get is not what you get. "Permanent," in many places, is five years—or at least at that time the sentence can be reconsidered. But in New Jersey, "life" means life—it means it is time to find another profession.

There is a correlation in New Jersey between disbarment and felonies. As Table 1 shows, 30.32% of felonies led to disbarment, while 42.02% resulted in disbarments by consent, meaning that the offending individual voluntarily surrenders his or her license to practice law. This total percentage of disbarments is high, but when the offense of knowing misappropriation of client funds is not taken into account, only 24.72% of other felonies led to disbarment and another 17.98% resulted in disbarments by consent. Thus, while New Jersey looks like a severe state (given the permanent nature of disbarment); this is largely a function of the severity associated with knowing misappropriation cases. Indeed, if incidents of misappropriation are removed from the consideration, a quite different picture emerges and allows us to see that New Jersey's disciplinary sanctions are actually rather mixed in their severity. In other words, an attorney who commits knowing misappropriation in New Jersey is finished; but with anything else, the punishment might not be that severe.

However, a small crack in New Jersey's rigid policy was opened in 2002 when the state supreme court, for the first time, recognized an indeterminate suspension option with the intention of carving out some approach between moderate suspension and permanent disbarment. But while the option is on the books, it has only been used in reciprocal cases, so as to allow for equal discipline across state lines (i.e., an indeterminate suspension has been issued when an attorney received a

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[93] *The New Jersey Bar Association, Report and Recommendations—Reinstatement of Disbarred Lawyers*, REPORT TO THE SUPREME COURT OF NEW JERSEY, at 2 (2001), *available at* http://www.njsba.com/activities/index.cfm?fuseaction=reinstatement.

comparable sentence in another state). Our data show that it has not yet been used as an alternative to disbarment by New Jersey for offenses committed in New Jersey. Nonetheless, it is important to note that this in-between class of punishment has been created and the future may portend a more expansive use of this alternative.

Felony Offense	Disbarment	Disbarment by Consent	2- to 5-year Snspension	3- to 21-month Suspension	Indeterminate Suspension	Reprimand and Disability-Inactive Statns	Total
Knowing Misappropriation	35 (35%)	63 (64%)	0	0	0	1 (1%)	99
Fraud	13 (36%)	7 (19%)	8 (22%)	7 (19%)	0	1 (3%)	36
Theft	6 (33%)	4 (22%)	3 (17%)	3 (17%)	1 (6%)	1 (6%)	18
Tax Evasion	2 (25%)	0	3 (38%)	2 (25%)	0	1 (13%)	8
Sexual Assault	0	1 (100%)	0	0	0	0	1
Motor Vehicle Offenses	0	0	1 (50%)	0	0	1 (50%)	2
Drug Offenses	0	2 (20%)	0	7 (70%)	0	1 (10%)	10
Offenses Involving Juveniles	0	1 (14%)	0	4 (57%)	0	2 (29%)	7
Arson	0	0	0	1 (100%)	0	0	1
Obstruction of Justice	1 (17%)	1 (17%)	2 (33%)	1 (17%)	0	1 (17%)	6
All Felonies	57 (30%)	79 (42%)	17 (9%)	25 (13%)	1 (1%)	9 (5%)	188

Table 1: Disciplinary Sanctions Imposed for Various Felonies*

*Source: Office of Attorney Ethics State of Attorney Discipline System Records, 2000-2003

2. Knowing Misappropriation

Table 1 and Figure I present the major conclusions of the analysis of the annual reports of the OAE; they show the breakdown of sanctions by offense across all four years. Perhaps the most striking finding from these data—and from our interviews—was the imposition of automatic disbarment for attorneys convicted of knowing misappropriation. These are generally felony offenses , and there seems to be almost no room for exceptions—an attorney found guilty of one of the offenses in this category will be disbarred permanently by the New Jersey Supreme Court (the DRB makes this recommendation to the Court, but only the

Court can actually order the disbarment). During the four years of our analysis, knowing misappropriation led to permanent disbarment ninety-nine percent of the time.[94] We see in Figure II that all but one case of knowing misappropriation led to disbarment or disbarment by consent during the four years under review. Similarly, we see in Table 1 and Figure I that while other felonies led to mixed dispositions (sometimes a five-year suspension and sometimes as little as a reprimand), tampering with client funds resulted in an automatic and definitive suspension. There are several sub-themes here that are worthy of note:

a. The *Wilson* Doctrine: The tough stand taken on knowing misappropriation stems in part from the implementation of this position in *In re Wilson*.[95] In *Wilson*, the New Jersey Supreme Court made it clear that knowing misappropriation, for whatever reason, would lead to permanent disbarment. Subsequent cases have only served to reinforce this rather rigid and Draconian policy.[96]

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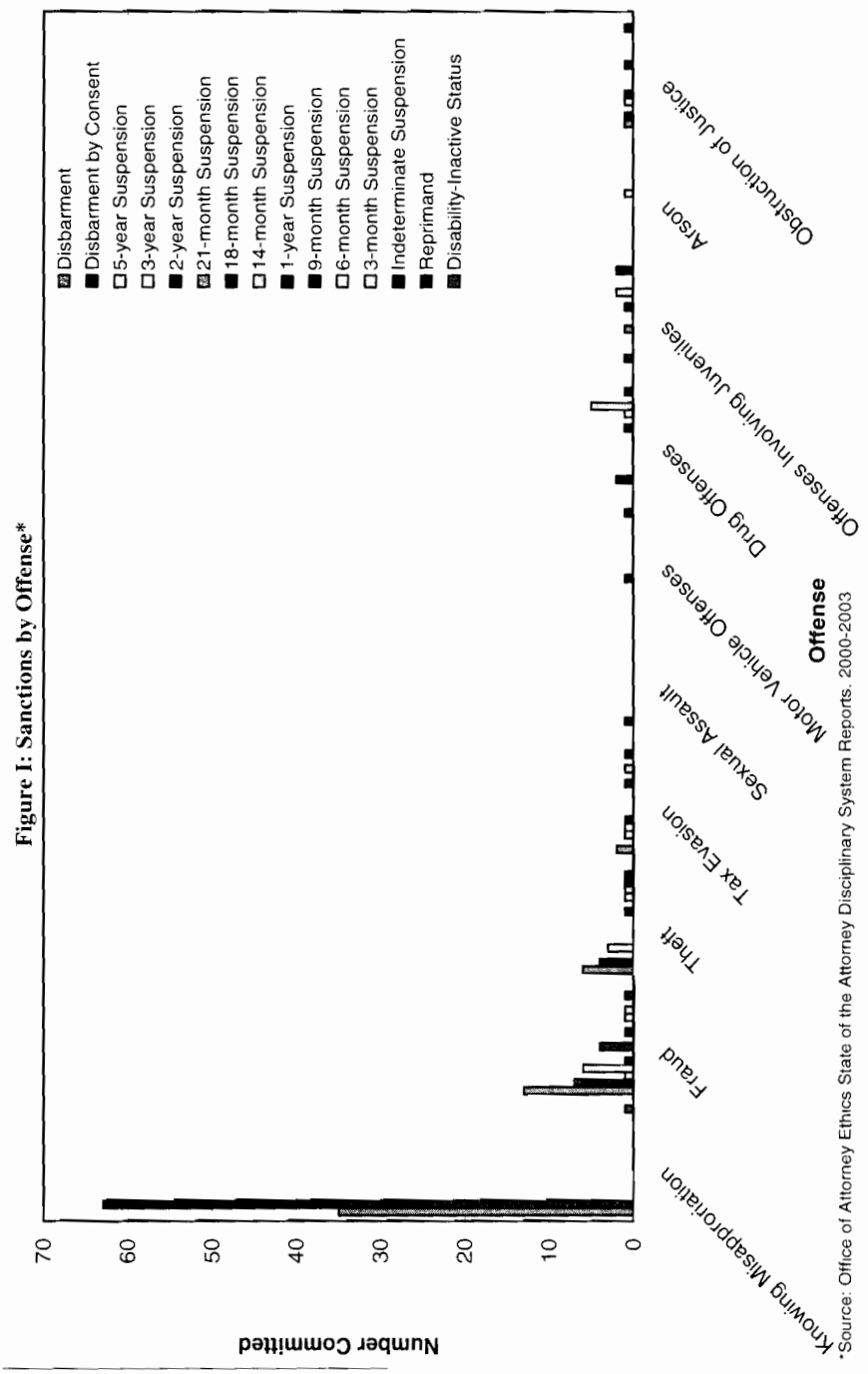
[94] *See infra* Table 1 and Figure II.

[95] 409 A.2d 1153 (N.J. 1979).

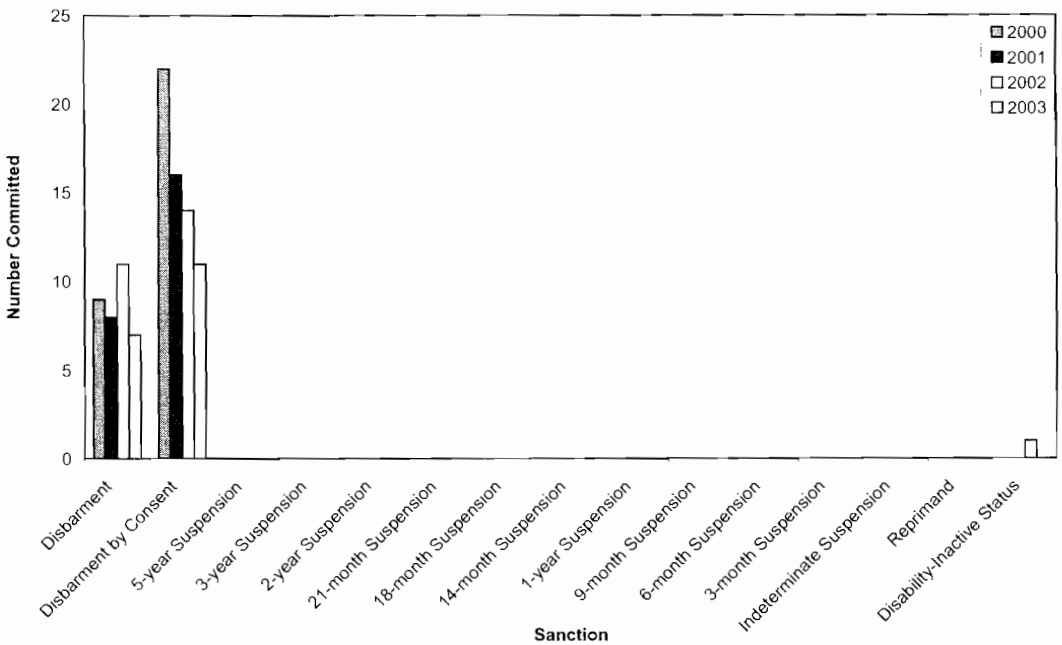
[96] In *Wilson*, the court concluded that the protection of the integrity of the profession requires that disbarment for knowing misappropriation be "almost invariable." *Id.* at 1154. Since *Wilson*, the only exceptions to this absolute rule that have been accepted are in circumstances in which there has been a "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful" (which is referred to as the "*Jacob* standard"). *In re* Jacob, 469 A.2d 498, 501 (N.J. 1984). The court has otherwise strictly adhered to the *Wilson* rule, rejecting various mitigating circumstances, including major depression, *In re* Roth, 658 A.2d 1264 (N.J. 1995), severe mental illness, *In re* Tonzola, 744 A.2d 162 (N.J. 2000), alcoholism, *In re* Davis, 603 A.2d 12 (N.J. 1992), drug dependency, *In re* Steinhoff, 553 A.2d 1349 (N.J. 1989), and compulsive gambling, *In re* Nitti, 541 A.2d 217 (N.J. 1988). In *In re* Barlow, 657 A.2d 1197 (N.J. 1995), the court reiterated its adherence to this standard while simultaneously appearing to sympathize with the respondent—after reviewing Barlow's arguments for mitigation (that no one was injured by his actions, his prior professional record was unblemished, and that he truly believed that his actions did not constitute knowing misappropriation), the court went on to state that "*[r]egrettably*, these factors are insufficient to warrant departing from the *Wilson* rule." 657 A.2d at 1201-02 (emphasis added). Moreover, the court has repeatedly held that the presence or absence of intent is irrelevant in ordering disbarment for knowing misappropriation, stating that "[i]ntent to steal from a client is not an element of knowing misappropriation . . . [and] [t]he motive of an attorney ordinarily is irrelevant in determining the appropriate punishment for knowing misappropriation." *In* re Mininsohn, 740 A.2d 1074, 1080 (N.J. 1999). And



thus, if the evidence clearly and convincingly establishes that an attorney has knowingly misappropriated, "disbarment is the only appropriate discipline." *In re Wilson*, 409 A.2d at 1154.

b. Charge Reticence?: One might speculate that the harsh penalty for knowing misappropriation would lead to its not being charged in all circumstances where warranted (akin to the concerns expressed by some that mandatory penalties for crimes such as rape will ultimately lead to fewer convictions as a result of fewer charges being brought). We found no evidence to sustain this speculation. Indeed, the many instances in which defendants have claimed mitigation consistently have been met with unsympathetic responses, suggesting adherence to an across the board implementation of the policy.

Figure II: Sanctions Imposed for Knowing Misappropriation, 2000-2003*



*Source: Office of Attorney Ethics State of the Attorney Discipline System Reports 2000-2003

3. Plea Bargaining

At the outset of the interviewing process for this research, we expected to find a relationship between the disposition of the *criminal* case and the *disciplinary* disposition. Our initial view was that a severe punishment in the criminal setting might be a justification for a more lenient disciplinary decision. Our argument was that if the defendant substantially suffered in the criminal decision, this might weigh against a

tough disciplinary decision. This was a complementary argument to the complaints leveled against the former manner of disposing of white collar criminals.

Specifically, there was a frequently articulated view that the white collar criminal "suffered enough" by the conviction (due to the shame, humiliation, loss of license, etc.) so that incarceration was unnecessary.[97] Thus, if the system got tough and sent white collar criminals to jail, it would be like a form of double punishment to also exact severe sanctions in the licensing area. Cutting the other way, of course, was the view that if the defendant committed a serious enough crime to warrant incarceration, licensing deprivations were *more* justifiable. In any case, we found little support for our initial speculation, nor did we find, with one exception, instances of weighing the disciplinary and criminal dispositions in one package. Whether the disciplinary and criminal dispositions are better viewed together as a package is something worth considering. If a defendant "pays" in terms of his time, is there an argument that licensing sanctions should be easier, not harsher? This is admittedly a tough position to take, but one we believe is worthy of more discussion.

We noted that there was one exception to the absence of a relationship between the criminal and disciplinary decisions. Some, but not all, of our respondents told us that for thefts below a certain amount—$40,000 seemed to be the consensus—the licensing officials frequently allow a defendant to voluntarily surrender his license for life, in return for an implicit (or maybe occasionally explicit) promise by the licensing officials not to forward the matter—or not forward it with much enthusiasm for prosecution—to the prosecutor. In effect, then, the defendant is bargaining away his license in order to avoid criminal prosecution. If the amount of money in play is greater than $40,000, it is unlikely that this kind of deal will be made.

There may be similar incentives for defendants to consent to disbarment for felonies other than knowing misappropriation or to plea bargain in a criminal trial. The standard of proof is clear and convincing in attorney disciplinary proceedings while it is beyond a reasonable doubt in criminal courts. Thus, if an attorney is found guilty by a court, he or she can be automatically disciplined for the offense without a hearing. Even if an attorney is acquitted in a criminal court case,

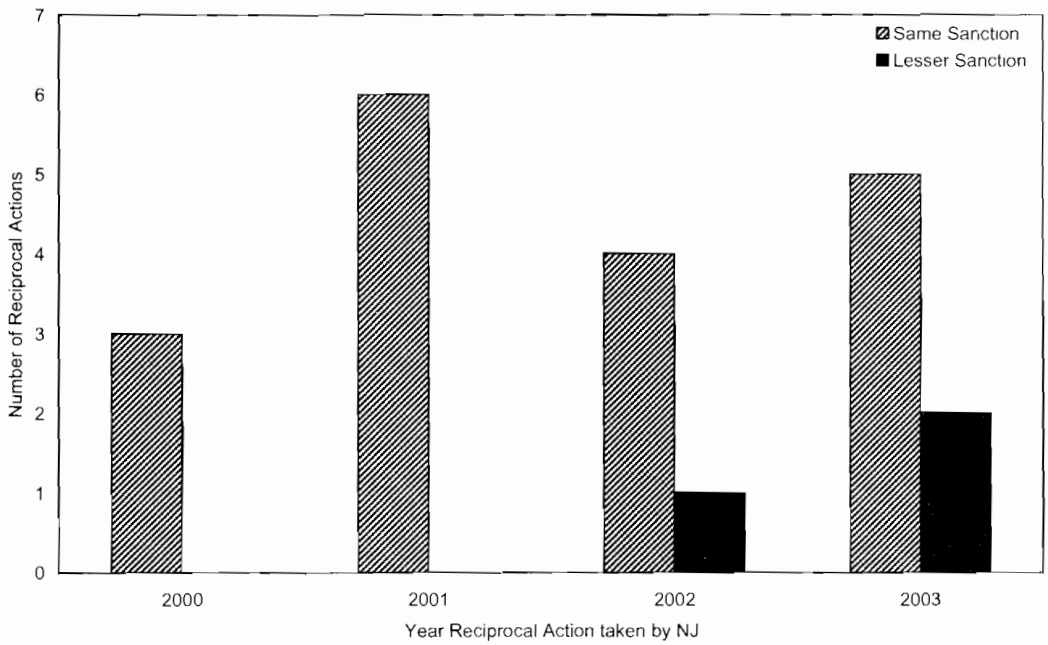
[97] *See, e.g.*, STANTON WHEELER ET AL., SITTING IN JUDGMENT (Yale University Press 1988).

however, he or she may still be disciplined given the different standard of proof requirements. If an attorney consents to disbarment before the disciplinary proceeding takes place, on the other hand, he or she may be less likely to be prosecuted in a criminal court because the prosecutor would have to build up a case from scratch rather than relying on disciplinary hearing findings.

4. Reciprocity

One important issue when assessing licensing matters across states is the issue of reciprocity—how a state treats the disciplinary actions of another state when it becomes aware that another state has taken action. In general, as Figure III demonstrates, New Jersey follows what other states have done. One exception, and one which illustrates the fact that care must be given when making comparative judgments, is the group of cases where New Jersey appears to be more lenient. This primarily occurs when the defendant was disbarred in another state but receives a three- or five-year suspension in New Jersey. It would appear that in these instances New Jersey is taking a more lenient position, but this generally is not the case. As indicated earlier, New Jersey's lifetime disbarment is rarely equaled in other states—in most other states, life frequently means five years. Thus New Jersey's actions in these cases are usually designed to produce the same outcome, not a more lenient one.

Figure III: Sanctions Imposed for Knowing Misappropriation, 2000-



*Source Office of Attorney Ethics State of the Attorney Discipline System Reports, 2000-2003

5. Data Collection/Analysis

Difficulties begin when one examines the disciplinary authority's actions. It is not always possible to know which charges constitute felonies (or indictable offenses). For the purposes of this paper, we made reasonable assumptions (e.g., most knowing misappropriations are, or could be considered, felonies). Short of examining each individual case file, the New Jersey data do not allow for any other kinds of assumptions. Similarly, the disciplinary data often give the charges, not the dispositions in a case. Again without tracking the cases on a case-by-case basis, we cannot be sure about the link between the specific and final charges. We assume that there is a correspondence between the initial and final charges and our conclusion is supported by the reports of the respondents. Similarly, we operate with imperfect information regarding the length of final dispositions in the courts and the sequencing of the court/disciplinary agency action. Even when we know the final charge, we are not always certain about the length of the sentence meted out or served or the order in which sanctions were administered. Given enough resources, then, examining these matters

case-by-case would yield a richer data set; however, for the purposes of the general themes of this paper, this labor intensive, time consuming, and expensive research is not necessary.

6. Reporting Requirements

We began with an assumption that the process by which the disciplinary authorities learned of offenses committed by attorneys was clear and automatic. To our surprise, we found that awareness of felony transgressions was frequently haphazard, though it is probably more consistent when the felony conviction precedes the licensing board hearing. In general, the process is surprisingly sloppy. The police, the courts, or even the defendants themselves report the matter to the disciplinary authorities. Often the disciplinary authorities (in the case of attorneys and other professionals) actually rely on newspaper reports of an incident as well. There does not seem to be much confidence in relying on the professional him or herself to consistently self-report an infraction. Again, this is a matter which no doubt takes different forms across states and which also may be related to the availability of different plea and licensing "package deals."

7. Additional Findings

a. Licensing as a *Privilege* not a Right:

In the interviews, and in the general literature, licensing is consistently viewed as a privilege, not a right. For this reason, violations of professional norms were met by the severest of sanctions—and there was little ambivalence about these Draconian disbarments. Moreover, there was little sentiment for embracing mitigating excuses.

b. Alternate Punishments:

Consistent with findings reached in our previous article,[98] respondents showed little enthusiasm for what we thought would be a reasonable alternative to license suspension—namely, having violators serve needy communities rather than losing their licenses (whether permanently or for a shorter period). Respondents found this proposal patronizing, asking why poorer locales should be served by people who violated professional norms. Moreover, this potential opportunity for blending licensing and plea negotiations did not seem to strike a

[98] Heumann et al., *supra* note 5.

responsive chord in the public (we were told), or among professional decision makers.

c. Property vs. Personal Injury:

There is a wonderful irony in examining the licensing data. In the criminal courts the distinction between property and personal injury crimes is important in understanding case dispositions—the former are almost always treated more leniently, while the latter are usually treated with greater toughness. However, in the licensing area, given the almost ironclad rules regarding knowing misappropriation and the greater flexibility with regard to almost all other matters, property, not personal injury matters, are automatically treated more severely.

d. "Going rates":

Within the field of criminal justice, it is common to speak of "going rates", or standard penalties, for particular crimes.[99] Though respondents generally denied that there are standard penalties for particular felonies, our data, and the responses of several of the respondents, suggested otherwise. In addition to the "normal sentence" for knowing misappropriation, the quantitative data suggest a going rate of three-month suspensions for drug possession[100] while the interviews suggest a going rate of six-month suspensions for crimes of the fourth degree. Again, these illustrate that, but for knowing misappropriation, "second chance" traditions for attorneys are alive and well (and sometimes predictable) in New Jersey.

e. Chaperones:

One policy suggestion which we learned of through our interviews with medical and dental professionals is the use of "chaperones" to ease

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[99] For the classic study on "going rates" see Milton Heumann, *Thinking About Plea Bargaining*, *in* THE STUDY OF CRIMINAL COURTS: POLITICAL PERSPECTIVES 201 (Peter Nardulli ed., 1979); on "normal crimes" see David Sudnow, *Normal Crimes*, *in* DEVIANTS 57 (E. Rubington & M. Weinburg eds., 2d ed., MacMillan 1973).

[100] In Table 1, five of the seven sanctions in the three- to 21-month suspension category were in fact three-month suspensions and these five constituted 50% of the total ten drug offenses. Information on specific sentences for each defendant included in the study is available upon request. In Table 1 we collapsed these specific data in order to highlight major findings.

professional transition back into private practice. In medicine, apparently, it is not uncommon to attach a condition to the return of a license wherein the sanctioned physician or dentist resumes practicing under the eye of an assigned chaperone (paid for by the physician). The New Jersey Supreme Court has, in some cases, imposed "practice conditions" on attorneys who have been disciplined and are deemed ready to be given conditional readmission to the bar. One such condition is a proctorship wherein an attorney can only practice under the guidance and oversight of another attorney. However, we believe that these proctorships could be successfully expanded and perhaps even used as alternatives to permanent disbarment.

CONCLUSION

In its recent *Black Letter* on the issue, the American Bar Association expressed the view that "[c]ollateral consequences of any kind should be strictly limited, and in any event closely related to the offense conduct involved."[101] Moreover:

> The defendant should be fully informed about collateral sanctions before pleading guilty at sentencing, and the court should take them into account in determining the appropriate sentence. Discretionary disqualification should not discourage reentry of offenders into law-abiding society. Relief from collateral sanctions or discretionary disqualification should be readily available from the sentencing judge or an appropriate administrative agency.[102]

As the earlier discussion of the history and rationale for licensing restrictions has indicated—and as our findings and reflections have revealed—the punishments that extend *beyond* the sentence for felony convictions of professionals (in this case attorneys) are worthy of further review for a multitude of reasons.

For one thing, as the passage above from the American Bar Association demonstrates, the legal community has begun to take note of the vast and profound democratic implications presented by the "crazy-

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[101] *Black Letter*, *supra* note 16, at R-10.
[102] *Id.*

quilt"[103] of state and federal laws that—whether by design or effect—work to impede the reentry and reintegration of felony offenders. As alluded to above, one of the reasons that collateral consequences have avoided attention for so long is that they are buried in such disparate and diverse areas of state and federal code, which means that even legislators and administrators are often unaware of the actual breadth and impact of these penalties.

Over time, it seems, as layer upon layer of conditions and qualifications are attached to felony offenses—or crimes of moral turpitude—and as more conditions are attached to those conditions or circumstances, the range of potential consequences and disabilities grows increasingly wide. One might imagine this as a tree, with the trunk representing a basic classification (e.g., felon) and with branches (consequences) extending high and wide—and growing exponentially, in directions both known and unknown. At the very least, we conclude from our review of the literature and from our past and present studies of the issue that such restrictions and (potential) disabilities should be consolidated in one location in the state code. Greater awareness and transparency is something that is owed to offenders, and it is also something that should be ensured in the plea negotiations process where the *complete* (as opposed to merely the *court*-imposed) sentence and *full* range of consequences and potential disabilities should be evaluated in the course of case disposition.

Increased awareness of this sort also benefits the criminal justice system, we believe, in the sense that greater cognizance of the full range of consequences imposed *beyond* the sentence could serve as a deterrent for certain crimes. As it stands now—with punishments that are, as Jeremy Travis suggested above, "invisible"[104]—it is hard to imagine that such penalties actually work to discourage crime at all. Rather, they attach to convictions in ways *unbeknownst* to offenders and in violation of basic predicates of fairness, consistency, and transparency in the administration of justice. It is our hope that studies such as this one can provide some of the much needed "sunlight"[105] that is needed in this

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[103] *See, e.g.*, ALEC C. EWALD, A "CRAZY-QUILT" OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW, 3, *at* http://www.sentencingproject.org/pdfs/crazyquilt.pdf.

[104] TRAVIS, *supra* note 5, at 63-65.

[105] As Justice Brandeis famously stated: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

arena and, ultimately, contribute to growing scholarly, legal and political attention to the process and politics of being "barred from the bar."